SIDGWICK'S UTILITARIAN ANALYSIS OF LAW: A BRIDGE FROM BENTHAM TO BECKER?

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ABSTRACT

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Jeremy Bentham's utilitarian analysis of crime and punishment is regularly characterized as an inspiration for the economic analysis of law, whereas Henry Sidgwick has been all but ignored in the discussions of the history of law and economics. Sidgwick is well known as the godfather of Cambridge welfare economics. Yet, as we will show, his utilitarian analysis of issues in property, contract, tort, and, criminal law reflect themes now associated with the Chicago approach and advance on Bentham in multiple ways—including through the use of marginal analysis—making him a bridge on the road from Bentham to Becker.

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I. Introduction

The Chicago tradition of economic analysis of law gained much of its original impetus from the scholarship of Ronald Coase, Gary Becker, and Richard Posner.[1] As Posner has rightly pointed out, however, some of the inspiration for the Chicago perspective can be traced to the work of Jeremy Bentham and his "utilitarian—essentially, economic—analysis of crime and punishment" in his *Introduction to the Principles of Morals and Legislation* (Posner 2001, p. 34). Here, Bentham laid out several ideas that are reflected in the modern economic analysis of criminal law, including the pleasure-pain (benefit-cost) calculus in the decision to commit a crime, the implication that deterrence activities increase pain, and thus the cost associated with crime, the social benefit-cost analysis of punishment, and so on. Of course, Becker's "Crime and Punishment: An Economic Approach" (1968) draws on and dramatically fleshes out Bentham's contribution in the process of developing the first full-blown economic theory of crime and its control.[2]

The attempt to link the Chicago approach to law and economics back to Bentham stands in contrast to the explicit and implicit efforts to distance the Chicago program from

[1] Of course, the oral tradition and the "school-building" efforts of Aaron Director were also key elements in the development of Chicago law and economics. See, e.g., Kitch (1983) and Mercuro and Medema (2005).

[2] See, e.g., Posner (2001).

associations with, among other things,[3] the Cambridge welfare tradition—particularly as reflected in the work of A.C. Pigou (1920) and those who build on his work. This practice goes back as far as Frank Knight's "Some Fallacies in the Interpretation of Social Cost" (1924) and, of course, achieved full flower in Ronald Coase's "The Problem of Social Cost" (1960) and "The Lighthouse in Economics" (1974)—the former of which, in particular, offered a devastating critique of certain of the excesses of the Pigovian theory of market failures and government remedies.

These two aspects of the prehistory of Chicago law and economics tradition intersect in the work of Henry Sidgwick. Sidgwick has been all but ignored in the discussions of the history of law and economics;[4] yet, his analysis of issues in property, contract, tort, and, especially, criminal law reflect themes and perspectives that have since come to be associated with Chicago law and economics. Sidgwick is much better known as the godfather, as it were, of the Cambridge tradition of welfare economics. His perspective was the inspiration for both Alfred Marshall (1890) and Pigou (1920), the latter of whom really solidified the Cambridge welfare tradition.[5]

The point of this paper is not to suggest that Sidgwick anticipated or inspired aspects of the economic analysis of law as it was later developed within the Chicago tradition. Rather, it simply seeks to take note of the fact that there is only an important contributor to an "economics" of common and civil law rules between Bentham and Becker, one who

[3] These "other things" include, for example, legal realism and the law and economics of the American Institutionalists of the first third of the twentieth century. On this, see Kitch (1983), Posner (1995, chs. 1, 19), and Medema (1998, 2003).

[4] Posner (2001, pp. 57-58) cites Sidgwick as an influence on Pigou's welfare economics and locates Sidgwick in the Bentham's utilitarian tradition, but he does not refer to Sidgwick's analysis of legal issues.

[5] The definitive editions of these two works are Marshall's eighth (1920) and Pigou's third (1932).

advances on Bentham in multiple ways—including the use of marginal analysis—and that this contributor is, of all things, the figure who stands at the headwaters of the Cambridge welfare tradition and who, perhaps more than any other figure, helped to turn the tide away from the strong belief in the efficacy of the workings of the system of natural liberty so much in evidence in classical political economy.

