THE NATURE OF LAW AND POTENTIAL COERCION

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By KARA M. WOODBURY-SMITH, B.A., M.A.

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AUTHOR: Kara M. Woodbury-Smith, B.A. (Hobart and William Smith Colleges), M.A. (King's College, London)

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Lay Abstract

This thesis explores the relationship between law and coercion. By 'coercion', I mean the way in which the law forces compliance with its prohibitions and requirements through the institutionalisation of sanctions (e.g., fines or prison sentences). A debate concerning the relationship between law and coercion has been present in jurisprudential literature for decades. Those who claim that that coercion is a conceptually necessary feature of law are essentially claiming that the existence of law is, in part, determined by the presence of coercive mechanisms. In this thesis I explain why such claims are erroneous. I then defend my own understanding of the relationship between law and coercion. I argue that it would be incorrect to call *y* 'law' if *y* is not coercion-*apt*. I explain what it means to say, 'law is coercion-apt' by distinguishing law from other normative systems like morality, religion, and voluntary associations and clubs.

Abstract

This thesis argues for a novel understanding of the relationship between law and coercion.

One of the relationships H.L.A. Hart sought to clarify is between law and coercion. In his work, Hart denies that coercion is a conceptually necessary feature of law – denies that the existence of law is in some sense determined by the presence of coercive mechanisms. According to Hart, coercion is *naturally necessary* to our legal practices. We humans need our law to be backed by coercive mechanisms so that it can do what it is supposed to: serve as an authoritative guide for behaviour.

Investigating the relationship between law and coercion not only depends on what one thinks about law, but also what one means by 'coercion.' I define an instance of coercion as a *forced-choice*. I also explain that understanding what it means to say, 'law coerces' is made difficult by the fact that what is coercive for one person may not be coercive for another. This subjective aspect of coercion means that more specific questions need to be asked in order to understand the relationship between law and coercion.

This thesis asks: is there a conceptual relationship between law and the law's institutionalisation and utilisation of coercive mechanisms?

I argue that coercive mechanisms are not a conceptually necessary feature of law. I also argue that Hart's work still leaves the relationship between law and coercion problematically undefined.

Rather, I put forward the claim that law is coercion-apt. I expand this claim by distinguishing law from other normative systems, like morality. Unlike law, morality, I argue, is not coercion-apt. Therefore, this thesis not only refines our understanding of the relationship between law and coercion, but also between law and morality – which is another relationship Hart sought to clarify in his work.

to my little family

with love and gratitude

Declaration of Academic Achievement

I, Kara M. Woodbury-Smith, do hereby declare that this thesis entitled *The Nature of Law and Potential Coercion* is a bona fide record of philosophical research done by me, under the supervision of Professor Wilfrid J Waluchow. It has not been submitted earlier by me for the award of a Degree, Title, or Recognition of any university.

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Philosophy is the most wonderful practice in the world. Law is central to human life. I will forever feel privileged for whatever time I spend as a philosopher and teacher of the Philosophy of Law.

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Introduction

Law coerces.

This is, perhaps, a strikingly banal assertion to most. Yet, a debate concerning law and its relationship to coercion has been present in jurisprudential literature for decades. Of course, *that* law coerces is not the focus of analysis but rather whether coercion is a conceptually necessary feature of law. As a crude example, a *cause* is a conceptually necessary feature of an *effect* because an *effect* is necessarily, as a matter of its existence, the product of a *cause*. So, claiming that coercion is a conceptually necessary feature of law is the same as saying that the existence of law is determined, at least in part, by the presence of coercion.

Such a claim, then, not only depends on what one thinks about law and its conceptually necessary features, but also what one means by 'the presence of coercion.' One of the more classic assertions is: It is a conceptual truth that every *legal norm*, R, is coercive such that R includes a coercive sanction for its violation. Another classic explanation is: It is a conceptual truth that every *legal system*, L, is coercive such that it includes coercive sanctions for the violation of some of its rules. Owing primarily to Hart's arguments found within *The Concept of Law*, such classic assertions are generally taken by legal theorists to be erroneous.

The 'Preface' to *The Concept of Law* begins: 'My aim in this book has been to further the understanding of law, coercion, and morality as different but related social

phenomena.'[1] Thus, one of the relationships Hart sought to clarify in his work was between law and coercion. He ultimately determined that they, like law and morality, are conceptually distinct. The relationship between the concept of law and coercion, he argues, is grounded exclusively in natural facts of our world – facts like resource scarcity and the fallible, sometimes selfish, nature of humans. Coercion, according to Hart, is not a conceptually necessary feature of law in general, but a *natural necessity* of *our* legal practices.

Whilst a great deal of the theory following *Concept* questioned, re-analysed, and refined the relationship between law and morality, very little movement happened regarding Hart's conclusions on the relationship between law and coercion. Indeed, in his 25th anniversary article on general jurisprudence, Les Green wrote that the discipline had experienced 'a stasis' when it came to law and its relationship to coercion, writing:

> We have known for half a century […] that there are legal rules that do not coerce and that law has non-coercive functions. That we have moved such little distance from that starting gate is somewhat disappointing.[2]

Since Green's article (but not necessarily because of it), there has been a recent resurgence in 'law and coercion' literature. A majority of it, as this thesis will show, does not build on Hart's conclusions, but rather questions their validity. In particular, questioning if he was mistaken when he denied a conceptual relationship between law and coercion.

The goal of this thesis is two-fold, and seemingly contradictory: I will defend Hart's original arguments wherein he denies a conceptual relationship between law and

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1 HLA Hart, *The Concept of Law* (3rd edn, OUP 2012) vi

2 L Green, 'General Jurisprudence: A 25th Anniversary Essay' [2005] OJLS 575. This is a particularly striking statement because most philosophers rarely claim to 'know' anything with such certainty.

coercion. I then go on to argue that there *is* a conceptual relationship between law and coercion, one that is consistent with Hart's arguments. I am, unsurprisingly, given the previous few paragraphs, writing from the positivist tradition – specifically Hartian. Yet, the arguments in this thesis, at least as they pertain to law and its relationship to coercion, are not dependent on any particular conception of the relationship between law and morality. As such, the arguments in this thesis can be, and I hope will be, accessible and acceptable to advocates of natural law theory[3].

