

Death Property and Lawyers a Behavioral Approach

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Death, Property, and Lawyers: A Behavioral Approach. THOMAS L. SHAFFER. New York: Dunnellen Publishing Company, Inc. 1970. Pp. xi, 292. \$7.95.

. . . the reading of the will . . . Once in a thousand times it's interesting.

*Wilder*¹

There is no use trying to compare this recent volume by Dean Shaffer of Notre Dame Law School to any other legal monograph on the same topic, because no others appear to have been written. The purpose of the book is to explore and delineate elements of the psychology of testation. In the introduction Dean Shaffer points out that the wills client must be thinking of death if he is seeking a will. Much of what the client verbalizes about his property expresses an unspoken hope that in arranging for the disposition of his property he is in some fashion defeating death, at least in part.² Part one of the volume is, in fact, entitled "Death." Shaffer investigates death as it is viewed in the courtroom by analyzing the attitude expressed by trial judges at a judicial conference towards the depiction of death in photographs offered in evidence. Revulsion was strongly expressed to the grisly nature of such evidence, especially to photographs suggesting suicide or pain before death. In general there was a feeling of the indecency of depicted death.³ In the chapter entitled "Death in the Living Room," persons in an encounter-type group discuss their plans for wills and their ideas about their own deaths and the deaths of members of their families. It becomes clear that many wills clients have both the desire to plan the disposition of their property after death and a strong aversion to facing the fact of death. Sensitivity on the part of the lawyer to this client ambivalence, and a good deal of patience, become essential.

"Death, Property, and Giving" is the topic explored in part two. Here in greater depth Dean Shaffer explores the values the wills client perceives as destroyed by death. As before, it becomes clear that it is not personal dissolution alone that is feared, but also loss of control, abandonment of responsibilities, and cessation of pending projects.⁴ The security of an orderly disposition of one's property, designation of

¹ T. WILDER, *OUR TOWN*, Act II.

² Pp. 8-9.

³ Pp. 30-31.

⁴ Pp. 74-89.

guardians of minors, and wise provision for all dependents assuages these fears and can make wills planning cathartic as well as merely sensible.⁵

As part of an experiment in teaching wills drafting on a clinical basis Dean Shaffer was able to arrange a series of interviews between wills clients and students under his supervision. Here again the intimate intertwining of notions of death and property was revealed.⁶ The chapter dealing with this experiment also explores some of the psychological and philosophical literature on this relationship.⁷

In part three, "The Psychology of Testation in the Judicial Process," the author deals extensively with cases arising under section 2035 of the Internal Revenue Code, which provides for taxation to the decedent's estate of gifts made in contemplation of death. Here courts are obliged to plumb the minds of persons now deceased to ascertain their attitudes towards donees and donations and their perceptions of the possibility of impending death.⁸ To summarize the host of individual cases a useful device is employed, one which should be more widely used in law schools. Dean Shaffer has prepared several composite cases, each illustrating common trends and typical fact patterns. He discusses three representative testators: a very old man in excellent health, a recently widowed woman, and a man just past the prime of life who died suddenly.⁹ The "facts" of each case and the "court's" decision are followed not only by Dean Shaffer's analysis but also by the comments of two clinical psychologists, one trained in law and the other considered a pioneer in the psychology of death. Each composite case is an illuminating investigation of death as viewed by the decedent and as viewed through the eyes of the court after an adversary process.

The last chapter is somewhat less successful, perhaps because it essays to examine testamentary relationships and the transference concept.¹⁰ In view of the lack of consensus among psychotherapists as to what precisely accounts for the transference phenomenon, it is understandable that analysis of it in the context of the testator-lawyer relationship appears somewhat strained.

Some minor aspects of the book are irritating. Most footnotes relating to legal sources are at the end of each chapter; most nonlegal sources are simply listed in a table of references at the end of the

⁵ Pp. 94-98.

⁶ Pp. 109-36.

⁷ Pp. 136-42.

⁸ P. 149.

⁹ Pp. 155-206.

¹⁰ Pp. 219-64.

book. The index is lean; beyond proper names it offers rather little aid to the searcher. If Dean Shaffer had spent additional time editing and polishing—some of the material was originally published in law reviews—a more integrated volume might have resulted. Nevertheless Dean Shaffer's foray into the interdisciplinary zone between testation and psychology is a unique contribution, and both disciplines are the richer for it.

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The Logic of the Law. GORDON TULLOCK. New York: Basic Books, Inc. 1971. Pp. x, 278. \$7.95.

In *The Logic of the Law* Gordon Tullock attempts to reconstruct legal rules and institutions on a scientific foundation. The science is modern welfare economics. Tullock, an economist and political scientist, complains that the American legal system rests on antiquated notions of morality. These notions, he submits, should be replaced by contemporary concepts of cost and benefit. From this new conceptual basis, Tullock claims, we can derive the way the law should be.

Tullock's goal is law without ethics. To keep ethics out, he admits only one rule of evaluation: an existing legal rule or practice, or a change in a legal rule or practice, is justified if, and only if, it is to someone's advantage and to no one's disadvantage. In the argot of welfare economists, it must be "Pareto optimal." By restricting himself to this single criterion, Tullock tries to avoid the problem of weighing one person's benefit against another person's detriment. Tullock announces six assumptions about people, the first three of which he deems major: (1) a person is not in a position to assure himself of special legal treatment;¹ (2) a person normally chooses what he prefers;² (3) a person normally prefers a choice to a lack of choice;³ (4) sometimes, however, a person chooses to restrict his future choice to maximize his present satisfaction;⁴ (5) a person prefers to avoid risk;⁵ and (6) a person does not get an amount of pleasure from inflicting injury on others, or observing injury inflicted on others, greater than the amount of pain he would suffer himself were he the victim.⁶

This bare framework of ideas, according to Tullock, is sufficient to reach important conclusions. His range is vast: from contracts and procedure to torts and probate, from illegal parking and tax evasion to theft, robbery, and fraud. Tullock's discussion of contracts and civil procedure exemplifies his method and its failings. He begins by deducing that some contracts should be enforced. He starts from his basic assumption about human nature that a person will choose to extend his range of choice. The complete deduction is as follows:

If confronted with the choice between situation A, in which promises are not "enforced," and situation B, in which promises

¹ P. 11.

