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The following four papers are based on presentations made to the Creditors' Rights and Bankruptcy Round Table Council of the Association of American Law Schools in December 1971. All discuss an article by Professor Arthur A. Leff, "Injury, Ignorance and Spite—The Dynamics of Coercive Collection," which appeared in the Yale Law Journal *in November 1970.* If the reader has not yet done so, he should read Professor Leff's article—there are rewards other than the ability to follow this discussion more closely. The Editors.*

A COMMENTARY ON LEFF, *INJURY, IGNORANCE AND SPITE—THE DYNAMICS OF COERCIVE COLLECTION*

*Arthur A. Leff***

The major problem (there are others) with Leff's paper arises, I think, out of the particular thinness of its empirical backing. Leff's writing theory is clear enough, at least to the careful reader. He was obviously struck by the fact that with respect to all forms of collection (which he defined roughly as "bringing about the completion of partially executed transactions") the applicable substantive law and the available procedures, both legal and economic, were formally constant and bilaterally symmetrical. But in fact the collection process seemed to work very differently in different distinguishable contexts. He sought, therefore, to set up a base model which could be progressively complicated by describing variations among the actual situations of various subclasses of debtors and creditors. Assuming the constancy of the formal laws and procedures, he tried to make these subclassifications turn on differences in "costs" (which he called, broadly, transaction costs) to different groups, including in those "costs" both economic and psychic varieties.

* Leff, *Injury, Ignorance and Spite—The Dynamics of Coercive Collection*, 80 YALE L.J. 1 (1970).

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Now that little game, as innocent as it sounds, really amounts to laying a seige very perilous to reality. For talking about transaction costs involves of necessity abandoning most model-simplifying constants, and brings one face to fangs with that horrible methodological monster which I would call "the problem of nonperfect perfection." Under assumptions of perfect rationality, perfect freedom, and perfect information, that is, under assumptions of cost-free transactions, there are no problems—but there is not much practical utility either. For such assumptions definitionally prevent there being any subclasses to differentiate; if remedies are identical and omni-available, and they are cost free, then every collection is like every other. But Leff started from the observation that every collection was *not* like every other—as a matter of empirical (though only loosely empirical) fact. Indeed, the trans-empirical fact is that the only transactions which could actually be made under conditions of perfect knowledge (omniscience), perfect freedom (omnipotence), and perfect rationality (justice) would have to be between deities—and even They seem to have stipulated the irrationalities of grace and mercy.

So Leff was after all obligated to create groups, to subclassify by assuming different levels of knowledge, freedom and rationality. Worse than that, since he was, for reasons of analytic and utilitarian efficiency, forced not to deal with individuals but with much larger classes, he had to stipulate not only material differences, but material similarities, and deal with these stipulated aggregations as unities even though he knew full well that there was no such thing as a thoroughly homogeneous class, that is, a class made up of *identical* members.

Well, he did so. He didn't go very far; he really created only two classes—merchants and consumers—and then complicated things a bit more by refusing to accept the hypotheses (1) that the same conditions obtained whether it was a merchant-merchant or merchant-consumer transaction; or (2) that the results were bilaterally symmetrical whether the merchant or consumer were creditor or debtor. Despite this classificatory modesty, the trouble remained that the basis upon which he distinguished and aggregated even these classes, and assigned characteristics to them, was barely above anecdotalism. And that makes things dangerous. For if those classificatory discriminations are not empirically based, how does one know what form and level of nonperfection—in rationality, knowledge or freedom—to stipulate? It would be easy if one could just create a counter-model of equal but opposite "perfection," for instance, total ignorance or irrationality, but that won't do either. No one is, say, *perfectly* ignorant. Thus, if one is going to classify with respect to a diversity of these factors, one really ought to have some evidence lest the classes become wholly arbitrary products of a wishful attempt to make one's own model look persuasive. For instance, I think Leff was right, that is, that he took a useful reality-enhancing risk, in daring to talk about spite as a factor in collections. He thereby explicitly recognized the existence of an operative psychological propensity *definitionally* different from the rationality ordinarily assigned to economic actors. But spite's actual existence, and a fortiori its significance and magnitude, is, as far as Leff's piece is concerned, a matter of mere assertion, or at most what I would call smiling plausibility.[1]

