FREEDOM WITHOUT LAW

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ABSTRACT

Untangling the relationship of law and liberty is among the core problems of political theory. One prominent position is that there is no freedom without law. This paper challenges the argument that, because law is constitutive of freedom, there is no freedom without law. I suggest that, once properly understood, the argument that law is constitutive of freedom does not uniquely apply to law. It also applies to social norms. What law does for freedom, social norms can do too. Thus, I claim the question facing us is not the easy one of either law or social norms. Respecting this draws attention to the unique risks to our freedom introduced by both sets of norms.

KEYWORDS

Freedom, Law, Liberty, Republicanism, Social Norms

I. INTRODUCTION

Untangling the relationship between law and liberty[1] is among the core problems of political theory. One prominent position follows Locke's statement that, "Where there is no law, there is no freedom" (1980: 32, §57). Let us call this the no freedom without law thesis. Locke is far from alone in endorsing this view. I could just as well enlist F. A. Hayek's statement, "[w]hen we obey laws… we are not subject to another man's will and are therefore free" (2011: 221) or Sir William Blackstone's suggestion, "laws, when prudently framed, are by no means subversive but rather introductive of liberty" (1893: Book I, Chapter 1, ¶126).

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[1] I use freedom and liberty interchangeably.

The claim that there is no freedom without law, like many such pronouncements, is ambiguous. Because of this, the claim requires clarification prior to assessment. As will soon become apparent, the no freedom without law thesis operates on two fronts. On one front, there are those who argue that law is necessary for freedom because law always in part constitutes our freedom. I call this the strong version of the no freedom without law thesis, or the strong thesis for short. On the other front, there are those who argue that law improves our freedom relative to lawlessness. I call this the weak version of the no freedom without law thesis, or the weak thesis for short.

In this paper, I challenge the strong thesis, or the view that law is a necessary condition for our freedom because law in part constitutes our freedom. One way to challenge the strong thesis is to challenge the premise that law constitutes our freedom (Sharon, 2016). This is not my strategy here. I grant this premise. Instead, I suggest that the main arguments in support of the no freedom without law thesis do not uniquely apply to law. I will suggest they also apply to *social norms*, or informal normative rules accepted by a given population and used by that population in evaluating the behavior of others. What law does for freedom, social norms can do too.

Given this, my primary goal in this paper is more modest than the title lets on. I do not intend to fully rebut the no freedom without law thesis. My main intention in this paper is to advance the modest claim that social norms can do the work law does in constituting our freedom, and thus the strong thesis fails. That being said, I do not wish to limit myself to this claim. I believe these arguments help push forward the debate over law and liberty more broadly. The hope is to unsettle common narratives about law and liberty, and suggest how accepting these narratives uncritically risks frustration or self-defeat. More specifically, I seek to upset the idea that republican accounts of freedom as non-domination imply the strong thesis and thus are relatively sanguine towards the state and law (e.g. Pettit, 1997: 148). I also intend to provide some reasons to be wary of the weak thesis. To that end, the second part of the paper raises critical questions about the weak thesis related to how legal norms centralize power in a way social norms do not, and what sort of risk to our freedom that generates. This is not to say social

norms do not pose their own set of risks – indeed I believe they do and will say more about how they do in later parts of the paper. At a more general level, I hope to push past the narrow terms of the debate set by the no freedom without law thesis in both its strong and weak forms. I will suggest that the question facing us is not the easy one of *either* law *or* social norms. Instead, we face a complex web of social and legal norms that operate alongside each other at some times, and on their own at others. Respecting this draws attention to the unique risks to our freedom introduced by both sets of norms.

II. THE WEAK THESIS AND THE STRONG THESIS

In this section, I detail the aforementioned two versions of the no freedom without law thesis, the weak thesis and the strong thesis. As mentioned, the strong thesis is my target. Nonetheless, understanding why the strong thesis fails can aid in showing what is at stake in the weak thesis. For purposes of exposition, I begin with the weak thesis.

The weak thesis is represented nicely by Jeremy Bentham: "All coercive laws… and in particular laws creative of liberty, are, as far as they go, abrogative of liberty" (1838-1843: 503). Bentham presents us with an instrumental relation between law and freedom. According to the weak thesis, law limits our freedom. However, this limitation is compensated by an overall expansion in our freedom. The short argument for the weak thesis is that law serves as a deterrent to infelicitous interference by others. Thus, the weak thesis interprets the claim there is no freedom without law as the claim that there is less freedom without law, conditional on law promoting more freedom than it hinders.

The strong thesis does not posit an instrumental relation between law and freedom. Instead, law is a constitutive part of our freedom. In contrast with the weak thesis, the strong thesis holds there cannot be freedom without law by definition. Consider Philip Pettit's words on republican freedom and law:

> Republicans do not say… that while the law coerces people and thereby reduces their liberty, it compensates for the damage done by

> preventing more interference than it represents. They hold that the properly constituted law is constitutive of liberty in a way that undermines any such talk of compensation (Pettit, 1997: 35).

While the strong thesis is associated here with the republican tradition, I will soon provide evidence that it goes beyond that tradition. Importantly, this quote suggests that the strong thesis does not say law is sufficient for freedom. Rather, the strong thesis holds that law is *necessary* for freedom.

