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BEFORE AND AFTER: TEMPORAL ANOMALIES IN LEGAL DOCTRINE

LEO KATZ[†]

I. PERSPECTIVES ON WRONGDOING

Wrongdoing often looks different before and after. To be exact, it often looks less serious in retrospect than it does in prospect. This Article means to explore this phenomenon, its manifestations, its reasons, and its implications.

It will be convenient to divide wrongdoing into two components, the first being the defendant's *misconduct* and the second being the *harm* which that misconduct precipitates—the "liability part," as it were, and the "damage part." Each of these components is subject to such a before-and-after effect, although it looks a little different in each case, has somewhat different ramifications, and is traceable to somewhat different origins. Let us consider them in turn.

Picture an assassin who has just fired a bullet at his target but has missed. Imagine he is about to fire a second bullet. Now suppose that before firing the second bullet, the would-be assassin turns to you and asks, "Having missed, suppose I try again, fire another bullet, and let us assume that contrary to my intention, I once again fail. How bad would that be?" In other words, he wants to know about the wickedness of this second attempt on his victim's life. Your answer, I take it, would be clear: his second attempt would be as bad as his first since there is nothing about it that materially differs from the first attempt. Now suppose he goes ahead and fires the second bullet, and once again misses. What has happened to his blameworthiness? Well, how much worse is it to have unsuccessfully fired two bullets at one's prey, as opposed to just one? Not very much, if at all. Under a criminal law which tries to tailor its punishment to the defendant's just deserts, we would not think the two-bullet assassin deserves twice the sentence of the one-bullet assassin. Indeed, we are likely to think that his sentence should not be *any* longer whatsoever. And therein lies the odd-

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ity. We ask *ex ante* how bad it would be to fire the second bullet, and the answer is, "Very bad. As bad as another criminal attempt." We then look *ex post* at how much the defendant's second action has in fact increased his blameworthiness, and the answer is that it has barely affected it at all.

When examining a defendant's misconduct, we expect it to look the same, morally speaking, whether we look at it before he has engaged in it, while he is engaging in it, or after he has engaged in it. A killing, or an attempted killing, should look equally bad before the defendant has committed it, while he commits it, and after he has committed it.¹ We expect the defendant's blameworthiness to be independent of our temporal vantage point. To be sure, sometimes we know less about an event before it has happened than after—and therefore we might feel differently about it before and after. But that is not what is going on here. Admittedly too, we know that people are prone to an irrational hindsight bias that makes certain outcomes seem more inevitable *ex post* than they did *ex ante*, and might prompt them to judge the defendant's actions as negligent in hindsight when they would not do so in advance.² But that is not what is going on here either.³ Something more mysterious is at work.

Let's turn to the second of my before-and-after anomalies, the one relating to harm. We all understand that whatever misfortunes may befall someone, he will adjust. Psychology has confirmed what intuition has long suggested: one's level of contentment is pegged to a set point, as it were.⁴ This set point will vary from person to person, with some people being naturally morose and others being naturally upbeat.⁵ But it is not likely to be changed much by the vicissitudes of life. Our moods are a matter of homeostasis. Win a lottery and you may be momentarily delirious; lose your fortune in the stock market and you will be momentarily dejected. In the long run though, you will gravitate back to your set point, your natural, God-given, congenitally pegged level of happiness. (Give or take an antidepressant, an

¹ It will not do, of course, to say that the second attempted killing looks worse *ex post* than *ex ante* because, *ex post*, we know it to have failed. The question asked *ex ante* was: how bad would it be to try for a second time and to fail for a second time?

² Baruch Fischhoff, *For Those Condemned to Study the Past: Heuristics and Biases*, 335, 335-51 in *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* (Daniel Kahneman et al. eds., 1982).

³ Hindsight bias cannot play a role when the actions being compared do not differ in outcome.

⁴ MARTIN E.P. SELIGMAN, *AUTHENTIC HAPPINESS* 45-61 (2002).

⁵ *Id.*

exceptional therapist, the right kind of ashram, or a particularly unhappy childhood.) That psychological phenomenon means that any calamity will in fact look more ominous *ex ante* than *ex post*, and it therefore raises an interesting puzzle for harmful conduct. It is most easily stated in connection with negligently inflicted harm, although it really applies to intentional harms as well. But for simplicity's sake, let me stick with negligent harm.

Judgments of negligence (or its close cognate, recklessness) require us to make comparisons between the benefits and the risks engendered by a defendant's actions. As a first approximation, we find a defendant's risky action negligent if its risks outweigh its benefits. But how are we to assess the risks? Specifically, are we to assess them from an *ex ante* or an *ex post* point of view? Are we to think about the risk of harm as the defendant's victim would think about it *before* the defendant has injured him, or as he would think about it *afterwards*? The balance between benefits and risks will of course look quite different depending on the perspective chosen; and so will our verdict on the issue of negligence. As things stand, the law pretty much sticks to the *ex ante* perspective when assessing whether someone has acted negligently, but things tend to change when assessing just how injurious the defendant's actions have in fact been. In determining the extent of tort damages or the severity of punishment due, we are much more prone to look at the harm from an *ex post* point of view. Perhaps equally important, when thinking about the harm outside of the legal context, we are likely to think of it from the *ex post* point of view. Is this a tolerable inconsistency?⁶

I will begin by taking up this last problem and will then return to the first one.

