

THE INTRINSIC VALUE OF OBEYING A LAW: ECONOMIC ANALYSIS OF THE INTERNAL VIEWPOINT

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Forthcoming in the Fordham Law Review

INTRODUCTION

Economic theory distinguishes sharply between what a person wants and what he can have. “Preferences” describe what a person wants, and “constraints” describe the limits of what he can have. The collision of preferences and constraints yields the choices that economists study. The meaning of both terms is broad and flexible. “Preferences” include wishes, values, desires, inclinations, attitudes, ends, goals, and objectives, and “constraints” include resources, technology, instruments, means, budgets, wealth, and powers.

Preferences and constraints help to distinguish between the internal and external viewpoints that H. L. A. Hart made famous.¹ The internal viewpoint concerns preferences to perform legal obligations. A person who prefers to obey a law is willing to give up something to perform his legal obligation. The preference is intrinsic, not an instrument for securing something else of value. Conversely, a person who is indifferent towards obeying or disobeying a law is unwilling to give up anything to perform his legal obligation. A person who is indifferent to a legal obligation takes a purely instrumental approach towards obedience—he obeys only when doing so secures something else of value.

What explains the distribution of preferences among people to obey a law? I will sketch part of the answer that emerges from economic and psychological studies. Finding an answer is important because when laws are reasonably just and many citizens intrinsically prefer to obey them, government is easier, and life is better than when most citizens are indifferent towards obeying the law.

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1. *See generally* H. L. A. Hart, *The Concept of Law* (P. Bullock & J. Raz, eds., 2d ed. 1994).

I. INTRINSIC VALUE OF OBEYING A LAW

When people want more than they can have, they must give up one thing to get another. Scarcity forces them to decide how much they value one thing relative to another.² This line of reasoning applies to obeying a law. Obeying a law often involves a sacrifice of time, effort, resources, or opportunities. The rate at which a person will give up these things in order to obey a law provides a measure of the relative value of obedience to him.

Markets reduce value to money. The rate at which a person will give up money for a good indicates his willingness to pay for it.³ By using specialized techniques,⁴ economists can often find an equivalent in money to the sacrifice of time, effort, resources, or opportunities that a person makes to obey a law. This paper will focus on those legal obligations that are commensurable with money. Examples include obeying the speed limit when driving, reporting all of your income for taxes, obtaining a permit to repair your house, not littering, sorting trash for recycling, registering your bicycle, not eating or smoking where forbidden, cleaning up after your dog, paying social security taxes for your housekeeper, conforming to health and safety regulations, abating pollution, serving on juries as required, and voting in countries where it is mandatory. In addition, civil law imposes obligations such as performing contracts, not trespassing on property, not making a nuisance for adjacent property owners, and taking reasonable care to avoid harming others.

Most people decide to violate some of these obligations occasionally and some people violate many of these obligations systematically. Violations are sometimes justified because they make life manageable. Widespread violations, however, lower the quality of life for everyone and unfairly advantage the wrongdoers. Violating one of these legal obligations often results in a fine or civil liability. People who contemplate violating these obligations and rationally decide what to do will compare the sanction in dollars to the resulting gain in time, effort, resources, or opportunities). This kind of decision making presumes commensurability with money.

Figure 1 assumes that the metric of money is appropriate to measure preferences to obey a law and depicts a plausible distribution among citizens. Any point on the curve illustrates the proportion of people

2. Economist's joke: Colleague to economist: "How's your husband?" Economist to colleague: "Compared to what?"

3. Willingness-to-pay is also called the "subjective price" or "subjective rate of substitution with the numeraire good." [Cite any text on microeconomics, e.g. Pindyck and Rubinfeld, or don't cite anyone. Add a cite?]

4. The techniques of cost-benefit analysis often require measuring the value of non-market goods, such as waiting time for commuters, clean air for homeowners, or safety for miners. The techniques are sometimes described as "hedonic indexes." [Add a cite? If you want a cite, find any book on preparing an environmental impact analysis.]

2006] *THE INTRINSIC VALUE OF OBEYING A LAW* 103

who are willing to pay at least the corresponding amount to obey the law in question. For example, twenty percent of the people are willing to pay at least \$*p* to obey the law in question. The downward slope of the curve in this zone indicates that, as the price of obedience falls, more people are willing to pay it.

[Figure one to be inserted here]

Figure 2 demarcates three zones in Figure 1. The zone labeled “internalize” contains all the people who are willing to pay something to obey the law in question. The zone labeled “indifferent” contains all the people who are unwilling to pay anything to obey or disobey the law in question. People who are indifferent take a purely instrumental view towards obeying or disobeying the law.