I begin by evaluating the strong thesis. For reasons that will become clearer as the argument progresses, focus on the strong thesis is instructive. Further, the weak thesis, unlike the strong thesis, does not hold that there can be literally no freedom without law. The point of the weak thesis is that, just *because* there is freedom without law, we need law in order to constrain others from interfering with us. Thus, we could redescribe the weak thesis as holding that we have *less* freedom without law relative to a condition of lawfulness. I do not intend to combat *that* claim within the narrow confines of this paper. Rather, my purpose is much more modest in drawing attention to how social norms can work below or alongside or in place of legal norms to both constitute and promote our freedom.

III. WHAT SORT OF FREEDOM?

The case for the strong thesis derives from a particular understanding of freedom. In this way, the strong thesis contrasts with the weak thesis. For the weak thesis, law itself limits our freedom, but does so in the service of increasing our overall freedom. The freedom in question for the weak thesis is freedom as non-interference.[2] Thus Bentham's compensatory logic: We trade some non-interference for

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[2] Insofar as the interference of others causes inability, the weak thesis still works if we take freedom as ability rather than as non-interference. Freedom as ability holds that all inabilities, and not just inabilities other agents are responsible for, constitute a constraint on freedom (e.g. Sen, 1992; Cohen, 2011: 193-197; Van Parijs, 1995).

more. In the Pettit quote above, however, law properly constituted does not limit our freedom. There is no need for compensation because no freedom is lost in the first place. To see this, we need to know what sort of freedom is at stake in the strong thesis.

As noted, the strong thesis is often associated with the republican tradition. Republicans hold that freedom requires not non-interference, but instead *non-domination* (Lovett and Pettit, 2009). Generally speaking, freedom as non-domination involves freedom from arbitrary power.[3] A continuing difficulty for republican theorists of freedom is providing an account of arbitrary power that avoids moralization (e.g. Sharon, 2016: 132-148; List and Valentini, 2016: 160-166). As my focus here is not republicanism, but instead the relation of law and liberty, I will set aside these difficulties and simply grant that republicans can avoid this problem. At a minimum, let us say that some agent A holds arbitrary power over another agent B when what happens to agent B is subject to the *discretion* of agent A. Agent A has discretion over what happens to agent B when agent A is able to act in, to use Christopher McCammon's term, "deliberative isolation" from agent B. That is, "A need only consult only A's sense of practical reason" when determining what happens to B (McCammon, 2015: 1046).

The appeal for freedom as non-domination comes from a particular set of cases. Primarily, republicans take the slave with a benevolent master as central to understanding freedom. A slave, no matter how permissive his master, is still unfree. To illustrate a similar point, Pettit uses the case of Nora in Henrik Ibsen's *A Doll House* (2014: xiii-xxiii). While Nora enjoys wide latitude in what she does by her doting husband Torvald, she ultimately enjoys this latitude at his pleasure given the structure of her society. Republicans use these sorts of cases to mobilize two arguments in favor of non-domination.

The first set of arguments involves the psychological costs attached to being subject to arbitrary power. In Pettit's memorable phrase, being subject to the arbitrary power

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[3] While Pettit has abandoned the language of arbitrary power in recent work, he has not abandoned it in spirit (2012: 58-59).

leads us to "fawn or toady or flatter" those with power (1997, 5). Specifically, arbitrary power promotes self-censorship and ingratiation (Lovett and Pettit, 2009: 13-18). Arbitrary power promotes self-censorship because one never knows what will trigger the wrath of those with power, and arbitrary power promotes ingratiation because the dominated seeks to keep the powerful benevolent.

There is some intuitive appeal to the psychological argument, but it is not without problems. Self-censorship and ingratiation are not always psychological outcomes we want to avoid – in ourselves and in others. For example, civil discourse requires people to sometimes hold back their true feelings and thoughts. Most people do not object to that sort of self-censorship. Similarly, we ingratiate ourselves with our friends on occasion as a way of making it more likely for them to grant us a favor in the future. This also is not obviously problematic. Nonetheless, the republican has a second, status-based argument at the ready. I suspect the psychological argument is parasitic on this argument.

According to the status-based argument, the problem with relations of domination is not their psychological cost, but that they involve relations of asymmetrical subjection. If I am subject to your discretionary power, I am in some ways dependent on your will while you are not subject to my will. This way of understanding domination posits a tight link between social equality and freedom (Anderson, 2015: 52-55; Kolodny, 2016: 63-68). You are free insofar as you have no one above you – you can act in the world without need for permission from a superior.

The idea that liberty requires freedom from subjection to the wills of others is not unique to the republican tradition. We already saw in my introductory remarks that Hayek also endorses this understanding of freedom. You can also find a similar notion among Kantians such as Arthur Ripstein, who claims, "You are independent if you are the one who decides what ends you will use your means to pursue, as opposed to having someone else decide for you" (2009: 33). I earlier noted that republicans are not alone in endorsing the strong thesis. This commonality between republicans and certain liberals in their conception of freedom suggests why.

IV. THE STRONG THESIS EXPLAINED

According to the strong thesis, law is a constitutive part of our freedom. Thus, without law there is no freedom. Understanding freedom as freedom from the discretionary power of others, we can see an argument beginning to take shape. Law is an impersonal force that allows us to keep at arms length the discretion of others, and those others can use the law to keep at arms length our own discretion. Where we have legal protection, even if some agent possesses power over us, we can use the legal system to ensure they answer to us as to how they use that power. Law closes the normative gap between those subject to power and those with power. You can read this sort of argument of the relation between freedom and law off of Harrington's plea for an empire of laws, not men. The implication is that, where laws rule, we are not subject to anyone's personal will (Lovett, 2012).