My case for a conceptual relationship between law and coercion, grounded on Hart's theory, will unfold over five chapters. The first chapter is historical. The reason the relationship between law and coercion is of particular concern to positivists is because: if morality does not explain the nature of law, then what? Classical natural law theory is premised on the claim that there is a conceptual relationship between law and morality. Positivism rejects that and, as such, must offer an alternative explanation for what grounds law. John Austin's answer was: not morality, but coercion; law is the command of the sovereign, backed by coercive sanctions. Chapter 1 will explain his arguments for the command theory of law – why it is he thought that coercion (law being backed by sanctions) explained the nature of law. Chapter 1, however, is not just a consideration of Austin's command theory; rather it is a look at the progression of theory on the relationship between law and coercion, starting with Plato and Aquinas, then Austin, Jeremy Bentham, Hans Kelsen, Hart, and, finally, Joseph Raz. It will explain why consensus among legal theorists is that coercion is not a conceptually necessary feature of law.

[3] Or, anti-positivism as some have styled it.

Chapter 2 developed from a concern that we are not 100% certain about what we mean when we say, 'law coerces'. As I wrote at the beginning of this introduction, claiming that there is a conceptual connection between law and coercion entails that one have something to say about what they mean by *coercion*. The historical theories considered in Chapter 1 used 'coercion' as a placeholder for observations that the law can threaten, command, and/or physically bind us. Whilst it is true that law typically has the capacity to do all of those things, they seem to be very different ways on exercising power over someone or something, so how can all of those things be 'coercion'? Thus, in the second chapter, I analyse the literature on coercion, a concept no less philosophically complex than law, and I present my own understanding.

I firstly argue that an instance of coercion is best conceived of as an instance of a forced-choice. I also explain that fully understanding what it means to say 'law is coercive' is made difficult by the fact that coercion has an inherently subjective element to it. What is coercive for one person may not be coercive for another, and so it follows that law may be more or less coercive for some of its subjects than it is for others. Think, for example, of the effect the threat of a fine would have on a poorer person when compared to an affluent person. This subjective aspect of coercion means that legal theory may need to be asking more specific questions if we are to properly understand the relationship between the law and coercion.

One possible line of inquiry is to ask whether there is a conceptually necessary relationship between law, on the one hand, and subjects of the law feeling as though they are coerced into following the law's directives, on the other. However, this does not seem to be the question legal theorists are trying to answer when they investigate the relationship between the nature of law and coercion. Rather, the focus is on the

structure of legal systems, on the coercive mechanisms that are employed by the law, and whether or not *they* are conceptually necessary to the nature of law *qua* legal systems. That is the avenue this thesis will pursue: is there a conceptual relationship between law and the law's intentional utilisation of institutionalised coercive mechanisms in order to motivate compliance with its directives.

Chapters 3 and 4 work in tandem to explain why I reject contemporary works that argue in favour of a conceptual relationship between law and coercion. In Chapter 3 I elaborate more on Raz's contribution to the denial of a conceptual relationship between law and coercion and that of his critics, and in Chapter 4 I elaborate on Hart's work and his critics. Whilst I discuss a variety of pieces across the two chapters, my critical lens is largely focussed on recent pieces by Kenneth Einar Himma. He defends the claim that there is a conceptually necessary relationship between law and the authorisation of Coercive Enforcement Mechanisms (CEMs). He engages in systematic conceptual analysis and is consistent across an assortment of articles and book chapters – meaning there is much to both unpack and respond to. Put simply, my response to Himma is this: if his arguments against the validity of Hart's and Raz's arguments do not stick, if his account of a conceptually necessary connection between law and coercion does not work, then surely it must be time to abandon that particular conclusion.

In Chapter 4, I also explain what I take to be lacking with Hart's natural necessity claim: his work may explain why *we* need coercive sanctions attached to our laws, but it still leaves the relationship between *law* and coercion problematically undefined. It seems strange that despite coercion being a stable feature of every known municipal legal system, the relationship between the two is wholly explainable without

invoking some feature of law. That sense of 'unbelievability' is, I think, behind the resurgence in works dedicated to explaining Hart's and Raz's mistakes regarding the relationship between law and coercion. But, I maintain, none of the contemporary pieces give good enough reason to abandon Hart's and Raz's arguments and do an about-face embrace of a conceptual relationship between law and coercion. This is, as I note, a fairly significant impasse. And so, Chapter 5 is, for want of a better term, my solution: there is a conceptual connection between law and coercion, but not between law and coercion *as such*.

I argue that law is naturally *apt* to include and utilise coercive mechanisms; that it is in the nature of law to be coercion-apt. I explain what I mean by comparing law with other normative systems, positive morality, and ideal morality. Whereas law is coercion-apt, morality is not coercion-apt – there is a particular inappropriateness attached to using coercion in order to motivate compliance with moral norms. If one is to comply with a moral norm, one must understand what makes that norm moral and also comply with the norm solely because *it is what morality demands*. If one is to comply with legal norms, on the other hand, it does not matter what one's motivations are. It may be better for society if people follow the law because of what *legality* demands, but those who follow the law only because they fear negative consequences are still following the law.

This insistence that law is coercion-apt whereas morality is not does not preclude a natural law theorist from accepting my claims. They acknowledge (like Aquinas) a distinction between moral truth and what is posited. It is perfectly consistent with natural law theory to claim that in order for a moral norm to be backed by coercive mechanisms, it must first be posited in a legal system. Coercion-aptness is

the best way forward for legal theory where the puzzle of law's relationship to coercion is concerned not only because it confirms the conceptual separability of law and coercion, but because it acknowledges that law, independently of human nature, has an innate capacity to *be* coercive – thus quelling the concerns of those who find fault with Hart's and Raz's arguments.

1

The State of Play

I Introduction

For nearly a half of a century, the relationship between law and coercion was presumed to be a settled matter with consensus being that there is no conceptually necessary connection between law and coercion. H.L.A. Hart's writings on the nature of law in the 1960's and 70's supplanted the once prominent position of Conceptual Necessity Claims (so-called by the present work and, henceforth, CNC), which claim that coercion is an essential part of law's nature. In its place, Hart constructed what the present work calls Natural Necessity Claims (henceforth, NNC). NNC denies CNC, denies that there is a conceptual relationship between law and coercion. NNC furthermore claims that, 'given the setting of natural facts [of the world] and aims [of law], which make [coercive] sanctions both possible and necessary in a municipal system,' coercion is simply *naturally necessary* for a well-functioning legal system.[1] NNC remained a relatively unchallenged jurisprudential position until about a decade ago when scholars like Ekow Yankah, Frederick Schauer, and Kenneth Einar Himma began reinvestigating the relationship between law and coercion, questioning the validity of NNC in the process.[2]

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1 HLA Hart *The Concept of Law* (3rd edn, OUP 2012) 199

