

What Makes Law Coercive When It Is Coercive*

PENULTIMATE DRAFT - PLEASE DO NOT CITE†

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Abstract

Most legal and political philosophers agree that typical legal systems are coercive. But there is no extant account of what *typically* makes typical legal systems coercive when they are coercive. This paper presents such an account and compares it with four alternative views. Towards the end I discuss the proposed account's payoffs. Among other things, I show how it can help us explain what I call 'comparative judgements' about coercive legal systems (judgements such as 'Legal system *a* is *more* coercive than legal system *b*') and how it can help the development of social scientific inquiries into the coerciveness of our legal systems.

1. Introduction

Most legal and political philosophers agree that typical legal systems¹ are coercive. But there is no extant account of what *typically* makes typical legal systems coercive when they are coercive. This paper presents such an account. According to the proposed account, it is the conjunction of four elements that typically makes typical legal systems coercive when they are coercive:

- (i) The reliance on systemic regulation to induce action.
- (ii) Citizens believing that pressure for compliance with legal mandates exists.
- (iii) Citizens believing that authorities are disposed to enforce legal mandates.
- (iv) Legal pressure being operative on citizens.

Section 3 is where I clarify and discuss each one of these elements. In the same section I compare my account with four alternative views, some of which *seem* to be implicit in the literature on the coerciveness of legal systems. Towards the end (section 4) I discuss the payoffs of my account. Among other things, I show how this account helps us explain what I call 'comparative judgements' about coercive legal systems (judgements such as 'Legal system *a* is *more* coercive than

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¹ Throughout the paper I use 'typical legal systems' to refer to legal systems of contemporary democratic countries and those that closely resemble them.

legal system *b'*) and how it can help the development of social scientific inquiries into the coerciveness of our legal systems. But before anything, I must add some clarificatory remarks about the question this paper addresses and my motivation for discussing it.

2. The Coerciveness Conditions

The main question this paper addresses should not be conflated with a question about the conditions that *any* legal system must meet in order to be coercive. A question about, as it were, the *coerciveness conditions* of legal systems could be formulated as follows:

(Q1) For every legal system LS, what must be true for 'LS is coercive' to be true?

Despite (Q1) not being the main question discussed in this paper, it will be necessary to provide an answer to it. That is because there is no way to answer the main question this paper addresses without answering (Q1). This becomes clear once we formulate this paper's main question:

(Q2) Consider typical legal systems that satisfy the *coerciveness conditions*. What is the typical way in which typical legal systems satisfy the coerciveness conditions?

Before I present my answer to (Q1) two ideas must be distinguished: the idea that a *legal system* is coercive and the idea that someone makes *coercive use* of a legal system.² The first, which is within the scope of (Q1), is about an attribute a legal system displays when *the system* coerces citizens. By saying that, I'm not assuming that legal systems are agents. We could just as easily, and without any loss to the current debate, paraphrase the proposition that *legal systems* coerce citizens as the proposition that *legal authorities*³ coerce citizens *in the name of the legal system*—i.e., they coerce citizens in the proper exercise of their role.

The idea that someone makes *coercive use* of a legal system, on the other hand, refers to those cases where someone uses the legal system (its mandates, resources, name, etc.) to coerce somebody else. A police officer who unlawfully uses legal resources and her reputation to coerce a citizen into doing something is an example. The police officer's act is coercive, but it is not performed *in the name of the system*; it cannot be identified as an act of the system. In fact, the very standards endorsed by the system could be used to criticise the police officer's act. Cases where

² This distinction has been first proposed by William Edmundson. See, William A Edmundson, 'Is Law Coercive?' (1995) 1 *Legal Theory* 81, 107.

³ There are instances where *citizens* are also permitted to perform functions which are typically performed by legal authorities. For example, citizens in some jurisdictions are permitted to conduct arrests. In those cases, it seems that citizens are both acting *in the name of the system* and *qua* legal authorities. For the purposes of discussion, I'll assume that citizens, in those cases, are indeed acting *qua* legal authorities who act in the name of the system. Therefore, when coercive, their acts would be examples of cases where the *system* coerces.

authorities make coercive use of the system fall outside the scope of (Q1) (and (Q2), for what is worth). They don't reveal facts about coercion in law; they reveal facts about the use of coercion outside or in spite of the law.

Having said that, here is my answer to (Q1), the *coerciveness conditions*:

For every LS, 'LS is coercive' is true if, and only if,

- (I) There is at least one type of action such that LS intends to be perceived by citizens as intending that at least one citizen performs.
- (II) LS conveys (at least one) conditional proposal(s) aiming to lead (at least one) citizen(s) to believe that LS has created (at least one) situation(s) where:
 - (IIa) There is no reasonable choice but to perform the action(s) indicated by LS;
 - (IIb) Performing the action indicated in LS's proposal(s) is unwelcome.
- (III) LS's conditional proposal(s), together with the existing background factors, lead(s) at least one citizen to believe that (IIa) and (IIb).
- (IV) At least one citizen performs at least one of the actions indicated by LS.
- (V) The beliefs that (IIa) and (IIb) are part of what motivates citizens who perform the action(s) indicated by LS to perform such action(s).