This argument is a bit too simple. One complication is that law can act, and has acted, as a tool of calcifying and even expanding discretionary power. However, this particular complication does not unsettle the strong thesis. For the strong thesis holds that law is a necessary condition, not a sufficient one, for freedom.

A more worrying complication challenges the claim that law is impersonal. Laws do not just fall from the sky. They have to come from *somewhere*. Specifically, laws are the product of a political decision and enacted through the state. Insofar as the state is an agent, we are subject to the *state's* will, albeit a collective one (Pettit, 2009: 50-51). Even in the presence of law, the objection continues, there is still some agent above us at whose pleasure we act – *the state*.

This objection is not as troubling as it appears at first. To show this, let me simply grant that the law is a product of the state, and, as such, places members of the state under the state's will as a collective agent. We can distinguish two questions suggested by the conception of freedom as non-domination. First, what would make it the case that our relationship vis-à-vis the state is a non-dominating one? Second, what would it make it the case that our relationship vis-à-vis other members of society is a non-dominating one?

Following Pettit, we can say the first question involves political legitimacy while the second social justice (2012: 3).

One way to interpret the strong thesis is that it only bears on social justice, not political legitimacy. There is no freedom without law insofar as law frees us from the discretionary power of other members of society. For our freedom vis-à-vis the state, some other conditions will have to be met. On the republican picture, these conditions traditionally involve democratic control over the state. We can set aside these issues here.[4] Regardless, the strong thesis still holds in regards to the question of social justice. Law is a constitutive part of our freedom because it limits discretionary power of those subject to those laws. To say that law is a constitutive element does not mean law is the only constitutive element, nor does it mean that law is sufficient. It only means that law plays a part that the symphony just cannot do without.

There is much more to be said about the relationship between law and liberty, but we have enough to proceed. The strong thesis holds that law is a constitutive element of our freedom. This is because law acts as an impersonal social force that limits the discretionary powers of others within our society. What I want to suggest is that the strong thesis is not wrong that law does these things. Rather, I will argue that there is another feature of our social world equipped to limit discretionary power: social norms. Social norms, like legal norms, function as accountability-creating devices. Thus, social norms can substitute for legal norms. The position I intend to take, then, is not that there is no freedom without law, but rather that there is no freedom without law and/or social norms. Thus, the title of this paper is slightly misleading. I am not exactly arguing for "Freedom without Law," but the less poetic "Freedom without Law Given the Presence of a Suitable Substitute in the Form of Social Norms." Before I get ahead of myself, it is worth saying something about how I understand social norms.

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[4] Similarly, we can set aside the view that freedom is constituted by democratic participation and strong political liberties. This is not a dismissal, but an acknowledgement that this topic requires its own paper.

V. A BRIEF INTRODUCTION TO SOCIAL NORMS

I follow Geoffrey Brennan and his collaborators in distinguishing social norms from two related concepts: statistical norms and objective normative principles (2013: 2). A statistical norm or habit is simply a regularity or commonality among a population. For example, we might describe the norm among a people is to go to sleep at night. By this, I mean nothing more than that we should tend to observe people going to sleep at night. The regularity is all that is referred to by this sense of norm. An objective normative principle is a sound moral precept, such as "Slavery is wrong" or "Do not murder." Such normative principles tell us nothing by themselves about what people will do, but are sources of genuine practical reasons to act in certain ways. These sorts of norms do not depend on whether or not people accept them.

Brennan and his collaborators suggest social norms at their most general level involve two elements (2013: 3-4). First, social norms have a "normative" element in that they purport to supply practical reasons and are generally presumed to do so. Social norms provide agents guidance in regards to what they ought or ought not do. These normative requirements are not particular, but general. By this, I mean that social norms pick out action-types. For example, a social norm holds "People should not cut in line." When Michael cuts Nora in line at the Starbucks this Monday at 9:03am, what the norm makes salient is not the particular agents and circumstances, but that this violation is a token of a broader action-type ("cutting in line"). Second, social norms are social facts. By this, I mean that social norms exist only to the extent that persons accept them and/or believe that others or enough others accept them. Because of this, you cannot have a social norm without referring a given population.

Although there is disagreement over the more fine-grained features of social norms so understood, these more detailed considerations needn't concern us here. Whichever specific account of social norms one favors, all agree that such norms render us *accountable* to one another (Brennan et al, 2013: 36-37). Accountability involves liability to sanction for violation of some known standard (Keohane and Grant, 2005: 29-30). In this way, norms not only invoke attitudes of approval or

disapproval, but also serve as grounds for sanction. The sanctions for violating social norms tend to come in the form of some type of public criticism, though they can also involve stronger sanctions such as ostracism or even violence. Sanctions relate to what H. L. A. Hart calls "the *internal aspect* of rules" (2012: 56). By this, Hart means that rules involve not just observable patterns of behavior, but also a "critical reflective attitude" among those subject to the rules (2012: 57). Such a critical attitude is not limited to internal reflection on the behavior of one's self and others, but enacts itself in how people respond to violations of the rules in question. Social norms ground and guide, to use Margaret Gilbert's term, forms of "punitive criticism" by others, even when these norms are not encoded formally in law (1999: 148).

Consider again a norm against cutting in line. When someone cuts in line, this prompts disapproval and some critical social response (e.g. I might ask the cutter "Excuse me. What do you think you're doing? There is a line here!"). Further, most of us would not bat an eye at an individual upholding norms surrounding queuing. An implication is that norms give strangers standing to sanction our actions if they are contrary to a norm – it does not matter if the person enforcing the norm against line cutting is someone we know.

