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LIABILITY, PRAGMATISM AND ECONOMICS**

Summary: *The article considers the concept of legal liability and shows how pragmatist legal thinkers (1) reshaped it in the light of their philosophical externalism and (2) developed an economic analysis of it that is certainly stimulating but raises some serious concerns. The main characters of this story are Oliver Holmes for the classical pragmatist reshaping of the concept, and Learned Hand and Richard Posner for the more recent economic analysis of it. The paper suggests that, despite those concerns, that pragmatist reshaping was, and still is, welcome.*

Keywords: *Economic Analysis, Hand Formula, O.W. Holmes, Liability, Pragmatism, Tort Law*

Men in this life are liable to punishment for their actions only,
not for their designs and intentions.

(Adam Smith, *The Theory of Moral Sentiments*)

1. INTRODUCTION

Do we need an understanding of how mind works to ascribe legal liability for harmful acts? Legal pragmatists think we don't. Oliver Holmes believed that the role of mental states in law diminishes as the law becomes more sophisticated, reflecting the progress of scientific knowledge.¹ This seems to suggest an eliminativist stance, namely that we should abandon the vocabulary of mental states as science abandons folk psychology and offers a more sophisticated account of animal intelligence and behavior. The point I would like to make is different, though. It is the idea that law can stay clear of the debates about

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¹ See Posner, R.A., *The Problems of Jurisprudence*, Cambridge (Mass.) and London, Harvard University Press, 1990, p. 168 and Holmes, O.W., *The Common Law*, Boston, Little, Brown & Company, 1923 (1st ed. 1881). One of Posner's provocative claims is that instead of treating dangerous objects as people, Holmes was proposing to treat dangerous people as objects.

the nature and functioning of mind, for the ascription of legal liability can be operated (and to a large extent is in fact operated) with “external criteria”. Holmes argued that as law matures, liability – even criminal liability – becomes progressively more a matter of conduct than of intent. This was Holmes’ “externalism”. In my reading of it, external criteria or standards are better than psychological criteria because they do not depend on controversial assumptions about mind, they do not raise special probatory problems, and, despite their vagueness, they are sufficiently understandable by law’s addressees.

The present article reconstructs (§§ 2–3) how pragmatist legal thinking reshaped the traditional concept of legal liability, moving from internalism to externalism, and how that reshaping profited from economic analysis (§ 4). At the same time I will consider some serious concerns raised by the pragmatist and economic account of liability, and I will conclude that, despite such concerns, the pragmatist reshaping of the concept of liability is still welcome (§ 5).

2. AN OLD CONCEPT

The concept of liability is as old as the law is. It consists, roughly speaking, in being responsible for the wrongful or unjust consequences of one’s actions (or omissions). Not those consequences that are bad for the agent herself, of course, but those that affect other people. And it results *a*) in the criminal imposition of some punishment, or *b*) in the civil obligation to pay an amount of money for compensating the damage caused, or the obligation to perform some action that repairs the harm that was done.

What I have just given is a very sketchy account, which should be supplemented with important details for a full understanding of the issue and the ways liability works. But the point I would like to convey now is much simpler: it is the idea that liability is a very basic legal concept. A legal system without it is hardly conceivable. Similarly, the concept of moral responsibility is as old as our moral attitudes are. It is hard to conceive a moral system in which agents are not responsible for the consequences of their actions (or omissions).²

The present paper will stick to the concept of legal liability and will try to show how pragmatist legal thinkers (1) reshaped it in the light of their philosophical externalism and (2) developed an economic analysis of it that is certainly stimulating but has raised some serious concerns in the contemporary debate. The main characters of this story are Oliver Wendell Holmes for the classical pragmatist reshaping of the concept, and Learned Hand and Richard Allen Posner for the more recent economic analysis of it. Still, I would disrespect their stature if I were to neglect the controversies raised by their views.

² Since it is not central to this paper, I won’t always repeat in the following that legal and moral responsibility can be determined not only by actions but also by omissions; this should be kept in mind as implicit. For further considerations on the relationship between liability and responsibility, see Hart, H.L.A., *Punishment and Responsibility. Essays in the Philosophy of Law*, Oxford, Oxford University Press, 1968 (2nd ed. 2008, with same pagination and an introduction by J. Gardner), pp. 215–227.

3. AN OLD CONCEPT PUT TO NEW USES: PRAGMATISM AND LAW

At the end of the 19th century some American legal scholars put the old concept of liability to some new uses. Those authors were influenced by the philosophical atmosphere of their time and by pragmatism in particular. One of them was Oliver Holmes, a young member of the “Metaphysical Club” in Cambridge who later became a judge of the U.S. Supreme Court.³

In his book *The Common Law* (1881) Holmes pointed out that the development of American tort law (i.e. the law that determines the conditions and criteria of non-contractual civil liability) was characterized by the increasing use of *external* standards to determine the factual and normative presuppositions of its application; that is to say, to determine the standards decision-makers have to follow in their findings of fact and attributions of responsibility.

