

*A Note to Oxford colleagues, friends, and readers: What follows are the first five chapters of an eleven chapter book entitled *The Force of Law*. Chapter One is an introduction and overview, and Chapter Two and the earlier parts of Chapter Three are largely jurisprudential throat-clearing. For purposes of the Jurisprudence Discussion Group session, I propose to concentrate on the methodological issues in 3.4 and 3.5 and the analysis in Chapter 4, with a bit on the empirical conclusions in Chapter 5. I should mention as well that the book is not nearly as final as the seemingly polished text that follows might suggest. Having the attention span of a typical ten-year-old boy, I relieve my boredom by polishing the prose and the footnotes. But this is very much a draft of a work in progress, and I look forward to your comments, corrections, and challenges. FS*

CHAPTER ONE

INTRODUCTION: THE FORCE OF LAW

1.1 *The Ubiquity of Coercion*

Law makes us do things we do not want to do. It has other functions as well, but perhaps the most visible aspect of law is its frequent insistence that we act in accordance with its wishes, our own personal interests or best judgment notwithstanding. The law demands that we pay taxes even when we have better uses for our money and think the taxes unwise. It forces us to obey traffic regulations even when the circumstances make them seem pointless. And at times the law conscripts us into military service, though we may believe the wars immoral, the dangers exaggerated, or the enemies imagined.

Law is hardly the only inhabitant of our normative universe. Morality makes demands upon our behavior as well, and so also do manners, etiquette, and countless social norms. But law, unlike morality and etiquette, possesses the resources to compel compliance in ways that

other normative systems do not. It may be wrong to tell a lie or clip one's fingernails in public, but disobeying these strictures often brings no sanctions whatsoever. And even when such behavior attracts the social penalties of disapproval, shaming, guilt, ostracism, and damage to reputation, the penalties are diffuse and unsystematic. By contrast, the law has sanctions at its disposal that are systematic, often severe, and highly salient. The legal system can put us in prison, take our money, and in some places even flog us and kill us. Moreover, when the law imposes such sanctions, it is commonly understood within the relevant society to be operating justifiably, that is, legitimately. Of course the law is often subject to moral and political criticism when it imposes its sanctions unfairly, unwisely, imprudently, or immorally, but it remains widely accepted that law may ordinarily and legitimately use force to ensure compliance with its directives.¹

That the law can force people to do things they do not want to do, and which are sometimes against their own interests or their own best (and not necessarily self-interested) judgment, might seem far too obvious to justify thinking or writing much about it. But here, as elsewhere, things are often not what they seem. For more than half a century, legal philosophers, drawing their inspiration from H.L.A. Hart,² have questioned whether force, coercion, and sanctions are as important to understanding the nature of law as the ordinary person – the man on the Clapham omnibus, as the English quaintly put it – believes. Leslie Green, for example,

¹ We will postpone until Chapter Nine considering whether there are distinctions of importance among “sanctions,” “force,” “coercion,” “compulsion,” and the various other ideas and terms that inhabit the same conceptual neighborhood. For now these words will be used more or less interchangeably, depending on context, but with no intention yet to mark any differences among them.

² H.L.A. Hart, *The Concept of Law*, 3d ed., Penelope A. Bulloch, Joseph Raz, & Leslie Green, eds. (Oxford: Oxford University Press, 2012) (first published 1961).

claims that a regime of “stark imperatives” that simply “bossed people around” or that employed a “price system” to “structure[] their incentives while leaving them free to act as they pleased” would not even count as a “system of law” at all.³ Such efforts to marginalize the place of raw force in explaining what makes law distinctive follow on Hart’s seemingly sound observation that law often empowers rather than coerces. It establishes the structures and even the very concepts by which people can create corporations, make wills, and, especially, form governments. Yet understanding law as being coercive when it operates in this manner seems odd. The law, after all, does not appear to care whether I make a will or not, and certainly does not coerce me into making or not making one. But although the choice to make or not make a will is mine, it is the law that enables me to make a will in the first place. Without the law there simply would be no such thing as a will, just as without the rules and the institution of chess there would be no such thing as checkmate, or castling, and without the rules of bridge (or baseball) it would be conceptually impossible to bid, make, or hit a grand slam. Because some aspects of what clearly is law do not appear to be coercive in any straightforward sense of

³ Leslie Green, “Positivism and the Inseparability of Law and Morals,” *New York University Law Review*, vol. 83 (2002), pp. 1035-1058, at p. 1049. Similarly, in commenting on Hart’s argument against those who see law as the “gunman situation writ large,” Hart, *op. cit.* note 2, pp. 6-7, John Gardner describes the sanction-focused position against which Hart argues as “sadly. . . familiar.” John Gardner, “How Law Claims, What Law Claims,” in Matthias Klatt, *Institutionalized Reason: The Jurisprudence of Robert Alexy* (Oxford: Oxford University Press, 2012), pp. 29-44, at p. 37. To the same effect, Jules Coleman maintains that “jurisprudence is the study, in part, of how law purports to govern conduct. It is not the study of how law secures individual compliance with the rights and duties it creates by its directives.” Jules Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (Oxford: Oxford University Press, 2001), p. 72 note 12. And see also, in much the same vein, P.M.S. Hacker, “Sanction Theories of Duty,” in A.W.B. Simpson ed., *Oxford Essays in Jurisprudence (Second Series)* (Oxford: Oxford University Press, 1973), pp. 131-170, and D.N. MacCormick, “Legal Obligation and the Imperative Fallacy,” in Simpson, *ibid.*, pp. 100-130, the latter describing the focus on imperatives backed by the threat of force as “one of the perennial and persistent fallacies in legal philosophy.” *Ibid.*, p. 101.

coercion, we can appreciate the distortion inherent in attempting to shoehorn all of law into the ideas of force or compulsion.

That law is often constitutive⁴ and empowering rather than coercive is an important part of why Hart and his successors have denigrated an emphasis on coercion in attempting to understand the phenomenon of law. But even more important is the fact that it is possible, certainly in theory and occasionally in practice, to understand people doing things they do not want to do just because the law has commanded them to do so, yet not because those commands are backed by the threat of force. People might, that is, follow the law just because it is the law but still without regard to what the law might do to them if they disobey. For example, in some countries – although decidedly not mine – pedestrians will stand obediently at “Don’t Walk” signs even when there is nary a car or police officer in sight. In doing so, they appear to believe that the law should be followed even when it seems to direct unnecessary, unreasonable, or unwise behavior, and even when the law’s sanctions are either absent or so deep in the background as to make their existence irrelevant. By the same token, governments and legal systems, which are themselves the source of the power to coerce citizens into lawful behavior, exist in the first place not because of force but because the governors have accepted – internalized – the rules establishing and circumscribing official power, and often appear to have done so independent of any fear of sanctions or other forms of coercion.

It thus appears that non-coercive law both can and does exist. But the question remains as to what we should make of this phenomenon. For some theorists, as exemplified by the quotation above from Leslie Green, we should make a great deal of it. In the tradition that Hart

⁴ Law’s constitutive dimension is discussed at length below, Chapter 3.1.

is taken to have established, the fact of law's possible and occasional non-coerciveness is seen to be dispositive in characterizing the *nature* of law,⁵ at least if we understand, as Hart's followers (but maybe not Hart himself⁶) have understood, the nature of something as involving its necessary or essential properties, the properties without which it would be something else.⁷ So if the nature of law is the collection of law's essential properties in all possible legal systems in all possible worlds, and if there are things that are plainly law – like the law of wills and the obedient behavior of Finns when confronting a pointless command not to cross at a deserted intersection – but which appear not to be coercive, then coercion can no longer be considered essential to law. And if coercion is not essential to the very idea or concept of law, so the argument goes, then coercion loses its philosophical or theoretical interest in explaining the nature of law, regardless of coercion's obvious importance to sociologists, psychologists, and the man on the Clapham omnibus. Joseph Raz is clearest and bluntest on the point: “The sociology of law provides a wealth of detailed information and analysis of the functions of law in some

⁵ See, for example, Scott J. Shapiro, *Legality* (Cambridge, Massachusetts: Harvard University Press, 2011). “It seems to me a mistake . . . to consider sanctions to be a *necessary* feature of law. There is nothing unimaginable about a sanctionless legal system; . . .” *Ibid.* p. 169. See also *ibid.*, pp. 175-176 (“I disagree with [the] claim that the law necessarily uses force, . . .”).

⁶ See Frederick Schauer, “Hart's Anti-Essentialism,” in Andrea Dolcetti, Luis Duarte d'Almeida, & James Edwards, eds., *Reading H.L.A. Hart's The Concept of Law* (Oxford: Hart Publishing, forthcoming 2013).

⁷ See Shapiro, *op. cit.* note 5, p. 9, claiming that “to discover an entity's nature is in part to discover those properties that it *necessarily* has. . . . Thus, to discover the law's nature . . . would be in part to discover its necessary properties, those properties that law could not fail to have.”

particular societies. Legal philosophy has to be content with those few features which all legal systems necessarily possess.”⁸

Yet there is a problem -- the soundness of the foregoing conclusion depends on two premises whose own soundness is hardly self-evident. First, it assumes that the nature of something is best understood in terms of its necessary or essential properties. But this is far from obvious.⁹ The nature or essence of any concept or category might often or always be a cluster of interrelated properties, none of which is individually necessary.¹⁰ Or it may be that the concept,

⁸ Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979), pp. 104-105. Similar claims can be found in Julie Dickson, *Evaluation and Legal Theory* (Oxford: Hart Publishing, 2001), pp. 17-25.

⁹ See Frederick Schauer, “On the Nature of the Nature of Law,” *Archiv für Rechts- und Sozialphilosophie*, vol. 98 (2012), pp. 457-467. And see below, Chapters 3.4 and 3.5.

¹⁰ That our words and concepts and even the phenomena to which they refer might be understood not in terms of essential properties but instead by reference to a cluster of properties connected by no more than a “family resemblance” is a claim notably associated with Ludwig Wittgenstein, who used the example of games to demonstrate the existence of concepts resistant to definition by necessary and sufficient properties. Ludwig Wittgenstein, *Philosophical Investigations*, 5th ed., G.E.M. Anscombe, trans. (Oxford: Basil Blackwell, 19XX), ¶66. Relatedly, Max Black (*Problem of Analysis* (London: Routledge & Kegan Paul, 1954, chapter 2) and then John Searle offered the related idea of a “cluster concept,” one whose application is a function not of necessary or sufficient criteria, but instead of a weighted list of criteria, none of which is either necessary or sufficient. John R. Searle, “Proper Names,” *Mind*, vol. 67 (1958), pp. 166-173, subsequently refined and elaborated in John R. Searle, *Intentionality: An Essay in the Philosophy of Mind* (Cambridge, UK: Cambridge University Press, 1983), pp. 231-261, largely as a response to criticism in Saul A. Kripke, *Naming and Necessity* (Cambridge, Massachusetts: Harvard University Press, 1980). The general idea is best captured by Wittgenstein’s metaphor -- the components of a concept are not like the links of a chain, where each is essential in that that the removal of one destroys the chain, but like the strands of a rope, which interlock and overlap, but where no single strand runs the entire length of the rope. Wittgenstein, *op. cit.*, ¶67.

The most prominent criticism of the notion of family resemblance is Bernard Suits, *The Grasshopper: Games, Life and Utopia* (Boston: David R. Godine, 1990) (first published 1978). More recently, see Colin McGinn, *Truth By Analysis: Games, Names, and Philosophy* (New York: Oxford University Press, 2011). Among the noteworthy contemporary defenses of conceptual analysis premised on the existence of necessary and sufficient conditions is Frank Jackson, *From Metaphysics to Ethics: A Defence of Conceptual Analysis* (Oxford: Oxford University Press, 1998). Joseph Raz defends the search for law’s essential properties, and

category, or institution of law, at least, has no essence, it being too diverse a collection of phenomena to be captured or explained by one or more necessary properties. Yet even without attempting to resolve some of the deepest issues about language, concepts, and the categorial division of the world, it may still often be more valuable to focus on the typical rather than the necessary features or properties of some category or social phenomenon. Just as we can learn a great deal about birds from the typical but not necessary fact that birds fly, and can understand important aspects of the history and chemistry of wine by focusing on the fact that wine is typically but not necessarily made from grapes, so too might we learn a great deal about law in general, and not just the law in this or that legal system at this or that time, from law's typical but not necessary features.

Second, we should not too quickly accept that the domain of inquiry designated as "philosophical" should be limited to the search for essential properties, even if all or some of our concepts do have such essential properties.¹¹ I have neither interest in nor standing to delineate

dismisses the focus on family resemblance as largely (and irrelevantly to jurisprudence) about semantics, in Joseph Raz, "Can There Be a Theory of Law,?" in Martin P. Golding & William A. Edmundson, *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Oxford: Blackwell, 2005), pp. 324-342.

This is not the occasion to debate the ultimate soundness of the ideas of family resemblance, cluster concepts, and essentialist or anti-essentialist views of our words, our concepts, and the phenomena to which those words and concepts are connected. We will return to these issues in Chapter 3. It is worth noting at this point, however, that even if Wittgenstein, Searle, and the other anti-essentialists are mistaken, whether about games in particular or about language and concepts generally, understanding the nature of the social phenomenon that is law might still not be best or even well illuminated by too insistent a focus on law's necessary rather than typical properties.

¹¹ For a strong defense of just such a (narrow) conception of philosophy, see McGinn, *op. cit.* note 11. A particularly vivid example of the claim with particular reference to the philosophy of law is Raz, see text at note 8, above. That Raz's understanding of the task of philosophy is a narrow one is not necessarily a fault, but now that so much of contemporary philosophy is partly empirical and sometimes even experimental, it is useful to recognize that Raz's conception of philosophy, while by no means idiosyncratic to him (see McGinn, *ibid.*), is hardly universally (or

or police the boundaries of the discipline we call “philosophy” or the sub-discipline designated as the “philosophy of law.” Still, the various analytic and argumentative tools of philosophy might well be deployed with profit to forms of understanding other than the largely non-empirical search for necessary (or, occasionally, necessary and sufficient) conditions that characterizes contemporary conceptual analysis. And in any event we ought not let the contingent and contested contemporary demarcations of the academic disciplines circumscribe the inquiry, or get in the way of following that inquiry wherever it might lead.

And thus although the present examination of the role of coercion in explaining the character and distinctiveness of law will at times be philosophical or conceptual in style and method, it will, unashamedly, often break out of those boundaries defined by the discipline of philosophy, or accepted, rather more narrowly, by many contemporary practitioners of the philosophy of law. Some of what follows will be sociological, in the broadest sense, and more than some will draw on experimental psychological research. Some will make use of empirical and analytical conclusions from economics and political science. And none of what is to come will be a theory of law, or for that matter a theory of anything else. Oliver Wendell Holmes may have overstated the case against general theories when he said that “I care nothing for the systems – only the insights.”¹² But at least in the case of law, we may historically and especially

perhaps even substantially) accepted even by professional philosophers. See Brian Leiter, “The Demarcation Problem in Jurisprudence: A New Case for Scepticism,” *Oxford Journal of Legal Studies*, vol. 31 (2011), pp. 663-677; William Ramsey, “Prototypes and Conceptual Analysis,” in Michael R. DePaul & William Ramsey, eds., *Rethinking Intuition: The Psychology of Intuition and Its Role in Philosophical Inquiry* (Lanham, Maryland: Rowman & Littlefield, 1998), pp. 161-178.

¹² Letter from Oliver Wendell Holmes, Jr., to Harold J. Laski (Jan. 5, 1921), in Mark De Wolfe Howe ed., *The Holmes-Laski Letters* (Cambridge, Massachusetts: Harvard University Press, 1953), vol. 1, p. 300.

recently have lost too many insights by too insistent a pursuit of a single systematic unifying account – or theory, if you will. Law might simply be too diverse a social phenomenon to support a unifying theory with very much explanatory power. Or even if a theory of the essence of law, or only of its necessary properties, were possible, such theories might turn out to be so abstract as to leave too many interesting questions, including philosophical questions, about law, about laws, and about legal systems unanswered. This book is thus an exploration of various aspects of law's coercive dimension, pursued largely philosophically and analytically, but with some empirical assistance. It is an account and not a theory. It is certainly not a system. But perhaps a mere account can have some value.

1.2 *Obedience to Law*

Telling people how to behave may not be all of law, but it seems at least a large part of it. And when law is in its commanding or prohibiting rather than empowering mode, it typically backs its commands and prohibitions with the credible threat of brute force or other sanctions in the event of non-compliance. The law tells us what to do, and tells us that if we do not obey then bad things will happen to us. Perhaps jail, perhaps a monetary fine, perhaps something else unpleasant. The threat of painful or expensive sanctions in the event of disobedience appears to be a large part of how law operates, and how it seeks to ensure compliance with its commands. And lying behind the ubiquity of legal force is the assumption that without force the law is often impotent. Compliance with the law may strike us as widespread when what the law commands happens to align with what people would do anyway, but when what law mandates diverges from what people would otherwise do or from what they otherwise believe to be right, the need for the threat of force becomes apparent. Perhaps if people always or even usually obeyed the law just because it was the law, their personal interests or not-necessarily-self-interested best judgment

notwithstanding, law would have less need to use the raw power it commonly has at its disposal. But as we will explore below, especially in Chapters Five and Six, that is not our world. In our world, more in some parts of our world than in others, people generally do what they want to do or what they think it is right to do unless some external force makes them do otherwise. Law's coercive side thus emerges as a consequence of the less than perfect – just how much less remains to be seen – willingness of law's subjects to follow the law just because it is the law.

Framing the issue in terms of people's proclivities towards obedience to law exposes issues that are both conceptual and empirical. Just what is it to follow or obey the law? Is following the law the same as obeying the law just because it is the law? Is every act in compliance with the law also an act of obedience to the law? Sorting out these matters is important, as it has been for generations. Indeed, if we look back to Socrates and his reasons for following a legal judgment to his own death even though he thought the judgment unjust, the issue has been with us even longer.¹³ So it will be necessary to engage in careful analysis, distinguishing obeying the law (or having a reason to obey the law) from acting consistently with or in compliance with the law, and thus distinguishing having a reason to follow the law just because it is the law from engaging in the same behavior in which we would have engaged even if there were no law on the subject at all.¹⁴ It is true, after all, that my practice of refraining from

¹³ The issue comes to us through Plato, in the *Apology*, *Crito*, *Euthyphro*, and *Phaedo* (Harold North Fowler, trans., Cambridge, Massachusetts: Harvard University Press/Loeb Classical Library, 1914). Important historical and philosophical commentary includes Reginald E. Allen, *Socrates and Legal Obligation* (Minneapolis, Minnesota: University of Minnesota Press, 1980); Thomas C. Brickhouse & Nicholas D. Smith, *Socrates on Trial* (Princeton, New Jersey: Princeton University Press, 1989); I.F. Stone, *The Trial of Socrates* (Boston: Little, Brown, 1988); Robin Waterfield, *Why Socrates Died: Dispelling the Myths* (New York: W.W. Norton, 2009); A.D. Woozley, *Law and Obedience: The Arguments of Plato's Crito* (London: Duckworth, 1979).

¹⁴ See especially Chapter Five, below.

murder, rape, arson, and insider trading puts me in compliance with law, but the law is no part of my unwillingness to engage in these activities, and neither my behavior nor even any of my behavioral inclinations would change one whit were the laws prohibiting such acts to be repealed tomorrow.

Having delineated what it means to follow the law, and thus for law to make a difference in our decisions and behavior, we will then turn to the empirical side, examining whether people really do follow the law just because it is the law. And if there are people who do so, how often do they do so, and under what circumstances? As we will see, it is far from clear that sanction-independent obedience to law, whether on the part of officials or of ordinary citizens, is nearly as common as many theorists and others believe.¹⁵ When we specify what it is to follow the law, and when we remove punishment and other coercive sanctions from the picture, it turns out that following the law just because it is the law, and not because of what the law can do to us if we do not obey, is hardly widespread. Plainly this varies with area of law, and even more with time, place, and legal culture, but the notion that law can do what it purports to do simply because of its own intrinsic moral or other power – its normativity, in the technical jurisprudential jargon¹⁶ – appears to be substantially exaggerated.¹⁷

¹⁵ See Chapters Six and Seven.

¹⁶ Legal philosophers spend much time and ink on the question of law's normativity, the question whether and how the law can exercise normative force not reducible to either the moral force of law's content or a moral obligation to obey the law just because it is the law. Along with others (see Brian Bix, "Kelsen and Normativity Revisited," in Carlos Bernal & Marcelo Porciuncula, eds., *Festschrift for Stanley L. Paulson* (Madrid: Marcel Pons, forthcoming 2014); David Enoch, "Reason-Giving and the Law," *Oxford Studies in the Philosophy of Law* (Leslie Green & Brian Leiter, eds.), vol. 1 (2011), pp. 1-38; Torben Spaak, "Plans, Conventions, and Legal Normativity," *Jurisprudence*, vol. 3 (2012), pp. 509-521), and as will be explored and explained in Chapters Four and Five, I believe the question is often improperly conceptualized, and that

And thus force reenters the picture. If the mandates of law often conflict with the law-independent judgments of officials or citizens, and if on many of those occasions the law is right and what its subjects would otherwise do is mistaken, and if, further, the law's subjects typically follow their own judgment and not the law's on such occasions, then law's coercive power – its raw force, if you will -- becomes necessary for law to do what it needs to do. Indeed, the pervasiveness of force and the threat of it may be what makes law distinctive. Morality urges us to take some actions and refrain from others, and public officials and other advocates do much the same thing when they are operating in persuasive and not coercive mode. But there is a difference between the mandates of morality and those of law, and between the urgings of officials and the edicts of those officials when they are backed by sanctions. As we shall see, it may well be that sanctions and coercion – the force of law – are what makes law different from morality, what makes law different from the suggestions, urgings, and importunings of public officials and countless others, and what makes law different from the social norms that pervade our personal and professional lives.

1.3 *The Dimensions of Force*

But just what is it for law to exert force, and how does it do it? Most obvious, of course, is the simple threat of imprisonment (or worse) for disobedience. But the criminal law does not exhaust all of law, and incarceration and capital punishment do not exhaust the coercive devices at law's disposal. There are fines and there are lawsuits, of course, in which the threat is to the

when properly framed and understood the issue of law's normativity is of far less consequence than many theorists have believed.

¹⁷ These issues comprise the bulk of Chapters Five and Six below, where the empirical dimensions of the problem will play a prominent role and where the social science research will be the focus of the inquiry.

disobedient's wallet and not to his liberty. But there are rewards as well as punishments, and law's coercive power may well include its ability to create positive as well as negative incentives.¹⁸ Sometimes the law does this by granting immunity from otherwise applicable and legally enforced obligations, as when the tax laws give tax exemptions for donations to charity or when the conscription laws grant exemptions to schoolteachers. And sometimes law's rewards are even more direct. The law can simply prohibit people from driving unsafely, and of course it does so in many ways. But if instead of or in addition to the standard negative sanctions for unsafe driving the law would provide to people with clean driving records the opportunity to renew their driving licenses with less effort or at less cost or less frequently, it would be attempting to achieve the same goal with positive rewards rather than negative punishment. Whether we want to call this latter approach "coercive" or even "law" is a difficult question, and one that will be addressed in Chapter Eight, but for now we ought not to constrict the inquiry preliminarily by assuming at the outset that law's sanctions are only negative and that punishment is the only coercive implement at law's disposal. And thus Chapters Eight and Nine will explore in multiple directions the varieties of coercive power that modern legal systems appear to have at their disposal.

Things are vastly more complicated than even this, however. Law may have the power to use force, but how and when it does so is a complex matter involving overlapping psychological, sociological, political, economic, and moral considerations. The United States Internal Revenue Service, for example, conducts extensive audits of the tax returns of only a miniscule number of taxpayers, and prosecutes genuine tax cheats even more rarely. But it publicizes the possibility of audits especially heavily shortly before the tax return deadline for most taxpayers, and

¹⁸ See Chapter Eight, below.

initiates visible tax fraud criminal prosecutions on much the same schedule, a strategy plainly designed to instill in taxpayers a subjective belief in the probability of audit or prosecution that is considerably higher than the actual or objective probability of such an event.¹⁹ Is such a strategy illegitimate? Or is it simply a more efficient way for the government to threaten legally available and legally legitimate punishment?

Or consider the possibility that the same sanctions are vastly more severe for some people than for others. If a fine of five hundred dollars for exceeding the speed limit by a given amount – say twenty miles per hour over the posted limit – is a week’s wages for a poor laborer and mere pocket money for a wealthy investment banker, and if the likelihood (and consequences) of the two individuals engaging in the prohibited activity is the same, is it wrong for the penalty for both be the same? Or is it wrong for the penalty for both *not* to be the same?

Thus, simply identifying coercion as the characteristic and arguably distinguishing feature of law is not nearly enough. Opening the door to a consideration of law’s coercive character exposes a myriad of important conceptual complications and normative questions. Historically, law’s coercive power was associated with the criminal law, and with the law’s ability to threaten imprisonment or death for violating its prohibitions. But then the monetary fine was added to law’s punitive arsenal, and things became more complicated. Is a twenty dollar fine for overtime parking a penalty, or is it simply a tax, or perhaps merely a different way of expressing the price for parking? Is a ten thousand dollar fine for operating an unsafe workplace a sanction, or is it only, as some employers undoubtedly see it, a cost of doing business? And is it possible that what the state sees as a penalty is perceived by the subjects as

¹⁹ See Joshua D. Blank & Daniel Z. Levin, “When is Tax Enforcement Publicized?” *Virginia Tax Review*, vol. 30 (2010), pp. 1-37.

only a tax or price? Moreover, the varieties of law's coercive force present additional complexities? Is there a difference, for example, between being liable to a ten thousand dollar fine and being liable to an award for damages in a civil lawsuit of the same amount? Now that the law is so much more than the criminal law and the king's executioner, and includes civil penalties and the entire administrative apparatus, examining the complete arsenal of law's coercive options is an essential part of exploring the coercive dimensions of law.

Once we see that legal coercion is itself a diverse phenomenon, we are prompted to inquire into what, if anything, makes law distinctive. Is it some special connection with the nation-state, such that the idea of non-state law is an oxymoron? Is there an important difference between law and the numerous social norms that govern our behavior? It may seem silly to try to make too much of the difference between law and other normative systems, but in a world of lawyers, judges, law schools, bar examinations, and much else treating law differently from other social institutions, ignoring the way in which law is at least somewhat distinctive is a mistake. And thus Chapters Ten and Eleven will address the question of what differentiates law from other sources of guidance and command, and the extent to which law's coercive power contributes to its differentiation.

1.4 *The Force of Law*

The unoriginal title of this book²⁰ is a play on words. It connotes the brute coercive force that law has at its disposal, to be sure, but in everyday parlance, both for lawyers and for

²⁰ See, for example, Jacques Derrida, "The Force of Law: The Mystical Foundation of Authority," *Cardozo Law Review*, vol. 11 (1990), pp. 919-1045; Ekow N. Yankah, "The Force of Law: The Role of Coercion in Legal Norms," *University of Richmond Law Review*, vol. 42 (2008), pp. 1195-1255.

ordinary people, to say that some rule or prescription or command has “the force of law” is to contrast the prescriptions of law with mere suggestions or recommendations, with the commands of morality, and with the more conventional norms of our social existence. It is to say that *this* norm has been legally enacted and is legally valid. The very phrase “the force of law” entails that there is something distinguishing norms that emanate from the legal system from those that do not.

But what distinguishes those norms that have the force of law from other norms? Is it a matter of governmental legitimacy? Is it because they come from the state rather than from God, or from social agreement? Or is it, at least in part, because norms that have the force of law, in one sense, have law’s force, in another sense, behind them? And thus the play on words is an attempt to suggest that law’s force – its raw coercive power – has more to do with the very idea of law, and with what makes law distinctive, than has recently and not-so-recently, but especially recently, been assumed. That law’s brute force – its violence, to some²¹ – is the principal identifying feature of legality has been in the past the conventional wisdom.²² It was Thomas

²¹ Robert M. Cover, “Violence and the Word,” *Yale Law Journal*, vol. 95 (1986), pp. 1601-1629. As in Cover’s case, describing law’s use of force as its “violence” takes place typically from a stance of skepticism or antipathy towards law and what it does.

²² Thus, the philosopher Elizabeth Anscombe noted law’s characteristic “actual or threatened violence” (G.E.M. Anscombe, “On the Source of the Authority of the State,” in Joseph Raz, ed., *Authority* (New York: New York University Press, 1990), pp. 142-173, at p. 148), the anthropologist E. Adamson Hoebel defined law to include its “application of physical force” (E. Adamson Hoebel, *The Law of Primitive Man: A Study in Comparative Legal Dynamics* (Cambridge, Massachusetts: Harvard University Press, 1954), p. 28, the sociologist Max Weber characterized law in terms of its monopoly on the legitimate use of force (Max Weber, “Politics as a Vocation,” (1919), in H.H. Gerth & C. Wright Mills, eds., *From Max Weber: Essays in Sociology* (New York: Oxford University Press, 1946), pp. 77-128), the legal philosopher Hans Kelsen described law as a “coercive order” that monopolizes “the use of force.” (Hans Kelsen, “The Law as a Specific Social Technique,” in Hans Kelsen, *What is Justice? Justice, Law, and Politics in the Mirror of Science* (Berkeley, California: University of California Press, 1957), pp. 231-256, at pp. 235-244, and the legal theorist Rudolph von Ihering insisted that there can be “no

Hobbes, after all, who famously observed that “Covenants, without the sword, are but words, and of no strength to secure a man at all.”²³ And James Fitzjames Stephen scarcely hesitated before proclaiming that “[i]ndeed law is nothing but regulated force.”²⁴ But precisely the opposite – that force is not the characteristic or identifying feature of law – is now the conventional wisdom, a new conventional wisdom that has been in place, at least in some circles of academic legal philosophy, for more than half a century.²⁵ The initial goal of this book is to show the ways in which the previous conventional wisdom may have been more correct than is now understood, and the ways in which the current conventional academic wisdom may be less sound than is now

law . . . without coercion,” that “coercion . . . makes the State and Law,” and that “law without force is an empty name.” Rudolph von Ihering, *Law as a Means to an End*, Isaac Husik, trans. (Boston: Boston Book Company, 1913), pp. 73, 176, 190. See also M.D.A. Freeman, *Lloyd’s Introduction to Jurisprudence*, 7th ed. (London: Sweet & Maxwell, 2001), p. 217 (“It is quite realistic to regard the policeman as the ultimate mark of the legal process”). And it has also been observed that a long line of philosophical greats, including Spinoza, Kant, and many others, understood law as the “ordering [of] human behavior through coercion.” Huntington Cairns, *Legal Philosophy from Plato to Hegel* (Baltimore, Maryland: Johns Hopkins University Press, 1949), p. 277.