To be clear, the form of sanction licensed by a norm is variable, and is itself subject to second-order norms. Setting off on a hate-filled tirade over violations of table etiquette is inappropriate, even if some form of sanction is called for (perhaps a furrowed brow will do). That said, social sanctions of all stripes constitute punitive criticism insofar as the sanction makes apparent the disapproval of the norm-enforcer. While less confrontational than questioning, raised brows, tutting, pursed lips, dirty looks, and the like all get the same message across: I disapprove of your norm-violating behavior and I want you to know. Where social norms call for stronger sanctions, such as ostracism and violence, even these cases appear to involve an expression of disapproval.

VI. SOCIAL NORMS AND FREEDOM

We can now return to the main argument. Social norms, as I have suggested, ground relations of accountability between agents within society. In this way, the presence of a social norm, much like the presence of a law, closes the normative gap between persons in society. If you act in a way contrary to a social norm, I am licensed to sanction you. Social norms thus constitute a limit on discretionary power, similar to legal norms. Formally speaking, it follows that social norms can do the task that legal norms do.

This is not to say social norms and legal norms are identical. A primary difference between social norms and legal norms is rooted in the *informality* of social norms in contrast with the formality of legal norms (see also Brennan et al, 2013: 40-56). Social norms are informal in two ways.

First, social norms are informal in their *source*. In the language of Hart, social norms are limited to *primary rules*, or rules that apply directly to people (2012: 117). Legal norms, following Hart again, involve not just primary rules, but also secondary rules. Secondary rules, simply put, are rules about rules. Secondary rules provide conclusive answers to questions such as: How do we know what the rules are? How do we create rules? How do we determine violations of the rule? And so on. Social norms lack secondary rules in this sense. There are no authoritative ways of answering these sorts of questions for social norms.[5]

Second, social norms differ from legal norms in questions of *enforcement*. When someone breaks the law, there are clearly demarcated agents who are responsible for enforcing the law. Other agents are not permitted to enforce the law. For example, the state can throw you in jail for assault, but I cannot throw you in my basement for assault. In contrast, social norms tend to be enforceable by everyone in the

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[5] We can look to Emily Post to find out what proper etiquette is, but we do not take such books as authoritative. Etiquette manuals' directives are subject to dispute and disagreement in a way that the finding of a court of law is not. To use Joseph Raz's language, the directives of Emily Post do not purport to be providing exclusionary reasons to set aside one's judgment about the case at hand (Raz, 1990). A court's ruling does.

relevant norm community.[6] Because of this, the power to enforce is generally dispersed for social norms in a way legal norms are not. Further, modes of enforcement tend to differ between social and legal norms. Social norms tend to operate through social opprobrium and criticism, while legal norms through force and violence. Though, as I noted in the previous section, this is only a tendency. The social norms that bind a mafia or gang together, for example, license violence.

It is worth pausing here to note a difference between legal and social norms significant for the strong thesis. As noted, social norms lack secondary rules. This means there is no rule of recognition for social norms – there is no authoritative procedure by which an agent, individual or collective, establishes a social norm. Earlier, I noted how the fact that law is established by the state generates a complication for the strong thesis. The idea was that, even if law acts as impersonal mediator of discretionary power between members within society, we nonetheless remain subject to the discretionary power of the state as a collective agent. But notice that, because they lack secondary rules, social norms do not directly emanate from any particular will. According to a number of influential analyses, social norms are not the product of a political process, but instead emerge from the unplanned interaction of individuals (Axelrod, 1986; Bicchieri, 2006). Being subject to a social norm then does not involve being subject to some further agent. In this way, the formal structure of social norms confers upon them an advantage over law. Whereas law provides an answer to the question of social justice at the cost of raising the question of legitimacy, social norms answer the question of social justice without raising the question of legitimacy.

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[6] I say this is only a tendency as some social norms may highlight particular individuals to enforce the norm in question. If you slight my honor, for example, I have the particular right of retribution in such a case. Nonetheless, even in such cases, the community tends to play a role in enforcing the norm of particular enforcement. I might not want to make use of my right of retribution, but feel pressured by the social norm to do so. In this way, enforcement may be dispersed on a second-order level.

As in the case of law, however, focusing on the formal characteristics of social norms will not tell us the whole story. Just as particular legal norms expand discretionary powers, so too do social norms. I will say more about this in Section IX. Nonetheless, it is worth briefly dealing with an objection here. While I see the lack of secondary rules as a strength, a critic might see this as a weakness. Specifically, a critic might object that, because social norms lack secondary rules, they lack authoritative mechanisms by which we can change and amend social norms. In contrast, we *do* have ways to change laws where they fail to live up to their promise. Thus, bad social norms may stick around in ways that laws do not.

I have a few things to say in response. First, I can grant the objection and still get my modal claim: If the strong thesis rests on law's power to limit discretionary power, social norms can do this too. Thus, law is unnecessary for freedom. I only raise the issues of secondary rules to distinguish social norms from legal norms, and point out a potential advantage for social norms. Second, the ability to change laws cuts both ways. Laws that presently do a satisfactory job may be changed to worsen our freedom. Thus, *good* social norms may stick around in ways that laws do not. Finally, my claim is not the anarchist one that we ought to opt for social norms *always* and avoid the law. I simply mean to challenge the claim that the absence of a legal rule limiting discretionary power means necessarily that we lack freedom. There are undoubtedly situations where legal norms will do better than social norms in constituting our freedom, as I will suggest later, but this does not unsettle my main claim.