II. Utilitarianism: Self-Interest, Ethics, and Justice

As John Rawls (1981, p. v) has pointed out, "since the middle of the eighteenth century the dominant systematic moral doctrine in the English-speaking tradition has been some form of utilitarianism." Sidgwick stands squarely within the classical utilitarian tradition so closely associated with Jeremy Bentham, a tradition which asserts that the ultimate end of individual and social action is the promotion of the greatest happiness of the members of society.

This depiction of utilitarianism as an *ethical system* is, however, only a part of what is commonly associated with the term. In its positive manifestation, utilitarianism describes a psychological propensity—that people make choices with a view to furthering their own utility, or happiness, or excess of pleasure over pain. Posner argues that "what sets Bentham apart is the tenacity, even vociferousness, of his insistence on the *universality* of utility calculations in human decisions" (2001, pp. 54-55).[6] And of course Becker's (1976, p. 5) method is at least as tenacious, something he makes clear in his reflection that "The

[6] Posner (2001, p. 57) goes on to suggest that there is a larger influence associated with this—that "if the idea of utility maximization as a fundamental element in the human psyche can be traced to Bentham, the economics of nonmarket behavior can be said to have been influenced by him."

combined assumptions of maximizing behavior, market equilibrium, and stable preferences, used relentlessly and unflinchingly, form the heart of the economic approach as I see it."[7]

Sidgwick was certainly a vociferous defender of economists' use of the assumption of self-interested action on the part of economic agents, noting in his *Principles of Political Economy* that "the motive of self-interest does work powerfully and continually" (1901, p. 402). He also went to some lengths in his "Scope and Method of Economic Science" both to defend the self-interest axiom against the critique of the German Historical School and to rebut those who suggested that promoting self-interested action was a *normative goal* of English political economy. Yet, Sidgwick does allow, from a normative perspective, that self-interested action—e.g., in the way of attempting to sell for the highest price the market will bear or attempting to buy at the lowest possible price—is not "blameworthy" (1885, p. 183).

While not in the camp of those asserting the strongest form of self-interest maximization, Sidgwick clearly sees it as a dominant force in human action, as for example when he points out that "the ordinary, normal phenomenon in the action of men is that each individual seeks his own greatest apparent pleasure" (1872, p. 82).[8] This, in turn, gives us some insight into Sidgwick's regular use of the term "reasonable" in his discussion of remedies. Given that the "reasonable" individuals referred to by Sidgwick are "ordinarily" looking to enhance their happiness or utility, it seems logical that the reasonable individual is, for Sidgwick, a utility-maximizing individual. And after all, it is the self-interest issue that is causing these harmful effects problems in the first place.

In fact, he was very much aware of social utility of self-interested behavior, both inside and outside of the economic sphere: "Though it is only in an ideal polity that 'self-interest

[7] Posner (1992, p. 3) works from a similar frame of reference.

[8] He makes it clear that "ordinarily," rather than "always," is the appropriate descriptor (ibid.).

well understood' leads to the perfect discharge of all social duties, still, in a tolerably well-ordered community it prompts to the fulfillment of most of them, unless under very exceptional circumstances" (1872, p. 79). So exceptional are these circumstances, and so problematic are potential alternatives, that "the difficulty of finding any adequate substitute for it, either as an impulsive or as a regulating force, is an almost invincible obstacle in the way of reconstructing society on any but its present individualistic basis" (Sidgwick 1901, p. 402).[9]

Sidgwick is clear not to confuse an "is" with an "ought" here,[10] and as such rejects the attempts by some, including J.S. Mill, to derive a utilitarian ethic from a utilitarian psychology of the individual decision process.[11] Nonetheless, as noted above, Sidgwick *did* subscribe to the classical utilitarian ethic and, in fact, elaborated an extensive defense of this ethic in his *Methods of Ethics*. Here, Sidgwick defines utilitarianism as "the ethical theory, that the conduct which, under any given circumstances, is objectively right, is that which will produce the greatest amount of happiness on the whole; that is, taking into account all those whose happiness is affected by the conduct" (1907, p. 411)—where "greatest happiness" is defined as "the greatest possible surplus of pleasure over pain" (ibid., p. 413).[12] This, then, gives justice—being "objectively right"—a utilitarian basis in Sidgwick's system (1907, Book IV, chapt. iii). This utilitarian grounding of justice is true, he says, in both abstract and empirical senses.

