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Governing Without Coercion¹

Governments make laws and orders that are supposed to influence people's decisions about how to act. To take just a few examples, governments claim to be able to decide where drivers are to park their cars, when landlords may evict tenants, and how much individuals and businesses are to pay to support public services. Governments also do things to bring about compliance with their laws and orders. Many ways of bringing about compliance are coercive.² When a taxpayer, tempted to file a false return, instead pays her taxes in full because she fears being fined or imprisoned, she is coerced to pay. When police threaten a trespasser with forcible arrest if he does not leave, the trespasser leaves under coercion. What counts as coercion is a vexed question, but I hope it is reasonably uncontroversial to say that a government either uses or threatens coercion when it announces that it will respond to certain illegal activities by applying physical violence, taking property from its owners, excluding people from essential public services (e.g., the roads), or entering homes without the residents' consent.

Many political philosophers seem to believe that laws and governmental orders normally have some connection to coercion. Some believe that there can be no law without a sanction and no right without a remedy, and that the sort of remedies required for laws and rights to exist are coercive remedies. Others, such as Dworkin, believe that the primary function of law is to “guide and constrain” the use of governmental force.³ I believe that the connection between coercion and government has been emphasized too strongly. Though it is true that many laws and governmental orders are and ought to be coercively enforced, the possibility of laws and

1 I am grateful to Seana Shiffrin, Barbara Herman, Calvin Normore, Arthur Ripstein, and the UCLA Ethics Writing Seminar for their comments on longer forms of this paper.

2 Some ways of bringing about compliance with the law are not coercive. For instance, the police do not coerce anyone when they return a stolen car to its owner.

3 *Law's Empire*. Cambridge: Cambridge University Press 1986. p. 93.

governmental orders that are not coercively enforced needs to be taken seriously. I will argue that one of the essential functions of government is to specify how people are to act on certain important moral reasons, such as the reason to drive cars safely and the reasons to respect property. In the right circumstances, it is possible to perform this function without using or threatening coercion. Furthermore, it is sometimes desirable, not merely possible, for a government to leave a law or an order unenforced.

1. Law and Indeterminate Reasons

Many laws and governmental orders serve to specify how people are to act on certain *indeterminate reasons*. People have an indeterminate reason when they have a reason to coordinate their activities, there are several possible schemes of coordination, and none of these schemes is obviously better than the others. A well-known example of an indeterminate reason is the reason we have to drive on the same side of the road as everyone else. It is dangerous for some people to drive on the left and others to drive on the right. In a place where people are driving motor vehicles, there is no obvious reason to prefer one side of the road to the other except the fact that other people are using that side.⁴ As another example, people who transmit radio signals have an indeterminate reason to coordinate their transmission frequencies to avoid interfering with each others' signals. A person who did not know how radio frequencies are in fact allocated could figure out that there ought to be a band of frequencies for emergency and police use, another band for hobbyists, another band for music broadcast, and so forth. She could not figure out at what *precise* frequencies these bands should stop and start. There are

4 Where horse-drawn vehicles are common, there can be clear reasons to prefer one side of the road to the other, depending on which vehicles are prevalent. Most people are right-handed, and drivers generally prefer to be on the side of their vehicle that is closer to the center of the road. Postilion wagons, with the driver on horseback, are best driven on the right, since a right-handed driver can most easily mount a horse from the left. Wagons with a seat for the driver are best driven on the left, since a right-handed driver must sit on the right to avoid hitting passengers with the whip. Peter Kincaid, *The Rule of the Road: An International Guide to History and Practice*. Greenwood Press: New York 1986. pp. 6-9.

many ways of carving up the radio spectrum, and though some are no doubt better than others, there is no one way that is obviously best.