At this point, a sympathetic but critical reader might acknowledge that I have established this modal claim. However, such a critic will wonder whether this modal claim matters much *for us*. For the remainder of this paper, I turn to this topic.

VII. SOCIAL NORMS AT WORK

To take stock, my primary goal in this paper is to challenge the strong thesis, or the claim that law is a constitutive element of our freedom. I have suggested the motivation for the strong thesis rests on law's ability to eliminate

domination by limiting discretionary power. I have suggested that social norms formally share this feature with law. As I noted earlier, I am interested in how social norms work alongside or below the law in constituting our freedom. Nonetheless, as this argument develops, I will point out its implications for the weak thesis, or the claim that law enlarges our overall freedom, understood as freedom as non-interference, at the cost of some of our freedom.

In this section, I intend to make my modal claim more robust by providing some evidence that social norms, practically speaking, promote freedom. As a first cut, indulge the following thought experiment: Suppose we had a system of law aimed at promoting freedom, understood here as freedom as non-domination (though my argument here has implications for freedom as non-interference as well). However, suppose that there were no social norms that converged with the requirements of that law. People only considered legal norms in terms of enforcement and management by the state. In such a situation, I agree with David Watkins that a "community indifferent to or even supportive of domination could render legal remedies dead letters" (Watkins, 2016: 850; see also Gaus, 2016: 206-207). The problem is that if legal norms are the only norms in force, we have to rely on the deterrent force of law in dealing with others. But such deterrence is imperfect, and varies in relation to the extent agents believe they can get away with the prohibited acts. You could think of this in relation to speeding. The legal norm against speeding is violated regularly. However, as soon as everyone sees a police car, they slow down to abide by the legal norm, likely for fear of enforcement of the legal norm against speeding. Imagine if such conditional norm abidance expanded to *all* legal norms. Specifically, imagine that most people basically broke the norm unless they saw a cop or expected monitoring. Such a relationship to law would be a recipe for disaster. Because of this, I want to make a slightly stronger claim than I have been making: social norms are *necessary* to law playing its part. However, this thought experiment does not vindicate social norms fully. This only shows the importance of social norms to formal legal and political norms. To go further, I would need to show how social norms operate independent of law.

In an important book, Robert Ellickson (1991) provides an in-depth study of how cattle ranchers in Shasta County, California deal with disputes over cattle trespasses. As you can imagine, a complex body of law dictates rules of liability surrounding cattle-trespass disputes. Further complicating matters are the distinction between open range laws and closed range laws, which apply different rules of liability (Ellickson, 1991: 44-48). In a closed range the cattle owner is strictly liable for property damages caused by trespass, whereas in an open range the cattle owner is generally not liable for property damages caused by trespass, even if negligent.[7] Now, you may be wondering why I am talking about the laws surrounding cattle trespass at this point. What is fascinating about Ellickon's study for my purposes here is how ranchers tended to ignore these laws in their disputes (1991: 40). Rather than resolve disputes through the law or even in the shadow of law, cattle ranchers in Shasta County tended to resolve their disputes, in Ellickson's words, "beyond the shadow" of the law (1991: 52). Generally speaking, ranchers abided by "an overarching norm of cooperation among neighbors" independent of whether or not open range or closed range laws applied (Ellickson, 1991: 53). This generally entailed absorbing minor damages, using gossip and reputation against abusers, and occasionally using force against cattle if their owners ignored repeated pleading. Further, use of law was looked down upon as un-neighborly among the ranchers of Shasta County (Ellickson, 1991: 60-61).

Ellickson's case of Shasta County shows some of the ways individuals rely on norms as they go about their business, independent of the formal legal and political system. Ranchers were able to understand the terms on which others interfered with their business, and were able to respond to violations of these terms. Are such ranchers "dominated" because they fail to use the formal mechanisms of control offered by the legal system? Such a conclusion is surely too strong. It seems that in such circumstances the norms successfully established relations of accountability between

[7] The exceptions are if the trespass is by animals other than cattle, if the trespassed property was legally fenced in, or if the trespass was intentional.

the ranchers – even though they were surely violated from time to time.

We could also point to cases where law incorporates pre-existing social norms as further evidence that social norms can play the part. Differing whaling communities historically adopt different norms surrounding what action establishes ownership (Ellickson, 1991: 191-206). Some communities adopt a "fast fish, loose fish" rule, where ownership requires the whale to be physically attached in some manner to the claimant's boat. Other communities adopted an "iron holds the whale" rule, where ownership belongs to the boat that landed a harpoon or weapon of some variety in the whale, whether or not the whale was attached to the boat. The difference tended to depend on circumstance. Where whales tended to be docile and slow, whaling communities tended to adopt the "fast fish, loose fish" rule. Where whales tended to be dangerous and fast, whalers tended to adopt the "iron holds the whale" rule. What is important is that, in the 1880 court case *Ghen v. Rich* involving a dispute over ownership of a beached whale that was harpooned, the judge did not make law out of whole cloth. Instead, the judge respected the previous existing social norms among various whaling communities. Where the norms work, it is better to have the law follow the norms (see also Schmidtz, 2011: 606). Norms evolve in response to diverse circumstances that those distant from the norm communities in question regularly fail to comprehend (Ostrom, 1990).