II. HARM, BEFORE AND AFTER

It will be very useful in understanding the harm problem if we ask what it is that tends to propel the victim of a mishap back to his original happiness set point. A good portion of the answer can be found by looking at some of the self-help literature designed to help de-

⁶ I am going to bypass an important related issue, which concerns the extent to which harm is to be evaluated objectively or subjectively. This is a tricky matter I will take up elsewhere. Leo Katz, *Choice, Consent, and Cycling in the Criminal Law* (unpublished manuscript in progress, on file with author). However, as long as there is some significant subjective component to our assessment of harm, and it is hard to see how there could not be, the *ex ante/ex post* difficulty arises.

pressed people adjust to a world they believe depresses them.⁷ This literature of “cognitive self-therapy” is essentially premised on the idea that many people are depressed because their natural mechanism of self-re-equilibration is broken, and that they can be helped by teaching them to do self-consciously what undepressed people do automatically. As a result, this literature can be used to give us some guidance on how all people, from the naturally resilient to those still learning to be resilient, manage to regain their bearings after a setback.

A good example of how this approach works can be found in the introduction to a renowned self-help book by David Burns, one of cognitive therapy’s foremost practitioners. It is called *The Feeling Good Handbook*, and it opens with this recollection:

Let me share an experience when my son, David Erik, was born

He was born around 6:00 P.M. on October 13, 1976. While his birth was a normal one it was obvious that he was having difficulties breathing. He was bluer than a healthy baby should be and he was wheezing and gasping for air. The obstetrician reassured us that the problem didn’t appear to be serious but explained that they were sending him to an incubator in the premature intensive-care unit as a precautionary measure because he wasn’t getting enough oxygen into his blood. I panicked and thought, “God! He needs oxygen for his brain cells. What if he ends up with brain damage or is mentally retarded?”

As I walked through the hospital corridors, frightening thoughts raced through my mind. I developed tunnel vision and I felt as if I were floating across the ceiling. I had fantasies of taking him to clinics for the rest of his life as he struggled with various handicaps. As the night wore on, I was flooded with wave after wave of panic and I felt like a nervous wreck.

Then I asked myself: “Why don’t you do what you tell your patients to do? Aren’t you always suggesting that distorted thoughts—and not realistic ones—upset people? Why don’t you write your negative thoughts down on a piece of paper and see if there’s something illogical about them?” Then I told myself, “Oh, that wouldn’t work because this problem is real! A silly paper and pencil exercise wouldn’t do me any good at all!” Then I countered this with[,] “Why not try it as an experiment and find out?”

The first thought I wrote down was[,] “Other people might think less of me if I have a mentally retarded son.” I’m a little ashamed to admit

⁷ E.g., DAVID D. BURNS, *THE FEELING GOOD HANDBOOK: USING THE NEW MOOD THERAPY IN EVERYDAY LIFE* (1989); JULIAN L. SIMON, *GOOD MOOD: THE NEW PSYCHOLOGY OF OVERCOMING DEPRESSION* (1993).

that my own ego was already caught up with the accomplishments and intelligence of my own son. But that was how I was thinking! This is such a common trap. We're programmed to believe that if we're number one in athletics or scholastics or in our careers, then we're no longer "average" or "ordinary" but "special." Our children incorporate this value system as they grow up and their feelings of self-esteem get connected with how talented, successful, or popular they are.

Once I wrote my negative thought down and thought about it, I began to see how distorted and unloving it was and I decided to look at it this way instead: "It's not very likely that people will evaluate me based on how intelligent my son is. They're more likely to evaluate me on what I do. Their feelings about me will depend more on how I treat them and how I feel about them than on my own or my son's success."

The more I thought about it, the clearer it became that my own feelings of happiness and my love for my son didn't have to be connected with his intelligence or career at all. And then a rather sweet realization came to mind. It dawned on me that even if he was only average or below average, it didn't need to diminish the joy we would share by one iota. I thought of how wonderful it would be to be close to him and to do things together as he grew up. I had the fantasy of going into the coin-collecting business with him when I was old and ready to retire from psychiatry. I had always had an interest in coin collecting, and my daughter, who was five years old at the time, was quite bright and independent. She had always developed her own interests and hobbies and never had much interest in coins. The fantasy of going to coin shows with my son and wheeling and dealing Lincoln pennies and buffalo nickels was so exciting that my anxiety vanished entirely

....

Ultimately it turned out that [David Erik] had no deficiencies or brain damage due to his breathing difficulties. My negative thoughts were quite unrealistic. This crisis helped me learn to love and cherish him as he is, and not because of his intelligence or talents. The joy he radiates everyday is my reward.⁸

This, I think, is a brilliant piece of self-therapy. Some readers may feel annoyed by the tone of pious "therapese" that pervades the passage. They should remember that quoting a book of therapeutic advice in a law review article is a little like quoting a sermon in a comedy club: it is the context, not the content, that makes us want to sneer.

The general applicability of this kind of approach to most of our disturbing thoughts might not be immediately apparent. The economist Julian Simon, who suffered from depression and developed a deep interest in cognitive therapy, wrote a book, *Good Mood*, in which

⁸ BURNS, *supra* note 7, at xvi-xviii.

he sought to lay out the underlying logic of the cognitive therapy approach and to show why most of our disturbing thoughts are susceptible to it.⁹ The key cognitive device, he notes, is for the patient to adopt the right benchmark by which to evaluate his lot in life.¹⁰ Adopt the wrong benchmark and you will be depressed, adopt the right benchmark and you won't be.¹¹ Simon explains:

The choice of whom to compare yourself with is one of the important ways that you structure your view of your life. Some choices lead to frequent negative comparisons and consequent unhappiness. A psychologically "normal" seven-year-old boy will compare his performance in shooting a basketball to other seven-year-olds, or to his own performance yesterday. If he is psychologically normal but physically not talented, he will compare his performance today only to his performance of yesterday, or to other boys who are not good at basketball. But some seven-year-olds like Billy H., insist on comparing their performances to their eleven-year-old brothers; inevitably they compare poorly. Such children will bring unnecessary sadness and despondency upon themselves unless they change their standards of comparison.