²³ Thomas Hobbes, *Leviathan*, Richard Tuck, ed. (Cambridge: Cambridge University Press, 1991) (1649), ch. 17.2, at p. 117.

²⁴ James Fitzjames Stephen, *Liberty, Equality, Fraternity* (Chicago: University of Chicago Press, 1991) (first published 1873), p. 200.

²⁵ See above, notes 2-5 and accompanying text. The prominent exception is Ronald Dworkin, who takes law’s ability to marshal coercive power as the starting point for an understanding of law that would make the exercise of that power politically and morally legitimate. “A conception of law must explain how what it takes to be law provides a general justification for the exercise of coercive power by the state.” Ronald Dworkin, *Law’s Empire* (Cambridge, Massachusetts: Harvard University Press, 1986), p. 188. To much the same effect, albeit in the context of political authority more generally, is Arthur Ripstein, “Authority and Coercion,” *Philosophy and Public Affairs*, vol. 32 (2004), pp. 2-35, at p. 2: “[T]he state’s claim to authority is inseparable from the rationale for coercion.”

widely accepted.²⁶ But to appreciate this aspect of law – to appreciate the force of law in two senses and not just one -- is only the beginning. Once we grasp the importance of law's coercive, force-imposing, and force-threatening dimensions, new areas of inquiry are before us. And thus this book seeks not only to re-situate law's coercive dimension into the jurisprudential and philosophical understanding of law, but also to begin to pursue some of the multiple paths of inquiry that this re-situation reveals. There should be no expectation that the new paths revealed will be followed to their ends. But finding – or re-finding – the beginnings may be accomplishment enough.

²⁶ In recent years a few others have also contributed to the project of attempting to reclaim coercion from the jurisprudential exile to which it has been banished. See Matthew Kramer, *In Defense of Legal Positivism: Law Without Trimmings* (Oxford: Clarendon Press, 1999); Kurt Gerry, "The Role of Coercion in the Jurisprudence of Hart and Raz: A Critical Analysis," http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1911249; Joshua Kleinfeld, "Enforcement and the Concept of Law," *Yale Law Journal Online*, vol. 121 (2011), pp. 293-315; Grant Lamond, "Coercion and the Nature of Law," *Legal Theory*, vol. 7 (2001), pp. 35-00; Grant Lamond, "The Coerciveness of Law," *Oxford Journal of Legal Studies*, vol. 20 (2000), pp. 39-62; Grant Lamond, "Coercion," in Dennis Patterson, ed., *A Companion to Philosophy of Law and Legal Theory*, 2d ed. (Oxford: Wiley-Blackwell, 2010), pp. 642-653; Danny Priel, "Sanction and Obligation in Hart's Theory of Law," *Ratio Juris*, vol. 21 (2008), pp. 404-411; Nicos Stavropolous, "The Relevance of Coercion: Some Preliminaries," *Ratio Juris*, vol. 22 (2009), pp. 339-358; Yankah, *op. cit.* note 21. And, even earlier, Dale A. Nance, "Legal Theory and the Pivotal Role of the Concept of Coercion," *University of Colorado Law Review*, vol. 57 (1985), pp. 1-43. My own efforts began as far back as 1994, in Frederick Schauer, "Critical Notice," *Canadian Journal of Philosophy*, vol. 24 (1994), pp. 495-509, and thus this book can be understood as the culmination of my own two-decade-long effort, an effort that also includes Frederick Schauer, "The Best Laid Plans," *Yale Law Journal*, vol. 120 (2010), pp. 586-621; Frederick Schauer, "Was Austin Right After All? On the Role of Sanctions in a Theory of Law," *Ratio Juris*, vol. 23 (2010), pp. 1-21; Frederick Schauer, "On the Nature of the Nature of Law," *Archiv für Rechts- und Sozialphilosophie*, vol. 98 (2012), pp. 457-467; Frederick Schauer, "Positivism Through Thick and Thin," in Brian Bix, ed., *Analyzing Law: New Essays in Legal Theory* (Oxford: Clarendon Press, 1998), pp. 65-78.

CHAPTER TWO

BENTHAM'S LAW

2.1 *Law as Coercion – The Beginnings*

The philosophical study of the nature of law – jurisprudence, to oversimplify – has a long and distinguished lineage. Plato in *The Laws*, *The Republic*, *The Gorgias*, *The Crito*, and *The Statesman* probed law's value and methods,¹ and was followed in ensuing generations by Aristotle,² Cicero,³ Aquinas,⁴ Hobbes,⁵ and countless others.⁶ Yet in important respects modern

¹ See Huntington Cairns, "Plato's Theory of Law," *Harvard Law Review*, vol. 56 (1942), pp. 359-387; Jerome Hall, "Plato's Legal Philosophy," *Indiana Law Journal*, vol. 31 (1956), pp. 171-206; George Klosko, "Knowledge and Law in Plato's *Laws*," *Political Studies*, vol. 56 (2008), pp. 456-474.

² Aristotle's most extensive commentary on law is contained in Aristotle, *Politics*, Peter L. P. Simpson, ed. (Chapel Hill, North Carolina: University of North Carolina Press, 1996). Useful commentary includes Richard O. Brooks & James Bernard Murphy, eds., *Aristotle and Modern Law* (Aldershot, UK: Ashgate, 2003); Max Hamburger, *Morals and Law: The Growth of Aristotle's Legal Theory* (New Haven, Connecticut: Yale University Press, 1951); Fred D. Miller, Jr., "Aristotle's Philosophy of Law," in Fred D. Miller, Jr., and Carrie-Ann Biondi, eds., *A History of the Philosophy of Law from the Ancient Greeks to the Scholastics* (Dordrecht, Netherlands: Springer, 2007), pp. 79-110.

³ Marcus Tullius Cicero, *De Legibus* (On the Laws), in Cicero, *On the Commonwealth and On the Laws*, James E.G. Zetzel, ed., (Cambridge, UK: Cambridge University Press, 1999), pp. 105-175. See also Elizabeth Asmis, "Cicero on Natural Law and the Laws of the State," *Classical Antiquity*, vol. 27 (2008), pp. 1-33.

⁴ Thomas Aquinas, *Treatise on Law: The Complete Text* (being a translation of *Summa Theologica*, questions 90-108), Alfred J. Freddoso, trans. (South Bend, Indiana: St. Augustine's

jurisprudence, at least in the analytic tradition, begins with Jeremy Bentham. As part of his unyielding campaign for comprehensive governmental and political reform, Bentham embarked on a systematic analysis of the phenomenon of law and the nature of a legal system. His effort to characterize the very idea of law was not, however, an abstract scholarly endeavor, nor even an entirely descriptive one.⁷ Rather, Bentham viewed the accurate characterization of the nature of law as the essential first step in his fundamentally normative enterprise of attempting to destroy and then rebuild the legal system he knew best.⁸ Bentham is one of history's great haters, and his hatred of the law, the field in which he himself was originally trained, and in which his father had practiced, knew few bounds. Recoiling against William Blackstone's veneration of the common law⁹ and Edward Coke's celebration of its "artificial reason,"¹⁰ Bentham instead

Press, 2009). And see John Finnis, *Aquinas: Moral, Political and Legal Theory* (Oxford: Oxford University Press, 1998); Anthony J. Lisska, *Aquinas's Theory of Natural Law: An Analytic Reconstruction* (Oxford: Oxford University Press, 1998); John Finnis, "Aquinas' Moral, Political and Legal Philosophy," in Edward N. Zalta, ed., *Stanford Encyclopedia of Philosophy*, <http://plato.stanford.edu/entries/aquinas-moral-political/> (2011).

⁵ Thomas Hobbes, *Leviathan*, Richard Tuck, ed. (Cambridge, UK: Cambridge University Press, 1991). Valuable commentary can be found in David Dyzenhaus & Thomas Poole, eds., *Hobbes and the Law* (Cambridge, UK: Cambridge University Press, 2012); Claire Finkelstein, ed., *Hobbes on Law* (Aldershot, UK: Ashgate, 2005); Robert Ladenson, "In Defense of a Hobbesian Conception of Law," *Philosophy and Public Affairs*, vol. 9 (1980), pp. 134-159.

⁶ A valuable overview of some of the important early contributions is Gerald J. Postema, "Legal Positivism: Early Foundations," in Andrei Marmor, ed., *The Routledge Companion to Philosophy of Law* (New York: Routledge, 2012), pp. 30-47.

⁷ Which is not to say there is anything wrong with such enterprises. Still, they were not Bentham's.

⁸ On the normative moral underpinnings of Bentham's descriptive project, see David Lyons, "Founders and Foundations of Legal Positivism," *Michigan Law Review*, vol. 82 (1984), pp. 722-739, at pp. 730-733.

⁹ Blackstone described the common law as "the best birthright and noblest inheritance of mankind." William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon

perceived the common law as scarcely more than a conspiracy between lawyers and judges to make the law unnecessarily complex and obscure. Both indeterminate¹¹ and highly complex law, Bentham insisted, required lawyers for its interpretation. Indeterminacy and complexity thus served the conspiracy by increasing the income of lawyers and the power of judges, all to the detriment of the public good. Bentham accordingly suggested, in all seriousness (which appears to be the only mode in which he operated), that it ought to be against the law to give legal advice for money.¹² Were such a prohibition in place, he believed, the incentives to make law more complex and less accessible to the ordinary citizen would disappear. And Bentham expressed a similar contempt for numerous other aspects of the then-existing English legal

Press, 1765-1769), vol. 1, p. 436. Grant Gilmore's intended caricature is in fact not far off the mark in encapsulating Blackstone's outlook: "Blackstone's celebration of the common law of England glorified the past: without quite knowing what we were about, he said, we have somehow achieved the perfection of reason. Let us preserve, unchanged, the estate which we have been lucky enough to inherit. Let us avoid any attempt at reform – either legislative or judicial – since the attempt to make incidental changes in an already perfect system can only lead to harm in ways which will be beyond the comprehension of even the most well-meaning and far-sighted innovators." Grant Gilmore, *The Ages of American Law* (New Haven, Connecticut: Yale University Press, 1977), p. 5.

¹⁰ Sir Edward Coke, *Prohibitions del Roy* (1607), 12 Co. Rep. 63. For a modern elaboration, see Charles Fried, "The Artificial Reason of the Law or: What Lawyers Know," *Texas Law Review*, vol. 60 (1981), pp. 35-58.

¹¹ There are many forms and sources of legal indeterminacy, but Bentham was particularly enraged by the inductive methods of the common law, believing that the pretense of extracting general and publicly known legal rules from a series of common law decisions was simply a smokescreen for individual (and hence not "common") inference and thus judicial lawmaking. "As a System of general rules, Common Law is a thing merely imaginary." Jeremy Bentham, *Comment on the Commentaries and A Fragment on Government*, J.H. Burns & H.L.A. Hart, eds. (Oxford: Clarendon Press, 2008), p.119. And see Postema, *op. cit.* note 6, pp. 36-40. On the possibility that Bentham might have been right, see Frederick Schauer, "Is the Common Law Law?" *California Law Review*, vol. 77 (1989), pp. 455-471, and, less directly, Frederick Schauer, "Do Cases Make Bad Law?" *University of Chicago Law Review*, vol. 73 (2006), pp. 883-918.

¹² Jeremy Bentham, "Scotch Reform," in *The Works of Jeremy Bentham* (James Bowring ed., Edinburgh: William Tait, 1838), pp. 1-53 (originally published 1808).

system. In describing legal fictions such as the law's presumption that a woman's husband was the father of any child born during the marriage, for example, he ranted that "the pestilential breath of Fiction poisons the sense of every instrument it comes near,"¹³ and that "[i]n English law, fiction is a syphilis, which runs in every vein, and carries into every part of the system the principle of rottenness."¹⁴

Bentham's opinions about legal fictions, legal complexity, and the indeterminacy of the common law are relevant to the present inquiry because the vehemence with which Bentham expressed his hatred of the characteristics and methods of English law highlights his contempt for almost all aspects of his own legal system at the time he was writing. And it was precisely this scorn which explains Bentham's deconstructive and consequent reconstructive goals, goals which led him to seek a descriptive and distancing, rather than sympathetic, characterization of law.¹⁵ Only by seeing law as it actually is, warts and all, could he and those of like mind start the process of rebuilding it.¹⁶ And only by recognizing that there could be (and often was) bad law

¹³ Jeremy Bentham, *A Comment on the Commentaries and A Fragment on Government* (J.H. Burns & H.L.A. Hart eds., London: Athlone Press, 1977), p. 411.

¹⁴ Jeremy Bentham, "Elements of the Art of Packing as Applied to Special Juries, Particularly in Cases of Libel," in *The Works of Jeremy Bentham* (John Bowring ed., Edinburgh: William Tait, 1838), vol. 5, pp. 61-186, at p. 92.

¹⁵ On the relation between Bentham's theory of law and his reformist goals, see Nancy L. Rosenblum, *Bentham's Theory of the Modern State* (Cambridge, MA: Harvard University Press, 1978), pp. 88-89. And on the contrast between theories of law that operate sympathetically within an existing legal regime and those that explicitly seek an external and distancing perspective, see Frederick Schauer, "Fuller's Internal Point of View," *Law and Philosophy*, vol. 12 (1994), pp. 285-312. And see also Michelle Madden Dempsey, "On Finnis's Way In," *Villanova Law Review*, vol. 57 (2012), pp. 827-843, at p. 842, urging that we consider the nature of law from the perspective of the law reformer, one who recognizes laws "potential for empowerment," but sees law's potential and risk of "oppression" as well.

¹⁶ On the normative goals undergirding Bentham's descriptive project, see Frederick Schauer, "Positivism Before Hart," *Canadian Journal of Law and Jurisprudence*, vol. 24 (2011), pp. 455-

could there be any hope of improving it. Modern legal positivism, which originated with Bentham, thus emerged out of his desire to describe law from the outside, free of sympathy or endorsement. Theorists have been debating the nature and commitments of legal positivism ever since,¹⁷ but at the heart of the positivist outlook is the goal of distinguishing the description of

471, and also in Michael Freeman & Patricia Mindus, eds., *The Legacy of John Austin's Jurisprudence* (Dordrecht, Netherlands: Springer, 2013), pp. 271-290.

¹⁷ This is hardly the place for a full or even not-so-full bibliography of the voluminous contemporary scholarship in the legal positivist tradition. Still, a good start within the English-language literature (which excludes work by and about Hans Kelsen, generally taken outside of the English-speaking world as the most important twentieth century legal positivist) would include, of course, H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, Penelope A. Bulloch, Joseph Raz, & Leslie Green eds., 3d ed., 2012), as well as, within the positivist tradition but excluding critiques of it (and also running the risk of insult by exclusion), Tom Campbell, *The Legal Theory of Ethical Positivism* (Aldershot, UK: Dartmouth Publishing, 1996); Jules Coleman ed., *Hart's Postscript: Essays on the Postscript to the Concept of Law* (Oxford: Oxford University Press, 2001); Jules Coleman, *The Practice of Principle: In Defense of a Pragmatist Approach to Legal Theory* (Oxford: Oxford University Press, 2001); Julie Dickson, *Evaluation and Legal Theory* (Oxford: Hart Publishing, 2001); Robert P. George ed., *The Autonomy of Law: Essays on Legal Positivism* (Oxford: Clarendon Press, 1999); Matthew Kramer, *In Defense of Legal Positivism: Law without Trimmings* (Oxford: Clarendon Press, 1999); David Lyons, *Ethics and the Rule of Law* (Cambridge, UK: Cambridge University Press, 1984); Andrei Marmor, *Positive Law and Objective Values* (Oxford: Oxford University Press, 2001); Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986); Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979); Scott J. Shapiro, *Legality* (Cambridge, Massachusetts: Harvard University Press, 2011); Wil J. Waluchow, *Inclusive Legal Positivism* (Oxford: Clarendon Press, 1994); John Gardner, "Legal Positivism: 5 ½ Myths," *American Journal of Jurisprudence*, vol. 46 (2001), pp. 199-227; Leslie Green, "Positivism and the Inseparability of Law and Morals," *New York University Law Review*, vol. 83 (2008), pp. 1035-1058.

Some readers may be tempted to place the present book, especially its earlier chapters, within the positivist tradition, but the word "positivism" will rarely appear. More than forty years ago Robert Summers urged that the term be discarded because it had become hopelessly mired in multiple and conflicting definitions. Robert Summers, "Legal Philosophy Today – An Introduction," in Robert S. Summers ed., *Essays in Legal Philosophy* (Oxford: Blackwell, 1968), pp. 1-16, at pp. 15-16. More recently, Joseph Raz has advocated much the same thing, believing that attempts to characterize this or that perspective on law as positivist or not have obscured efforts to achieve greater understanding of the phenomenon of law. Joseph Raz, "The Argument from Justice; or How Not to Reply to Legal Positivism," in George Pavlakos ed., *Law, Rights, Discourse: The Legal Philosophy of Robert Alexy* (Oxford: Hart Publishing, 2007), pp. 17-36. To the same effect, see John Finnis, "What is the Philosophy of Law,?" *Rivista di Filosofia del*

law from normative evaluation, particularly moral evaluation. Bentham and most of his fellow positivists, then and since, have thus aimed to challenge the natural law tradition which prevailed in Bentham's time. That tradition, and in particular the aspect of it against which Bentham rebelled, sometimes insisted that immoral law was simply not law at all. Moral acceptability, Blackstone and Cicero and a few others at times believed,¹⁸ was a necessary property of law properly so called. A more plausible and now dominant version of the natural law tradition rejects the view that unjust law is no law at all – *lex iniusta non est lex* – but nevertheless subscribes to the position that morally defective law, while still law in one sense, is defective *as law* just because of its moral defects.¹⁹ But whether in stronger or weaker versions, Bentham would have none of it. Introducing moral criteria into the identification of law and even into the evaluation of legality was for him a symptom of dangerous conceptual confusion. The existence

Diritto, vol. 1 (2012), pp. 67-78, p. 73. I believe that Summers, Raz, and Finnis are largely correct, not only because many attempts to characterize positivism degenerate into caricature, but also because excess dichotomization of perspectives into positivist and non-positivist (or anti-positivist), as if they were the two sides in the World Cup finals, makes it more difficult to see the value, even if only partial, to be found within the individual members of an array of diverse perspectives and analyses.

¹⁸ A contemporary effort to justify the classical claim is Philip Soper, "In Defense of Classical Natural Law in Legal Theory: Why Unjust Law is No Law at All," *Canadian Journal of Law and Jurisprudence*, vol. 20 (2007), pp. 201-223. For the contemporary contrasting view, see Julie Dickson, "Is Bad Law Still Law? Is Bad Law Really Law?" in Maksymilian Del Mar & Zenon Bankowski eds., *Law as Institutional Normative Order* (Farnham, Surrey, UK: Ashgate Publishing, 2009), pp. 161-183.

¹⁹ See especially John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), pp. 3-20, elaborating a "central cases" method in which there are central cases of the concepts of social theory (such as law), such that the non-central cases are still law but in some way deficient or defective as law. To the same effect, and more recently, see Mark C. Murphy, "Natural Law Jurisprudence," *Legal Theory*, vol. 9 (2003), pp. 241-267. A valuable overview of modern natural law theory is Brian Bix, "Natural Law Theory: The Modern Tradition," in Jules L. Coleman & Scott J. Shapiro, eds., *Oxford Handbook of Jurisprudence and Philosophy of Law* (New York: Oxford University Press, 2002), pp. 61-103.

of law was one thing, he insisted, and its moral value quite another.²⁰ By separating the descriptive identification of law from its moral assessment, Bentham believed, we would wind up better positioned to identify that which was, in Bentham's view, so sorely in need of radical reform. Far from seeing the legal positivist as an apologist for existing legal arrangements, as a common caricature has it,²¹ the Benthamite positivist is one who requires an entirely descriptive notion of law precisely for the purpose of evaluating it without empathy, and, in Bentham's case, of keeping one's moral distance from it. Bentham was, after all, a radical reformer, and his efforts to separate the identification of law from its moral evaluation was itself in the service of what were plainly moral and political ends.²²

Bentham's contempt for the English legal system inspired him to understand the character of law largely in terms of its coercive power. If one believes, as Bentham did, that much of law's substance and process is rotten to the core, then an overwhelmingly salient feature

²⁰ "A book of jurisprudence can have but one or the other of two objects: 1. To ascertain what the *law* is: 2. To ascertain what it ought to be. In the former case it may be stiled a book of *expository* jurisprudence; in the latter, a book of *censorial* jurisprudence; or, on other words, a book on the *art of legislation*." Jeremy Bentham, *On the Limits of the Penal Branch of Jurisprudence*, Philip Schofield ed. (Oxford: Clarendon Press, 2010), p. 16.

²¹ For examples of the caricature, and a rebuttal, see Frederick Schauer, "Positivism as Pariah," in George, *The Autonomy of Law*, *op. cit.* note 7, at pp. 31-56. The caricature is also described and challenged in Anthony Sebok, *Legal Positivism in American Jurisprudence* (New York: Cambridge University Press, 1998), pp. 2, 20, 39.

²² On the possibility (but not the necessity) of understanding the conceptual separation of law and morality as itself being in the service of moral goals, see Liam Murphy, "Better to See Law This Way," *New York University Law Review*, vol. 83 (2008), pp. 1088-1108; Neil MacCormick, "A Moralistic Case for A-Moralistic Law," *Valparaiso University Law Review*, vol. 20 (1985), pp. 1-41; Frederick Schauer, "The Social Construction of the Concept of Law: A Reply to Julie Dickson," *Oxford Journal of Legal Studies*, vol. 25 (2005), pp. 493-501. More controversially, this seems to be the position in H.L.A. Hart, "Positivism and the Separation of Law and Morals," *Harvard Law Review*, vol. 71 (1958), pp. 593-629, and in H.L.A. Hart, *The Concept of Law*, *op. cit.* note 13, pp. 207-212.

of a legal system is its ability to compel compliance with its directives despite the system's glaring faults. For Bentham, law was uniquely capable of forcing obedience on its subjects, and law's force was thus intimately related to law's defects. And so, largely in a work now known as *Of the Limits of the Penal Branch of Jurisprudence*,²³ earlier published as *Of Laws in General*,²⁴ and originally written around 1780 and intended to be part of his magisterial *An Introduction to the Principles of Morals and Legislation*,²⁵ Bentham developed what is commonly labeled, two hundred years later, the "command theory" of law.²⁶ According to the command theory, law is a species of command, or, as Bentham sometimes put it, a mandate. But there are all sorts of commands all around us, and what for Bentham distinguished the commands of law from the commands of other enterprises or other normative systems is the ability of the legal system to back its commands with the threat of unpleasant sanctions – fines, prison, or even death – in the event of noncompliance. Indeed, Bentham sometimes claimed that the possibility of such sanctions defined legal obligation itself. To have a legal obligation was simply to be under official state compulsion, and without the possibility of such force there was, he sometimes said, no legal obligation and no law.²⁷

²³Bentham, *op. cit.* note 19.

²⁴ Jeremy Bentham, *Of Laws in General*, H.L.A. Hart ed. (London: Athlone Press, 1970).

²⁵Jeremy Bentham, *In Introduction to the Principles or Morals and Legislation*, J.H. Burns & H.L.A. Hart ed. (London: Athlone Press, 1970).

²⁶ Thus, Bentham asks, rhetorically, "what is it that law can be employed in doing, besides prohibiting and commanding?" Bentham, *On the Limits of the Penal Branch of Jurisprudence*, *op. cit.* note 19, at p. 3.

²⁷ "A law by which nobody is bound, a law by which nobody is coerced, a law by which nobody's liberty is curtailed, all these phrases, which come to the same thing, would be so many contradictions in terms." *Of the Limits of the Penal Branch of Jurisprudence*, *op. cit.* note 19, pp. 75-76. And, by way of introducing the possibility that rewards as well as punishments might

Bentham's emphasis on the role of sanctions in understanding law was based substantially on his own psychological theories of human motivation. Although he recognized that people could on occasion have purely social motives of benevolence and sympathy, and could even more often possess what he called the "semi-social" motivations to work for a common good from which they as individuals would proportionately benefit, Bentham believed that for most people most of the time -- the "general rule,"²⁸ as he put it -- these social or semi-social motivations would be decidedly secondary to people's self-regarding motivations -- the desire to maximize their own well-being rather than that of others or that of the community as a whole. And thus if, as a contingent empirical matter, most people would most often prefer their own well-being to that of others or that of the community, then external force would be needed to prevent them from doing so, at least when their doing so would conflict with the common good. "[W]hatsoever evil it is possible for man to do for the advancement of his own personal and private interest . . . at the expense of the public interest, -- that evil sooner or later, he will do, *unless by some means or other . . . he be prevented from doing it.*"²⁹

Bentham's focus on coercion as lying at the heart of law was thus based on his empirical psychological assessment that other-regarding and social-regarding interests would rarely (but, it should be emphasized again, not never) be sufficient to motivate people to put aside their self-

also be sufficient to support those commands of the sovereign that would properly be understood as laws, Bentham notes that "the idea of coercion shall [in the sense of mankind] have become inseparably connected with that of a law." *Ibid.*, p. 145. And see also *ibid.*, pp. 24-25, where Bentham's cumbersome definition of a law includes the "means" of "bringing to pass" the lawmaker's desired state of affairs, and the way in which the law would supply "a motive upon those whose conduct is in question."

²⁸ Jeremy Bentham, *Constitutional Code*, in *The Works of Jeremy Bentham* (Edinburgh, 1842), p. 192.

²⁹ *Ibid.* (emphasis added).

regarding motivations. To the extent that law seeks to promote the common good at the expense of individual preferences and interests, therefore, law's ability to threaten or impose unpleasant sanctions emerges for Bentham as the principal way in which law can accomplish this end. More importantly, the threat of sanctions is for Bentham sometimes less a part of the *definition* of law than it is law's most prevalent modality and most pervasive characteristic. Coercion is something *added* to legal commands to make them effective by way of supplying additional motives for compliance. Although Bentham describes the relationship of coercion to the very idea of law in various and sometimes conflicting ways, most often he did not take coercion to be part of the definition of a command, nor view coercion as a component of what, as a matter of definition, makes a command a legal command.³⁰ Bentham may on occasion have expressed the role of coercion and sanctions in such definitional terms,³¹ but providing a formal definition of law was not his principal goal. He was mainly concerned to characterize how law typically functioned, and the centrality of force in law's routine operation was for him a consequence of the likelihood – albeit not the certainty – that people would not place the good of others or the good of society over their own well-being unless they were compelled to do so.³²

³⁰ See especially Bentham's discussion of "Force of a Law," *Of the Limits of the Penal Branch of Jurisprudence*, *op. cit.* note 19, pp. 142-160.

³¹ For example, Bentham seems to have taken the threat of punishment as a necessary condition for the bindingness of law in saying that "If [a person] is bound [by law], . . . he is at any rate in the first instance exposed to suffer." *Of the Limits of the Penal Branch of Jurisprudence*, *op. cit.* note 19, at p. 78.

³² My understanding of the relationship between Bentham's psychological views and his emphasis on law's coercive side has been aided by the meticulous and perceptive analysis in Gerald J. Postema, *Bentham and the Common Law Tradition* (Oxford: Clarendon Press, 1986), pp. 376-402.

Bentham's emphasis on sanctions as supplying the motives for compliance with law³³ is important for three reasons. First, it enables us to distinguish the question of what a law is from the question of what might lead people to comply with it. Second, a sanction-dependent understanding of the nature of law incorporates a falsifiable, or at least investigatable, empirical hypothesis about the likelihood that people will, absent coercive sanctions, comply with law just because it is law. And third, such an understanding puts into proper perspective some of the less charitable interpretations of Bentham and of his successors, interpretations that make it too easy to ignore the way in which Bentham understood legal coercion then, and how we might best understand legal coercion now. But in order to see why this is so, we must turn our attention away from Bentham and instead to the most prominent of his successors, and indeed the successor whose influence on thinking about the nature of law itself has far outstripped that of Bentham himself.³⁴

2.2 Enter Austin

For reasons that remain obscure, the work we now know as *Of the Limits of the Penal Branch of Jurisprudence* remained largely unpublished³⁵ in Bentham's lifetime, languishing unnoticed in the morass of Bentham's papers for more than a century. Not until 1939 was the

³³ See *Of the Limits of the Penal Branch of Jurisprudence*, *op. cit.* note 19, pp. 142-60.

³⁴ Thus, H.L.A. Hart has observed that "[h]ad [*Of Laws in General*] been published in [Bentham's] lifetime, it, rather than John Austin's later and obviously derivative work, would have dominated English jurisprudence." H.L.A. Hart, "Bentham's 'Of Laws in General,'" *Rechtstheorie*, vol. 2 (1971), pp. 55-66, p. 55, reprinted in H.L.A. Hart, *Essays on Bentham* (Oxford: Clarendon Press, 1982), pp. 105-126.

³⁵ Some of the material had, however, been translated into French and published while Bentham still lived. See "Editorial Introduction" to *Of the Limits of the Penal Branch of Jurisprudence*, *op. cit.* note 10, p. xii n.2.

manuscript discovered, and even then not published until 1945. But although Bentham's writings about the nature of law were lost for many years, his ideas were not. Within his circle of friends in early nineteenth century London was a lawyer highly taken with Bentham's theories -- John Austin. After failing at the bar, Austin, with the assistance of Bentham and James Mill, among others, was installed in a chair of law at the University of London. Taking up the chair, Austin delivered a course of lectures, hardly more successful than his law practice, in which he systematically expounded and expanded on the command theory of law, and on Bentham's basic insights about the role of force and the threat of sanctions in understanding law.³⁶

Austin's lectures were published in 1832 as *The Province of Jurisprudence Determined*, and subsequent editions, refined and actively promoted by Austin's wife Sarah after his death, added additional materials from the lectures.³⁷ And although Austin's intricate categorization of commands and elaborate typology of laws acknowledged some of the deficiencies in a pure command-based account of law and accordingly added many qualifications, he still followed Bentham in insisting on a rigid separation of moral evaluation from the criteria for identifying law:

³⁶ On Austin, see W.L. Morison, *John Austin* (Stanford, California: Stanford University Press, 1982); Wilfrid E. Rumble, *The Thought of John Austin* (London: Athlone Press, 1985); Wilfrid E. Rumble, *Doing Austin Justice: The Reception of John Austin's Philosophy of Law in Nineteenth-Century England* (London: Continuum, 2005); Brian Bix, "John Austin," in *Stanford Encyclopedia of Philosophy*, <http://plato.stanford.edu/entries/austin-john/> (2010). The personal side of Austin's life and its effect on his professional accomplishments is the focus of Joseph Hamburger & Lotte Hamburger, *Troubled Lives: John and Sarah Austin* (Toronto: University of Toronto Press, 1985).