[9] Sidgwick's *Principles* was originally published in 1883.

[10] See, in a general sense, Sidgwick (1892).

[11] See Sidgwick (1907, p. 412), and the more extensive elaboration of this in Book iii, chapter xiii.

[12] Sidgwick repeatedly emphasizes that the scope the general happiness, good, or welfare encompasses the interests of both present and future generations, and he also argues that this interpretation is held by "the great majority of persons" (1897, p. 38).

Sidgwick finds an empirical basis for a utilitarian conception of justice in his perception that both legislators and the community as a whole "share ... the belief that what is commonly thought right is conducive to the general happiness" (1891, p. 51). In fact, argues Sidgwick, "the limits of the duty of Law-observance are to be determined by utilitarian considerations" (1907, p. 440). This, in turn, has implications for the lawmaking process:

> from a Utilitarian point of view, the question, what rules of conduct for the governed should be fixed by legislators and applied by judges, will be determined by the same kind of forecast of consequences as will be used in settling all questions of private morality: we shall endeavor to estimate and balance against each other the effects of such rules on the general happiness (1907, p. 457).

What seems very clear is that a system of laws developed on a utilitarian basis will comport with the rules that "any man sincerely desirous of promoting the general happiness would generally endeavour to observe" (ibid.). Sidgwick cites a number of examples here, including,

> the rule of not inflicting any bodily harm or gratuitous annoyance on any one, except in self-defence or as retribution for wrong; the rule of not interfering with another's pursuit of the means of happiness, or with his enjoyment of wealth acquired by his own labour or the free consent of others; the rule of fulfilling all engagements freely entered into with any one,—at any rate unless the fulfillment were harmful to others, or much more harmful to oneself than beneficial to him, or unless there were good grounds for supposing that the other party would not perform his share of a bilateral contract—; and the rule of supporting one's children while helpless, and one's parents if decrepit, and of educating one's children suitably to their future life (ibid.).

In fact, such is the import of these particular rules for promoting the general happiness that people would abide by them even if they happened not to be legally binding (ibid.)

III. Some Early Law and Economics

Coase "Predux": Reciprocity and Bargaining

Bentham was no great fan of the common law, and he devoted little attention to the analysis of common law principles—perhaps, as Posner (2001, p. 54) suggests, because he didn't realize "that tort, contract, and property law are also important parts of the social fabric." Sidgwick, in contrast, tackles both common and civil law issues as part of a larger discussion dealing with the appropriate role for the state within the economic system and society generally.

Much of Sidgwick's legal analysis takes place against the background discussion of the individualism so prominent in classical discourse and the associated problem of the role the state under *laissez-faire*. The security of person, property, and contract that constitutes the "individualistic minimum" embodies, among other things, the principle of non-interference. As summed up by Sidgwick, "It is one of the most obvious duties of men living in society to avoid causing physical injury or discomfort to others." The problem, of course, is that the individual pursuit of happiness *does* at times result in injury or discomfort to others. And, he says, when "avoidable damage or serious annoyance of this kind has been even unintentionally inflicted through carelessness, there is a *prima facie* case for compensation" (1897, p. 60).

As Sidgwick is quick to point out, however, the non-interference principle is problematic. The issue here is that the protecting A from harm "involves a material restriction on the freedom of action of other persons"—as is the case, for example, when upstream water users are prevented from diverting a stream that is also used by those downstream, or when homeowners' utility is diminished by industrial pollution (1897, p. 69). Sidgwick's

utilitarianism is clearly reflected in his prescription for problems of this nature: The extent to which A's interests should be protected "can only be settled in any particular case by a careful balance of conflicting inconveniences" (1897, p. 69).