While these sorts of cases support my claim, they also reveal at least some of the limits of social norms in grounding our freedom in contrast with legal norms. Most examples of social norms successfully regulating cooperation among individuals independent of law tend to focus on property and commerce. Who owns what? What happens when you trespass? How do we deal with line-cutters? And the like. This is not to say that these are not all forms of interference. They are. But such questions do not capture all forms of interference, and, in particular, bodily harm.[8] Thus, social norms may be of limited use when the stakes are particularly

[8] Ellickson limits his analysis to "workaday affairs" as opposed to "foundational rules" (1991: 175).

high. When the stakes are high, this is when we need more formal institutions. Even then, I want to remind the reader that social norms play a key role *alongside* legal norms to secure freedom.

Prior to moving on to the upshot of this analysis, I want to briefly suggest that there is still a role for social norms in protecting people from severe interference, even in the absence of political and legal institutions. In such non-ideal circumstances, social norms can limit the potential threats to freedom of a lawless society. Peter Leeson (2009) discusses various norms and conventions that reduced violence at the Anglo-Scottish borderlands in the sixteenth century and earlier. The borderlands, on Leeson's account, constituted "a lawless arena," and, as such, held the potential to become a perpetual bloodbath (2009: 476). However, violence at the borderlands was restrained by various norms and customs. For example, borderers could resolve disputes via duels (Leeson, 2009: 492). While a duel is a suboptimal dispute resolution mechanism (to put it lightly), it still does better than an alternative: full-on fighting. Better at most two individuals die than put two families or group at war. [9] Even in the absence of formal institutions, then, it seems norms play a role in promoting freedom. To be clear, I do not think the borderlands constitute a free society. Nonetheless, there is something like a shadow of freedom that exists in such circumstances.[10]

VIII. NORMS AND THE DISTRIBUTION OF POWER

So far, I have argued that the strong thesis fails. Social norms can substitute for law or at least work alongside and below

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[9] It is worth also considering the case of *jus in bello* norms, or norms that govern what is permissible to do in the course of conducting war among nations. Such rules have only recently found their way into formal international law, being something like social norms among nations prior. It seems plausible that such norms of warfare limit violence relative to total war (e.g. Mavrodes, 1975: 124-130). I thank an anonymous reviewer for suggesting this case.

[10] Even on the borderlands, some felt sufficiently secure to engage in at least *some* agriculture, an activity that requires planning (Leeson, 2009: 478).

law in constituting freedom. While some of my comments in the previous section have touched on the weak thesis, I want to engage it more directly in this section. As I noted in the introduction, I do not think I can rebut the weak thesis here. Instead, I want to provide some reasons to be wary of the weak thesis grounded in this discussion. In particular, I want to point out how legal norms rely on centralization in a way social norms do not. Such centralization generates risks to our freedom. Again, I do not intend to adjudicate the weak thesis here, but only to show why we ought not take it for granted.

Let me begin with what I call "the simple case for decentralization," or "the simple case" for short. The simple case begins with the observation that different kinds of norms involve different distributions of power. Let us limit our purview to what I want to call a nodal approach to power. The idea is that we can imagine each person as a node in a network among other persons. Different kinds of norms distribute power among the nodes in particular ways. Take legal norms. Legal norms involve shifting power in the network to particular nodes that are agents of the state. This power is what Pettit in earlier work calls *imperium,* or the power the state has over its subjects (1997: 112). In contrast, social norms do not require *imperium*. Instead, they operate through the scattered beliefs and actions of individuals among a population. When an informal norm is broken, we do not turn to the state, but take it upon ourselves to enforce the norm. No one corporate or individual agent alone enforces informal norms. Instead, norms make us accountable to each other independent of our formal office. Whereas legal norms depend on centralized institutional frameworks, social norms operate through individual actors holding other actors accountable. This requires less power held in the hands of one individual or corporate agent. Instead, social norms disperse power throughout a population. In this way, social norms involve a flattening of the distribution of power in comparison with formal institutions.

This observation is not an insignificant detail. We have to be sensitive to the distribution of power, as granting power to particular agents for the sake of preserving freedom also grants them the power to invade that freedom. If we treat

others as agents, there are no guarantees regarding how those agents use their power. What follows from this?

A common view is that centralizing power poses a threat to our freedom. Why this is so is not always clear. To get at this, let us begin with the idea of expected interference, where "expected" is understood in a way similar to how utilitarians understand "expected" in "expected utility." Let us represent expected interference as the product of the probability of an interference occurring and the size of the interference. Formally speaking, $E(I) = Pr(I)*I$, where E(I) represents expected interference, Pr(I) represents the probability of a given interference occurring, and I represents a the magnitude of that interference. Following theorists of freedom as non-interference such as Ian Carter and Matthew Kramer, I hold that calculations of expected interference figure into judgments about overall freedom (Carter, 1999: 237-245; Kramer, 2003: 134-143). Starting from this simple formula, it becomes clearer how centralization might threaten our freedom.

First, centralization might involve increasing the probability of interference with our choices. I believe this sort of concern is at the core of Lord Acton's dictum that power corrupts, and absolute power corrupts absolutely (Acton, 1887: Letter I). We are steering into empirical territory here, but let me suggest a few plausible mechanisms of how centralizing power might increase the probability of abuse. I suspect these sorts of mechanisms tend to capture the ordinary fears people have about centralization and freedom.