Holmes’ “externalism” had two major critical targets: a) the use of moral standards and b) the use of psychological criteria to determine legal liability. On the former, Holmes contended that one should not conflate law with morality, even though it is historically true that most of our legal rules and institutions are the social and institutional outcome of moral needs and attitudes.⁴ On the latter, he contrasted an internal account of liability (liability upon intention) with an external one (liability upon action, irrespective of the state of consciousness of the agent). Here I will focus on the latter issue.

Holmes started by pointing out that the first form of *civil* liability, historically speaking, was upon intention⁵ and that the common law developed instead in the direction of external standards.⁶ At the end of this process, in his view, the “law only works within the sphere of the senses. If the external phenomena, the manifest acts and omissions, are such as it requires, it is wholly indifferent to the internal phenomena of conscience.”⁷

The measure of liability according to the external account, said Holmes, is the general *foreseeability* of the consequences of an action. This means that a non-foreseeable consequence does not make an agent liable. In his words, “if the intervening events are of such a kind that no foresight could have been expected to look out for them, the defendant is not to blame for having failed to do so.”⁸ We will come back to this in the following.

Now it is important to see where this account differs from an intentionalist, or internalist, one. When we perform an action we are usually in the condition of foreseeing some of its consequences and we are able to refrain from action if we realize that these consequences are bad for other people. Actually it may happen that they are the consequences the agent wishes

3 See, among others, Kellogg, F.R., *Oliver Wendell Holmes, Jr., Legal Theory, and Judicial Restraint*, Cambridge, Cambridge University Press, 2007; Menand, L., *The Metaphysical Club. A Story of Ideas in America*, New York, Farrar, Straus & Giroux, 2001; Pohlman, H. L., *Justice Oliver Wendell Holmes & Utilitarian Jurisprudence*, Cambridge (Mass.) and London, Harvard University Press, 1984.

4 See Haack, S., *On Legal Pragmatism: Where Does ‘The Path of the Law’ Lead Us?*, *American Journal of Jurisprudence*, Vol. 50, 2005, pp. 71–105. Cf. Holmes, O.W., *The Path of the Law*, *Harvard Law Review*, Vol. 10, No. 8, 1897, pp. 457–478.

5 “Our system of private liability for the consequences of a man’s own acts, that is, for his trespasses, started from the notion of actual intent and actual personal culpability.” (Holmes, *The Common Law*, p. 4).

6 *Ibid.*, pp. 39, 79–80, 108–114, 135–137.

7 *Ibid.*, p. 110.

8 *Ibid.*, p. 92.

to bring about; in such cases the expected consequences are the same as the intended ones. In other cases the agent does not want to bring about a sub-set of the consequences she is able to foresee; this is the “side-effects” set of a course of action.⁹ Now, an account of liability as based upon intention does not count such side-effects among the consequences one is responsible for,¹⁰ but an externalist view such as Holmes’ counts them indeed if they were foreseeable.

Consider my playing loud music accepting the risk of annoying my neighbors: I do not play that music for the purpose of annoying them, it is not my intention; I just play it for my fun, without caring too much for my neighbors, whose inconvenience is a mere side-effect of my conduct. According to liability upon intention I should not be responsible for it. Awkward conclusions as this speak against the intentionalist account. In addition there are problems of proof, since it is well-known that the proof of a mental state is often hard to get. Most of the time we only have behavioral evidence of mental states, and we can infer the latter from the former by abduction, using some generalizations about human conduct as major premises of the inference.¹¹ The externalist account avoids this problem by requiring only that it be proven that the action performed had foreseeable harmful consequences and that these occurred indeed. (But again some generalizations are needed, to infer the harmful consequences from the kind of action: in the example above, we need the premise that generally speaking neighbors are annoyed by loud music).

It also happens that, due to the complexity of our world, an action produces unintended and unexpected consequences, but these do not enter either account, neither the intentionalist nor the externalist.¹² It is not surprising that it is so, according to Holmes, given that the general principle of tort law is that “loss from accident must lie where it falls, and this principle is not affected by the fact that a human being is the instrument of misfortune.”¹³ There are economic reasons for the State not to change that general principle (becoming for instance a mutual insurance company against accidents) because “its cumbersome and expensive machinery ought not to be set in motion unless some clear benefit is to be derived from disturbing the *status quo*. State interference is an evil, where it cannot be shown to be a good.”¹⁴

The novelty of Holmes’ account should not be overstated, anyway. In fact it was in tune with the traditional standard of the “prudent” man, which has it that this man is capable, first, of foreseeing certain consequences of a course of action and, second, of refraining from

9 See, among others, Bratman, M. E., *Intention, Plans, and Practical Reason*, Cambridge (Mass.) and London, Harvard University Press, 1987, pp. 140-141, and Hart, H.L.A., *Punishment and Responsibility*, pp. 122-125, on the “double effect” theory, which is a complex and disputed issue.

10 Unless a broad concept of intention is used. This is the case, for instance, with the idea of *oblique intention*, which encompasses unwanted but expected effects of an action. See Williams, G., *Oblique Intention*, Cambridge Law Journal, Vol. 46, No. 3, 1987, pp. 417-438.