It is difficult to resist drawing a parallel between this aspect of Sidgwick's discussion and Coase's treatment of harmful effects early on in "The Problem of Social Cost." As Coase pointed out, "We are "dealing with a problem of a reciprocal nature" (1960, p. 2). In the case of wandering cattle who damage the crops of a nearby farmer, "it is true that there would be no crop damage with out the cattle. It is equally true that there would be no crop damage without the crops" (1960, p. 13).[13] The effect of this is that, "To avoid the harm to B would inflict harm on A. The real question that has to be decided is: should A be allowed to harm B or should B be allowed to harm A?" The goal here, says Coase, is "to avoid the more serious harm" (Coase, 1960, p. 2)—which, he notes, can only be accomplished via a case-by-case evaluation of benefits and costs (1960, pp. 18-19, 42-44).

One prominent set of examples Sidgwick cites in discussion of the collision between individual interests relates to the use of natural resources, including the potential depletion of mines, fisheries, and plant species, and the diversion of waterways necessary for irrigation and "the supply of motive power."[14] He begins by pointing out that in a "*perfectly ideal* community of economic men all persons concerned would doubtless voluntarily agree to take the measures required to ward off such common dangers" (1901, pp. 409-10, emphasis

[13] As he goes on to say, "If we are to discuss the problem in terms of causation, both parties cause the damage" (1960, p. 13). This is a slightly different notion of causation than one finds in, e.g., Landes and Posner (1983, p. 110), who argue that the least cost avoider is the cause of the harm.

[14] See Sidgwick (1897, p. 147; 1901, pp. 409-13).

added).[15] Once again, we see a parallel with Coase, here, in his argument that, if transactions are costless, "a rearrangement of rights will be made through the market whenever this would lead to an increase in the value of production."[16] Now, it would be foolhardy to suggest that Sidgwick's "perfectly ideal community of economic men" is nineteenth-century-speak for a world of zero transaction costs. Nevertheless, both Coase and Sidgwick understood that, under idealized conditions, agents would cooperate to resolve these self-interest-generated problems of harmful effects.

But of course, these are only idealized conditions. Sidgwick argues that the underlying conditions necessary for the system of natural liberty to work the wealth-maximizing magic so often attributed to it do not, in many instances, correspond to actual economic circumstances. The effect is that "even in a society composed—solely or mainly—of 'economic men,' the system of natural liberty would have, in certain conditions, no tendency to realize the beneficent results claimed for it" (1901, pp. 402-403). Sidgwick instances the depletion of common pool resources, where "the efforts and sacrifices of a great majority are liable to be rendered almost useless by the neglect of one or two individuals" (1901, p. 410). He illustrates the problem by applying the then-emerging marginal analysis to the fishery:

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[15] See also Sidgwick (1886, p. 207).

[16] See, more generally, Coase (1960, pp. 2-15). It is worth noting here that Coase's examples instance small-numbers bargaining rather than the large numbers typically associated with the term "market." Note also that this is a weaker statement than that which later came to be known as the Coase theorem: "It is necessary to know whether the damaging business is liable or not for damage caused since without the establishment of this initial delimitation of rights there can be no market transactions to transfer and recombine them. But the ultimate result (which maximizes the value of production) is independent of the legal position if the pricing system is assumed to work without cost" (Coase 1960, p. 8).

> Take, for instance, the case of certain fisheries, where it is clearly for the general interest that the fish should not be caught at certain times, or in certain places, or with certain instruments, because the increase of actual supply obtained by such captures is overbalanced by the detriment it causes to the prospective supply. Here—however clear the common interest might be—it would be palpably rash to trust to voluntary association for the observance of the required rules of abstinence; since the larger the number that voluntarily abstain, the stronger becomes the inducement offered to those who remain outside the association to pursue their fishing in the objectionable times, places, and ways, so long as they are not prevented by legal coercion (1901, p. 410).