Whose performance *should* you compare yourself to? People of the same age? Those with similar training? People with similar physical attributes? With similar skills? There is no general answer, obviously. We can say, however, that the 'normal' person chooses a standard for comparison in such manner that the standard does not cause very much sadness. A sensible 50-year-old jogger learns to compare his time for the mile to others' times in his age and skill class, not to the world record or even to the best 50-year-old runner in the club. (If the standard is so low that it provides no challenge, the normal person will move to a higher standard that offers some uncertainty and excitement and pleasure in achievement.) The normal person lowers too-high standards in the same manner that a baby learns to hold on when starting to walk; the pain of doing otherwise is an effective teacher. But some people do not adjust their standards in a sensible flexible fashion, and hence they open themselves to depression.¹²

People are not *wholly* free to alter their [benchmarks] for the sake of emotional comfort. A woman who has trained to be a professional tennis player cannot reasonably take much pleasure from entering local club tournaments and doing well. An even stronger case: a man who was paralyzed in an accident should not expect to have no unusual difficulty in maintaining a merry mood. A dog may be unaware of having lost a leg and hopping peculiarly on three legs, but humans almost surely have a consciousness of their situations that dogs do not have.

⁹ SIMON, *supra* note 7, at 11-25.

¹⁰ *Id.* at 13.

¹¹ *Id.* at 92.

¹² *Id.* at 88.

One can try to use the facts as they are; the paraplegic may focus on his courage in meeting his terrible fate with fortitude. He may even get satisfaction from participating in wheelchair athletics. But this is not the equivalent of not being paralysed.¹³

The healthy-minded person picks out characteristics—let's call them 'dimensions'—on which she rates well, and then argues to herself and to others that those are the most important dimensions on which to judge a person. A slightly exaggerated example: University faculty members who teach well but do no research argue that teaching should be weighted most heavily in salary and promotion evaluations; those who do much research and teach poorly argue instead that research should be most influential in evaluations; people who are rather good but not outstanding on both dimensions argue the virtues of well-roundedness. (Those who are *very* good on both dimensions don't waste their time on arguments like this one.)

As Collingwood put it, "The tailless fox preached taillessness." If a person cannot find some external objective dimension of performance by which she rates well, one can always fall back on piety and prayer-saying, in which any person can excel without talent or training.¹⁴

David Burns successfully undepressed himself over his son's possible brain damage by changing the benchmark against which he was going to measure his experience as a father.¹⁵ The test was no longer going to be whether he managed to raise an exceptional—or at least above-average—child but whether he managed to experience most of the joys of fatherhood.¹⁶

"Well and good," you might say, "whatever works . . . Truthfully though," you will be tempted to add, "doesn't it all really amount to a grand bit of self-deception? A brain-damaged child is a horrible thing. Isn't Burns just calming himself down by somehow, perhaps quite sensibly, fooling himself into thinking that it is not?"¹⁷ And the person without any talents who has to seek refuge in prayer-saying and piety as his only available form of excellence, isn't he too just fooling himself, sensibly perhaps, about the fact that he is one of life's losers?"

But is it self-deception? This is where things get interesting. Let's stick with Burns's example for the time being. Burns's take on what it would be like to have a handicapped child seems quite sensible. At least it does not seem obviously insensible. His choice of benchmark

¹³ *Id.* at 149-50.

¹⁴ *Id.* at 93-94 (footnote omitted).

¹⁵ BURNS, *supra* note 7, at xvi-xviii.

¹⁶ *Id.*

¹⁷ *Supra* text accompanying notes 12-14.

does not seem like mere self-deception. He seems right to note that some of what is so upsetting about having a “merely average” child is bound up with personal vanity; and it seems sensible and desirable to let go of that vanity if one can. Moreover, it seems like a promising strategy for ridding oneself of such unhappiness—destroying vanity to focus on the wide variety of joys children engender that do not depend on the admiration they might elicit in others.

“All right,” you say, “his arguments are not totally insensible. But let’s put them to the ultimate test to see whether they really have merit.” Suppose that Burns had been told in advance of his son’s birth that there are certain precautions he could take to avert the mishap of an oxygen-deprived delivery. These precautions, we should assume, would be costly and burdensome. Should he have undertaken them? To make that decision, he would have to weigh the costs and burdens of medical precautions on the one side against the benefits of averting a risky delivery on the other side. The question will then be how much weight to attach to the various costs and burdens and with how much dread to approach the possibility of a brain-damaged child. What if at this juncture Burns had chosen to reason as he did above? “A brain-damaged child? Not nearly as bad as it first seems. It’s all right to be average, or even below average. The pleasures of parenthood don’t depend on having an exceptionally talented child. Even a retarded child might enjoy going coin collecting with me. No need to go overboard protecting oneself against this contingency.” Suddenly his arguments seem not nearly as persuasive.

This is a potent objection. If the perspective cognitive therapy recommends for adverse events is really a valid one, as opposed to merely a handy bit of self-deception, then it should be equally valid *ex ante* and *ex post*—*before* a risky action has been engaged in, as well as *after* its adverse consequences have come to pass.

One cognitive psychologist, Martin Seligman, in recognizing the difficulty, has this to say:

[Imagine the following case:] Your child, let’s call her May, is in kindergarten. May is the youngest and the smallest kindergartner. She faces the prospect of being less mature than her classmates year after year. Her teacher wants to hold her back and have her repeat the year. And you are now worrying about this. Holding her back a year—a depressing prospect.

You might, if you choose, launch into all the disputations [a la cognitive therapy] that would let you think that she should go on to the first grade: She has such a high IQ, her musical talents are way above kindergarten level, she’s very pretty. But you can also choose not to dispute.

You can say to yourself that this is one of those moments that call for seeing reality with merciless clarity, not one of those moments that call for warding off your own depression. Your daughter's future is at stake. The cost of being wrong here outweighs the importance of fighting off your own demoralization. So this is the time to take stock. You can choose *not* to dispute the pessimistic thoughts.

