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THE FORCE OF LAW: THE ROLE OF COERCION IN LEGAL NORMS

*Ekow N. Yankah **

I. INTRODUCTION

The critical relationship between coercion and the law seems to attract little sustained attention. The reason must be that, on the whole, coercion appears to provide a shallow account of the nature of the law. It is unsatisfying to define law as the mere ability to enforce an edict. Classical models of jurisprudence, most notably those of John Austin and Jeremy Bentham, advanced this crude picture of the law.¹ For Austin and Bentham, laws were essentially commands from a sovereign backed with threats of force.² This reductive picture ignored important, independent features, such as the normative and authoritative nature of how we experience the law. The picture conflated one form of power with the richer social phenomenon that is the law.³ Moreover, some

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1. JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE 13–14 (1954); Jeremy Bentham, *Of Laws in General*, in 2 THE COLLECTED WORKS OF JEREMY BENTHAM 1–2 (H.L.A. Hart ed., 1970).

2. See AUSTIN, *supra* note 1, at 13–14; Bentham, *supra* note 1, at 54.

3. See Grant Lamond, *Coercion and the Nature of Law*, 7 *LEGAL THEORY* 35, 36–37, 54–55 (2001).

argue focusing on the coerciveness of the law overemphasizes its restrictive nature and obscures the constructive role the law plays in our lives.⁴ Thus, modern theorists, led by H.L.A. Hart, realized that coercion alone cannot distinguish law from threats and discarded the classical model.⁵

Most would find the claim that the law is coercive uncontroversial. Closer philosophical inspection, however, has caused some to divorce the concepts of coercion and law in favor of a richer view of the law. First, Hart and other modern theorists noted that the law is a normative system.⁶ It seeks to guide human activity by establishing a framework of norms for how one *ought* to behave.⁷ The law does not simply view punishment as a tax; one cannot purchase the right to murder by agreeing to spend thirty years in prison. By prohibiting murder, the law establishes that one ought not murder. Violations of this norm, as Hart famously pointed out, are viewed as reasons not only for punishment, but also for blame, criticism and moral censure. Because the law is normative, legal norms are not reducible to amoral commands.

Second, the law is a system of norms that claims practical authority.⁸ The law claims to promulgate reasons that determine how one must act, to the exclusion of all other reasons. This claim means that legal prohibitions should not be weighed against all other reasons, such as personal interest or the simple desire to obey the law. The law does not permit the kind of deliberation otherwise common in life: "Well, on the one hand, it is illegal, but on the other. . . ." Instead, the law implicitly presumes that all reasons have been examined and an authoritative legal decision has been made. This position is roughly termed "the legal point of view."⁹ Simply put, the law takes the position that when it tells a person what to do, he had better darn well do it. Practically, the conversation is over. Even where the law permits acts that are normally violations, the exceptions themselves are regulated by

4. See Hans Oberdiek, *The Role of Sanctions and Coercion in Understanding Law and Legal Systems*, 21 AM. J. JURIS. 71, 73–74 (1976).

5. See H.L.A. HART, THE CONCEPT OF LAW 82–84 (1961).

6. See *id.*

7. See HANS KELSEN, PURE THEORY OF LAW 4 (Max Knight trans., 1967); see also J. Raz, *On the Functions of Law*, in OXFORD ESSAYS IN JURISPRUDENCE, 278, 280–81 (A.W.B. Simpson ed., 2d ser. 1973).

8. JOSEPH RAZ, *The Claims of Law*, in THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 28, 29–31 (1979).

9. See JOSEPH RAZ, PRACTICAL REASON AND NORMS 139 (1975).

the law.¹⁰ Moreover, the law claims the ability to decree authoritative reasons over an unlimited domain of reasons; that is, the law is “globally authoritative.”

These features, normativity and authority, are notably absent from the classical model proposed by Austin and Bentham. In discarding the classical model, however, legal philosophers too often treat coercion as peripheral to the law, thereby ignoring a critical part of the story.

The law, after all, is not simply another normative system. Like law, religion, morality and household rules (and many other normative systems) all purport to bind us. Some of these normative systems aspire to exert exclusive force over our practical morality. All systems within this subset, including the law, claim to be supreme normative systems. In contrast to other systems of norms, however, the law’s claim of authority is enforced and used to justify sanctions. If coercion by itself does not explain the law, there remains the nagging suspicion that dismissing coercion too quickly leaves something important amiss.

This article will show that coercion is not merely important in light of human nature¹¹ and will make the stronger claim that coercive sanctions are a necessary and perhaps the most important feature for explaining legal norms. The emphasis will be on the *legal* aspect of legal norms. The ability to use coercion under special conditions defines legal norms. Legal philosophy is, to borrow a phrase, philosophy with bayonets.

That coercion is needed in human societies as a pragmatic matter does not answer the question of what is conceptually neces-

10. For example, the law allows some people, often called conscientious objectors, to opt out of certain forms of compliance for personal, moral reasons. See JOSEPH RAZ, *A Right to Dissent? I. Civil Disobedience*, in THE AUTHORITY OF LAW, *supra* note 8, at 262, 262–63; JOSEPH RAZ, *A Right to Dissent? II. Conscientious Objection*, *supra* note 8, at 276, 285–87.

11. Even legal scholars who have seemingly placed coercion within the concept of law have left it in this contingent role. For example, Hart deems sanctions and coercion necessary as a guarantee against disobedience. The further fact that Hart excludes from this requirement close knit communal societies seems to leave coercion short of a conceptual necessity. HART, *supra* note 5, at 193. Raz, notwithstanding language that appears to elevate coercion to a conceptual necessity, both restricts his definition of coercion to a much smaller realm than mine and, similar to Hart, regards coercion as an important part of others’ motivation to obey the law. JOSEPH RAZ, THE CONCEPT OF A LEGAL SYSTEM: AN INTRODUCTION TO THE THEORY OF LEGAL SYSTEM 186 (2d ed. 1980). As will be explored, Raz’s view has evolved over the years.

sary in law. One may wonder why the fact that coercion is pragmatically necessary is insufficient if the most basic portrait of human beings includes the need for coercion in the law, there appears no reason why one cannot be satisfied with the necessary connection between the law and coercion in human societies and quit any further pursuit. Is it not sufficient to note that coercion is necessary in all nomologically possible worlds?

One initial impulse is to shrug and admit that our philosophical curiosity often far exceeds sensible thinking. Still, the claim of necessity is at the very heart of the concept of law. Our concept of law would be incomplete, and perhaps undefined, without understanding that coercion constitutes at least part of it.

To tease out this claim, the concept of coercion must be defined. Particularly, one must not confuse the coerciveness of law with the fact that the law is backed by sanctions. Though sanctions are obviously important to legal coercion, they alone do not establish the law as coercive, nor is the law unique in being backed by sanctions. Rather, the ideas of sanctions and coercion are separable. Coercion must be understood as an independent concept and, ultimately, may always be subject to a sort of moral weighing. Moreover, the law is experienced as coercive in two layers: its ability to level coercive sanctions and its ability to coercively enforce its sanctions.¹² Thus, the resulting claim is a demanding one: Legal norms must be ultimately enforceable by coercion to be included in the core concept of the law.

This article will also make the positive argument that coercion is best seen as an inherent part of the law; coercion individuates the law as a normative system. While the classic models of Austin and Bentham ignored the law's normativity and authority, it is important to rescue their insight that the law is inherently coercive. Quite simply, the law must include three features: establishing a system of norms, laying claim to global authority, and possessing coercive power. The claim is not that coercion is necessary because of human nature or wickedness but that coercion is conceptually necessary to delineate the law.

Though a modest picture of law, this model sheds light on the current legal landscape. When one understands that the ability to

12. To be clear, the law may both impose coercive sanctions and may coercively enforce trivial, non-coercive sanctions.

coercively enforce authoritative norms is critical to legal norms, the status of some portion of international law is thrown into doubt. For example, where no provisions exist that enforce international regulations, this model recasts those regulations as aspirational norms instead of proper laws. In order to explore these ideas in a less abstract setting, this article will examine how an international court addressed this conception of the law when it attempted to determine identity of a legal regime.¹³

Finally, defining coercion as a necessary feature of law reminds us of the law's dangerous power and its need for constant justification. This article will purposefully avoid asserting the conditions that would morally justify the law's coerciveness in full. Instead, it will focus on establishing and stressing the inherently coercive nature of law. Coercion, far from being an artifact of human frailty, is inseparable from our concept of law. So long as the law exists, its coerciveness lays a moral burden on all. The positivist account of the law has long encouraged citizens to view it as separate from morality, thus subjecting the law to critical moral judgment.¹⁴ Viewing the law as coercive puts the charge in a different way: if the law is inherently coercive then, considering that coercion *prima facie* requires justification, the law requires vigilant challenging and never-ending inspection and justification.

Because the law plays a distinctive and hugely important role in the ordering of human affairs, highlighting its inherent coercive element imposes an important moral burden. Asserting that the law is coercive isolates a particular way it treats people; namely, the law imposes a non-voluntary normative system on people. This non-voluntary aspect places certain political and moral restraints on the law and requires the legal system to conform to certain justificatory reasons. The law's coerciveness does not simply require justification; it limits and shapes the type of moral justification.¹⁵

While this article will not explore the particular boundaries a legal system must observe to be justified, establishing that the law is inherently coercive is an important first step in understanding why the law is so properly restrained. That this explica-

13. Interesting analogies can be drawn to help understand cases in which systems of aboriginal law, too often slighted, should be understood as fully functioning legal systems.

14. See HART, *supra* note 5, at 207.

15. See H.L.A. Hart, *Are There Any Natural Rights?*, in THEORIES OF RIGHTS 77, 88–89 (Jeremy Waldron ed., 1984).

tion highlights an essential moral feature of the law—the necessity of morally justifying the law and why that justification may be restricted in certain ways—further counts in its favor. The attempt here is not to bootstrap the truth of the argument by underscoring an attractive consequence. If the argument is persuasive, however, the fact that it also points out critically important implications surely renders it more attractive.

Those familiar with jurisprudence will immediately note that this article builds on an explicitly positivist model of law. Given that every inch of the field seems afflicted with trench warfare, it is probably useless to offer that this article builds on such thin propositions that nearly all will, at the least, have access to the arguments. The bulk of the following claims do not intend to take a deep position on an issue that has worried legal philosophers for a few generations—the status of morality or principles in legal norms. Thus, this article does not defend the choice of a positivist framework in any strong way.

While this article claims that normativity, authority, and coercion are necessary aspects of the law, it explicitly takes no stand as to whether they are sufficient. Further, this article does not undertake the formidable task of defending the methods employed. It will not defend at great length the basic idea that descriptive jurisprudence or conceptual analysis is possible. Ultimately, the positions adopted here do have interesting implications for these questions. At the risk of contributing further to an already thick discourse, I will outline some of the implications my view has for the questions that have been at the heart modern jurisprudence. It is my hope that understanding the law as necessarily coercive will shed new and interesting light on this debate.

Part II begins with a brief description of the reductive, classical model, which defined a law simply as a command from a sovereign that was coercively enforced. Part III notes the additions offered by Hart, illustrating that the law is normative. Part IV addresses the further point that as a normative system, the law claims global authority; it claims authority to dispositively displace one's other reasons for action. Having noted that the law need be normative and authoritative, Part V elucidates this model of coercion explicitly based on Aristotle's conception of coercion. It also addresses the most widely held and powerful objections to the concept that the law is inherently coercive. Part VI constructs the positive case for viewing the law as coercive, dem-

onstrating that normativity and authority are insufficient to delineate legal norms. Part VII briefly notes the implications this more robust theory has for our real world conceptions of the law, examining how the model leads us to reconceptualize fields such as international law. Part VIII shows how understanding that the law is coercive sheds much needed new light on a generation of heavily contested jurisprudence between positivist, interpretivist and natural lawyers. It also has powerful implications for modern political theory, particularly, the manner in which the law can be justified.

II. THE LAW AS COERCION: THE CLASSICAL MODEL

The simplest jurisprudential model exploring the relationship between coercion and the law largely equates the two. This model, proposed by Austin and Bentham, sought to delineate the law from other systems.¹⁶ Austin describes the law first as a group of stable imperatives or commands. Commands, in turn, are the expression of a wish containing the threat of an accompanying evil or sanction for its violation.¹⁷ Only because one is liable to be sanctioned for violating a command does he have a duty to obey that command.¹⁸ Accordingly, the greater the sanction, the greater the strength of the duty.¹⁹ In this model, the notions of command, sanction and duty are inseparable.²⁰ It is important to note that a sanction does not merely ensure the effectiveness of the command; rather, it is the sanction itself that imposes a duty:

The greater the eventual evil, and the greater the chance of incurring it, the greater is the efficacy of the command, and the greater is the strength of the obligation: Or (substituting expressions exactly equivalent), the greater is the *chance* that the command will be obeyed, and that the duty will not be broken. But where there is the smallest chance of incurring the smallest evil, the expression of a wish amounts to a command, and, therefore, imposes a duty. The sanction, if you will, is feeble or insufficient; but still there *is* a sanction, and, therefore, a duty and a command.²¹

16. See AUSTIN, *supra* note 1, at 13–14; Bentham, *supra* note 1, at 54.

17. AUSTIN, *supra* note 1, at 13–15.

18. *Id.* at 13–14.

19. *Id.* at 16.

20. *Id.* at 17–18.

21. *Id.* at 16.

Austin views the law as little more than a set of stable commands, backed by the threat of sanctions addressed to a general class.²² It follows from Austin's conceptualization that commands without attached sanctions are not properly called laws.²³ Austin describes such commands as "imperfect laws."²⁴ Without the threat of sanctions, such dictates cannot be properly characterized as commands and cannot give rise to any duty or obligation.²⁵

By defining laws as commands attached with the threat of sanctions, Austin's model excludes other normative systems that are often conflated with, or compete for recognition as, legal norms. Specifically, Austin distinguishes between laws of custom and laws that are properly considered legal.²⁶ While Austin recognizes that a breach of customary norms may result in social sanctions, to the extent that those sanctions are not ultimately enforceable by state power, they are not properly considered laws:

At its origin, a custom is a rule of conduct which the governed observe spontaneously, or not in pursuance of a law set by a political superior. The custom is transmuted into positive law, when it is adopted as such by the courts of justice, and when the judicial decisions fashioned upon it are enforced by the power of the state. But before it is adopted by the courts, and clothed with the legal sanction, it is merely a rule of positive morality: a rule generally observed by the citizens or subjects; but deriving the only force, which it can be said to possess, from the general disapprobation falling on those who transgress it.²⁷

22. *Id.* at 19, 24.

23. *See id.* at 27–28.

24. *Id.*

25. *Id.* Austin notes that there are potential uses of the term "imperfect law" that equate perfect laws to non-legal norms and, thus, give rise to non-legal duties, be they religious or moral:

The imperfect laws, of which I am now speaking, are laws which are imperfect, in the sense of the *Roman jurists*: that is to say, laws which speak the desires of political superiors, but which their authors (by oversight or design) have not provided with sanctions. Many of the writers on *moralis*, and on the so called *law of nature*, have annexed a different meaning to the term *imperfect*. Speaking of imperfect obligations, they commonly mean duties which are *not legal*: duties imposed by commands of God, or duties imposed by positive morality, as contradistinguished to duties imposed by positive law. An imperfect obligation, in the sense of the *Roman jurists*, is exactly equivalent to no obligation at all.

Id. at 28.

26. *See id.* at 135.

27. *Id.* at 31; *see also id.* at 122–25. Austin does not make the distinction between a

Thus, while social sanctions may be powerful enough to assure one's obedience and regulate a group's behavior, they still only render social norms analogous to law.²⁸

Similarly, Bentham proposes that one cannot conceive of a legal mandate unless it coercively binds its subjects: "[A] law by which nobody is coerced . . . [is a] contradiction [] in terms."²⁹ Specifically, Bentham notes that regardless of whether the burden a law imposes is trivial or onerous, that burden is coercively imposed.³⁰

According to Bentham, only insofar as the law is coercive can it affect citizens' practical reasoning and thus produce any benefit; coercion makes law "efficient."³¹ But like Austin, Bentham conceives of the law's coerciveness as more than a practically contingent function needed to guarantee the law's effectiveness. Rather, Bentham conceives of the efficacy that coercion imposes in a deeper sense; it is the very duty-imposing feature of the law.³² The efficacy turns a command into a law, which, in turn imposes duties and confers legal rights.³³ Thus, that coercion binds legal subjects is as critical to constructing a legal mandate as the purpose of the law's creation. Both are necessary to the very conceptualization of a legal norm:

On the circumstance of there being a party whom it binds, a law depends for its essence: on the circumstance of there being a party whom it is designed at least to favour, it depends for its cause: on both together it depends for the sum total of its efficacy: without the last it never exists; without the first it could not so much as be conceived.³⁴

legal and a social sanction dependent on the severity of the legal sanction or the force and effect of the social sanction on the person. Rather, the distinction depends on the source of the sanction. Whatever sanction is leveled at a person as a result of violating a social or customary norm, it does not result from the command of a political superior. *See id.* at 133–35. Austin's distinction, however, does not fully capture the necessary claim of authority by the law. While a political superior by its nature claims authority, that claim is not limited to a political superior. Religious and moral norms often claim an authoritative position in one's practical reasoning.