³⁷ John Austin, *The Province of Jurisprudence Determined*, Wilfrid E. Rumble ed. (Cambridge: Cambridge University Press, 1995)(1st ed.1832); John Austin, *Lectures on Jurisprudence or the Philosophy of Positive Law*, 5th ed., R. Campbell ed. (London: John Murray, 1885) (1st ed. 1861).

The existence of law is one thing; its merit or demerit is another. Whether it be or not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, . . .³⁸

In distinguishing the existence of law from the assessment of its moral worth, Austin also followed Bentham in viewing the command backed by the threat of force in the event of disobedience as the central feature of law. In fact, Austin, whose normative commitments were less fervent than Bentham's but whose analytic proclivities (or perhaps obsessions) were stronger, incorporated the threat of force into his definitions of law and legal obligation. A law, for Austin, was simply the command of the sovereign backed by the threat of punishment for noncompliance. And it followed, for him, that to be under a legal obligation was equally simply to be the subject of a threat-backed command. Austin accordingly understood a command as the expression of a wish or desire, but, unlike other such expressions – requests or aspirations or hopes, for example – a command was the expression of a wish or desire backed by “the power and purpose of the party commanding to inflict an evil or pain in case the desire be disregarded.”³⁹ Austin thus viewed commands and duties as correlative. The subject of a command was bound or obliged to follow it by virtue of the threat of evil in the event of noncompliance, and it was precisely by being obliged to obey in this sense that the subject of the command had a duty to follow it. “Being liable to an evil from you if I comply not with a wish which you signify, I am *bound* or *obliged* by your command, or I lie under a *duty* to obey it.”⁴⁰ The binding nature of the command, and also the obligation or duty to follow it, was, for Austin,

³⁸ Austin, *Province of Jurisprudence*, *ibid.*, p. 157.

³⁹ *Ibid.*, p. 21.

⁴⁰ *Ibid.*, pp. 21-22.

entirely a function of the ability of the commander to threaten to inflict evil or pain in the event of disobedience.

Plainly this understanding of a command is too broad to explain the idea of law, as Austin well understood. The gunman who says “your money or your life” or the parent who threatens to send a disobedient child to bed without dessert are both issuing commands in exactly Austin’s sense. But unlike the parent or the gunman, law to Austin consisted of the commands of the *sovereign*, the entity by virtue of whose *position* (hence the term “positive law”) the commands of the state were to be distinguished from the commands of parents, gunmen, and everyone else. Consequently, law was for Austin the aggregate of only those commands of a political superior to a political inferior, where the threat of punishment was built into the very idea of a command. The notion of sovereignty then served the role of picking out the particular province of legal commands from the domain of commands generally.

There is much more in Austin’s thinking than just this. His conception of “political superior,” for example, required him to develop an elaborate theory of sovereignty, including a definition of the sovereign as the person or entity whose commands are habitually obeyed, but who owes no such duty of habitual obedience to anyone else.⁴¹ And Austin also distinguished occasional or particular commands – the police officer who tells me to get back or the judge who issues a ruling in a specific case, for example – from the general commands that constituted law. Laws, for Austin, were *general* commands, and thus not limited to particular acts at particular moments of time. The generality of a legal command made it applicable to multiple people at

⁴¹ For recent commentary, see Michael Rodney, “What Is in a Habit,?” in Michael Freeman & Patricia Mindus, eds., *The Legacy of John Austin’s Jurisprudence* (Dordrecht, Netherlands: Springer, 2013), pp. 185-214; Lars Vinx, “Austin, Kelsen, and the Model of Sovereignty: Notes on the History of Modern Legal Positivism,” in Freeman & Mindus, *ibid.*, pp. 51-72.

multiple times in multiple contexts. “Speed Limit 60” would have been for Austin a law properly so called, but the police officer’s warning to *me* to “slow down!” would not.

These and other complexities in Austin’s account of law are important, but it is the role of coercion that interests us here. And so we might ask why Austin thought coercion so crucial to understanding the nature of law. Despite the claims of some of his critics,⁴² Austin appreciated that the institutions generally understood as legal could offer rewards as well as impose punishments,⁴³ and he was also well aware that many kinds of laws, as we will discuss shortly, did not really fit the model of a command backed by the threat of pain or other punishment.⁴⁴ Yet despite appreciating such qualifications and nuances, Austin still insisted on a definition of law “properly so called,”⁴⁵ and on accompanying definitions of legal obligation and legal duty, that were undeniably dependent on and restricted to law in its most baldly coercive aspect. Why, we might ask, did he do that?

As with most attempts to understand texts from earlier times, it is important to appreciate the position an author was arguing against. And in this case Austin’s foil, as it had been for Bentham, was to a significant extent William Blackstone, narrowly, and the overall natural law

⁴² A widespread view holds Austin’s understanding of law to be “pedestrian.” Postema, *op. cit.* note 6, p. 36. Yet although that charge may have a ring of truth when Austin is compared to Bentham in the latter’s full glory and full fury, in general it relies too much on subsequent caricatures (perhaps especially Hart’s), many of which do not stand up to a close and charitable reading of Austin’s writings. And on the possibility (indeed, the probability) that Austin’s omissions were no greater than those of his critics, see Brian Bix, “John Austin and Constructing Theories of Law,” in Freeman & Mindus, *op. cit.* note 40, pp. 1-14.

⁴³ Austin, *op. cit.* note 36, p. 24.

⁴⁴ *Ibid.*, pp. 31-32, 156-157, 269-277.

⁴⁵ *Ibid.*, p. 28-37.

tradition, more broadly. We know this from the historical record and from Austin's and Bentham's other writings, but it becomes especially clear when we consider one of Austin's most memorable statements:

Suppose an act innocuous, or positively beneficial, be prohibited by the sovereign under penalty of death; if I commit this act, I shall be tried and condemned, and if I object to the sentence, that it is contrary to the laws of God, who has commanded that human lawgivers shall not prohibit acts which have no evil consequences, the Court of Justice will demonstrate the inconclusiveness of my reasoning by hanging me up, in pursuance of the law of which I have impugned the validity.⁴⁶

Read with modern eyes, the last phrase might be understood as suggesting that the crime was in impugning the law's validity, but that was not what Austin had in mind. Rather, he was insisting that one's view of the morality or justice of a law was largely beside the point. The hangman has the last word. More specifically, Austin was arguing against Blackstone's spare version of natural law theory, according to which an unjust law is no law at all.⁴⁷ Many modern (John Finnis, most prominently) and not-so-modern (Aquinas, especially) natural law theorists reject this version of natural law theory, insisting both on a distinction between positive (or human) law and higher law, and on a distinction between what might make law defective as law and what makes it simply not law at all.⁴⁸ But Blackstone, like Cicero before him⁴⁹ and Lon Fuller after,⁵⁰

⁴⁶ *Ibid.*, p. 158.

⁴⁷ Thus, Blackstone famously stated that if a decision were "manifestly absurd or unjust," it is not that it was "bad law," but that "it was not law." Blackstone, *op. cit.* note 8, vol. 1, p. 70.

⁴⁸ See above, notes 17-18 and accompanying text.

⁴⁹ Cicero, *op. cit.* note 3, I, vi, 18-19.

maintained that morality was simply a criterion for law properly so called. For Blackstone, or at least the Blackstone that Bentham and Austin took as their target, any law that contradicted the laws of God was not a law at all.

With such a view widely accepted at the time, the point of Austin's little scenario is to emphasize the way in which an argument from law's immorality would be futile in a court – a court with its own view of morality and its own conception of the morality of the laws it is enforcing. Note that Austin is not taking sides on whether the defendant's act in this scenario is actually innocuous or beneficial, nor on whether a law prohibiting that which is innocuous or beneficial is truly contrary to the laws of God. Austin is simply maintaining that in an important domain of human life – the courts of law and their apparatus of enforcement – it is the law's own view that matters, and it is the law's power to punish that prevails. Austin is not so much insisting that Blackstone's argument about the non-law status of an unjust law is wrong as much as he is saying that in an actual court and for an actual hangman it is the court's own view, whether right or wrong in a deeper sense, that really matters.

Austin's pithy story is thus of a piece with his insistence that “the existence of the law is one thing, its merit or demerit another.” And so although Austin, as with Bentham before him, fully recognized the possibility of criticizing the law – evaluating its merit or demerit – he recognized as well that a subject's ability to criticize the substance of the law was largely irrelevant to the operation of the law as it actually existed. For Austin the legal system was not a debating society. It was not the place where a law's merit or demerit could be discussed, and

⁵⁰ Lon L. Fuller, “Positivism and Fidelity to Law – A Reply to Professor Hart,” *Harvard Law Review*, vol. 71 (1958), pp. 630-672.

that was precisely and only because the law possessed the means of enforcing *its* view of a law's merit and validity.

Law's coercive power was thus for Austin the key to understanding the importance of the distinction between what the law is and what it ought to be. Moreover, we must bear in mind that Blackstone was a judge, and a judge in a common law system in which judges retained the power to make the law and to change it, even as they masked (or simply denied) this power in the language of discovery rather than creation. Indeed, Austin, even more than Bentham, was among the first to recognize the law-creating powers of the common law judge.⁵¹ And for a judge – Blackstone, for example – to conflate what the law is and what the law ought to be might not have been so surprising. After all, if you have the power to make and remake law, then your view of what the law ought to be can and, indeed, should dissolve into what the law is.

In describing the idea of the common law, A.W.B. Simpson observed that “[i]n the common law system no very clear distinction exists between saying that a particular solution to a problem is in accordance with the law, and saying that it is the rational, fair, or just solution.”⁵² But if, like Austin and Bentham, you have your own preferred metric of what is rational, fair, and just, and if you believe that judges in searching for the rational, the fair and the just are likely to get it wrong, then you would certainly not want to see the law through the judge's eyes.

⁵¹ Austin, *op. cit.* note 36, at 163. Austin's acknowledgment and acceptance of judicial legislation, and his departure from Bentham in this regard, is discussed in David Dyzenhaus, “The Genealogy of Legal Positivism,” *Oxford Journal of Legal Studies*, vol. 24 (2004), pp. 39-67, at p. 47; Andrew Halpin, “Austin's Methodology? His Bequest to Jurisprudence,” *Cambridge Law Journal*, vol. 70 (2011), pp. 175-202, at pp. 197-198.

⁵² A.W.B. Simpson, “The Common Law and Legal Theory,” in A.W.B. Simpson ed., *Oxford Essays in Jurisprudence*, 2nd Series (Oxford: Oxford University Press, 1973), pp. 77-99.

And that is why it is important that the defendant in Austin's story is not the judge. He is a defendant, with the power neither to make law nor to change it. For *him*, the distinction between what the law is and what it ought to be is crucial, and for *him* the distinction is supported by the law's power to punish. It is precisely the force of law that makes the distinction between law's existence and its merit essential, for without that force there would be no reason to recognize the importance of the law's own view of its merit. But by possessing that force the law's view of the law's merit captures the high ground. If we are to understand law from the legal system's point of view, therefore, and if we are to understand the importance to everyone else of the legal system's point of view, we must understand, as Austin seems to be insisting, the force that makes the legal system's point of view not simply one point of view among many, but one occupying a distinct position and a distinct conceptual space within the legal system.

2.3 *The Conventional Wisdom, circa 1960*

Bentham and especially Austin erected an elaborate theoretical apparatus to explain how the threat of unpleasant sanctions was central to the idea of law and to the distinction between law and other normative domains, such as those of morality, manners, honor, and religion. Moreover, for Bentham and probably (at least until later in life⁵³) for Austin, their view of the importance of coerciveness to law was an offshoot of their reformist program.⁵⁴ Because they

⁵³ On Austin's late-life political conservatism and apologetics for the then-existing hierarchies of English political and legal life, see Wilfrid E. Rumble, "Did Austin Remain an Austinian,?" in Freeman & Mindus, *op. cit.* note 40, pp. 131-154.

⁵⁴ Austin had law reform goals, but being less the reformer than Bentham was more inclined to take the analytic task as an end in itself. See Frederick Schauer, "Positivism Before Hart," *Canadian Journal of Law and Jurisprudence*, vol. 24 (2011), pp. 455-471.

were contemptuous rather than celebratory of the English law they knew, they found it easier to explain law's dominance by reference to its force than to its intrinsic soundness.

Yet although Bentham and Austin arrived at the importance of coercion to law by way of an intricate and normative theoretical route, their destination was hardly surprising. Not only does the ordinary citizen see law initially and predominantly in its coercive mode, but so too for those of a more theoretical bent. It is true that Bentham's most prominent positivist predecessor, Thomas Hobbes, drew a sharp distinction between law and imperatives backed by force, and he did so in the expectation that the populace would take the commands of the sovereign as dispositive as their part of the bargain that is the social compact. Hobbes obviously recognized that this expectation might not be satisfied in the conditions of actual social existence, but for theoretical purposes he was relatively unconcerned with the citizen who failed to understand the obligations of obedience that the social contract imposed.⁵⁵

Moving ahead in time, however, Bentham's focus on the coercive side of law can be seen as increasingly less remarkable, and indeed even banal. T.E. Holland, the author of what was the standard English text on jurisprudence in the late nineteenth and early twentieth centuries, accepted with little question Austin's basic scheme, and what criticisms he had were plainly interstitial.⁵⁶ Others followed the same route.⁵⁷ Henry Maine, for example, thought there was

⁵⁵ See Sean Coyle, "Thomas Hobbes and the Intellectual Origins of Legal Positivism," *Canadian Journal of Law and Jurisprudence*, vol. 16 (2003), pp. 243-270; Mark Murphy, "Was Hobbes a Legal Positivist?" *Ethics*, vol. 105 (1995), pp. 846-873.

⁵⁶ Thomas Erskine Holland, *The Elements of Jurisprudence* (Oxford: Clarendon Press, 1880).

⁵⁷ See, for example, W. Jethro Brown, *The Austinian Theory of Law* (London: J. Murray, 1906); E.C. Clark, *Practical Jurisprudence: A Comment on Austin* (Cambridge: Cambridge University Press, 1883); R.A. Eastwood & G.W. Keeton, *The Austinian Theories of Law and Sovereignty* (London: Sweet & Maxwell, 1929). The reception of Austinian views during this period is

little of importance to be said about law's "irresistible coercive power,"⁵⁸ believing the interesting issues to be about when, where, and how that coercive power was or should be deployed. Somewhat later, W.W. Buckland, in a dyspeptic survey of the state of English jurisprudence, lamented the philosophical efforts to explain the fact of obedience to law, and wished that theorists would perceive legal compliance in "a more pedestrian way," by which he meant following Bentham and Austin in their straightforward understanding of legal obligation in a less philosophical and more sanction-dependent manner.⁵⁹

At the same time that English legal theorists were following the command-coercion model of law, much the same was happening in the United States, albeit from a different direction and for a different purpose. When Oliver Wendell Holmes famously observed that we should look at law from the perspective of the "bad man,"⁶⁰ he was following Austin, whom we know he read, in understanding "law as regulated coercion."⁶¹ For Holmes, and then for Legal Realists such as Joseph Hutcheson, Jerome Frank, Leon Green, Herman Oliphant, Karl

thoroughly recounted in Neil Duxbury, "English Jurisprudence Between Austin and Hart," *Virginia Law Review*, vol. 91 (2005), pp. 1-91.

⁵⁸ Henry Sumner Maine, *Lectures on the Early History of Institutions* (London: Murray, 1875), pp. 359-60.

⁵⁹ W.W. Buckland, *Some Reflections on Jurisprudence* (Cambridge: Cambridge University Press, 1945), p. 28.

⁶⁰ "But if we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions, but he does want to know what the [courts] will do in fact." Oliver Wendell Holmes, "The Path of the Law," *Harvard Law Review*, vol. 10 (1897), pp. 457-478, at pp. 460-61.

⁶¹ As noted in Thomas C. Grey, "Holmes and Legal Pragmatism," *Stanford Law Review*, vol. 41 (1989), pp. 787-870, at pp. 793-74.

Llewellyn and many others from the 1920s through the 1940s (and, to some extent, thereafter),⁶² there was a large difference between the law on the books -- the “paper rules,” as Llewellyn put it⁶³ -- and the law actually applied. And what made this gap important was that the person affected by law, the “bad man,” was somewhere between principally and solely interested in what would happen to him if he engaged in this or that conduct. The Realists were not nearly as concerned as Austin with defining “law” in some strict sense of definition, but for them the important part of law was its ability to impose sanctions. The Realists insisted, often correctly, that the legal system sometimes imposed its sanctions in ways that could not be explained by the paper rules of the written law, but there was little doubt that they accepted the basic Austinian point that the line between when the legal system imposed its sanctions and when it did not was central to understanding the very idea of law.

Nor was the widespread acceptance of the importance of coercion limited to theorists in common law and English speaking environments. On the Continent, Hans Kelsen’s highly influential theory focused on the systemic nature of norms, and saw coercion and the state’s monopoly of legitimate coercion as the key to differentiating the legal system from all other

⁶² See Laura Kalman, *Legal Realism at Yale, 1927-1960* (Chapel Hill, North Carolina: University of North Carolina Press, 1986); Brian Leiter, *Naturalizing Jurisprudence: Essays on Legal Realism and Naturalism in Legal Philosophy* (New York: Oxford University Press, 2007); William Twining, *Karl Llewellyn and the Realist Movement*, 2d ed. (New York: Cambridge University Press, 2012); Frederick Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* (Cambridge, Massachusetts: Harvard University Press, 2009), pp. 124-147.

⁶³ Karl N. Llewellyn, *The Theory of Rules* (Frederick Schauer ed., Chicago: University of Chicago Press, 2011)(1937-1938), pp. 11-23; Karl N. Llewellyn “A Realistic Jurisprudence: The Next Step,” *Columbia Law Review*, vol. 30 (1930), pp. 431-465. See also Frederick Schauer, “Legal Realism Untamed,” *Texas Law Review*, vol. 91 (2013), pp. 749-780.

norm systems.⁶⁴ Indeed, although Kelsen's theory of law diverged sharply from Austin's, he was equally clear about the role of coercion, insisting that "outward sanctions . . . are of the law's essence,"⁶⁵ and that "[a]ll the norms of a legal order are coercive norms, i.e. norms providing for sanctions."⁶⁶ Similarly, the great sociologist of law Max Weber, who influentially focused on the creation and function of various social institutions, maintained that law simply does not exist where there are no institutions for the coercive enforcement of society's norms, that being the entire point of setting up a legal system in the first place.⁶⁷ And various other figures in German and French legal philosophy took the coercive core of law as so self-evident as to be barely deserving of extended commentary.⁶⁸

Most importantly, however, the central place of coercion in understanding the phenomenon of law remained, as it remains today, an obvious proposition for that overwhelming proportion of the world not composed of legal theorists. Movie mobsters refer to the police as "the law," and although the poet Robert Frost thought he was being funny when he quipped that "a successful lawsuit is the one worn by a policeman," the humor in his remark turned on the

⁶⁴ Hans Kelsen, *General Theory of Law and State*, Anders Wedberg trans. (Cambridge, Massachusetts: Harvard University Press, 1945), pp. 15-45.

⁶⁵ Hans Kelsen, "The Pure Theory of Law and Analytical Jurisprudence," *Harvard Law Review*, vol. 55 (1941), pp. 44-70, at pp. 57-58.

⁶⁶ Kelsen, *General Theory of Law and State*, *op. cit.* note 29, at 29.

⁶⁷ Max Rheinstein ed., *Max Weber on Law in Economy and Society* (Cambridge, Massachusetts: Harvard University Press, 1954), p. 13.

⁶⁸ Among French writers who explicitly accepted the centrality of coercion, see Henri Lévy-Ullman, *La Définition du Droit* (Paris: Larose, 1917), pp. 146, 165; Ernest Roguin, *La Science Juridique Pure*, vol. 1 (Paris: Librairie Générale de Droit et de Jurisprudence, 1923), p. 122. Roscoe Pound referred to their views as the "threat theory" of law. Roscoe Pound, "Book Review," *Texas Law Review*, vol. 23 (1945), pp. 411-418, at p. 413.

ease with which ordinary people think of law in term of its capacity to compel compliance. Blaise Pascal observed centuries ago that “law, without force, is impotent,”⁶⁹ and much later Albert Einstein noted that “nothing is more restrictive of respect for the government and the law of the land than passing laws which cannot be enforced.” Still more recently, Martin Luther King, Jr. commended the law precisely because of its power of compulsion. “It may be true that the law cannot make a man love me, but it can keep him from lynching me, and I think that’s pretty important.”⁷⁰

Among the highly visible facets of contemporary life is the tendency of public, when the law is most visibly violated, to insist not that the perpetrators simply be criticized, but that they be punished. For the public, it seems, as it did for Bentham and Austin, and as it did for James A. Garfield, among America’s most learned Presidents, that “[a] law is not a law without coercion behind.”⁷¹ But if it has seemed so obvious to the public and to presidents, to scholars and to activists, to scientists and to poets that law is all about force, then how could anyone deny it, and why would anyone want to? The ensuing chapter is devoted to exactly that question.

⁶⁹ Blaise Pascal, *Pensées*, William F. Trotter, trans. (New York: E.P. Dutton, 1941), §5, 298.

⁷⁰ As quoted in *The Wall Street Journal*, November 13, 1962.

⁷¹ James A. Garfield, Speech to 38th Congress as Member of Congress from Ohio, in Russell Herman Conwell, *The Life, Speeches, and Public Services of James A. Garfield* (Portland, Maine: George Stinson & Co., 1881), p. 199.

CHAPTER THREE

THE POSSIBILITY AND PROBABILITY OF NON-COERCIVE LAW

3.1 *Missing Pieces in the Conventional Wisdom*

It has long seemed self-evident -- to ordinary people and theorists alike -- that coercion, sanctions, threats, punishment, and brute force lie at the core of the idea of law. Not only for most citizens, but also for commentators in the tradition of Bentham and Austin, law's ability to compel compliance with its directives appears to be precisely what makes a legal directive different from a mere request or suggestion.¹ Moreover, the threat of force is what seems to distinguish law from the countless other prescriptions of which we are the targets. We exist, after all, in a normative world, constantly bombarded by people telling us what to do. They offer us advice, they give us instructions, and often they give orders and commands. Sometimes these people are parents or siblings or other relatives. Sometimes they are friends or teachers. Even

¹ Thus Bentham wrote, in a passage that did not make it into the final edition of his work on law, that an essential task was "distinguishing a law from a piece of exhortation or advice." Jeremy Bentham, *Of the Limits of the Penal Branch of Jurisprudence* (Philip Schofield ed., Oxford: Clarendon Press, 2010), p. 25 (editor's note, quoting from a fragment of the unpublished manuscript). Earlier, Hobbes had observed that "law in general, is not Counsell, but Command." Thomas Hobbes, *Leviathan*, Richard Tuck, ed. (Cambridge: Cambridge University Press, 1991) (1651), p. 183. And as Jules Coleman and Brian Leiter describe Austin's basic position, "[w]ithout sanctions, commands would really be no more than requests." Jules Coleman & Brian Leiter, "Legal Positivism," in Dennis Patterson, ed., *A Companion to Philosophy of Law and Legal Theory* (Oxford: Blackwell, 1996), pp. 241-260, at p. 244.

perfect strangers and casual acquaintances tell us what to do. And public officials seem to do it all the time. And in addition, we live our lives in a web of social norms, which although less precise purport to dictate many aspects of our behavior.

Yet against this background of what is often perceived as a pervasively prescriptive environment, law still stands out. And it does so in large part because when *it* tells us what to do it has a way of backing up its prescriptions with the coercive power of the state. Or so it has long seemed. And it is just this distinction between enforced orders from the state and all other prescriptions, whether from the state or otherwise, that attracted the focus of Bentham and Austin, and that has struck so many before and after them as the key to explaining the character and distinctiveness of law and the legal system.

Although law's seemingly singular ability to compel compliance with its directives appears at first glance to be especially important in understanding what makes law special, a host of legal theorists has long observed that a force-centered account of the nature of law leaves far too much unexplained. Writing in 1945, for example, Roscoe Pound, earlier the Dean of the Harvard Law School, wondered whether the Austinian picture omitted many aspects of law whose importance and status as law could hardly be questioned. "Might not one ask whether the legal canons of interpretation are law?" he suggested, and then asked, rhetorically, but "[i]f they impose duties on the judges (who else?), what punishment do they prescribe?"²

² Roscoe Pound, "Book Review," *Texas Law Review*, vol. 23 (1945), pp. 411-418, at p. 415.

For Pound, the canons of statutory interpretation – the second-order rules³ prescribing the methods for interpreting statutes – were obviously part of law. So too, by implication, were all the other rules (and principles, canons, maxims, standards, and other similar prescriptions⁴) that did not directly tell citizens how to behave, but instead were directed to judges and specified the manner in which *they* were to perform their tasks. Yet these rules, while plainly *legal* rules, seem to have no sanctions behind them. According to the so-called Golden Rule of statutory interpretation, for example, judges should interpret statutes according to the ordinary meaning of their language unless the interpretation would produce an absurd result plainly unintended by the enacting legislature.⁵ But no formal penalty awaits the judge who ignores the rule, or any other rule of that variety. For Pound it was important to acknowledge that many such rules were clearly part of law even though they lacked sanctions to back them up. He knew that Austin and

³ The phrase “second-order rules” comes from Joseph Raz, *Practical Reason and Norms*, 2d ed. (Princeton: Princeton University Press, 1990), but Hart’s earlier characterization of them as “rules about rules” also captures the basic idea. H.L.A. Hart, *The Concept of Law*, 3d ed., Penelope A. Bulloch, Joseph Raz, & Leslie Green, eds. (Oxford: Oxford University Press, 2012), pp. 94-99.

⁴ Famously, Ronald Dworkin distinguishes rules from principles, Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977), but his distinction is questionable, Frederick Schauer, *Playing By the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Oxford: Clarendon Press, 1991), pp. 00-00, and for present purposes nothing turns on Dworkin’s or any other distinction between rules and other kinds of prescriptions.

⁵ *River Wear Commissioners v. Adamson* [1877] 2 A.C. 743 (Q.B.); *Grey v. Pearson* (1857) 10 Eng. Rep. 1216, 1234 (H.L.). It has long been claimed, especially in the United States, that the canons of interpretation are largely non-constraining, primarily because most of the canons, including the Golden Rule, can be avoided by recourse to still other canons mandating the contrary approach. See especially Karl N. Llewellyn, “Remarks on the Theory of Appellate Decision, and the Rules or Canons about How Statutes Are To Be Construed,” *Vanderbilt Law Review*, vol. 3 (1950), pp. 395-406. Whether this skeptical claim is in fact true can be debated (see Michael Sinclair, “‘Only a Sith Thinks Like That’: Llewellyn’s ‘Dueling Canons,’ One to Seven,” *New York Law School Law Review*, vol. 50 (2006), pp. 919-992), but that debate would take us too far away from the basic point in the text.

his followers had excluded these rules from the definition of law by stipulating that coercion was a necessary component of any legal rule properly so called, but Pound believed that omitting such obvious aspects of law from a definition of law was perverse. Indeed, although Pound's own scholarship and law reform efforts focused on the criminal law, he thought that Austin's implicit use of a criminal law paradigm appeared to miss much of importance about private law. In particular, Pound worried that legally-constituted transactions – contracts, wills, the establishment of partnerships, and much else – could not without distortion be captured by the command model. Some laws, he observed, “recognize[ed] or confer[ed] power,” while others “recognized and conferred liberties and privileges,” and still others “delimit[ed] recognized interests.” “Reducing all this to commands,” Pound complained, “is an over-simplification which does violence to more than one of them and does not conduce to better understanding of them.”⁶

Pound was still not finished. Because he objected to conceiving all of law “in terms of the criminal law,”⁷ and remained unpersuaded by Austinian machinations to shoehorn “all that can be done by law or even by legislation” into a penal model, he wondered “[w]ho is ‘made to suffer’ when a court construes a will?” “We can’t say that [those] whose expectations are disappointed are punished for something they did. They do not succeed in getting what they hoped to get, and this not because of anything pronounced or regarded as a wrong on their part, but because it was not given to them.” And, further, “[i]f a court denies probate of a will because it was not executed in accordance with statutory requirements, does it allow pleasure to the virtuous collaterals next of kind, whom the testator considered unworthy of his bounty, and allot

⁶ Pound, *op. cit.* note 2, p. 415.

⁷ *Ibid.*, p. 416.

pains to the vicious friend of the testator whom he intended to provide for in token of gratitude for benefits conferred?” Moreover, “where a court construes a will or contract or a conveyance or instructs a trustee, is it taking a course of action against some one so as to make him a wrongdoer comparable to a felon or a tortfeasor?”⁸

Pound was harsher than most others in maintaining that a sanction-dependent picture of law left too much of law unexplained, but he was by no means the first. As early as 1878, when Austin’s influence was at its height, Frederic Harrison, foreshadowing Pound, catalogued in detail a lengthy array of enabling laws of property, public franchises, governmental offices, and much else which were plainly law but which could not in any plausible way be understood as commands backed by the threat of force.⁹ Other theorists in the late nineteenth and early twentieth centuries had also begun questioning whether Austin’s coercion-based picture was as complete a portrait of law as he and Bentham imagined.¹⁰ In 1931, for example, Carleton Kemp Allen observed, explicitly against Austin, that “a very great deal of law does not consist at all of . . . compulsion.”¹¹ Allen then became even more specific:

⁸ *Ibid.*, p. 417.

⁹ Frederic Harrison, “The English School of Jurisprudence: Part II. – Bentham’s and Austin’s Analysis of Law,” *Fortnightly Review*, vol. 24 (1878), pp. 682-703. And see the detailed analysis of Harrison’s views in Wilfrid E. Rumble, *Doing Austin Justice: The Reception of John Austin’s Philosophy of Law in Nineteenth Century England* (London: Continuum, 2005).

¹⁰ A particularly valuable analytic survey of these developments is Gerald J. Postema, “Analytic Jurisprudence Established,” in Gerald J. Postema, *A Treatise of Legal Philosophy and General Jurisprudence* (Dordrecht, Netherlands: Springer, 2011), pp. 3-42. See also Rumble, *op. cit.* note 8, pp. 178-241; Neil Duxbury, “English Jurisprudence Between Austin and Hart,” *Virginia Law Review*, vol. 91 (2005), pp. 1-91.

¹¹ Carleton Kemp Allen, “Legal Duties,” *Yale Law Journal*, vol. 40 (1931), pp. 331-380, at p. 346.