[Figure 2 to be inserted here]

In a reasonably just society, most people prefer to obey most laws, and some people are indifferent towards obeying some laws. A few people, however, invert social values and follow the philosophy articulated by Satan in Milton’s *Paradise Lost* when he said, “Evil be thou my Good.”⁵ These people intrinsically value disobeying a law. The zone labeled “inverted” in Figure 2 contains the few people who are willing to pay something to disobey the law in question. As depicted in Figure 2, internalization of obedience to a law varies among people from positive (“good citizens”), to zero (“indifferent”), to negative (“inverted”).

Faced with a choice, people must ask themselves how much they are willing to sacrifice to obey a law. A good citizen can take his intrinsic value of obedience as a guide to action. An indifferent citizen, who places no intrinsic value on obedience, cannot find this guide within himself. Instead, he must decide by looking to the consequences of obedience for things that he cares about. Finally, an evil person can also take intrinsic value as a guide, although his valuation is inverted.

We have been discussing breaches of minor legal duties—taxes, permits, recycling, registration, cleaning up, abating, keeping promises, exercising reasonable care, etc.—whose individual effects are often small and whose aggregate effects are often large. In contrast, most people in a well-ordered society never seriously contemplate committing the worst crimes, such as murder, treason, arson, assault, battery, blackmail, grand theft, fraud, rape, or child molestation. For these crimes, the question

5. John Milton, *Paradise Lost*, in 32 Great Books of the Western World, 152, 154 (Robert Maynard Hutchins ed., 1952).

of tradeoffs does not arise in the minds of most people, but it does arise for a small number of evil people. The sanction for these crimes is usually imprisonment. This punishment is commensurable with money for some people, but more often it is incommensurable for practical or theoretical reasons.

The practical problem of incommensurability arises when a cost exceeds the amount that a person has the ability to pay. To illustrate this concretely, assume that a person is willing to pay all of his wealth to avoid a sentence of ninety days in jail. Given this fact, it makes no sense to ask how much more he would be willing to pay to avoid increasing the sentence from ninety to one hundred days. In general, willingness to pay for something only measures its value to someone with the ability to pay for it, and most violent criminals have limited ability to pay for anything.

Besides the practical problem of incommensurability, some goods resist measurement in money for intrinsic reasons. For example, courts need to set damages in tort cases involving death, disfigurement, illness, bodily injury, alienation of affections, and loss of reputation. After careful reflection, however, many people do not believe that any amount of money would make them indifferent between suffering the injury and receiving the money. Thus, loving parents cannot name any amount of money, regardless of size, that would make them indifferent to their child's death. Indeed, parents who could name such a sum of money would be moral monsters. Economists cannot assign a money equivalent to the loss because none exists, even in theory.⁶

Moralists may have serious crimes and devastating injuries in mind when they argue that money cannot measure the value of obeying the law, when they claim that a good citizen will pay any price to obey the law, or that obeying the law advantages a person by contributing to his moral perfection. Speaking like these moralists, however, makes no sense when discussing the minor legal obligations that are this paper's subject. For these minor legal obligations, people decide what to do by making tradeoffs, including tradeoffs reducible to money.

II. COST OF OBEYING A LAW

Now I turn from preferences to constraints. I have already mentioned that disobeying minor legal obligations usually results in a fine or liability, and performing these obligations often involves a sacrifice of time, effort, resources, or opportunities that is commensurable with money. Reducing all of these costs to money yields a value for the net cost of obeying a law, which I have inserted in Figure 3. The cost-line is flat in Figure 3 because I assume that the cost of obeying the law does not vary with respect to the person in question. The intersection of the

6. See generally Robert Cooter, *Hand Rule Damages for Incompensable Losses*, 40 San Diego L. Rev. 1097 (2003).

2006] *THE INTRINSIC VALUE OF OBEYING A LAW* 105

cost-line and the willingness-to-pay curve gives the equilibrium proportion of people who obey the law. As depicted in Figure 3, half of the people are willing to pay the cost of obeying the law, so obedience equals fifty percent.

[Insert Figure 3 here]

Note that if the cost curve in Figure 3 shifted down until it was below the horizontal axis, the cost of obeying the law in question would be negative. These facts correspond to a situation where the effort, time, resources, etc., required to obey the law are less than the sanction for disobeying it. In these circumstances, people who place no intrinsic value on obedience will obey the law. The only people who will disobey the law in these circumstances are the ones who intrinsically value disobedience.