Four caveats about this answer. First, this answer assumes that 'LS is coercive' is true if, and only if, LS *coerces* citizens. And we know what it takes for LS to *coerce* citizens only by relying on an account of coercion. My answer—and this is the second caveat—presupposes a *particular kind* of account of coercion. Namely, it presupposes a version of what is known as a 'pressure approach' or 'Nozick-style' account of coercion.⁴ This kind of account identifies coercion with strong psychological pressure. One agent coerces another only when the coercer intentionally poses strong or overbearing pressure on the coercee's will and the coercee, as it were, succumbs to the pressure by performing the action indicated by the coercer at least partly because of being pressurised. The details of this kind of account of coercion vary. For example, while some think that coercion only happens when the coercer's proposal is a *conditional threat*, others think that

⁴ Early statements of this kind of account can be found, e.g., in Robert Nozick, 'Coercion' in MPS Suppes White Morgenbesser (ed), *Philosophy, Science, and Method: Essays in Honor of Ernest Nagel* (St Martin's Press 1969); Martin Gunderson, 'Threats and Coercion' (1979) 9 *Canadian Journal of Philosophy* 247; HJ McCloskey, 'Coercion: Its Nature and Significance' (1980) 18 *The Southern Journal of Philosophy* 335; Michael Gorr, 'Toward a Theory of Coercion' (1986) 16 *Canadian Journal of Philosophy* 383.

coercion can also take place when the proposal is a *conditional offer*.⁵ Here I will remain agnostic about whether conditional offers can also coerce simply because taking a stance on this issue won't substantially affect the answer I give to the core question this paper addresses (i.e., (Q2)).

I must admit, however, that the answer I give to both (Q1) and (Q2) will be substantially affected if one adopts an account of coercion that is broadly inconsistent with the central features of pressure accounts of coercion.⁶ Nevertheless, and this is the third caveat, I won't be able to *defend* or *justify* my choice of a pressure approach of coercion in this paper; consequently, I won't be able to properly defend or justify my answer to (Q1). The reason for this is manageability: it is simply not feasible to properly defend an account of coercion, an answer to (Q1), *and* an answer to (Q2) in a single paper.⁷ Be this as it may, I ask those inclined to reject pressure approaches to not simply discard my answer to (Q2); some aspects of my answer can still be useful for them to build an alternative account of (Q2).⁸

The fourth caveat that must be added is that according to the proposed answer to (Q1), a legal system that merely coerces a *single* citizen into performing a *single* action would still be *coercive*. This may strike some as implausible; it looks like it doesn't do justice to the seriousness of calling a legal system 'coercive'. This impression is misleading. I will explain why in the final section of this paper, where I introduce and discuss the notion of *degree of coerciveness*.

With these caveats and the coerciveness conditions in hand, we can now discuss (Q2).

3. The Coerciveness of Our Legal Systems

Here is how (Q2) has been formulated:

(Q2) Consider typical legal systems that satisfy the coerciveness conditions. What is the typical way in which typical legal systems satisfy the coerciveness conditions?

(Q2) is a question about the features and facts which are typically responsible for making typical legal systems satisfy the coerciveness conditions. It wouldn't be worth asking (Q2) if these features and facts were necessarily the same as the features and facts which are responsible for making *any*

⁵ See, e.g., Daniel Lyons, 'Welcome Threats and Coercive Offers' (1975) 50 *Philosophy* 425; David Zimmerman, 'Coercive Wage Offers' (1981) 10 *Philosophy and Public Affairs* 121.

⁶ Here, I have in mind accounts such as Scott Anderson's. See, Scott Anderson, 'The Enforcement Approach to Coercion' (2010) 5 *Journal of Ethics and Social Philosophy* 1. Those who defend such an account will end up with a different set of *coerciveness conditions*. Therefore, they will end up with different answers to both (Q1) and (Q2).

⁷ For a *defence* of the answer to (Q1) here presupposed, see [omitted for peer review].

⁸ For example, those who defend the *enforcement* approach to coercion may still accept what I say about systemic regulation in section 3.1 and most of the reasons why I reject some answers to (Q2) that seem to be implicit in the literature.

legal system satisfy the coerciveness conditions. But they can be distinct. Consider the following scenario:

(Doomsday Machine): Government controls the Doomsday Machine, a biological device capable of killing the entire population of a country in a few hours. The vast majority of citizens know that the government controls the Doomsday Machine. In a public speech, governmental representatives declare that they have abolished all sanctions and enforcement mechanisms. Yet, in the speech they threaten to activate the Doomsday Machine in the event the number of deviations of legal mandates per year meet a number randomly determined by an automated algorithm (suppose the number is a state secret). Imbued with fear of death, citizens who remain in the country become extremely law-abiding.

The legal system in (Doomsday Machine) is coercive; it does satisfy the proposed coerciveness conditions. Nonetheless, the way in which the Doomsday legal system satisfies the coerciveness conditions is intuitively not the same as the way in which typical legal systems typically satisfy these conditions. Typical legal systems satisfy the coerciveness conditions in a typical way; they satisfy such conditions in virtue of displaying particular features and facts. In fact, one could even think—perhaps rightly—that part of the reason why a legal system is typical is that it satisfies the coerciveness conditions in a typical way.

My motivation for discussing (Q2) is that it is useful to clarify two debates about the coerciveness of legal systems which many legal and political philosophers are interested in: the debate about the extent to which *typical* legal systems are coercive, and the debate about whether legal systems are necessarily coercive. The reason it helps to clarify the former debate is simple: if we want to evaluate the extent to which typical legal systems are coercive, we need to have a clear grasp of the features and facts which are typically responsible for making typical legal systems coercive.

