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Economic Justice and the Internal Point of View

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I. Economic Injustice and What to Do About It

The West is in a tumult about money. In the United States, the Tea Party movement and the Occupy Wall Street movement captured the public's attention, sounding themes of fiscal irresponsibility and material inequality, respectively. Political negotiations over the so-called "fiscal cliff," the debt ceiling, taxes, and entitlement spending have kept these themes before the public eye. In Europe, the protests have been more dramatic, and the declarations of national leaders that the European Union is in no danger of disintegrating have sounded at times suspiciously forceful.

Despite all of the exhortations that lawmakers should do something, the public debates do not reflect much understanding of the role that law can play in addressing these problems. This results in part from disagreement about the source of the problems. Critics of the status quo agree that something has gone wrong, and that those in power have much to answer for. But they focus their criticisms on different culprits. One side sees finance and corporate executives earning salaries that appear to be wildly incommensurate with the modest successes, and occasional disastrous failures, of the institutions that they lead. They see taxpayers, laborers, and the poor bearing the risks and costs of corporate bailouts, oil spills, and outright fraud. The other side criticizes government, observing that lawmakers spend far too much money on the wrong things and punish the wrong people. Governments rescue badly-run companies that they deem too big to fail, then create new regulatory schemes which increase burdens on small business owners and conscientious citizens and do little to curb abuses by the rich and well-lawyered.

Strikingly, though reformists are often faulted for harboring nefarious motivations, it is difficult to find anyone who claims that their substantive complaints lack merit. But the merits of their criticisms are often obscured

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by the controversies attending their proposals. By focusing almost exclusively on taxation, entitlements, and the efficacy of economic regulations, reformists reduce the controversies to the question how much coercive power the state should exercise to address economic injustices. That is of course an important question, but it ignores more fundamental jurisprudential questions, which promise to be more illuminating, and less provocative.

The law sometimes promotes economic well-being most effectively not by using coercion to bring about external consequences but rather by supporting the internal attitudes that will make economic well-being more likely. The apparatus for achieving this has long been hiding in plain sight, though it has fallen into disrepair for lack of use and attention.

II. Law and the Internal Point of View

A. Law From the Inside

Jurisprudence suffers from a needless fixation on external appearances. More than half a century ago, HLA Hart admonished lawyers to look at law not merely from the external perspective of OW Holmes Jr's bad man,[1] who is concerned merely with avoiding the uncomfortable consequences of disobedience, but also from the internal point of view of the law-abiding citizen, who takes law as a reason for her action.[2] Lawyers should concern themselves not merely with consequences but also with purpose, intent, and will. Others have built upon Hart's work. By taking seriously the idea of law as a reason for action, Joseph Raz,[3] John Finnis,[4] and other so-called perfectionist scholars of jurisprudence have opened to view the elaborate interior workings of law. Yet few lawyers profit from these jurisprudential insights.

Perhaps, as many critics of contemporary legal education have suggested,[5] law schools are to blame for this impoverishment of insight. I want to leave aside that possibility and consider another, namely that the legal profession has lost its sense of imagination. In particular, lawyers today fail to

[1] Oliver W Holmes Jr, 'The Path of the Law' (1897) 10 *Harvard Law Review* 457.
[2] HLA Hart, *The Concept of Law* (Oxford University Press, 2d ed, 1994) 90.
[3] Joseph Raz, *The Morality of Freedom* (Oxford University Press, 1986).
[4] John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 1980).
[5] See Robert L McFarland, 'Teaching the Law of Wrongs Without Searching for What is Right' (2009) 4 *Journal Jurisprudence* 323.

understand just how a citizen encounters law, whether that law is of binding moral force (practical reasonableness or "natural law"), or of authoritative promulgation (positive law), or of self-imposed obligation (a plan of action or a promise).