A law's sanction is sometimes described as the "price of disobedience." Sanctions have some similarities to market prices, but the differences are more striking. Markets often give quantity discounts—buy more goods and pay less for each one. Sanctions often impose quantity surcharges—disobey more and pay more for each act. Thus, the Federal Sentencing Guidelines enhance punishment for repeat offenders. In addition, sanctions often impose "intentionality surcharges"—disobey intentionally and pay more, disobey accidentally and pay less. Thus damages that tortfeasors pay often increase for harms caused intentionally rather than recklessly, or for harms caused recklessly rather than negligently.

Why do legal sanctions give surcharges for recidivism or intentionality, whereas markets give quantity discounts? Purchases in markets are permitted, so paying the market price of a good justifies taking it. Lawbreaking, however, is forbidden, so paying the sanction does not justify disobeying a law. People who disobey the law repeatedly or intentionally deserve a higher sanction, and a higher sanction is probably needed to deter them.

Whenever the law imposes quantity surcharges for recidivism or intentionality, the law signals that breaking the law in question is intrinsically wrong. Good citizens respond by obeying the law out of respect for it. In contrast, when the law does not impose quantity surcharges, the law gives ambiguous signals about whether or not breaking the law is intrinsically wrong. For example, people who accumulate many parking tickets in American cities usually pay no surcharge, and sometimes they can bargain for quantity discounts. Given this fact, ordinary citizens inevitably disagree over whether there is anything wrong with overstaying in a parking place and then paying the fine.

Similarly, compensatory damages in civil cases are based on the actual harm suffered by the victim, which is almost always independent of the

wrongdoer's recidivism or intent. When a civil wrong triggers compensatory damages without the possibility of punitive damages, as with almost all breaches of contract, the law provides an ambiguous signal about whether the defendant's act was intrinsically wrong. Given the law's ambiguous signal, scholars inevitably disagree about whether or not breach of contract is intrinsically wrong. Critics also sharply disagree over the "efficient breach hypothesis," which asserts that breach is all right whenever performance costs the promisor more than the promisee gains from it.⁷ (The efficient breach hypothesis has spread confusion by conflating breach and renegotiation when performance is inefficient.⁸)

III. INTERNAL AND EXTERNAL VIEWPOINTS AS DECISIONS

The distinction between preferences and constraints points to a model of the internal and external viewpoints towards a law for decision making. A person who is unwilling to pay anything to perform his legal obligation, whom I described as "indifferent" in Figure 1, decides whether or not to obey the law by comparing costs of obeying and disobeying:

Cost of obeying > Cost of disobeying => disobey.
 Cost of obeying < Cost of disobeying => obey.

A bad citizen, such as Holmes' "bad man,"⁹ decides whether or not to obey the law by this calculation.

A person who is willing to pay something to perform his legal obligation, whom I described as "internalizing" obedience in Figure 1, has another term in the decision formula:

Willingness-to-pay > (Cost of obeying – cost of disobeying) => obey.
 Willingness-to-pay < (Cost of obeying – cost of disobeying) => disobey.

A good citizen decides whether or not to obey the law by this calculation. To find out how much a citizen is willing to pay to obey the

7. See Daniel Friedmann, *The Efficient Breach Fallacy*, 18 J. Legal Stud. 1 (1989); see also Melvin Eisenberg, *The Theory of Efficient Breach and the Theory of Efficient Termination* (Berkeley Law & Econ. Workshop, Working Paper No. 14, 2004), available at http://repositories.cdlib.org/berkeley_law_econ/spring2004/14/.

8. When non-performance is inefficient, it can be achieved by breaching the contract or by renegotiating it to allow for non-performance. The courts can channel the promisor to renegotiate by not allowing him to keep the surplus from breach. A numerical example explaining these facts is found in Robert Cooter & Thomas Ulen, *Law & Economics* 254-61 (4th ed. 2004).

9. See Robert Cooter, *Self-control and Self-improvement for the "Bad Man" of Holmes*, 78 B.U. L. Rev. 903 (1998).

law, he must look inward and consult his intrinsic values. This is the internal point of view. After consulting his intrinsic values, he must compare them to his external costs in order to decide what to do.

This characterization of the internal viewpoint is consistent with many theories of intrinsic value. Intrinsic value may come from habit, socialization, role models, religion, or philosophy. Theories will disagree over the intrinsic values that a person *ought* to have for obeying particular laws. Disagreement causes different people to value obedience of a law differently, as depicted in Figure 1.

Since internalization of respect for the law makes governing so much easier, the state tries to inculcate it through education and other means. The state also imposes sanctions with intentionality surcharges to punish people for viewing the law extrinsically. If courts detect that a wrongdoer took a purely instrumental viewpoint towards an illegal act, courts will often increase the sanction for disobedience. In this respect, law requires citizens to intrinsically value obeying it, and the internal viewpoint is a legal obligation.