² P. 14.

³ P. 15.

⁴ Pp. 22-28.

⁵ Pp. 28-29.

⁶ P. 29.

may either be "enforced" or not, as the maker chooses, it would be rational to take the latter. It does not, after all, compel you to make enforceable promises, it only makes it possible. Situation A, on the other hand, limits you to unenforceable promises. Situation B is, of course, the existing law.⁷

This deduction merits some scrutiny, particularly since it is the first fruit of Tullock's method. First, Tullock's explanation of his method suggests that Pareto optimality is the only justification for a legal rule or institution. The six assumptions about human nature would appear to have only an ancillary role—permitting us to tell whether someone benefits and whether no one is harmed.⁸ Yet in this first deduction, Tullock does not rely at all on Pareto optimality. Indeed, he does not even attempt to show that "enforcement" of selected contracts benefits someone and harms no one. Second, Tullock never discloses what it means to "enforce" a promise, either here or anywhere else in his two chapters on contracts. Remarkably, he never once makes the basic distinction between damages and specific performance which would seem particularly significant to an economist. Since we never know what it means to "enforce" a promise, we never know what Tullock is talking about. Third, Tullock describes a situation in which a promise is enforceable if, and only if, the maker so chooses, and represents that situation as "the existing law." He is clearly mistaken; the enforceability of a promise does not depend solely on the promisor's choice.

This kind of fuzzy thinking continues when Tullock turns to the question of how detailed the law governing the interpretation of contracts should be.⁹ It is difficult to see how this general question could be answered in any meaningful way; Tullock, however, does not even see the significance of the issue. Trained as a lawyer before turning to economics, Tullock remains in the classroom world where agreements are negotiated by parties of equal strength. In that realm the issue is whether the advantage of agreeing on detailed terms and reducing them to writing is justified by the cost. However, the law governing contracts may often have a quite different justification. In a world where many, if not most, contracts are standard forms imposed by one party, the law of contracts can prevent oppression.

When Tullock reaches the chestnut of why some contracts should be void—for example, a contract to become someone's slave—one

⁷ P. 35.

⁸ See, e.g., p. 21.

⁹ Pp. 46-51.

begins to wonder whether the whole argument has drifted off course. Even Tullock senses that an explanation is needed:

What I have been trying to do is to demonstrate that it would be possible to draw up a law of contracts on the basis of our basic assumptions and without any ethical assumptions. From maxims of pure self-interest (in the sense that that term is understood by economists), we can deduce that a rather complex and detailed law of contracts, complete with enforcement agencies, is desirable. I think that I have carried the line of reasoning sufficiently far so that it is obvious that it could be used to formulate a complete law of contracts.¹⁰

If we take this passage seriously, Tullock seems to be claiming that from his single criterion of evaluation and six meager assumptions we can deduce the Uniform Commercial Code. That would be a neat trick.

Turning to the enforcement of contracts, Tullock distinguishes "two grand divisions": proving someone has made and breached a contract and compelling him to perform. He writes that "[t]he second part, the actual application of compulsion, is not very interesting or complicated and we need not linger over it."¹¹ So much for the law of remedies. Tullock then wanders through such topics as what sort of "judicial mechanism" is best to resolve contract disputes and what kinds of errors courts make in contract cases. He uses some formidable looking equations, and a few graphs as well, but fails to reach any startling conclusions.

When Tullock treats civil procedure—in a chapter entitled "Anglo-Saxon Encumbrances"—he loses sight of his method altogether and is content to tell us randomly what he happens to think of fact-finding, juries, lie detectors, and the law of evidence. Summarizing, he says:

[M]y position is that the suit to enforce the contract should be decided by a man who is specially selected and trained for that task, not a group of randomly selected, untrained men. The man selected to make the decision should take the primary role in the actual proceedings, and not be reduced to the passive role of the judge of a debate. He should be given access to any evidence that he thinks is important and not restricted by the customs developed many years ago to prevent illiterate juries from making mistakes. Lastly, he should be allowed every aid that science can give.¹²

¹⁰ P. 55.

¹¹ P. 57.

¹² P. 104.

These statements, of course, may be sensible. But Tullock does not derive them from, or even relate them to, welfare economics or any other kind of economics. They are simply common sense notions, spiced with an occasional rash conclusion.

Frequently, Tullock makes grand claims for his method. In discussing the relation between speed limits and accidents, for example, he claims that "[b]y the use of evidence obtained from statistical and other sources, we could compute a complete traffic code that would optimize some objective function"¹³ (curtly dismissing as overrated the relation between accidents and automobile design). Similarly, discussing tax evasion, he asserts: "Basically, we could calculate an optimum tax enforcement policy from a set of equations such as those given."¹⁴ In fact, however, the empirical research he suggests is never realistic and his method rarely has any relation to his argument. In short, Tullock claims to show us how law can be restructured through modern economics, but he actually produces only a collection of commonplaces.

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¹³ P. 162.

¹⁴ P. 167.

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