The issue of "overusing" natural resources is derivative of what Sidgwick sees as a more general failure self-interested agents to properly account for the effects of their actions—positive or negative—on the interests and needs of future generations (1901, pp. 412-13, 475-76).[17]

Here, Sidgwick's argument is based on the problems that arise when property rights are not specified over the resources in question, the effect of which, as Coase (1960, p. 12) points out, is that standard allocative mechanisms—such as markets or firms—are unable to operate on these resources. In particular here, the costs of negotiation and, especially, of "the inspection needed to make sure that the terms of the contract are being observed" are

[17] Recall Sidgwick's insistence that social happiness or utility, properly measured, includes the interests of future generations. See note 12, above. Sidgwick does understand that common pool problems are not ubiquitous, as when he says that "There are … important and extensive portions of the earth's surface which individuals have never been allowed to claim for their exclusive use,—their utility being clearly greater when they are not appropriated" (1897, p. 77).

very high, the effect of which is often "to prevent many transactions that would be carried out in a world is which the pricing system worked without cost" (1960, p. 15).

Remedies I: Accidents

Having analyzed the issue of how A's pursuit of his interests can impose costs on B, Sidgwick turns his attention to the legal mechanisms for dealing with these collisions of interests. In doing so, he distinguishes between accidents, or "unintentional" wrongs, on the one hand, and crimes, or "intentional" wrongs, on the other. Sidgwick points out that, according to "popular conception and received legal theory," the law with regard to situations where A inflicts harm on B has two primary functions: "(1) enforcement of damages due to the wronged individual; and (2) the infliction of punishment in the name of the community" (p. 110). The question then arises as to how we distinguish between damages and punishment. Some commentators suggest that damages are the reparative mechanism for redressing private wrongs (torts, or accidents), whereas punishment is retributative and appropriate for dealing with public wrongs—that is, crimes. But Sidgwick counters that many crimes are much more private than public, even accounting for potential spillover effects, so this distinction does not really seem useful.

In fact, Sidgwick argues that the distinction between damages and punishment, while important, "is not so fundamental as it is commonly conceived to be. The popular view makes "the common moral consciousness" the determining force as between prevention and punishment; Sidgwick, however, does not see things that way (1897, p. 111). His reasoning here is straightforward and has, to use Posner's description of Bentham, a "utilitarian—essentially, economic" flavor. Like Bentham, Sidgwick notes that the utilitarian perspective makes the pain associated with punishment an "evil" course of action, "only admissible in

order to prevent a worse evil" (1897, pp. 112-13).[18] And, as we shall see below, there are times when this is necessary. But, Sidgwick argues, "both in determining when damages are due, and when punishment should be inflicted, for past mischief, *the prevention of future mischief* ought generally to be a paramount consideration" (1897, p. 110, emphasis added). Such is the centrality of this point for Sidgwick that he reiterates it time and again, it overarches the entire question of remedies, to the extent that "it is the most decisive consideration" not just as between the choice of damages versus punishment, but with regard to the question of compensation and punishment *levels* as well (1897, p. 114). Retribution *per se* is not an issue that should govern the choice among remedies.[19]

The next question addressed by Sidgwick is that of the underlying conditions necessary for the imposition of compensation or punishment. The starting point, he says, is "that *blameworthiness*, in some degree, is normally characteristic of mischief for which reparation ought to be legally enforced as well as of that for which punishment is inflicted as punishment" (1897, p. 114, emphasis added). That is, "from a utilitarian point of view, it would be wrong to hold men responsible for all results to which they physically contributed, however impossible it may have been to foresee such results" (1897, p. 114). The determination of blameworthiness thus involves making a distinction between "physical" and legal causation—between the person who "physically caused" the harm and the whole notion of legal responsibility for the harm.

Once again, Sidgwick points out that the utilitarian perspective may not comport with common understanding:

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[18] See Bentham (1823, p. 158).