2 See: E Yankah 'The Force of Law: The Role of Coercion in Legal Norms' [2008] *University of Richmond Law Review* 1195; F Schauer 'Was Austin Right after All?: On the Role of Sanctions in a Theory of Law' [2010] *Ratio Juris* 1; F Schauer 'Positivism Before Hart' [2011] *Canadian Journal of Law and Jurisprudence* 455; F Schauer *The Force of Law* (HUP 2015); K E Himma 'A Comprehensive Hartian Theory of Legal Obligation: Social Pressure, Coercive Enforcement, and the Legal Obligations of Citizens' W J Waluchow and S Sciaraffa (eds) *Philosophical Foundations of the Nature of Law* (OUP 2013);

Before analysing contemporary critiques of Hart's work, this thesis is going to look back. Understanding the diachronic development of theory not only helps to provide context for contemporary theory, but also to illuminate a path forward. As such, this first chapter will highlight significant theoretical contributions to the analysis of the relationship between law and coercion with brief looks at selected readings by Plato, St. Thomas Aquinas, John Austin, and Hans Kelsen. More sustained attention will be paid to the theories of Jeremy Bentham and Hart. The chapter will conclude with an introduction to Joseph Raz's 'Society of Angels' thought experiment, which is typically taken to be the final nail in the coffin for CNC.

The objective of this chapter is to provide the background necessary to analyse the contemporary debates in Chapters 3 and 4. It will also highlight the cyclical nature of theory devoted to the relationship between law and coercion: since antiquity, this chapter will demonstrate, legal and political theory have moved from a presumption in favour of theories resembling NNC, to assertions of CNC (Austin and Kelsen), to denying CNC (Hart and Raz), and back to CNC currently re-gaining traction and support in the literature. Calling attention to such theoretical wavering stresses the need for a novel conceptual framework, one which seeks to reconcile the positive features both theories possess, like the one to be presented in the final chapter of this thesis.

and K E Himma 'The Authorization of Coercive Enforcement Mechanisms as a Conceptually Necessary Feature of Law' [2016] *Jurisprudence* 595

II Plato and St. Thomas Aquinas

While commonly regarded as works of political theory and theology respectively, Plato's *The Laws*, and St. Thomas Aquinas' *Summa Theologica* provide some of the earliest writings on the relationship between law and coercion. In *The Laws*, Plato's protagonist, The Athenian, asserts that a criminal code, with its corresponding coercive sanctions, is a necessary addendum to a legal code so that the state may better persuade its citizens to obey the law.[3] St. Thomas Aquinas' theory of law in *Summa Theologica* makes explicit distinctions among different types of law, with coercion taken to be necessary for 'Human Law,' as the threat of sanction is a way to enforce compliance. While neither theorist explicitly wrangles with the question of how coercion factors into a theory of law (e.g., as conceptually necessary or not), both works seem to represent the earliest presentations of NNC.

II.i *Plato*

The Laws is Plato's final dialogue in political theory, within which he describes the legal code of the utopian state, Magnesia. In staggering – indeed, sometimes pedantic – detail, the protagonist, known only as the Athenian, outlines not only a criminal code for Magnesia, but also: how the state ought to be populated, how the citizens ought to be educated, the best laws to guide its agricultural economy, laws pertaining to marriage, even laws regarding, 'The Right use of Leisure.'[4]

Within the breadth of Plato's political theory, *The Laws* represents an interesting shift from his earlier dialogues *Republic* and *Statesman*. In *Republic* Plato

[3] Plato *The Laws* (T J Saunders trs, Penguin 2004)
[4] Ibid 803a-804c

describes the utopian state Kallipolis, which is ruled by philosopher kings and queens, also called Perfect Guardians.[5] The guardians are rigorously trained in moral philosophy and, as such, guide the state and its citizenry by applying whatever moral standards they have reasoned to be the most just. The upshot of having 'Perfect Guardians' lead a state with absolute power and discretion is that Kallipolis does not adhere to anything resembling the 'Rule of Law'. Broadly construed, adhering to the 'Rule of Law' means that no one person in a state is above the law. Therefore, not only ought everyone adhere to the law, but no person(s) ought have the ability to arbitrarily change the law or its application. Adhering to Rule of Law principles is meant to safeguard nation states from becoming tyrannies or autocracies where those in control legislate and adjudicate in accordance with their own will and desires. The utopian society of Kallipolis, so the story goes, does not need to adhere to the Rule of Law as the Perfect Guardians can be trusted to legislate and adjudicate in accordance with their reasoning for the good of the state and its citizens.

In *Statesman*, Plato's protagonist, The Visitor, describes the utopian ruler as one who possesses a special type of practical political knowledge *in addition to* the moral training exclusively required of Kallipolis' Perfect Guardians.[6] This 'Statesman', owing to their excellent political knowledge, would be the ideal ruler, one who would rule most justly with regard only for what is best for their citizens; it would therefore be wrong, according to the Visitor, to limit a true Statesman with something like the Rule of Law. This is not to say that the nation-state run by a Statesmen lacks a legal code – rather, according to the Visitor, the presence of a written legal code is simply irrelevant

5 Plato *The Republic* C D C. Reeve (ed) (G M A Grube trs, Hackett Publishing 1992)
6 Plato *Statesman* J Annas and R Waterfield (eds) (R. Waterfield trs, CUP 1995)

when it comes to determining what features constitute the perfect ruler, e.g., the Statesman.[7] 'Legislation,' claims the Visitor, 'can never issue perfect instructions which precisely encompass everyone's best interests and guarantee fair play for everyone at once.'[8] Thus, something like adherence to the Rule of Law, while not the best principle of rule for a city state, is necessary only when an expert statesman is not available to lead with absolute discretion.[9] The idea is that the laws are rules for citizens, and the content of the law ought to be up to the Statesman's discretion alone. So long as the Statesman acted from their true knowledge, and for the sake of the good of the subjects, it would not matter whether they ruled on the basis of written law or not.

Kallipolis and the state governed by a Statesman remain, for Plato, ideals of the best state, one where the leaders are virtuous enough to rule without a legal code and not be corrupted into tyranny. However, in contrast to *Republic* and *Statesman*, *The Laws* dedicates its analysis to the development of the best possible legal code. Gone are the ideals of a state ruled by philosophers or Statesmen who would guide the state with perfect moral and political prowess. *The Laws* outlines what the Athenian calls, 'the second-best state', one where rule by individuals is abandoned for Rule of Law.[10]

For Plato, a state ought to exist for the good of its citizens. It should be economically stable and secure from would-be invasions, but it *also* ought to be constructed in such a way that it cultivates virtue in its citizens. The Athenian, then, pays close attention to those laws that establish the state (such as those that prescribe

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[7] 'And by any standard of what constitutes correctness [e.g., excellence of rule], there's absolutely no need for us to take into consideration whether they [Statesmen] rule with or without a legal code…' (Ibid 293d)

[8] Ibid 294a-b

[9] 'And that is why, when laws and statues *have* been established…, the second-best course is to prevent any individual or any body of people from ever infringing them in the slightest.' (Ibid 300c)

[10] Ibid (n 3) 739e

the duties of Magnesia's officials), those that set up the general structure of government, *and* those that guide the educational system. The goal of establishing such laws, according to the Athenian, is that they work to supply the state with perfectly virtuous citizens, rendering laws that regulate conduct, e.g., a criminal code, unnecessary.