Philosophers who engage in the latter debate often argue for or against hypothetical scenarios where a legal system is non-coercive.⁹ Those philosophers who argue for these scenarios usually take a *typical* legal system which is presumably coercive and transform it into a non-coercive legal system by removing some of its features. For the thought experiment to work, however, these features must meet two criteria: they must not deprive the system of its legal system-status and they must be the features that made the typical legal satisfy the coerciveness conditions. Whether it is possible for a legal system to lack these features and still bear the status of a legal system

⁹ See, e.g., Joseph Raz, *Practical Reason and Norms* (Oxford University Press 1999); Scott Shapiro, *Legality* (Harvard University Press 2011).

depends on knowing what features we are talking about. Philosophers who engage in this topic, however, never offer a precise list of the features and facts which are typically responsible for making typical legal systems coercive (features that non-coercive legal systems lack). There is no *explicit* received view on this topic. At times, however, it *seems* that some philosophers assume that typical legal systems typically satisfy the coerciveness conditions in virtue of one of the following features:

- (1) The possession of individual legal norms that authorise the prescription and application of coercive sanctions and coercive enforcement mechanisms.¹⁰
- (2) The possession of individual legal norms that prescribe coercive sanctions and coercive enforcement mechanisms.¹¹
- (3) The consistent use of coercive sanctions and coercive enforcement mechanisms.
- (4) A conjunction of (1), (2), and (3).¹²

As I'll argue, (1), (2), (3), and (4) are unsatisfactory answers to (Q2). (1)-(4) are insufficient to make typical legal systems satisfy the coerciveness conditions. Besides, because (1)-(4) require a legal system to prescribe or to authorise the use of sanctions and enforcement mechanisms that are themselves *coercive*, these views end up being too demanding. As I will show, typical legal systems typically satisfy the coerciveness conditions regardless of their *individual* sanctions and enforcement mechanisms being *coercive*; i.e., regardless of these mechanisms producing particular effects by themselves (e.g., depriving someone of a reasonable choice, compelling, etc.).¹³

My answer to (Q2) holds that typical legal systems typically satisfy the coerciveness conditions in virtue of the *conjunction* of four elements:

- (i) The reliance on systemic regulation to induce action.
- (ii) Citizens believing that pressure for compliance with legal mandates exists.
- (iii) Citizens believing that authorities are disposed to enforce legal mandates.

¹⁰ Ken Himma *seems* to endorse a view along these lines. See, Kenneth Einar Himma, 'The Authorisation of Coercive Enforcement Mechanisms as a Conceptually Necessary Feature of Law' (2016) 7 *Jurisprudence* 593.

¹¹ For H.L.A Hart, for instance, a 'coercive system' seems to be equivalent to a system that prescribes sanctions. See, H.L.A Hart, *The Concept of Law* (Joseph Raz and Penelope A Bulloch eds, 3rd edn, Oxford University Press 2012) 193. Ekow Yankah also seems to defend a view along these lines. See, Ekow N Yankah, 'The Force of Law: The Role of Coercion in Legal Norms' (2007) 42 *U. Rich. L. Rev.* 1195.

¹² Let me add the caveat that I don't want to attribute these views to anyone in particular. Even though it is possible to construe some legal philosophers as holding (1)-(4), it is not clear what their actual views on the issue are. For that reason, I'll ask the reader to take (1)-(4) only as possible answers to (Q2).

¹³ That not all sanctions and enforcement mechanisms are *coercive* is something most philosophers who have written on the coerciveness of law accept. For discussion on this point, see Hans Oberdiek, 'The Role of Sanctions and Coercion in Understanding Law and Legal Systems' (1976) 21 *Am. J. Juris.* 71; Grant Lamond, 'The Coerciveness of Law' (2000) 20 *Oxford Journal of Legal Studies* 39; Yankah (n 11).

(iv) Legal pressure being operative on citizens.

Each of the following subsections elaborates on each of the elements listed above.

3.1. *Systemic Regulation*

What I call ‘systemic regulation’ is a simple idea: it refers to the fact that typical legal systems, as *systems* of norms, build up and make use of a complex regulatory structure composed of different types of legal mandates and institutions that interact and reinforce each other. My point is that part of what typically makes typical legal systems satisfy the coerciveness conditions is the fact that legal systems rely on a complex regulatory structure to induce citizens’ actions. It is partly because of systemic regulation that the conditional proposals issued by typical legal systems leave citizens with (or at least lead citizens to believe that they have) no reasonable choice but to comply with legal norms.

To illustrate, consider a legal system which attempts to induce citizens to pay their taxes. In a typical legal system, when legal authorities attempt to do so they don’t simply threaten citizens who don’t pay their taxes by issuing a legal norm prescribing a sanction. A series of distinct legal norms and institutions are deployed to achieve this goal: norms that make tax evasion an offense, norms that empower and permit legal authorities to apply and enforce norms about tax evasion, offices and mechanisms that purport to detect tax evasion, norms that establish the relevant procedures for adjudicating disputes about tax evasion, as well as the relevant procedures for applying and enforcing norms about tax evasion.

Things don’t stop there. Legal authorities know that the norms and institutional mechanisms mentioned above may not suffice to motivate citizens not to evade taxation. For that reason, legal authorities tend to also create what we may call ‘second-order’ sanctions and enforcement mechanisms: sanctions and enforcement mechanisms designed to deal with those circumstances where first-order sanctions and enforcement mechanisms fail. These second order sanctions and enforcement mechanisms may be constituted by legal norms that make citizens liable to additional (and often more stringent) fines, or norms that empower legal authorities to freeze citizen’s assets, or even norms that make citizens liable to imprisonment.