It has often been pointed out, in opposition to Austin, that many laws are not primarily imperative at all; they merely prescribe the means and the methods by which a person may, if he desires, effect an act-in-the-law – make a will, let us say, or a conveyance, or pursue a remedy in the courts.”¹²

Such criticisms were hardly unanticipated by Austin,¹³ and certainly not by Bentham.¹⁴ At times Austin responded to these objections by acknowledging that such instances of law were simply not the principal object of his attention. More to the point, Austin, although like Bentham¹⁵ offering an admittedly sanction-dependent account of the nature of law, relied on a conception of sanction broader than one limited to fines, imprisonment, and death. Austin observed, for example, that even the legally-imposed nullity of a transaction could count as a sanction.¹⁶ It is true that the sovereign is indifferent as to whether I enter into a contract, sell my

¹² *Ibid.*, p. 351. See also, and even earlier, Edwin M. Borchard, “Book Review,” *Yale Law Journal*, vol. 28 (1919), pp. 840-843, at p. 842, lamenting that Austin’s conception of law excludes many legal rules that are not made by the sovereign, and John C. Gray, “Some Definitions and Questions in Jurisprudence,” *Harvard Law Review*, vol. 6 (1892), pp. 21-35, at p. 26, noting that much that is clearly law is not subject to sanctions at all.

¹³ Austin explicitly acknowledged that many of the laws excluded by his narrow definition would normally be understood to be part of law more broadly. John Austin, *The Province of Jurisprudence Determined*, Wilfrid E. Rumble, ed. (Cambridge: Cambridge University Press, 1995) (1832), pp. 31-37. And on Austin’s recognition of permissive laws, see David A. Gerber, Book Review, *Archiv für Rechts- und Sozialphilosophie*, vol. 61 (1975), pp. 450-451.

¹⁴ Thus Bentham recognized a set of procedural and other secondary rules which he labeled “corroborative appendages” and “remedial appendages.” Jeremy Bentham, *op. cit.* note 1, p. 41. Bentham’s recognition and analysis of the role of constitutive or permissive laws is thoroughly examined in David Lyons, *In the Interest of the Governed: A Study in Bentham’s Philosophy of Utility and Law*, rev. ed. (Oxford: Clarendon Press, 1991), pp. xviii, 108, 112-116, 125-137.

¹⁵ See Lyons, *ibid.*, pp. 134-136.

¹⁶ John Austin, *Lectures on Jurisprudence* (London: John Murray, 1862), vol. II, Lecture XXIII, p. 141.

house, or leave my money to a cousin upon my death. But if I try to accomplish such transactions without complying with the prescribed legal forms, the transaction will not be enforced by the state. The nullity of a transaction I desired to pursue will frustrate my intentions, make it impossible for me to do what I want to do, and perhaps even produce a result that is positively distasteful to me, as when the alternative and law-demanded beneficiary of my estate is another cousin, whom I loathe. For Austin, this kind of legal nullity could operate as a genuine sanction, even if nullity's effect was only to make an optional act ineffective, as opposed to the sanctions attendant upon failure to comply with a mandate that I do something (such as pay taxes) or refrain from doing something (such as theft). The acts that legal nullity nullifies may have originally been optional, Austin believed, but when an expected outcome is nullified, the nullification, by virtue of frustrating the expectations of those who wished to consummate a transaction, seemed to him to fit within the idea of a sanction.¹⁷

We will return presently to this notion of the threat of nullity as a form of coercion. At the very least the idea should be taken seriously. Requiring that I do something in the state's way rather than mine is not totally unrelated to the idea of a command, and the penalty of not being able to do it at all if I do not do it in the state's way is at least plausibly a form of sanction. But the sanction of nullity is also plausibly, as Pound and Allen first observed, coercive in only an attenuated way. And so they, with others, were led to conclude that much of what we normally understand as being part of law is not satisfactorily explained by coercion in even a broad sense. And if this is so, then coercion and sanctions may not do nearly as much work in

¹⁷ The claim that nullity can be a sanction is more fully developed by Hart than by Austin himself, Hart, *op. cit.* note 3, pp. 33-35, but Hart then proceeds to argue against it. A useful elaboration on and partial critique of Hart's critique is Richard Stith, Punishment, Invalidation, and Nonvalidation: What H.L.A. Hart Did not Explain," *Legal Theory*, vol. 14 (2008), pp. 219-232.

accounting for the idea of law as Bentham and Austin supposed. What we should make of this, even if true, will be the subject of much of Chapter Four, but in the meantime it will be valuable to turn to what is by far the most influential version of the critique just sketched.

3.2 *H.L.A. Hart and the Gaps in Austin's Picture*

Although Allen, Pound, and many others had long been pointing out the gaps in Austin's picture of law, what has become the canonical critique of Austin for over-emphasizing coercion and slighting the non-coercive dimensions of law was the opening portion of H.L.A. Hart's *The Concept of Law*.¹⁸ In laying the groundwork for what he described as a "fresh start" in thinking about the nature of law, Hart devoted much of the early chapters of his profoundly influential book to a critique of Austin. Indeed, so important has Hart's work become for legal philosophy in the Anglo-American tradition that the earlier challenges to Austin, not substantially different from what Hart later offered, have essentially been forgotten.¹⁹

Hart's critique of the Austinian model revolved around two major themes. The first tracked the objections offered earlier by Pound and others -- that numerous dimensions of what is widely understood to be law are either ignored or unsatisfactorily explained by a sanction-based account. But Hart took these objections further. He not only re-emphasized that coercion

¹⁸ Hart, *op. cit.* note 3.

¹⁹A less benign side-effect has been that several generations of students and scholars have learned their Austin from Hart rather than from Austin's own texts. This is particularly unfortunate because Hart explicitly acknowledged that his reconstruction of Austin's views was intended to set out a clear target that may not accurately have captured the depth and nuance of Austin's own writings, Hart, *op. cit.* note 3, p. 18, and because Hart, for all his justified influence, was not known as a careful or sympathetic reader of the works of other authors. See Nicola Lacey, *A Life of H.L.A. Hart: The Nightmare and the Noble Dream* (Oxford: Oxford University Press, 2004), p. 301; Frederick Schauer, "The Best Laid Plans," *Yale Law Journal*, vol. 120 (2010), pp. 586-621, at p. 594 note 29.

seems not to explain the legal status of contracts, wills, trusts, and numerous other optional features of law, but also explored a topic noted only briefly by Pound and Allen -- the role of law in constituting such arrangements in the first place. Indeed, in Hart's 1953 inaugural lecture as Professor of Jurisprudence at Oxford²⁰ he developed a theme later to become even more prominent in John Searle's distinction between constitutive and regulative rules.²¹ Some rules constrain or otherwise regulate conduct whose conceptual existence is logically prior to the rules. My ability to drive a car at 90 miles per hour may be a function of the car, the road, and my preferences, but it does not depend on the law.²² Much the same can be said about a person's ability to bring about the death of another. After all, human beings, just like other animals, killed each other long before there were laws or legal systems, and thus prior to the existence of laws against murder, or of legal rules distinguishing murder from justified killing. And thus a rule or law prohibiting driving at 90 miles per hour or banning most killings of other people is one that operates on conduct that could exist without law, and whose conceptual existence is

²⁰ H.L.A. Hart, "Definition and Theory in Jurisprudence," in H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1984), pp. 21-48.

²¹ John R. Searle, *Speech Acts: An Essay in the Philosophy of Language* (Cambridge: Cambridge University Press, 1969), pp. 33-42. Similar ideas appear in Max Black, "The Analysis of Rules," in Max Black, *Models and Metaphors* (Ithaca, New York: Cornell University Press, 1962), pp. 95-139, at pp. 123-125; B.J. Diggs, "Rules and Utilitarianism," *American Philosophical Quarterly*, vol. 1 (1964), pp. 32-44; and John Rawls, "Two Concepts of Rules," *Philosophical Review*, vol. 64 (1955), pp. 3-32. For critiques, although directed more to the wisdom of calling constitutive act descriptions "rules" than to the basic idea, see Joseph Raz, *Practical Reason and Norms*, 2d ed. (Princeton: Princeton University Press, 1990), pp. 108-113; Frederick Schauer, *op. cit.* note 4, p. 7 n.13.

²² At least not in the conceptual sense. I put aside the contingent empirical possibility that neither cars nor roads would exist without the laws that make constructing roads and manufacturing cars possible.

consequently logically prior to the law. I do not need the law – any law -- to drive at 90 miles per hour, nor to kill my neighbor.

But now consider the rules or rule systems that *create* possibilities that would otherwise not exist. To recall an example noted briefly earlier, it is simply not possible to engage in castling without the system of rules that constitute the game of chess. Castling only exists *within* chess (although moving wooden pieces with a certain shape in a certain way on a board with squares is certainly possible, even if pointless), just as home runs only exist within baseball. The rules of chess create the very possibility of castling, and without those rules there would be no castling.

So too with law. Criminal law may regulate killing, and tort law may regulate certain forms of conceptually antecedent activity,²³ but a corporation or a trust or a will is like castling and not like killing. A group of people can run a business together without the law, but they can only create a corporation by virtue of law's establishment of the very idea of a corporation. And so too with trusts, wills, pleadings, and countless other law-constituted and thus law-dependent activities.

How are we to understand what the law is doing when it constitutes such activities or processes? It hardly appears as if the law is coercing anything or anyone, at least in the sense of requiring people to engage or not engage in any of these law-constituted activities. Law constitutes corporations, but does not mandate that anyone create one. That is essentially what Pound argued, and what Hart later argued, and for both of them neglect of law's constitutive

²³ Thus, although the idea of “negligence” may exist within and be defined by law, a surgeon may without law at all neglect to remove a sponge from the patient's body cavity after completing an operation.

dimension was a large part of their broader objection to too heavy a dependence on coercion in explaining the phenomenon of law.

The argument from law's constitutive capacity should not be taken too far. If the point of the argument is to show the importance of law even when it is not being coercive and not backing its actions with sanctions, then we should consider the possibility that law, even in its constitutive mode, may be more coercive than is often appreciated. Sometimes, to be sure, coercion is simply telling people what to do, but sometime coercion exists when it tells people that what they want to do must be done in this way and not that way. When the law creates the very possibility of engaging in an activity, it often supplants a similar and law-independent one. And if the law-independent activity is part of people's normal behavior and background expectations, then eliminating this possibility and compelling people to use law's alternative operates as a form of coercion. Consider the legal idea of a contract. It is true that contracts exist by virtue of law, and thus the concept of a contract is law-constituted in just the sense we are discussing. But even were there no contracts, there could still be promises,²⁴ and the moral obligation to keep one's promises might well be enforced with the sanctions of shame, guilt, and reputational harm, among others. Yet once the law has created the institution of the contract, it turns out that promises, at least on the same topics that might be encompassed by the law of contract, seem to have been pushed to the side, psychologically even if not conceptually. I can

²⁴ The relationship between the legal idea of contract and the moral idea of promise has generated a huge literature. See, for example, Charles Fried, *Contract as Promise* (Cambridge, Massachusetts: Harvard University Press, 1981); Jody Kraus, "The Correspondence of Contract and Promise," *Columbia Law Review*, vol. 109 (2009), pp. 1603-1649; Joseph Raz, "Promises in Morality and Law," *Harvard Law Review*, vol. 95 (1982), pp. 916-938; T.M. Scanlon, "Promises and Contracts," in T.M. Scanlon, *The Difficulty of Tolerance* (Cambridge: Cambridge University Press, 2003), pp. 234-269; Seana Valentine Shiffrin, "Is a Contract a Promise?" in Andrei Marmor, ed., *The Routledge Companion to Philosophy of Law* (New York: Routledge, 2012), pp. 241-257.

promise to sell you my house for a certain amount, but in a world of contracts there develops a background understanding that a contract to sell a house is the *only* way to promise to sell a house. To repeat, this is a psychological and not a logical claim, but it is one that appears sound. By moving into an area of behavior, law often essentially occupies the field, crowding out other pre-existing alternatives. And it is not only about contracts. Consider the law of wills. Again, a will is a creature of law, but leaving one's property upon death to designated individuals is not. A person could, after all, tell all of her brothers and sisters and children that upon her death the house and car should be given to one child and the bank accounts to another. In theory this could happen, and in many instances these wishes would be carried out. But this is not the way these things are now done in our world. In our world, a world in which there are wills, other ways of achieving the same end have been supplanted. To say to someone that they will receive my money upon my death, and to do so outside of the established legal processes, will be less effective in a world in which there are wills than in a world in which there are not.²⁵

When legally constituted forms of conduct supplant somewhat similar law-independent forms of conduct, therefore, or when law regulates optional but law-independent conduct, the so-called sanction of nullity is a real sanction. If I want to make a contract, but I do not do so in accordance with the forms prescribed by law, the contract is no contract at all, and, given the frustration of my expectations and desires, my disappointment will be palpable. Insofar as I wish to avoid such disappointment, and insofar as I want to accomplish some goal by entering into a contract, the law's ability to frustrate these desires gives it a power of coercion not dissimilar to

²⁵ Leslie Green makes a similar argument in the context of same-sex marriage. He recognizes that no one is required to marry at all, and no one is required to marry someone of the opposite sex. But when law sanctions one form of marriage but not another, he argues, it gives options to some and not others and thus embodies its coercive power. Leslie Green, "The Concept of Law Revisited," *Michigan Law Review*, vol. 94 (1996), pp. 1687-1717, at pp. 1703-1704.

coercion in more direct ways. The collapse of a complex transaction for reasons of non-compliance with law's mandates, for example, may be a far greater penalty for the parties engaged in that transaction than a \$100 fine for exceeding the speed limit. As Leslie Green puts it, "nullity can be as inconvenient, distressing, and expensive as some penalties."²⁶

Of course sometimes nullity may not be disappointing at all, and then the threat of it will lose its coercive force. As Hart points out, for example, a contract invalid because one of the contracting parties is not of age may not appear as a sanction at all to the minor who is no longer bound by the terms of contract.²⁷ And although Hart overstates the case in saying that it is "absurd" to think of the lack of effectiveness of a contract or legislation as a form of punishment,²⁸ the charge that speaking of punishment is out of place in the context of violating constitutive rules is apt when aimed at the idea that a chess player's attempt to move a rook diagonally is punished by the rules of chess, rules that specify that rooks may never move diagonally. To move a rook diagonally is impermissible, but it would be odd to describe the player who attempts to do so as having been punished.

Some violations of constitutive rules are thus so far removed from being plausibly understood as sanctions that the Austinian picture again emerges as incomplete. But the fact that some conclusions of legal nullity are not plausibly perceived as sanctions or punishments does

²⁶ *Ibid.* p. 1702. Other attempts to rehabilitate the idea that nullity can function as a genuine sanction include Theodore M. Benditt, *Law as Rule and Principle* (Sussex, UK: Harvester Press, 1978), pp. 142-157; Philip Mullock, "Nullity and Sanction," *Mind*, vol. 83 (1974), pp. 439-441; Richard Stith, "Punishment, Invalidation, and Nonvalidation: What H.L.A. Hart Did Not Explain," *Legal Theory*, vol. 14 (2008), pp. 219-232.

²⁷ Hart, *op. cit.* note 13, p. 34.

²⁸ *Ibid.*

not mean that none are. To be sure, the invalidity of a contract is sometimes not experienced as unpleasant, but for most of the people making most of the contracts most of the time, the law's ability to say that it must be done in a particular way on pain of non-enforcement will be experienced as coercive. Similarly, some judges will, as Hart notes, be indifferent to the validity of their orders,²⁹ but most judges feel the sting of reversal and seek to avoid it, making the power of an appellate court over a trial judge a power that is perceived as coercive as well. And thus in many ways the power to impose invalidity will be the power to coerce those for whom invalidity is unpleasant, likely a far larger number in many contexts than those for whom invalidity is a matter of indifference. Indeed, even the case that Hart sees as the *reductio ad absurdum* may not be so absurd at all. It is true that nullity is in some sense an essential component of any constitutive rule, and thus that "if failure to get the ball between the posts did not mean the 'nullity' of not scoring, the scoring rules could not be said to exist."³⁰ And so it may be true that nullity is best understood as part of a constitutive rule rather than a conceptually distinct enforcement of an independent requirement. But once one is inside the game, whether that game be judging or contracts or football, the rules lose some of their constitutive power and appear regulative and coercive. The coercive aspect of constitutive rules thus becomes a phenomenological matter, and the power of those who make, change, and enforce the constitutive rules may well appear coercive to those who are inside the institutions that the constitutive rules constitute.

We can concede that law's ability to create the power to make wills and trusts and contracts, just like its ability to create the power to enact legislation and issue judicial decrees, is

²⁹ *Ibid.*

³⁰ *Ibid.*

not completely captured by a coercion-based account of law. But even having made this concession, we can also recognize that attempting to explain the operation of constitutive rules without recognizing the coercive dimensions of nullity or invalidity is incomplete as well. Still, it seems plainly true that it is an error to see *all* legal rules properly so-called as coercive. What to make of the widespread but non-essential presence of coercion-based reactions to law even in its constitutive mode remains a difficult question, and one to which we shall return at length. But for now it may suffice to note that the claim that coercion is present for all law properly so called seems plainly false, and in that sense the pure Austinian account is incomplete.³¹ Just how incomplete it is, and why that incompleteness matters, will be taken up presently.

3.3 *The Internalization of Legal Rules*

By the time that Hart was writing, the view that large chunks of law could only with difficulty be explained by the command model had become, at least in jurisprudential circles, commonplace. Hart added his voice to these critics, but his more influential criticism of the command model cuts deeper. The problem is not merely that sanctions in the traditional sense are absent from much of what law does, but also that even law in its most overtly regulatory and commanding mode is logically distinct from the sanctions and threats it employs to enforce those commands. As Arthur Goodhart, Hart's predecessor as Professor Jurisprudence at Oxford, put it in 1953, "[i]t is because a rule is regarded as obligatory that a measure of coercion may be attached to it: it is not obligatory because there is coercion."³²

³¹ To the same effect, see also Hans Oberdiek, "The Role of Sanctions and Coercion in Understanding Law and Legal Systems," *American Journal of Jurisprudence*, vol. 71 (1976), pp. 71-94.

³² A.L. Goodhart, *The English Law and the Moral Law* (London: Stevens & Sons, 1953), p. 17.

We need to consider this idea, enriched substantially by Hart, more carefully. For Bentham and especially Austin, sanctions were essential to the very idea of legal obligation. Laws created obligations by backing their commands with threats. And thus to be subject to a legal obligation – to be under a legal *duty* – was to be the subject of an official command supported by a threat of an “evil” for non-compliance. Force was not only an essential component of a legal command, but also an equally essential part of the related ideas of legal obligation and legal duty.

But as Goodhart, Hart, and others since have pointed out, treating the threat of unpleasant sanctions for non-compliance as essential to the obligation excludes the possibility of an obligation without a threat. Hart believed that the distinction between being under an obligation and being threatened by force, as with the gunman who threatens my life if I do not hand over my money, is identified by and reflected in the linguistic distinction between being obliged, as in the gunman situation, and being under an obligation, as in being subject to a law. As a linguistic matter, Hart was mistaken. It is no error in English to say that one is morally obliged to care for a sick relative, nor to say that people have sanction-compelled obligations to pay their taxes or obey the speed limit. Indeed, it may not be a linguistic error to say that the gunman imposed on me an obligation to hand over my money. It is far more common than Hart supposed simply to understand “obligation” as the noun form of the verb “oblige,” as when the Supreme Court of the United States says that “the heir in virtue of his liability as heir for the obligation of his ancestor would be obliged to respond for all the fruits and revenues as heir if not possessor,”³³ or when

³³ *Longpre v. Diaz*, 237 U.S. 512, 528 (1915).

another American federal court says that “[a]s the Order did not make the independent obligation delegable, CDSS was obliged to comply with it.”³⁴

That the linguistic distinction between being obliged and having an obligation does far less work than Hart believed in marking the distinction does not make the distinction itself any less genuine or important. If we put aside the question whether the distinction can be extracted from ordinary language, the difference that Hart intended to describe remains crucial, precisely because we can understand having an obligation even absent a threat for non-compliance.

The capacity of obligations to exist even without sanctions is clearest in the case of moral obligations. Most people believe they have a moral obligation to care for their elderly parents, but that obligation is typically unsupported by the threat of sanctions. Yes, the sanction of criticism, especially public criticism, will be both effective and necessary for some people, but it is too impoverished an understanding of the very ideas of moral sensibility and moral motivation to believe that everyone who cares for an aged parent or an infirm relative is doing so solely to avoid the sting of public criticism. Consider, for example, the moral vegetarian, who refrains from eating meat not for health reasons, but because she believes it morally wrong to kill sentient creatures for food. There are many such people nowadays, but not so many that vegetarians risk condemnation, at least in most social environments. Nevertheless, the moral vegetarian believes she has an obligation to refrain from meat-eating, and she believes that she would be in breach of that obligation – or duty – were she to eat a steak, a pork chop, or fried chicken. And so the very notion of a moral obligation, a notion familiar to most of us, shows that reducing the very idea of an obligation to the threat of sanction is simply confused.

³⁴ *California Department of Social Services v. Leavitt*, 523 F.3d 1025, 1035 (9th Cir. 2008).

We can characterize the moral obligation just described as having been *internalized*. The obligation to refrain from meat-eating is a reason for and guides our vegetarian's conduct. And under some circumstances she might even criticize others for eating meat, a criticism whose purchase derives from the vegetarian's internalization of the "don't eat meat" rule. Or, to put the same point in a different way, her criticism presupposes – Hart says "accepts" -- the rule, and the criticism is made *from* the standpoint of the presupposed or accepted rule.

But if moral obligations can be internalized without sanctions, then so too can legal ones. And this was the very point that Hart, a few of his predecessors, and almost all of his successors wished to emphasize. We need not become enmeshed in complex meta-ethical questions about just where moral obligations come from to recognize that for all but the most irresolute subjectivists they come from somewhere. In the minds of some people they come from God, for others from culturally and temporally contingent social norms, for others from their own intuitions, and for still others from an objective reality of right and wrong. But they come from somewhere, a notion that is important in understanding the differences between raw preferences and perceived moral constraints. The committed moral vegetarian may well adore Beef Wellington and pork barbecue, and may even believe that a diet including meat and fish is healthier than one without, but the moral obligations she has internalized require her to set aside some of her preferences, some of her desires, and possibly even some of her needs in the service of her moral obligations. Her internalized moral obligations are second-order constraints on her first-order preferences.

Much the same applies to law, at least as a theoretical possibility. If people can understand and respond to a sanction-free moral obligation coming from, say, God,³⁵ or from an objective notion of moral right and moral wrong, then there is no reason that the law could not occupy a similar position. As a logical and conceptual matter, people who do things because morality says so (the locution is intentional, designed to suggest the common even if not necessary external phenomenology of moral obligation) could do things because the law says so. People could perceive law as an independent source of obligation, and could understand the law as imposing obligations even though the law threatened no sanctions. If it makes sense to say that I do something because morality tells me to do it, then it makes just as much sense, as a logical and phenomenological matter, to say that I do something because the law tells me to do it. In Hart's language, people can have an *internal point of view* vis-à-vis legal obligations. When they have such an internal point of view – when they have internalized the nature of the obligation -- they recognize the fact of a legal “command” as creating an obligation and thus a reason for action in a way that is logically, phenomenologically, and empirically distinct from the possibility of sanctions for violating that obligation.

Legal philosophers since Hart have tended to accept this account of how law can create obligations, but they often make it more mysterious than necessary, typically by describing the issue in terms of a genuine puzzle about the source of law's “normativity.”³⁶ But the issue is not

³⁵ This is not a book of theology. Nevertheless, it is worth noting here that threats of divine retribution or burning eternal damnation are hardly universal to religious belief and religious understanding. In some religious traditions, the commands of God are to be followed just because they are the commands of God, and they are to be followed even though neither thunderbolts nor the fires of Hell are there to be feared.

³⁶ See, for example, Stefano Bertea & George Pavlakos, eds., *New Essays on the Normativity of Law* (Oxford: Hart Publishing, 2011); Scott J. Shapiro, *Legality* (Cambridge, Massachusetts: Harvard University Press, 2011), pp. 181-188; Jules L. Coleman, “The Architecture of

nearly as puzzling as these theorists would have us believe. Whenever we are inside a rule system, we have obligations created by that system. If we understand morality as a system of rules (which not everyone does, to be sure), then moral obligation is constituted by the set of obligations created by a system of rules that one accepts. And when one is playing chess -- when one has internalized and is thus inside the rule system that constitutes the game of chess -- we might say, infelicitously but in a way that captures the idea, that one is under a chessal obligation to follow the rules of chess. Not an unconditional obligation, but an obligation conditional on being inside the game of chess and its rules. Similarly, when one is inside the rule system of, say, Victorian etiquette, then we could say that people are under an etiquettal obligations to follow the rules that the practice establishes. And if one internalizes the rules of fashion, then one is under a fashional obligation to follow the dictates of the ever-changing rules and norms of fashion. To be under an obligation is a function of being within – and thus accepting, or presupposing – the rules or commands of some system. The acceptance is conditional upon being inside the system. As a logical matter, moral obligation, religious obligation, chessal obligation, etiquettal obligation, and fashional obligation are all species of the same logical genus.

Legal obligation is another species of this same genus. Legal obligation can be like chessal obligation. If one accepts – internalizes, or takes as a guide to action – the system, then

Jurisprudence,” *Yale Law Journal*, vol. 121 (2011), pp. 2-80; Christopher Essert, “From Raz’s Nexus to Legal Normativity,” *Canadian Journal of Law & Jurisprudence*, vol. 25 (2012), pp. 465-482; John Gardner, “Nearly Natural Law,” *American Journal of Jurisprudence*, vol. 52 (2007), pp. 1-23; Andrei Marmor, “The Nature of Law: An Introduction,” in Marmor, *op. cit.* note 19, pp. 3-15, at pp. 4, 11-12; Stephen Perry, “Hart on Social Rules and the Foundations of Law: Liberating the Internal Point of View,” *Fordham Law Review*, vol. 75 (2006), pp. 1171-1209; Veronica Rodriguez-Blanco, “Peter Winch and H.L.A. Hart: Two Concepts of the Internal Point of View,” *Canadian Journal of Law & Jurisprudence*, vol. 20 (2007), pp. 453-473.

that system can create obligations for those who accept it. And the system can create such obligations for those inside it, as a conceptual or logical matter, without any reference to force, to sanctions, or to coercion.³⁷ This is what Joseph Raz has called the “legal point of view,”³⁸ and as so expressed it is no more mysterious or puzzling than the chessal point of view or the moral point of view.³⁹ To be inside a system of norms is to have the ability to take actions, have reasons, make statements, offer criticism, and reach judgments *from* and not about the norms of that system. And thus the normativity of law presupposes (or is conditional upon) one being inside law’s normative system. But once the contingent condition is satisfied, or the presupposition is accepted, then the normativity of law stands on the same footing as any other form of reason-giving from the standpoint of a presupposed system of rules or norms.⁴⁰

Recognizing what it is to make judgments (both about one’s own behavior or in criticism or praise of others) from inside a system of rules was thus Hart’s basic and profoundly influential point. *Contra* Bentham and *contra* Austin, there can indeed be legal obligation independent of sanctions. To take sanctions, or the credible threat of them, as logically or definitionally part of

³⁷ See John Gardner, “How Law Claims, What Law Claims,” in Matthias Klatt, ed., *Institutionalized Reason: The Jurisprudence of Robert Alexy* (Oxford: Oxford University Press, 2012), pp. 29-44.

³⁸ Joseph Raz, *Practical Reason and Norms*, 2d ed. (Oxford: Oxford University Press, 1999).

³⁹ On the latter, see especially Kurt Baier, *The Moral Point of View* (Ithaca, New York: Cornell University Press, 1958).

⁴⁰ See David Enoch, “Reason-Giving and the Law,” *Oxford Studies in the Philosophy of Law* (Leslie Green & Brian Leiter, eds.), vol. 1 (2011), pp. 1-38. To the same effect, and also valuable, is Torben Spaak, “Plans, Conventions, and Legal Normativity,” *Jurisprudence*, vol. 3 (2012), pp. 509-521, and Brian Bix, Book Review, *Ethics*, vol. 122 (2012), pp. 444-448, at pp. 447-448.

the very idea of an obligation or a duty is, as Goodhart first put it, to confuse the very idea of an obligation with the instruments that are commonly used to enforce them.

To be sure, some of the theorists who continue to puzzle about normativity believe the foregoing account of legal obligation insufficient. Legal obligation is not merely relative to acceptance or being inside the system, they say, but, like morality, is unconditional. Just as I do not have to accept a system of morals in order to be morally wrong, so the argument goes, so too can I be legally wrong even if I do not accept the framework of the legal system. That is true enough, but there is no mystery about being *legally* wrong from the standpoint of the law. Perhaps, as it is said, the mystery resides in why being legally wrong is simply wrong, apart from the possibility (see Chapter Four) of there being a *moral* obligation to obey the law. But why would we even think that there is something more to being legally wrong than being legally wrong unless being legally wrong was also to be morally wrong just by virtue of being legally wrong. The puzzle of legal normativity is not the puzzle of trying to explain why there is a non-moral and non-legal wrongness to being legally wrong, but why anyone would think there was in the first place.

3.4 *Internalization and the Nature of Law*

It should by now be clear that the sanction-independent internalization of legal obligation is logically and conceptually possible. Just as our moral vegetarian in an environment of non-vegetarians follows her moral calling in the absence of sanctions, people could follow the law just because it is the law (about which much more remains to be said, and will be said, especially in Chapter Four), and without any fear of sanctions. But is this more than just a logical

possibility? And what does the existence of this logical possibility tell us about the phenomenon of law itself?

In the contemporary jurisprudential tradition, the simple existence of the possibility of sanction-independent legal obligation is sufficient to establish that sanctions – coercion – are not part of law’s *nature*. And those who reach this conclusion do so by way of an understanding of the nature of something -- of anything -- that is constituted by the essential or necessary conditions of its existence. To understand the nature of something, or, as some would put it, to understand the *concept* of something, is to be able to identify its essential or necessary properties. It may be that most birds fly, for example, but because some creatures are clearly birds and just as clearly cannot fly – penguins and ostriches, for example – it is a mistake to understand flying as an essential property of birdness. And because most people understand pineapple wine as wine, even if very poor wine,⁴¹ it is similarly mistaken to include any reference to grapes within the concept of wine.