Of particular interest is the Athenian's insistence that the legislators of Magnesia should justify their laws to Magnesia's citizens by adhering to a 'double method,' which is the ideal structure of an instance of law whereby each rule ought to be preceded by a preamble.[11] It is not enough, according to the Athenian, for a legal code to merely tell its subjects how to act. A legal code should also educate it subjects as to the point of its rules. It is only through educating the citizens about the law that the legal code can contribute to the overall virtue of Magnesia and its citizens. The 'double method' serves to persuade citizens to follow the law by explaining the point of the law, or why it is that following such a law will add to the virtue of the citizens.

The Athenian, however, takes care to stress to his interlocutors that, 'we are human beings, legislating in the world today for the children of humankind.'[12] He goes on to point out that there is no guarantee that a citizen, 'will [not] turn out to be, so to speak, a "tough egg"… powerful as our [so-called establishing] laws are, they may not be able to tame such people.'[13] It is for this prudential reason that the Athenian suggests Magnesia should incorporate a criminal code made up of both laws and corresponding legal penalties.

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[11] Ibid 720e
[12] Ibid 853c
[13] Ibid 853d

The criminal law itself, then, issues the rule *and also* a corresponding penalty, which is meant to function as both a deterrent and a punishment. Consider, for example, the Athenian's proposed law prohibiting robbery from temples. His suggested preamble begins: 'My dear fellow, this evil impulse that at present drives you to go robbing from temples comes from a source that is neither human nor divine.'[14] The law goes on to claim that if one is seduced by such evil impulses and cannot turn away, 'then you should look upon death as the preferable alternative, and be quit of life.'[15]

The corresponding penalty for such an offense varies if the perpetrator is a foreigner, a slave, or a citizen. For the foreigner or slave, the person is to be whipped, branded, and cast out of Magnesia; the citizen, however, is to be put to death.[16] The citizen, unlike the foreigner or slave, would have been educated within Magnesia's educational system, which is developed specifically to inculcate citizens with knowledge and virtue. The individual who passes through such an educational system and still goes on to steal from temples, according to the Athenian, is 'beyond cure' and, as such, death is the only suitable sentence.[17]

How does Plato's framework fit into the contemporary debate on the relationship between law and coercion? An attempt to argue that *The Laws* provides an early CNC framework resting on the observation that coercive penalties are described as a necessary feature of the legal code would fail as CNC does not adequately capture the role the criminal code plays in Magnesia's legal system. Firstly, it is important to

14 Ibid 854b
15 Ibid 854c
16 Ibid 854d-e
17 Ibid 854e

note that sanctions are a supplement, and not conceived of as part of the law itself. Also, the Athenian is developing a *utopian* legal code. He is not determining what constitutes a legal code, or a legal code's conceptually necessary elements. So, it is not the case that without a criminal code Magnesia would fail to have a legal code. Rather, the criminal code is included so that Magnesia can have the best possible legal code. To repeat, Magnesia is a state for humans that must, '[legislate] in the world today for the children of humankind.'[18] The criminal code, and its corresponding coercive punishments, can only properly be said to be *naturally necessary* elements of Magnesia's legal code.

II.ii *St. Thomas Aquinas*

St. Thomas Aquinas writes in *Summa Theologica:* 'the notion of [human] law contains two things: first, that it is a rule of human acts; secondly, that it has coercive power.'[19] Aquinas defines coercive power as the ability of the governor of a city to, 'inflict irreparable punishments such as death and mutilation' in order to ensure maximum compliance with the law.[20] Owing to the definitional power Aquinas gives coercion in relation to human law, it could seem as though his theory represents an early CNC. However, when Aquinas' definition of Human Law is considered within the wider context of his theory of law in general, it becomes clear that, like Plato's *The Laws*, *Summa Theologica* is more properly situated within the NNC class of theories.

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[18] Ibid 853c
[19] T Aquinas *The Summa Theologica of St. Thomas Aquinas* (Burns Oates & Washbourne 1912) I.II Q96 A5
[20] Ibid Q65 A2

Aquinas' theory features a general definition of law that is ontologically prior to Human Law; that is to say, Human Law is simply a specific type of what Aquinas takes law *qua* law to be. His definition of law *in general* is as follows: 'Law is a rule and measure of acts, whereby man is induced to act or is restrained from acting.'[21] Whilst the definition states 'man' is induced to act, Aquinas' general theory of law applies to all beings, rational or not.

To illustrate this, it is helpful to identify the four types of laws he identifies in his typology, and how they relate to one another. The typology is as follows:

1: *Eternal law* can be described as God's rational plan for the universe. It is unconstrained by time (hence eternal) and pertains to all things within the universe. As a result, it includes the laws of physics and planetary motion, of animal instinct, of nature, etc.[22]

2: *Divine laws* are those communicated directly to humans by God; for example, the Ten Commandments or Papal bulls.[23]

3: *Natural law*, perhaps Aquinas' most famous type, is a subset of Eternal Law and governs the behaviour of only rational creatures, including humans. Its laws can be derived via reason alone, are morally perfect, and universal.[24]

4: *Human law* are those bodies of law created by governments – what Aquinas calls, 'laws framed by men' – whose aim, per Aquinas, ought to be as precise an expression of the natural law as possible.[25]

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[21] Ibid Q90, A1
[22] Ibid Q91, A1
[23] Ibid A5
[24] Ibid Q94
[25] Ibid Q95, A1

Eternal law commands all things over all time, including those things not capable of reason. Hence it encompasses the laws of physics, and mathematics. In other words, eternal law is why 2+4=4, why planets follow their orbits, and why the force of an object is equal to its mass multiplied by its rate of acceleration. Eternal law is also what gives every *thing* its end; thus, the lion's instinctual predator behaviour is, according to Aquinas, properly understood as the lion following the precepts of eternal law. Eternal law, however, is not sufficient to guide the conduct of rational beings, such as humans.[26] Thus, the remaining types of laws (Divine, Natural, and Human) are specifically directed towards rational beings. The body of Divine Law are those laws issued to humans directly from God, while Natural Law is the 'rule and measure' of that which is good and evil, which humans can discover by rational thinking.