Moreover, legal systems typically make disobeying orders of legal authorities an offense and usually attach sanctions to disobedience. So, it is not just that a citizen may be fined for evading taxation; if the citizen also defies the authority that is enforcing the fine, things may get worse. It should also be added that legal systems also retain, and usually exercise, the power to decide which

excuses and justifications for non-compliance are acceptable. For instance, many (if not all) actual legal systems don't accept ignorance of legal mandates as an excuse for non-compliance. Besides, citizens are generally not given the liberty to opt-out from legal mandates (especially from norms about taxation).¹⁴

That legal authorities intentionally use systemic regulation to ensure citizens' compliance with legal mandates is perhaps common sense among philosophers and lawyers. Be this as it may, legal philosophers have consistently given prominence to *individual legal* norms that prescribe or authorise the use of sanctions (recall views (1), (2)) rather than to systemic regulation in their accounts of the factors which are typically responsible for making typical legal systems coercive.¹⁵ Perhaps the reason for the focus on individual legal norms that prescribe or authorise sanctions or enforcement mechanisms is something along the following lines: a legal system needs to issue conditional threats or offers to satisfy the coerciveness conditions. And it may be thought that typical legal systems typically issue conditional threats or offers by issuing individual norms that prescribe or authorise the use of sanctions or enforcement mechanisms.

This focus on individual legal norms is misguided. Even if we concede that typical legal systems typically issue conditional threats or offers *by* issuing individual norms prescribing or authorising the use of sanctions and enforcement mechanisms, there are still other reasons not to focus on individual norms. As we know on the basis of the answer to (Q1) here presupposed, issuing conditional proposals is not enough for *any* legal system to satisfy the coerciveness conditions. The conditional proposals must lead citizens to believe, among other things, that citizens have no reasonable choice but to comply with the legal demands. In other words, the proposals must create *strong pressure* for compliance. And typically, proposals create strong pressure for compliance only insofar as they are part of a broader regulatory structure.

I'm not denying that individual legal norms that prescribe or authorise the use of sanctions and enforcement mechanisms may help induce citizens to comply with legal mandates. My claim is just that if we are concerned with the *coerciveness* of typical legal systems, we shouldn't be looking at these norms in isolation. Individual legal norms typically exert pressure for compliance only as part of a broader systemic structure. We know, for instance, that without norms

¹⁴ As Heath Wellman and John Simmons put it: 'For many citizens there are few *acceptable* options to remaining in their states and obeying (most) law, and for most persons active resistance to the state is in effect impossible.' Christopher Wellman and John Simmons, *Is There a Duty to Obey the Law?* (Cambridge University Press 2005) 118. My emphasis.

¹⁵ A clear exception is Michael Huemer, who focuses on the regulatory structure legal systems deploy to ensure compliance with legal mandates. See, Michael Huemer, *The Problem of Political Authority: An Examination of the Right to Coerce and the Duty to Obey* (Palgrave MacMillan 2013) 9–10.

empowering and permitting legal authorities or private citizens to apply and enforce the prescribed sanctions, no legal sanction or other similar unwelcome measures can be applied or enforced. Besides, without legal institutions such as courts and arbitration chambers, and without norms setting out the relevant procedures for holding citizens liable to the relevant sanctions, norms that prescribe sanctions or similar unwelcome measures are pretty much sterile. Hobbes may be right that covenants without swords are just empty words. But swords without capable swordsmen are just idle blades.

A consequence of focusing on systemic regulation is that, contrary to (1) and (2), we need not hold that what typically makes typical legal systems coercive is the authorisation or prescription of sanctions and enforcement mechanisms that are themselves *coercive*; that is, sanctions and enforcement mechanisms that, by themselves, generate strong pressure. If I am right, this sort of reasoning is mistaken. Typically, sanctions and enforcement mechanisms don't (and cannot) exert pressure by themselves.

There is, however, a more charitable way to interpret (1) and (2). What those who defend these views might actually hold is that typical legal systems typically satisfy the coerciveness conditions when, *as part of a broader regulatory picture*, the system contains norms that prescribe or authorise the use of *coercive* sanctions and enforcement mechanisms. In other words, according to (1) and (2), the broader regulatory picture aside, typical legal systems typically satisfy the coerciveness conditions when their sanctions and enforcement mechanisms are, as Ekow Yankah puts it, 'big enough' to compel.¹⁶

But even this charitable interpretation should be rejected. Sanctions and enforcement mechanisms issued by typical legal systems exert pressure only as part of systemic regulation. Therefore, looking at how big sanctions and enforcement mechanisms are won't necessarily help to assess the strength of the pressure the system exerts. If legal mandates exert pressure systemically, then there is no good reason to think that typical legal systems don't (or wouldn't be able to) coerce citizens by putting forth weak sanctions (e.g., a small fine) in tandem with other legal mandates (e.g., second order sanctions, burdensome procedures,¹⁷ norms barring excuses, and so forth). In fact, if what matters is *systemic* pressure, then why focus on *sanctions*?¹⁸ By accepting

¹⁶ Yankah (n 11) 1217.

¹⁷ Ralf Poscher helpfully illustrates the role of procedural norms in inducing citizen's action. Sometimes citizens may be more willing to curb violent or unlawful behaviour instead of facing long and burdensome procedures. As he puts it, procedural norms can help 'to redirect conflict energy'. See, Ralf Poscher, 'The Ultimate Force of the Law: On the Essence and Precariousness of the Monopoly on Legitimate Force' (2016) 29 *Ratio Juris* 311, 9.