Just as an essentialist understanding of the very concept of wine excludes being made from grapes as part of wine’s nature, so too does a similar perspective exist, at least in recent decades, about the concept of law. Thus, to repeat the quotation from Chapter One, we see Joseph Raz observing that what distinguishes legal philosophy from legal sociology is that “[t]he latter is concerned with the contingent and the particular, the former with the necessary and the universal. Sociology of law provides a wealth of detailed information and analysis of the functions of law in some particular societies. Legal philosophy has to be content with those few

⁴¹ For the state of Hawaii’s understandable desire to provide protectionist support for a pineapple wine industry that would likely struggle if left to compete on the intrinsic merits of the product itself, see *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984).

features which all legal systems necessarily possess.”⁴² Similarly, Scott Shapiro takes the task of conceptual analysis generally, and conceptual analysis about law, to involve a search for “truisms,” which are not contingent empirical truths, but necessary truths about the entity the concept of which is being investigated.⁴³ Thus Shapiro emphasizes that the truisms identified about law must be ones that are “in fact present in every legal system.”⁴⁴

It is this essentialist understanding of the nature of law, or the concept of law,⁴⁵ or the nature of the concept of law that leads some theorists to view the possibility of sanction-free

⁴² Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979), pp. 104-105. In somewhat more recent expositions, Raz reiterates that an account of the nature of law “consists of propositions about the law which are necessarily true.” Joseph Raz, “Can There Be a Theory of Law?” in Martin P. Golding & William P. Edmundson, eds., *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Oxford: Basil Blackwell, 2005), p. 324, and that the theses of a general theory of law claim to be about “necessary truths.” Joseph Raz, “On the Nature of Law,” *Archiv für Rechts- und Sozialphilosophie*, vol. 82 (1996), pp. 1-XX, at p. 2. To the same effect are Julie Dickson, *Evaluation and Legal Theory* (Oxford: Hart Publishing, 2001), p. 17 (defining the enterprise of analytic jurisprudence as the search for important “necessary truths” about law); Andrei Marmor, *Interpretation and Legal Theory* (Oxford: Clarendon Press, 2d ed., 2005, p. 27); R.H.S. Tur, “What is Jurisprudence,” *Philosophical Quarterly*, vol. 28 (1978), pp. 152-XXX, at p. 155. Useful commentary includes Brian Bix, “Raz on Necessity,” *Law and Philosophy*, vol. 22 (2003), pp. 537-XXX, at pp. 546-549; Danny Priel, “Jurisprudence and Necessity,” *Canadian Journal of Law and Jurisprudence*, vol. 20 (2007), pp. 173-200. As the quotation in the text indicates, this view may merely reflect a view about the differentiation of academic disciplines and not about what is, in the final analysis, worth knowing. But I suspect that some theorists are interested not only in marking the boundaries between philosophy and other disciplines, boundaries that are themselves far more contested than they may acknowledge, but also in making the case for the independent importance of an essentialist inquiry, an importance that this and the ensuing sections seek to challenge.

⁴³ Scott J. Shapiro, *Legality* (Cambridge, Massachusetts: Harvard University Press, 2011), pp. 13-22.

⁴⁴ *Ibid.*, p. 407 n.20. Including the legal systems that non-human aliens from other planets might have. *Ibid.*, pp. 406-407 n.16.

⁴⁵ For the moment, I do not want to make too much of the concept of a concept. For present purposes, we can agree with Kenneth Ehrenburg that “[t]alking about a concept of law is really just a shorthand way of talking about the nature of legal practices.” Kenneth M. Ehrenburg,

legal obligation and sanction-free law as profoundly important. If, as we have seen and as Hart and many others have argued, there exists the logical possibility of law and legal obligation without force and coercion, then that very possibility, apart from the size of its empirical presence, causes coercion to drop out of the nature of law for those who believe that the nature of something consists in and only in its necessary or essential properties. Even though all real legal systems employ a large battery of coercive devices to enforce the obligations they create, the fact that non-coercive law is possible, and the fact that some parts of real legal systems appear to operate without coercion, is sufficient under an essentialist view to exclude coercion from law's nature. Coercion emerges as contingent and not necessary, useful but not essential, ubiquitous but not universal, and thus not part of the very nature of law itself.⁴⁶

As we have seen, it is possible for those who are inside the rule-based enterprise of law to internalize its commands without sanctions, just as it is possible for those who are inside the enterprise of chess to internalize *its* rules without sanctions. But now we might wonder about the import of this phenomenon. Assume for the moment what no one denies – that sanctions are a large part of how all real legal systems enforce many of the obligations they create. But if this contingent and non-necessary fact is not part of the nature of law just because of its non-necessity, then we are led to consider what the nature of something consists of, and whether it is necessary, as it were, for necessity to be the touchstone of an inquiry into the nature of any phenomenon.

“Law is Not (Best Considered) an Essentially Contested Concept,” *International Journal of Law in Context*, vol. 7 (2011), pp. 209-232, at p. 210.

⁴⁶ For the related claim that coercion and force “are not part of the concept of the state,” see Christopher W. Morris, “State Coercion and Force,” *Social Philosophy and Policy*, vol. 29 (2012), pp. 28-49.

3.5 *Generics, Concepts, and the Concept of Law*

So what are we to make of the fact that coercion is not a necessary property of law, in the sense that there can be, and sometimes is, law without coercion? People can internalize legal norms independent of their methods of enforcement, and people, especially legal officials, as Pound first observed, sometimes do internalize, follow, and use legal norms even when sanctions are absent. But does this really mean that coercion drops out of an inquiry into the nature of law, as many legal theorists have believed?⁴⁷ Perhaps it does, but perhaps the view that it does rests on a view of just what a concept or a nature is, a view that is by no means universally held. Indeed, it may rest on a view of what a concept or a nature is that is empirically false.

Consider, again, birds. Most birds fly. Some do not. But if we ask someone to think quickly about a bird, it is hard to imagine that what first comes to mind will be a penguin, an ostrich, an emu, or an eagle with a broken wing. And this is not just about birds. Cognitive scientists who study concept formation have almost universally concluded that people do not use concepts in the way that the “essential feature” view of concepts supposes. Rather, they understand that their concepts have central cases – flying birds, wine made from grapes, clever mathematicians – and also cases that are peripheral, such as non-flying birds, pineapple wine, and stupid mathematicians. They understand that permanently moored but floating houseboats are sort of like boats but are not central cases of boats, and that houseboats are also sort of like

⁴⁷ A valuable survey of these issues is Brian Bix, “Conceptual Questions and Jurisprudence,” *Legal Theory*, vol. 1 (1995), pp. 465-479. For a skeptical view of some of the main methodological lines of contemporary jurisprudential conceptual analysis, see Brian Leiter, “Realism, Hard Positivism, and Conceptual Analysis,” *Legal Theory*, vol. 4 (1998), pp. 533-547, at pp. 544-547.

houses but not central cases of houses.⁴⁸ In their thinking and in their talking, people have prototype or paradigm or central cases of the concepts and words they use, and there are other cases that are more debatable, less central, and more peripheral. Moreover, people think of concepts and categories in terms of properties – like flying for birds and grape origin for wine – that may not hold even for all of the central cases of the category.⁴⁹ And although cognitive scientists debate about many things, this is not one of them, for it is widely recognized that a picture of concept formation that stresses necessary (and sufficient) conditions or properties is an inaccurate picture of how actual people actually think.

The same idea has been recognized from several different philosophical traditions. Most famously, but also most controversially, Ludwig Wittgenstein suggested the idea of a family resemblance as explaining at least some, probably most, and possibly all of language.⁵⁰ Using the example of *games*, he suggested that all the things we call games do not share common characteristics. There are no necessary or essential properties of games. And, importantly, there are no necessary or essential properties of all of the games we think of as central cases of games. Rather, the things we call games, and even the multiple things that are central cases of games, relate to each other as a family resemblance, like the strands of a rope rather than the links in a

⁴⁸ See *Lozman v. City of Riviera Beach, Florida*, 133 S. Ct. 735 (2013).

⁴⁹ See James A. Hampton, “Thinking Intuitively: The Rich (and at Times Illogical) World of Concepts,” *Current Directions in Psychological Science*, vol. 21 (2012), pp. 398-402, at p. 399. Related research to the same end includes James A. Hampton, “Typicality, Graded Membership, and Vagueness,” *Cognitive Science*, vol. 31 (2007), pp. 355-383; Steven A. Sloman, “Feature-Based Induction,” *Cognitive Psychology*, vol. 25 (1993), pp. 231-280; Ling-ling Wu & Lawrence W. Barsalou, “Perceptual Simulation in Conceptual Combination: Evidence from Property Generation,” *Acta Psychologica*, vol. 132 (2009), pp. 173-189.

⁵⁰ Ludwig Wittgenstein, *Philosophical Investigations*, 3d ed., G.E.M. Anscombe, trans. (New York: Macmillan, 1958), ¶¶ 66-67.

chain. Anything we understand as a game – as an instance of the concept of a game – shares some number of properties with some number of other games, but there are no properties that are shared by all games, not even by all of the games that are clear cases of games.

Not everyone agrees with the idea that family resemblance explains even games. Most notably, Bernard Suits argued that *all* games can be characterized as rule-based activities that are “voluntary attempts to overcome unnecessary obstacles.”⁵¹ And thus he purported to provide, explicitly *contra* Wittgenstein, a definition of games in terms of necessary and sufficient conditions. Suits’s definition may not actually be correct. Would it apply to those who play sports for money, for example? But even if the definition that Suits offers is sound, it may not actually tell us very much of interest about games, and may be a definition offered at such a high level of abstraction as to be essentially uninformative.

But although Wittgenstein’s views are hardly without dissenters, his and other forms of anti-essentialism have nevertheless been highly influential. The philosophers Max Black and John Searle discussed “cluster concepts,” concepts defined by a weighted set of criteria, with no single criterion being either necessary or sufficient for proper application of the concept, and no one of which is either necessary or part of a set of jointly sufficient criteria for proper application

⁵¹ Bernard Suits, *The Grasshopper: Games, Life and Utopia* (Peterborough, Ontario: Broadview Press, 2005) (1978). To the same effect, and more recently, see Colin McGinn, *Truth by Analysis: Games, Names, and Philosophy* (Oxford: Oxford University Press, 2012). Suits offers a more complete definition – “To play a game is to engage in activity designed to bring about a specific state of affairs, using only means permitted by specific rules, where the means permitted by the rules are more limited in scope than they would be in the absence of such rules, and where the sole reason for accepting the rules is to make possible such activity.” Suits, *op. cit.*, pp. 48-49. See also Bernard Suits, “What is a Game?” *Philosophy of Science*, vol. 34 (1967), pp. 148-156.

of even the central cases of the concept.⁵² Still other philosophers have taken up a prototype theory of meaning that hews even more closely to what cognitive scientists have learned about how people actually think and reason with concepts.⁵³ And even more recently, there has been great interest in *generics*, characterizations that are usually or generally true but that tolerate exceptions.⁵⁴ It is not universally true that Volvos are reliable, that Swiss cheese has holes, or that birds fly, but it is no mistake to say that “Volvos are reliable,” “Swiss cheese has holes,” or that “birds fly.” It thus appears that an important feature of human cognition and human

⁵² Max Black, *Problems of Analysis: Philosophical Essays* (Ithaca, New York: Cornell University Press, 1954), p. 28; John Searle, *Speech Acts: An Essay in the Philosophy of Language* (Cambridge: Cambridge University Press, 1969), pp. 162-174. See also Hilary Putnam, “The Analytic and the Synthetic,” in Herbert Feigl & Grover Maxwell, eds., *Scientific Explanation, Space, and Time* (Minnesota Studies in the Philosophy of Science, vol. III: Minneapolis, Minnesota: University of Minnesota Press, 1962), pp. 358-397, at p.378. On Kripke’s response to Searle and Searle’s rejoinder, see Karen Green, “Was Searle’s Descriptivism Refuted?” *Teorema*, vol. 17 (1998), pp. 109-113.

⁵³ The principal cognitive science source for prototype theory is the work of Eleanor Rosch. See Eleanor Rosch, “Principles of Categorization,” in Eleanor Rosch & Barbara B. Lloyds, eds., *Cognition and Categorization* (Hillsdale, New Jersey: Lawrence Erlbaum Associates, 1978), pp. 27-48; Eleanor Rosch & Carolyn B. Mervis, “Family Resemblances: Studies in the Internal Structure of Categories,” *Cognitive Psychology*, vol. 7 (1975), pp. 573-605. See also Hans Kamp & Barbara Partee, “Prototype Theory of Compositionality,” *Cognition*, vol. 57 (1995), pp. 129-191. Philosophical adaptations include Dirk Geeraerts, “On Necessary and Sufficient Conditions,” *Journal of Semantics*, vol. 5 (1986), pp. 275-291; Sally Haslanger, “Gender and Race: (What) Are They? (What) Do We Want Them to Be?” *Noûs*, vol. 34 (2000), pp. 131-155; William Ramsey, “Prototypes and Conceptual Analysis,” *Topoi*, vol. 11 (1992), pp. 59-70. Prototype theory and objections to it are described in Eric Margolis & Stephen Lawrence, “Concepts,” *Stanford Encyclopedia of Philosophy*, <http://plato.stanford.edu/entries/concepts/> (2011).

⁵⁴ See especially Mark Johnston & Sarah-Jane Leslie, “Concepts, Analysis, Generics and the Canberra Plan,” *Philosophical Perspectives*, vol. 26 (2012), pp.113-171; Sarah-Jane Leslie, “Generics: Cognition and Acquisition,” *Philosophical Review*, vol. 117 (2008), pp. 1-47; Sarah-Jane Leslie, “Generics and the Structure of the Mind,” *Philosophical Perspectives*, vol. 21 (2007), pp. 375-403. It is noteworthy that the recent scholarship has often and usefully combined philosophical analysis with experimental cognitive psychology. See, for example, Sarah-Jane Leslie, Sangeet Khemlani, & Sam Glucksberg, “All Ducks Lay Eggs: The Generic Overgeneralization Effect,” *Journal of Memory and Language*, vol. 65 (2011), pp. 15-31.

communication is the use of probabilistically but not universally true characterizations as a vital part of our cognitive and communicative existence.

This is not a book about cognitive science or the philosophy of language. That our language and our concepts, especially those that do *not* describe natural kinds such as gold and water, are best characterized in terms of prototypes, central cases, generic properties, clusters, and family resemblances is contested terrain.⁵⁵ But at the very least it is far from self-evident or universally accepted that grasping and using a concept requires knowing the necessary and sufficient conditions for its proper use.⁵⁶ To say that to understand the nature or concept of law is to understand its essential properties or even the essential properties of its central cases is thus to rely on a premise whose empirical basis is shaky and whose philosophical provenance is highly contested. Moreover, and to repeat, this cluster of anti-essentialist claims is not merely about peripheral cases. The issue is not, or at least not only, whether there are core and fringe cases of law, just as there are core and fringe cases of pretty much everything else. Rather, the question is whether even the core or standard cases can be understood in terms of necessary features.⁵⁷ Many theorists say that they can, but many others say that they cannot, and the latter view – that even standard or central cases do not have essential properties – has its own substantial philosophical provenance and even more substantial empirical support. Neither this

⁵⁵ Among the prominent defenses of conceptual analysis and the classical definition of concepts are Frank Jackson, *From Ethics to Metaphysics: A Defense of Conceptual Analysis* (Oxford: Clarendon Press, 1998), and McGinn, *op. cit.* note 41. And at the opposite extreme are those who reject classical essentialism even for natural kinds and mathematical entities. See Joseph Almog, “Nature Without Essence,” *Journal of Philosophy*, vol. 107 (2010), pp. 360-383.

⁵⁶ Or even that we need concepts at all. See Edouard Machery, *Doing Without Concepts* (New York: Oxford University Press, 2009).

⁵⁷ Or, relatedly, whether there might be in a society, “multiple and conflicting concepts” of the same phenomenon, including law. Bix, *op. cit.* note 42, p. 556.

provenance nor the empirical support makes the anti-essentialist claim necessarily correct. And it is rarely a good idea to rely on the authority of anonymous or not-so-anonymous mass academic opinion. “No one thinks this anymore” is a bad argument, even though it sometimes represents an accurate empirical description. But the existence of live philosophical disputes and somewhat of an empirical consensus should caution against too quickly accepting the idea that looking for the nature of the phenomenon of law must be an exercise in searching, even in the central or standard cases, for law’s essential properties.⁵⁸

Even Hart, the inspiration for much of modern legal philosophy in the essentialist tradition, may himself have held non-essentialist views about the nature of law. Just as Hart memorably urged us to recognize core and penumbral instances of “vehicles” for purposes of applying a “no vehicles in the park” rule⁵⁹ -- that trucks and other motor vehicles were core cases but that roller skates and bicycles and toy cars were on the fringe – he appeared to suggest, especially in the earliest pages of *The Concept of Law*, that not only might “law” be like “vehicle” in the sense of having central and peripheral cases, but also that “law” might itself be a family resemblance concept with neither necessary nor sufficient conditions for its proper application.⁶⁰ Whether this is what Hart actually meant, or whether this view carried through to the remainder of his book, are interesting exegetical questions, but not our primary concern here.

⁵⁸ For a similar conclusion, albeit reached by a different route, see Brian Leiter, “The Demarcation Problem in Jurisprudence: A New Case for Skepticism,” *Oxford Journal of Legal Studies*, vol. 31 (2011), pp. 663-677.

⁵⁹ H.L.A. Hart, “Positivism and the Separation of Law and Morals,” *Harvard Law Review*, vol. 71 (1958), pp. 593-629, at pp. 606-615. The example is reprised in Hart, *op. cit.* note 3, pp. 125-127.

⁶⁰ Textual support for this claim is offered in Frederick Schauer, “Hart’s Anti-Essentialism,” in Andrea Dolcetti, Luis Duarte d’Almeida, & James Edwards, *Reading H.L.A. Hart’s The Concept of Law* (Oxford: Hart Publishing, forthcoming 2013).

At the very least, however, we can recognize that there is substantial support for the view that the concept of law, perhaps like all concepts and perhaps like only some concepts, is best characterized in terms of central cases not themselves identifiable in terms of necessary properties and whose properties may not be present in other arguably proper applications of the concept. And thus law, like much or perhaps everything else, may well be a generic, a cluster concept, or a family resemblance.

If the concept of law, or the proper application of the word “law,” are best characterized in the anti-essentialist way just discussed, or if the phenomenon of law itself has no essence, then the absence of coercion in things properly or at least plausibly understood as law is no longer fatal to coercion being an important feature of the central case of law. If, like generics in general, an unquantified statement about law is resistant to counterexamples, then the statement that “law is coercive” may be similar to statements such as “mosquitoes carry malaria” and “birds fly.” Coercion may be to law what flying is to birds – not strictly necessary but so ubiquitous that a full understanding of the phenomenon requires us to consider it.⁶¹ Conversely, non-coercive law, while interesting and important both theoretically and practically, may be like the flightless bird – useful in telling us something about all birds, but hardly deserving of exclusive attention.

3.6 *In Search of the Puzzled Man*

⁶¹ And thus Brian Bix rightly and skeptically asks whether, even if law has essential properties and even if we can identify them by conceptual analysis, the “achievements” of such an enterprise “are substantial.” Brian Bix, “Joseph Raz and Conceptual Analysis,” *APA Newsletter on Philosophy of Law*, vol. 6/2 (2007), pp. 1-7, at p. 5.

Proponents of an essentialist picture of the nature of law would deny at least some, and perhaps all, of the foregoing claims about the empirical and practical unimportance of coercion-free law. First, they would point out that legal systems have to “start” somewhere, and that the officials who impose sanctions on others do not themselves internalize legal rules because of the threat of sanctions. Even this, however, may not be so. Judges may internalize the canons of statutory construction in order to avoid the penalties of reputational damage and in order to gain the rewards of professional prestige and advancement.⁶² And many officials may internalize and apply legal rules simply because of fear of imprisonment or death. We know of societies in which there are elaborate systems of rules, including the rules about rules that Hart called secondary rules, in which the officials make and enforce those rules out of fear of the despot and his army, and in which the despot and his army are motivated simply by the desire for wealth or power.⁶³ Perhaps some would deny that such systems are law at all, but an account of law that says there was no law in Zaire under Mobutu, or in the Philippines under Marcos,⁶⁴ or in some

⁶² See Richard A. Posner, “What Do Judges Maximize? (The Same Thing Everybody Else Does),” *Supreme Court Economic Review*, vol. 3 (1993), pp. 1-41; Frederick Schauer, “Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior,” *University of Cincinnati Law Review*, vol. 68 (2000), pp. 615-636.

⁶³ For exploration of how an entire government (and, *mutatis mutandis*, and entire legal system) could be grounded on officials acting in a “net of fear” of each other or of a single despot, see Gregory S. Kavka, *Hobbesian Moral and Political Theory* (Princeton, New Jersey: Princeton University Press, 1986), pp. 254-257. See also Matthew H. Kramer, *In Defense of Legal Positivism: Law without Trimmings* (New York: Oxford University Press, 1994), p. 94; Sean Coyle, “Practices and the Rule of Recognition,” *Law & Philosophy*, vol. 25 (2006), pp. 417-452, at p. 497.

⁶⁴ I have not forgotten about Hitler or Stalin. But neither they nor the regimes they dominated were motivated by greed, or even greed for power, as much as by a grotesque moral vision, but a moral vision nonetheless. That may not be so for the modern and not so modern kleptocracies whose officials, especially at the top, create legal systems as part of a regime whose only goal may be the accumulation of wealth, or, sometimes, power for its own sake.

number of other nation-states, may depart too much from an ordinary understanding of law to be very helpful.⁶⁵

I do not wish to fall into trap that I have just accused others of failing to avoid. Legal systems in which no one at all, not even the officials, internalizes law except out of fear of sanction are possible, and sometimes they exist, but they are rare. Far more common are legal systems in which at least some officials are committed to the system for sanction-independent reasons.⁶⁶ For that reason it is a mistake to ignore coercion-free internalization entirely. The sanction-independent acceptance of a legal regime by officials at the pinnacle of that system is an important part of most legal systems, and thus deserves of the kind of analysis that much of the modern jurisprudential tradition has provided.

But although it is wrong to neglect sanction-independent internalization entirely, there is a more profound claim made by those who have succeeded in relegating coercion to the jurisprudential sidelines. Hart made reference to Holmes's image of the "bad man," whose behavior vis-à-vis the law was entirely a function of what the law would do to him or not do to him if he engaged in this or that conduct.⁶⁷ But this ignores the "puzzled man," Hart said, the

⁶⁵ Entire books have been written about the relationship between law and the "rule of law." This is not one of those books. Nevertheless, I subscribe to the view that the rule of law entails certain values of morality or efficiency that may not be satisfied by all legal systems. As long as the rule of law is not a redundancy, then we can imagine – and indeed observe – law without the rule of law.

⁶⁶ On the intriguing possibility that law is less about the state's use of coercion than about limiting and regulating that use, see Patricia Mindus, "Austin and Scandinavian Realism," in Michael Freeman & Patricia Mindus, eds., *The Legacy of John Austin's Jurisprudence* (Dordrecht, Netherlands: Springer, 2013), pp. 73-106, at pp. 99-106.

⁶⁷ Oliver Wendell Holmes, Jr., "The Path of the Law," *Harvard Law Review*, vol. 10 (1897), pp. 457-478, at p. 459.

person who wants to know what the law requires not so he can know what he can get away with, but in order to do what is required by the law -- sanctions, punishment, and coercion aside.⁶⁸ The puzzled man is disposed to comply with the law *just because it is the law*, and an account of law that fails to take account of the puzzled man simply does not, Hart said, “fit the facts.”⁶⁹

More recently, Scott Shapiro has built on the same idea. In developing what he calls the “planning theory” of law, a theory whose details are not germane here,⁷⁰ Shapiro demonstrates how an entire legal system could be erected and would be needed without any coercion whatsoever. And he explains the importance of this admittedly hypothetical system in terms of telling us something about the “many people” who are in fact like Hart’s puzzled man, that is, who are inclined to follow law’s mandates because they are law and not because of what people with uniforms and guns and robes might do to them if they do not.⁷¹

Hart, Shapiro, and many others thus justify their attention to coercion-free law, and their departure from Bentham and Austin, not only on the conceptual grounds we have been discussing, but also because of their belief that by stressing coercion Bentham and Austin were empirically misguided, underestimating the importance of the puzzled people in most societies whose inclination to follow the law is robust, and who would follow law’s mandates without the need for threats of force. It turns, out therefore, that the case against Bentham and Austin is not only conceptual and philosophical, but also empirical. It is thus time to turn to the empirical

⁶⁸ Hart, *op. cit.* note 3, p. 39.

⁶⁹ *Ibid.*, p. 78.

⁷⁰ Scott J. Shapiro, *Legality* (Cambridge, Massachusetts: Harvard University Press, 2011).

⁷¹ *Ibid.*, pp. 69-73.

issue, to examine what lurks behind the image of the puzzled man, and to see just how many of them there really are.

CHAPTER FOUR

IN SEARCH OF THE PUZZLED MAN

4.1 *Taking Stock – and Moving Ahead*

So where are we? The time has come to recapitulate the argument to this point.

A portion of Chapter Three focused on questions of methodology, but the methodological questions are important not because the answers reveal new ways of searching for the necessary features of law. Rather, the importance of the methodological inquiry lies in the way that rejecting an essentialist understanding of the nature of law removes a barrier to careful theoretical consideration of the role of coercion in law. Having shed the baggage of supposing that properties that are not conceptually necessary are of little philosophical or jurisprudential interest, we are now better situated to think about those aspects of law that are ubiquitous and typical but not conceptually essential. Coercion is surely one of those aspects, and freed from the necessity of limiting our examination to conceptual essences we can recover the theoretical and philosophical examination of coercion in law from the exile to which a dubious essentialism has cast it. Or, to recast the same point in a less tendentious but more direct way, methodological questions about the philosophical significance of non-coercive law should not distract us from recognizing the truth and importance of the contingent empirical fact that law as we experience it is overwhelmingly coercive.

The significance of law's coerciveness is highlighted by the omnipresence of law in the modern regulatory state. Hart, some of his predecessors, and most of his followers criticized Bentham and Austin for attempting to shoehorn too much of law into a criminal and tort law paradigm,¹ but if anything the modern regulatory state makes that paradigm more rather than less important now than it was in Bentham and Austin's time. To a greater extent in the twenty-first century than either of them could have imagined in the nineteenth, individuals, businesses, and associations operate within the constraints of the administrative state. And, importantly, the modern administrative state is an environment of pervasive regulation, with a mass of detailed regulations being enforced by the threat of criminal fines, civil liability, loss of privileges, and a panoply of other sanctions. Moreover, much of the contemporary regulatory environment, although often effective in implementing worthwhile environmental, health, safety, consumer protection, financial stability, and other policy goals, rarely inspires voluntary compliance. The ordinary owner or manager of a typical business may not need to be coerced into refraining from murder or outright fraud, but only rarely will she view the intricate regulation of securities transactions, anti-competitive agreements, and even worker safety with the same spirit of voluntary compliance. And the French cheese maker whose traditional use of raw milk has been declared unsafe by those he sees as meddling Brussels bureaucrats is little more inclined to comply with these regulations absent coercion than is his American counterpart whose workplace is regularly examined by inspectors from the Occupational Safety and Health Administration. For a vastly larger range of human and commercial activities than was the case even as recently as half a century ago, the state's power to regulate and punish is the

¹ See above, Sections 3.1 and 3.2.

overwhelmingly salient feature of law, even as that power has made life for millions and even billions of people far better than it was in the past.²

Not only does modern public law make the legal system's regulatory side vastly more important in the full scheme of social life than it was in earlier generations, but we now see as well a far greater regulatory intrusion into the seemingly voluntary transactions lying within the purview of private law. The legal implications of contracts, wills, and trusts, for example, are far more wide-ranging than in the past, and the tax consequences of effectuating such transactions in one way rather than another add a new element of coercion into the legal systems of modern states. And thus it is not just the man on the Clapham omnibus but almost all of us, in expanding aspects of our lives, who encounter law substantially in terms of the force it can bring to bear in the event of non-compliance. Not less but more than when Austin was writing, we should appreciate that an examination of the nature of law cannot ignore the obvious fact of law's pervasive coerciveness. To deny the importance of law's force seems ever more perverse, even if we accept that coercion is a necessary feature neither of all possible legal systems nor of all aspects of the actual legal systems with which we are most familiar.

That the coerciveness of law is important seems obvious. But that what is important is necessarily jurisprudentially important often seems less so. And thus we are led to consider the

² The literature on the rise of the administrative state and administrative regulation is vast. Useful contributions include Susan Rose-Ackerman & Peter L. Lindseth, eds., *Comparative Administrative Law* (Cheltenham, UK: Edward Elgar, 2010); James M. Landis, *The Administrative Process* (New Haven, Connecticut: Yale University Press, 1938); Paul L. Joskow & Roger G. Noll, "Regulation in Theory and Practice," in Gary Fromm, ed., *Studies in Public Regulation* (Cambridge, Massachusetts: Harvard University Press, 1981), pp. 1-78; Giandomenico Majone, "The Rise of the Regulatory State in Europe," *West European Politics*, vol. 17 (1994), pp. 77-101; David H. Rosenbloom, "The Judicial Response to the Rise of the American Administrative State," *American Review of Public Administration*, vol. 15 (1981), pp. 29-51.

very question of importance, for one way of understanding the methodological debate is in terms of how we should treat the important features of law as we know it. Indeed, even those who believe that examining the nature of law must involve a search for its essential properties widely accept that we are only searching for those properties that are, in addition to being essential, also important.³ After all, the essential properties of law include that it does not play the clarinet or explode before our eyes, but we have learned nothing of interest by including such properties within an account of law. And thus even for those who hold an essentialist view of concepts and of the jurisprudential enterprise, the features we identify as being part of the nature of law must be those that appear to be important to the phenomenon under inspection and to our deeper understanding of it. But if it is pointless to examine those properties that are essential but not important, then perhaps one way of understanding the argument up to now is as stressing that it is far from pointless to examine, even philosophically, those properties that are important but not essential.⁴

Appreciating the role of importance in focusing the inquiry allows us to situate the concern for what Hart called the “puzzled man.”⁵ Even as we accept that non-coercive law is important in appreciating multiple dimensions of what law does, much of the argument for treating coercion as decidedly secondary in understanding the phenomenon of law is the view

³ See, for example, Julie Dickson, *Evaluation and Legal Theory* (Oxford: Hart Publishing, 2001); Joseph Raz, “The Problem about the Nature of Law,” in *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford: Clarendon Press, 1994), pp. 195-209; Leslie Green, “Positivism and the Inseparability of Law and Morals,” *New York University Law Review*, vol. 83 (2008), pp. 1035-1058, at p. 1043 (“not all necessary truths are important truths”).

⁴ See Danny Priel, “Jurisprudence and Necessity,” *Canadian Journal of Law and Jurisprudence*, vol. 20 (2007), pp. 173-200, at pp. 184-186.