Whilst the body of the Natural Law is general and universal, Human Laws are always evolving, and are particular to the legal system within which they are promulgated. Human Law, then, is the name Aquinas gives to so-called positive law, or laws that have been promulgated by rulers and governments. In addition to citing its posited origins, Aquinas further claims that Human Law ought to be derived from the Natural Law. The aim of Human Law, then, is not only that it provides practical guidance to its subjects, but also that it reflects the universal moral standards of the Natural Law as closely as is possible. For this reason, Aquinas famously claims those Human Laws that are not derived from the Natural Law, e.g., promulgated laws that would perpetuate inequality among citizens are, 'a perversion of law.'[27]

[26] Ibid Q91, A2
[27] Ibid Q95, A2

Like Plato, Aquinas thought Human Law was an instrument of *training*. He writes: 'man has a natural aptitude for virtue; but the perfection of virtue must be acquired…by means of some kind of training,' which takes the form of moral education or what Aquinas calls, 'the discipline of [human] laws.'[28] As Aquinas interprets human behaviour, there are two general types of individuals: those who are 'inclined to acts of virtue, by their good natural disposition, by custom, or rather by the gift of God,' for whom parental supervision and formal education would be sufficient in their virtue training.[29] There are also those who are, 'found to be depraved, and prone to vice, and not easily amenable to words.'[30] Those individuals, Aquinas claims, ought to be, 'restrained from evil by force and fear, in order that...[they] might be brought to do willingly what hitherto they did from fear, and thus become virtuous… [T]his kind of training, which compels through fear of punishment, is the discipline of [human] laws.'[31] Coercion, then, finds a necessary place in Aquinas' schema at the level of human law as an enforcement mechanism.

In what way is coercion *necessary* according to Aquinas' theory of law? One could be tempted to conclude that, for Aquinas, coercion is a conceptually necessary element of law if one focuses solely on his conception of *Human* Law. Such a conclusion, however, would be inaccurate. Recall Aquinas' *general* definition of law: Law, 'is an ordinance of reason for the common good, made by him who has care about the community, and promulgated.'[32] There is nothing in that definition that implies coercion – necessary or otherwise. It does not make logical sense, for example,

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28 Ibid A1
29 Ibid
30 Ibid
31 Ibid
32 Ibid Q90 A4

to invoke coercion within the concept of Eternal Law; a planet cannot be coerced into following orbit, likewise, a rock cannot be coerced out of falling at the rate of gravity. Similarly, the theories of Divine and Natural Law do not conceptually require an element of coerced obedience. Rather, it is assumed that rational individuals will see the virtue in their dictates and behave as required. Such commands of the Divine and Natural law, in other words, are only capable of being forced onto individuals if they are promulgated into human law.

Could one then argue that coercion is conceptually necessary to Aquinas' theory of Human Law? Again, the answer must be no. Aquinas conceives of Human Law [1] as training for those who do not naturally aim towards virtue, or understand the Natural Law (similar to Plato), and [2] as providing protection for those who comply with Natural and Human Law from those who would not. Thus, NNC offers the best explanation for Aquinas' theory; it is, according to Aquinas' understanding, a natural fact about the world that people who are 'found to be depraved' exist, and, from this, our laws need corresponding coercive measures to address the social challenges such people present.

It is not a stretch to suggest that both Plato and Aquinas would agree that law without integrated coercive mechanisms, conceptually speaking, is still law – and not in any reduced, so-called 'soft law', capacity. Additionally, what these two theoretical glosses highlight is the most difficult Gordian knot this niche area of jurisprudence must untangle: what role does the presumed relationship between the lawmaker and the subject of the law play in how theorists conceive of law? In the works to come, those who ultimately argue in favour of CNC give more theoretical weight to the law as an effective tool for the control of a population: without coercive mechanisms, the

law cannot do what it is meant to do and, therefore, fails to be law. Those who argue in favour of NNC conceive of laws as mandatory norms of conduct, though not necessarily coercive. Coercive mechanisms, according to such a conception, are 'naturally necessary' because humans are fallible and resources are limited, and it is for these reasons that legislators ought to add coercive mechanisms to law.

III Austin

John Austin is most famous for authoring what is taken to be the defining claim of traditional positivism: 'the existence of law is one thing; its merit and demerit another.'[33] Owing to this positivist declaration, Austin must explain what counts as in instance of law *without* reference to morality, or the natural law, an endeavour that gives rise to his command theory of law. Briefly stated, Austin defines law as a species of a command, where the nature of a command is that it conceptually entails the presence of a corresponding sanction, to which Austin ascribes the coercive function of the 'enforcement of obedience.'[34] Austin's theory of law is *the* paradigmatic example of a CNC: in order for there to be a full instance of law, per Austin, there necessarily must be a corresponding coercive sanction.

Austin writes: 'A law, properly so called, may be defined in the following manner… a command which obliges a person or persons.'[35] A command, according to Austin, is an expression of a desire that the commanded party should either act, or refrain from acting, in a certain way. Defining 'command' as the expression of a desire

[33] J Austin, 'The Providence of Jurisprudence Determined' in K C Culver (ed), *Readings in the Philosophy of Law* (2nd edn, Broadview Press 2007) 92
[34] Ibid 83
[35] Ibid 87

can lead to confusion as pleas and requests are also 'expressions of desire'. Austin, thus, distinguishes between requests and commands by claiming that only commands imply sanction and, therefore, commands obligate the receiving party in a way a request cannot: '[I]t is only by the chance of incurring evil that I am *bound* or *obliged* to compliance.'[36]

Put another way, being 'liable to evil,' as Austin describes the threat of sanction, is what gives rise to any duty.[37] Austin also makes a point to assert that the offer of a reward cannot stand in for the threat of a sanction in distinguishing commands from other expressions of desire. Rewards, he writes, can only give rise to, '*motives to comply* with the wishes of others,' as they do not indicate duties on the person being tempted with a reward. The only one to whom we can ascribe a duty is the person offering the reward as that person is under duty to uphold her promise of the reward.[38]

Thus, per Austin, a command has been issued *if and only if* the person making the command is both disposed to, and capable of, sanctioning a subject in the event the command is not satisfied. Simply put, if I tell my child to make her bed, and I do not express the intention to punish if she does not follow through then, per Austin, I have merely expressed a desire for her to make her bed. If I try to get her to make her bed by offering her time to play with her Nintendo upon completion of the task, then, per Austin, I still have not commanded her. Rather, I have made her a promise from

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[36] Ibid 84

[37] Ibid 83

[38] Ibid 84, emphasis added. This assertion is frustratingly lacking in argument; Austin takes for granted that his claims reflect ordinary use of language and, therefore, are entailed. That being said, the distinction between rewards and sanctions is significant when he turns his analysis to the types of laws found within a legal system and how we are to properly identify laws that create rights. This will be addressed in the next section.

which it follows that she can claim against me the right to play her Nintendo once her bed is made. Only if I tell her to make her bed and let her know that she will not be going to the park if she does not make her bed have I, according to Austin, commanded her; and *only then* does she have an obligation to make her bed.