¹⁸ For an account of sanctions and an explanation of how to distinguish them from other types of legal consequences, see [omitted for peer review].

that typical legal systems typically satisfy the coerciveness conditions by applying pressure systemically, we can accommodate and make better sense of the idea that typical legal systems exert strong pressure (and *perhaps* even coerce citizens) in many circumstances where legal systems threaten citizens with consequences other than *sanctions*; consequences such as the invalidation of contracts or wills.¹⁹ And we can do so without relying on arguments that attempt to classify nullities as sanctions.²⁰

When talking about the features typically responsible for making typical legal systems coercive we shouldn't, therefore, restrict ourselves to individual legal norms that prescribe or authorise the use of coercive sanctions or enforcement mechanisms. We should instead look at how typical legal systems induce action by relying upon an intricate regulatory structure. Laws that prescribe or authorise the use of sanctions and enforcement mechanisms contribute to making legal systems coercive insofar as they are part of this broader regulatory picture.

3.2. *Believing the Pressure*

The deployment of a broad regulatory structure is typically what makes the pressure exerted by typical legal systems strong. It is, therefore, one of the factors typically responsible for making typical legal systems coercive. But that alone is not enough for typical legal systems—or *any* legal system, for what is worth—to satisfy the coerciveness conditions. The pressure the system exerts must also be believed by citizens. Legal pressure for compliance, therefore, must not only exist; citizens must also have the true belief that pressure exists.²¹

To understand why this belief is necessary, consider a scenario where a gun-man with a loaded gun intends to be perceived as inducing a passer-by to hand over her purse and threatens to shoot her in the event she doesn't surrender her purse. No doubt the gun-man is imposing strong pressure on the passer-by. Now, suppose the passer-by is under the influence of strong hallucinogenic drugs. To her, the gun-man appears as Gandalf smoking his pipe. As the gun-man

¹⁹ One might also want to include cases where authorities threaten to quarantine an individual in case he gets seriously ill, or other cases where a legal system threatens to bring about an unwelcome consequence on citizens *who did not commit a wrongdoing*.

²⁰ Frederick Schauer, for example, has recently defended the idea that nullity can be a sanction: 'When legally constituted forms of conduct supplant similar law independent forms of conduct, therefore, or when law regulates optional but law-independent conduct, the sanction of nullity *becomes a real sanction*. If I want to make a contract but do not do so in accordance with the forms prescribed by law, the contract is no contract at all. My expectations and desires will have been frustrated, and my disappointment will be palpable.' See, Frederick Schauer, *The Force of Law* (Harvard University Press 2015) 29. My emphasis. For a reply to this sort of argument, see [omitted for peer review].

²¹ The belief must be true otherwise we wouldn't be able to differentiate a scenario where one *thinks* one is being coerced from a scenario where someone is really coerced.

says ‘Give me your purse, or I’ll kill you’, she hears ‘Gather your horse, Gollum needs you!’. Excited, the passer-by runs to find a horse and gets shot as a result.

The passer-by wasn’t coerced in the scenario above. And one of the reasons why she wasn’t coerced was because the passer-by did not believe that the gun-man was threatening her to give away her purse; for the passer-by, things were as if the pressure for surrendering her purse didn’t exist. The pressure didn’t figure in her practical reasoning as a motive for her to act.²² The same is true of legal systems.

3.3. *The Disposition to Enforce*

We’ve seen how systemic regulation typically contributes to making typical legal systems coercive: it is via systemic regulation that it becomes unreasonable for citizens to resist the conditional proposals issued by legal systems. There is, however, a factor that significantly impacts the strength of the pressure the system exerts, namely the belief that legal authorities are *disposed to enforce* legal mandates.

I use ‘disposition’ in virtually the same sense as it is used by contemporary metaphysicians.²³ Though discussions about dispositions raise several intricate problems,²⁴ the central idea relevant to the present discussion is a simple one: if an agent possesses a disposition, the agent tends to manifest a characteristic behaviour in the presence of some stimulus conditions. Take, for instance, the disposition to be irascible. We can ascribe this disposition to a person in the following way: a person has the disposition to be irascible if, and only if, she would generally burst in anger if challenged, stressed, or mocked.²⁵

What I call ‘disposition to enforce’ refers (roughly) to an authority’s disposition to intentionally use sanctions, enforcement mechanisms, or other consequences conditionally

²² Notice that the role the belief plays is that of allowing the threat to enter into the practical reasoning process of the agent: by believing that pressure exists, the agent *becomes able* to take the threat as a reason to act in a particular way and weigh it against her other reasons. Of course, the agent might end up not doing what she is pressurised to do. However, there is a substantial difference between ‘believing that there is pressure to φ and still deciding not to φ ’ and simply ‘deciding not to φ ’.

²³ Though ‘dispositions’ nowadays seems to be the most common term used by philosophers working in metaphysics, many still use terms such as ‘powers’, ‘capabilities’, ‘abilities’, or ‘tendencies’ to designate the same phenomenon. See, Shungho Choi and Michael Fara, ‘Dispositions’, *The Stanford Encyclopedia of Philosophy* (2012) <<https://plato.stanford.edu/archives/spr2016/entries/dispositions>>.

²⁴ For helpful surveys see, Troy Cross, ‘Recent Work on Dispositions’ (2012) 72 *Analysis* 115; Choi and Fara (n 23).