28. *See id.* at 154–55.

29. Bentham, *supra* note 1, at 54.

30. *Id.* at 54–55.

31. *Id.* at 57.

32. *Id.* at 58.

33. *Id.*

34. *Id.* at 63.

Thus, the classical model, as constructed by Austin and Bentham quite straightforwardly ties coercion to legal norms. Legal norms are more or less commands backed with the threat of coercive force.

It is easy to see why modern theorists reject the classical, reductive account of coercion in legal norms. The mere ability to coerce another cannot be suitably described as law. An older brother, a bully on the playground and a back-alley mugger may all be quite capable of forcing others to obey their will. They may also issue commands backed by attached sanctions. Yet none of these instances should be given the name of law. Moreover, attaching coercion to a particular actor, the sovereign, does little to resolve the issue.

This intuition is correct. Simply being able to compel actions through coercive pressure cannot amount to law. Coercion is only one form of exercising power over another. The classical model, absent further conditions, merely illustrates the exercise of social power over others, which is not properly described as law. Power, in this respect, is a broader concept than coercion.³⁵

35. Bertrand Russell defined power as “the production of intended effects.” BERTRAND RUSSELL, POWER: A NEW SOCIAL ANALYSIS 23 (2004). This definition, while focused, is overly narrow. Though we are most often concerned with the use of power in human or social contexts, there are natural and other non-human forms of power. To say, “The storm was powerful” does not seem like a metaphorical way of speaking, though it would be difficult to imagine, without positing that a god controls the weather, that the storm has any intended effect. This language suggests that power is connected with the ability to force change even amidst resistance.

The overly broad sweep of formulation, of course, presents problems. The central case of power is social power, exerted to make others conform to an individual or institutional will. Yet, the armed lunatic or the suicide bomber may cause a great deal of change, despite resistance, but represent problematic cases of power. More precisely then, power is the ability to compel change. The suicide bomber does not seek to exert control over others, but wishes to singularly force a change in the environment. Notice that the bomber, as opposed to the armed robber, does not compel others; there is no wish to have anyone comply with his will. This represents a borderline case of exhibiting power and is perhaps best recognized as such.

Defining power as the ability to compel change avoids a definition which turns on the dependence of one person (or group), the dependent, on the behavior of another person, the controlling unit. Robert Dahl, *Power as the Control of Behavior*, in POWER 40 (Steven Lukes ed., 1986). Dahl's definition provides no specific guidance on how to distinguish between the controlling unit and the dependent (the controlled unit). A boss wishing to channel her workers must react to their development. Thus, her behavior depends in real part on their actions. Yet the power relationship of interest may be precisely the opposite one. Nor should the conception of power be tied too closely with the bare concept of overcoming resistance. Many forms of power depend not on overcoming resistance but on removing it. Russell recognizes the case of coercively overcoming resistance as a particular

Power is a broad concept, and the law may exercise its power in many ways. Coercion represents but one manner of manipulating the will of others and, thus, is but one form of social power.³⁶ One may exercise power over people due to physical strength, enormous wealth, social position or personal charisma.³⁷ Indeed, the law, unlike the purely reductive picture presented, often exerts its power by being normatively internalized by its subjects.

There are at least three important ways in which raw power and the type of normative sanction that is the crux of the law diverge. First, having brute power over someone does not equate to possessing normative power over that person.³⁸ Being able to compel someone, by brute strength alone, to stay inside does not mean the bully claims that the victim ought to stay inside or that the victim thinks he ought to stay inside (except prudentially to avoid being pummeled).³⁹

Second, power need not claim authority over its subject. The robber does not need to believe he has a justified right to command his victim. Certainly, he does not believe the individual whom he is robbing has a duty to obey him to the exclusion of other reasons. This is why the robber carries a gun.

form of power only, “naked power.” See RUSSELL, *supra*, at 26. Cases remain where one persuades, “educates,” or trains others to respond to their will. Because power is the ability to compel one to serve another’s will, and human beings are intentional creatures, power, in a social sense, is easily aligned with Russell’s “production of intended consequences.” *Id.* at 40, 46–48; see also MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 152–53 (Talcott Parsons ed., 1957); Lamond, *supra* note 3, at 55.

36. See Lamond, *supra* note 3, at 50–51. Talcott Parsons presents a contrasting view, explicitly denying that coercion itself represents a form of power. This view is based on Parsons’ rather thick definition of power. Parsons’ interest in political power leads him to exclusively focus on normative and legitimized coercion as the paradigmatic form of power. In this respect, Parsons recalls Weber’s focus on “legitimate” power. The definition Parsons forwards—power relies on legitimized authority, which is ultimately reinforced by coercion—though explicitly a political definition, is complementary to this article’s definition of legal power. Talcott Parsons, *Power and the Social System*, in POWER, *supra* note 35, at 103–04, 125.

37. See R.B. Friedman, *On the Concept of Authority in Political Philosophy*, in AUTHORITY 56, 70–71 (Joseph Raz ed., 1990); see also ALAN WERTHEIMER, COERCION 292–93 (1987) (discussing persuasion and manipulation as various forms of power).

38. R.P. Wolff, *The Conflict Between Authority and Autonomy*, in AUTHORITY, *supra* note 37, at 20–21; see Joseph Raz, *Authority and Justification*, 14 PHIL. & PUB. AFF. 3, 4 (1985).

39. JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT AND DISCOURSES 168 (J.H. Brumfitt and John C. Hall eds., G.D.H. Cole trans., J.M. Dent & Sons, Ltd. 1973) (1762). Rousseau stated, “Force is a physical power, and I fail to see what moral effect it can have. To yield to force is an act of necessity, not of will—at the most, an act of prudence. In what sense can it be a duty?” *Id.*

Third, coercion alone need not be part of an act-guiding or normative enterprise and, thus, need not be a sanction. The robber does not mug you because you did something; he simply mugs you. This is a logical extension of the earlier observation that brute strength is not normative. To be sure, raw power may be used as a sanction; the bully may beat you up because you did not follow his long-standing dictate to hand over your daily lunch money. But, of course, the bully may just beat you up.

Thus, the objection to the reductive picture of the relationship between coercion and the law holds true. The mere ability to force others to do as one wishes cannot be enough to make something the law. That ability does not pretend to lay down systematic or stable norms, to enforce those norms or to claim authority. Where any particular instance of brute force claims all three, its very nature changes.

Still, in exposing the flaws of the classical model, legal theorists have often been led to believe that coercion is only contingently linked to the law—a human necessity that does not define the intrinsic nature of the law. While it is necessary to supplement Austin and Bentham's views, it is a mistake to conceive coercion as merely contingently linked to the law. Rather, we must explore first the missing features needed to fully describe legal norms. Only after examining the other features of legal norms can we examine the role coercion plays in fully describing legal norms. The classical model Austin and Bentham drew can be completed without losing sight of the importance of coercion as intrinsic to the law.

To complete the classical model, it is critical to realize that the law is a normative system and that it claims practical authority. Both subjects are themselves deep topics on which volumes have been written.⁴⁰ Briefly discussing them may generate more questions than answers. Still, even a cursory discussion will supply the distinctions needed to individuate a viable concept of law and provide the platform from which we can explore our main focus, coercion's unique role.

40. See, e.g., HANS KELSEN, GENERAL THEORY OF LAW AND STATE 175–77 (Anders Wedberg trans., Russell & Russell 1961) (1945); JOSEPH RAZ, *Authority, Law, and Morality*, in ETHICS IN THE PUBLIC DOMAIN: ESSENCE IN THE MORALITY OF LAW AND POLITICS 194, 195–96 (1994).

III. THE LAW AS A NORMATIVE SYSTEM

The law is plainly a normative system. Like all normative systems, it seeks to guide human activity by establishing how one "ought" to act. Obviously, not all laws are first-order norms.⁴¹ Many laws, for example, a time limit on appealing one's income tax, modify other legal norms or create permissive norms by which one may undertake legal duties.⁴² But, taken as a whole, the law cannot be understood without recognizing that it is a system of norms.

When a law, or any other norm for that matter, comes into being, it purports to guide human behavior.⁴³ It establishes what one "ought" to do by some system or body of norms. This "ought" is meant to describe what one should do objectively, quite apart from the subjective will of the issuer, the addressee or a third party.⁴⁴

Norms may exist in many different systems. There are moral, religious and custom-based norms. For example, in most every home there exists a set of norms that attempt to direct the behavior of its members.⁴⁵ Some norms, like the law, may come into existence instantaneously.⁴⁶ In other cases, a norm may emerge slowly, such as with custom or may be a matter of from philoso-

41. See Joseph Raz, *Legal Principles and the Limits of Law*, 81 YALE L. J. 823, 835 (1972).

42. Thus, a posited legal norm does not always create a complete norm. See *id.*; HART, *supra* note 5, at 27.

43. See KELSEN, *supra* note 7, at 4–5; see also RAZ, *supra* note 9, at 124–25; JOSEPH RAZ, *The Rule of Law and its Virtue*, in THE AUTHORITY OF LAW, *supra* note 8, at 210, 213–14.

44. KELSEN, *supra* note 7, at 7–9. The creation of a norm establishes a directive as to how one "ought" to behave. This "ought" exists within the legal, moral, religious, or other relevant normative system. As Kelsen describes, the "ought" exists objectively, that is, the norm creates an objective "ought." This "ought" exists apart from the subjective will of the issued directive. Independent from a command or wish, a norm is a valid directive according to the normative system in which it is placed:

It is, however, necessary to distinguish the subjective and the objective meaning of the act. "Ought" is the subjective meaning of every act of will directed at the behavior of another. But not every such act has also objectively this meaning; and only if the act of will has also the objective meaning of an "ought," is this "ought" called a "norm."

Id. at 7.

45. See RAZ, *supra* note 9, at 107.

46. See KELSEN, *supra* note 7, at 8. A legal norm may depend on or reference other legal norms to complete it or other supervening norms to legitimate it. See RAZ, *supra* note 11, at 70–71.

phical or theological dispute, as is the case with moral and religious norms.⁴⁷

Hart recognized the objective (normative) nature of the “ought” in a legal system in delineating between being obliged and having an obligation.⁴⁸ In Hart’s terms, being obliged is being forced to do something.⁴⁹ An obligation, however, exists independently regardless of whether the person escapes detection, incurs sanctions, or feels or believes he has an obligation.⁵⁰ This definition of obligation gives rise to Hart’s famous internal point of view. In fact, this is one of the central ways in which we express obligations. Arguing that one has an obligation under a valid and valuable normative system is often important to correct someone’s lack of conviction or belief in their duty.⁵¹

The normative picture of the law helps us distinguish the role of norms from the mere presence of commands backed by force. As Hans Kelsen describes, a valid norm creates an objective “ought.”⁵² The will of another, the gunman, for example, merely creates a subjective “ought” or “will.”⁵³ Ronald Dworkin describes this distinction:

47. See KELSEN, *supra* note 7, at 9.

48. HART, *supra* note 5, at 80.

49. *Id.* at 6; see also KELSEN, *supra* note 7, at 114–19. Perhaps the confusing distinction would have been clear if Hart substituted “compelled” for “obliged.”

50. HART, *supra* note 5, at 85–86.

51. See *id.* at 85; Wolff, *supra* note 38, at 21.

52. See KELSEN, *supra* note 7, at 118–19.

53. See generally D.N. MacCormick, *Legal Obligation and the Imperative Fallacy*, in OXFORD ESSAYS IN JURISPRUDENCE, *supra* note 7, at 100, 109–12. The important distinction here is between a subjective posited will and an objective norm; one must not conflate the two. As MacCormick notes, acts of will do not always posit an “ought.” As was true in Kelsen’s example of the robber, MacCormick argues that this also applies to most issued commands. A command is simply the issuance of a desired action by someone in a position of superiority, which is intended to communicate his wish. Merely issuing a command (positing an act of will), however, does not necessarily mean positing an “ought.” Nor does telling someone what he “ought” to do presuppose the issuance of a command:

It is perfectly clear that no command is normally involved when one person tells another what he ought to do; for example, when a solicitor advises his client that he ought not to defraud the Inland Revenue. . . . Conversely, it would be highly unusual, though not quite impossible, to give a command by using the auxiliary “ought.”

Id. at 109. From this, MacCormick points out that, in much the same way “ought” cannot be derived from “is,” it cannot be derived from “shall.” *Id.* at 100.

MacCormick’s clarification should not lead us to minimize the role of mixed commands, both within and outside legal settings. Though MacCormick is right that a command is the positing of a “shall,” many commands have normative components. These components appear in one of two ways. First, many commands are straightforwardly

We make an important distinction between law and even the general orders of a gangster. We feel that the law's strictures—and its sanctions—are different in that they are obligatory in a way that the outlaw's commands are not. Austin's analysis has no place for any such distinction, because it defines an obligation as subjection to the threat of force, and so founds the authority of law entirely on the sovereign's ability and will to harm those who disobey. . . .

. . . .

. . . [But a] rule differs from an order, among other ways by being *normative*, by setting a standard of behavior that has a call on its subject beyond the threat that may enforce it. A rule can never be binding just because some person with physical power wants it to be so.⁵⁴

Indeed, the gunman himself does not imagine he is issuing normative commands.⁵⁵ The law, by contrast, lays down norms that guide behavior. These norms exist independently of the accompanying threat of force.⁵⁶ In this way, the law, like all normative systems, posits an "ought" guides one's behavior, and criticizes nonconformity. These norms stand as an objective "ought" in the world and establish obligations and duties apart from force or fear of detection.⁵⁷

based on normative propositions. "Thou shall not murder" is on its face a command, but few would fail to realize that it receives its force from the normative proposition "thou ought not murder." Second, most commands are typically founded on the presumption of moral good in the institution authorized to issue those commands. Hence, when a general orders his troops to attack a hill, he means that he wishes them to take the hill, that they ought to take the hill (because of the moral good connected to the military campaign), and that they ought to obey his order (to serve the values preserved by a well ordered military). It is perfectly common for most commands to be imbued with these normative layers.

MacCormick's point that a command need not necessarily posit an "ought," clarifies Kelsen's model. Commands do not necessarily, but often do, carry a normative element. As noted earlier, when legal systems posit directives, these directives are posited normative statements and are explicitly differentiated from mere commands. See KELSEN, *supra* note 7, at 114–15. Hence when the legal system issues a legal prohibition, the law posits both that one ought not commit the prohibited act and that one is commanded not to commit the prohibited act.

54. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 19–20 (1978); see also Wolff, *supra* note 38, at 20–21.

55. It would be peculiar for the gunman to say, "You ought to hand over your money or I will shoot you." It would be even more bizarre if he said, "If you do not hand over your money I ought to shoot you." Simply put, the gunman does not (and does not attempt to) guide your actions by addressing you with norms. His commands are meant to simply compel your immediate obedience. The force of his directive ends as soon as the threat of his force abates. The special case of the gunman who issues imperatives embedded in a normative framework of his own will be explored later.

56. DWORKIN, *supra* note 54, at 19–20.

57. This article leaves many important issues surrounding norms untouched. When

IV. THE LAW AS AUTHORITATIVE

The law is not merely normative, but is a particular type of normative system in that it claims authority. The law does not contain a system of normative rules with the caveat, “Do whatever you like.”

What does it mean to define something as an authority? Authority is the notion that certain reasons—authoritative reasons—preclude independent deliberation of their underlying propositions. One has authority over another when his dictates prevent the other from weighing other reasons to act.⁵⁸ As the old line goes, “Because I said so . . .” Thomas Hobbes touches on this type of authority in his discussion of commands.⁵⁹ He defines an authoritative command as “where a man saith, *Doe this, or Doe not this*, without expecting other reason than the Will of him that sayes it.”⁶⁰

Joseph Raz offers the most sophisticated elucidation of practical authority.⁶¹ According to Raz, a practical authority is one that can preclude or constrain consideration of certain other reasons

one describes a norm possessing an “ought,” is this “ought” real? Does it actually obligate or is it merely believed to be obligating by actors within a particular normative system? Are norms action-guiding, or can there be right-making norms, norms about what one’s goals “ought” to be? These issues involve deep jurisprudential debates and deserve their own full treatment. The thin foundation just discussed above, however, is sufficient to support the work ahead.