11 On abductive inference, see e.g. Walton, D., *Abductive Reasoning*, Tuscaloosa, The University of Alabama Press, 2004. On abduction in legal reasoning, see Tuzet, G., *Legal Abductions*, in: Bourcier, D. (ed.) *Legal Knowledge and Information Systems: Jurix 2003*, Amsterdam, IOS Press, 2003, pp. 41-49.

12 There might be liability, though, according to the scheme of “strict liability” (see n. 28 below).

13 Holmes, *The Common Law*, Boston, Little, Brown & Company, 1923, p. 94.

14 *Ibid.*, p. 96. For a criticism of this view see Calabresi, G., *The Costs of Accidents*, New Haven, Yale University Press, 1970, pp. 261-263.

it if it's likely that it will negatively affect other people.¹⁵ The standard is vague, of course, but sufficiently understandable by lay people and sufficiently manageable by decision-makers like judges and jurors. In particular, consider that jurors (who decide on liability in the U.S. system) would be puzzled by the application of sophisticated scientific accounts of human mind and behavior. Unless there are reasons for taking into account a more or a less developed set of capacities (consider the case of an expert who is able to foresee more consequences than non-expert people, or the case of a disable who is capable to foresee less), the law uses the average prudent man as the standard for determining liability. Minute differences of capacity and character are not allowed for.¹⁶

Interestingly enough, this standard bears some resemblances with the common-sense standards that pragmatists used to praise in philosophy.¹⁷ In addition, the emphasis on external criteria is in tune with the critical attitude that pragmatists generally had towards psychology and internal criteria in both cognitive and practical matters.¹⁸

Notice, however, that Holmes' externalist account was not behavioristic, nor purely focused on what actually follows on a course of action: it was based on the idea that, given our standard cognitive capacities and our common experience,¹⁹ we are usually in the position of foreseeing some of the consequences of an action we are about to perform. It is these consequences we are responsible for, in case they take place, irrespective of our actual prediction of them and irrespective of our intentional states about them. The standard is *foreseeability*, not actual foresight. So it is a moderate form of externalism, which maintains a mentalist vocabulary when talking about foreseeability. Or, it is a disembodied form of mentalism which assumes the possibility of making certain predictions but doesn't care about the actual predictions of actual agents.

Holmes held the same view about *criminal* law. He said indeed that criminal liability is *a fortiori* determined by external standards, for it is the part of the law which is more concerned about inducing addressees' conformity to its rules or standards of conduct:

when we are dealing with that part of the law which aims more directly than any other at establishing standards of conduct, we should expect there more than elsewhere to

15 To be more precise, such "negative" consequences must be *unjust* (as civil lawyers use to say) or *wrongful* (as common lawyers rather say) according to the law itself. For it happens that the law permits some courses of action that have bad consequences for other people: this is for instance the case of economic competitive behavior (that has bad consequences for competitors), or the case of self-defense (that has bad consequences for the assailant). When the law permits this, it is for the promotion of some higher value than that which is negatively affected.

16 "The law considers, in other words, what would be blameworthy in the average man, the man of ordinary intelligence and prudence, and determines liability by that." (Holmes, *The Common Law*, p. 108) Cf. Gray, J. C., *The Nature and Sources of the Law*, New York, The Columbia University Press, 1909, pp. 276–277: "In determining whether a man has been reckless or negligent in doing or not doing an act, we do not inquire whether he has taken every possible precaution. The test is whether he has acted as a reasonable man, and this must be settled largely upon whether he has acted in accordance with general practice; that is, custom." See also Kellogg F.R., *Oliver Wendell Holmes, Jr., Legal Theory, and Judicial Restraint*, Cambridge, Cambridge University Press, 2007, p. 161 on community-driven standards (like the "prudent man") as a form of judicial restraint.

17 See e.g. Calcaterra, R.M., *Pragmatismo: i valori dell'esperienza*, Roma, Carocci, 2003; Tiercelin, C., *In Defense of a Critical Commonsensist Conception of Knowledge*, International Journal for the Study of Skepticism, Vol. 6, No. 2–3, 2016, pp. 182–202.

18 For instance, see Hookway, C., *The Pragmatic Maxim. Essays on Peirce and Pragmatism*, Oxford, Oxford University Press, 2013, p. 83ff on Peirce's rejection of psychologism.

19 Holmes, *The Common Law*, Boston, Little, Brown & Company, 1923, pp. 149–150, 162.

find that the tests of liability are external, and independent of the degree of evil in the particular person's motives or intentions.²⁰

Such an external standard is, again, foreseeability of what follows on a certain course of action.