The preceding formulas refer to the cost of obedience and disobedience. Now I consider the main elements constituting these costs. As previously mentioned, performing an obligation often costs something in time, money, or effort. In addition, obeying the law often requires foregoing the opportunity to profit from disobeying it. Focusing on these two costs to the exclusion of others yields a simple formula:

Cost of obeying the law = performance cost + opportunity cost.

Another type of cost is the sanctions for disobeying a law. Legal sanctions are mostly fines and incarceration, and social sanctions are mostly censure, disesteem, and boycott. Focusing on these two costs to the exclusion of others yields this simple formula:

Cost of disobeying the law = legal sanction + social sanction.

IV. POSITIVE THEORY OF INTERNALIZATION

What advantage is gained by characterizing the internal viewpoint in terms of preferences and constraints? The willingness-to-pay curve in Figure 1 is a demand curve. Economists know a lot about estimating demand. The characterization in terms of preferences and constraints suggests how to study the internalization of laws by using techniques for estimating demand. Someday scholars will use economic techniques to

estimate the intrinsic value of obeying a law.¹⁰ In the meantime, I can offer a few observations about the probable results.

First, people in different societies respect and disrespect different laws, and the patterns often seem arbitrary or random. When I was visiting a Swiss colleague, we walked to a department store in Berne. At the store's entrance, the shoppers left bags, bundles, and babies while they nipped inside. I remarked to my colleague, "[a]n American who did this in San Francisco would have his bags and bundles stolen, and he would be arrested for leaving his baby unattended. The Swiss are remarkably honest." He replied, "[w]hile I was teaching in Berkeley, I was amazed to find that students seldom cheat on exams. Swiss students think that cheating on exams is their right, and helping others to cheat is their duty." Some data supports the point of this anecdote—that people in different societies internalize and externalize different legal obligations in unpredictable patterns.¹¹

Second, besides this idiosyncratic component, there is a systematic component; people in different places have different levels of respect for law. *The Economist* and Transparency International publish indices of perceived corruption by country. In 2005, Iceland was seen as the least corrupt country in the Transparency survey, Chad and Bangladesh were seen as the most corrupt, and the United States ranked seventeenth.¹² The most striking example of corruption reduction comes from Singapore, which is now perceived as one of the world's least corrupt countries. The correlation between national wealth and freedom from corruption is not only obvious in these surveys, but also imperfect. To illustrate, in 2002 France was perceived as more corrupt than Botswana.¹³

Third, an individual's resolve to obey the law ebbs and flows from time to time. Economists and psychologists have had some success in studying time-inconsistent preferences, which philosophers call "akrasia."¹⁴ The most important result is that people are more consistent about their tradeoffs towards two future choices than they are

10. Economists often estimate the deterrent effects of sanctions, but they do not try to separate "final demand" (intrinsic value) from "derived demand" (instrumental value).

11. Tax compliance is an example. In Switzerland and the United States, citizens mostly pay their income taxes, whereas people in Belgium and France comply much less frequently. This fact cannot be explained by a rational fear of sanctions. See Eric Posner, *Law and Social Norms: The Case of Tax Compliance*, 86 Va. L. Rev. 1781 (2000).

12. [FORMAT] Press Release, Transparency Int'l, Transparency International Corruption Perceptions Index 2005 (Oct. 18, 2005), available at http://www.transparency.org/cpi/2005/dnld/media_pack_en.pdf.

13. [FORMAT] *Corruption*, *Economist*, Aug. 29, 2002, http://www.economist.com/displayStory.cfm?story_id=1302402.

14. For the psychology of hyperbolic discounting, see George Ainslie & John Monterosso, *Will as Intertemporal Bargaining: Implications for Rationality*, 151 U. Pa. L. Rev. 825 (2003). For an economic theory [of akrasia?], see Jonathan Gruber & Botond Köszegi, *A Theory of Government Regulation of Addictive Bads: Optimal Tax Levels and Tax Incidence for Cigarette Excise Taxation*, 88 J. Pub. Econ. 1959 (2004).

about a present and a future choice. To illustrate, assume that a child must choose between a promise to be given one candy on Saturday or two candies on Sunday. He prefers the two candies when he chooses on Monday, Tuesday, Wednesday, Thursday, or Friday. When Saturday arrives, however, the child may switch and choose to receive one candy immediately rather than two candies the next day. Empirical research should suggest policies to increase resolve to obey the law.