What you now have is more freedom—an additional choice. You can choose to use [cognitive therapy] when you judge that less depression, or more achievement, or better health is the issue. But you can also choose not to use it, when you judge that clear sight or owning up is called for. [Cognitive therapy] does not erode your sense of values or your judgment. Rather it frees you to use a tool to better achieve the goals you set. It allows you to use to better effect the wisdom you have won by a lifetime of trials.¹⁸

The problem with this defense of the cognitive therapy approach is that it concedes that the approach depends on self-deception, while noting that it is in our power to use those powers of self-deception wisely and to our benefit.

My guess is that this defense would not please most practitioners of the approach. Nor is it especially persuasive. Is it clear that David Burns is deceiving himself when he makes those arguments about the joys of fatherhood not depending on having an exceptional child? More generally, is it clear that the choice of a favorable benchmark, as Julian Simon characterizes as the essence of the cognitive therapy approach, amounts to self-deception? I tend to think not.

But that leaves us with a paradox. We might call it the Paradox of Positive Thinking. We fight sadness and depression by skillfully choosing the benchmarks against which to measure ourselves. But what seems like a perfectly legitimate perspective on a risk *ex ante*, seems like an inappropriately casual one *ex post*. Can both perspectives be right? Does not the rightness of the one condemn the other to mere self-delusion? Do we not have to reject one of those perspectives as being in error; in other words, either discount the cautious *ex ante* view as being the product of obsessive worry or else dismiss the rationalizing *ex post* view as being sour grapes?

What bearing does this paradox have on the legal problem with which we began—namely, what to make of the fact that we evaluate harm differently *ex ante* and *ex post*, that we tend to think about it one way when determining whether someone is being negligent in risking some harm, and that we think about it differently when evalu-

¹⁸ MARTIN E.P. SELIGMAN, *LEARNED OPTIMISM* 291-92 (2d ed. 1998).

ating the injury retrospectively? What the Paradox of Positive Thinking suggests is that there are different, seemingly legitimate ways of evaluating harm, some of them harm-minimizing, some of them harm-magnifying, and that the harm-magnifying ones are more appropriate for assessing a harm while it is being risked, and the harm-minimizing ones for assessing it once, and if, it materializes.

But can that possibly be right? Is it really conceivable that the law should let us think about risk in these quite inconsistent ways?

Temporal inconsistency is something that has attracted the attention of psychologists, economists, and philosophers.¹⁹ Does any of this literature speak to our concerns?

The philosopher Derek Parfit explores one such intriguing instance of a temporal inconsistency.²⁰ Parfit pictures himself in a hospital, where he is to receive some kind of surgery:

Since [the surgery] is completely safe, and always successful, I have no fears about the effects. The surgery may be brief, or it may instead take a long time. Because I have to co-operate with the surgeon, I cannot have anesthetics. I have had this surgery once before, and I can remember how painful it is. Under a new policy, because the operation is so painful, patients are now afterwards made to forget it. Some drug removes their memories of the last few hours.

I have just woken up. I cannot remember going to sleep. I ask my nurse if it has been decided when my operation is to be, and how long it must take. She says that she knows the facts about both me and another patient, but that she cannot remember which facts apply to whom. She can tell me only that the following is true. I may be the patient who had his operation yesterday. In that case, my operation was the longest ever performed, lasting ten hours. I may instead be the patient who is to have a short operation later today. It is either true that I did suffer for ten hours, or true that I shall suffer for one hour.

I ask the nurse to find out which is true. While she is away, it is clear to me which I prefer to be true. If I learn that the first is true, I shall be greatly relieved.²¹

The fact that he will feel thus relieved, Parfit notes, is really quite odd. It betrays a strange sort of bias toward the future. Why is a prolonged and intense pain yesterday preferable to short-lived mild pain tomorrow?

¹⁹ See, e.g., CHOICE OVER TIME (George Loewenstein & Jon Elster eds., 1992) (compiling articles on intertemporal choice—how decisions involving consequences distributed over time are made).

²⁰ DEREK PARFIT, REASONS AND PERSONS 165 (1984).

²¹ *Id.* at 165-66.

Whether or not this strikes you as odd, there is a second, related fact which definitely will strike you as odd and which might serve to further bring out the oddity of the first fact. "Suppose," Parfit writes,

I am an exile from some country, where I have left my widowed mother. Though I am deeply concerned about her, I very seldom get news. I have known for some time that she is fatally ill, and cannot live long. I am now told something new. My mother's illness has become very painful, in a way that drugs cannot relieve. For the next few months, before she dies, she faces a terrible ordeal. That she will soon die I already knew. But I am deeply distressed to learn of the suffering that she must endure.

A day later I am told that I had been partly misinformed. The facts were right, but not the timing. My mother did have many months of suffering, but she is now dead.²²

When contemplating his mother's pain, Parfit notes, the asymmetry between the way we regard past and future pain disappears.²³ His mother's suffering seems equally distressing regardless of when it occurred. The strangeness of this is further enhanced when we consider some variations: What if his mother had recovered from her pain before she died?²⁴ What if Parfit had been with her throughout her agonies and during the subsequent recovery? Now he is liable to feel uncertain whether to think of the pain as she does—as something to be dismissed because it is over and past—or to think of it the way he ordinarily would when hearing of a third person's pain—as distressing regardless of when it occurred.

Let's try to translate Parfit's paradox into the terms of our original harm problem. Suppose the defendant is going to undertake an action creating a risk of substantial pain to some third party, but creating also the prospect of some substantial benefit to someone else. Since pain weighs heavily before it has occurred, and apparently weighs very little afterwards, we might well judge this action to be negligent if we evaluate it before the pain has occurred and not so if we evaluate it afterwards. What is interesting is that this inconsistency seems so utterly natural that it seems well-nigh impossible to tar it with the brush of irrationality. Perhaps, then, this is how we should think about the inconsistent evaluation of harm more generally—as being nothing but a variation of this sort of case. In other words, we might say that, if it is not peculiar to think about pain in a dread-inducing,

²² *Id.* at 181.