[19] See Sidgwick (1897, p. 114), where he disavows the utility of basing remedies on "the retribution of wickedness."

> it may be thought that the need of reparation arises from the mere fact that mischief, such as law aims at preventing, has been inflicted by A on B, without any consideration of the blameworthiness of A: that if A has caused, even quite accidentally, mischief or loss which must ultimately fall on somebody, it is more reasonable that the burden of the loss should be borne by A, who did, in a physical sense, act, than by B, who is innocent of any action whatever (1897, p. 114).

In putting the matter this way, Sidgwick is essentially rejecting the standard of strict liability. While perhaps an implication of the individualistic approach to problems of harmful effects, it does not, he says, comport with utilitarianism.

So, if "blameworthiness" is the trigger for compensation, the question then becomes that of what constitutes "blameworthiness" and thereby gives rise to damages. The answer given by Sidgwick is negligence:

> I hold … that damages for unintentional mischief should only be legally enforced, as a general rule, when the man who has physically caused the mischief has not taken due and proper care: *i.e.* has not taken such care as would be taken by an ordinary person desirous of avoiding injury to others, as completely as this can be done without serious interference with his normal functions … (1897, p. 115).

Sidgwick does not elaborate on the meaning of "such care as would be taken by an ordinary person …" and, as such, does not operationalize the concept of negligence as Judge Hand was later to do in *U.S. v. Carroll Towing*.[20] All that Sidgwick has to say by way of prescription is that "common sense and experience should be the guide" here (1897, p. 115). However, his utilitarian ethic and our earlier discussion of the content that Sidgwick gives to the term

[20] 159 F.2d 169 (2d Cir. 1947).

"reasonable"[21] does offer some insight into the content he would give to this criterion—promoting the greatest happiness, or maximizing the excess of pleasure over pain.

Sidgwick does *not* restrict the application of blameworthiness to the party who (in the traditional sense) inflicts the harm. Rather, he invokes the principle of comparative negligence[22] in asserting that, when "the person injured is partly to blame, it is obviously reasonable that the compensation should be diminished by an amount proportional to his share in causing the injury." That which is reasonable may not, however, be feasible, in that "it may often be impossible to determine the diminution otherwise than very roughly" (1897, p. 121).

Like Coase, Sidgwick recognizes the potential for bargaining in the shadow of the law: "where it is an adequate means of preventing wrongs to fix the burden of reparation on the wrongdoer, there is obviously no absolute necessity for any intervention of government: the required reparation may as well be made privately between the parties …" (1897, p. 119). The party due compensation can then invoke the assistance of government if an agreement cannot be reached. And given that the parties will often be unable to work these things out between themselves, it falls to the legal system to determine appropriate compensation. How, then, is the appropriate level of compensation to be determined?

> In the case of injuries affecting property, restitution in kind, where possible, and the payment of an equivalent in money for the utilities of which the proprietor has been wholly or partially deprived, are the most obvious modes of compensation, and capable in most cases of being made adequate … (1897, p. 120).

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[21] See pp. 3-5, above.

[22] The term itself is not used by Sidgwick.

Sidgwick contends that this monetary compensation for loss of utility should also apply to *physical* injuries, to the extent that is possible. However, he is not overly optimistic about the likelihood of this being operational in many instances, noting that "the adequacy of a money payment is in this case much more doubtful" (1897, p. 120).

It is interesting to note Sidgwick's belief that money can adequately compensate for *utility* losses associated with property-related harms, but not necessarily those arising from physical harms. We can suggest two possible explanations for Sidgwick's unwillingness to go all the way with the idea of money being able to compensate for utility losses. It may be an artifact of his assumption of diminishing marginal utility of income (1901, p. 518), the effect of which is that, beyond some point, additional dollars of compensation may simply generate too little additional happiness to be able to fully offset the sum total of the disutility associated with many physical injuries. Or, Sidgwick's pessimism here may simply reflect a perceived inability of monetary payments to fully compensate for certain types of harm. The case for the latter interpretation is enhanced by Sidgwick's believe that "life and death are goods which it is not possible to estimate at a definite pecuniary value" (1901, p. 424). But then, even this is qualified by his allowance that "all reasonable persons would admit that at a certain point the machinery for saving even life and health may become too costly," and thus "the practical necessity of balancing these goods in some way against wealth cannot be avoided" (1901, p. 424, n.1).