One who carefully observes interior attitudes toward law, viewed as a reason for choice and action, will perceive that human choosing has a self-making quality to it, even when obedience to law is the reason for the choice. Obedience to law is, like all practical reasoning, reflexive. In each case of obedience to law, the lawful person internalizes the law. He makes the law a reason, often a conclusive reason, for choosing one option over another option. He sees legal obligation as resolving the dilemma. And this changes the person. By choosing to follow the law a person makes herself into a lawful person. A lawful person is a very different kind of person than Holmes' bad man. And this difference has both moral and material consequences.

The difference can be observed whether we consider human choosing as an exercise of what Raz calls the ideal of personal autonomy, or rather as what Finnis calls practical reason. One who chooses makes both the object of his choice and the means chosen to achieve that object reasons for his actions. He makes reasons for his own deliberations and actions, and thus in important respects he makes his own life. By choosing to write this essay I made completion of this essay, and all that is bound up with it—an examination of economic justice and law; the pursuit of knowledge; the communication of truth claims to other lawyers and scholars to be considered and, if found reasonable, relied upon—reasons that now have binding effect upon me. If I am to be a person of integrity I must remain true to my commitments. Having committed myself to write the essay, this portion of my life can be deemed a success or failure according to whether I complete the essay, or at least according to whether I make every reasonable effort to complete the essay in light of obstacles and exigencies that I encounter along the way. I am, in a sense, just toward myself only if I make every reasonable effort to succeed, and unjust toward myself if I take any actions that are inconsistent with my commitment to succeed.

The reflexivity of choice takes on even richer significance when the agent takes on board reasons not of his own making. Some reasons for action have intelligible value simply in and of themselves. A fully reasonable person will be oriented rightly toward goods such as friendship and knowledge, and will not make choices that are inconsistent with a will

toward well-being, both the well-being of oneself and of others. Many unjust acts are clearly unjust because they entail an orientation of the will that is directly at odds with—does violence to—the good of the perpetrator and his neighbors.

Now the stakes are raised, for one who breaks his promises to himself fails himself, but one who acts with a will that is inconsistent with human well-being fails his entire community. And because choosing has a self-making quality to it, this person becomes not merely a personal failure but also a failure as a communal being, a person at odds with society. Law has a particularly acute interest in this person.

To summarize: By adopting reasons as one's own, one internalizes those reasons. My choices, in a real sense, make me who I am. In the benign case, I make myself a legal scholar by writing essays in jurisprudence. Of course, other choices have far more dramatic, often destructive, internal effects. One who murders becomes someone for whom murder is a reason for action, and therefore becomes a murderer. A murderer suffers self-inflicted internal harm as a result of his choice to commit murder (though obviously a very different kind of harm than the harm he inflicts upon his victims).

That much is now old news, even if it is still not clearly understood or taught in law schools. Here's the interesting part: The interior attitudes of those under law matter as much for economic issues as for so-called moral issues. An act of fraud and theft makes a liar and a thief out of the person who perpetrates the act. It makes him a very different kind of person, one for whom dishonest gain has become a reason for action, which he views as having intelligible value. Initially, the value in the fraudulent act consists in the end for which the act is instrumentally efficacious. But one cannot commit to and carry out a plan of action without taking both the means and the ends into one's intention, and thereby one's character. By choosing to commit fraud the con man comes to see a dishonest act as an acceptable means of achieving other goals.

The obverse is also true. When one chooses the good one becomes more willing to do good. By doing good deeds one makes other human beings reasons for one's actions. An act of charity makes the donor charitable. By the charitable act the donor prioritizes the well-being of others over superfluous comforts that his excess money might purchase. This makes the donor the kind of person who is disposed toward seeking the well-being of

others, and who is willing to accept fewer material comforts as a means to achieve his end.

Now if the pragmatist has read this far he is perhaps unimpressed. After all, like Holmes, the pragmatist lives in the material world, not the existential world of mysteries and morals. But here is a payoff for the pragmatist. All of this internal directing of the will has external, material consequences. One who makes dishonest gain a reason for his choosing becomes more willing and therefore more likely to commit acts of fraud in the future. Fraudulent acts cause real economic harm, even material suffering. So multiplying acts of fraud multiplies economic harm. By contrast, one who makes himself charitable by choosing the well-being of another over his own personal comfort makes the well-being of the other a reason for his choosing, and thus becomes predisposed to prefer others to himself in the future. Others benefit materially from the internal change that has taken place in the life of the charitable donor. So, careful attention to the internal aspects of human choice bears fruit not merely for the moral well-being of the actor but also for the material well-being of his community.