²⁵ Notice that by ascribing the disposition this way we have brought to light a conditional relation between the characteristic behaviour of irascibility (bursting in anger) and its stimulus conditions (challenged, stressed, or mocked). This conditional relation is, as Elizabeth Prior puts it, a ‘pre-theoric common ground’. See, Elizabeth Prior, *Dispositions* (Elsevier Science Ltd 1985) 5. Be this as it may, the precise way to formulate ascriptions of dispositions is controversial. For different formulations, see Choi and Fara (n 23). Here we need not worry about these controversies, for nothing significant for our purposes hangs on them.

proposed by legal systems when the authority is faced with situations where she believes these consequences apply. And I take it that an authority believes that legal consequences *apply to* a situation only if she believes that she is permitted or required to apply them in that situation.

In more precise terms:

Given a legal authority (A), a legal sanction, enforcement mechanism, or other legal consequences A is permitted or required to use (L), and a situation faced by A in the exercise of its role (S),

(DE) A is disposed to enforce legal mandates if, and only if, for every L and for every S, if A believes L applies to S, then it is generally the case that A would intentionally apply L in S.²⁶

(DE) implies that an authority who believes that a particular L (*l1*) applies to a particular S (*s1*) may still be disposed to enforce legal mandates and, for whatever reason, *not* apply *l1* in *s1*. In other words, (DE) tolerates exceptions.²⁷ It would be implausible to consider an authority as no longer *disposed* to enforce legal mandates just because the authority has failed to use sanctions in a few cases.

Having clarified what I mean by ‘disposition to enforce’, here is how the belief that authorities are disposed to enforce legal mandates typically contributes to making typical legal systems satisfy the coerciveness conditions. Think of a case where citizens have the true belief that legal authorities employ systemic regulation to induce compliance. In this scenario, citizens are aware that the system has prescribed some consequences for breaching the law. Nevertheless, suppose most citizens also believe, for whatever reason, that authorities are not disposed to enforce legal mandates. In fact, they believe that authorities are disposed *not* to enforce legal mandates. In this scenario, regardless of it being true or false that authorities are disposed to

²⁶ Some cases are more complex and call for a slightly different formulation. I’m thinking here of cases where legal mandates *apply conjunctively* and cases where legal mandates *apply disjunctively*. The former are cases where an authority believes to be permitted or required to use legal mandates cumulatively. When dealing with these cases, it is more precise to formulate the second half of (DE) as follows: “if A believes that (*l1, l2...ln*) *apply conjunctively* to S, then it is generally the case that A would intentionally apply *l1, l2...ln* in S”. The latter are cases where an authority believes to have a liberty to choose which mandate to use and the additional belief that it is not permitted to use more than one mandate in the same case. Here, a more precise formulation of the second half of DE would be: “if A believes (*l1, l2... ln*) *apply disjunctively* to S, then it is generally the case that A would intentionally apply (*l1 ∨ l2 ... ∨ ln*) in S”, where “∨” stands for an exclusive disjunction.

²⁷ This is a commonly accepted feature of dispositions. Many philosophers, for example, agree that there are factors that ‘mask’ the disposition; they call them ‘dispositional maskers’. A dispositional masker is ‘a factor that would block the manifestation of a disposition even if its characteristic stimulus obtains’. S Choi, ‘What Is a Dispositional Masker?’ (2011) 120 *Mind* 1159, 1169. A glass’ disposition to break if dropped is *masked* when, e.g., the glass is protected by a thick bubble wrap.

enforce, from the citizens' perspective there is a reason to think that violations of legal mandates won't be typically met with unwelcome consequences. The threats of the system lack credibility, which makes non-compliance more attractive. When that happens, it is no longer plausible to hold that citizens have (or take themselves to have) no reasonable choice but to comply.

This helps us to see that view (3) is mistaken. The consistent use of coercive sanctions and coercive enforcement mechanisms is not sufficient to make *any* legal system satisfy the coerciveness conditions. The typical way in which typical legal systems satisfy the coerciveness conditions involve (and must involve) citizens *perceiving* legal authorities as if they are disposed to enforce legal mandates. On many occasions, this belief is true. But it need not be. Contrary to the belief in the existence of pressure, the belief that authorities are disposed to enforce contributes to the satisfaction of the coerciveness conditions even if false.²⁸

3.4. Operativeness

On top of the previous elements, typical legal systems typically satisfy the coerciveness conditions by the occurrence of a further fact: the conditional proposals typical legal systems issue as part of systemic regulation are operative on citizens. A conditional proposal a typical legal system issues as a means to induce citizens to φ is operative on a citizen if, and only if:

- (a) the citizen φ -s when the relevant conditions stated in the relevant regulations take place.
- (b) At least part of what motivates the citizen to φ is the belief that the conditional proposal has been issued and that authorities are disposed to enforce legal mandates (i.e., the beliefs explained in sections 3.2. and 3.3.).

Some clarifications are needed. According to the type of account of coercion presupposed in my answer to (Q1)—i.e., a *pressure approach*—coercion is a success concept: for coercion to take place, the coercee must perform the action indicated by the coercer. Thus, whenever a legal system is coercive, part of what makes it coercive must be related to the fact that citizens *perform* the actions indicated by the system.²⁹ Hence, condition (a). Condition (a), however, doesn't just require a citizen to perform an action indicated by the legal system; it requires a citizen to perform the relevant action indicated by the legal system *only if all the relevant* conditions stated in the relevant

²⁸ This shows that (3) also doesn't describe a feature that is necessary to the satisfaction of the coerciveness conditions. A legal system can be coercive regardless of legal authorities consistently applying sanctions and enforcement mechanism: all we need is the belief that authorities are willing to enforce legal mandates.

²⁹ This point also shows that view (4) is mistaken. The features it describes aren't sufficient to make typical legal systems satisfy the coerciveness conditions.

regulation obtain. But why such a requirement? Simply because the conditions stated in the regulation may never be satisfied and, thus, citizens may never get the chance to perform the action indicated by the relevant regulations.