Establishing the distinction between general desires and commands gives rise to another distinction in Austin's theory: between posited laws and rules. Both, he claims, are commands and, as such, both must necessarily give rise to sanctions. Austin must therefore be able to distinguish between laws and rules if he is to properly define what he calls the 'province of jurisprudence.'[39] His solution is quite simple: to focus on *who* issues the command. Rules are general commands and, as such, can be issued by any agent capable of expressing and following through on the intention to inflict a sanction should the rule be disobeyed. Laws, on the other hand, are a type of rule that are issued specifically by a *sovereign*, defined by Austin as the individual, or body of individuals, '[who is] *not* in the habit of obedience to a like superior, [and who] receive[s] *habitual* obedience from the *bulk* of a given society.'[40]

The identification of a law properly so called, according to Austin, rests on two conceptually necessary components: [1] that the rule is issued by a sovereign, and [2] that the rule contains a sanction (otherwise it is not a true command). One may claim that there are clearly examples of laws that do not sanction, such as laws that govern the legislative process, and laws that create rights. However, Austin sets out to define them with reference to his definition of a command. Any law that lacks a corresponding sanction, such as those that govern legislative processes, are called

[39] Ibid 81
[40] Ibid 94

'imperfect' laws; they are still within the province of jurisprudence but they are not laws properly so called.[41] Laws that create rights, according to Austin, are properly interpreted as commands: they command all subjects to respect whatever interest the law seeks to protect and if an individual fails to respect the rights of another, she will be sanctioned.[42] Austin's explanation of customary laws is similarly tethered to whether or not the law has a corresponding coercive sanction. He writes that a customary law is merely a 'rule of conduct' until such a time as it is, 'transmuted into positive law…when the judicial decisions fashioned upon it are enforced by the power of the state [e.g., the sovereign].'[43]

Austin's theory is interesting when compared to Aquinas' because of how narrowly Austin construes law. For Austin, only Aquinas' Human Law is 'law properly so called' as only Human Law is promulgated by a sovereign. Natural law, per Austin, is not 'law properly so-called', because it does not owe its legal validity to being the promulgation of a sovereign – the same can be said of Divine Law. Both Natural and Divine Law can become positive law, and thus exist within the Province of Jurisprudence, but only once a sovereign adopts their commands as her own. Nor would Austin categorize Eternal Law as law properly so called. That objects fall at the constant rate of gravity is an Eternal Law as no object – humans included – can be said to have been *rationally directed* to fall at the rate of gravity, so there is no choice whether to comply, which means there can be no coercion. Austin's theory of law, then, is much more restrictive in what counts as a true instance of law, with peripheral

41 Ibid 89
42 Ibid 90
43 Ibid 91

declarations of the sovereign being labelled 'imperfect' – it is only in this way is Austin able to defend something like CNC.

IV Bentham

There are core similarities between Austin's and Bentham's jurisprudential theories as both identify the sovereign as the ultimate source of law, and both place the command as central to their conception of the structure of laws. These similarities, together with Bentham's oft-quoted statement that a law by which, 'nobody is bound, a law by which nobody is coerced, a law by which nobody's liberty is curtailed, all these phrases which come to the same thing would be so many contradictions in terms,' results in Bentham often being labelled a classical proponent of CNC alongside Austin.[44]

Much of legal theory's ability to properly distinguish between Bentham's and Austin's theories comes from Bentham's work *Of Laws in General*, which, though completed in 1780, was not published until 1945.[45] Of the work Hart writes, 'I think it is clear that, had it been published in [Bentham's] lifetime, it, rather than John Austin's later and obviously derivative work, would have dominated English jurisprudence.'[46] When it comes to the ways in which the two theorists argue their cases, Hart claims that, 'Bentham expounds these ideas [that of the sovereign and of the command] with far greater subtlety and flexibility than Austin and illuminates aspects of law largely

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[44] J Bentham *Of Laws in General* H L A Hart (ed), (The Athlone Press 1970) 54. For a sample of works that equate Bentham's and Austin's command theories see: Schauer (n 2); Himma (n 2); Yankah (n 2); A S Morrison 'Law is the Command of the Sovereign: HLA Hart Reconsidered' [2016] *Ratio Juris* 364; and J D'Agostino 'Law's necessary violence' [2017] *Texas Review of Law & Politics* 121.

[45] J Bentham, *The Limits of Jurisprudence Defined*. Ed. Charles Warren Everett. New York, NY: Columbia University Press, 1945

[46] H L A Hart *Essays on Bentham: Studies in Jurisprudence and Political Theory* (OUP 1982)

neglected by [Austin].'[47] Similarly, David Lyons writes that while Austin and Bentham share some basic assumptions, e.g., that laws are the will of the sovereign, Bentham's theory is, 'more subtle and complex, more interesting, and perhaps more defensible than the view ascribed to Austin.'[48] The subtleties that Hart and Lyons pick out between Austin's and Bentham's command theories of law have one rather significant upshot for the purposes of the present chapter: Bentham's command theory of law does not defend CNC in the same way as Austin's and, furthermore, can be interpreted as an embryonic version of NNC.

Bentham's full definition of law is presented at the outset of *Of Laws in General*:

> A law may be defined as an assemblage of signs declarative of a volition conceived or adopted by the *sovereign* in a state, concerning the conduct to be observed in a certain *case* by a certain person -or class of persons, who in the case in question are -or are supposed to be subject to his power: such volition trusting for its accomplishment to the expectation of certain events which it is intended such declaration should upon occasion be a means of bringing to pass, and the prospect of which it is intended should act as a motive upon those whose conduct is in question.[49]

The first difference one may notice between Bentham's definition and Austin's – aside from general length and the level of detail provided – is that 'sanctions' do not play a definitional role for Bentham. One could claim that Bentham alludes to sanctions when he writes that subjects of the law are *supposed to be subject to [the sovereign's power]*, but that would be too simple an interpretation of Bentham's wider conception of law's force.