⁵ H.L.A. Hart, *The Concept of Law*, Penelope A. Bulloch, Joseph Raz, & Leslie Green, eds., 3d ed. (Oxford: Clarendon Press, 2012), pp. 39-40.

that in the typical advanced society law's unenforced obligatoriness – its normativity, as it is sometimes put⁶ -- is a substantial determinant of human behavior. After all, law has value as a distinct phenomenon, a distinct institution, and a distinct category largely insofar as it affects human behavior. Perhaps law might be of interest even were it causally inert, because examining a society's laws might reveal some feature of interest of which law was the consequence. From that perspective we might (and perhaps should) be interested in law as indicator and not as cause. Realistically, however, and certainly in this book, our principal interest in law and legal systems lies in their capacity to shape and influence what people do. Hart's puzzled man, who seeks to know what the law is in order to inform his behavior,⁷ is the embodiment of this view.

It is possible to think of the puzzled man and thus of law's normativity from an entirely non-empirical perspective. We might wish to explore in a purely conceptual manner the way in which law -- as law, and not as a reminder of what we should do even without it⁸ -- can provide its subjects with reasons for acting in accordance with the law just because it is the law, and can

⁶ See Chapter Three, above, and in particular Section 3.3.

⁷ "Why should not law be equally if not more concerned with the 'puzzled man' or 'ignorant man' who is willing to do what is required, if only he can be told what it is?" Hart, *op. cit* note 4, p. 40.

⁸ The statement in the text is slightly too quick. Law might be causally efficacious in indicating to the uninformed or the unsure what their law-independent responsibilities are, as is argued persuasively in Donald H. Regan, "Reasons, Authority, and the Meaning of 'Obey': Further Thoughts on Raz and Obedience to Law," *Canadian Journal of Law and Jurisprudence*, vol. 3 (1990), pp. 3-28. See also Donald H. Regan, "Authority and Value: Reflections on Raz's *Morality of Freedom*," *Southern California Law Review*, vol. 62 (1989), pp. 995-1095; Donald H. Regan, "Law's Halo," *Social Philosophy and Policy*, vol. 4 (1986), pp. 15-30. To much the same effect is David Enoch, "Reason-Giving and the Law," *Oxford Studies in the Philosophy of Law* (Brian Leiter & Leslie Green, eds.), vol. 1 (2011), pp. 1-38, noting the possibility that law's reason-giving capacity may be strictly "epistemic."

do so without regard for any possible sanctions. Sanctions would then be understood as a way of enforcing law's normativity, but not, *contra* Bentham and Austin, as a necessary component of law's normativity itself.

Yet in the face of a purely conceptual inquiry in which the puzzled man is a potentially hypothetical construct and not an empirical description, some people might respond with a simple "So what?" If unsanctioned law does not actually influence human behavior, then why should we care about it? And at just that point in the dialectic, Hart's puzzled man – this is no longer 1961, so we will talk about the puzzled person – emerges in a different light. The image of the puzzled person is Hart's rejoinder to the "So what?" argument. The puzzled person is the one who actually does take sanction-independent legal obligation as a reason for action, and as a reason that can and often does influence her behavior and her decisions.

But even if *legal* obligations can in theory exist and be conduct-guiding without the state's army to back them, the extent to which people actually do internalize those obligations remains a serious empirical question. More specifically, our (not so) imaginary objector might respond, the actual number of people who take law's norms as reasons for action absent some form of coercion or incentives is so small that it is hardly worth worrying about.⁹ Coercion is pervasive, the objector continues, precisely because the person who follows the law just because it is the law may be a theoretically instructive construct, but is not representative of very many, if any, people we encounter in our everyday lives.

⁹ See, in the context of criminal law theory, Michael Plaxton, "The Challenge of the Puzzled Man," *McGill Law Journal*, vol. 58 (2012), pp. 451-480.

But now Hart has a further response. The puzzled person is not just a theoretical possibility, he argues, but the representation of people who exist in sufficient numbers that ignoring them gives a false picture of what law is and how it actually operates.¹⁰ Hart, after all, used the puzzled man in conjunction with his charge that Austin's coercion-dependent picture did not "fit the facts" or recognize the "complexity of facts" of our actual existence under law.¹¹ Moreover, and more famously, the puzzled man is the central feature of Hart's response to what he understands as the import of Oliver Wendell Holmes's image of the "bad man."¹² Now we should not make too much of Holmes's language. There really are, of course, genuinely bad people, and for them the law is a looming threat to their exclusively self-interested and amoral or immoral proclivities. But there are also many people who are not "bad" in any conventional sense of that word, but who plan much of their lives and many of their activities in what has been called "the shadow of the law."¹³ The editor of a newspaper whose editorial decisions are

¹⁰ Scott Shapiro, *Legality* (Cambridge, Massachusetts: Harvard University Press, 2011), is even more empirically and quantitatively explicit, emphasizing his assumption that there are "many" "Good Citizens" who "accept that the duties imposed by [legal] rules are separate and independent moral reasons to act." Pp. 69-70. [ESSERT?]

¹¹ Hart, *op. cit.* note 3, at pp. 80, 91. See also *ibid.*, p. 79 ("the simple model of law as the sovereign's coercive orders failed to reproduce some of the salient features of a legal system"). But for the view that Hart and his successors have similarly failed to reproduce some of the salient features of a legal system, albeit different salient features, see Brian Bix, "John Austin and Constructing Theories of Law," in Michael Freeman & Patricia Mindus, eds., *The Legacy of John Austin's Jurisprudence* (Dordrecht, Netherlands: Springer, 2013), pp. 1-13, and Brian Bix, Book Review, *Ethics*, vol. 122 (2012), pp. 444-448, at p. 447.

¹² "If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside, in the vaguer sanctions of conscience." Oliver Wendell Holmes, Jr., "The Path of the Law," *Harvard Law Review*, vol. 10 (1897), pp. 457-478, at p. 459.

¹³ Robert H. Mnookin & Lewis Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce," *Yale Law Journal*, vol. 88 (1979), pp. 950-997.

influenced by the probability of a libel judgment is not ordinarily a bad person, nor are the individuals whose decisions about whether to use marijuana, to drive above the speed limit in favorable conditions, or to engage in technically illegal but harmless sexual practices are influenced by the likelihood of actual enforcement of the laws.

If we thus put aside the unfavorable connotations of the “bad man” image, we see a contrast between the individual whose inclinations to obey the law are determined substantially by the likelihood of punishment and the individual who is inclined to obey the law just because it is the law and without regard to the possibility of punishment. The former class is what Bentham, Austin, and Holmes, among many others, all had in mind, and the latter is Hart’s puzzled person. And if Hart and his followers are correct in their belief that puzzled people exist in significant numbers, then law’s commands as laws are important even if and when they are backed by no sanctions at all. But if instead Bentham, Austin, and Holmes are correct in supposing that such puzzled people might exist in theory but only rarely in actual practice, then an account of the phenomenon of law that stresses coercion is not nearly as incomplete as many have believed. Bentham, in particular, did recognize that people might behave for other than self-interested reasons, but he recognized as well that that the demands of self-interested prudence would so often dominate the demands of altruism and community that law needed to use force to provide the motivation to do what the law required.¹⁴

¹⁴ Jeremy Bentham, *Of the Limits of the Penal Branch of Jurisprudence*, Philip Schofield, ed. (Oxford: Clarendon Press, 2010), pp. 6, 91, 142-160.

The question is thus revealed to be an empirical one. Hart offered the puzzled man as an empirical claim, but provided no empirical support for that claim beyond bald assertion.¹⁵ We can understand and agree that too insistent a focus on coercion may leave parts of law unexplained, and we can understand as well that following Austin in *defining* legal obligation in terms of coercion seems confused. But even conceding these objections, we may still wonder how important law without coercion really is. And when we do, the answer to that question turns out to depend largely on the extent to which people actually do take the law's commands as reasons for action, sanctions aside. If many people do so, as Hart and others have supposed, then it is indeed a mistake to put too much stock in coercion as an important element of the phenomenon of legality. But if sanction-oblivious law-followers are rare, if puzzled people are few and far between, then it is not the account stressing coercion but the one setting it aside that presents a distorted picture of law as it is experienced.¹⁶ And so although Hart accused the Austinian account of failing to "do justice to the complexity of the facts,"¹⁷ the soundness of that charge rests on an empirical claim that must now be examined with care.

4.2 *What Is It to Obey the Law?*

The image of the puzzled person is that of someone wishing to know what the law is in order that she can obey it, and who is consequently inclined to obey the law just because it is law

¹⁵ See Plaxton, *op. cit.* note 8, at pp. 456-458. "[It is] quite problematic [for Hart] to claim, as a descriptive matter, that we can have legal obligations in the absence of at least a threat of sanctions. Hart produced no empirical evidence in support of such a claim." *Ibid.*, p. 457. And see also Stephen R. Perry, "Hart's Methodological Positivism," *Legal Theory*, vol. 4 (1998), pp. 427-467.

¹⁶ See Plaxton, *op. cit.* note 8.

¹⁷ Hart, *op. cit.* note 3, p. 91.

but without having to be coerced. But although we can more or less easily understand what it is to be free of the threat of sanctions, at least in the standard case, the question of what it is to obey the law is a bit trickier.

Consider the laws against theft. Suppose I covet a much nicer car than the one I now own, and one much nicer than I can afford. And then suppose that one day I am strolling down the street and I see just the car I would like to have, parked at the side of the road, with the windows open and the keys lying invitingly on the driver's seat. The owner is presumably in a nearby shop, but no one is on the street or elsewhere in sight. With very little effort I could open the door, put the key in the ignition, and drive off in the car of my dreams.

Like many others, I like to think I would not steal the car. And I would not steal the car even if, counterfactually in a world of vehicle identification numbers and registrations and license plates, there were no possibility of apprehension, and even if, more counterfactually still, there were no laws against stealing at all. For me, and I believe (and hope) for many other people, the wrongness of the act would keep me from doing it, even though at a shallower level stealing the car would satisfy my immediate desires.

There are, of course, laws against theft, and those laws make it illegal to drive off in someone else's car without permission, even if the owner's carelessness has made it easy. And thus when I refrain from stealing a car my behavior is consistent with the law. I have not violated with the law. But I have not behaved as I did *because of* the law. Even were taking someone else's car not illegal, I still would not do it, and thus my actions in not taking the car are not actions taken because of the law. We might say I have acted *consistently* with the law but have not *complied* with the law, but I do not wish anything to turn on a linguistic distinction, if

one exists, between consistency and compliance. It is the underlying distinction that is important, and not whether the English language happens to recognize it. Similarly, we might say, and I would say, that it is only acting consistently with the law because of the law, and not acting consistently with the law for reasons other than the law, that counts as obeying the law, but again nothing in this argument turns on what the word “obey” means.¹⁸ The point is only that there is a crucial difference between doing something because of the law and doing something for law-independent reasons that happens to be consistent with the law.

So now consider my dog. When I put food in front of her and command her to “Eat!” she eats. Every time. But of course she is not obeying my command. She would eat the food placed before her even if I said nothing at all.¹⁹ And likewise with the commands of the law. When the law tells me to do what I would have done anyway, the law’s commands are no more causally consequential than commanding my highly food-motivated dog to eat. Our interest in law is largely an interest in law insofar as it is causally consequential, and for that purpose the distinction between law that makes a difference to behavior and law that makes no difference is of central importance. If we are interested in obedience to law, we must focus on law’s effect on people who, but for the law, would have done something other than what the law commands. Or, to put it differently, we are interested in the cases in which what the law commands differs from what a subject of the law would have done for law-independent reasons.

¹⁸ Although my understanding of what it is to “obey” does not rely on ordinary usage, it is nevertheless conventional. See Joseph Raz, “The Obligation to Obey: Revision and Tradition,” *Notre Dame Journal of Law, Ethics & Public Policy*, vol. 1 (1984), pp. 139-155; Regan, *op. cit.* note 4.

¹⁹ Or, for that matter, even if I said “Don’t Eat!”

There are many kinds of law-independent reasons, but two are particularly important here. One is the domain of law-independent personal preferences, desires, or tastes. It is illegal in most legal regimes to engage in cannibalism – eating the flesh of a deceased person, even if the eater has not caused the death. And it is illegal in many regimes – although perhaps not quite so many – to have sex with animals. But the fact that I do not eat the flesh of human beings or have sex with the aforesaid dog has nothing at all to do with the law, even though my refraining from these activities puts me in compliance with the law. If the laws against such activities were repealed – and for all I know they have been in the jurisdictions I frequent – my culinary and sexual practices would change not at all. These actions may be illegal, but I do not avoid them because of the law. I avoid them because I simply have no desire to engage in them in the first place.

There are other cases, however, in which I refrain from indulging my first-order preferences, but where it is morality in the broadest sense that dictates my behavior. I do not steal even the objects I covet because I believe that stealing is, usually, wrong. I do not throw heavy objects at those of my colleagues who speak interminably at faculty meetings not because I do not want to, but because, even apart from the prudence of worrying about retaliation, I believe that such a reaction would be morally wrong, however much it might satisfy an immediate desire. And I refrain from likely profitable insider trading not because it is illegal, but because I believe it wrong to take advantage, in most cases, of undisclosed informational disparities in commercial and business transactions. Of course theft, assault, and insider trading are all illegal, but their illegality is no determinant of my behavior. Even when I have desires I would like to satisfy, I often refrain from satisfying them for reasons of morality. The fact that

the morally wrong thing to do is also illegal is interesting, and might be important for others, but for me, at least on these and many other topics, illegality is no part of the equation.²⁰

I make no claim that I am more moral than most. I might even be less. The only point is that most people make decisions about what to do, and what not to do, based on some complex mix of reasons of preference, prudence, and morality, but it is a mix that need not include the law. For most people most of the time, much that they do is consistent with the law, but is not done because of the law. Indeed, once we recognize that people can have altruistic, sympathetic, cooperative, and public-spirited motives,²¹ that such motives often produce behavior consistent

²⁰ There is an interesting question about the extent to which, if at all, law plays a role in creating moral beliefs, or in informing people about moral requirements of which they might otherwise be unaware. The Scandinavian Realists, who were ethical non-cognitivists and thus denied the existence of a moral reality, are important figures here, because they believed that the moral beliefs that people actually held were substantially created or influenced by the commands of the law. See especially Axel Hägerström, *Inquiries into the Nature of Law and Morals*, Karl Olivecrona, ed., C.D. Broad, trans. (Stockholm: Almqvist & Wiksell, 1953); Anders Vilhelm Lundstedt, *Legal Thinking Revised: My Views on Law* (Stockholm: Almqvist & Wiksell, 1956). And for valuable analysis and commentary, see Patricia Mindus, *A Real Mind: The Life and Work of Axel Hägerström* (Dordrecht, Netherlands: Springer, 2012). The question of the causal effect of positive law on the moral beliefs of the citizenry is an empirical one, as to which there are both supporters and skeptics. A valuable review of the literature, which has a positive but qualified conclusion about the ability of law to affect moral beliefs, is Kenworthy Bilz & Janice Nadler, “Law, Psychology, and Morality,” in Daniel Bartels, et al., eds., *Moral Judgment and Decision Making (Psychology of Learning and Motivation*, vol. 50) (San Diego, California: Academic Press, 2009), pp. 101-131. Examples of greater skepticism about the causal powers of law on moral beliefs include Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 1991); Nigel Walker & Michael Argyle, “Does the Law Affect Moral Judgments,?” *British Journal of Criminology*, vol. 4 (1964), pp. 570-581. For present purposes I assume not only that there really are law-independent moral requirements, but that positive law typically plays something other than the principal role in inculcating knowledge of and belief in those requirements.

²¹ The literature on the ability of people to behave morally and altruistically, even without the threat of sanctions, is vast. Useful exemplars include Daniel M. Bartels, “Principled Moral Judgment and the Flexibility of Moral Judgment and Decision Making,” *Cognition*, vol. 108 (2008), pp. 381-417; Gert Cornelissen, et al., “Rules or Consequences? The Role of Ethical Mind-Sets in Moral Dynamics,” *Psychological Science*, vol. 24 (2013), pp. 482-488; Ernst Fehr & Urs Fischbacher, “The Nature of Human Altruism,” *Nature*, vol. 425 (2003), pp. 785-791;

with those motives, and that these motives are neither self-interested nor caused by law, we can recognize the false dichotomy between Hart's law-motivated puzzled person and Holmes's self-motivated bad man. For in addition to law-motivated people and self-motivated people, there are other-motivated and morally-motivated people. These other-motivated and morally-motivated people are interested not only in furthering their own interests, but can and often do take account of the interests of others even without the guidance of the law.

The point that concluded the previous paragraph is worth underscoring, for the false dichotomy between law-governed and self-interest-governed actions is ubiquitous. Consider the following, from a sociologist of law:

Why do some people comply with the letter of the law, even when there is no threat of sanctions against their non-compliance and even though they know that following the law is not in their self-interest and will cost them in material and other terms? The answer to this question takes us to the heart of law's normativity.²²

No it doesn't. The leap from the fact of some people's making decisions for reasons other than self-interest to *law's* normativity assumes both law's causality and the lack of non-self-interested causality, most obviously from morally-produced altruism, sympathy, cooperation, and public-spiritedness. But once we recognize that these latter motivations are real and frequently causal of human behavior, that people might behave for reasons of morality rather

Shaun Nichols, "Norms with Feeling: Towards a Psychological Account of Moral Judgment," *Cognition*, vol. 84 (2002), pp. 221-236.

²² Reza Banakar, "Can Legal Sociology Account for the Normativity of Law?" in Matthias Baier & Karsten Åström eds., *Social and Legal Norms* (Farnham, Surrey, UK: Ashgate Publishing, 2012) (forthcoming, manuscript at 5).

than self-interest, and that such behavior will often be consistent with the law even if not caused by the law, we are left with the question of what causal contribution, if any, the law makes to people's non-self-interested behavior when there are no legal sanctions or other forms of coercion in the offing. The contribution might be substantial, or it might be negligible, but posing an exclusive dichotomy between self-interest, on the one hand, and *law's* normativity, on the other, ignores even the possibility of morality's normativity, and thus makes it virtually impossible even to glimpse an answer to the question of how much law, *qua* law, contributes to people's decision-making processes.

Now that we have added moral, altruistic, cooperative, and sympathetic motivations to self-interested-motivation, the question of law's effect becomes more complex. Consider, therefore, the person who has decided on a course of action on the basis of the full array of law-independent reasons, an array including both the self-interested and the moral. But then she discovers that the law prohibits what she has otherwise decided to do, or requires what she has otherwise decided to avoid. Under these circumstances, the question is whether she will do what the law requires even when the full array of law-independent reasons – what Joseph Raz calls the balance of reasons²³ – says otherwise. And bear in mind that we have stipulated that this is a person – the puzzled person – for whom law's coercive force is not relevant. That is, we are putting ourselves in the place of someone who thinks that she ought to ϕ on the basis of the full array of law-independent reasons, who then discovers that the law requires not- ϕ , and who then, *because of the law*, proceeds to do not- ϕ , and proceeds to do it without regard to the possibility of punishment or any other form of legal coercion. This is the puzzled person according to Hart's formulation. But the question is whether she exists.

²³ Joseph Raz, *Practical Reason and Norms*, 2d ed. (Oxford: Oxford University Press, 1999).

4.3 *Refining the Question*

The question now before us is whether there are people, and if so in what quantity, who take the law *qua* law, and without the prudential reasons that threats of sanctions for violation may provide, as a reason for action. If such people exist in significant numbers, then, as Hart argued, explaining law largely in terms of its coercive force is a poor representation of the role that law serves in most people's decision-making processes. But if those who take the very fact of law as a reason for action or reason for decision are few and far between, then coercion resurfaces as the likely most significant source of law's widespread effectiveness and its longstanding appeal in achieving various social goals.

It is worth emphasizing that we are considering what is often referred to as law's *content-independent* authority.²⁴ The question is not whether we should follow the law because of the substantive content of the law. Yes, we should follow the laws against murder, rape, and price-fixing, but that is because murder, rape, and price-fixing are wrong. Laws against these activities should be followed because of the soundness of their content. Consequently, we should avoid such behavior even were it not illegal, and thus without regard for the law. By contrast, to take the law as obligatory in a content-independent way is to take the very fact of a law – its very existence independent of its content, or its very status as law rather than as something else – as a

²⁴ The standard citation is H.L.A. Hart, "Commands and Authoritative Legal Reasons," in H.L.A. Hart, *Essays on Bentham: Jurisprudence and Political Theory* (Oxford: Oxford University Press, 1982), pp. 243-268, at pp. 262-266. See also Kenneth Einar Himma, "H.L.A. Hart and the Practical Difference Thesis," *Legal Theory*, vol. 6 (2000), pp. 1-43, at pp. 26-27; Frederick Schauer, "Authority and Authorities," *Virginia Law Review*, vol. 94 (2008), pp. 1931-1961. A skeptical challenge to the idea that authority is content-independent is P. Markwick, "Independent of Content," *Legal Theory*, vol. 9 (2003), pp. 43-61. And a different skeptical challenge, focusing on the relation between content-independence and political authority, is George Klosko, "Are Political Obligations Content Independent?" *Political Theory*, vol. 39 (2011), pp. 498-523.

reason to follow it. Our question is whether law is in reality understood in this way by its subjects – whether people follow the law not because of its content but because of its existence.

Two important refinements need to be added to the stark way in which the issue has just been presented. First, law's putative effectiveness in providing reasons for action must be distinguished from its possible conclusiveness. As a longstanding literature about duties, obligations, reasons, and rules has stressed, there is a difference between a reason and a dispositive reason.²⁵ If I promise to meet you for lunch, I have a reason – an obligation -- to meet you for lunch, but if a close relative falls ill in the interim the reason I have to meet you for lunch will be overridden by the even stronger reason stemming from my obligation to be available for ill relatives. At times this idea of a not-necessarily-conclusive reason is described in terms of a *prima facie* reason, at times as a *pro tanto* reason, but the idea is the same. What we have a reason to do is different from what we should do, all things considered. And thus if the simple fact of law is a reason to behave in compliance with its directives, it will not necessarily always (or even usually) be the case that people actually follow the law. One can believe in the obligation to obey the law while believing that the obligations of morality and prudence are often stronger.

²⁵ The *locus classicus* is W.D. Ross, *The Right and the Good* (Oxford: Clarendon Press, 1930), pp. 19-47. Ross uses the language of “*prima facie*” rights and duties, but more common nowadays is to express the same idea with the term “*pro tanto*.” See also Alan Gewirth, “Are There Any Absolute Rights?”, *Philosophical Quarterly*, vol. 31 (1981), pp. 1-16; Robert Nozick, “Moral Complications and Moral Structures,” *Natural Law Forum*, vol. 13 (1968), pp. 1-50; Frederick Schauer, “A Comment on the Structure of Rights,” *Georgia Law Review*, vol. 27 (1993), pp. 415-434; John R. Searle, “*Prima Facie* Obligations,” in Joseph Raz, ed., *Practical Reasoning* (Oxford: Oxford University Press, 1978), pp. 81-90; Judith Thomson, “Some Ruminations on Rights,” *Arizona Law Review*, vol. 19 (1977), pp. 45-60.

This qualification should not be taken too far. As an empirical and not a conceptual matter, we would expect that a real reason would actually make a difference in some cases. If we were to discover that over a run of a very large number of instances the law, as law, never determined the outcome, we would have reason to suspect that the law did not operate as even a weak reason. Only if in at least some cases did the presence of law produce an outcome or a decision different from that which would otherwise have prevailed could we plausibly conclude that law was actually operating as a reason.

Second, and relatedly, the distinction between the law and the array of law-independent reasons should not be taken as suggesting that decision-makers necessarily bifurcate or sequence their decision-making processes in this way. Sometimes they do, and a nice example is President Franklin Roosevelt's suggestion to the United States Congress in 1937 that they consider the merits of a proposed regulation of the coal industry entirely as a matter of politics and policy, putting aside even "reasonable" potential legal and constitutional objections.²⁶ But sometimes the law exists as one of a number of non-sequentially-ordered reasons affecting decisions in a less serial and less bifurcated matter. When this is so, the law is among multiple more-or-less simultaneously considered factors, as opposed to being consulted only after a law-independent decision has been reached. But even when this is so, it would again be highly unlikely, even if not logically impossible, for law to have the status of an actually internalized reason for action unless it made a difference in at least some instances. If law never made a difference – if it never produced an outcome different from the outcome produced by an

²⁶ Letter to Congressman Hill, July 6, 1935, in *The Public Papers and Addresses of Franklin D. Roosevelt* (Washington, D.C.: Government Printing Office, 1938), vol. 4, pp. 297-298.

array of reasons not including the law – then we might conclude, as an empirical matter, that it did not actually function as a reason at all.

The distinction between legal and all other reasons is thus a construct designed to isolate the question whether law figures in the decisions and actions of law's subjects. Without this construct we would be unable to ask the question whether law actually matters. We could, of course, just choose to assume that law matters, but at this point the bare assumption that law matters begins to resemble an assumption that there are unicorns. We know what unicorns are (or would be), but the mere fact that we can describe a unicorn tells us little about whether there are actual unicorns in the world. Similarly, we can describe and understand legal normativity – the ability of law to make a practical difference²⁷ -- but we should also want to know whether the law, without regard to the sanctions that might contingently back it up, actually plays a role in determining the actions and decisions of its subjects. And for purposes of this inquiry, distinguishing law-free decisions from those in which law is part of the array of reasons internalized by a decision-maker remains important.

Yet we should not be too quick to assume that the distinction between law-free and law-influenced decision-making is merely an analytical fiction, however useful that fiction may be. In fact, just this kind of law versus everything else bifurcation appears to occur as often in reality as in fiction. Business people often strike their bargains in a business-informed but not law-informed way, and only after agreeing on the fundamentals of the transaction will they call in the lawyers to make it legal or tell them how it might not be. And in much the same way policy-

²⁷ See Kenneth Einar Himma, "H.L.A. Hart and the Practical Difference Thesis," *Legal Theory*, vol. 6 (2000), pp. 1-43; Scott J. Shapiro, "Law, Morality, and the Guidance of Conduct," *Legal Theory*, vol. 6 (2000), pp. 127-170.

makers will often make policy decisions without regard to legality, only thereafter securing the advice of government counsel to determine whether the policy they wish to pursue may be pursued in accordance with the law.

The question is thus refined: If we distinguish the reasons provided by law from the reasons provided by morality, policy, prudence, and everything else, and if we distinguish the reasons provided by law from the various forms of enforcement that law typically employs to assure actual decision according to those reasons, then to what extent to these sanction-independent legal reasons actually influence decisions? This is the question to which Hart's puzzled person is the implicit answer. But we do not know whether Hart's answer is correct.

4.4 *The Ought and the Is*

Obedience to law *qua* law – taking the very existence of law as at least a *prima facie* reason to follow it – is a topic with a distinguished history. But almost all this history is normative and not descriptive. As far back as Socrates and his insistence on acknowledging his obligation to the law even as he believed it to have condemned him unjustly,²⁸ philosophers and ordinary people have argued that there is a content-independent moral obligation to obey the law. Thomas Hobbes and John Locke, among others, found the basis of such an obligation in the social contract,²⁹ John Rawls and others even more recently have located the source of the

²⁸ Socrates' arguments are recounted by Plato in the *Crito*, and the surrounding events are also set out in *Euthyphro*, *Apology*, and *Phaedo*. A particularly valuable analysis is Thomas C. Brickhouse & Nicholas D. Smith, *Socrates on Trial* (Princeton, New Jersey: Princeton University Press, 1989).

²⁹ Thomas Hobbes, *Leviathan*, Richard Tuck, ed. (Cambridge: Cambridge University Press, 1991) (1651); John Locke, *Two Treatises on Government*, Peter Laslett, ed. (Cambridge: Cambridge University Press, 1988) (1690).

obligation in principles of fairness and reciprocity,³⁰ and still others have seen the obligation to obey the law as arising out a notion of consent,³¹ or from law's ability to coordinate collective action in the face of diverse and sub-optimizing incentives to individual preference satisfaction,³² or from our obligations to respect our fellow citizens in the process of making the law.³³ But all these theories share the goal of justifying an obligation on the part of people to obey the law just because it is the law, and thus to obey – or at least have reason to obey – even those laws with which they disagree.

Standing alongside this longstanding tradition of seeking to justify a moral obligation to obey the law is another and more recent tradition denying that there is a moral obligation to obey the law at all.³⁴ Often these days called “philosophical anarchism,” these days, this more recent

³⁰ John Rawls, “Legal Obligation and the Duty of Fair Play,” in Sidney Hook, ed., *Law and Philosophy* (New York: New York University Press, 1964), pp. 3-18. See also Jonathan Hecht, “Fair Play – Resolving the Crito – Apology Problem,” *History of Political Thought*, vol. 32 (2011), pp. 543-564.

³¹ See Mark C. Murphy, “Surrender of Judgment and the Consent Theory of Political Authority,” *Law and Philosophy*, vol. 16 (1997), pp. 115-143.

³² See Eerik Lagerspetz, *The Opposite Mirrors: An Essay on the Conventionalist Theory of Institutions* (Dordrecht, Netherlands: Kluwer Academic, 1999); Chaim Gans, “The Normativity of Law and Its Co-ordinative Function,” *Israel Law Review*, vol. 16 (1981), pp. 333-349; Gerald J. Postema, “Coordination and Convention at the Foundations of Law,” *Journal of Legal Studies*, vol. 11 (1982), pp. 165-203; Noel Reynolds, “Law as Convention,” *Ratio Juris*, vol. 2 (1989), pp. 105-120.

³³ See Thomas Christiano, *The Constitution of Equality: Democratic Authority and Its Limits* (New York: Oxford University Press, 2008).

³⁴ See Joseph Raz, “The Obligation to Obey: Revision and Tradition,” *Notre Dame Journal of Law, Ethics & Public Policy*, vol. 1 (1984), pp. 139-162; M.B.E. Smith, “Is There a Prima Facie Obligation to Obey the Law?” *Yale Law Journal*, vol. 82 (1973), pp. 950-976. Two valuable overviews are William Edmundson, “State of the Art: The Duty to Obey the Law,” *Legal Theory*, vol. 10 (2004), pp. 215-259, and George Klosko, “The Moral Obligation to Obey the Law,” in Andrei Marmor, *The Routledge Companion to Philosophy of Law* (New York: Routledge, 2012), pp. 511-526.

tradition rejects all of the existing reasons to recognize a content-independent obligation to obey the law. Philosophical anarchism thus concludes that although the moral citizen has a moral duty to do the right thing, she has no moral duty to follow the law just because it is the law, and thus has no moral duty, and no reason, to follow those laws (or other manifestations of the state's assertion of normative authority) that conflict with her own best all-things-considered moral calculation about what to do.³⁵

The debates about the existence (or not) of a moral obligation to obey the law are interesting and profoundly important. But our concern here is different. For present purposes, the question is not whether citizens *should* follow the law because it is the law, but whether, and to what extent, they actually do so. For if citizens (or officials, as we shall explore in Chapter Six) rarely obey the law just because it is the law, and if puzzled people, in Hart's sense, are few and far between, then coercion reemerges as a phenomenon empirically even if not logically necessary for law to do what is expected of it. The importance of looking at obedience to law *qua* law descriptively and empirically rather than normatively is that the importance – albeit not the possibility – of sanction-free law presupposes a critical mass of obedient subjects. If a significant proportion of the population does not need to be coerced into following the law even when the demands of the law are at variance with subjects' otherwise best law-independent judgment, then coercion may be a useful support for law, but is hardly central to it. But if the significant proportion does not exist – if there is no critical mass of people willing to subjugate

³⁵ The leading modern work is A. John Simmons, *Moral Principles and Political Obligations* (Princeton: Princeton University Press, 1979). More or less in the same vein, but with important variations, are Leslie Green, *The Authority of the State* (Oxford: Clarendon Press, 1988); Robert Paul Wolff, *In Defense of Anarchism* (Berkeley, California: University of California Press, 1970).

their own judgment to that of the law unless they are forced to do so – then sanction-free law is more theoretical possibility than empirical reality. And if sanction-free law is empirically rare, then coercion, which even Hart acknowledges is a “natural necessity,”³⁶ is revealed, as it was for Austin and Bentham, as a central feature of the legal systems that actually exist.