If the known present state of things is such that the act done will certainly cause death, and the probability is a matter of common knowledge, one who does the act, knowing the present state of things, is guilty of murder, and the law will not inquire whether he did actually foresee the consequences or not. The test of foresight is not what this very criminal foresaw, but what a man of reasonable prudence would have foreseen.²¹

Here the example refers to a form of *certainty* (that death will certainly follow the act), but the same point holds for the *likely* consequences that the prudent or reasonable man can predict.²² This is clear in tort law:

The standard applied is external, and the words malice, intent and negligence, as used in this connection, refer to an external standard. If the manifest probability of harm is very great, and the harm follows, we say that it is done maliciously or intentionally; if not so great, but still considerable, we say that the harm is done negligently; if there is no apparent danger, we call it mischance.²³

There are some interesting objections to Holmes' views, however. One is that civil liability is one thing and criminal liability is quite another. The difference would reside in the fact that criminal liability is more focused on the agent's personality, her motives, her intentional states, her personal history.²⁴ Whereas civil liability is not usually affected by those features: to determine if someone has to compensate the economic loss of someone else, we need not take into account such features as their personality, their affective states and so on. Basically civil liability is economically-driven, while criminal one is not so – or at least it is so to a lesser degree.

To appreciate the features of individual cases, Herbert Hart suggested this double test for attributing criminal liability for negligent conduct: (i) Did the accused fail to take those precautions which any reasonable man with normal capacities would in the circumstances have taken? (ii) Could the accused, given his mental and physical capacities, have taken those precautions?²⁵ The first test is in line with Holmes' approach, the second is not. But on the other hand Hart made it clear that it is "quite arguable that no legal system could afford to individualize the conditions of liability so far as to discover and excuse all those who could not attain the average or reasonable man's standard."²⁶

20 *Ibid.*, p. 50. But see Hart, H.L.A., *Punishment and Responsibility*, for a philosophically more sophisticated account of criminal law and criminal liability.

21 Holmes, *The Common Law*, Boston, Little, Brown & Company, 1923, pp. 53–54.

22 Cf. e.g. *ibid.*, pp. 75–76.

23 Holmes, O. W., *Privilege, Malice, and Intent*, Harvard Law Review, Vol. 8, 1894, pp. 1–14, p. 1.

24 Cf. Hart, H. L. A., *Punishment and Responsibility*, pp. 38–39, 242–244 (criticizing Holmes' theory of "objective liability").

25 *Ibid.*, p. 154.

26 The passage continues like this: "It may, in practice, be impossible to do more than excuse those who suffer from gross forms of incapacity, viz. infants, or the insane, or those afflicted with recognizably inadequate powers of control over their movements, or who are clearly unable to detect, or extricate themselves, from situations in which their disability may work harm." (*Ibid.*, p. 155).

Another worry is that the law distinguishes, among torts, the unintentional (like accidents caused by negligence) from the intentional (such as libel and battery). The problem for an externalist account is that it seems to lack the conceptual resources for this distinction, once liability is reduced to some external standard.²⁷ This is not the place to go deeper into these critical issues, however. What matters for our purposes now is the economic rationale that can be seen behind civil liability at least.

4. AN OLD CONCEPT PUT TO NEW USES: PRAGMATISM, LAW AND ECONOMICS

In the middle of the 20th century an American judge, Learned Hand, promoted the use of a cost-benefit analysis to determine legal liability in torts. The criterion he used to decide some cases was this: the agent is liable if the expected costs of the harm determined by her action (or omission) outweigh the prevention costs. That is, if the expected benefits of harm avoidance outweigh the costs of harm prevention. In this framework the judgment of liability depends ultimately on a weighing of costs and benefits. And the calculus adds a consequentialist flavor to the picture, quite differently from a deontological account where the crucial aspect is the agent's intentional state contrasted with her duties or obligations.

As a mundane case, consider the circumstances of my knocking over a valuable Ming china while I dance wildly in your sitting room, with the harmful upshot of the breaking of the china. Unless "intention" is broadly construed so as to encompass foreseeable effects of intentional behavior, I cannot be said to have had the intention of breaking your china. However – unless you encouraged me to dance, accepting some risks – it is correct to make me liable to compensate the loss, not only because such harmful effects were foreseeable but also because the expected costs of the harm (the value of the china multiplied by the probability of its breaking) exceeded the prevention costs (abstaining from dancing wildly, or from dancing even more wildly). Therefore, the benefits of avoiding the harm outweighed the costs. It was reasonable, in more common jargon, to abstain from dancing wildly. Or, to use the traditional phraseology, a prudent man would have refrained from it.

Hand used the criterion to decide some cases of alleged civil negligence,²⁸ and his (pragmatist) idea was to construe this concept not in a moral or like fashion, but with reference to measurable costs and benefits.²⁹ The most known of such cases is *U.S. v. Carroll Towing Co.* (1947),

27 Cf. Holmes, O.W., *Privilege, Malice, and Intent*, Harvard Law Review, Vol. 8, 1894, (referring to different degrees of probability); Kellogg, F.R. *Oliver Wendell Holmes, Jr., Legal Theory, and Judicial Restraint*, Cambridge, Cambridge University Press, 2007, pp. 80–99. Posner, R.A., *The Problems of Jurisprudence*, pp. 169–170, proposes to take intentional torts as acts with a large gap between the cost to the victim and the small or even negative cost to the injurer of not committing the act.