In order for people to act on an indeterminate reason, they need to settle somehow on one of the possible schemes of cooperation. Sometimes consensus about which scheme to follow arises without any leader or central organization taking action. When no such consensus has emerged, an act of communication from a leader or central body can bring about consensus. Communication from leaders can also change an existing consensus about what practice to follow. I say that an act of communication *successfully specifies* how to act on an indeterminate reason if, at least partly as a result of this act, it is clear that people are best able to act on the reason by acting as the communication dictates.⁵

Sometimes it is obvious that there are several good ways of coordinating an activity and that none of these schemes is better than the others. In such a situation, someone can successfully specify how to coordinate the activity simply by suggesting an alternative. For instance, suppose a group of ships needs to sail around an island in waters known to be deep, calm, and frequented by pirates. Since the sailors all know that it is important for the ships to stay together and that it does not matter whether they go to the left or the right, the pilot of one of the ships can make the decision for the group simply by steering left. Situations like this are not common. More often, the need to settle on one of several schemes of cooperation is clear, and it seems at least possible that one of the schemes is better than the rest, though it is not clear which one. The choice of a rule of the road is such a situation. Since most people are right-handed, and since most people have a preference for their right eye, it is possible that one side is slightly safer than the other, but it is not clear which side is better, if either. In such cases, people will

⁵ Though I am not discussing authority here, this definition is inspired by Raz's normal justification thesis. *The Morality of Freedom*. Oxford: Oxford University Press 1986. p. 53.

have varying opinions about what the best system of coordination would be. Simply proposing that people select a certain scheme will not give people reason to follow that scheme. But suppose that someone persuades a substantial subset of the population to accept one of the alternatives, and that this alternative is one of the good options. It is clearly more important to have consensus around one of the good options than it is to choose the best option. So if consensus appears to be emerging around a good scheme, people have reason to follow this scheme, even if another possible scheme appears better.

It is clear that laws and governmental orders do, in fact, specify how we are to act on various indeterminate reasons for coordinated action. Traffic laws and specific orders from police officers specify how we are to coordinate our driving and parking; governmental regulations specify how we are to coordinate our use of the radio spectrum. Whether government should perform this coordinating function is another question. One might think that it would be better if custom did the work. Sophisticated solutions to coordination problems can arise without formal rule-making. For example, American whalers in the eighteenth and nineteenth centuries developed elaborate norms for deciding which ship may claim a whale that has been pursued by several ships.⁶ But even if a system of traffic rules or a plan for coordinating the use of the radio spectrum could arise through custom, there are good reasons to prefer that governments be involved. More formal systems for making rules have an advantage over the formation of rules by custom: a formal authority can change rules quickly, when needed.⁷ In the face of economic and technological change, the ability to change coordinating rules quickly is important. For instance, if the opening of a new shopping center causes the

6 Ellickson, *Order Without Law*. Cambridge: Harvard University Press 1991. pp. 191-206.

7 Hart points out in *The Concept of Law* that the existence of a procedure to change rules quickly, when needed, is one of the features that distinguishes legal systems from other systems of social control. Oxford: Oxford University Press 1994 (Second Edition). p. 90.

traffic on a major street to increase suddenly, it is good for the city to be able to enact a law prohibiting parking on that street. Formal legal systems also have the ability to respond to grievances in a way that custom cannot. In a well-functioning political system, a small group of people can get a bad law changed relatively quickly by bringing grievances to legislators.

One class of important indeterminate reasons addressed in law deserves special mention: the reasons we have to establish and respect a system of property rules. By property, I mean an entitlement to use a physical resource (a plot of land, a car, a tomato, a radio frequency) in some way or set of ways, free from interference by others. This conception of property is broad: an entitlement to walk in a public park is a property right, for instance, and I have a property interest in the books I have checked out from the library. It is clear that we have strong reasons to respect a system of property rules. People must have property in order to be able to set projects for themselves and pursue them.⁸ Having widely respected property rules is also important for the functioning of a sophisticated economy, which is required for people's needs and desires to be met in a modern society. The system of property rules we follow needs to be reasonably clear. If the rules governing acquisition and transfer leave it unclear which of several people owns a thing, one of three things will happen: either those people will leave the thing unused, for fear of interfering with the rights of others, or they will come to some agreement about who may use it, or they will come into physical conflict. Leaving things unused is often wasteful. Negotiating property rules on a case-by-case basis is costly, and it leaves those who are unable or unwilling to confront neighbors at a disadvantage.