58. RAZ, *supra* note 40, at 212–15; Raz, *supra* note 38, at 7–8, 10. In this sense, authority can be both practical and theoretical. Theoretical authority provides reasons for belief rather than reasons for action. Someone possessing theoretical authority has sufficient knowledge in a field, such that his pronouncements give reason to believe the content of the pronouncement, without further deliberation.

For example, if Gary Kasparov is an authority on chess, when he says something about a chess move, no one longer needs to independently investigate the truth of that statement; the statement precludes *his or her* independent consideration. Note that Kasparov’s theoretical authority over reasons for belief will then influence reasons for action. Kasparov does not merely possess theoretical authority, but, to the extent one wants to win the game, his theoretical authority provides reasons for making the suggested move.

Of course Kasparov is not necessarily an authority for all people, most notably his colleagues, who are world-class chess players. Thus, a person could be a theoretical authority, but be unrecognized in their time.

Practical authority is, by the same token, authoritative as to practical matters regarding what one should do.

59. THOMAS HOBBS, LEVIATHAN 127 (Richard E. Flatham & David Johnston eds., 1997).

60. *Id.* (emphasis in the original).

61. See, e.g., RAZ, *supra* note 40, at 212–25; JOSEPH RAZ, *Legitimate Authority*, in THE AUTHORITY OF LAW, *supra* note 8, at 21–25.

one has for acting.⁶² The authority does not merely add to or provide sufficient reasons to act in a particular way but alters the domain of reasons for which one may act at all.⁶³ Further, one recognizes authority only if one's behavior is, in fact, guided by that authority. One must behave in the manner the authority prescribes because the authority decreed it.⁶⁴ To be sure, most people do not accept or understand the law as unquestionably authoritative. Rather, they believe that the law's claim to authority can be outweighed by its moral repugnance, especially in extreme cases. Notwithstanding this belief, the law (or any authority) views itself as promulgating authoritative reasons.

One may object to Raz's conception of authority on several grounds. How can law claim authority? How can a moral agent subordinate his agency to another's authority? What is the function of the law's claim to authority? When is a claim of authority justified?⁶⁵

More central to this article is whether the nature of the law must claim authority over an unlimited dominion. Many foundational legal documents in the world today—the United States Constitution is one example—contain provisions that limit the scope of laws that may be enacted.⁶⁶ In powerful ways, these documents surrender their ability to claim authority over a certain range of reasons, including particular religious practices and

62. See RAZ, *supra* note 61, at 25.

63. *Id.* at 22–24. If an authority decrees that cost will not be considered in lifesaving medical procedures, then that authority, if followed, *excludes* all cost considerations from life saving medical procedures. Other reasons, however, may be considered: the need of others, the age of the patient, or the doctor's golf schedule. Alternatively, when one exercises complete authority over a decision, no other reasons may be weighed.

An authoritative institution that demands that one act based on certain reasons does not truly preclude him from considering other reasons. For instance, if a child takes his mother to be an authority and she confines him to his room, he need not stay in his room if the house catches on fire. Her order was not meant to exclude exceptional reasons like the house catching on fire. In some situations, even excluded reasons may be considered. Such consideration, however, must not influence one's practical consideration—consideration of his actions. If considered at all, deliberation must remain purely academic in nature.

64. See RAZ, *supra* note 40, at 213–15. It is not enough for one to move to New York when ordered if he was planning on doing so in any case or his reasons for moving have nothing to do with the order.

65. These important questions have given rise to much debate that cannot be addressed here. For our purposes we need only the plausible starting claim that law claims authority.

66. E.g., U.S. CONST. art. I, § 8.

First Amendment speech. Only a peculiar notion of law would exclude the entirety of the liberal Western legal systems.⁶⁷

Hart suggests the beginning of our answer. Hart notes that the restriction of the law's authority simply reflects the social practice of placing limits on the domain of reasons the legal system may exclude.⁶⁸ This reflects a social practice of law within a particular legal system, not a conceptual necessity of law wherever one may find it.

Kelsen complements Hart's view by noting that the law regulates its own creation. Thus, while the range of its authority may be limited, these limits are created by the law itself.⁶⁹ Raz, also expanding on this view, proposes that the law remains normatively authoritative by regulating behavior outside its limits. In these situations, the law regulates by permitting the protected behavior.⁷⁰

67. The problem of internally limited law led Hart to be skeptical about Hobbes's views of legal authority. See HART, *supra* note 5, at 68–69. Hart notes that where such restrictions exist, they limit the law-making power of the law-postulating sovereign. Restrictive limitations are not properly conceived as creating duties for officials to avoid creating illegitimate law. Rather, they represent limits on the ability to create certain laws. When the law-making body abrogates these limits, it fails to create a valid law; only conforming enactments represent valid law.

Some very sophisticated conceptualizations of sovereign authority may be constructed to save the view that the law is unlimited in its authority. Under this view, the law's authority is splintered into various legal branches (e.g., legislative, judicial, and executive) that are sovereign when performing their functions yet stand subject to each other in certain respects. Taken as a whole, however, these branches would be a sovereign and authoritative figure. Robert Ladenson, *In Defense of a Hobbesian Conception of Law*, 9 PHIL. & PUB. AFF. 134, 153–56 (1980).

It is doubtful that such complicated notions resolve the tension between the limits of authoritative commands and the idea that the law must claim ultimate authority. Whether it revives certain conceptions of the law (the Hobbesian sovereign), it still does not explain how rights that may not be governed may now exist.

68. HART, *supra* note 5, at 68–69; see also H.L.A. HART, *Commands and Authoritative Legal Reasons*, in ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY 243, 258–59 (1982).

69. HANS KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY 56–57 (Bonnie Litschewski Paulson & Stanley L. Paulson trans., 1992); see also JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 268 (1980); KELSEN, *supra* note 7, at 12–15.

70. See JOSEPH RAZ, *The Institutional Nature of Law*, in THE AUTHORITY OF LAW, *supra* note 8, at 103, 116. Raz carefully notes that the law does not intend to preclude action based on other possible reasons, but only a range intended to be excluded. In fact, the law often allows non-compliance for certain powerful reasons. Crucially, however, even permissible reasons must be recognized by the law itself. See KELSEN, *supra* note 7, at 15–16; RAZ, *supra* note 11, at 215.

The law is distinguished from other normative systems partly by its claim to authority.⁷¹ Different normative systems claim various levels of authority. Some claim no authority at all. I may propose a set of rules that people ought to follow, but I do not take myself to preclude people's other reasons for acting. Some normative systems claim high levels of authority, but claim them over a limited range.⁷² Implicit in a mother's admonishment, "As long as you live under this roof . . ." is the spatial and temporal limitation of this level of authority.

Other normative systems, like the law, do not have this limiting feature; these may be labeled global normative systems. The law claims to regulate the full range of one's activities.⁷³ In this sense, the law is distinct from household and sporting norms; there is no restricted area.⁷⁴ Just as important, the law and other global normative systems, such as religion and morality, claim the ability to dominate all other normative systems.⁷⁵ While they refrain from interfering with many deeply important fields, the law and other global normative systems claim the ability to regulate all fields and reasons. The law may fully recognize and allow other normative systems, giving effect to the rules of churches, private clubs, and the like, but it always reserves the right to correct or nullify these rules.⁷⁶ This claim is of great importance.

The law may define itself as bounded or restricted but, just as importantly, it may not. The key is that the law represents a type of normative system that can claim authority over all domains of reasons;⁷⁷ whether or not it chooses to do so is unimportant, and need not trouble us greatly.⁷⁸

71. See RAZ, *supra* note 8, at 29–30.

72. See RAZ, *supra* note 70, at 119. The International Olympic Committee, for example, claims absolute right to determine the rules of the Olympic games but would not claim authority over a state's criminal law. The breadth of its authority is limited to the Olympic Games. *Id.*

73. See *id.* at 116–17; KELSEN, *supra* note 7, at 15–16.

74. See KELSEN, *supra* note 7, at 15–16; Oberdiek, *supra* note 4, at 91.

75. See JOSEPH RAZ, *Legal Positivism and the Sources of Law*, in THE AUTHORITY OF LAW, *supra* note 8, at 37, 43.

76. RAZ, *supra* note 70, at 118–19; see FINNIS, *supra* note 69, at 276–77; JEROME HALL, FOUNDATIONS OF JURISPRUDENCE 138–39 (1973); HART, *supra* note 5, at 106–07; ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 14–15 (1974).

77. See KELSEN, *supra* note 7, at 15–16.

78. *Id.* at 14–15; HART, *supra* note 5, at 106–07.

This picture of the law seeks simplicity. Law is defined as normative and as claiming authority over one's practical reasoning. Law does not provide reasons to be balanced against all other reasons in practical reasoning. The directive is authoritative insofar as it claims to exclude further determination and balancing of most other reasons for action. The law is, further, a global normative system and claims the right to issue norms in all domains of its subjects' lives.

V. THE LAW AND COERCION

The classical model missed the normative aspects of the law that exist apart from the mere imposition of coercion and, to a lesser extent, the authoritative status law claims. The classical model did, however, isolate a third critical feature of legal norms. The law is distinct as a coercive system of norms. It claims the right to not only explicate norms but to create and enforce coercive norms.

This article does not propose that the law is coercive as a practical matter, i.e., a condition of human nature necessary to assure obedience.⁷⁹ Rather, it makes the stronger claim that coercion is inherent to the very nature of the law. Without understanding coercion, one misses a defining characteristic of the law. Thus, one cannot delineate the social phenomenon known as the law without accounting for its coerciveness. Like Austin and Bentham, who missed the normative and authoritative aspects of law, some modern theorists have missed an equally important tenant of the law by denying that it is inherently coercive.

In examining the role of coercion in the law, one must exercise care not to conflate the coerciveness of the law with the related fact that it is backed by sanctions. While the law is typically backed by sanctions, this is neither enough to establish that a norm is coercive nor sufficient to make the law unique. This distinction becomes clearer when one inspects the concept of a sanction more closely.

79. See HART, *supra* note 5, at 199–200; Lamond, *supra* note 3, at 45–47. *Contra* Oberdiek, *supra* note 4, at 71.

A. Sanctions

Sanctions are penalties attached to the breach of a norm, that typically are meant to discourage breaches of that norm.⁸⁰ Sanctions are much broader phenomena than laws and accompany violations in many normative systems. The norms of a game, religion and social custom may all contain some form of sanction. Sanctions play the same conceptual role in all these systems.

Though sanctions are not unique to the law, their place in the legal system is a matter of particular difficulty. With most normative orders, the existence of a norm does not depend on having a sanction attached to its violation. One may break a moral norm even if he is not punished. Yet the notion of laws without attached sanctions seems strange. Kelsen, for example, conceived of the law as simply proscribed norms, the violation of which gives rise to a corresponding sanction.⁸¹ This undoubtedly results from our intuitive focus on criminal laws and their attendant sanctions as paradigmatic examples of the law.⁸²

Nevertheless, large portions of the law exist without sanctions. Much of the law is not concerned with prohibiting actions. The law of contracts and wills are examples of how the law allows people to arrange their lives rather than prohibits specific action.⁸³ These permissive norms are not directly supported by sanctions, though failing to fulfill adopted obligations may result in sanctions.⁸⁴ Further, legal duties levied on legal officials, such as judges, often have no corresponding sanctions.⁸⁵ Attaching sanctions to duties imposed on the very people designated to enforce those duties would be, Raz suggests, impractical.⁸⁶ Officials in-

80. Oberdiek, *supra* note 4, at 75. I disagree with Oberdiek, who proposes that all sanctions must be aimed at deterring breach. A sanction tends to exert some rational pressure in deterring breach but need not be aimed at such deterrence. For example, a fine for boarding public transportation without pay may be calibrated to the percentage of predicted law breakers detected to compensate the system for lost revenue, not to deter breach. See Grant Lamond, *The Coerciveness of Law*, 20 O.J.L.S. 39, 58–59 (2000).

81. KELSEN, *supra* note 7, at 108–14.

82. John Finnis, while noting that legal systems provide a wide range of coercively enforced norms, evidences how punitive sanctions seem naturally to draw our eye. FINNIS, *supra* note 69, at 261.

83. See Raz, *supra* note 41, at 834–35.

84. See *id.* at 835.

85. See RAZ, *supra* note 11, at 153.

86. *Id.*

stead subject themselves to legal duties because they have a sense of normative commitment to those duties.⁸⁷

Many sanctions fall short of any plausible definition of coercion. Coercion occurs when sufficient pressure is applied to compel a certain course of action. Many sanctions attached to legal norms are so weak, and so rarely enforced, that they cannot provide the reason for compliance.

While sanctions play a major role in coercion, not all sanctions are coercive. Many sanctions may simply raise the cost of an action without precluding it.⁸⁸ That littering decreases when the law prohibits it probably results from the normative force attached to the law, quite apart from any attached sanctions. Thus, it is not hard to imagine passing an anti-littering law without attaching sanctions.⁸⁹

Conversely, some legal coercion is imposed without being linked to sanctions at all. Where a medical quarantine is imposed against a group, the coercive force applied would be ill-conceived as a sanction.⁹⁰

87. *Id.* Some have countered these propositions by pointing out that the law can be thought of as attaching a disadvantage to the breach of permissive and official-directed norms. See Oberdiek, *supra* note 4, at 75. For example, the disadvantage of breaching the legal norms required to make a valid will is the invalidity of the will. HART, *supra* note 5, at 33. Likewise, an official that does not follow prescribed methods of passing laws or decreeing judgments is “punished” by having his purported laws or decrees invalidated. In cases where norms do not validate a legal right, making the law truly sanctionless, Kelsen denies the statute is a law at all. KELSEN, *supra* note 7, at 114–15.

Raz also recognizes that legal norms directed at officials may exist without sanctions, but he proposes that duty-imposing norms not directed at officials must be backed by sanctions. RAZ, *supra* note 11, at 152–53. But as Raz’s position evolves, he later highlights the importance of permissive legal norms aimed at the public. These are valid legal norms and illustrate that the law need not be supported by sanctions. *See id.* at 155.

The explored sanction of nullity also provides no satisfying reformulation. Although the invalidation of a legal document is certainly a disadvantage, it is somewhat inconvenient to equate it to a penalty. See HART, *supra* note 5. The invalidation of a will, for example, is a function of a failure of formation. See Oberdiek, *supra* note 4, at 79. Kelsen believes that invalidation cannot be considered a penalty, but rather a failure to enter into the normative regime at all. KELSEN, *supra* note 7, at 267–68. This invalidity leaves no normative jurisdiction for attaching a sanction. Conceptually, validity must precede the attached sanction; without entering into the normative regime, there can be no sanction. *See id.* Therefore, permissive norms remain valid legal norms without sanctions.

88. Lamond, *supra* note 80, at 57.

89. *See id.* at 53.

90. Notice that when the quarantine is not in response to the breach of a norm, it is not a sanction. See KELSEN, *supra* note 40, at 278–79; RAZ, *supra* note 11, at 79–80; Oberdiek, *supra* note 4, at 87–88.

Some may find this distinction that a sanction is not coercive until it is “big enough” unsatisfying.⁹¹ Yet this distinction is important for two reasons. First, it reveals that while sanctions and coercion are related, neither is a subset of the other. Some sanctions are not coercive and some forms of coercion that are not sanctions. Second, because coercive sanctions interact with our voluntary choices in certain ways, particularly by overbearing our will, they engage our moral sensibilities in different ways than non-coercive sanctions. It is one thing to claim that one was unfairly punished, but quite another to claim that the punishment, or threat of punishment, forced one to follow a particular course of action. Coercion exacts a different moral toll.⁹²

This analysis reveals that sanctions and coercion are separable concepts. Sanctions are neither unique to law nor equivalent to coercion. While sanctions may not be intrinsic to the law, coercion is; the law is intrinsically coercive.⁹³

B. *Coercion*

At first blush, my claim should strike many as uncontroversial. Coercion looms large in the everyday understanding of the law. Pointing out that the law is coercive may risk making the most banal of observations. But greater scrutiny of the idea that the law is defined by coerciveness has divorced the two concepts.

