Chapter 13

Temporal Structures of Justification in the Economic Analysis of Law: Legal Philosophy and Free Will

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Abstract In an appropriation of jurisprudence away from moral philosophy in the name of advancing positive science, the economic analysis of law repudiates judicial responsibility in regard to human freedom and rights. I argue that the moral freedom and responsibility presupposed by a system of legal rights should not be eclipsed by narrow causal determinism but instead upheld by proper judicial discernment of wider temporally balanced structures of legal rights within such a system. Indeed, this is part of a wider claim that moral philosophy at large proceeds at its best by means of a temporally holistic reasoning process. I am interested in exposing and challenging theoretical bias and unacknowledged assumptions about time-value – in particular the privileging of future outcomes – lurking behind the economic analysis of law philosophy.

13.1 Economic Analysis of Law

Economic analysis of law uses concepts from micro-economic theory to analyse legal rules and institutions. Such an approach adopts the idea of rational action that is at the heart of micro-economic theory.

The notion of rational action in economic theory holds that each agent will act to maximize her or his preferences no matter what environment is being considered. Preferences are rankings of various elements in one's domain of preference. An agent's domain of preference is made up of the things that fundamentally matter to him or her. For typical consumer behaviour models, an agent has fundamental preferences over consumption bundles. The consumer's decision problem consists of

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choosing a consumption bundle from the set of feasible consumption bundles (feasibility being defined by prices of goods and the income of the agent).

Normally the scenario for an economic analysis of law is slightly more complicated. An agent will have preferences concerning a set of consequences, like income, health or wealth. And the agent chooses an action that partly determines which consequence is realized. Ordinarily the domain of preference differs from the domain of choice. That is usually because an agent chooses a strategy that, coupled with the strategy choices of other agents, together determines the consequence at hand.

Richard Posner advances two theses that are characteristic of the economic analysis of law (Posner 2014). What is termed the “positive” thesis says that, as a factual matter, the legal rules of common law are efficient. His second thesis, usually referred to as the “normative” thesis, says that the legal rules of common law ought to be efficient.¹ The concept of efficiency in this context means maximization of social willingness-to-pay. Other law-and-economics scholars sometimes employ “efficiency” in the Pareto sense.

Under the guise of the economic analysis of law approach, judges become emboldened to exercise activist inclinations, using legal rhetoric about rights *instrumentally* to advance various social agendas. For the law and economics movement, such agendas are grounded in a peculiar ideology of rational choice, efficiency, pareto optimality, and wealth maximization. Propositions about rights are taken merely on an *as-if* basis – it is as if we had rights, but they don’t really exist. All that exists are competing preferences to be understood and arranged according to causally determined scientific laws.

13.2 Theoretical Time-Privileging

This paper posits that the economic analysis of law fails to give any satisfactory normative justification for its peculiar *theoretical privileging of the future over the past*. Judicial decision making, according to the economic analysis of law mindset, is portrayed as giving justifications exclusively in terms of future outcomes.² The

¹Throughout Posner’s work stress is placed on the expected efficient results normally accomplished through free trade and voluntary exchange. In Posner’s law-and-economics world the good is prior to the right. Yet it seems that the normative appeal of voluntary exchange and the legal rights that uphold this institution should not rest upon the resultant wealth maximization and efficiency that are anticipated to ensue. Rather, what ought to be treasured most is moral respect for free will and chosen allegiance to rule of law – the system of legal rights and responsibilities as such – rather than the economic outcomes they enable. If market solutions are deemed superior it is because they are the intended outcome of free exchanges (O’Driscoll 1980).