No fully-specified system of rules for the acquisition and transfer of property is clearly

8 Arthur Ripstein defends this view in "Authority and Coercion." *Philosophy and Public Affairs* 32:1 (2004) 2-35.

better than all others. Consider abandonment.⁹ Suppose that a bicycle has been left unlocked in a public place for ten years. Would it be wrong to take it? If our property rules said that it would be stealing, even if the bicycle has been unused for this long, then a useful thing would go to waste. So the bicycle should count as abandoned after it has been left unused for some interval of time. What should that interval be? Considerations of justice may tell us whether the time until abandonment should be a matter of weeks, months, or years, but they will not reveal, say, whether the boundary should be twenty days rather than twenty-five. A system of property rights ought to specify some time interval after which a bicycle is abandoned, but there is no fact of the matter about what that interval should be. A similar argument could be made about adverse possession.

There are also several equally good sets of rules specifying what rights come with property ownership. Consider the function of zoning laws. There are many ways in which one person's use of his land can interfere with a neighbor's use of hers. For instance, if a cabinetmaker sets up a workshop that uses toxic varnishes, the fumes will prevent anyone from safely residing on nearby land. It is important for people to coordinate their use of land so that incompatible activities do not occur on adjacent plots. So a system of restrictions on how people may use land in different parts of a city or region is an important part of a system of property rules. If no set of rules regarding land use is clearly better than all other possible sets of rules, the reason to respect a system of property rules is indeterminate.¹⁰ This will often be the case.

9 Ripstein uses the example of abandonment to illustrate the “problem of determinacy.” *Ibid.* p. 28.

10 The indeterminacy of the moral reasons to respect a system of property supports Jonathan Garthoff's Embodiment Thesis: “Moral values underdetermine the obligations and entitlements of individual persons in some moral domains, and actual social institutions must embody morality by specifying these moral relations.” “The Embodiment Thesis.” *Ethical Theory and Moral Practice* 7:1, 2004, p. 15. Note that our reasons to respect property are indeterminate whether or not the correct principle of distributive justice is a maximizing principle.

2. Property Without Coercion

One of the essential functions of government is to specify what property rules people are to follow. It is difficult to imagine a rule-making organization that had nothing to say about property and nonetheless qualified as a government. I will offer two examples to show that it is at least conceptually possible for a person or organization that does not use or threaten coercion to perform this function of government. Since some might claim that governments, by definition, have coercive power, I will not assume that the person or organization in question is a government.

Suppose that the residents of an island all agree that Jane is the best person to write a code of rules specifying what property rights are to consist in and how they are to be acquired and transferred. They promise to abide by whatever code she produces. Jane's publication of a code of property rules would successfully specify how people are to respect property. In virtue of their promise, the residents of the island would be obliged to respect Jane's property rules. By publishing a code, then, Jane issues a morally binding directive that performs an essential function of government. Yet Jane has neither used coercion nor threatened to use it. Indeed, she does not do anything to bring about compliance with her code except to tell people what it is. Now, lawmaking does not usually work this way. Rarely, if ever, does an entire population explicitly consent to a government.¹¹ So it would be good to show that it is possible to specify what property rules people are to follow without obtaining everyone's explicit consent.