To understand whether the law is inherently coercive, we must first examine the concept of coercion. Coercion is elusive both because the concept itself is controversial and it often plays different roles in our normative thinking. Indeed, most scholars who employ the concept of coercion rarely define it with precision. Even scholars who propose explicit definitions of coercion typically concede that coercion is a highly contextual concept, which turns the moral work to which the concept is put.⁹⁴

91. I am grateful to Michael Moore for pressing me on this point.

92. The nature of coercion inherently calls for moral justification in a way that is unique from solely being punished.

93. To be precise, sanctions will be inherent in the law to the extent it is needed to render law coercive.

94. See WERTHEIMER, *supra* note 37, at 3, 6–7; Mitchell N. Berman, *The Normative Functions of Coercion Claims*, 8 *LEGAL THEORY* 45, 45–46 (2002).

Still, this article attempts to construct a defensible and persuasive view of coercion and illustrate the implications for certain concepts embedded in coercion. Ultimately, this article attempts to navigate these nested concepts and defend this view against competing conceptions.

Coercion is normally claimed when one has been forced by another to act, or refrain from acting, against their will. Coercive pressure can overcome one's will and make a particular course of action unreasonably costly. For example, where coercive pressure is applied to Bob, that pressure would render one or more of his options unreasonably costly.⁹⁵ Coercive pressure in this respect makes a particular option unreasonable but not necessarily impossible.⁹⁶ A small number may always be able to resist such pressure. In other words, coercion need not be a "success" term.⁹⁷

Coercive pressure, however, is neither radically subjective nor a purely psychological phenomenon. A particularly skittish person may find even the most trivial threat genuinely overwhelming. Perhaps, from that person's point of view, there is a sincere claim of coercion. But a perfectly subjective claim cannot deter-

95. Mitchell Berman explores how these two different aspects of coercion forward different normative claims and can be viewed as analytically distinct. See Berman, *supra* note 94, at 46–47. The first aspect of coercion consists of the claim that one's actions are excused because his will was overcome such that he could not act voluntarily (coercion_e). *Id.* at 59. The second aspect focuses on the act of wrongfully imposing pressure—threatening to violate one's moral duty owed to another by inducing him to act in a way he otherwise may not (coercion_w). *Id.* at 53.

Though Berman argues that these two aspects serve different purposes, it is important to view both when examining the role of coercion in the law. Coercion_e plays a large role in legal coercion. To answer the question of whether or not law is inherently coercive we must look at one facet of coercion_e . That is, we must look at whether the law can force its subjects to claim that their actions are no longer voluntary. Ultimately, the law must be felt by its subjects as coercive.

This article does not view coercion as an excuse in the strictest sense of the word. Where the law compels morally sound behavior, it would be peculiar to invoke a claim of excuse. Still, we are interested in the same normative feature that makes excuses viable; the claim that one's voluntary actions were in some ways overcome or severely constrained. This normative feature is occasionally invoked for reasons other than to excuse behavior. For example, one may withhold praise if he or she discovers that the actor is engaged in praiseworthy behavior because he or she had little choice. *Id.* at 87–88. Certainly, one would be unlikely to praise someone when he only followed a law, merely because it is lawful. We are interested in this type of phenomenon—obeying the law because of its coercion, or at least the perception that one has little choice but to obey the law due to its coercion.

96. See *id.* at 84. In other words, the law does not simply claim to coercively prohibit or mandate action, but continually applies pressure to enforce its sanctions.

97. William A. Edmundson, *Is Law Coercive?*, 1 LEGAL THEORY 81, 84–85 & n.10 (1995).

mine whether the pressure that overcame that person's will made his alternatives *unreasonable*.

Further, abandoning a purely psychological view of coercion prevents one from viewing coercion as susceptible to a purely empirical analysis. It would, of course, be attractively straightforward to discover that moral conclusions not only supervened on natural facts, but could also be fully derived from them. But there is no reason to believe that one can reach such conclusions without introducing some moral judgments.⁹⁸ The most important implication is that the level of pressure needed to make a choice unreasonable will turn on the relationship between the act being compelled and the harm being threatened. Thus, whether the pressure was coercive will always involve a deep moral judgment.⁹⁹

This view of coercion—pressure that no one could reasonably resist—has much in common with Aristotle's view of coercion.¹⁰⁰ Under Aristotle's view, one is coerced when forced to act on externally applied pressure.¹⁰¹ Aristotle is purposefully ambiguous about how one might neatly define external pressure. Nonetheless, he clearly points out that describing one as coerced by any internal motivation would turn all volitional acts into coerced acts.¹⁰² Thus, for Aristotle, a classic case of coercion and pardonable behavior is where the motivating force stems from externally applied pressure.¹⁰³

To an important extent, Aristotle's model of coercion is a moralized one.¹⁰⁴ Whether one is compelled to adopt an action depends on whether the pressure was external and could not have been reasonably resisted.¹⁰⁵ As Aristotle notes, "On some actions praise indeed is not bestowed, but pardon is, when one does what he

98. See WERTHEIMER, *supra* note 37, at 7–8. Hume most famously introduced the "is" / "ought" distinction.

99. See ARISTOTLE, *Ethica Nicomachean*, in THE BASIC WORKS OF ARISTOTLE 935, 964–66 Richard McKeon ed., W.D. Ross trans., (1941); see also Lamond, *supra* note 80, at 44, 52; Oberdiek, *supra* note 4, at 80.

100. See ARISTOTLE, *supra* note 99, at 964–65.

101. See *id.* Particularly, where one has an internally motivated fear or desire premised on an externally generated force, say a fear of drowning generated by a storm at sea, these may be "mixed" actions. *Id.*

102. See *id.* at 965.

103. *Id.* at 965–66.

104. See *id.* at 965.

105. *Id.*

ought not under pressure which overstrains human nature and which no one could withstand.”¹⁰⁶ Nevertheless, it is not a wholly moralized view; Aristotle does not explicitly equate coercion with the presence of an independent rights violation.¹⁰⁷

Given the central role it plays, it is important to clarify the conception of coercion being forwarded. Coercion is pressure that overcomes another’s will—overstrains human nature—by applying pressure one cannot reasonably resist.¹⁰⁸ That pressure is coercive even if some exceptional persons can heroically resist it. To be coerced, the pressure must aim to force one to act against his will—act as they otherwise would not. If the pressure is focused on actions the actor would willingly adopt, he is not coerced; the coercive pressure remains, but is dormant.¹⁰⁹ This conception remains moralized to the extent that there is no clear definition of what choices are unreasonable—this will turn in large part on a moral weighing of the interests involved.

One debate surrounding coercion centers on one aspect of legal coercion, the pressure notion of coercion. Mitchell Berman illustrates this debate by identifying a measure of coercive pressure as coercion_w .¹¹⁰ He defines coercion_w as a normative function; coercion describes pressure that violates an independent moral duty.¹¹¹ The pressure described in coercion_w , wrongful pressure, is coercion precisely because it threatens to violate a moral duty.¹¹² William Edmundson and Arthur Ripstein also argue that pressure is not coercive unless applied in some immoral way.¹¹³

106. *Id.* This is not a purely psychological measure in Aristotle’s view, even if one were placed under tremendous pressure. There are some acts which one cannot be considered compelled to do. Rather, some acts are such that one ought suffer death, or worse, rather than be pushed to commit them. *Id.*

107. Here, there is some ambiguity in Aristotle’s conception—“one does what he *ought not*.” *Id.* It does not seem Aristotle goes so far as to link coercion to a rights violation.

108. *Id.*

109. See *infra* text accompanying notes 124–40.

110. Berman, *supra* note 94, at 50–51.

111. *Id.* at 52–53.

112. Berman does not commit to the idea that this is the only form of normative claim embedded in coercion. Hence, coercion_e describes coercion as excusing. *See id.* at 88.

113. Edmundson, *supra* note 97, at 85–86; Arthur Ripstein, *Authority and Coercion*, 32 PHIL. & PUB. AFF. 15, 17, 21–22 (2004). Edmundson and Ripstein seem to underpin Oberdiek’s view. Oberdiek has led the modern attack on the concept of law as coercive by viewing the law as most significantly liberating instead of repressive. Oberdiek, *supra* note 4, at 92.

Not all pressure exerted by the law is wrongful. But, it is a matter of grave concern anytime the law imposes wrongful coercive pressure. It is just this fear that compels us to inquire into the coerciveness of the law. Because legal pressure is intentionally imposed by a legal norm, however, whether any particular instance of legal pressure is wrongful depends on a thoroughly moralized theory—in the case of the law, a theory of political morality—of why that pressure, violates some moral duty.¹¹⁴ Where the law exerts pressure on a person without violating moral duty, can it be properly considered coercive? Is non-wrongful pressure coercive?

Ripstein, in exploring a related thesis, proposes that coercion only occurs between private citizens when one improperly uses the other as a means to his own ends, thus violating the moral duties owed to him.¹¹⁵ Ripstein's account explores how, outside the context of private citizens, coercion can be understood as forcefully guiding another's actions through external pressure when internal normative guidance fails.¹¹⁶ But, where pressure does not interfere with the pursuit of legitimate aims, it is not fully coercive.¹¹⁷ Similarly, Edmundson argues that coercion only occurs when a unilateral coercive threat is immoral.¹¹⁸ For example, where the law prohibits a potential wrongdoer from unjustifiably killing, the law is not properly considered coercive because it cannot be seriously argued that such prohibitions are immoral.¹¹⁹ For these scholars, that law supplies sufficient pressure to foreclose certain courses of action is insufficient to render it fully coercive.

Edmundson argues that concluding that the law is coercive solely because of the amount of pressure it applies, ignoring whether that pressure is immoral, is both over and under-inclusive.¹²⁰ A pressure theory of coercion is over-inclusive because it will “count as coercive significantly many more cases” than alternative moralized theories of coercion.¹²¹ Without more,

114. See Berman, *supra* note 94, at 45.

115. See Ripstein, *supra* note 113, at 22.

116. *See id.* at 23.

117. *Id.*

118. Edmundson, *supra* note 97, at 85.

119. *See id.* at 85–86.

120. *See id.* at 94.

121. *Id.*

specifically a compelling explanation regarding why those cases are mistaken, Edmundson's critique provides little reason to reject a pressure account of coercion due to over-inclusion.

Edmundson further argues that a pressure theory would be unsustainably under-inclusive because of the individualized effects of coercion.¹²² The law would not exert pressure on those who are disinclined to commit a crime for independent moral reasons or those who believe they can escape detection. This would not count as coercion, and a pressure theory would, therefore, be under-inclusive.¹²³ John Gardner similarly proposes that the law cannot be considered inherently coercive where its coercive effects are dormant.¹²⁴

This is a peculiar critique of the general coerciveness of the law. That one may act for independent reasons does not undermine the law's coerciveness; the law can still eliminate choice in acting if those independent reasons fail. If a prisoner does not want to try his luck in the forest surrounding a prison during a blizzard, do his independent reasons for not leaving suddenly render the fact that he is legally prohibited from leaving the prison in any case noncoercive? Dormant coercive force remains coercive.

Berman and Ripstein's similar restrictive definition of coercion—wrongful or immorally imposed pressure—also fails to convince. In fact, Berman's own work contains an adequate response to this collective objection.¹²⁵ As Berman notes, when natural forces equally restrain a person's courses of action, there is little way to distinguish why he is any less compelled than when influenced by human forces.¹²⁶ Thus, cliffs on either side of a driver

122. *Id.*

123. *Id.*

124. John Gardner, *Prohibiting Immoralities*, 28 CARDOZO L. REV. 2613, 2624 (2007) (“[Law is coercive] only in those cases in which the threat is operative, i.e., in which it figures in the reasoning of those against whom it is issued.”).

125. See Berman, *supra* note 94, at 63.

126. See *id.* Berman illustrates the dual nature of coercion, with coercion_E representing the excusing nature, where the cost of one's choices are heavy enough to restrict his actions. Berman ultimately concludes that there is no difference in the nature of the excuse of one's actions when the pressure is man-made rather than natural. But, comparing one who is forced to run over pedestrians because a gunman threatens to kill him with one who is forced by a storm to refrain from swerving, the difference may be that people expect to bear the cost of natural tragedies that threaten them, but not the cost of another's illegitimate imposition on their will. That argument is outside the scope of this article.

can decisively restrict a person's choice to veer away from a pedestrian lying across the road.¹²⁷ To the extent that natural pressure sufficiently forecloses a person's options or serve as an excuse, his act is equally involuntary.¹²⁸

Of course, many involuntary acts are not properly described as coercive.¹²⁹ Perhaps the term coerced is inappropriate in Berman's example because a human agent with the intent to coerce the driver is lacking. But law, the product of purposeful human action, does not suffer from this problem. If amoral forces can render a person's choices involuntary, there seems little reason why we cannot similarly describe human forces.¹³⁰ Again, it is important to distinguish between involuntary choices naturally imposed and coerced choices intentionally imposed. That distinction does not apply, however, to intentionally imposed human action, even if the imposition does not violate a person's rights.

Berman, Edmundson and Ripstein give us good reasons to see why pressure must be wrongful before coercion invokes a moral claim of excuse.¹³¹ They do not, however, explain why rightful pressure cannot be used to describe coercion—pressure that eliminates other reasonable courses of action.¹³² If this pressure theory of coercion is viable, then the law's ability to restrain a person's options is coercive regardless of the final moral judgment of its appropriateness.¹³³ Thus, regardless of whether the pres-

127. See *id.*

128. See *id.* Harry Frankfurt properly focuses on the fact that one's will may still be overborne in that situation. HARRY G. FRANKFURT, *Coercion and Moral Responsibility*, in THE IMPORTANCE OF WHAT WE CARE ABOUT: PHILOSOPHICAL ESSAYS, 26, 45–46 (1988).

129. See WERTHEIMER, *supra* note 37, at 4.

130. See Peter Westen, "Freedom" and "Coercion"—Virtue Words and Vice Words, 1985 DUKE L.J. 541, 560 (1985). Of course one may simply deny that the choice to run over the pedestrian is involuntary. Such a view would lead to the conclusion that human actions which do not violate a person's independent rights are coercive. See NOZICK, *supra* note 76, at 262.

131. Similarly, Wertheimer illustrates how when a person has "been forced" to do X, the sense in which he is forced may depend on the type of normative claim embedded in the coercion claim. See WERTHEIMER, *supra* note 37, at 252–56. Indeed this is the point of Berman's distinction between coercion_w and coercion_e.

132. There are many different ways in which we employ coercion claims. Wertheimer points out that coercion may turn on the task to which it is employed. This article's definitions of coercion may be deeply contextual, but only some of which focus on the notion of state employed coercion. See *id.* at 184–88.

133. Regardless of whether Berman's distinction of coercion or Ripstein's analysis would label such pressure as fully coercive, rational pressure still stands in need of justification. See Edmundson, *supra* note 97, at 88; Lamond, *supra* note 80, at 49–51.

sure applied is wrongful, pressure that restricts one's ability to reasonably choose an option is coercive.

In contrast to the sense of coercion used above, when a person is coerced, he is not only brought under coercive pressure to do α , but his will is in fact overcome, leading him to do α .¹³⁴ The focus is not on increasing the costs of the option, but on the very idea that his will was overborne, causing him to act a certain way.¹³⁵

These differences may not reflect any deep semantic differences in the concept of coercion; the underlying phenomenon remains the same in both cases. But stressing these different uses allows one to isolate certain debates surrounding coercion and, perhaps, makes some progress in clarifying them.

Focusing on overcoming a person's will highlights a particular debate embedded in coercion, specifically, two different modes of coercion. One manner of overbearing another's will is bringing rational pressure—"rational coercion"—to bear.¹³⁶ Rational coercion relies on increasing the cost of a certain course of action until it is unreasonably high. A person's desire to engage in that course of action is eventually overcome; he can no longer rationally choose that course of action. When legal, social and other sanctions raise the cost of certain actions past what a person can reasonably bear, the sanctions are to that extent coercive. Many things that seem like physical coercion are, in the first instance, rational coercion; a robber pointing a gun at a person does not, strictly speaking, pry the money out of his hands, but rather radically changes the costs of his choices.

A second way of overbearing a person's will is physical coercion. Physical coercion occurs when a person's will is overcome by acting upon him as a physical being.¹³⁷ A person's refusal to move may be overcome when he is hoisted bodily and removed. Likewise, having his closed hand forced open by physical pressure

134. Cf. Lamond, *supra* note 80, at 51. In many ways this distinction is no different than the trying/accomplishing distinction inherent in many words. For example, the word "bribed" may refer to merely giving a person money in an attempt to improperly influence him, or it may describe the money having successfully influenced the person. With coercion, however, this common distinction leads to conceptual confusion. See Oberdiek, *supra* note 4, at 80.