On the ordinary reading, Lord Acton's dictum gives the sense that when people come to have power it tends to warp their character. This provides our first mechanism of how power might increase unfreedom by increasing the probability of interference: Power corrupts individuals. Given people as they are, the temptation presented by more and more power becomes irresistible. We might get something like the corruption present in the Ring of Gyges story, where being placed in a position of great power allows the power-holder to get away with self-interested behavior that he could not otherwise get away with.

In addition to individuals, power also might corrupt offices or institutions. When you confer power on an office or

institution, you make it so the individual who occupies the office or a role in the institution has more power in virtue of his or her position. This makes the office more appealing to individuals who want that power to use for their own self-serving purposes. However, this is not how we want the institutions tasked with preserving our freedom run. To use David Schmidtz's metaphor, the point of an umpire is to call the shots and make sure the game is played fairly, not create a winner (2015: 49).

Both of these theories provide an explanation for how centralization might increase expected interference by increasing the probability of interference. However, they involve empirical claims about how power actually operates on individuals and institutions. While plausible and even intuitive, such explanations are only speculative. I have provided no evidence here to suggest how this might be the case. The next suggestion about centralizing power, too, involves an empirical claim. However, this next claim is slightly more robust as it holds true not only when centralizing power increases the probability of interference, but also when centralizing power has no effect on the probability of interference.[11]

The second way centralizing power can increase expected interference is through acting on the invasion that we are worrying about. The formula $E(I) = Pr(I)*I$ implies that granting an agent or institution more power increases the expected interference we face by increasing the magnitude of potential interference, even if increasing power has no effect on the probability of abuse of power. Let me explain this less formally and more intuitively. Consider Isaiah Berlin's use of the metaphor of many doors and Pettit's development of that metaphor to explain our freedom. For Berlin, freedom is represented by the amount of doors that are open to us (1969: xxxix). Pettit adds in the character of a doorkeeper to explain why the reasons that led Berlin to

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[11] There is the possibility that centralizing power actually *decreases* the probability of interference. In contrast with Lord Acton's dictum, we might instead consider Spider-Man's dictum: With great power comes great responsibility. While I believe it unlikely, this possibility is worth acknowledging. I thank Andrew Williams and an anonymous reviewer for alerting me to this possibility.

endorse non-interference over non-frustration should lead one to endorse non-domination over non-interference (Pettit, 2011: 708-709). Suppose I am the doorkeeper, and there are three doors. Suppose I am only in charge of guarding one door. My potential abuse of this power is limited to closing that door, rendering you unfree to go through that door, but not the others. If you give me power over two doors, however, I now can abuse that power to render you unfree to go through *two* doors, not just one. The threat to your freedom is larger in the second scenario not because I am more likely to abuse my power, but simply in virtue of the fact I can do more to invade your freedom. Giving me this power increases the magnitude of my potential interference. Ceteris paribus, increasing the power of a given agent necessarily increases expected abuse by that agent.

A quick caveat to avoid misunderstanding: Despite my reference to Pettit in the previous paragraph, I am not saying that the mere possibility of a given interference constitutes an invasion of freedom à la freedom as non-domination. Instead, I am saying that insofar as the *magnitude* of a given interference figures into calculations of *expected* interference, increasing the magnitude of interference will increase expected interference. [12] To the extent that expected interference is relevant to judgments about degrees of freedom, then, ceteris paribus, increasing the magnitude of a possible interference will matter to judgments about degrees of freedom as non-interference.

What this means, practically speaking, is that we should be wary of expanding the reach of coercive institutions and procedures where there are gaps in those institutions and procedures. Social norms require the least centralization insofar as they operate without formal institutions. This does not mean we should *never* opt for law. Again, I am only raising questions about the weak thesis, not rebutting it. The point is that we ought to be sensitive to how individuals are able to navigate their social lives through the use of informal norms. Obviously, this is not always possible. Further, attention to the relation of social norms to freedom also points out how such norms can go awry and make our

[12] Unless the probability of a given interference is zero. Then expected interference will remain at zero.

choices *more* vulnerable (e.g. Hayward, 2011: 483). I have already suggested at least one situation where social norms will fail to do the job: When the stakes are high. In the next section, I will say more about when decentralization fails.

IX. THE FAILURES OF DECENTRALIZATION

So far, my arguments have proceeded formally. My discussion of social norms assumed that they apply to people in an even manner, independent of the particulars of their identity. However, in practice, norms do not universally apply to all people equally within a society. People tend to hold others to different standards depending on their identity. For example, consider a norm of holding the door for others. It is difficult to talk about that norm without acknowledging the role gender plays in judgments surrounding when and how the norm applies. Here, I focus on situations where social norms serve as an instance of one of Iris Young's five faces of oppression: Violence. Violence for Young involves, "the daily knowledge shared by all members of oppressed groups that they are *liable* to violation, solely on account of their group identity" (2011: 62). The idea, I take it, is that being a member of a particular group places one in a position of vulnerability. I think this idea is best cashed out in terms of social norms.