Suppose that the people on an island have not agreed to a code of law and that the island has no government. Sam, a resident of the island, believes that there is something inadequate about existing customs for deciding who owns what and what ownership involves. Perhaps he

¹¹ The government of Plymouth Colony initially purported to derive its authority from the Mayflower Compact, signed by forty-one passengers, but women did not sign.

thinks existing customs do not establish sufficiently clear norms, or perhaps he thinks that the norms they establish are bad. So Sam decides to put together his own, improved code of property rules and to publish it in the hopes that people will follow it. Sam solicits the opinions of others in putting together the code. The code he devises, with the advice of other residents of the island, is at least as morally acceptable as any other possible system. That is to say, there might be some moral reasons to prefer other possible codes of property rules, but there are equally weighty reasons to prefer Sam's code, and there is no all-things-considered moral reason to prefer a different code. When Sam publishes the code, many people read it and like it. A large majority of the population decides to accept it as a standard of conduct, and, at least for the most part, they follow it. They consult Sam's code to determine whether a bicycle counts as abandoned after ten days, whether and where it is permissible to walk across private land, how the ownership of a deceased person's property is to be determined, for what reasons a landlord may evict a tenant, and so forth. Periodically, Sam releases a revised code, soliciting advice when he does. When he publishes a revised code, people change their practices in response.

For those people who like Sam's code and have implicitly consented to it, Sam's code has successfully specified how to act on the reason to respect property. In order for Sam's attempts at legislation to do the work a government normally does, he must successfully specify the rules of property for everyone, not just for those people who like his code. Now, the mere fact that a large majority of the population implicitly consents to Sam's code gives everyone else reason to follow it. It is important for there to be a single system of property rules that everyone respects. Since Sam's code has already obtained widespread acceptance, refusing to follow Sam's code is justified only if there is a reason to prefer some other code.

People could have two sorts of reasons for preferring another code to Sam's. First, people

could have self-interested reasons for preferring another code. Suppose there is only one soapstone deposit. The only efficient way to use this deposit is to give one person rights to develop a mine. Two people, Nate and Maria, both want to be the developer, since developing soapstone mines is a uniquely pleasurable activity for people of their turn of mind. Sam's rules for property acquisition use criteria for allocating resources that would result in Maria becoming the developer. Another possible code uses criteria that would result in Nate becoming the developer. Nate would not be justified in refusing to follow Sam's code for this reason. The code Nate favors would disadvantage Maria in exactly the same way.

People could also have moral reasons for preferring another code. By hypothesis, no other possible code of rules is morally preferable to Sam's code; there is no all-things-considered moral reason to prefer another code to Sam's. So a moral objection to the content of Sam's code would be unreasonable. There might be grounds to think Sam's system unjust because of the way it came about, depending on exactly what Sam did to solicit the views of others and to take their concerns into account. Suppose that Sam openly solicited advice from the public when he began to compose his code, and that he has established a channel through which people may submit grievances to be considered in future editions of the code. Perhaps he also sets up a mechanism by which people can vote to replace him with another person to produce revisions of the code, and no one tries to use this mechanism. Then no objection to Sam's law-making process would justify a refusal to follow the code. Since there is no good reason to refuse to follow Sam's code and its revisions, I take Sam to have successfully specified the system of property rules for everyone on his island. Yet Sam does not have everyone's explicit consent, and he does not use or threaten coercion to enforce his code or authorize anyone else to enforce it on his behalf.

3. Beyond Conceptual Possibility

The case of Sam shows that it is conceptually possible for someone who does not use or threaten coercion to issue morally binding directives that perform an essential function of government. One might think that this possibility is unimportant for either of two reasons. First, one might think that people are morally obliged to do their part in a system of coordinated activity only if most other people are doing their part. Perhaps a system of property rules can command widespread obedience in a large-scale society of flawed human beings only if the rules are coercively enforced.¹² I cannot pretend to have enough knowledge of psychology or sociology to answer definitively the question how much obedience non-coercive rule-making could command in a large human society. I can identify some features of a system of rules and of a society that would have a bearing on the degree to which unenforced rules could secure obedience. First, there are often powerful incentives to violate rules of coordination, but there can also be natural incentives to obey. (Do you avoid driving on the left side of the road because you fear the legal consequences or because you fear a head-on collision?) Second, people are less likely to violate rules when violations are highly visible and can negatively affect their reputations.¹³ Third, people sometimes comply with a rule even when they have no narrowly self-interested reason to do so. I suspect that the proportion of people who would be inclined to follow a law without a narrowly self-interested incentive would depend at least partly on whether it is obvious that violating the law involves a moral wrong. For example, many people who

12 Rawls argues that even if everybody had a shared sense of justice and wanted to adhere to the existing system of cooperation, the legal system would have to threaten coercive sanctions (possibly mild sanctions) in order to secure stable cooperation over time. Without sanctions, people would be tempted not to fulfill their obligations because they would suspect that others are not doing their part. *A Theory of Justice*, Revised Edition. Cambridge, MA: Harvard University Press 1999. p. 211.