135. Lamond, *supra* note 3, at 40.

136. *Id.*

137. See generally *id.* (noting that directly using irresistible physical force to make a person do something amounts to coercion).

represents central case of physical coercion.¹³⁸ Frankfurt notes that some cases of physical coercion are difficult to separate from rational coercion. Where a person is being tortured and reveals secret information, it can be difficult to know if the information slips from sheer exhaustion or from the prospect of further torture.¹³⁹

Hans Oberdiek, Berman and others are understandably suspicious of considering physical force as properly coercive.¹⁴⁰ It is difficult to isolate a coherent view of physical coercion. Oberdiek's objection turns on his notion that coerced behavior must be the result of voluntary action; notwithstanding that the behavior, by default, is compelled, it must be voluntary.¹⁴¹ Oberdiek defines coercion as a reasonably believable threat of visited evil if one chooses a given option.¹⁴² Oberdiek limits coercion to the threat and not the harm itself.¹⁴³ A person is coerced, in this sense, when enough rational force is applied to make him do another's will.

Oberdiek is correct to the extent he emphasizes that coercion need not be a success concept. A person can be under coercive pressure even when he is not coerced into performing a particular action; applying unreasonable pressure is coercive even if it is resistible.¹⁴⁴ Because, however, he ignores that coercion can describe the pressure applied as well as the success in physically overbearing a person's will, Oberdiek misses varying modes of coercion. In particular, he denies that central cases of physical coercion qualify as coercion at all.¹⁴⁵ As a result, he misses important elements of the law's coerciveness.

Oberdiek's resistance relates to the objection that physical coercion constitutes one being acted upon as a physical being, hav-

138. See FRANKFURT, *supra* note 128, at 26. But see Oberdiek, *supra* note 4, at 82.

139. FRANKFURT, *supra* note 128, at 26–27. Many things that look like physical coercion are, in fact, rational coercion. Imprisonment, torture, and physical threats usually rely on their threat for coercive effect; only when this threat fails do they implement physical coercion.

140. See Berman, *supra* note 94, at 50–51; Oberdiek, *supra* note 4, at 82.

141. See Oberdiek, *supra* note 4, at 81. This partly turns on Oberdiek's position that coercion is limited to the fear of threatened evil and not evil itself. *See id.* at 80.

142. *See id.* at 83.

143. *See id.* at 82.

144. See Lamond, *supra* note 80, at 44.

145. See Oberdiek, *supra* note 4, at 82; *see also* Lamond, *supra* note 80, at 40.

ing no interaction with rationality or will. Physical coercion seems to describe actions that are unwilling.

Although Oberdiek rejects the idea of physical coercion, his conception of coercion shares the idea that one's will must be overborne.¹⁴⁶ The point of coercion is to apply sufficient pressure so a person cannot reasonably veer from the coerced course of action. If this is the crux of the shared concept of coercion, there is an internal tension in insisting that such behavior be chosen voluntarily while, at the same time, recognizing that the choice is involuntary. Thus, there is no reason to exclude from this definition instances of physical coercion when they focus on the same phenomenon—overcoming a person's will.

Where force is used as an end unto itself, a distinction emerges. Force as an end does not attempt to interact with a person's will. When a person strikes another in anger, that use of force is aimed as an end unto itself.¹⁴⁷ It is not meant to compel or interact with the other's will. This may make characterizing physical compulsion as coercion where one seems to be simply acted upon seem strange. The bulk of legal force, however, is not used as an end, but is particularly concerned with compelling a person to take, or restrain from taking, action. In the legal context, force typically plays a coercive role.¹⁴⁸

There are three typical examples of the legal application of force. The first, and most obvious, is forcing compliance or prohibiting breach of legal norms, such as when the police prevent a crime. The second is threatening sanctions, such as imprisonment, to induce rational coercion. The third is enforcing legal orders or sanctions, for example, when a marshal enforces a judgment. All of these are focal cases of legal coercion; none represent force used as an end unto itself. Of course, there are cases where a legal directive may order force employed as an end—a CIA order to have someone assassinated. But, it is perhaps best not to consider this coercion at all.¹⁴⁹

146. See Oberdiek, *supra* note 4, at 82 (stating that force must be resistible to be coercive).

147. That is not to say that his force may not be linked to some other ultimate end. Rather, the use of force does not seek to compel anything further.

148. Cf. RAZ, *supra* note 9, at 157 (noting that force is used as an enforcement message to ensure compliance with the law).

149. Using physical force in the law is still linked to legal coercion. Ultimately, the jus-

Admittedly the distinction between coercive force and non-coercive force is difficult to determine. When is force used to overcome a person's will as opposed to being an end unto itself? If a thief reaches into someone's pocket and steals his wallet, there is no question of coercion; this is simply theft. If an assailant strikes a person, again there does not seem to be coercion. If a thief grabs a person's hand and forces him to remove a wallet from another's pocket, how is this properly described? In what sense, if any, does this constitute overcoming the will so that this force could be considered coercive as opposed to simple theft?

Overcoming another's will is crucial to distinguishing between coercive and non-coercive force. The two modes of coercion delineated above, track particular forms of overcoming a person's will. The key to understanding the two modes of coercion, rational and physical, is that they typically restrict a person's opportunity sets to render certain choices unreasonable or work to incapacitate a person's will. When the robber proclaims, "Your money or your life," the effect raises the cost of keeping your wallet well past the breaking point of reasonable deliberation. Thus, the robber has limited the opportunity sets dramatically—the choice to carry about your business or give to others is unbearably curtailed.

Alternatively, physical coercion often works by flatly incapacitating a person's will. When the police bar a person from leaving a room by physically blocking him, the cost has not only been raised, but the execution of his will has been purposefully blocked. This contrasts scenarios where force is used as an end unto itself, which have no relationship with a person's will. This distinction leaves some difficult examples unresolved. If the thief forces your hand into your pocket to steal your wallet, has he incapacitated your will? This represents a borderline and admittedly unclear example of coercion.

This explication, particularly the notion of restricting a person's opportunity sets, invites a further question relating to ways the law may be coercive. Can offers be coercive? Consider the mother who cannot afford the exorbitant cost of medication to prevent her child from dying. She is approached by a millionaire who offers to pay for the medication if she will sleep with him.¹⁵⁰

tification for using force is to compel obedience and stop the violation of valid legal norms. Such a justification, as with the justification of all coercive force, requires careful scrutiny.

150. See Joel Feinberg, *Noncoercive Exploitation*, in PATERNALISM 201, 208 (Rolf Sarto-

Arguably, there would be no coercion because the offer does not threaten to remove from her something to which she had access. The offer actually expands her opportunity sets; where her child faced certain death before, she now has an opportunity, however repugnant, to save her child. Perhaps there are other reasons we morally condemn this offer besides it being coercive. Analogously, the law often attempts to induce certain actions—marriage and homeownership, for example—by offering a host of benefits. Do those incentives constitute legal coercion?¹⁵¹

The argument that the expansion of one's opportunity sets cannot be properly construed as coercive owes a great deal to Robert Nozick's taxonomy in his important piece on coercion.¹⁵² But, it is not obvious why coercion should be limited to threats to deprive as opposed to offers that cannot be reasonably declined. Accepting this limitation depends on accepting that coercion only results from *reducing* a person's opportunities, not merely from severely *restricting* opportunity sets. If a person's opportunity sets are restricted by certain offers to the extent that he could not reasonably choose to act otherwise, his will is equally overcome.¹⁵³ There is no reason to believe that only threats meet Nozick's critical distinction—imposing or expressing the will of another.¹⁵⁴ Many offers can be intentionally made to render a course of action substantially less available thus controlling a person's will through the actions of another.¹⁵⁵

Conceiving coercion as including threats and offers leads to strange results. Offering a starving man a job could be character-

rius ed., 1983).

151. I am grateful to Heidi Hurd for pressing me on this issue.

152. Robert Nozick, *Coercion*, in PHILOSOPHY, POLITICS AND SOCIETY 101 (Peter Laslett et al. eds., 4th series 1972).

153. *Id.* at 128–29.

154. *Id.* As Nozick points out, not all offers, even when one cannot refuse, will be properly considered coercive. In some cases, events otherwise not properly considered coercive may force a person to choose a course or render him unfree to do otherwise. *Id.* at 101.

155. Nozick notes that focusing on overcoming a person's will makes it difficult to distinguish between coercive threats and overwhelming offers. See *id.* at 132. He then proposes that the key to understanding why threats are coercive, as opposed to offers, is that a rational person will willingly receive an offer, for they can always decline, but would not willingly choose to face a threat. *Id.* at 133. It is not clear, however, why this distinction removes the offer from Nozick's earlier arguments. If the crux of coercion is overcoming a person's will by either substantially reducing his opportunity sets or incapacitating his will, then an offer may still be coercive. Indeed, Nozick's own argument is that an action taken to make an alternative less (or more) likely may overcome a person's will. See *id.* at 104. Thus, it is hard to see why offers ought to be excluded.

ized as coercive in certain circumstances. Taken to the extreme, perhaps capitalism could be considered coercive.¹⁵⁶ Could a lawyer, offered a job at ten times his current salary at a more prestigious firm, have been coerced into switching jobs?¹⁵⁷

We need not go so far to rescue a usable conception of coercion. While it may be uncomfortable to describe a job offer to a starving man as coercive, it is natural to imagine the man saying that he had no choice but to take the job. If one imagines an economic system in which the only jobs available are grueling, physically destructive jobs at subsistence wages, and people are perfectly free to turn them down and starve to death, literally an offer they cannot refuse, these offers would be plausibly coercive. Similarly, if the legal benefits in a society allowed a person to secure a job, a home and a large dowry upon marriage, and without marriage he faced a lifetime of uncertainty and near poverty, the legal system may be coercing citizens to marry.¹⁵⁸ These circumstances may come about in other ways without the intent of any will to restrict others to a course of action. In other words, people could simply be forced by circumstances to act in certain ways or feel unfree to act in their desired ways. While unfree or nonvoluntary choices that a person may face may not be labeled coercive, where the circumstances of the offers were created with the intent to restrict available courses of action, there may be a coercive offer.¹⁵⁹

This line is difficult to draw. In cases where a person is offered an overwhelming benefit—the lawyer offered a ten-fold raise, for example—one is rightfully hesitant to characterize this as coercion. While it may border on unthinkable for the lawyer to turn down the job, the lawyer could, in fact, reasonably turn it down.¹⁶⁰ But perhaps this is wrong. Whether something is coercive will always turn on judgments about whether a person could behave

156. WERTHEIMER, *supra* note 37, at 4–5.

157. See FRANKFURT, *supra* note 128, at 41–42.

158. Frankfurt highlights the importance of such background considerations when judging coercion based on an offer/threat distinction. *See id.* at 32–33.

159. *See* David Zimmerman, *Coercive Wage Offers*, 10 PHIL. & PUB. AFF. 121, 144–45 (1981) (explaining when a wage offer counts as coercion). Zimmerman notes important additional conditions that may be necessary to describe appropriately the situation as coercive, particularly, whether a person has behaved purposefully to prevent the coercion from creating conditions with alternative choices. Others have offered insightful arguments against this controversial point. *See* Lawrence A. Alexander, *Zimmerman on Coercive Wage Offers*, 12 PHIL. & PUB. AFF. 160, 161 (1983).

160. Presumably those reasons would turn on non-economic factors.

reasonably otherwise. This proposition requires further argument but does suggest that by understanding coercion to be both restricting opportunity sets and incapacitating the will, the idea of a coercive offer becomes viable.

We have wandered a bit far a field. We now return to the incapacitation of the will and its relationship with the use of force. Oberdiek rightfully points out that the use of force does not transform every sanction into a coercive sanction:

That legal systems permit and authorize the police to use force to prevent certain crimes or to apprehend criminal suspects or to take convicted criminals to prison does not entail that these measures are coercive sanctions; they are not even sanctions. Police have the right to prevent anyone from attempting to hijack an airplane, but the possibility of being shot—a risk run by hijackers and the fear of which might deter them—is not a legal sanction for attempted hijacking: *that* sanction is a prison sentence. Only when specified as a penalty for violating or neglecting a law should we regard the legal use of force as a coercive sanction.¹⁶¹

In one sense, he is correct. But this illustrates, and Oberdiek does not defeat, that legal sanctions are coercively enforced. Moreover, this applies to all sanctions, even those that do not impose costs that rise to the level of coercion.¹⁶² By separating sanctions from coercion and noticing that coercion is a broader concept than sanctions, we notice that law is coercive even when it does not impose coercive sanctions. Thus, this article's primary inquiry into the coerciveness of law does not turn on Oberdiek's distinction.

Strangely, Oberdiek does not seem to disagree with this picture. He illustrates that a threatened prison sentence may give a person no choice but to pay a parking fine.¹⁶³ Yet, “[i]t would be a mistake [] to regard the fine as coercive; only the threat of imprisonment for contempt of court constitutes a coercive sanction.”¹⁶⁴ But the question is not whether all legal sanctions are

161. Oberdiek, *supra* note 4, at 88.

162. *Id.*

163. *Id.* at 89.

164. *Id.* The success notion of coercion may seem to swamp the pressure notion. Given that the law's success in coercing someone requires that he experience the law as coercive, legal norms can seemingly impose the requisite amount of pressure. These concepts are unsurprisingly related. Separating these two facets of pressure, however, allows us to understand coercion when compliance with the intended course of action is unsuccessful. For example, a court may order a journalist to reveal a source. If the journalist refuses, the

coercive, but whether the law as a normative system is coercive.¹⁶⁵ The critical question is whether the law is coercive not simply whether each legal sanction is coercive or if the law stipulates force as a coercive sanction. Despite the fact that not all sanctions are coercive, the above paradigmatic instances of legal force suggest that all sanctions are backed by coercive force. Thus, Oberdiek's point that many of the sanctions of a mature legal system do not rise to the level of coercion is inapposite.¹⁶⁶ Finally, his point that legal sanctions may be a pragmatic necessity insufficiently addresses the role of coercion in individuating the law as a unique normative system.¹⁶⁷

It is clear that people, by and large, experience the law as coercive on two levels. First, the law imposes pressure that often makes a course of action unreasonably costly.¹⁶⁸ Thus, the law is coercive by raising the cost of prohibited behavior to prevent it. Second, the law, unlike other normative systems, claims the right to coercively enforce its sanctions. On this level, nearly all people experience the law as coercive. So while it is true that a minor sanction, infrequently enforced, may not deter the sanctioned behavior, it is clear that when that sanction is levied, the state reserves the right to compel compliance. In this situation, both aspects of coercion are used. Most subjects will feel that they must involuntarily comply with any imposed legal sanction, knowing that the cost of noncompliance will continually increase until it overcomes their resistance. The legal regime itself will continue to impose pressure until it coercively overbears the subjects' wills. Those who do not succumb to rational pressure on any level will have sanctions forcibly imposed upon them.

court may threaten costlier sanctions until finally the journalist is put in jail. While the journalist does not succumb to the pressure to reveal her source, the law seemingly exerts coercive pressure. As Berman noted the two sides of normative claims of coercion, we must see these two sides to understand coercion in the law.

165. Hart distinguished between exploring the law as a legal system and laws as individual legal norms. See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 600–01 (1958); see also MICHAEL S. MOORE, *Law as a Functional Kind, in EDUCATING ONESELF IN PUBLIC: CRITICAL ESSAYS IN JURISPRUDENCE* 294, 299 (2000).

166. See Oberdiek, *supra* note 4, at 89.

167. *Id.*

168. While the legally imposed cost does not stop some people, those people commit crimes *despite* the fact that the cost has often been made unreasonable. This also illustrates the distinction between the pressure and success notions of coercion and demonstrates that coercion need not always be a success concept.

Oberdiek's core objection to defining the law as coercive is that it ignores the profound ways in which the law is a moral good; law has the capacity to be deeply liberating.¹⁶⁹ While Oberdiek is unquestionably correct, the moral goods the law secures do not erase its coercive nature. Rather, it justifies law's coercion and explains its value and near universality in human society. Indeed Immanuel Kant points out that the use of coercion to restrict unjust actions may be authorized by the moral principles that render the restricted action unjust.¹⁷⁰ Kant realizes that the critical burden of the law is the just use of coercion; the law must continuously justify its coercive force.¹⁷¹ The obligations imposed by just law and the moral authorization to coercively impose these obligations cannot be separated—their unity is required by justice.¹⁷² Regardless of whether one signs on for Kant's full model, it points out that even where legal coercion is justified, where it is liberating, we can still recognize that the law is coercive. The liberation the law secures does not mean that the law should not be recognized as coercive. Rather, it explains why this terrifically important coercive institution is often justified. Moreover, recognizing that the law is coercive can draw our attention to this very point: the law must be vigilantly regarded and justified.