28 Basically, non-contractual civil liability follows either the scheme of negligence (or "fault liability") or that of strict liability (or "no fault liability"): according to the second, only causation between conduct and harm matters. There are economic reasons to follow the one in some cases and the other in others. See J.L. Coleman, *Risks and Wrongs*, Oxford, Oxford University Press, 2002 (1st ed. 1992), pp. 237–251; S. Shavell, *Foundations of Economic Analysis of Law*, Cambridge (Mass.) and London, Harvard University Press, 2004, pp. 177–206; Cooter, R.B., Ulen, T., *Law and Economics*, 6th ed., Harlow, Pearson, 2014, pp. 187–201.

29 But in principle it is possible to use it for other purposes as well. For instance, it can be used by the agent herself to determine the optimal level of care in a context of strict liability (i.e. liability that does not depend on negligent conduct but on causation

which consisted in a negligence issue about the loss of a barge and its cargo. The following is a *résumé* of the case facts.³⁰

The case concerned the loss of a barge and its cargo in New York Harbor. A number of barges were secured by a single mooring line to several piers. The defendant's tug was hired to take one of the barges out of the harbor. In order to release the barge, the crew of the defendant's tug, finding no one aboard in any of the barges, readjusted the mooring lines. The adjustment was not done properly, with the result that one of the barges later broke loose, collided with another ship, and sank with its cargo. The owner of the sunken barge sued the owner of the tug, claiming that the tug owner's employees were negligent in readjusting the mooring lines. The tug owner replied that the barge owner was also negligent because his agent, called a "bargee", was not on the barge when the tug's crew sought to adjust the mooring lines.

Notice that on those facts there was, among other things, a reciprocal claim of negligence: the owner of the barge claimed that the tug owner's employees were negligent (the mooring lines adjustment was not done properly), and the tug owner claimed that the barge owner was negligent (no one was aboard). Consider also that negligence does not automatically determine a liability outcome. It depends on the applicable rule. According to the *simple* negligence rule, if the agent is negligent she has to compensate the victim. According to the *contributory* negligence defense rule³¹ if the victim too is negligent she has no right to compensation, and, to use Holmes' words (though in a context which is different from that of misfortune), "loss from accident must lie where it falls." According to the *comparative* negligence rule, instead, damages should be split between negligent parties. This was indeed Hand's conclusion in *U.S. v. Carroll Towing Co.*³² and what in his view justified the finding that both parties were negligent was the cost-benefit analysis of the values at stake.

He claimed first that a vessel breaking away from its moorings is a menace to those about it, and that its owner has a duty to provide against resulting injuries. On this premise he generalized the idea that a duty of care is a function of three variables, namely (1) the burden of precaution, (2) the probability of the resulting loss, and (3) the gravity of it – which he called respectively *B* (burden), *P* (probability), and *L* (loss). Then he claimed that negligence *depends upon whether B is lower than L multiplied by P*.

In the specific case Hand held that the tug owner was negligent for not readjusting the mooring lines appropriately and that the barge owner was negligent too for not having a bargee aboard during the (few and busy) hours of daylight (note that the accident occurred on early January 1944, i.e. during the time of war activity and in the period of the year with less hours

only). See for instance P.Z. Grossman *et al.*, *Uncertainty, Insurance and the Learned Hand Formula*, Law, Probability and Risk, Vol. 5, No. 1, 2006, pp. 1–18, in particular pp. 7–8.

30 I borrow it from Cooter and Ulen, *Law and Economics*, pp. 201–202. For more details, see Feldman, A.M., Kim, J., *The Hand Rule and United States v. Carroll Towing Co. Reconsidered*, American Law and Economics Review, Vol. 7, No. 2, 2005, pp. 523–543.

31 See Posner, R.A., *A Theory of Negligence*, Journal of Legal Studies, Vol. 1, No. 1, 1972, pp. 29–96, p. 39; Id., *Economic Analysis of Law*, 9th ed., New York, Aspen, 2014, p. 199: sometimes "the efficient solution is for one party, but not both, to take care, so that the lower-cost avoider is encouraged to take care. But sometimes it is more efficient for each party to take some care than for one to take care and the other do nothing."

32 Actually the damages were divided into collision and sinking damages, and were split according to the "equal division" rule of pre-1975 U.S. Admiralty law. See Feldman, Kim, "The Hand Rule", pp. 526–527.

of daylight). As to the barge owner Judge Hand held so because, in his assessment, $B < PL$: the cost for the victim of not having a bargee aboard was lower than the loss multiplied by the probability of it. (This is almost trivial if we assume that the barge owner incurred no precaution costs at all, which means that B would be zero and then would be less than whatever positive loss multiplied by some positive probability).³³

Though different from Holmes' more traditional views, Hand's criterion is on the same path of externalism and pragmatism as a philosophical stance that is skeptical towards psychological accounts of human action. Such a stance focuses instead on empirical and practical consequences of human acts and omissions. To make a philosophically bolder claim, not only to assess human conduct but also to conceive of it we need to spell out the consequences of certain types of human behavior. So, to rephrase Peirce's pragmatic maxim, the conception of those consequences is the whole of our conception of those acts.³⁴ "All acts are indifferent *per se*"³⁵ – was the way Holmes put it to highlight that what matters about acts is their consequences. What Holmes had in view was the classification of certain kinds of action as criminal, and what Hand had in view was the classification of certain kinds of behavior as negligent; but more deeply, and more generally, the pragmatic maxim applied to human action requires us to look at conceivable consequences in order to conceive of a certain piece of behavior as an act.³⁶

Hand's economic standard has been accepted and praised by many economists and lawyers including a contemporary judge who is also a distinguished scholar and considers himself to be a pragmatist: Richard Posner. In several of his works, like *A Theory of Negligence* (1972) and *Economic Analysis of Law* (9th ed. 2014), he claims that the economic standard of the so-called Hand formula helps us take a fresh look at the social function of liability.³⁷ The function is basically economic, consisting in optimal cost allocation and reduction.