Remedies II: Crime and Punishment

It would be pushing the matter to suggest that Posner was mistaken in his belief that "no economist before Becker … had expounded an economic theory of crime and crime control" (2001, p. 53). However, Sidgwick does take up the subject, and in a way that, while

not nearly so well-developed as we would later see in Becker, does extend the ideas set out by Bentham a century earlier.

Sidgwick's theory of crime and punishment is based on his general principle that deterrence, or prevention of future mischief, is the ultimate goal in the design of remedies within a legal system based on utilitarian principles. As such, he is very much of the mind that damages, rather than punishment, should be employed to the extent that they can adequately compensate for past harm and deter the harmful actions in question in the future (1897, pp. 118-19). We have already seen that Sidgwick does not believe adequate compensation is likely to be forthcoming in many instances of physical injury. Again, however, the major issue here is the prevention of future harm and what level of damages or punishment is sufficient to accomplish this. It is possible that there is a level of damages that, while not fully compensatory, is sufficient to generate the appropriate level of deterrence. However, damages alone may well be insufficient to accomplish deterrence, thus necessitating the use of punishment.

However, this does not exhaust the matter. There are some cases which, "either from the gravity of the offence, or because, though socially dangerous, it causes no definite harm to assignable individuals, … punishment proper is the indispensable means of determent" (1897, p. 119), and he cites as examples "Foiled attempts to commit grave crimes," such as "forgery detected before it takes effect" (1897, p. 119n.1) It may also be the case, he says, that "nothing like adequate reparation is likely to be obtained," as in the case where the party on whom blame is affixed is too poor to be able to pay the necessary level of compensation (1897, p. 119n.2).

Sidgwick sees the decision to commit a crime as the result of a utility calculation on the part of the prospective criminal. He also—like Bentham, but in a rather more sophisticated

fashion—recognizes that the ability of the law to deter crime is not solely a function of the level of punishment. In Bentham, we see at several different points the recognition that the deterrent effect of any given level of punishment is a function of the likelihood that the crime will be detected—as, for instance, when he notes that if prospective criminals know that they or others have committed a particular crime without punishment a certain proportion of the time, this will correspondingly weaken the deterrent effect of any given level of punishment (Bentham 1823, p. 146).[23] Putting this in modern language, the cost associated with a crime is given by the punishment (P), weighted by the probability of detection (p_d):

$$EC = p_d P.$$

Likewise, something that reduces the risk of detection—Bentham instances wearing a mask in the commission of a crime—makes it proper to increase the level of punishment for that type of crime so as to maintain the appropriate level of deterrence.[24]

Sidgwick takes this discussion a bit further in his assertion that deterrence "depends not only on the amount of punishment, but also on the chances that the criminal (1) will be caught, and (2) will be condemned if caught." That is, Sidgwick adds the likelihood of conviction to Bentham's detection effect so that, in modern language, the deterrence effect of any given amount of punishment involves weighting that punishment by the probability of conviction (p_c), as well as the probability of detection, with the effect that the expected cost associated with committing a crime is:

$$EC = p_d p_c P.$$ [25]

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[23] See also Bentham (1823, pp. 137-38).

[24] See Bentham's discussion in *The Rationale of Punishment* (1830, Book I, Ch. VIII, Sec. IV); see also Bentham (1823, p. 288).