VI. COERCION IN LEGAL NORMATIVITY

The previous sections address objections to the common intuition that the law is coercive. That all sanctions are not coercive does not mean that the law is not coercive. Indeed, the concepts of sanctions and coercion are separable. Further, the fact that the law may threaten to compel behavior without threatening a rights violation does not mean such compulsion is not coercive.

169. Oberdiek argues that:

Nothing can be necessarily, universally, or by nature coercive which has within it the capacity to be as profoundly *liberating* as law. Even in the worst legal systems of the most oppressive governments, the liberating potential of law is never wholly suppressed. And in the better systems of tolerable or good governments, the liberating effects of law are immense. At its best, law not only protects its subjects from harm, but it augments their natural powers many times.

Oberdiek, *supra* note 4, at 92.

170. IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 35–36 (J. Ladd trans., Bobbs-Merrill Co. 1965) (1797).

171. *Id.* at 36.

172. See *id.*

Coercion focuses on overbearing a person's will. To that extent, the use of force as an end is a problematic instance of coercion.

Still, no positive case that the law is coercive has been proposed. Why should the law be viewed as coercive? Why must coercion be a conceptual necessity to understand the law? This section will explore why coercion is best seen as conceptually necessary for the law.

Without understanding the role of coercion, one cannot understand the singularity of the law as a system of norms. Coercion individuates the particular normative system, defining the institution known as law. Here I will employ that old jurisprudential construct, the Martian sociologist to reinforce the earlier contention that coercion plays a distinct, conceptual role in the law apart from the law's efficiency, authority, or importance in society. Doing so will also address important critiques of the picture drawn.

Raz has prosecuted important critiques of the idea that the law is coercive. His position in considering the inherent coerciveness of the law has evolved over the years. Raz's earliest incarnations adopted Oberdiek's view that coercion and the law are separable.¹⁷³ Raz's later work abandons this position for a more sophisticated and compelling objection to viewing the law as inherently coercive.¹⁷⁴ While these views recognized that the law and sanctions are separable and that law is a normative system ultimately backed by force, they did not sufficiently denote the law as inherently coercive.¹⁷⁵ Notwithstanding that sometimes Raz explores the belief that coercion is plausibly an inherent part of the law,¹⁷⁶ his prior arguments to the contrary require response.

Raz proposes that the law as a human institution may always be coercive to assure conformity from its subjects;¹⁷⁷ but conceptually, this need not be so. He proposes that even in a community of angels who are unfailingly committed to obeying legal norms, differing conceptions of good, self-interest or mere accidents would necessitate institutions to authoritatively resolve dis-

173. See, e.g., JOSEPH RAZ, THE AUTHORITY OF LAW, *supra* note 8, at vi.

174. See generally RAZ, *supra* note 40, at 112.

175. See RAZ, *supra* note 9, at 156–62.

176. See RAZ, *supra* note 40, at 210; RAZ, *supra* note 75, at 44 n.4.

177. See RAZ, *supra* note 75, at 44–45; see also Lamond, *supra* note 3, at 46 & n.33.

putes.¹⁷⁸ In such a community, however, coercion and perhaps sanctions depending on how one characterized civil remedies, would be unnecessary.¹⁷⁹ Thus, coercion, whatever its role in human institutions, is not conceptually necessary in the law.

The rebuttal to Raz's critique lies in which of the two competing pictures constructs a persuasive, or for that matter, identifiable picture of law. Where should one begin in isolating the social system of law? While separating the law from threats or orders, neither isolating normative systems nor focusing on normative systems that claim global authority identifies a unique system. Moral principles and religious doctrine are normative systems that claim global authority. They also claim to authoritatively determine a person's reasons for acting. For example, confronted with the Catholic church's adjudicative institutions, authoritative decrees, and use of sanctions, both worldly and otherwise, can preclude the Martian sociologist from distinguishing between the church and the modern legal system. The difference is the Catholic church cannot, at least in modern liberal states, coercively enforce obedience to its religious norms except by appealing to the law. The church may occasionally be coercive; it may exert decisive economic or social pressure or coercive pressure on those who deem church sanctions as particularly powerful reasons for action. But these exceptions do not erase the differences between the two systems.

This illustrates that while coercion is constitutively necessary in the law, it is not because of the law's effectiveness, importance or authority. Let our visitor travel to a community of highly religious and exemplary persons, a community of saints. The state has promulgated few laws in comparison with modern legal systems, but it does cover the basics of criminal, tort, contract and property law. In this land, although the basic laws may be enforced, they are complied with unthinkingly. They are considered rudimentary in each citizen's quest to obtain great moral achievement. Conflicts that fall outside the rudimentary legal

178. RAZ, *supra* note 9, at 159–60. Lon Fuller shares this intuition. See LON L. FULLER, THE MORALITY OF LAW 55–56 (1964). Yet, this view assumes that angels would be unfailingly dedicated to obeying the law. As Finnis notes, it is not only moral failing which requires coercion. FINNIS, *supra* note 69, at 260–61. “[H]igh minded” and principled opposition may cause some to disregard legal stipulations. *Id.* Further, there would be other moral reasons to introduce the law. See *id.* at 268–69.

179. See RAZ, *supra* note 9, at 160.

system are taken to the ranking religious official for enlightened settlements. Though these dictates are scrupulously obeyed, they are not coercively supported like the basic norms.

Notice that unlike Hart, who believed coercion was important to guarantee that the interests of the innocent would be protected against those who would violate the law,¹⁸⁰ in the community of saints, the distinctive role coercion plays is not based on efficacy and does not determine, on most accounts, the most important normative system in the society. In this society the most important normative system is clearly the religious system. Yet if we wished to identify the legal system in the community, the normative order that fits our considered notion of the law would be the minimal structure of enforceable norms rather than the richer religious order. To say "religion is the law of the land" is only to speak metaphorically. After all, in many parts of the world, religious doctrine exerts as much or more practical authority in citizens' lives as the civil law. Yet, this practical authority alone cannot differentiate religious edicts from the law. We should not assume that the law must be the most important normative system wherever it exists.¹⁸¹

Let us further examine Raz's jurisprudential testing ground, the community of angels. As opposed to the society of saints, the community of angels has no enforcement mechanism whatsoever. Raz proposes that a community of angels would still require the law, not to coerce members into obedience, but to coordinate among legitimate and well-intentioned differing conceptions of the good.¹⁸² What Raz illustrates is that this community would not need the law per se, but would require a coordinating institution endowed with the power to issue authoritative edicts.¹⁸³ This distinction separates this article's thesis from Raz's view.

180. See HART, *supra* note 5, at 193; see also FINNIS, *supra* note 69, at 262–63 ("Punishment . . . seeks to restore the distributively just balance of advantages between the criminal and the law-abiding, so that . . . no one should actually have been disadvantaged . . . by choosing to remain within the confines of the law.").

181. Raz has noted this inclination. RAZ, *supra* note 70, at 116, 120 ("We would regard an institutionalized system as a legal one only if it is necessarily in some respect the most important institutionalized system which can exist in that society.").

182. RAZ, *supra* note 9, at 159. Similarly, Kant notes that even if men were perfectly good-natured, their competing visions of the good would create instability without an external coordinating and coercive authority. KANT, *supra* note 170, at 76.

183. Andrei Marmor persuasively argues that this position may seriously underestimate the need for a legal system to address coordination problems and solve prisoner's di-

While Raz proposes that the angelic authoritative system could easily be called law, it would be very different from what we conceive of as the law.¹⁸⁴ Problematically, it would be impossible to separate this system from social norms, religious norms, or any other normative system that existed in the community and tugged at any angel. If one (fallen) angel inexplicably decided to disobey those edicts, the inability of any structure to even theoretically compel him to obey would cast serious doubt on the system's claim to be the law. This does not diminish Raz's important point that coercion does not fully explain legal normativity or the law's value.¹⁸⁵ But the claim is not that coercion is sufficient to explain legal normativity, but that coercion is necessary to understand the specifically legal nature of that particular normative system. James Madison proposed that "[i]f men were angels, no government would be necessary."¹⁸⁶ Similarly though authority might still be required in such a perfect society, the law, strictly speaking, would be unnecessary; put another way coercion individuates the law as a system of norms.

Some ground must be conceded to Raz's arguments. It is surely tempting to say that if a community of angels is governed by a system of authoritative norms that are constantly obeyed, there is no reason not to consider theirs a system of laws. Admittedly, it is tricky to argue that coercion should be elevated to the level of conceptual necessity. After all, the law—unlike gold—is a social type, not a natural kind.¹⁸⁷ Thus, society could collectively understand that concept in one way or another. There is little reason why the society of angels, with an authoritative decision-making system, could not conceptualize theirs as a system of laws.

lemma situations and problems of opportunism. See ANDREI MARMOR, *POSITIVE LAW AND OBJECTIVE VALUES* 44 (2001). It is hard to understand if or how angels would be affected by opportunism or prisoner's dilemma problems. *See id.* But if any society must solve prisoner's dilemma problems, coercion becomes important and commands attention. *See id.* Nevertheless, Marmor agrees with Hart and others that coercion would remain a practical or natural, as opposed to a conceptual, necessity. *See id.* at 45.

184. See Lamond, *supra* note 3, at 46 & n.33. In this way, this view benefits from the separation of sanctions and coercion. We can imagine individual laws without attached sanctions, but where a purported legal system cannot ultimately compel obedience, it is improper to consider it a legal system. Not surprisingly, Oberdiek comes to the opposite conclusion. Oberdiek, *supra* note 4, at 92–93.

185. RAZ, *supra* note 9, at 161–62.

186. THE FEDERALIST NO. 51, at 349 (James Madison) (Jacob E. Cooke ed., 1961).

187. MOORE, *supra* note 165, at 310; Lamond, *supra* note 3, at 38; Frederick Schauer, *The Social Construction of the Concept of Law: A Reply to Julie Dickson*, 25 O.J.L.S. 493, 496–97 (2005).

Say the society of saints was transitioning toward becoming the community of angels. In year one, it possesses the minimal police force. That police force, not surprisingly, has little to do. The following year, having noticed the police force sitting around playing cards and such, the appropriate body severely cuts their budget and reduces the force to four people and two (empty) prisons. Another year of no crime and other budget needs results in just one police officer and an old barn in the countryside that can be used as a prison if necessary. In year four, the legislature of the saints makes no budget provision for law enforcement, the officers quietly quit and the old barn is destroyed by natural disaster. By what alchemy does the society become lawless in the fourth year? Some will say that the normative system at any of these points may be properly considered the law.

At first blush, the reply to this objection is purely practical. While it is possible to simply denote this angelic normative system as law^a, it is different from our concept of the law.¹⁸⁸ But to view this as merely a pedestrian concern hides its more significant thrust. This reply shows that law^a is at least some distance from the concept of the law. Adopting law^a as the law would radically alter our concept of the law and replace it with a different concept altogether. Further, this concept would lack distinctiveness or “fine-grained-ness”; it would be impossible to differentiate the law from other normative systems that have competing global and authoritative normative systems.¹⁸⁹ The inability to distinguish law^a from other normative systems also implies that our earlier examples do not merely rely on linguistic intuition.¹⁹⁰ This indicates an embedded claim of conceptual necessity; so long as we ascribe to our recognizable and individuated concept of the

188. This response is rooted in the traditional claim that the goal of jurisprudence is descriptive as opposed to prescriptive. That claim states that we should describe the law as it is, not as it could be. See JULIE DICKSON, EVALUATION AND LEGAL THEORY 43, 89 (John Gardner ed., 2001). Limiting the reply to this critique, however, sells short its claim.

189. See TONY HONORÉ, MAKING LAW BIND: ESSAYS LEGAL AND PHILOSOPHICAL 67–68 (1987); MAX WEBER, ECONOMY AND SOCIETY 34–35 (Guenther Roth & Claus Wittich eds., 1968); Hans Kelsen, *Professor Stone and the Pure Theory of Law*, 17 STAN. L. REV. 1128 (1965) (explaining that basic norms, while giving efficiency to coercive orders, do not specifically give efficiency to the legal order); Lamond, *supra* note 3, at 42–43.

190. See Brian Leiter, *Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence*, 48 AM. J. JURIS. 17, 30–31 (2003). I am grateful to Michael Moore for his thoughts on this issue.

law, coercion is an inherent part of the law,¹⁹¹ not merely necessary to insure compliance.¹⁹²

Conceiving of coercion as conceptually necessary in the law is not simply a definitional stop. Our examples reveal that coercion is one of the critical features for a normative system to be able to claim legal status. Recall two earlier points: First, even though society willingly obeys many normative systems that impose duties above those required by the law, it is the system of coercively enforceable duties that is properly referred to as the legal system. Second, although people often obey the law for separate reasons, the underlying coercion of the legal system independently precludes certain courses of action. This extends to the communities of angels and saints. Even where the law is never violated and a much richer system of norms is constantly observed, the minimal layer of enforceable norms is, upon reflection, best characterized as the law.¹⁹³ In other words, it is not whether a system of norms is simply obeyed but whether it is coercively enforceable that identifies it as the law.¹⁹⁴

Raz's view may raise a different objection. Building on Hart's rule of recognition, Raz's positivist model of the law proposes that a norm qualifies as a legal norm because it emanates from a particular social source.¹⁹⁵ A norm is a law if it is recognized by a socially determined source of authoritative norms.¹⁹⁶ Does this view alter the argument that law must be and is defined by its coerciveness?

No, rather the sources thesis merely pushes back one step the question of where coercion must be located. Consider a society with three different leaders, each claiming to be the appropriate social source of the law. Leader A heads a group of self-appointed persons that occupies a large stone building from which he prom-

191. Because many legal norms are incomplete or reference other legal norms, the coerciveness of a legal norm may depend entirely on other legal norms. Contrary to Kelsen's view, coercion does not individuate *laws*; coercion individuates *the law*. See Lamond, *supra* note 80, at 56.

192. Moore convincingly describes jurisprudential claims of necessity as related to a different necessity claim, a claim of metaphysical necessity. MOORE, *supra* note 165, at 304–05. This article's claim of conceptual necessity need not go as far as Moore's claim.

193. See AUSTIN, *supra* note 1, at 31, 122–25, 133–35.

194. *Id.* at 31.

195. See RAZ, *supra* note 75, at 43–44.

196. *See id.*

ulgates what he claims to be statutory law. Leader B leads a large group that resembles a religion. Leader C has been appointed by the society's ancient traditions to interpret its customs. Peculiarly, all three normative systems are identical; they are in complete agreement with each other. There may be genuine ambiguity about which normative system is the legal one, but there may also be ambiguity regarding which is the appropriate social source of the law.¹⁹⁷ Now imagine that each of the normative systems takes a different position on a question of first impression. Leaders B and C appeal to the population's spiritual beliefs and traditions to require compliance with their pronouncements. Leader A calls out an armed battalion to enforce his edicts. Notice that focusing on the appropriate social source leads to the same conclusion: the social source that can coercively enforce its dictates conceptually fits our notion of the law.¹⁹⁸ Inquiring into the social sources merely relocates the inspection of coercive force.

For the same reasons, other jurisprudential theory markers are also insufficiently fine-grained to select a distinct notion of the law. For example, Hart argues that when a society adopts a "rule of recognition"—a rule about rules—that directs officials to apply and modify the primary rules it is appropriately regarded as establishing a legal system.¹⁹⁹ Yet, for the reasons noted in the examining the sources thesis, the rule of recognition is also insufficiently fine-grained to delineate between the two conceptions of law above. This insufficiency is an important flaw—one that reveals the conceptual necessity of coercion in a description of the law.

One objection Raz raises strikes at the heart of this picture. Raz argues that the claim that coercion is unique to the law may be overstated.²⁰⁰ Other normative systems claim authority and employ coercion to compel members to obey their norms. For example, the Mafia has traditionally done this. The objection is similar to the query concerning the band of robbers who begin taking a normative stance and employ coercion to enforce their

197. For a description of similar ambiguity, see HART, *supra* note 5, at 86–88.

198. To the extent the citizens of the community came to regard Leader C as the supreme source of norms and adopted a normative stance towards it, that stance would come to fill other tenets of a legal system. *See id.* at 106–07.

199. *See id.* at 94–95.