A standard way of putting the Hand formula, or Hand rule, is the following (where, again, B is the burden or cost for the economic agent, P is the probability of the loss, and L is the loss):

The defendant is negligent if $B < PL$, that is, if the burden (cost) of avoiding the accident was less than the cost of the accident (L for loss) discounted (multiplied) by the probability that the accident would have occurred had the burden of avoidance been shouldered.³⁸

Note that if B is greater than PL the agent is not legally liable, but her conduct is not economically efficient. Because that means that she took too many precautions compared to the

33 In fact, the case was complicated by the circumstance that the bargee (employed by the barge owner) was supposed to be there and was actually absent.

34 This is Peirce's 1878 formulation of the maxim: "Consider what effects, that might conceivably have practical bearings, we conceive the object of our conception to have. Then, our conception of these effects is the whole of our conception of the object" (now in Houser, N., Kloesel, C., (eds.) *The Essential Peirce*, Vol. 1, Bloomington and Indianapolis, Indiana University Press, 1992, p. 132).

35 Holmes, *The Common Law*, Boston, Little, Brown & Company, 1923, p. 75.

36 Such consequences are Peirce's *would-be's*. See Tiercelin, C., *Le ciment des choses. Petit traité de métaphysique scientifique réaliste*, Paris, Les Éditions d'Ithaque, 2011, p. 247ff, 355ff; Hookway, *The Pragmatic Maxim. Essays on Peirce and Pragmatism*, Oxford, Oxford University Press, 2013, p. 8ff, 165ff. For a further distinction (between results and consequences of an action) see von Wright, G.H., *Explanation and Understanding*, London, Routledge & Kegan Paul, 1971, p. 66ff.

37 See Posner, R.A., *A Theory of Negligence*, pp. 32–34, and Id., *Economic Analysis of Law*, p. 191ff.

38 Posner, R.A., *An Economic Approach to the Law of Evidence*, Stanford Law Review, Vol. 51, 1999, pp. 1477–1546, p. 1516.

expected loss – like the hypochondriac who is constantly buying medicines, for unlikely and slight forms of illness too, out of fear of falling ill. The economically optimal amount of precaution is the level at which B equals PL . There you have no waste of resources and a burden which is appropriate to the expected loss. This level of care, or burden, is called *due care*. Of course in such an ideal situation the agent is not liable. And if an accident however occurs, it would simply be a case of misfortune where, to quote Holmes again, the “loss from accident must lie where it falls.”

To be true, the application of the formula raises a bunch of epistemic and practical problems. Do decision-makers have the necessary information to assess the relevant costs and benefits? Where does the information come from? Are they able to use it properly? One of these problems is generated by the probability assessment that is needed to calculate the expected harm. As I read Posner’s last quotation above, we should understand it as the probability of the accident *given a certain burden of avoidance*. So, P should be assessed given a definite B . But even then you may ask how can decision-makers assess this. Do they need statistics or some sort of objective probabilities? Where do they gather the information? Are the parties supposed to provide it? How could decision-makers check it? Should they trust instead their own intuitions about it, or their subjective probabilities? These are serious questions for thinkers who have pragmatist inclinations. But Posner claims that in most real cases some “crude estimate” is enough, when B and L greatly differ.³⁹ And the problem of quantifying the variables is not so serious compared to the value of the formula as a theoretical tool: Posner says of the formula that it has greater analytic than operational significance.⁴⁰

However, there are also theoretical issues concerning the formula. One of them is the total/marginal values ambiguity.⁴¹ Hand seems to refer to total economic values (the total of precaution burdens and expected losses), but economists tend to prefer a reading of the formula that substitutes total with marginal values (marginal increase in prevention and marginal decrease in expected loss).⁴² And a further critical issue cuts more deep: it is the concern about the status of the formula. Is the Hand formula a conceptual account of tort law? Is it a simple technique for determining the applicability of the relevant law? Does it involve instead an economic reduction of basic legal and moral principles?

Jules Coleman, in particular, has claimed that economic analysis is unsatisfactory as a conceptual analysis of tort law. In his view it consists in a reductive analysis according to which the only function of tort law is to optimally reduce accident costs, whereas for him tort law

39 “If B is very low and L is very high, a crude estimate of P may be all that is needed to justify a finding of negligence” (Posner, R.A., *Economic Analysis of Law*, p. 194). And if B is very high and L is low or only moderate, a crude estimate of P as low is enough to justify a finding that the defendant was not negligent.