For Bentham, the phrase 'the sovereign's power' is understood as the sovereign's power to *enforce* the law. Such power consists not only in the use of

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[47] Ibid 108
[48] D Lyons 'Logic and Coercion in Bentham's Theory of Law' [1972] *Cornell Law Review* 336
[49] Bentham (n 44) 1

sanctions, but *also* in the offering of rewards and the conferral of rights. This is a prime example of the nuanced differences between Bentham's and Austin's theories. Recall that for Austin rewards cannot create obligations and signal a command, only sanctions can. Therefore, only the sanction is a conceptually necessary feature of law. Bentham, however, does not make the same conceptual claim as Austin; rather, Bentham suggests that a legal system could not *function properly* with rewards as the *only* means to motivate compliance and enforce the laws.[50] Bentham's understanding, then, allows for full instances of law that do not have corresponding sanctions. In addition to maintaining that offers of reward can signal commands, Bentham's theory of the force of law also allows for the logical possibility of extra-legal sanctions.[51] Such sanctions can be moral (i.e., being socially shunned) or religious (i.e., being damned to Hell) in nature and, even if they have not been co-opted into a legal system, can have the effect of motivating compliance with the law.[52]

Bentham's conception of the sovereign is also theoretically distinct from Austin's. Like Austin, Bentham claims that the sovereign is the ultimate source of law, so if a mandate is to be considered legal, then it must be, 'referable to the sovereign.'[53] However, Bentham does not conceive of laws as commands alone, but rather as *any* expression of the sovereign's will. Significantly for the present work, Bentham's conception of the sovereign's will does not entail the intent to coerce, as it does for Austin. Bentham writes, the, 'circumstances of sovereignty, and an intention to coerce, though closely connected, are not by any means inseparable.'[54] In order to understand

[50] Ibid 134-5
[51] Ibid 70
[52] Ibid 68-70
[53] Ibid 29
[54] Ibid 298

the grounding for this claim, it is helpful to explain the types of laws Bentham categorizes in *Of Laws in General.*

According to Bentham, there are two main species of law: [1] imperative laws, which impose duties on subjects to either act, or refrain from acting as prescribed by law, and [2] laws of permission, which do not impose duties as an act is neither commanded nor prohibited, but merely allowed. These two species can be further divided into four logical types, as summarized by Lyons: 1, commands *(P* must do *A);* 2, prohibitions *(P* must not do *A);* 3, non-command (*P* need not do *A*); 4, non-prohibition (*P* may do *A*).[55]

Commands impose a duty on individuals owing to their logical form (P *must* do A), same for prohibitions.[56] A command, per Bentham, can signal the sovereign's intention to coerce. However, that *intention* to coerce is not conceptually connected to a command in the same way as it is within Austin's theory. Recall Bentham's claim that sovereignty and coercion, 'though closely connected, are not by any means inseparable.'[57] Unlike Austin, Bentham formally allows for commands that carry the offer of motivating rewards, in addition to those that carry the threat of punishment. Moreover, Bentham acknowledges that motivating factors can even be extra-legal, for example, moral, social, or religious pressures. Thus, the possibility of a conceptual connection between the expression of a sovereign's will and coercion weakens when one accounts for the conceptual possibility that commands can offer rewards instead of being conceptually limited to threats of punishment.[58] As Lyons points out,

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55 Lyons (n 48) 345
56 Bentham (n 44) 58, 294
57 Ibid 298, a
58 Ibid 134-5. Bentham acknowledges that while such laws are rare for a reason, mainly that they are politically impractical, he includes them in his analysis to formally recognise that there are a variety of full instances of laws.

Bentham, 'conceives of the law as a system of social control.'[59] Law, for Bentham, is a motivating force and the threat of sanction is merely one way of many that a subject can be motivated to do as the law prescribes.

Bentham furthermore claims that the connection between the expression of a sovereign's will and coercive intent, 'entirely dissolves' for the second type of law he identifies: laws of permission.[60] Bentham asserts that laws of permission express what the sovereign decides his or her subjects may, or may not, do. The important distinction between permissions and imperative laws, then, is that laws of permission cannot be enforced: because, 'permissive laws…have no restrictive implications, [they] cannot possibly be broken.'[61] For example, consider the Parks Regulation Act of 1872 wherein Parliament established Speakers' Corner in Hyde Park as a national site for public speaking and free speech.[62] The act created a legal permission: anyone who wishes to do so may hold a public meeting or engage in public speaking at Speakers' Corner, without needing written permission. The permission to speak one's mind at Speakers Corner cannot be forced on a person. If, however, use of Speakers' Corner were *imperative* in nature, if it were the sovereign's will that all *must* speak at Speakers' Corner at least once every five years, then it would make sense for such a law to be enforced.[63]

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[59] Lyons (n 48) 357
[60] Bentham (n 44) 298, a
[61] Lyons (n 48) 357
[62] Stated limitations on free speech still apply and the police may intervene if they receive complaints or if the speaker is being particularly disruptive or inciting violence.
[63] Whist Hart's theory will be expanded in the next section, I want here to highlight the similarity between Bentham's laws of permission and Hart's secondary, power-conferring rules. Hart's theory of secondary rules is how he accounts for the legal powers subjects of the law can have, such as the ability to create a will. Power conferring rules do not follow from commands, nor require actions under threat of penalty; rather, they provide the necessary facilities should one *want to* create a will, get married, or move to a new house. The creation of a legal power, per Hart's theory, is not the same as what Bentham claims to be, 'the state granting permission'. For Bentham, legal permissions are

As Lyons suggests, Bentham's theory of law relies on, 'an essential motivational aspect to the law, and this is responsible for the asymmetry between restrictions and permissions.'[64] For Bentham, permissive laws are conceptually on a par with restrictive laws; both are full instances of law, as opposed to one being an 'imperfect' form of the other. Bentham's analysis stresses the point that while imperative laws that have corresponding sanctions are the archetype for an instance of law, they are not the only conceptual possibility. However, this sentiment does not *prima facie* seem reconcilable with Bentham's famous remark that there cannot exist a law by which no one is bound, or coerced.

The unedited sentence reads as follows: 'A law by which nobody is bound, a law by which nobody is coerced, a law by which nobody's liberty is curtailed, all these phrases which come to the same thing would be so many contradictions in terms.'[65] It is found in the fourth chapter of *Of Laws in General* entitled, 'Of the parties which may be affected by a law.' To begin the chapter, Bentham delineates the three ways in which subjects can be affected by a law: [1] being bound, or coerced; [2] being made to suffer; or [3] being favoured (e.g., rewarded).[66] He claims that there is no other way in which a person can be affected by the law and, interestingly, that there must *necessarily* be at least one person being affected by a law, 'in all these three ways.'[67] The classically quoted statement above, then, functions for Bentham as an elaboration of the first way in which a law can affect a person.