13 Ellickson's study of a tight-knit ranching community in Shasta County, California found that cattle trespass norms were enforced largely through social pressure. Trespass victims rarely sought legal recourse or resorted to self-help that went beyond spreading truthful gossip. *Order Without Law* pp. 40-81.

would never think of stealing a car or a bicycle do not hesitate to commit embezzlement because they do not understand why it is wrong to steal from a corporation. Finally, even if a system of property rules, say, could not secure widespread compliance if it was not coercively enforced at all, it is possible to have a system of rules in which some rules are coercively enforced and others are not.

One might think that although it is possible for governments to issue morally binding directives without using or threatening coercion, this should never be done. I will describe three situations in which a government is justified in issuing a directive that specifies how to act on an indeterminate reason, but the government is not justified in enforcing the directive coercively. First, nations have a reason to have national symbols, such as flags. Legislation is needed to specify what those symbols are and how they are to be respected. To protect free speech, these rules should have no sanctions attached. If one of America's few remaining Loyalists chooses to express his counter-revolutionary sentiments by flying the American flag underneath the British one, in violation of the Flag Code, he should not be fined or imprisoned for doing so.¹⁴

Second, sometimes laws should be unenforced or incompletely enforced because full enforcement of the laws would be too costly. For example, it is good to have rules about how pedestrians and cyclists should move in traffic. Because most municipalities are, quite reasonably, unwilling to allocate extensive resources to enforcing these rules, the statutory penalties attached to these rules are often empty threats.

Finally, there are cases in which a law should be unenforced because coercive enforcement would undermine an important relation of trust, such as the relationship between doctors and patients. Suppose that widespread use of antibiotics could lead to the evolution of a

¹⁴ With the exception of a prohibition against certain uses of the flag in the District of Columbia, the United States Flag Code imposes no sanctions for violations. 4 U.S.C. §1 *et seq.*

dangerous strain of drug-resistant bacteria. The government judges, correctly, that this problem could be prevented by limiting the use of some, but not all, antibiotics to situations in which there is a grave risk to human health. No one set of drugs is the best set to restrict. We could restrict drugs A, B, and C, or we could restrict drugs B and E, and the problem would be solved equally well. So the reason to limit the use of certain antibiotics is indeterminate. It would make sense for the government to pass a law prohibiting the use of drugs B and E except to address a grave risk to a human being's health. There is a class of cases in which doctors should be able to make decisions about the use of these antibiotics without fear of being second-guessed by courts or administrative agencies.

It may well turn out that the vast majority of laws and governmental orders ought to be coercively enforced. Even if this is so, the possibility of issuing binding governmental directives without coercively enforcing them is important for two reasons. First, this possibility bars a certain form of argument in political philosophy: one cannot argue that governments should not make laws about a certain area of life (e.g., about how we treat the flag) simply because it would be wrong or unjust to enforce such laws. Second, this possibility shows that the justification of political authority and the all-things-considered justification of governmental coercion come apart.¹⁵ Even when it is clear that a certain governmental directive is warranted, showing that coercive enforcement of that directive is justified, all things considered, requires further argument. Questions about when government should use or threaten coercion are important. The first question of political philosophy, however, is the question how and when a government ought to tell people what to do.

¹⁵ It may be that whenever a governmental directive is called for, there is always a reason for the directive to be coercively enforced, but there is not always all-things-considered reason for the directive to be coercively enforced.