40 See one of his judicial opinions quoted by Grossman *et al.*, *Uncertainty, Insurance and the Learned Hand Formula*, *Law, Probability and Risk*, Vol. 5, No. 1, 2006, p. 2.

41 Cf. Posner R.A., *Economic Analysis of Law*, pp. 192–193; Cooter, Ulen, *Law and Economics*, pp. 202–203. See also Brown, J.P., *Toward an Economic Theory of Liability*, *The Journal of Legal Studies*, Vol. 2, 1973, pp. 323–349, pp. 332–335.

42 “Fortunately, the common law method facilitates a marginal approach, simply because it will usually be difficult for courts to get information on other than small changes in the safety precautions taken by, or that should have been taken by, the injurer” (Posner, R.A., *Economic Analysis of Law*, pp. 192–193). But, for a critique of the marginal view, see Esposito, F., *Negligence Law and Economics. What if Hand Formula Really is Total? And if It is Simply (Represented as) a Bisector?*, unpublished work, 2014.

embodies the principle of corrective justice.⁴³ The Hand formula has been used in such an economic spirit for a reduction of the concept of negligence, and this constitutes a conceptually wrong attempt according to Coleman (he criticizes functional economic *analysis* but leaves room for functional economic *explanation* of tort law).

The Learned Hand test is itself simply an expression of the economic goal of tort law, namely, the optimal reduction of accident costs. Thus, the concept of negligence has been reduced to the economic terms of cost and risk. The analysis is reductive because it purports to exhaust the content of the concept that is explained: once we understand its analysis in economic terms, there is nothing more to be understood about how the concept is to be applied. Similar reductive analyses are proposed for other central concepts of tort law.⁴⁴

This is a wrong and unsuccessful attempt for Coleman because tort law embodies the principle of corrective justice according to which “*individuals who are responsible for the wrongful losses of others have a duty to repair the losses.*”⁴⁵ In the typical tort suit the victim sues the alleged injurer and not the alleged cheapest cost avoider, and if she makes out her case against the injurer, she is entitled to compensation for damages *from the injurer*. For Coleman economic analysis cannot give an account of these features which are at the core of tort law, and this shows that the normative principle of corrective justice is not susceptible of a reductive economic analysis. By the way, also Coleman considers himself to be a pragmatist, but of a different sort: he traces back his pragmatism to Sellars in particular and endorses a “pragmatic method” consisting in a set of commitments about the semantic contents of theories and about the criteria of theory justification.⁴⁶

In addition, coming back to the Hand formula, if you look at cases where some calculus along the lines of the formula was made by the agent herself, you may feel discomfort in learning that *PL* was the expected loss of some human life (or was some expected severe injury) and that the agent accepted such risk. This is what happened in the Ford Pinto case for example.⁴⁷ In the ‘70s Ford Motor Company decided not to invest in a device to improve the safety of a Ford Pinto (preventing the gas tank from rupturing and exploding after a rear-end collision). That decision was made since the burden per vehicle of the additional investment was calculated to be \$11 and the expected loss \$1. So the investment was not cost-justified. The expected loss was determined assuming an amount of \$200,000 per death and of \$67,000 per injury, with a very low accident probability. But things went bad for Ford when a severely

43 Coleman, J.L., *The Practice of Principle. In Defence of a Pragmatist Approach to Legal Theory*, Oxford, Oxford University Press, 2001, pp. 13–14. I cannot pause to discuss that principle here, but see the few things I say below. On the major conceptual and philosophical issues about torts and economic analysis, see Papayannis, D.M., *Comprensión y justificación de la responsabilidad extracontractual*, Madrid, Marcial Pons, 2014.

44 Coleman, *The Practice of Principle*, p. 14. Cf. Summers, R.S., *Essays in Legal Theory*, Dordrecht, Kluwer Academic Publishers, 2000, pp. 365–366, who thinks that the formula is merely a technique for determining negligence; Dworkin R., *Hard Cases*, Harvard Law Review, Vol. 88, 1975, pp. 1057–1109, p. 1077: the formula and its variations “do not subordinate an individual right to some collective goal, but provide a mechanism for compromising competing claims of abstract right.”

45 Coleman, *The Practice of Principle*, p. 15. Cf. Id., *Risks and Wrongs*, pp. 303–328, 361–406, 432–435.

46 Cf. Coleman, *The Practice of Principle*, pp. xiii, 6–8, 171, 179.

47 *Grimshaw v. Ford Motor Co.* (1981). See e.g. Grossman et al., *Uncertainty, Insurance and the Learned Hand Formula*, Law, Probability and Risk, Vol. 5, No. 1, 2006, pp. 7–8. The case involved a punitive damages issue (based on the defendant’s risk assumption) and was in fact a strict liability dispute (which in any event does not change the point made here, concerning optimal cost reduction).

injured person decided to sue the company and won the case. The decision for the plaintiff was supported by a different estimate of L , which dramatically changed the Hand formula scenario leading to an expected loss of \$37.5 (an estimate approximately 37 times greater than Ford's). The company had decided to run the risk of potential injury, and even of death, rather than pay the additional per-unit cost. But the decision was shown to be wrong *ex post*, in the light of the different figures assumed by decision-makers. However, note that with Ford's figures the decision not to invest was economically justified according to the Hand formula.