²In this respect, the economic analysis of law falls within the criticism Ronald Dworkin levelled against what he termed ‘legal pragmatism.’ “The pragmatist takes a skeptical attitude toward the assumption we are assuming is embodied in the concept of law: he denies that past political decisions in themselves provide any justification for either using or withholding the state’s coercive power. He finds the necessary justification for coercion in the justice or efficiency or some other

economic analysis of law proceeds squarely in line with the dictates of modern economic theory's obsession with calculations of preferences. By contrast, coming from the opposite direction, the judicial philosophy of 'originalism' harbours its own theoretical bias of time-value, which proceeds from a privileging of the past concerning questions of constitutional intent.³

Economic theory regards preferences as a type of empirical data, and it seeks to bypass any regard for the moral content of preferences or for the propensities of preferences to change in the face of moral considerations. However, what economists term 'preferences,' sometimes include peoples' judgments on moral issues. Such judgments are made as a result of moral reflection and argumentation. As such, economic theory also ignores the various temporal value structures that are constitutive of preferences. Such temporal value structures implicate the free will of people making choices in time that are not causally determined nor predicable in advance of the time they are made. The moral decisions made engage further choices about alternative time-values – whether consequentialist (future oriented considerations) or nonconsequentialist (blending past and future considerations) – which together is what enables them to be responsible moral agents. In their reductive treatments of these choices, economists are ignoring the fact that sometimes they are determined by moral judgments arrived at through antecedent moral arguments. So a more complete treatment would take into account the soundness of the moral argumentation that is presupposed by preferences. Accordingly, the best foundation for philosophy of law is not economic analysis and economic theory but rather moral philosophy.

13.3 Temporal Structures of Moral Decision Making

Temporal structures are implicated in moral decision making and in the acts of free-will that follow from those decisions. Consider that at time t , moral agent M , faces choices x or y (x : give money to a homeless person on the street, or y : walk on by). M can freely decide to do x or y . At time t_1 , after considering various arguments for and against, M decides to do y .

One significant point is that M 's decision to do y is not causally determined in advance of t_1 . On the contrary, the choice is free, it cannot be predicted in advance, either by M or by an external observer. Like M , our conscious moral decisions are

contemporary virtue of the coercive decision itself, as and when it is made by judges, and he adds that consistency with any past legislative or judicial decision does not in principle contribute to the justice or virtue of any present one. If judges are guided by this advice, he believes, then unless they make great mistakes, the coercion they direct will make the community's future brighter, liberated from the dead hand of the past and the fetish of consistency for its own sake. Of course judges will disagree about which rule, laid down in which circumstance, would in fact be best for the future without concern for the past." Dworkin (1986, 151)

³For an account of originalism, see Whittington (2013).

independently significant in their own right. The logic of ethical justification is different from the logic of scientific explanation. The importance of making a moral case supporting a decision, and the weight that such a justification carries, is not contingent on, nor even particularly relevant to, any remote causal explanation that scientific study may offer.

A second important point is that M's moral reasoning involves free (non-causally determined) choices about time orientation, horizon, and so on that express and depend upon a variety of M's values. These engagements in time-value factors are not quantitatively measurable clock-time events but rather qualitative touchpoints that figure into moral reflection. M considers, say, the significance of the recently-past fact that he already has given money to charities just this week; M thinks ahead about whether, if he gives the beggar some money he will still have enough cash to cover the subway ride M's about to take; M reflects that often in the past when he has given handouts to people they've used the money for drugs or booze; he recalls a time long ago when he himself was down and out; he wonders what if this was his son or daughter. Further, M makes a rough assessment of whether the beggar seems to be sincere and desperate, based on a complex mix of other past, present and future factors. M thinks about how these kinds of choices and judgments connect to the kind of person M has been, is, and will become; and perhaps M extends a similar process of thinking to the perceived character of the beggar as well. Or M may not give a thought to any of it at all – who knows? At any rate, even M's deciding not to think about it is itself a moral choice.