B. The Inefficacy of Coercion

The internal point of view has important implications for jurisprudence because it suggests why so many laws fail to promote communal well-being. One of the immediate implications of the reflexivity of human choice is that coercive laws will often be ineffectual to bring about the legislator's intended objectives. Coercion is a blunt instrument; it can do as much harm as good, often more.

Coercion is sometimes a useful tool for preventing both external and internal (sometimes called "moral") harm. After all, Holmes' bad man understands only coercion. Standing outside the operation of practical reasoning, one can perceive the effects of coercion upon the victims of the would-be wrongdoer. They are better off if the threat of coercion deters the wrongful conduct, or if coercive incapacitation prevents the wrongdoer from performing additional bad acts. And from the internal point of view, one can detect that coercive deflection of wrongful acts prevents the actor from becoming a wrongdoer, or a worse wrongdoer.

In the economic context, coercion is sometimes justified, even required, by norms of commutative and distributive justice. Obviously, the law rightly uses coercion to deflect harmful uses of assets. Perhaps more

controversially, the law rightly employs some degree of coercion to distribute assets. Where those who own and control assets owe duties to employ those assets for the common good, and they either will not do so or cannot sufficiently coordinate their efforts to do so, the community has some obligation in justice to distribute those assets to whom they are owed.[6]

Nevertheless, coercion generally does little more than prevent harm or address basic needs. And coercion can be harmful if used without care, primarily because coercion can do little to improve the interior disposition of a wrong-doer. A bad man who abstains from an unjust act or performs a just act merely in order to avoid painful consequences has not abstained or acted for reasons that will orient him toward the good. He has merely abstained or acted in order to avoid what, from his perspective, is a greater evil. Coercion thus has the potential to pervert even the practical reason of a wrong-doer.

Furthermore, coercion does great harm to a good-doer. If the law were to coerce charitable acts then it would destroy the charitable nature of those acts. In the best case, if I give in obedience to the law-as-reason then law has become the reason for my action, rather than the well-being of the recipient. I have lost the opportunity to dispose my will toward the well-being of others. In the worst case I will give because I fear the consequences that the law attaches to disobedience. Now the reason for my action is not the good of another human being, nor even law itself, but rather fear of the bad things that will happen to me if I do not perform the act. I will perform an action that looks like charity, but by performing the act I will not become the type of person who performs charitable acts. Instead I will become the type of person who acts out of fear of adverse consequences. In short, coercive laws can make bad men out of good ones.

C. Neglected Features of Law

A student of the common law who stood inside the law would note the complexity of law's architecture, the variety of its features, and would develop a sense that law does many important things, not all of which can be clearly seen from the outside, through the lens of empiricism. The architecture of law is in places ornate and intricate, but the most delicate features have grown dusty since Holmes shooed all the lawyers out of the

[6] Finnis, *Natural Law and Natural Rights*, above n 4, 173.

building and attempted to lock the door behind.[7] There is now a substantial and growing body of scholarship on the internal point of view, though one searches in vain to discover it in most law school curricula (at least in the United States). Hart's intellectual descendants have been busy exploring law and choice, and the implications of each for the other. But their work is largely overlooked in contemporary legal education and scholarship, so a cursory examination of their insights is required here.

Hart and his disciples have much to teach us. As Finnis has observed,[8] one of Hart's greatest contributions to the study of jurisprudence was to peer inside the law itself. Numerous distinctions emerged to view. The law can create obligations without issuing a command backed with a coercive threat.[9] And not all rules create obligations. Some aspects of law actually *expand* the number of available options. Primary rules impose duties, while secondary rules confer powers.[10] These powers enable citizens and lawmakers to make law, to create obligations both for others and for themselves. Thus secondary rules are at least as important as primary rules.