200. *See RAZ*, *supra* note 9, at 149–50.

norms. Yet these examples do not defeat the above picture of the law. When we inspect the Mafia or the band of robbers, is not the heart of our concern that they aspire to compete as legal systems?²⁰¹ Unlike the first robber who simply ordered a person to surrender money, when a robber believes he has a normative right to do so and becomes something of a revolutionary. If a group of such people retreats to a desert, adopts its own norms, and enforces them, does not the group create a new legal system?²⁰² For example, upon arriving on American shores, colonists ignored the laws of the native tribes. Those tribes either did not or could not subdue them. The colonists promulgated their own authoritative norms backed by their own police force. It seems inadequate to characterize the settlers as simply acting illegally on Native American land. It is clear that they constructed a competing legal system.²⁰³ As Kelsen points out, given a stable normative system backed by coercion, a band of robbers begins to represent its own state.²⁰⁴

Recognizing that coercion is a conceptual feature of law yields the resolution necessary to individuate normative systems that are naturally described as the law. Simultaneously, this model clarifies important similarities between systems which can be viewed in accord. The role of coercion in an authoritative normative system illustrates how the Mafia and other gangs are threatening because they aspire to be competing legal systems.

This revelation naturally invites the question of how to treat social norms, which may be seen as authoritative norms. Andrei Marmor insightfully notes that there are many social groups, with accompanying norms, to which we belong without clear consent or willful participation.²⁰⁵ There are even “elaborate conventions determining what is ‘right’ or ‘proper’ dress for certain occasions, and people who deviate from such conventions are harshly criticized.”²⁰⁶ Does the fact that a person finds exclusion from his

201. See RAZ, *supra* note 70, at 118–19.

202. Nozick notes the difficulty of distinguishing between the state’s claim of sole legitimate use of authority and other competing claims. NOZICK, *supra* note 76, at 23–24.

203. A similar description could apply to the separation of the colonial legal system from its genesis of British law. See HART, *supra* note 5, at 116–18.

204. See KELSEN, *supra* note 7, at 47–50.

205. MARMOR, *supra* note 183, at 37. Dworkin makes a similar point in exploring non-consensual associative obligations. RONALD DWORKIN, LAW’S EMPIRE 195–98 (1986).

206. MARMOR, *supra* note 183, at 37.

religious or social group so psychologically terrifying that he feels forced to obey the group's rules make those rules coercive (and coupled with the normativity and authority, law-like)?

This is a difficult question. We have already seen that Austin's claim that social sanctions cannot be regarded as the law because they do not emanate from a political superior is unsatisfying.²⁰⁷ Unlike Marmor, however, understanding that the law is not merely involuntary, but is coercive, reveals a distinction between powerful social norms and the law. The tentative answer is located somewhere in the discussion, promoted by Aristotle, concerning coercion and independent external reasons.²⁰⁸ A person's decision to regard as necessary the esteem of his friends or social peers seems closer to a set of personal reasons from which he may opt out than those reasons that are imposed regardless of his relationship. Simply, a person must, at least in some sense, choose to value the esteem of his friends. Recall Aristotle's distinctions in determining what constitutes coercion²⁰⁹—the desire to be included in a social network is a desire that originates from within.²¹⁰ By contrast, the coercive force the law wields is external and can be imposed on a person aside from whether he holds the law in any particular regard. This lack of an opt-out feature may be critical.

This may be overly simplistic. Perhaps humans are not constitutionally the kind of creatures who can simply turn their backs on their social needs. Even if they could, it is not clear that one can opt out of all socially important constraints; nearly everyone needs something from the society of their fellow man. Thus, the proposed model may clarify that, at a certain point, socially imposed coercion represents the law in some sense. If the violation of an authoritative norm on a desert island results in social banishment, which would lead to certain death, the norm may constitute law, regardless of how else it was described. Alternatively, this may indicate that the proposed model is incomplete; it has been argued that coercion, along with normativity and authority,

207. AUSTIN, *supra* note 1, at 121–24.

208. See *supra* text accompanying notes 116–18.

209. See 2 ARISTOTLE, *Nicomachean Ethics*, in THE COMPLETE WORKS OF ARISTOTLE 1729, 1752–54 (Jonathan Barnes ed., 1984).

210. See *id.* at 1778.

are necessary only to delineate law. This example may indicate why these features are likely insufficient to describe law.²¹¹

Grant Lamond's recent work on the role of coercion in the law strongly resonates with this article's picture of the law. Lamond notes that the law is a system of norms.²¹² Moreover, he points out that the law claims authority to regulate a person's practical reasoning to the exclusion of other norms and does so over the entire range of one's actions; that is the law is globally normative and authoritative.²¹³ Further, Lamond in agreement with this article, proposes that the existence of sanctions, without more, does not render the law coercive,²¹⁴ and the conceptual role of coercion is not restricted to the pragmatic matter of its effectiveness.²¹⁵

Still, Lamond denies that coercion is fundamentally constitutive of the law or individuates the law from other global normative systems.²¹⁶ Rather, he sees coercion as tied to the law's claim of practical authority.²¹⁷ Law claims the right to command a person's practical reasoning and the right to change his normative position.²¹⁸ The law's claim to authority is made outside its coercive ability, but the law further claims the right to enforce its claim to authority.²¹⁹ Thus, on Lamond's view, the claim of authority is a justificatory link to the coercive force of the law.²²⁰ While Lamond believes it is possible to describe the law as coercive because it claims this right,²²¹ this need not be so. He proposes that the coerciveness of the law ultimately depends on whether the threat is realistic.²²² Lamond finally concludes that the unique feature of the law is that it claims this authority over an indeterminate range of reasons; it is a global, authoritative, normative structure.²²³

211. Raz's early attempts to draw such distinctions are helpful, but not fully satisfactory. See RAZ, *supra* note 11, at 150–51; RAZ, *supra* note 9, at 154–62.

212. See Lamond, *supra* note 3, at 50–51.

213. *See id.* at 55.

214. See Lamond, *supra* note 80, at 57.

215. Lamond, *supra* note 3, at 48.

216. *See id.* at 55.

217. *Id.* at 54; Lamond, *supra* note 80, at 39.

218. See Lamond, *supra* note 3, at 54.

219. *See id.* at 55.

220. *Id.*

221. *See id.* at 56.

222. *Id.*

223. *See id.* at 57.

Lamond's justificatory, rather than constitutive, conception of the law results in a more attenuated role of coercion. For example, in dismissing coercion as simply pragmatically necessary in the law, Lamond suggests that the law could authorize coercive enforcement by other social institutions.²²⁴ He points out that other social norms can attach sanctions to legal violations (shame, ostracism, etc.) that independently reinforce legal norms.²²⁵ But Lamond's own claim, that the law can authorize enforcement by other institutions, is stronger. He posits that because the law could outsource its coercive enforcement to private groups or institutions, the law and its coercive enforcement are separable.²²⁶

It is hard to conceptualize Lamond's claim that the law could authorize other forcible measures, such as private violence, to enforce compliance with legal norms without internalizing that force.²²⁷ If the legal violation authorizes coercive force against someone to enforce its sanctions, rather than for immediate repulsion (e.g., self-defense),²²⁸ that authorization and attendant enforcement would be part and parcel of the legal system. If the violation of a legal norm results in the permitted enforcement through coercive force by an organized mob, that group would be, a police force, in a real sense, a police force. Certainly the natural view would consider this a compound enforcement or police system. These norms that claimed authority would be completed by the authorized enforcement or would establish a competing legal system. As previously noted in touching upon the Mafia, where the violation results in coercive force within the system, the precise threat is the rise of a dual legal system.²²⁹ Similarly, where the legal system only authorizes but does not require the use of coercive force to vindicate a legal right, the optional nature of that right does not erase the underlying coercion. Tort law, after all, only grants to an injured party the right to appeal to the law

224. *See id.* at 48, 57.

225. *See id.* at 47.

226. *See id.* at 55–56.

227. *See id.*

228. Private citizens' abilities to "enforce" legal norms in very small circumstances, most notably self-defense, do not undermine this contention. In the case of self-defense the legal enforcement mechanism is meant to be enforced by other legal enforcement mechanisms, such as police protection. In this way, self-defense is supplemental, or complementary, to other legal enforcement.

229. *See KELSEN, supra* note 7, at 47–50.

to enforce a claim, but none doubt that once granted that claim is coercively enforced by the legal system.²³⁰

On the whole, Lamond's explanation is certainly convincing, but it is peculiar to stop where he does, denying that the law is inherently coercive. The conclusion that coercion is linked to the law merely because the law uses its claim of authority to justify coercion seems insufficiently fine-grained to isolate the legal system. Not all global normative systems claim the right to enforce their authoritative demands. For example, many religious norms are viewed as valuable precisely because a person must willingly commit to their normative guidance. The Catholic church explicitly claims that its normative authority extends over certain portions of human moral life, but leaves other realms of its subjects' lives to be regulated by positive law.²³¹ Other normative systems, however, claim the right to enforce their demands. Religious zealots or cultural traditionalists claim that their respective normative systems are global, authoritative and fully justify violence or coercion to enforce their edicts. To the extent those norms are not enforced or enforceable, Lamond's thesis does not provide any way to identify the system of norms that provides legal rights.²³² That a would-be king claims his norms justify coercion without coercive enforcement does not turn those norms into the law.

Finally, the law's authority is not used merely to justify coercion. While other normative systems claim to be justified in using coercion, they simply do not, or cannot, effectively use coercion to enforce this authority. Thus, it is not the justificatory link, but the coercion itself that makes the law distinctive. This is simply a roundabout way of capturing the earlier arguments—coercion is constitutive of the law. Coercion transforms authoritative, global, normative systems and puts them in contention to be legal systems. The law may not be reducible to coercion, but coercion turns certain norms into legal norms.²³³

230. I am grateful to Scott Shapiro for raising this issue.

231. See John Finnis, *Religion and State: Some Main Issues and Sources*, 51 AM. J. JURIS. 107, 120 (2006).

232. Lamond, following Kelsen, may distinguish these unenforced claims on the basis of their effectiveness. See Lamond, *supra* note 3, at 56.

233. Coercion turns these types of norms into candidates for legal norms, though the ultimate judgment may turn on other competing and dominating legal systems.

VII. OF JURISPRUDENCE AND CONCEPTUAL ANALYSIS

The argument that coercion is inherent in the law relies on two interlocking contentions. First, between an authoritative normative system that is obeyed without coercion and one that can be coercively enforced, the coercive system that intuitively matches our considered judgments about the law. Second, without noting that coercion introduces a distinction between the two systems, we lack the conceptual granularity to distinguish two separate concepts. We can no longer discern the law from other normative systems and we lose a distinct concept.

These two arguments depend on premises that are under serious attack in philosophy and jurisprudence. Specifically, Brian Leiter has recently prosecuted the very approach of conceptual analysis in jurisprudence.²³⁴ He builds his arguments on W.V. Quine's attack of the idea that some things are inherently true—analytic truths—as opposed to concepts that are only true in light of contingent facts—synthetic truths.²³⁵ Leiter indict the idea that a person can conduct, without serious explanation, the jurisprudential project of identifying inherent truths about the law.²³⁶

Put much too simply, Quine attacked the distinction between analytic and synthetic truths, arguing that these were based on sociohistoric facts—suppositions held onto with greater or lesser conviction at different historical moments.²³⁷ Leiter further indict the idea that stable intuitions across time and cultures can be used to distinguish these concepts.²³⁸

These are powerful arguments and deserve attention that will have to wait until another day. I mentioned earlier that conceptual analysis would not be deeply defended here, so a few words will have to serve as a place holder. As important as Quine's work has been, it is hardly uncontroversial.²³⁹ But more immediate for

234. See Leiter, *supra* note 190, at 43–44.

235. *Id.* at 44; see W.V. Quine, *Two Dogmas of Empiricism*, 60 PHIL. REV. 20, 34 (1951).

236. See Leiter, *supra* note 190, at 43–44.

237. See Quine, *supra* note 235, at 20.

238. See Leiter, *supra* note 190, at 24–27, 50.

239. Among the powerful rebuttals is Grice and Strawson's argument that undermining the distinction between analyticity and co-extension would in turn undermine the idea that sentences have meaning. See generally PAUL GRICE & P.F. STRAWSON, *In Defense of a Dogma*, in STUDIES IN THE WAY OF WORDS 196 (1989). After all, the reason one believes that there are good and bad translations of one language into another is because we be-

our purposes, it is not clear that this jurisprudential project “depends upon a robust conception of the analytic/synthetic distinction.”²⁴⁰ In particular, it is not claimed that this article’s distinctions are metaphysically true. Because the law is not a natural kind that exists outside of human societies, it is not clear what it would mean for these distinctions to be metaphysically true. Concepts do not turn on every person’s subjective understanding, but neither are they mind independent. This article proceeds on the weaker version of the analytic/synthetic claim, conceptual necessity—certain features are true in light of the role they play in shaping, distinguishing, and explaining concepts we share.²⁴¹ Finally, depending on how much one concedes that these concepts are true because they are shared and distinguishable concepts, it is not clear that there needs to be a great tension between this form of conceptual analysis and Leiter’s naturalism.²⁴²

VIII. COERCION AND THE LEGAL LANDSCAPE

I hope to have painted a simple but compelling picture of the law. The law does not issue orders, but promulgates norms. These norms claim to be authoritative; they present exclusionary reasons for acting. Finally, the law is intrinsically coercive. Without coercion, a normative system cannot be differentiated or understood as the law.

This picture of the law has consequences for recasting the current legal landscape. Notably, it excludes from the law those systems of norms that aspire to legal status but lack coercive enforceability. Much of the distinction drawn here will remain confined to theoretical musings. On rare occasions, however, a legal problem illustrates philosophical questions nicely. One example is in the *Western Sahara* case before the International Court of Justice.²⁴³ The court rendered an advisory opinion regarding whether the precursor to the modern state of Algiers belonged to

lieve that sentences have meanings that can be conveyed more or less correctly. *See id.* at 201.

240. John Oberdiek & Dennis Patterson, *Moral Evaluation and Conceptual Analysis in Jurisprudential Methodology*, in 10 LAW AND PHILOSOPHY: CURRENT LEGAL ISSUES 2007, at 60, 72 (Michael Freeman & Ross Harrison eds., 2007).

241. *See id.* at 74.

242. *See id.* at 75.

243. *Western Sahara*, Advisory Opinion, 1975 I.C.J. 12 (Oct. 16).

any people at the time of Spanish colonization and, if not, whether it had special legal ties with any state at the time.²⁴⁴ The court decided that the organized tribes occupied the territory and had legal ties to the territory through various treaties,²⁴⁵ but the separate opinion of Judge Dillard is most interesting.²⁴⁶ Judge Dillard concurred that the presence of organized tribes was sufficient to establish that the territory was not *terra nullius*, but understood that this was insufficient to establish whether any ties the tribes established were legal ties.²⁴⁷ Deciding that the tribes had created legal ties required determining what special characteristics rendered certain ties properly legal.²⁴⁸

Judge Dillard noted that law must exert some normative pull over its subjects. Moreover, that normative pull must in some sense be felt as authoritative or a “deferential obligation.”²⁴⁹ As Judge Dillard pointed out, although the primary reason for compliance need not be the fear of sanctions, in order to be properly labeled legal more was needed than what was commonly or pervasively felt.²⁵⁰ Thus, Judge Dillard consciously attempted to differentiate legal ties from those “based on religious, cultural, ethnic, linguistic or other factors.”²⁵¹ His test seems imprecise; those other norms are often felt persuasively and regarded with deference, too. Judge Dillard sought and missed that legal norms must also be enforceable, indeed coercively so, to complete his analysis.²⁵²

244. *Id.* at 14.

245. *Id.* at 39.

246. *See id.* at 116 (separate opinion of Judge Dillard).

247. *Id.* at 124.

248. *Id.* at 125.

249. *Id.* (“[T]he evidence must support the view that the inhabitants of the territory had a sense that the wishes of the Sultan or the Emir [the sovereign] (however expressed and by whatever investiture of authority) not only ‘should’ be obeyed out of a feeling of religious affiliation or courtesy, but ‘must’ be obeyed out of a sense of *deferential obligation*. This *sense of obligation* need not be inspired by the fear of sanctions, nevertheless it must exist in the sense of being pervasively felt as part of the way of life of the people. The point is that it is this quality which, at least intellectually, differentiates a tie based on religious, cultural, ethnic, linguistic or other factors from one that is legal.”).

Dillard also correctly rejects the conception that the appropriate test for what is considered a legal test depends on whether the obligation felt is owed to a secular or religious power. *See id.* at 125–26.

250. *See id.* at 125.

251. *Id.*

252. This is not to deny that there are difficulties we miss in the normal case of pin-pointing the transitions in the phenomena of a legal system coming into being, evolving

Depending on the details presented to Judge Dillard—particularly whether the norms he examined could be enforced—the constitutive theory of law proposed here would clarify the normative system at issue as pre-legal or quasi legal. I hasten to add that the cultures here labeled “pre-legal” certainly do not deserve any less respect or have less substantial interests.²⁵³ (Such a view only reflects parochial arrogance.)