A third point is that it is meaningful, and in line with what ordinary people do, to either blame or praise M (for his ungenerousness or sound judgment, respectively) if, say, he decides to do *y*. But ascribing blame or praise is only meaningful on the assumption that M's decision comes from his free will. Determinism holds that your sense that you decided to walk on by comes from exercising your "free will" is delusional – your decision was caused by forces or events from the past. But determinism does not show why any of this is true, nor give convincing reasons why we should suppose that we are living under a grand illusion about our free will. Determinism depicts the decision-making process the way we understand our internal organs to function. You don't will or choose to make your heart beat or intestines digest. In this way determinism misrepresents moral decision making as a cause-and-effect process with no room left for the temporal nuances attending the free moral choices we have identified as figuring into one's ordinary decision-making process.⁴

A fourth point – moving from M's scenario to the context of judicial reasoning – is that in a relevantly similar way to M's moral decision-making, the structure of legal decision-making presupposes and engages a vast and intricate web of time-values, and as such is not necessarily or exclusively portrayable as a project of justifying results solely in terms of future outcomes (efficiency, pareto optimality,

⁴According to the research studies of Zimbardo and Boyd (2009), people are psychologically determined to dwell, in quantifiably measurable allocations, on past, present, or future orientations with negative or positive attitudes.

wealth maximization). For instance, in civil cases, the well-entrenched legal time-value structure of *stare decisis* requires that judicial decisions respect relevantly similar case precedents laid down in the past by the same or a superior court. It is owing to the force of *stare decisis* that a party's legal rights are, in an important sense, pre-existing and thus interpretations of those rights are not hostage to the sort of future-oriented consequentialist justifications advanced by the economic analysis of law.

13.4 Time and Free Will

Henri Bergson sought to mount a challenge against arguments that deny the existence of free will. In *Time and Free Will*, he claims that such arguments stem from confused concepts about time. The concept of time enlisted by physics and mathematics is that time is a measurable construct analogous to dimensions of space. Yet Bergson insists that from the standpoint of human experience, one's life is comprehended as a non-measurable, continuous flow. As such it is different from a succession of distinct, quantitatively measurable states of consciousness. The perceived flow is essentially qualitative, and not subject to quantitative reduction. Insofar as the human personality is expressed and revealed in actions that are not completely predictable, Bergson asserts that human free will is an observable fact. So *Time and Free Will* posits the idea of duration – lived time – in contradistinction from Bergson claims is a spatial understanding of time whereby time is measured and quantified scientifically with the instrument of a clock.

For Bergson the awareness we have of an inner self shows that psychological facts remain qualitatively distinct from other kinds of facts. Indeed, Bergson alleges that, in their pursuit of quantifying and calculating relations within the phenomena of this inner dimension psychologists ('psychophysicists') are implicated in a practice of "an inaccurate psychology, misled by language," (1910, 165) that will "fail to translate completely what our soul experiences" (1910, 164). He takes issue in particular with Fechner's reductive quantitative portrayal of a purported logarithmic lawlike relationship between the intensity of stimuli and the magnitude of corresponding sensations they produce (1910, 62)

$$S = C \int_o^E \frac{dE}{f(E)}$$

[B]y invading the series of our psychic states, by introducing space into our perception of duration [the confusion of quality with quantity] corrupts at its very source our feeling of outer and inner change, of movement, and of freedom. (1910, 74)

For Bergson the key is to clear away conceptual confusions in metaphysics and psychology that confound the problem of free will:

What I attempt to prove is that all discussion between the determinists and their opponents implies a previous confusion of duration with extensity, of succession with simultaneity, of quality with quantity: this confusion once dispelled, we may perhaps witness the disappearance of the objections raised against free will, of the definitions given of it, and, in a certain sense, of the problem of free will itself. (xxiii–xxiv)

More recently, Thomas Nagel posits a distinction between two realms of truth concerning ourselves and the place we occupy in the world. One realm concerns our subjective, personal point of view. The other realm concerns the objective, impersonal perspective from which one seeks to understand oneself as belonging to the natural world. Nagel (1986, 115) thinks the free will problem stems from the shift from one realm to the other:

The objective view seems to wipe out such autonomy because it admits only one kind of explanation of why something happened – causal explanation – and equates its absence with the absence of any explanation at all... [T]he basic idea which it finds congenial is that the explanation of an occurrence must show how that occurrence, or a range of possibilities within which it falls, was necessitated by prior conditions and events.