My discussion of internalizing a law stressed willingness to pay to obey it. In addition, internalizing a law involves willingness to enforce it on others. The cost of enforcing a norm on others includes the time and effort needed to cooperate with the police and courts, the risk of retaliation when reporting a wrongdoer to the authorities, the risk of confrontation when intervening to prevent wrongdoing, the possibility of liability for libel when attributing wrongdoing to another, and the higher price paid for a good in order to boycott a particular seller. Thus, Figure 1 could be interpreted as depicting willingness to pay to sanction others who disobey a law, and the horizontal line in Figure 3 could be interpreted as the cost of doing so.¹⁵

Fourth, enforcing obligations on others makes disobedience more risky for them. In contrast, conforming to the obligation yourself often increases the payoff to others who disobey the law. Internalization, consequently, contributes to the level of obedience in society mostly by causing people to enforce the legal obligation on others, not by causing them to obey the law themselves. (The elucidation of these facts is straightforward with the help of some economic reasoning.¹⁶)

Fifth, when cooperating with the police, testifying in court, reporting lawbreakers to authorities, confronting or challenging a wrongdoer,

15. For an analysis of how the expression of legal obligations can change behavior, see Robert D. Cooter, *Three Effects of Social Norms on Law: Expression, Deterrence, and Internalization*, 79 *Or. L. Rev.* 1 (2000).

16. For many acts, the advantage of wrongdoing decreases with the number of wrongdoers. Thus, the profitability of theft decreases with competition from more thieves. This is an application of the principle of decreasing marginal productivity. People who view the law instrumentally disobey it until the point is reached where the advantage of further wrongdoing equals the risk of being sanctioned. Starting from such equilibrium, assume that one wrongdoer "gets religion" and switches from disobedience to obedience. Because there is one fewer wrongdoer, the advantage from wrongdoing increases slightly, and now it exceeds the risk of sanction. This situation is disequilibrium. To restore equilibrium, someone who was obeying the law must switch to disobeying it. After this switch, the same number of rights and wrongs are committed as in the old equilibrium. Thus, the wrongdoer who "got religion" did not cause aggregate wrongdoing to decrease by changing his personal behavior and doing the right thing.

If, however, the wrongdoer who "got religion" adds to the social sanctions against wrongdoing, then wrongdoing will become slightly less profitable for every wrongdoer. To restore equilibrium, the number of people committing wrongs must decrease. In the new equilibrium, the number of rights has increased, and the number of wrongs has decreased relative to the old equilibrium. Thus, the wrongdoer who "got religion" and sanctioned wrongdoers has caused aggregate wrongdoing to decrease.

intervening to prevent lawbreaking, or criticizing wrongdoers, there is safety in numbers. The cost to citizens who enforce the law depends on how many other citizens join them. By using the law expressively, officials can change the beliefs of citizens about how many people will enforce the law. The “expressive use of law” by officials includes publicity attached to prosecutions, the language in which the wrong is condemned, the connection drawn between law and morality, and the severity of the sanction. If the expressive use of law can change the beliefs of citizens about how many of them will enforce it, large changes in behavior can result because the social system jumps from one equilibrium to another. Legal expression that changes beliefs about interdependent behavior may have greater effects on obeying the law than changes in the objective level of sanctions.

Finally, I observe that, since contemporary economics has little to say about how people acquire their preferences, I will not say anything in this Article about why some people become good citizens and others become bad citizens.

CONCLUSION

In *The Fall of Rome*, W. H. Auden writes: “Fantastic grow the evening gowns; Agents of the Fisc pursue; Absconding tax-defaulters through; The sewers of provincial towns.”¹⁷ SINCE THIS IS POETRY, IT’S BEST TO RETAIN THE AUTHOR’S ORIGINAL OF THE LINES, WHICH MAKES IT MUCH EASIER TO READ. AUDEN WROTE IT LIKE THIS, WHICH IS THE WAY I QUOTED IT I MY DRAFT:

Fantastic grow the evening gowns;
Agents of the Fisc pursue
Absconding tax-defaulters through
The sewers of provincial towns.

Auden thus attributes an empire’s collapse to materialism and petty law-breaking. Good government apparently requires most citizens to value obeying the law intrinsically. Otherwise, the state’s coercive mechanism is over-taxed and it succumbs to crippling agency problems. Not much is known about the distributions of the intrinsic value to obey different laws. Demand theory in economics provides techniques for finding answers. The aim is a causal model with power to describe the distribution of good citizenship and predict its consequences.

17. W. H. Auden, *The Fall of Rome*, in 2 *The Oxford Anthology of English Literature* 2110, 2110 (Frank Kemmode & John Hollander eds., 1973).