This subtlety is lost on the lawyer who confines himself to the external point of view. He must necessarily miss most of the operation of law both because he cannot perceive the reasons for which the lawmaker—the legislator promulgating rules or the citizen making promises—exercises his power and because the internal deliberations of the law-abiding citizen are concealed from his view. Because the internal aspects of human choice and action are far more complex than the material consequences of those actions, and because they operate within the human mind, the connection between law and choosing is much less obvious than the connection between coercion and harm.

On the other hand, powers are uniquely designed to respect and nurture the practical deliberations of citizens. Powers emanating from secondary rules can be exercised or not, and can be exercised in various ways to suit various ends. Indeed, legal powers have the potential to beget a nearly infinite variety of states of affairs, to suit the faculties and preferences of a nearly infinite variety of people. This feature gives powers immense instrumental

[7] Holmes, above n 1, 457.
[8] John Finnis, 'On Hart's Ways: Law as Reason and as Fact' (2007) 52 *American Journal of Jurisprudence*.
[9] Hart, above n 2, 82-86.
[10] Ibid 80.

value in shaping practical deliberations, because it enables powers to meet a basic need of practical reasonableness: the need for valuable options.

Choosing well is not possible without some amount of personal autonomy. Personal autonomy of course requires freedom from coercion, but it also requires more. It requires a sufficient availability of good options from which to choose; availability of bad options is not enough.[11] These preconditions, which are necessary for the exercise of personal autonomy, make sense of both the demands that personal autonomy makes upon law and the limits of those demands.[12] Personal autonomy presupposes goods other than itself. And it is valuable only insofar as it is exercised in favor of those external goods. Thus law should promote the conditions in which human goods can be promoted and protected, a set of conditions sometimes called the common good. Law should create zones of freedom in which communities of people can collaborate to create beneficial states of affairs, and should protect the conditions necessary for their fruitful collaboration.

An important corollary must not be neglected. Because the value of personal autonomy is contingent upon its exercise in favor of goods, the law does no harm to personal autonomy when it eliminates or disincentivizes evil options.[13] Indeed, when one bears in mind the reflexive, self-making nature of free choice, it becomes apparent that the law can accomplish great *good* by eliminating evil options. To deprive one who is willing to commit fraud of the opportunity to perform the act is to prevent him from becoming a fraudulent person, and this is good not only for his potential victims but also *for him*. Law can do a lot of good work simply by abstaining from empowering evil actions.

These two observations about the relationship between law and personal autonomy go a long way toward explaining the internal operation of many neglected legal rules. By enabling opportunities for a citizen to choose well, and preserving a zone of freedom in which the citizen can choose from several possible good ends, the law opens far more opportunities for good than it could by simply commanding a particular choice and sanctioning disobedience. But the law should neither respect nor enable every choice.

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[11] Raz, above n 3, 203-05.

[12] See generally Adam J MacLeod, 'The Mystery of Life in the Laboratory of Democracy: Personal Autonomy in State Law' (2012) 59 *Cleveland State Law Review* 589.

[13] Raz, above n 3, 133; Robert P George, *Making Men Moral: Civil Liberties and Public Morality* (Oxford University Press 1993) 164.

There is nothing unjust in declining to enforce or protect a choice to do something evil.

Property law is the paradigmatic institution in which law operates this way. By carving out a zone in which the property owner exercises sovereignty over his assets, free from outside interference, the law enables property owners to use their assets for a nearly infinite variety of good external ends. And because property owners themselves are in the best position to know what is best for their own lives and the lives of their families, children, and neighbors, everyone in the community benefits from this arrangement. In order to do good things, the property owner must have options, and he must have freedom to pursue those options. Sharp and unyielding legal protections against theft and trespass preserve this zone of freedom.