The obvious implication is that there are ways to deter crime besides adjusting the level of the punishment itself—that is, by devoting more resources to crime detection and to the courts. But at least as important for Sidgwick's utilitarian system is the fact that more effective policing and court systems will allow punishment to be reduced without a consequent increase in crime (1897, p. 123). Given that punishment is an evil in the utilitarian calculus, the ability to be able to combine a relatively smaller punishment with relatively more intensive policing and prosecution may well generate an increased level of societal happiness.[26]

Sidgwick is also well aware that the prospective criminal faces a range of choices as to the type and amount of criminal activity to engage in, and that, as such, the operation of deterrence works at the margin as well as in total.[27] This, in turn, makes it important to avoid "excess in punishment"—not only so as to cause no more pain than is necessary ("which, of course, is to be aimed at from a utilitarian point of view"), but, even more importantly, "in order that different degrees of punishment may all be adequately deterrent, where the criminal has choice of alternatives of crime, differing in degree of mischievousness." Sidgwick goes on to bring out the marginal deterrence aspect even more clearly: "It is of fundamental importance," he says, "that a man should always have adequate motive to

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[25] These equations are not meant to suggest this level of probabilistic specificity in either Bentham or Sidgwick. Rather, they are a convenient means of illustrating the distinction between Bentham's discussion and that of Sidgwick. That having been said, it is interesting that Sidgwick did not apply a similar logic to negligence. See p. 10, above.

[26] Sidgwick does not explore the relative merits—in a utilitarian sense—of the pain associated with punishment and the pain associated with the additional taxes necessary to finance increased levels of policing and prosecuting.

[27] Here, Sidgwick follows Bentham quite closely. See Bentham (1823, pp. 165-174).

refrain from committing each successive part of any possible complex offence; or a greater offence, instead of a lesser." The implication, then, is that "Punishment … should be chosen so that clearly greater punishments may be allotted to more mischievous crimes" (1897, p. 124).

In sum, the utilitarian ethic demands that "Punishment should, other things being equal, be as little burdensome as possible to the community." Thus, to the extent that it is feasible to substitute compensation for punishment as a deterrent, that should be done. Indeed, if compensation is "sufficiently preventative of the offence," it alone should be used. Finally, if some other activity, such as "useful labour" is sufficient to adequately deter crime, "its utility is so much gain" and this, rather than punishment *per se*, should be employed (1897, p. 125).

IV. Conclusion

Sidgwick's view of punishment, and of remedies generally, is of a piece with his overall approach to dealing with problems of harmful effects—an approach that is pragmatic and case-by-case. And in fact, Sidgwick, like Coase,[28] is well aware of the potential for the cure to be worse than the initial disease:

> Where the restraints or burdens imposed by such interference are more serious, the annoyance and cost entailed by it, on the community or on individuals, must of course be carefully weighted against the evils which experience shows it to be capable of preventing:

[28] Having discussed the possible of using markets, firm, and government to deal with problems are harmful effects, Coase points out that "There is, of course, a further alternative, which is to do nothing about the problem at all. And given that the costs involved in solving the problem by regulations issued by the governmental administrative machine will often be heavy …, it will no doubt be commonly the case that the gain which would come from regulation the actions which give rise to the harmful effects will be less than the costs involved in Government regulation" (1960, p. 18).

and under the head of cost must be included any economic loss caused by the enforced substitution of a more expensive for a cheaper process of attaining any industrial end.

The complexity of these issues makes it all but impossible to lay down "any general rules … for determining the limits of such interference." The one thing that can be said, he argues, is that "a milder degree of interference, if effective, is generally to be preferred" (1897, p. 131).

Now if, as Posner suggests, the "question of Bentham's influence on the law and economics movement is particularly difficult," it would be particularly foolhardy to suggest that Sidgwick had any significant influence modern law and economics—at Chicago or anywhere else. He did, however, have a substantial influence on the Cambridge school of welfare economics—first through Alfred Marshall, and ultimately through A.C. Pigou (1920). That both the Cambridge and Chicago traditions can trace an intellectual commonality back to Sidgwick illustrates how minor differences in assumptions can lead to radically different results. But that is a subject for a different paper. The road from Bentham to Becker does pass through Sidgwick—and thus Cambridge—even if only by happenstance.

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