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What Makes Intervention Legitimate?

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Editorial Preface

Modern states are sovereign. Within their territories, and vis-à-vis their nationals, sovereign states have jurisdiction to prescribe and jurisdiction to enforce. Sovereignty is defined as the right to exercise power. In the days of absolutism, that was it. Yet all power can be abused, which is why modern states have constitutions. Constitutions do not only procedurally contain the exercise of sovereign powers. Constitutions also require that the exercise of the state’s powers be legitimate. Many constitutions even establish a constitutional court with the power to invalidate illegitimate sovereign interventions. This makes the legitimacy of intervention a matter of legal doctrine. Even if the constitution does not go that far, governments tend to explain why their interventions into freedom and property are legitimate. If the public perceives an intervention to be legitimate, this increases the probability of its implementation, and it makes reelection more likely.

But what makes intervention legitimate? This question was discussed by a group of economists, lawyers, psychologists, philosophers, and political scientists at the symposium that led to this special issue. In normative debate, consistency is a powerful property of a theory. The beauty of welfare theory is in the consistency between the descriptive model of human behavior and prescriptive consequences derived from this model. In the rational-choice model, individual decision-takers are assumed to maximize their subjective utility functions, which have the set of feasible outcomes as domain. The same utility functions are taken to define (Pareto-)efficient outcomes. Under rational choice, efficient outcomes serve as reference points for normative assessments. Notice that, since outcomes may describe the consumption bundles of all the involved parties and since one party’s bundle may enter another party’s utility function, the rational-choice setting is rich enough to cover preferences of an altruistic nature.

In political philosophy, originally, sovereign powers were not motivated by market failure. Hobbes pleaded for sovereignty as the solution to a much more basic problem: Sovereignty stops the war of all against all. Modern institutional economists would rephrase this task as defining and enforcing property rights. In their model,
Grechenig and Kolmar (2014) extend the domain of this argument. The normative problem is not confined to excessive aggression. Excessive defense may be as detrimental for welfare. If one owner of a house is the only one to protect her property by means of a vicious dog, thieves are likely to break into other houses. But if other house owners become aware of the deflection effect, they may buy even scarier dogs. This leads to a war of defense that burns as much welfare as a war of aggression. Grechenig and Kolmar interpret sovereignty as a technology for committing to a maximum level of defense. Government intervenes to prevent owners from later exceeding the collectively determined maximum.

Welfare economics is in trouble if preferences are not stable over time. Suppose a government is deciding whether a proposed bridge is worth building. The intervention in question thus is a straightforward decision to provide a pure public good. If preferences are stable, the only problem is learning individuals’ willingness to pay for the bridge. If the aggregate, time-discounted willingness to pay exceeds the cost of construction and maintenance, the bridge should be built. But what if people’s willingness to pay for the bridge changes once the bridge has been built? Empirically this seems quite plausible. Since crossing the river has become convenient, people move to the other side of the river, even if this means they have to commute to this side of the river. They become dependent on the bridge. Carl Christian von Weizsäcker (2014) develops a theory of adaptive preferences to tackle this problem. While the theory as it stands only speaks to isolated individuals, it lends itself to, and actually is meant for, enabling welfare economics in a world where preferences change in response to earlier choices. If the government has found acceptable ways of learning contemporaneous willingness to pay for the bridge (i.e., if it has implemented a mechanism), then it only needs one additional piece of information: The government must find out whether, in the relevant domain, the number of individuals holding antiadaptive preferences is sufficiently small. Preferences are antiadaptive if the fact that an agent consumes (one unit of) the good now decreases her willingness to pay for (the next unit of) the good in the future.

Welfare economics starts from the distinction between coercion and consent. If an individual has consented to some form of government action, this alone makes the intervention legitimate. One might also put it thus: by consenting, the individual reveals that she at least weakly prefers this action over the government remaining inactive. The power of consent is its potentially unconstrained domain. Once an individual has consented, this individual may not resist the exercise of sovereign powers, whatever its content. James Konow (2014) casts doubt on this normative conclusion. As a practical matter, a government often cannot wait until all affected have explicitly consented. Even if the government can point to statements, these statements are subject to interpretation. This is all the more required if consent must be inferred from action or inaction. Mere hypothetical consent is even more problematic. On the other hand, free will is not the only source of legitimacy. In political discourse, interventions are also regarded as legitimate if they have desirable consequences. This leads to a theoretical and, eventually, empirical research program aiming at charting the fragmented territory between coercion and consent.