By going ahead anyway, making his classifications on the basis of guess and "common sense," Leff risked being just plain wrong. But there is a more subtle danger in his kind of artificial empiricism which I was not quite able to put my finger on until I read the various commentaries. None of them actually made the point in quite the terms I shall, but they got me there nonetheless. The danger this time is in confusing analytics with synthetics. Leff began his analysis in terms of cost-free transactions between parties locked by contract in what amounted to a bilateral monopoly problem. He therefore used as a useful (though not very deep) initial vocabulary some primitive game-theoretic language. This helped him ultimately to reach the conclusion, which I think correct, that information was the limiting parameter most open to useful manipulation in order to render collection practices, in all contexts, more efficient and less painful. But then, when he was groping about for more particularized solutions, for practical ways of introducing the desired additional information, he ended up, albeit tentatively and carefully, with an improved and umpired playing field for a better designed *game*. Now I am not at all sure that that suggestion is wrong; it may be the most efficient technique after all, or at least one of them. But I think Leff ended up there at least partly because his early central analytic metaphor made him keep thinking of a conscious game, that is, of a two-party, rule-bound interaction. In fact, however, that one can accurately describe the result of a complex process as a game does not mean that, synthetically, the process is played as one. It is a mistake to *assume* that analytics and synthetics are at all transitive; one tells a ballplayer to watch the ball and hit it, not to raise his shoulder, take a four-inch stride, cock his wrists seven-tenths of a

1. Of course, not to explore, however gingerly, psychological differentiation is to end up, as Caplovitz almost did in his critique of Leff's article, assuming "the innate goodness of man" for debtors (and thus little need for coercive collection remedies), and instinctive evil for creditors (and thus a need to cut down their present remedies), as if "debtor" and "creditor" were terms that described a necessarily different psychic mix, rather than the same general mix in different roles. If people are by and large so "good" that they will voluntarily carry out their assumed obligations, why bother policing them?

second before impact and follow through 22.8 inches past his left shoulder—even if that's what happened when he got that home run last time. Similarly, it doesn't necessarily follow that Leff's little meeting room will actually maximize information flow, even though it might be the *game form* most likely to bring about that increase.

As I said, I have no certainty that Leff's final suggestion is not on the right track. I'm just not convinced that it is because of the way his own metaphor, created for a different (analytic) purpose, propelled him to that end. And that propulsion, I think, is once again the partial product of his partial empiricism. Had he not complicated his bare game model with a loving consideration of some of the realities of transaction costs, it never would have occurred to him to think in terms of improved gaming. But having gotten some flesh on the bare bones of his theory, it began to look not like an analytic at all, but almost like an empirical description of reality. It may have become for him not just a way of talking about the "as ifs" of complex human behavior, *but about the way people behave.* It was then a short step for him to suggest that they continue to behave that way, though in a better institutional setting—even though he had no real evidence about actual *behavior* at all, and even though his analysis demonstrated that *the avoidance of play* was one of the most natural and pervasive "moves" in certain kinds of collection practice. In fact, I strongly suspect that the only thing that kept Leff from the ultimate embarrassment of proposing a complex game-theory procedure as a law reform technique was that he is too lousy a mathematician to have worked one out.

Having pointed out the dangers of non-empiricism and partial empiricism, I think that in fairness I ought also mention some of the dangers and weaknesses of empiricism itself. This line of thought is triggered, of course, by Professor Caplovitz' piece. That commentary is obviously the product of a fat book of thoroughgoing empiricism Professor Caplovitz recently completed,[2] and it is such a gorgeous example of some of the pitfalls of fact-steepage that it deserves a few words—even in a commentary on Professor Leff's piece.

Professor Caplovitz' book is the expensive product of a very long inquiry into the actuality of collection processes—*as they apply to a small subset of all collection situations.* He investigated collections from debtors who were (1) consumers, (2) in default, and (3) sued. Now that's an interesting group, and his results were very useful, among others to Leff, who cited him from time to time.[3] But having sunk in this mass

2. D. CAPLOVITZ, DEBTORS IN DEFAULT (Temp. ed. 1970-71).

3. *See* Leff, *Injury, Ignorance and Spite—The Dynamics of Coercive Collection*, 80 YALE L.J. 1, 22 n.74, 37 n.117 (1970) [hereinafter cited as Leff, *Injury*].

of data, Caplovitz seems (on the basis of his commentary) to have confused it with what he calls "the real world of collections." But, of course, it isn't anything like that; even assuming his work was well done (and I have no reason to suppose that it wasn't), it is still just an approach to the "real world" of collections from defaulting and sued consumer debtors. It is not even worth a damn with respect to defaulting and not sued consumer debtors because he has no useful data on them, and they (to Leff) would be the most interesting class: the Morrises and Kevins[4] of the consumer world who, having not paid in full or on time, have nonetheless apparently played the game Caplovitz denies was open to them.