²³ *Id.* at 183.

²⁴ *Id.* at 182.

size-magnifying way before it has occurred and in a dismissive, size-minimizing way afterwards, then it should not be thought of as peculiar to apply inconsistent evaluations *ex ante* and *ex post* when dealing with harm in other contexts.

Alas, this will probably not do as a satisfactory way of dealing with our original problem, for reasons which Parfit's subsequent examples about the exiled son suggest: the *ex ante*/*ex post* inconsistency disappears as soon as a third party, rather than the victim himself, is contemplating the harm.²⁵ In evaluating the defendant's conduct, we would not dream of dismissing the risk he took on the grounds that it is "just pain," even though the victim will in fact view it like that. (Not that he would admit to it in court!)²⁶ Ultimately, then, Parfit's "pain paradox," promising though it seemed, probably does not help much here.

More help can be gotten from another temporal inconsistency that has long fascinated psychologists and economists, sometimes called "nonstationarity."²⁷ To illustrate:

Imagine two rewards, one clearly preferable to the other—for instance, a large candy bar versus a small candy bar—offered to a child. As long as the large and small candy bars are offered at the same time, the child prefers the large one. Imagine that the preferred reward was not available until tomorrow. The child may well prefer the small candy bar now to the large one tomorrow. Imagine that the temporal difference between the rewards is held constant but that both are further delayed—the child is offered a choice between the small candy bar a week from now and the large one a week and a day from now. Preference may reverse; the child may again prefer the large candy bar.²⁸

More generally put, if we prefer outcome *A* to outcome *B* because *A* occurs slightly earlier than *B* despite *B*'s being intrinsically more attractive to us, then we would expect our relative preferences between

²⁵ See *id.* at 181 ("I would not be distressed at all if I was reminded that I myself once had to endure several months of suffering. But I would be greatly distressed if I learnt that, before she died my mother had to endure such an ordeal.").

²⁶ We might be more inclined to such a view of the matter when deciding what damages to award him for pain and suffering. Juries probably do so all the time, which may account for their relative stinginess in awarding pain and suffering damages.

²⁷ Cf. George Loewenstein, *The Fall and Rise of Psychological Explanations in the Economics of Intertemporal Choice*, in CHOICE OVER TIME, *supra* note 19, at 3, 21 ("The stationarity condition states that if the first outcome in both *X* and *Y* is the same, $x_1 = y_1$, then preference between *X* and *Y* will be preserved by dropping the first outcome and shifting the remaining outcomes by one period.").

²⁸ Howard Rachlin & Andres Raineri, *Irrationality, Impulsiveness, and Selfishness as Discount Reversal Effects*, in CHOICE OVER TIME, *supra* note 19, at 93, 93.

A and *B* not to change—to remain stationary—as both of them move into the future by an equal amount. But in fact this is not generally the case. As they proceed into the future, the temporal difference between outcomes *A* and *B* will tend to count for less and less: *B*'s intrinsically greater attractiveness will tend to count for relatively more and more, and as a result our preference between them may well reverse.

Although perfectly commonplace, nonstationarity seems very perverse. Its perversity jumps out if we rephrase it in terms of an inconsistency between the *ex ante* and the *ex post* perspective on things. Think of the two outcomes, *A* and *B*, as lying far in the future, with *B* being slated to occur slightly after *A*. At this point *B* is preferred to *A*. Now imagine our getting closer and closer to them with the passage of time. At some point *A* will have drawn even, in attractiveness, with *B*. And a little later, *A* will actually seem more attractive than *B*, by virtue of preceding it temporally. In other words, there is a moment in time, just prior to which we would say that outcome *B* is preferable to outcome *A*, and a slightly later moment in time, after which we will say that *A* is preferable to *B*.²⁹

The perversity of this can be accentuated even further if we translate it into legal terms. Let's again consider the problem of whether someone who has made a risky decision has acted negligently. Suppose the benefit for the sake of which he undertakes the risk corresponds to outcome *A*; and suppose further that the risk which he runs corresponds to outcome *B*. If we evaluate his actions while *A* and *B* both lie far in the future, we would have to say he did not act negligently, since *A* outweighs *B*. If we reevaluate his actions after both have drawn closer by an equal amount, we might well say the reverse, since now *B* outweighs *A*. Which, then, is the right way to look at the matter? Unfortunately, nothing in the literature directly addresses this.

In *Rationality and Time*, Derek Parfit, as it happens, addresses an issue that seems as though it might subsume this problem as a special

²⁹ Rachlin and Raineri put it like this:

People typically prefer a large to small reward if both are available at specific distant times in the future even if the larger reward is slightly more delayed. However, as time passes, the smaller reward will eventually be available immediately. If the discount functions cross, the smaller reward will be preferred after that point is reached.

Id. at 109.

case.³⁰ The question he raises is how we ought to go about making decisions today concerning matters in the future in light of the fact that our present desires, beliefs, and judgments are going to change in predictable ways in the future. It might be tempting to reason thus: "You will have reasons later to try to fulfil [sic] your future desires. Since you *will* have these reasons, you have these reasons *now*."³¹ In other words, act not merely in such a way as to satisfy your present desires, but as far as the future is concerned, try to take into account what you know you will be desiring later on, down the road.

In fact, Parfit then argues, to thus reason is a mistake.³² To try to fulfill a desire one expects to have, but does not yet have, is no different than fulfilling a desire one had in the past, but no longer has. The point is clearer still, he notes, with regard to desires that have a moral foundation, and which change because our moral beliefs change. "The point is then a familiar one about all beliefs. We cannot honestly say '*Q* is true, but I do not now believe *Q*.' We must now believe to be true what we now believe to be true."³³

This analysis could be applied to our problem in the following way: when deciding whether to undertake a certain risky action, the defendant predicts that the view which we all will have of the matter once the harm has come to pass is different from the view we will be inclined to have right now. However, under Parfit's argument, that should not count for anything in deciding what to do now. What matters *now* is what view we have of the harm *now*. That does not mean, however, that we are irrational in changing our minds once the harm has come to pass. It only means that we are permitted to ignore that predictable change of mind when we make our original decision about whether to run the risk.