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The normative debate on legitimacy is almost exclusively concerned with government action. Relying on normative philosophy, Fred Schauer (2014) claims this to be a limitation that leads to libertarian bias. If government does not become active, this is not normatively neutral, let alone desirable per se. He for instance regards it as intervention calling for justification if government does not engage in redistributing income so that the needy can lead a better life. Normative assessment depends on the (intended or unintended) consequences of either choice. In his thinking, the desired effect is critical. Legitimacy not only requires reducing the risk of false positives. Depending on the issue, false negatives may be more relevant.

Leo Katz (2014) compares legal choice versus rational choice and sees several conflicts between the two approaches. Legal filters, e.g., may prevent parties from implementing Pareto improvements, as the law serves multiple purposes, some of which may not (easily) be reconstructed in terms of welfare economics. Take a problem of triage. Assume an absolute limitation of medical personnel and equipment such that only one of three patients may be treated. If untreated, one would lose two legs, a second would lose one leg, and the third would lose a finger. Arguably the law solves the resulting moral dilemma by giving priority to the first patient. Now further assume that the third patient is the first patient’s wife, and would wish to cede his priority to his wife. Seemingly welfare economics dictates that this wish should be respected. It leads to a Pareto improvement. Nobody is made worse off, but husband and wife are made better off. Yet it is not clear whether the law would endorse this position. The original assignment of priority results from dissolving a moral dilemma. The law may not want to make this position tradable. Another way of making the point is this: the law feels entitled to ask the second person to tolerate losing one leg, since it is morally preferable to cure the person who stands to lose most. But the law does not feel entitled to ask the second person to tolerate the husband and wife’s trading this priority.

Several influential models from behavioral economics consider objective functions with a larger domain than just outcomes. Behavior is still predicted in line with maximizing these objective functions. Yet, due to the enlarged domain of these functions, the very concept of an efficient outcome as a normative reference point may be lost. Such behavioral theories may predict actual decisions more accurately than does rational choice. Normative assessments, however, may have to be based on exogenously imposed criteria. The link between positive and normative analysis becomes even more intricate if the underlying decision theory questions, implicitly or even explicitly, whether individual behavior is driven by maximizing any objective function at all.

Two papers address aspects of this challenge. Evidence from the field and from the lab supports the idea that many social dilemmas loom less large than welfare theory would expect. A social dilemma is characterized by the fact that it is in the individual’s best interest not to contribute to a public project, despite the fact that all would be best off if all contributed, maximally or optimally, depending on the production function of the public good. A substantial fraction of typical populations behave as assumed by this model. But the majority tends to consist of conditional
cooperators. They are willing to cooperate as long as they observe or expect sufficiently many members of the population to do the same. Feldman and Smith (2014) develop solutions for governing such heterogeneous populations, based on psychological evidence. They propose a regulatory mix that combines specific rules with standards that only fix a goal, and that combines mere constraints with interventions aiming at shaping moral attitudes. The law thus would prohibit some obviously socially detrimental acts of opportunism, but would also empower a regulatory authority or the courts to issue an injunction against “antisocial behavior,” and give the authority or court discretion to define what this means, given the circumstances.

All the foregoing papers discuss legitimacy as an objective standard. Xiao and Tan (2014) point to the subjective dimension. If addressees perceive intervention as legitimate, government may economize on the actual exercise of sovereign power. Addressees may accept the decision and implement it without further ado. This has a double advantage. The government saves resources, and addressees need not suffer government officials’ infringing on their liberty. In a lab experiment, Tan and Xiao show that the obligation to give explicit reasons disciplines public officials, and that this is rightly anticipated by addressees. Their game creates a conflict between an informed and an uninformed party, and empowers a third party to intervene on behalf of the uniformed party. In two treatments these third parties are given the opportunity to be corrupt. Still the governance effect is about the same as if this opportunity is not provided, provided justification is mandatory.

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