To further illustrate this point, consider the following hypothetical legal mandate: ‘In the event of a natural disaster, citizens who fail to comply with the evacuation guidelines issued by authorities will lose their right to be compensated by the state for loss or damage occasioned by the disaster’. True, it is possible that many citizens would comply with evacuation guidelines in virtue of the fear of losing their right to be compensated. Nevertheless, these citizens may never have the chance to comply with (or to disobey) evacuation guidelines: the conditions set out by this legal mandate may never be satisfied. It is possible that a natural disaster never comes about, or that authorities never issue evacuation guidelines (even when natural disasters occur). Hence, before the occurrence of the conditions specified in the legal mandate, we cannot say that citizens are being coerced into complying with evacuation guidelines.³⁰

Let me now turn to (b). As per *pressure approaches* of coercion, coercion doesn’t merely require that the action performed by the coercee coincides with the coercer’s demand. The coercer’s conditional proposal must play some role in motivating the coercee to act. The coercee must be motivated to act at least *partly* in virtue of her beliefs about the coercer’s threats. The same is true of legal systems. For citizens to be coerced by legal systems, it is not sufficient that citizens’ actions coincide with what legal systems demand. It is also not sufficient that citizens get to conform to legal mandates in virtue of believing that obeying legal mandates merits moral praise. For a legal system to satisfy the coerciveness conditions, at least part of the citizens’ motivation to comply with legal mandates must be due to their holding certain beliefs about the pressure that the system exerts for compliance via threats. When it comes to typical legal systems, the relevant beliefs are typically those I’ve discussed in the previous sections.

4. Degree of Coerciveness

I left a question unanswered at the beginning of the paper. The question was whether a legal system would be *coercive* if it coerced just a *single* citizen into performing a *single* action.

It may be tempting to answer this question with a categorical ‘No’. The claim that a legal system is coercive seems to be connected to the idea that legal systems consistently coerce a

³⁰ It wouldn’t be an exaggeration to say that perhaps many—if not most—legal mandates of typical legal systems resemble the legal mandate in the hypothetical example just given. It just happens that many of the conditions set out by mandates of typical legal systems are usually satisfied as a matter of fact.

number of citizens into performing a number of actions. By using ‘coercive’ to refer to a system which has coerced just a single or a couple of citizens into performing a single or a couple of actions—one may argue—we seem to somehow trivialise the notion. To avoid clashing with this intuition, perhaps the best alternative would be to defend that a legal system is coercive if, and only if, the system coerces a *sufficient number* of citizens into performing a *sufficient number* of actions.

This view, however, faces the following objections: first, ‘sufficient number’ is vague and it entails that it will be impossible to determine if some legal systems are coercive or not. Second, it also has a counter-intuitive implication: suppose a given legal system coerces just a small minority of its citizens into not performing several actions these citizens regard as important to their daily lives. But suppose further that despite coercing all members of this minority, the legal system doesn’t coerce a *sufficient number* of citizens. In this situation, then, we have a legal system that coerces all members of a group and yet is not coercive. That doesn’t sound plausible; the view under consideration makes it too stringent for a legal system to be considered coercive.

We seem to have reached an impasse. If we hold that a legal system is coercive if, and only if, it coerces citizens and resile from specifying the relevant number of citizens and actions, we will have to accept that a legal system may be *coercive* even when it coerces a single citizen into performing a single action. Alternatively, if we hold that a legal system is coercive if, and only if, it coerces a sufficient number of citizens into performing a sufficient number of actions, then we will not only have to say something about vagueness, but also be committed to the existence of cases where a legal system would not be coercive despite a strong intuition to the contrary.

I take it that the first view still fares better than the second. One thing we can say to mitigate the counter-intuitive consequence that the first view gives rise to is this: legal systems can be more or less coercive. When a legal system just coerces a single citizen into performing a single action, its *degree of coerciveness* is so low that we tend not to afford too much importance to it. It is only when the degree of coerciveness reaches a certain level that it starts attracting our attention.

But notice that—and here is an advantage of preferring this view—even a legal system with a very low degree of coerciveness will still give rise to the same concerns that has brought many legal and political philosophers to discuss the coerciveness of legal systems; namely, concerns about the way in which legal systems wrong citizens by coercing them (in case it wrongs them), and concerns about the kind of justification legal systems need to offer to coerce citizens. A legal system that coerces one person and a legal system that coerces many citizens into performing a series of actions, both need justification for their use of coercion just as equally. It just happens that the need for justification in the latter case becomes more salient.

Adopting this view and relying on the notion of *degree of coerciveness* has another advantage: it allows us to make sense of what I call ‘comparative judgements’ of the coerciveness of legal systems. Here are some examples of such judgements: ‘A legal system can be more or less coercive than it currently is’; ‘Some legal systems are more coercive than others’; ‘The same legal system may be more coercive to a group of citizens than to others’. The notion of degree of coerciveness allows us to evaluate the truth of such comparative judgements. To do that, we need a way to determine the degree of coerciveness of legal systems. To illustrate how to do it, let me take typical legal systems and explain how we could assess their degree of coerciveness and evaluate comparative judgements about them on the basis of the account of (Q2) proposed in the previous section.