On the other hand, property law simply will not honor bad choices. The doctrine of adverse possession terminates the sovereignty of the neglectful landowner. The rule against perpetuities prohibits courts from enforcing the wishes of those who would tie assets up indefinitely, preventing their productive use.[14] And, of course, property law contains many doctrines that are designed to prevent a property owner from harming his neighbors (not all of which entail coercion).

III. Charity and Law

Turning to questions of economic justice more broadly, one finds a similar complexity, upon which the internal operation of the common law maps remarkably well. If charitable action is good, as I shall suppose it is, then it has something of a reflexive nature to it. That is, some aspect of its value can be realized only if there are sufficient opportunities to practice it, and only if it is freely chosen. Only if the donor sets his mind on the well-being of the recipient, and adopts that person's well-being as a reason for his action, does an act of donation make the donor a charitable person. The donor builds a connection with the donee, which transforms both of them.[15] But this can occur only if the donor has both opportunities and the

[14] Thomas W Merrill and Henry E Smith, *Property* (Oxford University Press 2010) 110-11.

[15] Here is Gertrude Himmelfarb:

Charity,… Tocqueville said, being private, involves no… acknowledgment of inferiority. Because it is personal and voluntary, it establishes a moral tie between the donor and the recipient, unlike public relief which is impersonal and compulsory and therefore vitiates any sense of morality. In the case of public relief, the donor (that is, the taxpayer) resents his

freedom to perform the charitable act. Among other things, the donor must possess material assets and the freedom to dispose of them. The law should favor arrangements that promote the creation and production of assets, and it should refrain from coercion when possible. The option to choose the donee's well-being can be neither prohibited nor coercively demanded.

Careful attention to the internal point of view makes sense of many architectural features of the law governing charity. For example, the common law concerning gifts of property has long paid careful attention to donors' intent. Property law carves out a robustly-protected domain of ownership in which the donor's intent is honored, wherever the expression of that intent is not inconsistent with the demands of justice. With few exceptions, the law insists upon adherence to the donor's intent regardless of outcome. Gifts of personal property are enforceable only upon evidence of donative intent and some form of delivery,[16] which demonstrates that the donor understood what he was doing. In the ancient phrase, the donor must have felt the wrench of delivery.

Other rules also preserve charitable intent. A claim that a gift was made in anticipation of death, in lieu of an attested will, is viewed with suspicion precisely because the law is concerned about claimants' "self-serving versions of the decedent's intent."[17] Instruments by which donative transfers are made are construed with the goal of honoring the grantor's intent.[18] And a chief factor in discerning the donor's intent is his motive, particularly whether he was motivated by the betterment of the donee.[19]

This fixation on intent and motivation must baffle anyone who views law only as a consequentialist enterprise. There is no reason to believe that donors and testators on balance intend the most efficient uses of their resources, much less that they intend so in every case. And in fact, the

involuntary contribution, and the recipient feels no gratitude for what he receives as a matter of right and which in any case he feels to be insufficient.
Gertrude Himmelfarb, 'Welfare as a Moral Problem' (1996) 19 *Harvard Journal of Law and Public Policy* 685, 686.

[16] Merrill and Smith, above n 14, 92.

[17] Ibid 93.

[18] Peter T Wendel, *A Possessory Estates and Future Interests Primer* (Thomson Weest 2007) 11-13.

[19] American Law Institute,*Restatement (Second) of Property* (1983) vol 1, §5.2.

American Law Institute expressed some bewilderment when drafting the Second Restatement of Donative Transfers in 1981.[20]

The ALI also struggled to understand the rationality of *restrictions* upon donor intent. But those restrictions make sense from the internal point of view. Property law refuses to honor the grantor's intent when that intent is contrary to the common good. The common law impeded the donor who would by his gift attempt to prevent the donee from getting married. The authors of the Restatement thought it obvious that many such prohibitions "no longer serve any useful function."[21] They opined that it no longer makes sense for parents to exercise control over the marriage decisions of their children.[22] But of course this presupposes a particular conception of human choice, particularly choice about the good of marriage, and precisely to what extent marriage can be understood as a reflexive good. The Restatement authors paid no attention to the contestability of their assumption, and thus did not bother to examine it.