To sum up, there are crucial evaluative assumptions in risk assessment and in the application of the Hand formula. And the claim that human death or severe injury cannot be economically estimated is no objection: there is an entrenched legal practice of awarding such damages for death or injury estimated in monetary terms, and without it the victims and their relatives would be helpless in front of such tragic events.⁴⁸

Notice about the last point that in a civil lawsuit it is the victim herself (or her relatives) who acts against the alleged wrongdoer and asks for a monetary compensation. Unless the wrongdoer can perform a certain action that reestablishes the *status quo ante*, there is no alternative for the victim or her relatives: compensation must be monetary. No one can give back a limb or a life that was lost in an accident. This is a hard fact. And if the victim asks for compensation we can assume that she accepts an amount of money as *the* way of compensating what was lost. So, there is a form of reduction here: the loss of certain goods cannot be legally compensated but in monetary terms. And victims who act against wrongdoers are willing to accept this. It is not the conceptual reduction that Coleman criticizes, but it is a practical reduction of goods and duties to money transfer. We may like it or not, but it reflects the unfortunate situations where money is the only way to repair a damage, if any.⁴⁹

A standard economic explanation of this is that money is a preference satisfaction means: being awarded a monetary compensation, victims have the possibility of satisfying more of their preferences than they had if successful lawsuits ended by simply blaming the wrongdoer. It is true that situations are conceivable where neither is the *status quo ante* reestablished nor a monetary compensation awarded, but the plaintiff is given the right to ask the defendant that she performs a certain action which is considered to be functionally equivalent to monetary compensation. But, first, this is not what happens in usual cases of civil liability and, second, you may wonder what happens if the defendant does not perform or cannot perform the reparatory action: again, coercive monetary compensation becomes the only way to repair the plaintiff's loss.

5. CONCLUSION

I have tried to show that external standards of liability are preferable over internal ones because (i) they do not depend on controversial assumptions about mind, (ii) they do not raise special probatory problems, and, despite some vagueness, (iii) they are sufficiently un-

⁴⁸ See Cooter, R.B., *Hand Rule Damages for Incompensable Losses*, San Diego Law Review, Vol. 40, 2003, pp. 1097–1120.

⁴⁹ A similar issue I cannot explore here is the economics of pollution and the cost-benefit analysis of pollution control and reduction. See at least Calabresi, G., Melamed, D., *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, Harvard Law Review, Vol. 85, No. 2, 1972, pp. 1089–1128, esp. pp. 1115–1124.

derstandable and manageable by law's addressees (including lay people and decision-makers like judges and jurors).

I have also pointed out, however, some of the concerns that those standards and accounts have raised in the contemporary debate. As to Holmes' externalism, one should be careful about the differences between civil and criminal liability, and, within civil liability, between intentional and unintentional torts.

As to the economic account of tort law, the application of the Hand formula has generated some significant worries like the ones sketched above, namely the operational significance of the formula (how are we to calculate the variables?), the total/marginal ambiguity, the inadequacy of economic analysis as a conceptual account of tort law, and the concerns about monetary compensation of serious torts. On the other hand, the formula leaves pragmatists with the philosophical satisfaction of finding, once again after the "Metaphysical Club", some pragmatist insights in legal practice and theory. Hand's and Posner's accounts, like Holmes', focus on external and consequentialist standards of liability rather than on internal and deontological ones.⁵⁰ What is crucial in their picture is not the state of mind of the agent, but the external features of the circumstances at stake; nor is crucial the value of the agent's conduct in itself, but the practical consequences it produces. For pragmatist thinkers at least, this is a significant achievement that law and philosophy have brought about in their joint effort of understanding and governing human interactions.

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⁵⁰ However, not every pragmatist is a consequentialist. See Dewey, J., *Theory of Valuation*, in: *The Later Works of John Dewey, 1925–1953*, Vol. 13, Carbondale and Edwardsville, Southern Illinois University Press, 1988, pp. 191–251 (1st ed. 1939).

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ODGOVORNOST, PRAGMATIZAM I EKONOMIJA**

Sažetak

U članku se razmatra koncept pravne odgovornosti i kako su pragmatični pravni mislioci (1) preoblikovali ovaj koncept u smislu filozofskog eksternalizma i (2) razvili ekonomsku analizu koja svakako potiče, ali i izaziva ozbiljnu zabrinutost. Glavni su dionici ove priče Oliver Holmes, kada je riječ o klasičnoj pragmatičkoj preobrazbi koncepta, te Learned Hand i Richard Posner vezano uz noviju ekonomsku analizu. U radu se navodi da je pragmatično preoblikovanje, unatoč postojećoj zabrinutosti, bilo i još dalje jest poželjno.

Ključne riječi: ekonomska analiza, Hand Formula, O.W. Holmes, odgovornost, pragmatizam, građansko deliktno pravo



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