Unfortunately, the argument does not quite work. Or, rather, it only sort of works. The problem is that we make our decision about the defendant's negligence and our decision about the significance of the harm he caused at one and the same time, retrospectively, after the harm has occurred. What needs to be explained is why *at that very moment in time*, we will be inclined to evaluate his negligence in a harm-magnifying way, and the actual harm he wrought in a harm-minimizing way. This is something Parfit's astute analysis does not

³⁰ PARFIT, *supra* note 20, at 137.

³¹ *Id.*

³² *Id.* at 154.

³³ *Id.*

deal with. We could try to make his analysis fit the problem by emphasizing that the allegedly negligent decision we are reviewing happened at an earlier time, and then argue that the perspective on the harm of that earlier time is the more appropriate one. But the logic of that argument seems less than compelling.

So I am at a bit of a loss. I continue to have some measure of confidence in the widely shared intuition that we should think about harm differently *ex ante* and *ex post*, but I cannot yet account for it in a truly persuasive way.

III. MISCONDUCT, BEFORE AND AFTER

So far we have looked at the oddities arising out of the fact that we make temporally inconsistent judgments of harm. Next let us turn to the peculiarities arising out of the fact that we make temporally inconsistent judgments of misconduct: to wit, that we view misconduct differently *ex ante* and *ex post*. The example I offered at the outset of this Article was that of the would-be assassin who fires multiple shots at his target and inquires after each shot how bad it would be if he ventured another shot. The answer we felt compelled to give him was, "Very bad. As bad as another criminal attempt."³⁴ The puzzling thing was that once we looked back on the firing of all those bullets (none of which succeeded in killing the victim), we would not judge the defendant's blameworthiness to have commensurately increased with each additional bullet. In fact, we would scarcely judge him worse than if he had just fired one bullet. How can one explain this seeming anomaly?

The key thing to note is that this anomaly does not arise in all cases of multiple firings. It will not occur if the firings are spaced relatively far apart. If the first firing takes place today, the second one tomorrow, and the third one the following day, then we have three separate attempts. Each will be viewed in retrospect as it was in prospect. Each firing will add (roughly) to the blameworthiness total of the defendant the amount that it was valued at *ex ante*. This fact should give a clue as to what is going on. Temporal spacing, it seems, makes a tremendous difference to the overall blameworthiness of the defendant's wrongdoing. When we look at the individual components of a closely spaced collection of acts *ex ante*, we are examining them individually, assessing their individual value. When we look at them

³⁴ See *supra* p. 828 (addressing the inconsistencies in judging a defendant's blameworthiness *ex post* and *ex ante*).

ex post, we are examining their contribution to the defendant's overall blameworthiness. However, when acts are closely spaced together, the overall value of the defendant's actions is not a simple sum of the various parts. And the ex ante/ex post effect seems simply to be a reflection of that fact.

This of course raises a new question: why does this spacing effect occur? A partial answer can be provided by noting just how ubiquitous this spacing effect is. That does not quite get to the bottom of the problem, but it does tell us that something very general is going on, and that no account that is peculiar to the example I started with will be sufficient.

To appreciate the ubiquity of the spacing effect, note first of all that it holds for many, if not most, other crimes in addition to attempted murder. It really holds in most cases in which the defendant commits several iterations of the same crime in quick succession: they will get consolidated into one infraction. A series of lies on the witness stand constitutes but one perjury; a series of takings of property on a single occasion constitutes but one theft; a series of sexual assaults against the same person and within a short span of time constitutes but one rape.

There are more complicated and surprising instances of this sort of thing—more complicated and surprising cases, that is, in which spacing actions closely together results in an overall assessment of the defendant's blameworthiness that is smaller than the sum of the blameworthiness of the individual acts. Consider a set of hypotheticals posed in Kadish and Schulhofer's criminal law casebook for another purpose altogether.³⁵ In discussing the meaning of the act requirement of the criminal law, they ask us to think about the following cases in which there is external behavior accompanied by a criminal disposition, but the external behavior, looked at from an objective point of view, is wholly innocent:

A soldier during battle shoots and kills an enemy soldier believing that his victim is his own sergeant.

A man has sexual intercourse with a woman over the age of consent, though he believes that she is underage.

³⁵ SANFORD H. KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES* 181 (7th ed. 2001).

Defendant deliberately shoots and kills victim, unaware that at that very instant victim was about to kill him.⁹⁶

Now consider some variations of these scenarios. To begin with, consider a set of variations in which the defendant deliberately deludes himself into his mistaken state of mind. In other words, the soldier, so as to be able to fight more aggressively, momentarily manages to make himself think that the enemy soldier he is firing at is really his sergeant. Similarly, the man who is about to have sexual intercourse with a woman over the age of consent decides to add "sexual spice" to the experience by momentarily imagining that he is in fact having intercourse with a minor. In the same vein, the defendant who shoots and kills someone who he knows is about to kill him, decides to forget about that fact while he in fact carries out the killing. In other words, in each case, the defendant is carrying out his acts while he is in a self-induced guilty frame of mind. It seems pretty clear that this will not result in inculcating him. We would not convict such a defendant for the fact that momentarily he is in such a frame of mind.