Take, for example, norms of neighborhood segregation. In a recent book, the legal scholars Richard Brooks and Carol Rose (2013) discuss how white neighborhoods turned to a mix of social norms and law to enforce segregation. One element of racial segregation is racially restrictive covenants – legal restrictions that run with property forbidding members of minority racial groups from owning that land. As a legal tool, the ability of racially restrictive covenants to enforce segregation is self-evident. However, such covenants were declared legally unenforceable in the 1948 Supreme Court case *Shelley v. Kraemer.* The puzzle is that, despite being declared legally unenforceable, such covenants remained in use by real estate professionals in the years following *Shelley* (Brooks and Rose, 2013: 5). If racially restrictive covenants were legally unenforceable, why would real estate professionals still use and refer to such covenants? Brooks and Rose suggest that these covenants signal to both neighbors and potential buyers what the

norms of ownership in the neighborhood were (2013: 191). Such covenants were primarily a tool of middle-class neighborhoods. Working-class neighborhoods, Brooks and Rose report, were effective in enforcing segregation through the use of informal intimidation and norms alone (2013: 4).

Cases such as racial segregation suggest opting for a decentralized solution does not always promote freedom, both as non-interference and non-domination, but instead can directly threaten it. Norms can fail to promote our freedom in terms of *content* and in terms of *scope*. The segregation norms above appear to be a case of where a particular norm fails in terms of content. The content of the norm of segregation holds that it is impermissible for a member of non-white racial groups to hold property in white neighborhoods. The norm itself directs harassment and social sanctions against people who violate it – black people attempting to buy and hold property in white neighborhoods. The very content of such a norm involves a breach of freedom. But, a norm might fail to serve as a basis for freedom in terms of *scope* rather than content. By scope, I mean the question of to whom the norm applies. It might be that certain norms against interference protect some groups within society, but not others.[13] Take a norm against shoving people in the street. The content of such a norm seems to promote freedom. We are all better equipped to navigate the streets if we can rely on being free of physical invasion. But, if that norm applies only to members of a certain class or group, then it will fail to perform this function. For example, if in a particular community, white people are licensed to shove black people without reproach because the norm community is thought to not include black people, this seems to be the epitome of Young's notion of violence.

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[13] The problem of scope relates to Melvin Rogers's worry that Pettit's account of republicanism is excessively legalistic. For Rogers, the experience of African Americans as having a status separate from and less than that of White Americans under White Supremacy indicates the ways that different standards apply to different people, and that a failure to attend to the cultural forces that create such status-differentials will leave intact systems of domination (Rogers, forthcoming).

Thus, it is clear that social norms do not always promote our freedom, and knowing how and when they fail is important. However, prior to concluding, I would like to make a quick observation. If it is the case we cannot rely on norms to secure our freedom in a particular case, it does not necessarily follow that we should opt for centralization, or at least centralization on its own. Consider the segregation case above. *Shelley* was a centralized response to a decentralized problem. And yet, it was insufficient. Racially restrictive covenants and the norms against integration they signaled remained. Failures of decentralization might require decentralized responses alongside centralized ones to be successful. Indeed, Brooks and Rose discuss "norm-breaking entrepreneurs" in their investigation of norms of segregation (2013: 115). Such individuals disrupt the norms in question by purposefully violating them. We could also note how the National Association of Real Estate Exchanges (NAREB), or the professional association of realtors, adopted a norm against racial discrimination in their Code of Ethics in 1974 (Morrow, 2016). To be clear, I do not mean to say that centralization does not have its place in such efforts. Undoubtedly the change in norms for the NAREB was in part a response to the Fair Housing Act of 1968. I only mean that centralized means of promoting freedom are limited by their ability to move in concert with more decentralized means.

X. CONCLUSION

In this paper, I argued against a version of the claim there is no freedom without law. My strategy involved granting many of the premises held by defenders of that claim. Specifically, I engaged those who hold what I have called the strong thesis, or the idea that the law is a constitutive element of our freedom insofar as it frees us from being subject to the will of other agents, individual and collective. I argued that social norms, too, limit the discretionary powers of other agents. Thus, there can be freedom without law when the proper social norms are in place. Based on these arguments, I raised questions about the weak thesis, or the claim that law promotes our overall freedom, understood as freedom as non-interference, at the cost of some of our freedom. I argued that the centralization of power that law

creates introduces new risks to our freedom that social norms do not share.

Defenders of the strong thesis sometimes appear sensitive to these ideas. Pettit, for example, in building his account of political legitimacy, briefly entertains the idea of establishing a system of justice not through the state, but through a decentralized system of social norms (2012: 134-135). However, Pettit rejects this possibility. Most important for our purposes, Pettit suggests that a system of norms would "be unlikely to provide suitable protection for all" (2012: 135).

I agree that a system of informal norms is insufficient to securing freedom, whether that freedom is understood as non-domination or as non-interference. But these sorts of criticisms fail to appreciate the complexity of authority in any given system. We do not face the choice of *either* a state *or* a system of decentralized norms. The reality is that authority is not vested in the state alone, but rather decentralized and shared among many different individuals and group agents. The authority of the state overlaps with and works alongside the various informal social norms that structure our daily interactions. It is a fact of our associational life that there are gaps in the authority of the state, and attempting to close these gaps is both undesirable and infeasible (see also Levy 2015). We should push the debate past the narrow confines set by the no freedom without law thesis, in both its strong and weak forms, as the choice is not so much state or norms, but about when do we expand coercive rules and when do we want to let informal modes of navigating social life secure people's choices. This requires us to have the knowledge of when norms operate effectively in constraining power, and when do more formal modes of enforcement work. These sorts of questions become more complicated by the fact that formal institutions tend to fail without certain social norms in place. Nonetheless, this complex landscape of securing freedom is the one we should confront, rather than the simple one often presented by the narrowly state-oriented outlook embodied by the no freedom without law thesis.

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