But is the impersonal point of view Nagel characterizes suitable for handling moral issues concerning responsibility, where such issues surpass scientific questions about freedom? Some scholars have developed views that treat issues of moral freedom as reducible to matters of control that is uncaused. Yet if it is true, as determinism holds it to be, that all our behaviour is determined by external forces, then one is never in control of one's behaviour in the sense that one can be held responsible for it. A scientifically reductive determinism links moral judgments about responsibility to scientific explanations that are rendered on the basis of causation. Free will, from such a standpoint, is an illusion. Common attitudes about praise and blame and punishment, according to views espoused by J.C.C. Smart in his 1961 *Mind* article, need to be adjusted accordingly. The implications of scientific determinism for the philosophy of law are as astounding as they are implausible. Some legal scholars say that because science shows there is no free will, it is always wrong to punish. Instead we should treat criminals medically or reprogram them to change their behaviour. A similar view is put forward by an SEC attorney who couples his advocacy of scientific determinism and denial of moral free will with a thesis about the unreality of time (Gulack 2012).

13.5 Free Will and Legal Rights

Having a right to something means that you have control over others' free will in regard to it. Otherwise, they can do as they please.

Someone violates your right by acting contrary to your free will in regard to your right's object.

The will theory of rights, also known as the "choice theory," allows rights-holders the freedom of choice to insist upon respecting their rights or permitting them to be waived.

Example 1: the right to ownership of my land includes the freedom to do with it as I wish (subject to a set of legal constraints). It is wrong (a rights violation) for someone to interfere with my freedom unless they have a right to so interfere. If someone uses my land without having a right to do so, then I am free to either allow it, or to choose to prevent it by claiming protection of my right from relevant legal authorities (injunction, criminal arrest, tort action for trespass).

Example 2: you cannot be subjected to harvesting of your bodily organs simply because transplants in others could be shown to make society better off. A tort right protects your individual interest in bodily security from any such coerced social redistributions. To lend protection, the tort right prioritizes your right-holder's security interest over conflicting liberty or economic interests of correlative duty-bearer(s). Your tort-based right, in turn, is grounded in an even more fundamental moral right of dignity.

A legal right has a *temporal justificatory structure* that extends from the present both ahead towards the future and backward towards the past. Any theory of law that fails to recognize this complex, multi-temporal nature of rights will be descriptively deficient and normatively implausible.

That is to say, a theory of law should be *temporally holistic* in the way it accounts for the interpretation of rights.

13.6 Holism of Time-Value

Legal rights refer (either in tacit or explicit fashion) retrospectively to values from the past that ought to be respected. Interpretations of rights must bear consistency with settled precedents and statutory authority laid down in the past. This idea is enshrined in the common law doctrine of *stare decisis*. Legal rights also refer prospectively to justifications based on moral objectives. Interpretations of rights must make sense in terms of political morality. Of course, legal rights refer to and exist in the present as well, as political rights that may be enforced on demand via coercive legal structures and adjudicative institutions. The call for their present recognition and enforcement does not require future supplemental legislation or additional law-creating action.

One example (there are others) of a temporally holistic conception of law is found in the work of Ronald Dworkin. Within Dworkin's philosophy of law, there are two fundamental temporal structures – I will call them “theoretical time-value orientations” – that figure into interpretations of law. The first component, which he terms ‘fit,’ is *retrospective*. The second component, called ‘appeal’ or ‘justification,’ is *prospective*. In judicial decision making, a challenge is to develop a theory of law that simultaneously fits with past legal decisions while making the law the best it can be. Judges are bound to seek out historical legal principles that are woven into previously established ‘institutional material’ and then look forward to improving

and further purifying law for the future by rendering the most coherent interpretation of it.

In opposition to the claim that pre-existing legal sources might be contradictory or irreconcilable, Dworkin gives an interpretation according to what he terms the ‘unity of value’ thesis. The project of interpretation he envisions reconciles values. The reconciliation seeks to show why moral conflict may call for a deeper structure of collaboration to resolve apparent conflicts and sometimes to illuminate a new point of comparison or contrast.

