



THE GOLDEN HAND FORMULA

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NO DOUBT A FEW TORTS SCHOLARS still reject the Hand formula as the incantation of a black art. Certainly many law students find this “cold, dehumanized algebraic equation”¹ to be a bitter pill. For a spoon full of sugar, it may be useful to bring into relief a point that others have implied before: the Hand formula enforces the Golden Rule.² Note the juxtaposition on the following pages of the Hand formula with various formulations of the Golden Rule from many of the world’s major religions.



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¹ Leslie Bender, A Lawyer’s Primer on Feminist Theory and Tort, 38 J. Legal Educ. 3, 34-35 (1988).

² See, e.g., Michael Green, Negligence = Economic Efficiency: Doubts >, 75 Tex. L. Rev. 1605, 1614 (1997) (“the Learned Hand formula can also be understood noninstrumentally to reflect the Golden Rule”); Gary Schwartz, Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice, 75 Tex. L. Rev. 1801, 1820 (1997) (the Hand formula is “conducive to an ethical explanation of the negligence standard” because defendant is liable under the Hand formula when he attaches more weight to his own interests than to the interests of others).

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Hand formula (B < PL)

Defendant is liable if he fails to take care to avoid causing loss, provided his burden of taking care is less than the reduction in expected loss. Perforce, to avoid liability the defendant cannot act as if he regards harm to others as less weighty than harm to himself.³

Buddhism

Treat not others in ways that you yourself would find hurtful. (Udana-Varga 5:18)

Christianity

All things whatsoever ye would that men should do to you, do ye even so to them. (Matthew 7:12)

Confucianism

What you do not want done to yourself, do not do to others. (Analects 15:23)

Hinduism

This is the sum of duty: Do naught unto others which would cause you pain if done to you. (Mahabharata 5:1517)

Islam

No one of you is a believer until he desires for his brother that which he desires for himself. (No. 13 of Imam Al-Nawawi's Forty Hadiths)

Judaism

What is hateful to you, do not do to your fellowman. This is the entire Law; all the rest is commentary. (Talmud, Shabbat, 31a)

Taoism

Regard your neighbor's gain as your gain, and your neighbor's loss as your own loss. (Lao Tzu, T'ai Shang Kan Ying P'ien, 213-218)

³ Suppose that defendant could, by adopting a \$50 precaution, avoid expected harm to another person of \$100. The defendant's choice to forego the precaution shows that the defendant regards his own interests as more important than others'. Accordingly, the defendant would be liable under the Hand formula.

The Golden Hand Formula

Zoroastrianism

Whatever is disagreeable to yourself do not do unto others. (Shayast-na-Shayast 13:29)



The Golden Rule promotes moral consistency through the heuristic of trading places. The Hand formula enforces the Golden Rule by punishing those who act as if they have not traded places. The Hand formula likewise enforces the single owner heuristic. The single owner heuristic instructs us to imagine that all of the interests at stake are owned by a single party and to then ask “what would the single owner do – WWSOD?”⁴ Ownership by a single party is functionally the same as ownership by multiple parties in a world with no transaction costs.⁵ Thus, the single owner heuristic and the Hand formula point us toward the outcome of Coasian bargaining. The feature shared by all these tools, and also by the veil of ignorance,⁶ is that they encourage us to act as if we are one.



⁴ See generally Ward Farnsworth, ‘The Single Owner,’ from *The Legal Analyst: A Toolkit for Thinking about the Law*, pp.37-46 (Univ. Chicago 2007) (pointing out, *inter alia*, that the single owner principle links economic talk about costs and benefits to the Golden Rule); Stephen G. Gilles, The Invisible Hand Formula, 80 Va. L. Rev. 1015, 1032-35 (1994) (the Hand formula operates through the single owner version of the reasonable person standard).

⁵ See Richard A. Epstein, Holdouts, Externalities, and the Single Owner: One More Salute to Ronald Coase, 36 J. L. & Econ. 553, 555-57 (1993); Farnsworth, *supra* note 4 at 75-77.

⁶ The “original position” is a hypothetical situation in which parties agree to a social contract that defines their basic rights and duties. The veil of ignorance refers to the ignorance of the parties in the original position as to whose interests they represent. See John Rawls, *A Theory of Justice*, pp. 136-42 (Belknap 1971). See also John Harsanyi, Cardinal Utility in Welfare Economics and in the Theory of Risk-Taking, 61(5) Journal of Political Economy 434, 434-35 (1953).