This view presents challenges that manifest themselves repeatedly in the legal world. Some international law must be excluded as truly legal. Many international law regimes, to the extent they lack enforceability, are difficult to distinguish from norms that could be proposed by a religious institution, a school, or a person’s group of friends. The players—and certainly the expertise—are different, but the norms remain aspirational. The norms depend on their moral attractiveness for force and are no different from many promulgated normative systems, which do not coercively bind those meant to be its subjects. This is true to the extent that these international legal norms are not enforceable by the legal apparatus of the individual member states. International law certainly qualifies as a legal regime to the extent international law regimes are increasingly binding through the enforcement apparatus of the individual member states.²⁵⁴

IX. CONCLUSIONS IN JURISPRUDENCE AND POLITICAL THEORY

In concluding, let us examine whether we can locate any profit in the preceding effort. What, after all, hangs on a theory of the law that elevates coercion to a conceptual necessity in law? The prior argument produced at least two valuable insights. The constitutive theory of the law creates a thin account of the law, but an account that nonetheless requires certain features for a normative system to be considered the law. Much of jurisprudence has been preoccupied for the last few generations with exploring

and maturing and then decaying and passing away. Cf. HART, *supra* note 5, at 112–13 (discussing private citizens’ internal reasons for obeying the law and external pressures from courts to aid in that obedience).

253. It is parochial arrogance to imagine that only legal relationships define a society or are the primary marker of its worth or advancement.

254. See Ward Ferdinandusse, *Out of the Black-Box? The International Obligation of State Organs*, 29 BROOK. J. INT'L L. 45, 53 (2003) (explaining that there is a growing trend toward international obligations binding member states).

the truth conditions of legal propositions. This debate has, in large part, centered on the tension between the positivist model presented in this article and Dworkin's interpretivist model. Much ink has been spilled on the subject and hoping that one can shed new light on the subject may evidence boundless optimism. Still, defining coercion as an essential feature of the law offers a novel view in this long-running debate.

To appreciate why Dworkin's interpretivist model is so compelling, it is crucial to understand how it differs from the positivist model and why understanding the law as essentially coercive may reveal that Dworkin's model is mistaken. Dworkin's conception of the law is, first and foremost, an integrative model. Under Dworkin's view, one cannot understand the law as determined by a social rule that recognizes an authoritative source of law, or composed of rules moderated by or in competition with principles. Law is, rather, seen as a particular model of morality: legal morality.²⁵⁵ The analogy bears explaining. It would be impossible to suppose that moral reasoning is subject to separate rules, standards and principles. Instead, moral reasoning uses rules because they are believed to stand for propositions about moral truths.²⁵⁶ Moral rules are, however, constantly subject to inspection and justification by the principles upon which they rely. They must be examined in their application to moral conflicts to arrive at the correct view of our moral duties.²⁵⁷

Likewise, legal rules gain their force from the norms embedded in legal values.²⁵⁸ Put simply, Dworkin proposes that the very truth of propositions of law—legal rights and obligations—are derived from a certain type of political-moral reasoning.²⁵⁹ Law, so understood, creates rights and obligations that exist by virtue of the background political rights and morality of every legal system. This background morality includes past legal decisions as well as other attendant political values such as integrity, fairness, equality and liberty. Truth propositions of law are the most morally attractive propositions that correctly determine and weigh all competing political moral reasons determining the ap-

255. Cf. DWORAKIN, *supra* note 54, at 240–58.

256. I am ignoring the sophistications surrounding utilitarianism generally and rule utilitarianism in particular.

257. See DWORAKIN, *supra* note 54, at 57–58.

258. See *id.* at 293.

259. See *id.* at 68, 102–04, 129.

propriate legal rights.²⁶⁰ Thus, Dworkin's conclusion: "[A] principle is a principle of law if it figures in the soundest theory of law that can be provided as a justification for the explicit substantive and institutional rules of the jurisdiction in question."²⁶¹

Dworkin seeks to illustrate how one arrives at true conclusions of law by reasoning about what political morality requires. For Dworkin, this definition of law is criterial. A proposition is law if the proposition is the morally best explanation of all the legal rules, decisions and principles in a legal system. True propositions of law necessarily turn on and are derived from one's political moral rights. Hence, Dworkin's famously misunderstood statement, "Jurisprudence is the general part of adjudication. . . ."²⁶²

At first blush Dworkin's model seems irreconcilably distant from the positivist model. For Dworkin, that legal principles are binding on judges is revealed by examining the role of judicial reasoning in deciding legal cases. The positivist tenet that legal duties exist only by virtue of a recognized social practice—a rule of recognition—Dworkin argues, miscasts the thinking of judges in arriving at a decision concerning legal rights.²⁶³ No judge imagines that where conventionally defined duties run out so too does the law, leaving him free to "trot off" and make his decision according to his own tastes.²⁶⁴ Rather, judges reason from principles

260. *See id.* at 81, 116.

261. *Id.* at 66, 340; *see DWORAKIN, supra* note 205, at 90.

262. DWORAKIN, *supra* note 205, at 90. One clarification is necessary. By proposing that legal rights are "implicit" in background morality, Dworkin does not mean that true propositions of law exist in some metaphysical sense awaiting discovery. *See DWORAKIN, supra* note 54, at 293. Rather, legal rights are derived from political morality. Saying these rights are embedded is merely a metaphorical way of expressing that they derive through the correct determination of political moral reasons. *See id.* at 112–13, 115–17, 293, 326.

If this casting of the Dworkinian thesis is correct, then certain early responses crafted against it fail. They cast the role of legal principles as either vague summaries or "actual" legal rules. *See Raz, supra* note 41, at 825–29. Nor can this picture be reduced to a hybrid or two-tiered picture of law, where legal rules are first consulted and legal principles serve an adjudicative function when these are indeterminate. *See Joseph Raz, Dworkin: A New Link in the Chain*, 74 CAL. L. REV. 1103, 1107–09 (1986) (reviewing RONALD DWORAKIN, A MATTER OF PRINCIPLE (1995)).

This formulation misses Dworkin's point that principles cannot be treated as though extraneous to the law. Principles instead are part of the law and, in fact, properly weighed, generate legal rights. *See DWORAKIN, supra* note 54, at 24–25, 64–68, 79. It will not suffice to suppose that principles merely summarize legal rules or are applied where they are indeterminate. Of course, these were very early responses and Raz's critiques have grown more sophisticated.

263. *See DWORAKIN, supra* note 54, at 112.

264. *See id.*

of political morality in law to tease out legally binding rights.²⁶⁵ Hence, Dworkin proposes, the principles of political morality are binding law.

Yet the most sophisticated positivist models do not deny that moral principles play a role in determining legal rights. For example, while Raz disputes that a legal rule can be valid contingent on its moral virtue as such, he recognizes that moral principles may be incorporated into a legal system by virtue of their social pedigree.²⁶⁶ If a legal rule incorporates a moral virtue such as "fairness" into the conditions of a contract, validity turns on brute facts, not on whether the contract is in "moral fact" fair—but that it is so declared by the appropriate social sources.²⁶⁷

This position does not commit Raz to the view that legal reasoning is an insulated form of reasoning—technical and hermetically sealed reasoning—obeying its own logic.²⁶⁸ This formalist doctrine ignores the fact that on any view conflicting values and goals within the law cannot be settled exclusively by legal rules. The law must supplement legal standards with other reasons.²⁶⁹ When this occurs, judges are directed by the law to engage in the best moral reasoning they can. This does not mean these moral precepts are part of the law, for the law may bind judges to apply reasons that fall outside the body of the law itself. It does mean that, in any positivist conception, applying legal rights brings the law into contact with morality.²⁷⁰ Further, for Raz, the moral benefits of maintaining the law's authoritative ability provide the

265. See *id.* at 117.

266. See RAZ, *supra* note 40, at 213–15, 234.

267. See *id.* at 231, 234. Raz's view of the role of principles in the law is driven by his conceptualization of law as authoritative. The function of law is to mediate between people and their reasons for actions. Law must present to people new reasons that displace the reasons on which they are dependent. If law resorted to pure moral argument, it would be unable to generate new reasons, which would send people back to their dependent reasons for acting. Note that Raz's view does not depend on the contention that moral reasons are more controversial than non-moral reasons. Rather, it rests on the conceptual claim that placing validity on underlying moral reasons simply does not report any new reasons for acting.

268. JOSEPH RAZ, *The Obligation to Obey: Revision and Tradition*, in ETHICS IN THE PUBLIC DOMAIN, *supra* note 40, at 325, 330–34.

269. See *id.* at 331 (explaining three situations in which individuals feel obligated to obey laws based on non-legal reasons).

270. This is often ignored due to misunderstanding the implications of the "separation thesis." See H.L.A. HART, *Positivism and the Separation of Law and Morals*, in ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 49, 57 (1983).

justification for separating the reasoning of the courts from direct moral reasoning.

While philosophical differences are sometimes of importance and often of interest, it is striking to note how close these models become when they are fleshed out.²⁷¹ Dworkin objects to the positivist's tenets on the grounds that, without admitting that political moral principles are a part of the law, the rights of claimants are "out of court" and must rely on the judge's discretion. Yet in the Razian model, judges are equally bound by law to determine legal rights through sound moral reasoning. The difference between judges being bound by the law to delineate legal rights and those rights being a part of the law seems ever slighter.²⁷²

While the positivist model Raz and others proposed preserves some distinction from Dworkin's, a model that highlights the role of coercion brings this distinction into starker relief. Recognizing coercion as an inherent part of the law reveals how Dworkin's insistence that legal principles are binding may force us to speak in peculiar ways. Imagine a legal system where we know the principles of legality forbid the death penalty. Suddenly and inexplicably, a law is passed that authorizes it. The law is recognized and, critically for my thesis, enforced. Here, Dworkin's model forces us not only to say that the condemned person's rights are being violated but the law itself is invalid, that the police and other agen-

271. See Michael S. Moore, *Four Reflections on Law and Morality*, 48 WM. & MARY L. REV. 1523, 1529 (2007).

272. Perhaps it is best to examine a fundamental objection underlying the positivist's position that remains even after finding a place for political moral principles in the law, and contrast it with the Dworkinian model. One must not be confused and think that the inclusion of political morality in the law secures a moral outcome. Under either model, even if the judge reasons perfectly to deduce the legal rights within a jurisdiction, those rights still may not reach a moral ideal (indeed, they may be immoral), even in systems that fall well short of being "wicked" systems of law. As Hart reminds us,

It does not follow that, because . . . a decision [is] intelligently reached by reference to some conception of what ought to be, we have a junction of law and morals. We must . . . beware of thinking in a too simple-minded fashion about the word "ought" . . . The word "ought" merely reflects the presence of some standard of criticism; one of these standards is a moral standard, but not all standards are moral.

HART, *supra* note 270, at 69. The background morality of a jurisdiction may be far from our reflective moral standards, and deciding cases by their standards may remain offensive to our total sensibilities—after all, even wicked games have rules by which one must delineate the "rights" of the game. It is the need to maintain our critical moral view of the law, though acknowledged by all, that the positivist is keen to bring to the fore. *See id.* at 72–75; *see also* DWORKIN, *supra* note 54, at 352; Dworkin, *supra* note 205, at 79. *See generally* Jeremy Waldron, *All We Like Sheep*, 12 CAN. J. L. & JUR. 169 (1999).

cies are acting illegally. When taken literally it does seem odd. Is it not more accurate to describe the circumstances as due to an odious law? Here, recognizing that the law is the normative system that claims authority and is being coercively enforced gives a clearer account of the prevailing legal system. Dworkin's model would hold that such legislation would (at least until such time had passed that the political morality had conformed itself) be in contradiction with the law. Dworkin has gone so far as to pronounce that such propositions are nonsensical, for they would entail holding that the values of legality prohibited something while the law allowed it.

Dworkin's model, however, is not an incoherent way of speaking. We recognize, in certain cases, that our political-legal rights have been violated. Indeed, such rhetoric is often used to capture the depth of our outrage. These pronouncements are frequently bolstered by a particular reading of a supervening legal standard—for instance, the Constitution or the Bill of Rights—but may also be made when one pronounces recognized law invalid in light of precepts of political morality. Yet sometimes, when we ask after the law, we wish to know the true propositions that are authoritatively binding on social institutions before we ask about the value they possess or embody. Hart points out that this is one of the most powerful tools the positivist account gives us. Dworkin himself has recognized that even when we speak of thoroughly normative values we sometimes inquire after a largely value-free account, which he refers to as the "flat sense" of a value.²⁷³ To do so we must sometimes be ready to say not that something is not a law, but that it is a bad law. This challenge is strongest exactly where the positivist makes his stand: where a law violates our prior precepts of political morality.²⁷⁴

273. See RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 125–26 (2000).

274. Further, though this thesis makes a claim that some level of understanding of law must be objective, the thin theory proposed here takes no further position on whether law can be wholly understood without a meta-moral analysis. Moreover, one may be interested in pre-legal and quasi-legal systems that fall short of the constitutive theory proposed here, for they, too, play important roles in human society. Additionally, legal philosophy gives us rich and varied ways of understanding the function of law. In this respect, everything from Marxist theory and current Critical theory, to Oberdiek's valuable observation that in many respects, law allows one to organize constructively his life, constitutes the splendid battleground of philosophy. Again, this article does not attempt to instruct us on how to view the many different ways of understanding the functions of law. It does, however, insist on a particular understanding on what fully counts as law.

Certainly philosophical clarity is valuable unto itself. The law is an important human institution and thus we are properly driven to further clarify its inherent features. But a model of law that highlights the law's inherently coercive nature offers us much besides philosophical clarity. Indeed, highlighting the law's coerciveness makes vivid once again why the analytical jurisprudence question of what constitutes law matters so greatly. Coercion is a concept that engages our moral faculties in a variety of ways. Even between those who argue that law is or is not intrinsically coercive, one common thing is clear: coercion demands a justification of the coercive act itself.²⁷⁵ Indeed, some view the justification of the law's coercive nature as the fundamental motivation of legal philosophy.²⁷⁶

Because coercion attempts to eliminate some portion of a person's options or liberties, it often appears as a *prima facie* evil. Moreover, quite apart from the value of the option eliminated (for that may be trivial) coercion demands justification because of the way that it treats people. Coercing someone invades his autonomy, attempting to decide for him how he may or may not act.

Thus, the law's inherent coercion places law under a unique moral burden—a burden of justification that is distinct from the burden of justification that rests with other normative systems. Whereas it may be no small feat to establish a robust justification for the normative system of a particular church because that system is voluntary (to a much larger extent than law), the requirement for justification is decidedly different than that for the law. The law must be justified in a way that other normative systems may not be. Further, the fact that the law's coercion is involuntarily imposed on an entire community—one whose members may hold vastly different conceptions of fundamental principles—limits the type of justificatory reasons to which the law must conform. The underlying recognition of this involuntary imposition may motivate liberal scholars to demand that reasons grounding legal force be accessible to all reasonable persons—that they be based in public reasons.

Ultimately, the moral requirement of justifying the law's coerciveness—its restriction on the type of reasons that may properly

275. See Edmundson, *supra* note 97, at 87–88, 90–91; Lamond, *supra* note 80, at 40; Oberdiek, *supra* note 4, at 80–81.

276. See DWORKIN, *supra* note 205, at 93.

justify the law—is linked to nothing less than the need to justify a full-fleshed political theory. And while I cannot begin here to sketch a viably justified political theory, highlighting the coerciveness of law lets us know the boundaries such a justification must respect and the burden it must carry. If coercion is built into the very nature of law, then so is the need for justification. More important because law's coercive nature differs from other relationships that may compel or restrain one's actions—for instance, personal and communal relationships—law must be justified in unique ways. Understanding law as coercive, then, may show that these important restrictions on reasons that can be used to justify legal force may be built into the very nature of law. It is no trivial proposition to imagine that a legal system by its nature must conform to certain (liberal?) reasons to be justified.

This does not imply that coercion cannot be justified or that it even should be seen as antithetical to power being used justly. Kant and many others have noted that coercion may be used—indeed may be necessary—as a tool of justice in securing the greatest amount of reciprocal freedom for all.²⁷⁷ Still, just as Oberdiek hoped to highlight the liberating features of law by questioning whether it must always be coercive, by bringing coercion to the fore of our concept of law we remind ourselves of the dangerous power of law. The law claims to be the supreme normative system in our practical reasoning. This claim must be vigilantly challenged and, in light of the coerciveness of law, continuously justified.

277. See, e.g., KANT, *supra* note 170, at 35–36.