The stage is now set for examining this empirical question, informed and clarified by the understanding of obedience to law that generations of legal theory have helped us to see. We know that mere consistency with law is not enough. We want to see whether people make decisions or take actions *because* of the law. And we want to know whether people who make decisions or take actions because of the laws do so without regard to law’s threats of force or other sanctions. And that, precisely, is the focus of the following chapter.

³⁶ Hart, *op. cit.* note 3, p. 198.

CHAPTER FIVE

DO PEOPLE OBEY THE LAW?

5.1 *Complying with the Laws We Like*

In an influential book, the social psychologist Tom Tyler asked *Why People Obey the Law*.¹ But the book's title is revealing. A book entitled "Why Humans are Omnivores" would be expected to focus on the causal explanation of what we know to be plainly the case, but a book entitled "Why Humans Have Antlers," would surprise us, precisely because the title presupposes a fact that is in reality false. Human beings do not have antlers, and asking why they do is simply confused.

Tyler's title is not confused in so obvious a way, yet it does assume that people *do* obey the law. But is the assumption sound? *Do* people obey the law? The answer is not obvious, and hinges not only on clarifying what it is to obey the law, but also on the empirical answer to the question as so clarified. We thus need to look closely at the question whose answer Tyler takes to be self-evident. Do people actually *obey* the law?

In concluding that people do obey the law, and in using that conclusion to inquire into why they do so, Tyler's main point is that people obey the law for reasons other than fear of

¹ Tom R. Tyler, *Why People Obey the Law* (Princeton: Princeton University Press, 2d ed., 2006).

punishment or other sanctions. He is interested, as we are in this book, in the causal role of law in influencing behavior. And Tyler is especially interested, as was H.L.A. Hart in referring to the “puzzled man,”² in the extent to which law influences behavior even when the law’s directives are unsupported by the threat of coercive sanctions in the event of non-compliance. Yet although Hart and others³ have simply asserted or assumed that puzzled people exist in large enough quantities to support a sanction-independent account of the nature of law, Tyler believes that much the same conclusion is supported by systematic empirical investigation. More particularly, he and his colleagues take themselves to have established, largely by survey research, that sanctions are of decidedly secondary importance in explaining legal compliance. Rather, they conclude that “morality [is] the primary factor in shaping law-related behavior.”⁴

Put aside for the moment the ambiguity of the phrase “law-related behavior.” We will return to it, and to the distinction between behavior correlated with law and behavior caused by law. But first we must attend to an essential preliminary issue. And that is that Tyler derives his conclusion that morality is the principal determinant of law-related behavior by setting up a contrast with his principal foil -- the belief that people ordinarily behave for entirely or principally self-interested reasons. That this is Tyler’s target is made clear by his arguments

² H.L.A. Hart, *The Concept of Law*, 3d ed., Penelope A. Bulloch, Joseph Raz, & Leslie Green, eds., (Oxford: Oxford University Press, 2012), p. 39.

³ See Scott J. Shapiro, *Legality* (Cambridge, Massachusetts: Harvard University Press, 2011), pp. 69-70, describing the “many” “Good Citizens” who comply with the law *qua* law even without the threat of punishment.

⁴ Tom R. Tyler, “Compliance with Intellectual Property Laws: A Psychological Perspective,” *NYU Journal of International Law and Politics*, vol. 29 (1997), pp. 213-236, at p. 224. Similarly, “the research suggests that people’s behavior is *more* strongly influenced by their sense of what is morally appropriate than by their concerns over being punished for rule breaking.” Tom R. Tyler, “Beyond Self-Interest: Why People Obey Laws and Accept Judicial Decisions,” *The Responsive Community*, Fall 1998, pp. 44-52, at p. 45.

explicitly aimed at the “self-interest model”⁵ and his claim that “the study of law-related behavior [has] been dominated by economic[] analysis.”⁶

Whether economists actually believe that self-interest and the fear of unpleasant sanctions (or the hope for personal rewards) are the sole or dominant human motivations is a question best left to the economists to address. But Tyler nevertheless posits a dichotomy between self-interested behavior and law-related behavior, as if self-interest and law exhausted the universe of human motivation. But if there are motivations that are neither self-interested nor law-related, then the move from the absence of motivation by self-interest to the presence of motivation by law is an error. More particularly, if the motives of law-independent morality (or altruism, cooperation, and working for the public interest) also impel human action, then Tyler’s conclusion about the effect of law from the premise of non-self-interest is fallacious. If people frequently engage in morally or socially motivated rather than purely selfish behavior, and if they do so without reference to the law, then the conclusion that morality is the primary factor in shaping law-related behavior tells us little about law and even less about law’s effect on behavior.⁷

That people can be altruistic, cooperative, moral, social, sympathetic, and other-regarding not only in their attitudes but in their behavior has long been established by extensive empirical

⁵ Tyler, “Beyond Self-Interest,” *ibid.*, at p. 45.

⁶ See www.psych.nyu.edu/tyler/lab.

⁷ Indeed, Tyler himself, more recently, acknowledges the role that law-independent cooperation may play. Tom Tyler, “The Psychology of Cooperation,” in Eldar Shafir, ed., *The Behavioral Foundations of Public Policy* (Princeton, New Jersey: Princeton University Press, 2013), pp. 77-90.

research.⁸ It is true that self-interest is an important and often dominant motivation for many people in many contexts, and indeed it may even be a natural human impulse.⁹ Yet we know that when people perceive a form of behavior to have substantial moral (or religious) or “prosocial” implications, they will often relegate their own personal interest to secondary importance behind what they believe is the right thing to do.¹⁰ But if moral motivations and internalized moral norms lead people to refrain from activities that are both self-interested and illegal – if they keep people from stealing even when it would be profitable and from committing assault even when it would be pleasurable – we do not know whether the cause of people’s non-self-interested actions is the illegality or the immorality. And without distinguishing the two, we

⁸ See, for example, and in addition to the references in notes 16 and 22 below, C. Daniel Batson & Laura L. Shaw, “Evidence for Altruism: Toward a Pluralism of Prosocial Motives,” *Psychological Inquiry*, vol. 2 (1991), pp. 107-122; Augusto Blasi, “Moral Cognition and Moral Action: A Theoretical Perspective,” *Developmental Review*, vol. 3 (1983), pp. 178-210; Robert Hogan, “Moral Conduct and Moral Character: A Psychological Perspective,” *Psychological Bulletin*, vol. 79 (1973), pp. 217-232; John A. King et al., “Doing the Right Thing: A Common Neural Circuit for Appropriate Violent or Compassionate Behavior,” *NeuroImage*, vol. 30 (2006), pp. 1069-1076; Louis A. Penner et al., “Prosocial Behavior: Multilevel Perspectives,” *Annual Review of Psychology*, vol. 56 (2005), pp. 365-392; Jane Allyn Piliavin & Hong-Wen Charng, “Altruism: A Review of Recent Theory and Research,” *American Review of Sociology*, vol. 16 (1990), pp. 27-65; Lauren J. Wispé, “Positive Forms of Social Behavior: An Overview,” *Journal of Social Issues*, vol. 28 (1972), pp. 1-19. Other valuable contributions are collected in Walter Sinnott-Armstrong, ed., *Moral Psychology* (Cambridge, Massachusetts: MIT Press, 2008). There are continuing debates about whether seemingly altruistic behavior is at some deeper level produced by self-interest, as with the good feelings that such behavior fosters in the altruist (see Martin L. Hoffman, “Is Empathy Altruistic?” *Psychological Inquiry*, vol. 2 (1991), pp. 131-133), but for our purposes this debate is beside the point. Both those who see deep altruism and those who see altruism as based on deep egoism would agree on the widespread occurrence of law-independent and sanction-independent non-self-serving behavior.

⁹ See Roy F. Baumeister, Todd F. Heatherton, & Dianne M. Tice, *Losing Control: How and Why People Fail at Self-Regulation* (San Diego, California: Academic Press, 1994); Roy F. Baumeister, Kathleen D. Vohs, & Dianne M. Tice, “The Strength Model of Self-Control,” *Current Directions in Psychological Science*, vol. 16 (2007), pp. 351-355.

¹⁰ See Linda J. Skitka, “The Psychology of Moral Conviction,” *Social and Personality Psychology Compass*, vol. 4 (2010), pp. 267-281.

do not know how much of a causal contribution, if any, the illegality is making to people's decisions.

The existing research on human motivation thus supports what should be hardly surprising (except to those who believe that self-interest is the only human motivation): that people often do what they believe is right, questions of law aside. But insofar as that is so, then law's contribution can be understood largely in terms of constraining moral outliers rather than in affecting the behavior of the majority. The majority may well often engage in morally-motivated behavior that happens to be consistent with the law, but it is not clear why we would want to call such behavior "law-related." Maybe we should just call it "moral." And if we did, it would be easier to focus on the distinction, as an empirical matter, between consistency with the law and actual obedience to the law. If moral people do not shoplift, then the fact that their non-shoplifting happens to be consistent with the law is compatible with law being causally inert for them. It is worthwhile knowing that people will behave consistently with those laws that track their own moral preferences,¹¹ but this conclusion tells us nothing if we are interested in examining the effect of sanction-independent law on human behavior and decision-making.

If we thus seek to distinguish morally-motivated consistency with law from law-motivated behavior, another aspect of Tyler's research seems initially more fruitful. And that is his conclusion that the perception of legitimacy, while not as important as morality in determining conformity with law-related behavior, is an important factor. More specifically,

¹¹ In addition to Tyler's work, see Mike Hough, Jonathan Jackson, & Ben Bradford, "Legitimacy, Trust and Compliance: An Empirical Test of Procedural Justice Theory Using the European Social Survey," <http://ssrn.com/abstract=2234339>.

Tyler concludes that when the probability of sanctions is low,¹² subjects' beliefs in the law's legitimacy are more important than the threat of sanctions in bringing about law-consistent behavior.¹³ Thus, one of Tyler's secondary conclusions is that people tend to obey the law for reasons other than fear of punishment when they believe that the laws are the product of a system they believe legitimate. And legitimacy, Tyler maintains, is largely a matter of procedural regularity, opportunity for citizen input, and the respectful treatment of citizens by those in authority. When people have a say in the laws that bind them, when those laws are made through fair and open methods, and when people feel respected by their officials, Tyler concludes, they will be inclined to obey the law just because it is law.

But now look at the laws that are Tyler's predominant focus. Much of his research focuses on compliance with the minor prohibitions of the criminal law, such as shoplifting, littering, making excessive noise, and the laws regulating driving and parking.¹⁴ But in almost all the cases in which Tyler finds that people claim they would follow the law for reasons other than fear of sanctions, the laws are ones the followers likely think are good laws, even if application of those laws disadvantages them personally. Few people who shoplift think that

¹² Tyler qualifies his findings by making plain that they apply largely when the probability of punishment is low. Tyler, *op. cit.* note 1, p. 22. But the qualification assumes that people's subjective probability of punishment tracks the objective probability, which may not be true. Especially when the penalties are severe, people may systematically have subjective probabilities of punishment that are higher than the objective probabilities. And to the extent that this is so, the assumption that people are not responding to the possibility of punishment when the objective probabilities are low is a potentially pervasive error.

¹³ Tyler, *ibid.*, pp. 19-68. Hough et al., *op. cit.* note 8, using a different data set, and looking at Europe and not the United States, reaches a different conclusion, finding that legitimacy, although a statistically significant determinant of compliance with the law, is less of a determinant than are both consistency with the agent's moral beliefs and the agent's perceived risk of sanctions.

¹⁴ *Ibid.*, pp. 41-43, 187-190.

prohibiting shoplifting is a poor idea, and so too with laws against excessive noise, littering, speeding, and even overtime parking. The people who break these laws do not typically believe that societies should not have those laws, but only that it is advantageous to them at some particular time to break what in the abstract they believe to be a good or necessary law. And so it turns out that people who claim to be following laws they believe to have been enacted legitimately are also following laws they believe to be good laws. And again it is not clear that law *qua* law is playing any causal role. If a perception of legitimacy increases the likelihood that people will obey laws they think good but which “cost” them personally, we have learned something about compliance, but little about the extent to which the fact of legality leads people to obey laws they think wrong, and not merely costly, frustrating, or inconvenient. Or, to put it differently, we have learned nothing about people’s willingness to defer to the law’s judgments about correct and incorrect courses of action when our field of vision is limited to people who agree with the law’s judgment but would still prefer to do what they acknowledge is wrong but which will benefit them personally.¹⁵

More promising is the question in Tyler’s survey¹⁶ asking respondents whether they agree or disagree with the statement that “[p]eople should obey the law even if it goes against what

¹⁵ See Elizabeth Mullen & Janice Nadler, “Moral Spillovers: The Effect of Moral Violations on Deviant Behavior,” *Journal of Experimental Social Psychology*, vol. 44 (2008), pp. 1239-1245; Linda J. Skitka, Christopher W. Bayman, & Brad L. Lytle, “The Limits of Legitimacy: Moral and Religious Convictions as Constraints on Deference to Authority,” *Journal of Personality and Social Psychology*, vol. 97 (2009), pp. 567-578; Linda J. Skitka & Elizabeth Mullen, “Moral Convictions Often Override Concerns about Procedural Fairness: A Reply to Napier and Tyler,” *Social Justice Research*, vol. 21 (2008), pp. 529-546.

¹⁶ Tyler’s predominant methodology is the survey rather than the experiment. Surveys are frequently valuable, but may be less so when people are asked to respond about their inclination to engage in behaviors that they believe are socially valued, such as obedience to law. In such cases, professed willingness to comply may be, as discussed below, an unreliable indicator of actual compliance.

they think is right.”¹⁷ On this 33% of the respondents strongly agreed, another 52% agreed, and the remaining 15% disagreed or disagreed strongly.¹⁸ If these responses are to be believed, it does appear that many people are willing to obey the law just because it is the law even when they think the laws are unwise.¹⁹

Yet although this question is aimed at whether people will obey laws with which they disagree, a problem remains, for the question does not exclude the possibility of reaction to sanctions. Tyler’s research does indicate that, at least at low levels of enforcement, fear of sanctions is not as strong a motivation for compliance as belief in the wrongness of the act or belief in a law’s legitimacy. But without excluding sanctions from abstract statements of willingness to comply with laws that one believes are wrong we cannot reach strong conclusions about the extent to which sanction-free law *qua* law is providing people with a reason to avoid engaging in behavior they would, the law aside, have considered desirable.²⁰

This is not to say that the research in this vein is without value. Many laws do track people’s law-independent decisions about what to do, and enforcing those laws against outliers is important. And so is enforcing those laws in the face of personal interests in non-compliance. If a sense of legitimacy will increase compliance rates under those circumstances, it is a valuable

¹⁷ Tyler, *op. cit.* note 1, at Table 4.4 (p. 46).

¹⁸ *Ibid.*, pp. 45-46.

¹⁹ See also Jonathan Jackson, et al., “Why Do People Comply with the Law? Legitimacy and the Influence of Legal Institutions,” *British Journal of Criminology*, vol. 52 (2012), pp. 1051-1071.

²⁰ For a similar conclusion, see Leslie Green, “Who Believes in Political Obligation?” in John T. Sanders & Jan Narveson eds., *For and Against the State: New Philosophical Readings* (Lanham, Maryland: Rowman & Littlefield, 1996), pp. 1-17, at pp. 10-14.

tool for policy-making purposes. But our interest here is in whether, absent sanctions, the very fact of law makes a difference to the reasoning and decision-making processes of ordinary people. For this purpose, Tyler's research provides some support for the conclusion that legitimacy makes a difference, but also supports the conclusion that the level of sanction-free compliance with laws with which people disagree remains very low. At the very least, the research provides at best weak evidence for the empirical claim that Hart and others have found so important -- that significant numbers of puzzled people take the bare fact of a norm being a legal one as a reason for action or a reason for decision; that is, who follow the law just because it is law.

5.2 *Isolating the Effect of the Law*

As referenced above,²¹ a longstanding body of research finds that people commonly act for reasons other than self-interest.²² Often they tell the truth even when it would be beneficial to lie. They help strangers in need even at personal cost. They do not take others' belongings even when there is no possibility of detection. And in many other ways, to borrow the words of the filmmaker Spike Lee, they "Do the Right Thing."²³ Moreover, even when self-interest in the broad sense predominates, we know from the research on collective action and cooperative and

²¹ See note 5, above.

²² See, for example, Ernest Q. Campbell, "The Internalization of Moral Norms," *Sociometry*, vol. 27 (1964), pp. 391-412; Ernst Fehr & Urs Fischbacher, "The Nature of Human Altruism," *Nature*, vol. 425 (2003), pp. 785-791; Ernst Fehr & Urs Fischbacher, "Social Norms and Human Cooperation," *Trends in Cognitive Sciences*, vol. 8 (2004), pp. 185-190. A comprehensive collection of perspectives is in Walter Sinnott-Armstrong (ed.), *Moral Psychology* (Cambridge, Massachusetts: MIT Press, 2007).

²³ Spike Lee (producer, writer, and director), "Do the Right Thing" (Universal Pictures, 1989).

coordinating behavior that individuals will frequently engage in short-term self-denying acts in order to reap the benefits of longer-term coordinated action.²⁴

There are numerous competing or overlapping explanations of why people seem frequently, although hardly always, to set aside their self-interest in the service of moral or other values. Under some accounts, certain moral intuitions explain much of moral behavior.²⁵ Other accounts emphasize moral behavior as a function of the internalization of social norms and social expectations.²⁶ Others attribute non-self-serving moral behavior to the way in which morality and altruism make us feel better about ourselves, and thus be self-serving in a deeper sense.²⁷ And still others are attracted to Freudian,²⁸ evolutionary,²⁹ or neuroscientific explanations of

²⁴ See Robert M. Axelrod, *The Evolution of Cooperation* (New York: Basic Books, 1984); Elinor Ostrom, "Collective Action and the Evolution of Social Norms," *Journal of Economic Perspectives*, vol. 14 (2000), pp. 137-158. See also James Andreoni, William T. Harbaugh, & Lise Vesterlund, "The Carrot or the Stick: Rewards, Punishments, and Cooperation," *American Economic Review*, vol. 93 (2003), pp. 893-902.

²⁵ Fiery Cushman, Liane Young, & Marc Hauser, "The Role of Conscious Reasoning and Intuition in Moral Judgments: Testing Three Principles of Harm," *Psychological Science*, vol. 17 (2006), pp. 1082-1089.

²⁶ See Alan Page Fiske & Philip E. Tetlock, "Taboo Trade-offs: Reactions to Transactions that Transgress the Spheres of Justice," *Political Psychology*, vol. 18 (1997), pp. 255-297.

²⁷ See Karl Aquino & Americus Reed II, "The Self-Importance of Moral Identity," *Journal of Personality and Social Psychology*, vol. 83 (2002), pp. 1423-1440.

²⁸ For example, Campbell, *op. cit.* note 6.

²⁹ See W.D. Hamilton, "The Genetical Evolution of Social Behavior," *Journal of Theoretical Biology*, vol. 7 (1964), pp. 1-52; Kalle Parvinen, "Joint Evolution of Altruistic Cooperation in a Metapopulation of Small Local Populations," *Theoretical Population Biology*, vol. 85 (2013), pp. 12-19.

moral, altruistic, and genuinely cooperative behavior.³⁰ But whatever the deeper cause, it seems clear that behavior other than the self-serving is often a significant motivation of human action.

The import of this conclusion is that it is a mistake to view human motivation as based either on self-interest or on law. Setting up this false dichotomy between law and self-interest was Tyler's mistake. And, earlier, it was Hart's mistake as well. In framing the issue of obedience as an opposition between the bad man – who cares only for self-interest -- and the puzzled man – who wants to know what the law is so he can follow it -- Hart ignored the moral person, the person who acts for reasons other than self-interest, but who does not need the motivations or prescriptions or instructions of the law to get her to do so.

If people often for non-self-interested reasons, inquiring into the effect of law thus requires distinguishing law-produced reasons for action not only from self-interested reasons, but also from law-independent moral reasons. Because people sometimes act morally for reasons other than self-interest and other than law, we need to know what, if anything, law adds to the equation. More precisely, we need to know not only what people do when law conflicts with their self-interest, but also, and often more importantly, what people do when the law conflicts with their all-things-except-the-law-considered best judgment. The question now is whether, when people have reached this all-things-except-the-law-considered judgment, they will, sanctions aside, subjugate *that* judgment to the prescriptions of the law. Will people will do

³⁰ See Joshua D. Greene et al., "An fMRI Investigation of Emotional Engagement in Moral Judgment," *Science*, vol. 293 (2001), pp. 2105-2108; Joshua D. Greene et al., "The Neural Bases of Cognitive Conflict and Control in Moral Judgment," *Neuron*, vol. 44 (2004), pp. 389-400; Dominique J.-F. de Quervain, et al., "The Neural Basis of Altruistic Punishment," *Science*, vol. 305 (2004), pp. 1254-1258.

what they believe is wrong (or silly, pointless, unsound, immoral, improvident, unwise, etc.) just because of the law, and without regard to the threat of sanctions?³¹

Hart's puzzled person is thus someone who follows the law just because it is the law even when what the law requires seems not only not in her best interest, but also contrary to her best judgment. There is a reason that philosophers grappling with the issue are fond of imagining "Stop" signs in the middle of the desert,³² and that is because the example creates a situation in which the likelihood of apprehension and punishment is close to zero, and in which acting in accordance with the law appears otherwise pointless. The example is artificial, but does present the issue clearly, and does capture, as we shall see, a rather wide range of real-world circumstances in which what the law commands diverges from what its subjects would otherwise do, and in which the likelihood of sanction is negligible. It is in such circumstances that Hart supposed that his puzzled person would likely follow the law, or at least take the law as a sometimes dispositive reason for action, and it is with respect to such circumstances that the question of sanction-independent obedience to law *qua* law arises.

To formulate a question is not to answer it. But proper formulation steers us in the right direction and keeps us from wrong ones. More specifically, the correctly formulated question about obedience to law points us to research focused precisely on how people behave and decide when their own best all-things-considered analysis indicates one course of action or decision and

³¹ Failure to attend to this distinction bedevils much of the literature on compliance with international law, which often fails to distinguish national acts consistent with international law from national acts caused, at least in part, by international law. The point is discussed in George W. Downs, David M. Rocke, & Peter N. Barsoom, "Is the Good News about Compliance Good News about Cooperation,?" *International Organization*, vol. 50 (1996), pp. 379-406.

³² See, for example, Donald H. Regan, "Law's Halo," in Jules Coleman & Ellen Frankel Paul, eds., *Philosophy and Law* (Oxford: Basil Blackwell, 1987), pp. 15-30.

the law indicates another. At times this divergence will reflect someone's belief that the law is morally or otherwise mistaken, as with the now-common beliefs about laws restricting the use of marijuana and other so-called soft drugs, or prohibiting various sexual practices that conflict with the majority's moral notions. And at other times people believe that the law's mandates are mistaken not because the entire law is, by their lights, misguided, but because a good law appears by virtue of its generality to have generated a poor result on a particular occasion.³³ Most people who violate traffic laws, for example, do not object to traffic laws as such, nor even to the particular traffic laws they violate. Rather, they believe that the traffic laws have indicated a bad or silly result on some particular occasion, as with a speed limit that seems far too low on a clear, dry, and traffic-free Sunday morning, or a "Don't Walk" sign that tells pedestrians to wait at the curb even when there is no approaching car as far as the eye can see.

Whether because of a belief that an entire law is wrong or only that a good law would produce a bad result under particular circumstances, people often face situations in which their all-things-except-the-law-considered best judgment indicates one course of action and the law indicates another. It is in such cases that Hart and Tyler, among others, believe that many people

³³ Law is necessarily general, and by virtue of its generality will inevitably generate erroneous results on occasion. Aristotle first captured the idea, and argued that equity was the necessary method of "rectification" of the mistakes occasioned by the intrinsic imprecision of general rules and general law. Aristotle, *Nicomachean Ethics*, trans. J.A.K. Thomson (Harmondsworth, UK: Penguin, 1977), ¶1137a-b. See also Aristotle, *The "Art" of Rhetoric*, trans. John Henry Freese (Cambridge, Massachusetts: Harvard University Press, 1947), ¶1374a, where Aristotle says that "equity, although just, and better than a kind of justice, is not better than absolute justice – only than the error due to generalization." For a historical, exegetical, and legal analysis of Aristotle on equity, see John Triantaphyllopoulos, "Aristotle's Equity," in Alfred Mordechai Rabello, *Aequitas and Equity: Equity in Civil Law and Mixed Jurisdictions* (Jerusalem: The Hebrew University of Jerusalem, 1997), pp. 12-22. On the problem of rule-generated error, see Frederick Schauer, *Profiles, Probabilities, and Stereotypes* (Cambridge, Massachusetts: Harvard University Press, 2003), pp. 27-54; Frederick Schauer, *Playing By the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Oxford: Clarendon Press, 1991), *passim*.

will follow the law's indications even absent sanctions. But both the existing research and ordinary observation appear to provide virtually no support for their conclusions.

To be specific, little actual empirical research focuses directly on the question whether people obey the law, sanctions and their own best judgments apart, just because it is the law. And what research there is appears more consistent with the conclusion that the law makes little difference under such conditions than with the opposite conclusion – that adding law to the decision making process makes a substantial difference apart from the sanctions the law may have at its disposal. Of course there is a difference between lack of support for a conclusion and support for the opposite conclusion. Here, however, there appears to be little support for the conclusion of law's sanction-independent influence, and some, albeit weak, support for the conclusion of law's sanction-independent non-influence.

Thus, in one study, researchers asked subjects whether they would, as a teacher, violate a rule (which in this context can be considered equivalent to the law) mandating so-called blind grading of papers when following the rule would produce injustice. And although the subjects professed to have general attitudes favoring rule adherence over rule-independent good outcomes, these general attitudes withered in the face of a concrete example. When given a specific example as opposed being asked for their abstract opinion, subjects preferred the good outcome to the rule-directed one. And this was so not only for lay subjects, but also for law students and lawyers.³⁴ The law students and lawyers were somewhat more inclined to follow

³⁴ N.J. Schweitzer, et al., "The Effect of Legal Training on Judgments of Rule of Law Violations," paper presented to the American Psychology-Law Association, March 5, 2008, http://www.allacademic.com/meta/p229442_index.html. To much the same effect is N.J. Schweitzer, Douglas J. Sylvester, & Michael J. Saks, "Rule Violations and the Rule of Law: A Factorial Survey of Public Attitudes," *DePaul Law Review*, vol. 56 (2007), pp. 615-636.

the rule even when it produced what they deemed to be an unjust result, but subjects in all categories took their own sense of a just result to be more important than following what they perceived to be the governing law. Thus, this particular study – only one study, to be sure – not only suggested that there may be less law-following for the sake of law than others have supposed, but also that abstract attitudes about the importance of law-following may be less reliable as predictors of law-following behavior than some of the earlier research – Tyler’s, in particular – has assumed.

Other research has produced similar results. In one pair of studies, law students were found more willing to make decisions in accordance with their own policy preferences than in accordance with the law, even when the law was clear, even when they were given incentives to follow the law, and even though they tended to believe that their policy preferences should not have and did not have any effect on their legal decisions.³⁵ Again, these studies indicate not only that being guided by law *qua* law is less prevalent than often assumed, but also that the importance of legal guidance is systematically over-estimated even by the decision makers themselves. We *think* that law ought to matter, and thus we think that law *does* matter, but in fact it may matter less than we think, at least when our law-independent judgments are inconsistent with the law’s judgments, and when force, coercion, and sanctions are removed from the equation.

³⁵ Joshua R. Fergusson, Linda Babcock, & Peter M. Shane, “Behind the Mask of Method: Political Orientation and Constitutional Interpretive Preferences,” *Law & Human Behavior*, vol. 32 (2008), pp. 502-510; Joshua R. Fergusson, Linda Babcock, & Peter M. Shane, “Do a Law’s Policy Implications Affect Beliefs About Its Constitutionality? An Experimental Test,” *Law & Human Behavior*, vol. 32 (2008), pp. 219-227.

These conclusions should not surprise. We know that preferences influence judgments, the phenomenon being what psychologists sometimes call “motivated reasoning”³⁶ and sometimes “myside bias.”³⁷ And the more specific application of this phenomenon is the tendency of legal decision makers, including ordinary people deciding whether the law constrains their actions, to understand and interpret the law in light of their outcome preferences.³⁸ Indeed, this was the core claim of the American Legal Realists, who argued that judges often or even usually understood and interpreted the law in light of their non-legally-determined outcome preferences.³⁹ And although the empirical conclusions of the Realists were

³⁶ Ziva Kunda, “The Case for Motivated Reasoning,” *Psychological Bulletin*, vol. 108 (1990), pp. 489-498. A prominent legal application is Dan M. Kahan, “Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law,” *Harvard Law Review*, vol. 126 (2011), pp. 1-77. A good discussion of motivated reasoning can also be found in Peter H. Ditto, David A. Pizarro, & David Tannenbaum, “Motivated Moral Reasoning,” *Psychology of Learning and Motivation*, vol. 50 (2009), pp. 307-338.

³⁷ See Keith E. Stanovich & Richard F. West, “On the Failure of Intelligence to Predict Myside Bias and One-Side Bias,” *Thinking & Reasoning*, vol. 14 (2008), pp. 129-167; Keith E. Stanovich & Richard F. West, “Natural Myside Bias is Independent of Cognitive Ability,” *Thinking & Reasoning*, vol. 13 (2007), pp. 225-247; Keith E. Stanovich, Richard F. West, & Maggie E. Toplak, “Myside Bias, Rational Thinking, and Intelligence,” *Current Directions in Psychological Science*, vol. 22 (2013), pp. 259-264.