But let me generalize Caplovitz' particular error, for despite the egregiousness of his example, it is hardly an error limited to him alone. What Caplovitz did was commit a very common logical error, so common that it even has a name—the fallacy of misplaced concreteness. It consists of treating all members of a proper analytic class as identical in all ways with one particular proper member of that class. For instance, if one classifies all six-legged, tripartite, air-breathing animals with exoskeletons as insects, and then acts as if all insects sting because wasps, which *are* insects, do, then one has committed the fallacy. In Caplovitz' case, he saw all the *C's* and *D's* in Leff's first twenty pages,[5] before Leff got done subclassifying, as members of his own little subclass of subjects. Thus, he naturally but totally failed to understand what was going on. He kept protesting that Leff's *D's* and his beloveds were not at all the same. And he was right—they were not meant to be.

Now that's a pity—that Caplovitz should have expended so much emotional energy in exorcising demons from the wrong head.[6] But I think the seriousness of the problem transcends one instance of imprecise thinking by one social scientist. For it seems to me that empiricism has a strong tendency to foster in its practitioners an impulse to substitute for "reality" whatever data one has, can get, or (most attractive)

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4. *See* Leff, *Injury, supra* note 3, at 24-26.

5. *"C"* is used by Leff to refer to the party who has completed his performance under a partially executed contract, while *"D"* refers to the party who has not. *See* Leff, *Injury* 2-5. The terms are not exactly the same as "creditor" and "debtor." For instance, a buyer of goods who has paid cash or given a negotiable promissory note to the seller may be, if the goods are defective, a *"C"* of the seller, now a *"D." See* Leff, *Injury* 20-22.

6. In fairness to Professor Caplovitz, it should be pointed out that Leff was being a bit cute in the early stages of his article, playing for the outrage that would be felt by specialists in poor-consumer-defaulter *D*'s on seeing the construct "*D*" given an initially one-up structural position in the collection game. *See, e.g.*, Leff, *Injury* 5: "Under the American law of contracts, after the other party has fully performed his obligations it is absolutely irrational for you fully to perform yours." Though Leff did add a footnote cautioning against accepting the all-context validity of that dictum, he could have prevented misreadings by a somewhat less cryptic warning.

can quantify. It doesn't show itself only in the form of misplaced concreteness. It can be the fallacy of composition, that is, the fallacy of seeing each member of a class as a sort of composite average of all the members and not as an individual. It shows up as "spurious quantification," for instance the decision to define urban "blight" in terms of plaster holes and toilets per housing unit without reference to anything hard to count. It turns up (as Kripke argues here and elsewhere)[7] in the impulse to make differentiable classes into one, when the emotional power of one set of circumstances can be attached to a fundamentally different situation, as with the use of "the poor" to foster "truth-in-lending" which can benefit, if anyone, only the middle classes.

In brief, if total lack of empirical data can lead to unreality and sterility (not to mention proneness to plain error), and partial, anecdotal empiricism can lead, among other things, to a confusion between analysis and synthesis, a total commitment to empiricism seems to tend, unless one is very careful, toward a characteristic blindness toward the fruits of any investigating methodology, or the significance of any investigated "tribe," except one's own.

But all methods have their dangers. People will continue, sometimes often, to fall into the pits they unavoidably dig while clearing their own roads toward partial understanding. One cannot abandon empirical inquiry because it is always incomplete and might mislead, or analysis because it might masquerade as actuality—even if the inquirers and analysts are sometimes the victims. One is always, ultimately, the victim of any question important and complicated enough to be worth asking.

THE HUSK OF PUFF AND THE KERNEL OF TRUTH: A CRITIQUE OF *INJURY, IGNORANCE AND SPITE—THE DYNAMICS OF COERCIVE COLLECTION*

*David Caplovitz**

The paper by Professor Leff is comprised of two parts. Part I, consisting of the first twenty-six pages, deals with coercive collection, meaning that

7. *See, e.g.*, Kripke, *Gesture and Reality in Consumer Credit Reform*, 44 N.Y.U.L. Rev. 1-13 (1969).

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