The tendency among twentieth-century lawyers to view the actions of those under law only from the outside made the most intricate features of the law of gifts appear wholly arbitrary. Here is a striking example: If the donor conditions his gift upon the donee not getting married then the restriction is invalid, unless the "dominant motive" of the donor was to provide support until marriage.[23] Now, no matter what motive the donor harbored, the effect of the condition upon the donee would be the same. Yet the rule mandates invalidity if the donor was motivated by a desire to influence the donee's marriage decision, and honor's the donor's restriction if the donor was motivated by the donee's material well-being. Everything turns on the interior disposition of the donor toward the freedom and well-being of the donee.

This is extraordinary from any view. But from the internal point of view one can more easily discern why the law of donative transfers should concern itself with the donor's motivations. The donor can expect courts of law to respect his purposeful dispositions of property as long as his purposes are not contrary to the well-being of others. He enjoys great freedom to do good things with his assets, but he has no power, and ought to have no power, to demand that the law participate in his projects when he chooses

[20] Ibid 235-36.
[21] Ibid 252.
[22] Ibid.
[23] Ibid §6.1.

to employ his assets for ends other than the common good. Law should not always coerce the donor to choose well. But law also should not endorse, and lend its considerable authority to, every choice the donor makes.

IV. Renovating the Interior

Much more can, and I hope will, be said about these neglected nooks and crannies in property law, and in other areas of law that touch upon problems of economic justice. Consider here two possible, contemporary implications of law's attention to the internal point of view.

Careful attention to the internal perspective of fiscal fiduciaries will sometimes reveal reasons not to honor their decisions. In the wake of the 2008 financial crisis one heard objections to the compensation practices of some large financial firms. How could those firms, some wondered, pay such large bonuses to executives who made such patently terrible decisions, with such dramatic costs? Understandable dismay led some to demand that the government *do something*. Those demands were hasty. It is not obvious that the government should do anything. There were and are many good reasons not to interfere with private compensation arrangements. But are there not, in at least some cases, equally valid reasons not to allow courts to enforce such arrangements where courts are called upon to adjudicate their validity? Should companies and their executives expect the law to come to their aid when their stewardship of resources is rightly challenged?

Those reasons will not be conclusive in all cases. If the bonuses were promised then the law should require enforcement of the contract, all other things being equal. And there are good reasons not to give courts discretion to pass on the reasonableness of executive pay. But these considerations of retroactivity should not deter lawmakers from fashioning prospective rules that account for human motivations, just as common law judges did centuries ago when crafting the rule against perpetuities.

Similar reforms are possible in the area of economic entitlements. In the 1990's, the United States Congress reformed American welfare largely by paying attention to the interior attitudes and dispositions of welfare recipients, and by removing disincentives to work and marry. It was not necessary for law to command recipients to work. It was enough for lawmakers to notice the deleterious effects of welfare policies and to give recipients new reasons for choice and action.

American welfare reform is a rare success, a triumph of conscientious, bi-partisan lawmaking. Experts have studied its policy and social implications with careful attention. But few have noticed its jurisprudential operation. This is unfortunate. It is also strange, given the perils that unreformed entitlements today pose to Western governments. Future entitlement reforms ought to imitate the successful legal mechanisms of the earlier welfare legislation. And the jurisprudential lessons of that legislation can bear additional fruit. Lawmakers themselves have reasons for creating wasteful and unsustainable entitlements in the first place. Future reform efforts should take those incentives into account and should be designed to mitigate them. And the law of entitlements should not destroy incentives for citizens to meet the needs of their neighbors through private acts of charity.

This brief survey will undoubtedly suggest to thoughtful readers additional architectural features of positive law that can benefit from study and renovation. Law's interior is capacious and it remains largely unexplored. It also suffers from a lack of maintenance. Particularly in private positive law, very little has been done in recent decades to work out the implications of the internal point of view. This presents an opportunity, and a potential calling, for scholars of jurisprudence.