Consider next a further variation on these cases. Imagine that the defendant induces this delusion in himself a long time in advance, perhaps by taking some kind of special pill. A significant time later, this self-induced delusion leads him either to be a soldier firing at an enemy thinking it is his sergeant, or to have intercourse with a non-minor thinking it is a minor, or to shoot at someone trying to kill him without realizing that he is trying to attack him. When the two sets of actions, the self-deluding acts (i.e., the taking of the pill) and the subsequent act (i.e., the killings, the statutory rape) are spaced so far apart, we will now be prepared to hold the defendant liable. The blameworthiness of the individual component acts, of course, does not change. Taking the pill is not blameworthy at all. The actions committed under its influence are blameworthy. But the sum of the two varies depending on how closely one follows upon the heels of the other. If the second follows the first very closely, then despite the substantial blameworthiness of one of the component parts, the actor's overall blameworthiness is zero.

Spacing can have the opposite effect. Sometimes grouping certain acts close together causes the overall assessment of blameworthiness to be more, rather than less, than the sum of its parts. Here are some increasingly complex examples of that:

⁹⁶ *Id.*

The simplest case has to do with recklessness. Suppose the defendant knows that if he engages in certain reckless conduct repeatedly the chances are virtually certain that he will kill someone. If he does kill someone, has he killed him knowingly (murder) or only recklessly (manslaughter)? The answer will depend on the amount of time that elapsed between the various instances of recklessness. If his actions are spaced far apart, each instance of recklessness is considered independently, and any death that ultimately ensues will attach to the last instance of recklessness and will constitute manslaughter. If little time passed between his reckless actions, the instances will be consolidated, and the ensuing death will constitute murder.³⁷

A more complicated instance of overall blameworthiness exceeding the sum of its parts has to do with a somewhat obscure criminal law problem known as the *actio libera in causa*.³⁸ It is a well-known but poorly understood fact that careful planning will often enable a legal actor to attain an ostensibly prohibited end without actually running afoul of the prohibition. Although the phenomenon recurs throughout law, it happens to occur in a particularly pristine form in the criminal law, where it acquired its special Latin label. A criminal prohibition does not simply forbid the infliction of some harm or loss, the loss or harm has to be brought about in a particular way for it to qualify as a crime. Intentionally, knowingly, recklessly, or maybe negligently, but generally not merely inadvertently. Not by a mere omission (generally) but by an act. And by the right causal route: there has to be proximate causation and, of course, in the absence of any defenses, like necessity, duress, insanity, or self-defense. Just to name the most generic of prerequisites.

But what of an actor who manages to attain a forbidden end in a manner that does not meet these prerequisites for liability? You can now see the origin of the phenomenon's Latin label, *actio libera in causa*—an "action free in its origin," the planning stage, even if unfree in its execution. For an example in the case of murder, an actor arranges the circumstances so that the killing is committed in self-defense, or by an omission rather than an act, or caused nonproxi-

³⁷ To be more concrete: compare the defendant who drives recklessly everyday, and fully understands that, over time, this creates a near certainty of running someone over, to the defendant who on a particular occasion drives in a manner that creates a near-certainty that he will run someone over.

³⁸ For a discussion of *actio libera in causa*, see generally MICHAEL HETTINGER, DIE "ACTIO LIBERA IN CAUSA": STRAFBARKEIT WEGEN BEGEHUNGSTAT TROTZ SCHULDUNFÄHIGKEIT? EINE HISTORISCH-DOGMATISCHE UNTERSUCHUNG (1988).

mately, or without the required intention. That might seem impossible at first. If you intentionally make yourself do something unintentionally, have you not in fact done it intentionally? If you actively set things up so as to cause someone's death by an omission, have you not in fact acted? If you arrange to cause someone's death in a circuitous, seemingly nonproximate way, does that not automatically render it proximate? If you provoke someone into attacking you in order to utilize the right of self-defense, do you not forfeit the self-defense privilege? Paradoxically, the answer to these questions is not necessarily.

How might one restructure the circumstances of an intentional killing so that it is no longer intentional? A closer look at the logic of the intention concept will quickly suggest a method. To bring a consequence about intentionally, rather than merely inadvertently or recklessly, is to desire that consequence to happen either for its own sake or because it is *a means* toward the attainment of something else desired. If the consequence is neither of those, but merely something which the actor risks bringing about as a byproduct of the thing he really wants to happen, then he has brought it about inadvertently, recklessly, or perhaps knowingly, but not intentionally. Thus a clever defendant might take a plan in which the untoward, criminal end, e.g., someone's death, was a means toward some larger objective and restructure it so that the criminal end becomes a mere byproduct of his plan. For instance, the defendant who means to kill his wife in order to collect the life insurance would be guilty of an intentional killing (murder). However, the same person could restructure his plan by buying insurance on the house which he jointly inhabits with his wife. He might keep every other aspect of his homicidal plan intact—the pouring of the gasoline, the torching of the house, the doomed effort to drag her out, the filing of the fraudulent insurance claim—but he would now have brought about her death as a byproduct of his insurance fraud rather than as a means towards implementing it. Thus, he would at most be guilty of manslaughter, if that, not of murder.³⁹

Note, however, that from a functional point of view not much has changed: the defendant is still killing his wife as part of his plan to derive money from insurance fraud. But the slightly different causal structure of the undertaking, which he has managed to put in place through his restructuring of the transaction, has radically changed its legal character.

³⁹ I am putting to the side the felony-murder rule.

A less recondite strategy is often employed by doctors wanting to assist their patients in suicide. If a doctor directly acquiesces in a patient's request to inject him with a lethal substance, the doctor would be guilty of murder. But if the doctor arranges the circumstances so that the final step in the injection procedure is taken by the patient himself, the doctor can no longer be found guilty: he would not be deemed to have caused the patient's death proximately, since the final voluntary action of the patient disrupts the chain of causation. Again note that functionally not much has changed: the doctor still is assisting a patient in a suicide. The slightly different causal structure of the assistance radically changes its legal character.