³⁸ See Eileen Braman, *Law, Politics, and Perception: How Policy Preferences Influence Legal Reasoning* (Charlottesville, Virginia: University of Virginia Press, 2009); Linda Babcock and Joshua Furgeson, “Legal Interpretations and Intuitions of Public Policy,” in Jon Hanson, ed., *Ideology, Psychology, and Law* (New York: Oxford University Press, 2012), pp. 684-704; Linda Babcock & Joshua Furgeson, “Experimental Research on the Psychology of Disputes,” in Jennifer Arlen, ed., *Research Handbook on the Economics of Torts* (Cheltenham, UK:Edward Elgar, forthcoming 2013).

³⁹ Legal Realism has many dimensions, but the focus on judicial opinions and justifications as law-based rationalizations for decisions reached on non-legal grounds is most associated with, inter alia, Jerome Frank, *Law and the Modern Mind* (New York: Brentano’s, 1930); Joseph C. Hutcheson, Jr., “The Judgment Intuitive: The Function of the ‘Hunch’ in Judicial Decision,” *Cornell Law Quarterly*, vol. 14 (1929), pp. 274-288; Herman Oliphant, “A Return to Stare Decisis,” *American Bar Association Journal*, vol. 14 (1928), pp. 71-076, 107, 159-162. This understanding of Legal Realism is shared by Brian Leiter, who analyzes it and relates it to

often under-researched and over-claimed, subsequent research has confirmed at least some of the basic Realist insight that judges frequently perceive and locate the law in light of their preferred outcomes.⁴⁰ And thus insofar as even lawyers and judges often find or interpret the law in ways that produce their desired outcomes, it should come as little surprise that ordinary people do the same thing. We know, for example, that lay jurors generally prefer what they perceive as the right decision over the legally-mandated one when the two conflict.⁴¹ And thus to the extent that both lay and legally-trained people treat the law as less important than their law-independent judgments, the empirical foundations of the notion of law operating, absent coercion, as an external constraint on people's preferred courses of action are undercut even further.

Indeed, when we turn from experimental research to data on actual legal compliance, we find substantial support for the hypothesis that unenforced law that does not track people's law-independent preferences and judgments (including moral judgments) is often ineffective. Before computers facilitated the process of tracking down people who did not appear in court in response to citations for traffic violations, for example, the non-appearance rate was 60%, even though in such cases the legal "command" was directed to a particular person to engage in the

contemporary jurisprudential debates in Brian Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (New York: Oxford University Press, 2007). See also Frederick Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* (Cambridge, Massachusetts: Harvard University Press, 2009), pp. 124-147; Frederick Schauer, "Editor's Introduction," in Karl N. Llewellyn, *The Theory of Rules*, Frederick Schauer, ed. (Chicago: University of Chicago Press, 2011), pp. 1-28; Frederick Schauer, "Legal Realism Untamed," *Texas Law Review*, vol. 91 (2013), pp. 749-780.

⁴⁰ See Duncan Kennedy, "Freedom and Constraint in Adjudication: A Critical Phenomenology," *Journal of Legal Studies*, vol. 36 (1986), pp. 518-562.

⁴¹ Much of the research has been conducted in the context of the use of epistemically relevant but legally inadmissible evidence. A useful overview is Nancy Steblay, Harmon N. Hosch, Scott E. Culhane, & Adam McWethy, "The Impact on Juror Verdicts of Judicial Instruction to Disregard Inadmissible Evidence," *Law & Human Behavior*, vol. 30 (2006), pp. 469-492.

particular act of showing up in court.⁴² Much the same can be said about people who are individually summoned to appear for jury duty, where compliance rates absent stringent sanctions range have been found to be as low as 20%, and are often in the 30% to 50% range.⁴³ Similarly, the scofflaw rate for parking meters in San Francisco was 40% in 2007,⁴⁴ and official reports indicate that compliance rates for mandatory pet licenses in New York, New Jersey, and Pennsylvania are below 20% for dog licenses and, at least in New York, around 3% for cat licenses.⁴⁵ In Australia, non-compliance with High Occupancy Vehicle lane laws was 90% without enforcement, and estimated at over 50% in the United States.⁴⁶ Similarly, fare evasion in cities and countries with so-called honor systems of fare collection on public transport has been reported at equivalently high rates.⁴⁷ And one study found that under circumstances of low

⁴² Associated Press Story, December 5, 1967, as published in numerous newspapers, including the *Kentucky New Era*.

⁴³ Associated Press Story (by Joann Loviglio), August 11, 2001, as published in numerous newspapers, including the *Topeka Capital-Journal*.

⁴⁴ *San Francisco Chronicle*, May 9, 2007.

⁴⁵ See Hearing of the New York City Council Health Committee on a Bill to Increase the Dog Licensing Surcharge Fee, December 17, 2010, available at www.shelterreform.org/2010DecHealthMetting.html; Report of the Manhattan Borough President, www.mbpo.org/re;ease_details.asp?id=2029 (2006).

⁴⁶ See Lior Jacob Stahilevitz, “How Changes in Property Regimes Influence Social Norms: Commodifying California’s Carpool Lanes,” *Indiana Law Journal*, vol. 75 (2000), pp. 1231-1294, at p. 1242 n.52.

⁴⁷ When Los Angeles County, for example, attempted to operate its subway system without active enforcement of the law requiring payment of the fare, a majority of people did not pay, causing the transit authority to give up the “experiment” and install turnstiles. See “LA Subway Installs First Turnstiles,” *Boston Globe*, May 4, 2013, p. A2. See also Ronald V. Clarke, Stephane Contre, & Gohar Petrossian, “Deterrence and Fare Evasion: Results of a Natural Experiment,” *Security Journal*, vol. 23 (2010), pp. 5-17.

enforcement, the degree of compliance with a Hong Kong law prohibiting tobacco sales to minors was below 19%.⁴⁸

A great deal of interesting data come from studies of compliance with tax laws. There is an unfortunate tendency in the tax compliance literature to refer to taxpayer provided information and payments as “voluntary” in order to distinguish taxpayer reporting and payment from point of-income payments, as with the common (and required) practice of withholding taxes from salary payments.⁴⁹ But failing to report income is a crime, as is intentionally failing to pay the taxes that are due. And even when the level of culpability does not rise to the criminal, underpayment of taxes often brings substantial civil penalties. As a result, so-called voluntary tax compliance is voluntary only in the same way that someone who drives under the speed limit rather than be stopped by the police and required to pay a fine is voluntary, and only in the same way that the would-be thief who refrains from theft in order to avoid imprisonment can be said to have acted voluntarily. It may be true that someone who chooses compliance rather than punishment has made a voluntary choice in some sense, but to describe the an act of legal compliance under threat of punishment for non-compliance as voluntary is inconsistent with our ordinary understanding of voluntariness and incompatible with our effort here to focus on coercive dimensions of law.

⁴⁸ Ming-yue Kan & Maggie Lau, “Tobacco Compliance in Hong Kong,” *Nicotine and Tobacco Research*, vol. 10 (2008), pp. 337-340; Ming-yue Kan & Maggie Lau, “Minor Access Control in Hong Kong under the Framework Convention on Tobacco Control,” *Health Policy*, vol. 95 (2010), pp. 204-210.

⁴⁹ The misleading nature of the word “voluntary” in the tax context is noted in Leandra Lederman, “Tax Compliance and the Reformed IRS,” *Kansas Law Review*, vol. 51 (2003), pp. 971-1011.

When we put aside the confusing connotations of the word “voluntary,” we discover that genuinely uncoerced compliance with the tax laws is hardly common.⁵⁰ In the United States, many forms of income are reported directly by the payor (such as an employer) to federal tax authorities, making the opportunities for undetected evasion small. But for income neither withheld nor directly reported in this manner -- income not subject to information reporting, as it is put -- and thus for income whose existence is known primarily by the taxpayer, estimates of the rates of non-compliance range from 50% upward (the Internal Revenue Service estimated 54% in 2007) -- and this under circumstances in which taxpayers know that failing to report is a crime involving serious penalties. Although rates of tax compliance vary greatly across countries, these figures are hardly atypical internationally.⁵¹ Indeed, the data from the United States, where compliance is thought to be higher than in many other countries, suggest that truly uncoerced and unthreatened obedience to the tax laws is far rarer than the image of the puzzled person would suggest.

This collection of studies and reports provides considerable support for the conclusion that when sanctions are removed from the equation, and when the laws at issue are not ones that

⁵⁰ Much of what follows comes from Internal Revenue Service Release IR-2012-4 (January 6, 2012) (“IRS Releases New Tax Gap Estimates”); Internal Revenue Service Report GAO/T-66D-97-35 (1997) (“Taxpayer Compliance: Analyzing the Nature of the Income Tax Gap”); Maurice Allingham & Agnar Sandmo, “Income Tax Evasion: A Theoretical Analysis,” *Journal of Public Economics*, vol. 1 (1972), pp. 323-338; Internal Revenue Service, “Reducing the Federal Tax Gap: A Report on Improving Voluntary Compliance” (2007); James Andreoni, Brian Erard, & Jonathan Feinstein, “Tax Compliance,” *Journal of Economic Literature*, vol. 36 (1998), pp. 818-860; Charles Clotfelter, “Tax Evasion and Tax Rates: An Analysis of Individual Returns,” *Review of Economics and Statistics*, vol. 65 (1983), pp. 363-373; Lederman, *op. cit.* note 49.

⁵¹ See James Alm, “Tax Compliance and Administration,” in *Handbook on Taxation* (New York: Marcel Dekker, 1999); John L. Mikesell & Liucija Birksyte, “The Tax Compliance Puzzle: Evidence from Theory and Practice,” *International Journal of Public Administration*, vol. 30 (2007), pp. 1045-1081.

track people's salient and law-independent sense of what they ought to do, compliance with the law just because it is the law is far less widespread than Hart, with his reference to puzzled person, and Tyler, in presupposing that people *do* obey the law, assume. Indeed, looking carefully at Tyler's reference to "law-related behavior" is particularly instructive. Behavior can be law-related if it correlates with law even if it is not caused by law, and it can be law-related if it is caused by the sanctions that accompany the law (or a perception of those sanctions) and not the sanction-independent internalization of a legal norm as a norm of behavior. But when we remove the instances in which we see correlation but probably not causation, and when we remove sanctions, what we are left with is an empirical claim about the prevalence of obedience to law *qua* law that appears largely unsupported by the available evidence.

5.3 *On Obedience to Authority*

But what about Milgram? From 1963 to 1974, the Yale psychologist Stanley Milgram conducted a series of now-notorious experiments in which subjects were instructed by the researcher to inflict increasing amounts of pain (through electric shocks) on various victims, allegedly as part of an experiment on the effect of punishment on learning.⁵² In fact the victims were not actually inflicted with pain, and the experiment was not about the effect of punishment on learning. The experiment was about obedience to authority, but the subjects – many of

⁵² Stanley Milgram, *Obedience to Authority: An Experimental View* (New York: Harper & Row, 1974); Stanley Milgram, "Some Conditions of Obedience and Disobedience to Authority," *Human Relations*, vol. 18 (1965), pp. 57-76; Stanley Milgram, "Behavioral Study of Obedience," *Journal of Abnormal and Social Psychology*, vol. 67 (1963), pp. 371-378. The notoriety is based partly on the substance of the studies, partly on the implications of the studies for understanding the Holocaust, and partly on the trauma imposed on the subjects, the last explaining why it is hard to imagine the experiments being approved today by an institutional review board. Indeed, the Milgram experiments were at least part of the reason for the creation of institutional review boards themselves.

whom followed instructions to inflict pain -- did not know that at the time, and the Milgram experiments have been widely understood to support the view that people will obey authority even to the point of doing things they would not otherwise do, and which they would otherwise find morally or otherwise unacceptable. And, not surprisingly, many people have taken the Milgram experiments as providing an explanation of why so many people blindly followed orders from authority to engage in the appalling acts we now refer to as the Holocaust.⁵³

For present purposes it seems to appear as if the lesson of the Milgram experiments is that people will often do things other than what their own authority-independent judgment tells them to do when an authority figure instructs them to do so. And because law is a practice of authority in which the law claims the right to tell its subjects to put aside their own judgment in favor of the law's judgment,⁵⁴ then do not the Milgram experiments suggest that people might blindly or at least presumptively defer to the law in the same way that they deferred to the authority figure in the laboratory? Because our inquiry at this point is empirical, the Milgram experiments seem to support the conclusion that people can and will obey, in the strict sense of "obey," an authority. Just as subjects appeared to set aside their own judgments and their own moral compass in favor of following the commands of the experimenter in the Milgram

⁵³ For discussion, see, for example, Neil Lutsky, "When is 'Obedience' Obedience? Conceptual and Historical Commentary," *Journal of Social Issues*, vol. 51 (1995), pp. 55-65; David R. Mandel, "The Obedience Alibi: Milgram's Account of the Holocaust Reconsidered," *Analyse & Kritik*, vol. 20 (1998), pp. 74-94. See also Herbert C. Kelman & V. Lee Hamilton, *Crimes of Obedience: Toward a Social Psychology of Authority and Responsibility* (New Haven, Connecticut: Yale University Press, 1989).

⁵⁴ When understood as a claim of authority and not the actual existence of justified authority, the description in the text captures some of the highly influential work of Joseph Raz. See, for example, Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford: Clarendon Press, 1994), pp. 325-338; Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1988); Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979), pp. 233-249.

experiments, then it would seem that much the same might apply to the willingness of people to set aside their own judgments in favor of the commands of the law.

As several decades of commentary on the Milgram experiments have suggested,⁵⁵ however, it is hardly clear that the subjects understood themselves to be following an authority, as opposed to trying to please someone with whom they were in close contact, or as opposed to participating in a collective small group enterprise. Indeed, when subsequent experiments attempted to isolate obedience as such, and thus exclude various forms of interpersonal cooperation, it became less apparent that following an authority figure just because he or she exhibited the trappings of authority or possessed formal authority was very much of an identifiable phenomenon.⁵⁶ At the very least, the subsequent research cautions against reading too much into the Milgram experiments, and against taking them as plainly establishing the willingness of people to obey authority simply because it is authority.

Just as we should not take the lesson of the Milgram experiments too far, so too should we not take the subsequent skepticism about those experiments too far. People frequently do

⁵⁵The commentary is voluminous. See Arthur G. Miller, *The Obedience Experiments: A Case Study of Controversy in Social Science* (New York: Praeger, 1986); Thomas Blass, *The Man Who Shocked the World: The Life and Legacy of Stanley Milgram* (New York: Basic Books, 2004); Thomas Blass, "Understanding Behavior in the Milgram Obedience Experiment," *Journal of Personality and Social Psychology*, vol. 60 (1991), pp. 398-413; Jerry Burger, "Replicating Milgram: Would People Still Obey Today?," *American Psychologist*, vol. 64 (2009), pp. 1-11; Steven J. Gilbert, "Another Look at the Milgram Obedience Studies: The Role of the Graded Series of Shocks," *Personality and Social Psychology Bulletin*, vol. 7 (1981), pp. 690-695; Moti Nassani, "A Cognitive Reinterpretation of Stanley Milgram's Observations on Obedience to Authority," *American Psychologist*, vol. 45 (1990), pp. 1384-1385; Stephen D. Reicher, S. Alexander Haslam, & Joanne R. Smith, "Working Toward the Experimenter: Reconceptualizing Obedience Within the Milgram Paradigm as Identification-Based Followership," *Perspectives on Psychological Science*, vol. 7 (2012), pp. 315-324; Philip G. Zimbardo, "On 'Obedience to Authority,'" *American Psychologist*, vol. 239 (1974), pp. 566-567.

⁵⁶See especially Reicher, et al., *op. cit.* note 55.

follow authorities, and often take the instructions and commands of an authority as a reason for action. Sometimes, of course, this obedience grows out of a fear of sanctions, and it is hardly unusual for people to set aside their own judgment in favor of the judgments of sergeants, parents, teachers, deans, police officers, and others just because of what such authority figures can do to them if they do not obey. And sometimes the obedience is indeed sanction-independent. It is implausible to claim that the directives of parents, teachers, and religious and political leaders, even when not backed by sanctions, never or even rarely have an effect on behavior.⁵⁷

The premise that people often follow authorities, however, does not entail the conclusion that people follow *legal* authorities with the same frequency. I might trust the judgment of the sergeant but doubt that the law systematically has the same degree of experience or expertise. I might obey my parents out of respect but not have the same respect for the law. And I might understand that numerous social tasks require someone to be in charge without believing that law is very often the best candidate for that role. Indeed, law's very distance from its subjects might make legal obedience less likely than in some of these other examples, and law's distance from its subjects might make it more necessary for law than it is for sergeants, parents, teachers, and lifeboat commanders to have sanctions at their disposal. To offer that hypothesis is to get ahead

⁵⁷ Much of the research is summarized in Robert B. Cialdini & Noah J. Goldstein, "Social Influence: Compliance and Conformity," *Annual Review of Psychology*, vol. 55 (2004), pp. 591-621. As this article exemplifies, however, the tilt of much of the research, perhaps still influenced by the Milgram experiments and the belief that the Holocaust was more the product of excess obedience than of willing conformity, has been on excess rather than insufficient obedience. This is curious, for it is hardly clear that the harms from excess obedience, in the aggregate, are greater than those of insufficient obedience. Plainly this conclusion will vary with context, but, still, it appears to be a background and largely acontextual assumption in much of the research that excess obedience is a greater problem than insufficient obedience.

of things a bit, but at least at this point in the argument it is wise not to draw too many inferences about sanction-free legal obedience from instances of obedience in far different contexts.

5.4 *Does Law Cause Morality?*

One potential objection to the empirical analysis in the previous sections is that it assumes a false dichotomy between law and morality, or between law and someone's all-things-other-than-the-law considered best judgment. One way in which opposing legal to non-legal reasons might be a false dichotomy would be if the very idea of "law" included a wide range of political, moral, empirical, and policy considerations, thus making any attempt to isolate the effects of a narrower conception of positive law a fundamentally misguided enterprise. If the very category of law encompassed the factors I have been supposing are the components of a law-independent decision, then the distinction between the legal and the non-legal would be rendered incoherent.

This objection has overtones of Ronald Dworkin's perspective on law and his capacious understanding of the category of law.⁵⁸ For Dworkin, law itself is the best interpretive understanding of a wide range of legal, moral, and political inputs, and he thus rejects what he describes as the "positivist" inclination to separate out a distinct realm of the legal from this larger array of normative considerations. Consequently Dworkin would find it hard even to understand an inquiry premised on isolating the effect of a narrower conception of law.

⁵⁸ Ronald Dworkin, *Justice in Robes* (Cambridge, Massachusetts: Belknap/Harvard University Press, 2008); Ronald Dworkin, *Law's Empire* (Cambridge, Massachusetts: Harvard University Press, 1986); Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Massachusetts: Harvard University Press, 1977).

Such an understanding of law, however, defines away what would otherwise be a range of important questions. Most significantly, too capacious a conception of law makes it virtually impossible to determine the effect on the decisions of judges, policy-makers, and the public of what the ordinary person and the ordinary officials takes to be law – the category of materials largely dominated by statutes, regulations, reported judicial decisions, written constitutions, and the conventional devices of legal analysis. Following Ruth Gavison, we might label this skeletal category of materials “first stage law.”⁵⁹ Whether first stage law is all or just some of law is an interesting and important question, but it is not the only interesting and important question. After all, when such famous practitioners of civil disobedience as Henry David Thoreau, Mahatma Gandhi, Bertrand Russell, the Suffragettes, and Martin Luther King engaged in what they took to be acts in contravention of existing law, *they* understood their acts as violations of law understood in a narrower and more concrete way. *Their* question was whether and when first stage law should be violated in the service of what they perceived as a higher moral calling. But only with a grasp of a category such as first stage law does their (and our) understanding of their acts even make sense, because the very conflict they perceived and articulated dissolves if law includes the very moral issues they believed to conflict with the law.⁶⁰ And thus only with something like the category of first stage law in hand can we understand the perspective on law not only of most ordinary people, but of the legal system itself. When we are interested in

⁵⁹ Ruth Gavison, “Legal Theory and the Role of Rules,” *Harvard Journal of Law & Public Policy*, vol. 14 (1991), pp. 727-770, at pp. 740-741. Similar language is in Ruth Gavison, “Comment,” in Ruth Gavison, ed., *Issues in Contemporary Legal Philosophy: The Influence of H.L.A. Hart* (Oxford: Clarendon Press, 1987), pp. 21-32, at pp. 29-32.

⁶⁰ See N.W. Barber, “Legal Realism, Pluralism and Their Challengers,” in Ulla Neergaard & Ruth Nielsen, eds., *European Legal Method – Towards a New European Legal Realism* (Copenhagen: DJOEF Publishing, forthcoming 2013).

whether people obey the law, we require such a relatively narrow understanding of law in order to make sense of the question. If “law” is simply the label we attach to a judgment with a far more capacious set of inputs – if obeying the law collapses into doing the right thing -- then inquiring into the effect of law on decisions becomes pointless, defining away a question that has endured at least since the death of Socrates.⁶¹ So whether we call the category first stage law, positive law, human law, or something else, a persistent issue is whether people should and do act in accordance with the mandates of the components of that category. At least here, we are asking whether this category, as a category, has an effect on people’s behavior, and, if so, when, how, and why

The more serious false dichotomy objection, however, accepts that there are important differences between law and the non-law set of moral and social norms, but claims that law, even in the narrow “first stage” sense, has a causal effect on what people believe that morality requires. Even steering well clear of the metaethical question of what morality actually is, there is still the question of where people’s moral beliefs come from. And if the law has a causal effect on what people believe that morality requires, then law is potentially doing more work than a skeptical conclusion about law’s persuasive effect would acknowledge.

The research on the effects of law on perceptions of morality is, again, and not surprisingly, mixed. In the 1930s and 1940s the legal theorists called Scandinavian Realists started with the assumption, derived from the Logical Positivism that was fashionable at the time, that morality itself was an inherently subjective and entirely psychological phenomenon.⁶²

⁶¹ See Frederick Schauer, “Official Obedience and the Politics of Defining ‘Law,’” *Southern California Law Review*, vol. 86 (forthcoming 2013).

⁶² For references, see above, Chapter Four, note 13.

The Logical Positivists believed that the very concept of morality was meaningless except as the outgrowth of the contingent beliefs that people happened to have, and the Scandinavian Realists believed that law was a significant contributor to these beliefs. In short, the Scandinavian Realists believed that public official pronouncements in the form of law had a causal effect on what people believed to be right and what they believed to be wrong.

The Scandinavian Realists were not sophisticated social scientists, and their conclusions about the causal effect of law on beliefs about morality were largely speculations, hypotheses, assumptions, and perhaps just hopeful guesses. In the ensuing years, however, social scientists have become interested in the question, but the research on the effect of law on opinion formation remains inconclusive.⁶³ Although some studies have found that making an activity (attempting suicide and littering, for example) illegal appeared to have no effect on the percentage of people finding the activity immoral,⁶⁴ others have found some effect of law on moral beliefs in the context of acts such as public drunkenness and failure to prevent suicide, although the latter studies did not distinguish between the effect of law and that of peer opinion.⁶⁵

A contemporary example illustrates the issue. There is little doubt that many countries have seen a rapid change in opinion about homosexuality in general and same-sex marriage in

⁶³ See Kenworthy Bilz & Janice Nadler, "Law, Psychology, and Morality," in Daniel Bartels, et al., eds., *Moral Judgment and Decision Making (Psychology of Learning and Motivation, Volume 50)* (San Diego, California: Academic Press, 2009), pp. 101-131.

⁶⁴ Nigel Walker & Michael Argyle, "Does the Law Affect Moral Judgements,?" *British Journal of Criminology*, vol. 4 (1964), pp. 570-581.

⁶⁵ Leonard Berkowitz & Nigel Walker, "Laws and Moral Judgments," *Sociometry*, vol. 30 (1967), pp. 410-422. For the critique, see Bilz & Nadler, *op. cit.* note 63.

particular. And much of that change has taken place in parallel with or subsequent to legal change, including the proliferation of laws and judicial decisions prohibiting discrimination on the basis of sexual orientation, and including the increasing number of jurisdictions legally recognizing same-sex marriage. But these changes have also taken place in parallel with and subsequent to a dramatic increase in the favorable portrayal of gays and lesbians in the mass media, particularly in movies and on television. And there has also been an equally dramatic increase in the number of gays and lesbians who are willing to be open and explicit about their sexual orientation, and thus an increase in the number of heterosexuals who have regular contact in school, at work, and in social interactions with people they know to be gay or lesbian. As a result, it is not surprising that the research task of sorting out direction of causation among these multiple factors is daunting, and that the results have been largely inconclusive on the precise question that interests us here. To think that the law is the predominant factor in attitudinal change seems to attribute to law more importance in attitude formation than the research conclusions justify, but to attribute to law no or only a small effect seems equally unjustified.⁶⁶ At the moment we just do not know the answer, but that does not make the question any less important.

Much the same can be said about some number of other topics that combine high public and legal salience. American constitutionalists, in particular, are fond of attributing to the Supreme Court's decision in *Brown v. Board of Education*⁶⁷ in 1954 a substantial causal effect

⁶⁶ See Michael Klarman, *From the Closet to the Altar: Courts, Backlash, and the Struggle for Same-Sex Marriage* (New York: Oxford University Press, 2012); Marieka M. Klawitter & Victor Flatt, "The Effects of State and Local Antidiscrimination Policies on Earnings By Gays and Lesbians," *Journal of Policy Analysis and Management*, vol. 17 (1998), pp. 658-686.

⁶⁷ 347 U.S. 483 (1954).

on changing racial attitudes, but the lawyer/political scientist Gerald Rosenberg has offered evidence that the *Brown* decision's effect on people's beliefs may be less than that of changes in popular culture, mass media reports of important public events, and various official acts and pronouncements less obviously associated with the legal system as such.⁶⁸ Yet there is some evidence that Supreme Court decisions may have produced attitudinal change with respect to prayer in the public schools.⁶⁹ And we might hypothesize the same about laws relating to the environment. Many more people now believe that environmental preservation is of fundamental moral importance than believed the same thing fifty years ago, and there are far more laws protecting the environment than there were fifty years ago, but sorting out the causal pathways is extraordinarily difficult, and perhaps intractable.

For our purposes, the issue is even more complex. Even if law is itself a contributor at one remove to what seem to be law-independent moral and policy judgments, we do not know how much of law's effect on moral and policy attitudes is a function of law's sanction-independent content and how much is a function of the emphasis supplied by the sanction. Could law have the opinion-forming or opinion-influencing it has, however much that may be, without the way in which the sanction arguably underlines the importance of the legal norm itself? We simply do not know, and it is not clear how we could find out given that the causal terrain is so complex. But although it would be a mistake, as much of this chapter has argued, to equate behavioral consistency with compliance, it is also a mistake to assume that the factors that produce seemingly law-independent behavioral motivation are entirely divorced from the

⁶⁸ Gerald N. Rosenberg, *The Hollow Hope: The Courts and Social Change* (Chicago: University of Chicago Press, 1991).

⁶⁹ William K. Muir, Jr., *Law and Attitude Change: Prayer in the Public Schools* (Chicago: University of Chicago Press, 1973).

symbolic and persuasive power of the law. Lawyers and legal academics are, not surprisingly, prone to exaggeration of this power, but it seems difficult to claim that it is entirely inconsequential.

5.5 *The Cultural Contingency of Obedience to Law*

Europeans -- especially Germans, Austrians, Swiss, Finns, and Scandinavians -- who travel to the United States are often surprised at the extent to which American drivers and pedestrians ignore various signs telling them how to drive and where and how to cross the street. And Americans who travel in Germany, Austria, Switzerland, Finland, Norway, Sweden, and Denmark are often equally surprised to see a Finn, for example, standing obediently on the sidewalk when facing a “Don’t Walk” sign when there is nowhere a car or a police officer to be seen.

There is no reason to believe that the Finns are right and the Americans wrong, or vice versa. But the cultural variability on such a trivial matter illustrates the way in which the empirical question of obedience to law is itself culturally variable in a larger way. We know, for example, that subsequent replications of the Milgram experiments show people from Russia and Japan to be more deferential to authority figures in a hierarchical structure than Americans.⁷⁰ We know that dog license compliance is far higher in Calgary, Alberta, than in New York.⁷¹ And we know that rates of tax and traffic law compliance vary widely across countries, although again the large number of cross-cultural legal and non-legal variables makes it difficult to draw

⁷⁰ V. Lee Hamilton & Joseph Sanders, “Crimes of Obedience and Conformity in the Workplace: Surveys of Americans, Russians, and Japanese,” *Journal of Social Issues*, vol. 51 (1995), pp. 67-88.

⁷¹ See Hearing, *op. cit.* note 45.

strong conclusions from this fact. Still, the fact that United Nations diplomats from some countries are vastly more likely than those from others to park illegally in New York confirms the folly of attempting to assume that obedience to law is similar across different times and different cultures.⁷²

If the puzzled person is merely a useful analytic construct, then none of this makes a difference. If we are interested in how law *could* make a difference, then the fact that it makes more of a difference *qua* law in some countries than in others is almost entirely beside the point. But if the puzzled person is not just an analytic construct but the empirical underpinnings of the claim that we have good practical reasons to take non-coercive law seriously, then the actual presence of such persons, and to what degree, becomes important. And what we can conclude from the existence of cultural variation is that there are plainly more puzzled people in some countries than others, and that the prevalence of Tyler's sanction-independent compliers, although likely much less than he supposes, will nevertheless vary with time and place as well as with a host of more fine-grained cultural variables.

This variation may doom the very process of trying to find very much about law itself that is not culture-specific. If we cut off all avenues of inquiry that vary in interesting ways across legal systems, we may find that the legal systems of the United States, Germany, Zimbabwe, North Korea, and Saudi Arabia do not share very much in common. And reaching this conclusion might not be a bad thing. There is no reason that law must have a cross-cultural essence, and "law" may merely be the label attached to a diverse collection of socio-

⁷² See Raymond Fisman & Edward Miguel, "Corruption, Norms, and Legal Enforcement: Evidence from Diplomatic Parking Tickets," *Journal of Political Economy*, vol. 115 (2007), pp. 1020-1048.

governmental phenomena neither joined by shared properties nor interestingly connected across different systems. But law's coercive force, even if not necessary for law's existence, may be more persistent across cultures than law's coercion-independent normative power. And if this is so, then we may learn as much if not more about law wherever and whenever it actually exists by focusing on coercion than by looking exclusively at a phenomenon that not only varies widely across cultures, but may well be relatively empirically unimportant even when and where it is most prevalent.