Dworkin presents a version of the drowning swimmer scenario:

One person clings to a life preserver in a storm that has wrecked her boat; sharks circle her. Two other passengers cling to another life preserver a hundred yards away; sharks circle them as well. You have a boat on shore. You can reach one life preserver in time, but then not the other one. Assuming all three are strangers, do you have a duty to save the two swimmers and let the lone swimmer die? (2011, 280)

But if we approach the decision in another way – by concentrating not on consequences but on rights – it is far from plain that we should automatically save the greater number. We might think that each victim has an equal antecedent right to be saved, and we might therefore be tempted by a lottery in which each shipwreck victim has at least one-third chance to be saved. (The sharks agree to circle while the lottery is conducted.) (2011, 281)

Whereas most people may, owing to the fact that there are *two* swimmers holding on one of the life preservers, yet only one swimmer clinging to the other, be automatically inclined to save the two. That response follows from a utilitarian (consequentialist) calculation to advance the greatest good for the greatest number. It is not clear, however, that this is the right solution from a principles-and-rights conception. Yet it is not obvious that each of the swimmers that one can aid has an “equal antecedent right to be saved.” If it is too dangerous and you would unreasonably risk your own life, then a right to be saved cannot be invoked to force you to give aid. The swimmers can, nevertheless, claim a right to equal concern and respect.

That right to equal concern and respect, in turn, is interpreted in light of a broad moral value: that life has value. So one needs to interpret the available options – lottery to decide among them, or whether the lone swimmer is your spouse, or a gifted violinist or outstanding surgeon – in line with respecting the value of human life (2011, 281).

I wish to drill down further and ask: what does it mean to speak, in such contexts, of having an “*antecedent right*” in temporal terms? Is it a non-temporal antecedence – that is, only a logical sense of antecedent? (As in ‘If x, then y’ – x is the logical antecedent to y). The idea of antecedent *legal* rights does have a temporal sense, since the rights are *pre-existing* (they are not invented on-the-spot, but rather interpreted), in that they exist already (historically) in settled law. To be sure, in the swimmer case, we are not dealing with legal (institutional) rights but rather with a moral rescue (aid) context. But that context is nevertheless used to illustrate the structure of legal rights and duties. It easily could be a legal case in some places, considering that there is a legal duty to rescue in some countries.

Consider some of the ways that various temporal factors – engaging a host of value judgments – might come into play, particularly in connection with interpreting the “equal objective importance of all human lives”:

- One can justifiably choose to save the lone swimmer if, say, it is one’s spouse. In that case, there is a special justification that refers to the *past* (the historical act of marriage and resultant relationship). And the justification presumably draws support as well from one’s *present* and *future* commitment to the spouse.
- What if the lone swimmer, a convicted child molester, nevertheless came out to save you from drowning last week when you’d fallen overboard? Does his criminal *past* matter *now* and for the *future* (should you forgive and forget)? Is there a present duty to reciprocate in saving his life now in respect of his past saving of your life?

What I would like to draw attention to in such examples (and others) is this: neither the past nor the future dominates in this approach. There is instead a need for intricate temporal balancing that defies any rigid privileging in any one direction or for any given retrospective or prospective distance.

13.7 So What?

Why does this kind of critique of the distorted temporality deployed in the economic analysis of law matter? There is a resurgence in interest in the economic analysis of law, fuelled in no small way by trends toward using digital technologies (including artificial intelligence) for resolving legal conflicts. The empirical-scientific conception of law, which sees legal conflicts as best resolvable through future-oriented assessments of quantifiable data according to objective scales of efficiency, Pareto optimality, welfare maximization of revealed preferences, and so on, lends apparent philosophical support to the agenda of such a research project. This kind of reductive scientism (not scientific method *per se*) should be opposed, not only because of the perils of the ideology of scientism as such, but also because of the theoretical shortcomings of the economic analysis of law exposed herein.

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