Or does it? Do courts really buy these sorts of stratagems? Sometimes they do and sometimes they do not. The critical factor seems to be how far in advance the defendant's devious machinations occurred. If they are highly antecedent to his misconduct, they are far more likely to work than if they are not. Compare the following two cases of contrived self-defense: (1) The defendant marches into Central Park at midnight, packing a gun, dressed like a vulnerable tourist, just spoiling for the opportunity to kill the first thug who approaches him, hoping to get in a "free killing," as it were, by exercising his right of self-defense. (2) The defendant joins the police force, just spoiling for the opportunity to kill the first thug who attacks him, hoping to get in a "free killing," as it were, by exercising his right of self-defense. Courts will be more inclined to deny the defendant in the first case his right of self-defense, but will find it impossible to do so with respect to the defendant in the second case.⁴⁰ The same sort of contrast could be worked out in connection with my other examples. In other words, if the component pieces of the defendant's misconduct are spaced far apart, they add up to something different than if they are closely bunched together.

We now understand that the ex post/ex ante effect with respect to wrongdoing is an artifact of the spacing effect—the fact that the overall blameworthiness of the defendant's actions need not be the sum of his individual blameworthy acts. We also see that the spacing effect is

⁴⁰ One way to understand what is going on here is to think about the so-called care-level/activity-level distinction in tort scholarship, as in STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 25-26 (1987). For example:

When assessing whether a driver has behaved with the requisite care, we look at how he drove—whether he drove too fast, looked in the mirror often enough, kept enough of a distance to the car ahead—but we don't assess the wisdom of his decision to drive in the first place.

Leo Katz, *Form and Substance in Law and Morality*, 66 U. CHI. L. REV. 566, 585 (1999).

quite widespread. But that does not yet get to the bottom of it. Why does this happen, and does it make sense?

Consider the last version of the effect, cases in which spacing causes overall blameworthiness to be *greater* than the sum of the individual blameworthy acts. This phenomenon was illustrated with the help of cumulative instances of recklessness, either closely or loosely spaced, and of strategic restructuring of one's misconduct, the restructuring either immediately or distantly preceding the restructured misconduct. To get a deeper sense of what is going on here, we should probably try to find a simpler, far more pristine version of the phenomenon. And here is one, so simple and so pristine one might easily miss that it is the same phenomenon at all. Think of a simple instance of an intentional killing. Now space the mental and the physical components of that crime further apart. In other words, the actor has an intention to kill, and some time later there is a killing, which we will assume has been caused by it. An example of this sort of case is the defendant who plans to kill his victim, drives to his house and inadvertently, on his way there, runs over a pedestrian who turns out to be his victim. There is both an intention to kill and an act of killing, but of course it is not an intentional killing because the two do not fit together in the right way as required by the concurrence doctrine. Perhaps we can think of the other spacing cases mentioned earlier as more complicated versions of this, in which the same sort of synergy here provided by the concurrence doctrine is provided instead by a more complicated version thereof.

Let me suggest in an equally sketchy and tentative way how one might try to account for the spacing effect in cases in which the defendant's overall blameworthiness is *less* than, rather than more than, the sum of the individual blameworthy acts; the cases I illustrated with the help of the same crime repeated quickly in several iterations. Here too, we should try to think of a very simple, pristine version. Compare the following two cases of the same phenomenon: (1) a thief steals two million dollars out of a bank vault; (2) a thief breaks into the same bank vault on two separate occasions, stealing one million dollars each time. We would judge the second thief worse than the first, since he is guilty of two thefts as compared to only one. This is a clear instance of the spacing effect. Space the two thefts very closely together and it is one robbery, space them apart and it is two. Indeed, many people will find it strange that we should find greater blameworthiness on the part of the thief who steals the same amount

but does it in one fell swoop. But the source of that strangeness is easier to grasp and§ reckon with.

It is a strange feature of the criminal law that the identical harm perpetrated in various ways should be judged differently, that the same harm caused by an omission is beyond punishment (certain exceptions notwithstanding), but not if caused by an act. This is not the place to defend this feature of the criminal law. It familiarly hangs on a long-standing debate between utilitarianism and deontology.⁴¹ Deontological morality, and a criminal law based on it, are going to necessarily exhibit this feature. Once we have decided to live with this feature—once we have accepted the rightness of caring about the different causal routes by which harm might be committed—we should not be surprised to find that it also matters whether one has committed a given harm by one act or by several. Now we are still left with the problem of explaining why spacing matters so much when we decide whether we are dealing with one act or several. But that is a much smaller mystery, and really not much of a mystery at all. Two peas glued sufficiently tightly together are regarded as one pea; two parties, following closely upon each other and involving the same people and the same location are regarded as one party, and so on. This is how we individuate things, by the physical and temporal space between them. Nothing very striking in that.

CONCLUSION

Legal doctrine exhibits some striking temporal anomalies, previously not much adverted to. Wrongdoing looked at before it has occurred, and after it has occurred, is apt to look very different. I take up the two key components of wrongdoing *seriatim*, the harm portion and the misconduct portion: the “liability” part and the “damage” part. We tend to look at harm in a harm-magnifying way before it has occurred, and in a harm-minimizing way afterwards. We thus tend to think about negligence and the harm it wreaks in seemingly inconsistent ways. I examine and reject some possible explanations of this phenomenon. Misconduct too looks different before and after its occurrence. The reason for this anomaly seems to be a certain spacing phenomenon: space blameworthy actions closely together and their overall blameworthiness can turn out to be greater or less than the sum of their individual blameworthy parts. The *ex ante* perspective

⁴¹ See LEO KATZ, *ILL-GOTTEN GAINS* 113-20 (1996) (exploring the path dependence of criminal law doctrines).

involves looking at the blameworthiness of the individual parts. The ex post perspective involves looking at how much the piece contributes to the overall blameworthiness of the person's actions. If, therefore, for some reason the sum of the blameworthy acts is greater or less than the overall blameworthiness of the actor, we get an ex ante/ex post inconsistency. I offer a somewhat preliminary account of the likely bases of this spacing effect.

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