According to the proposed account of (Q2), we would be committed to saying that a typical legal system doesn’t necessarily become more coercive just by prescribing more sanctions, or by prescribing harsher sanctions. We know that, because the system exerts pressure via systemic regulation, the number and strength of sanctions don’t matter much. Nor does a typical legal system necessarily become more coercive by simply increasing its enforcement ratio: if citizens don’t believe that authorities are disposed to enforce, nothing will be accomplished by increasing the enforcement ratio. According to the proposed account, a system with fewer sanctions and lower enforcement ratio may be more coercive than a system with more sanctions and higher enforcement ratio. But how exactly should we determine how coercive a typical legal system is?

Here is a *rough* way to determine the degree of coerciveness of a typical legal system. Take (A) the total number of actions a given typical legal system attempts to induce its population to perform or to abstain from performing via systemic pressure; (B) the percentage of population on which legal pressure is operative;³¹ and (C) the percentage of actions the system successfully induces citizens on which legal pressure is operative to perform or abstain from performing. We could then rely on a function—call it ‘Dc-function’—that takes (A), (B) and (C) into account. The value given by this function would amount to the degree of coerciveness of a particular legal system. The higher the value given by the Dc-function, the more coercive a system is.

The Dc-function is also useful to assess how coercive a legal system is to a particular group and to determine if a legal system coerces one group more than another. A legal system coerces Group1 more than Group2 provided that the system’s Dc-function value relative to the

³¹ For simplicity’s sake, I have omitted considerations about the degree of credence. A given population may have, for example, a higher degree of credence in legal authorities’ disposition to enforce. This seems likely to have impact on the degree of coerciveness. I am also disregarding the fact that some legal mandates are addressed to just a parcel of the total population.

population of Group1 is higher than the system's Dc-function value relative to the population of Group2. When comparing groups, however, we should not forget to exclude legal considerations that don't apply to the groups under analysis (e.g., certain laws and institutional mechanisms don't apply to certain minorities like migrants) and to include those legal mandates that—overtly or covertly—apply only to them.

As it may be apparent from what I've just said about the Dc-function, the assessment of the degree of coerciveness of legal systems depend on empirical analysis (but not solely on empirical analysis). Empirical methods from social sciences will be needed to investigate, for example, the extent to which a population holds the relevant beliefs about legal pressure, and the reasons why they comply with legal mandates. But by claiming that we can determine the degree of coerciveness of a typical legal system via the Dc-function, I'm not suggesting that a sociologist or political scientist could use it without any further qualifications or amendments to carry out empirical studies about the degree of coerciveness of a given typical legal system. There may well be methodological and practical challenges to use the Dc-function to conduct empirical studies that I'm neither aware of, nor have the proper expertise to identify. Be this as it may, the Dc-function at least provides a general idea of what sort of considerations are relevant in an assessment of the degree of coerciveness of typical legal systems. It can thus be taken as a starting point for political scientists and sociologists to develop more refined tests to determine the extent to which our legal systems are coercive.

References

- Anderson S, 'The Enforcement Approach to Coercion' (2010) 5 *Journal of Ethics and Social Philosophy* 1
- Choi S, 'What Is a Dispositional Masker?' (2011) 120 *Mind* 1159
- Choi S and Fara M, 'Dispositions', *The Stanford Encyclopedia of Philosophy* (2012) <<https://plato.stanford.edu/archives/spr2016/entries/dispositions>>
- Cross T, 'Recent Work on Dispositions' (2012) 72 *Analysis* 115
- Edmundson WA, 'Is Law Coercive?' (1995) 1 *Legal Theory* 81
- Gorr M, 'Toward a Theory of Coercion' (1986) 16 *Canadian Journal of Philosophy* 383
- Gunderson M, 'Threats and Coercion' (1979) 9 *Canadian Journal of Philosophy* 247
- Hart H.L.A, *The Concept of Law* (Joseph Raz and Penelope A Bulloch eds, 3rd edn, Oxford University Press 2012)
- Himma K, 'The Authorisation of Coercive Enforcement Mechanisms as a Conceptually Necessary Feature of Law' (2016) 7 *Jurisprudence* 593

- Huemer M, *The Problem of Political Authority: An Examination of the Right to Coerce and the Duty to Obey* (Palgrave MacMillan 2013)
- Lamond G, 'The Coerciveness of Law' (2000) 20 *Oxford Journal of Legal Studies* 39
- Lyons D, 'Welcome Threats and Coercive Offers' (1975) 50 *Philosophy* 425
- McCloskey H.J., 'Coercion: Its Nature and Significance' (1980) 18 *The Southern Journal of Philosophy* 335
- Nozick R, 'Coercion' in MPS Suppes White Morgenbesser (ed), *Philosophy, Science, and Method: Essays in Honor of Ernest Nagel* (St Martin's Press 1969)
- Oberdiek H, 'The Role of Sanctions and Coercion in Understanding Law and Legal Systems' (1976) 21 *Am. J. Juris.* 71
- Poscher R, 'The Ultimate Force of the Law: On the Essence and Precariousness of the Monopoly on Legitimate Force' (2016) 29 *Ratio Juris* 311
- Prior E, *Dispositions* (Elsevier Science Ltd 1985)
- Raz J, *Practical Reason and Norms* (Oxford University Press 1999)
- Schauer F, *The Force of Law* (Harvard University Press 2015)
- Shapiro S, *Legality* (Harvard University Press 2011)
- Wellman C and Simmons J, *Is There a Duty to Obey the Law?* (Cambridge University Press 2005)
- Yankah E., 'The Force of Law: The Role of Coercion in Legal Norms' (2007) 42 *U. Rich. L. Rev.* 1195
- Zimmerman D, 'Coercive Wage Offers' (1981) 10 *Philosophy and Public Affairs* 121