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interpreted as the sovereign saying, 'you may if you wish'; for Hart, power conferring rules say, 'if you wish to do, or to bring about, X, then this is how you can *legally* do, or bring about, X.'

64 Lyons (n 48) 357

65 Bentham (n 44) 54

66 Ibid 53

67 Ibid

The second way in which a person can be affected by a law, e.g., being made to suffer, is, according to Bentham, the logical consequence of the first way, e.g., being bound/coerced. This is where he makes another well-known statement, that a law, 'may be a necessary evil… [That] to make a law is to do evil that good may come.'[68] The reason a law causes suffering is that it bounds, or coerces, at least someone, for if no one is bound by a law then, as Bentham points out, that law, 'has no effect.'[69] He is making the point that a law which affects no person is pointless *and* logically impossible. Imagine, for example, a law which required people to exhale after they have inhaled. As it is natural for all to exhale after inhaling, no one *could* be bound by it, and, correspondingly, no one could suffer at its forced compliance. Such a law would affect no person, it would therefore have no effect; thus, such a law, for Bentham, is simply inconceivable due to its absurdity.

During his exposition of what it means for a law to favour a person, Bentham's claim that all laws must affect at least one person in *all these three ways* seems to fall apart. A law, per Bentham, can favour a subject by conferring a specific benefit of either agency or interest, where agency is conferred by a law that allows a person to *do* something, e.g., create a will, and an interest is conferred by a law that protects a person's interest, e.g., one's legally owned property. Bentham further stipulates that such laws may be said to show favour to the community at large, not just to specific individuals.

However, Bentham continues, 'when applied to the party bound [by a law]: coercion, *if it attaches at all* can attach only upon individuals.'[70] Here, Bentham seems to

[68] Ibid 54
[69] Ibid
[70] Ibid 58-59, emphasis added

be doing two things. Firstly, he seems to be rejecting the claim that the law binds or coerces communities at large, instead asserting that when the law binds and coerces it does so upon particular individuals, specifically, would-be law breakers. Second, by adding the phrase *if [coercion] attaches at all*, he has allowed for the possibility that no individual may be coerced by a law that shows favour. Similarly, in explaining how property laws favour the owner of property, Bentham writes: 'the parties bound are all mankind… the parties intentionally exposed to suffer, *none*… the party favoured, [the owner alone].'[71] It seems, then, that Bentham's claim that all laws must affect at least one person in all three ways (being bound/coerced, causing suffering, or showing favour) is simply not reconcilable with his theory of permissive laws. Who, for example, is coerced by the creation of a will? We can, of course, imagine a disgruntled relative written out of her assumed inheritance, but there is no guarantee that there *must* be some person who feels bound or coerced by such laws that merely permit, but do not demand, the creation of a will. Bentham, himself, allows for such a possibility, per his statement above that coercion 'may not attach' to those laws that confer agency on its subjects.

The most charitable way to interpret Bentham's classical phrase, then, is to restrict its application. As Lyons suggests, 'Bentham's claim that all laws are necessarily coercive can be understood as referring *only* to "efficient" laws or restrictions,' e.g., those laws that carry a corresponding sanction.[72] Put it another way, it is not logically possible to discuss permissive laws as though they are commands or restrictions. It goes against the very nature of permissive laws to *be* restrictive, in the same way that it

71 Ibid 60, emphasis added
72 Lyons (n 48) 359

goes against the very nature of a command, in both Austin's and Bentham's theories, to *not* be coercive. So, it seems that what *prima facie* appears to be an inherent contradiction within Bentham's theory law between his classical statement, 'a law by which nobody is coerced…would be [a contradiction],' and what his theory as a whole seems to suggest, can be settled by specifying the application of the quotation in question.[73]

Indeed, Lyons' suggestion that theorists ought to restrict the application of Bentham's classic pronouncement to restrictive laws alone is echoed by Hart in his *Essays on Bentham*. Hart, like Lyons and myself, notes that there is an apparent conflict between Bentham's claim that 'a law by which nobody is coerced' and Bentham's claims about the nature of law. 'However,' Hart writes, 'this appearance of conflict dissolves if account is taken of the fact that in such passages stressing the necessary coercive, sanction-backed character of law, Bentham is using the expression "law" in what he takes to be its *ordinary meaning* from which he departs at other times.'[74] Per Hart, when Bentham writes about the type of law that requires coercive sanctions, he is specifically writing about law as it is used in ordinary language. Conversely, when Bentham writes about *Law*, e.g., what Hart calls, 'his highly technical' sense, the *only* conceptually necessary attributes Bentham ascribes to Law is that it is, 'an act and as aspect of the legislator's (e.g., sovereign's) will.'[75]

It seems, then, that Bentham's classification as an original proponent of CNC cannot stand when his wider theory is considered. The claim that coercion is a conceptually necessary element of law does not apply to his theory of permissive laws

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[73] Bentham (n 44) 54
[74] Hart (n 46) 123
[75] Ibid 124; see also: Bentham (n 44) 93

as it is not conceptually possible for laws of permission to bind or coerce. Nor is the connection between coercion and restrictive, or imperative, law conceptually necessary. In Bentham's own words, their connection is *separable*, owing largely to the inclusion of rewards as a conceptual way in which a sovereign can motivate compliance with the law.

Bentham may assert that a rewards-based legal system would fail, whilst a punishment-based one would thrive; however, this is not a claim that supports CNC. Rather, it supports NNC as the claim that a rewards-based legal system would fail is rooted in the following considerations: punishments are easier to carry out than a rewards-based scheme; rewards need to be individualized in a way punishments do not; sources of pleasure are finite whilst sources of pain are, 'innumerable.'[76] Thus, it is owing to these *natural facts* that Bentham concludes that punishment-based legal system is necessary, just not a conceptually necessary feature of law.

V Kelsen

In *General Theory of Law and State* Hans Kelsen writes:

> The doctrine that coercion is an essential element of law does not refer to the actual behaviour of the individual subjected to the legal order, but to the legal order itself, to the fact that the legal order provides for sanctions and that by this very fact and only by this fact… [law] is distinguished from other social orders.[77]

Like Austin, Kelsen asserts that law is essentially coercive. However, Kelsen's is not a command theory of law. Whereas for Austin and Bentham, the nature of law is reduced to a rule commanded by a sovereign, Kelsen claims we ought to conceive of the law

[76] Bentham (n 44) 135
[77] H Kelsen *General Theory of Law and State* (A Wedberg tr, Russell & Russell 1945) 25

as a unified system – a legal order that provides for sanctions. Laws, writes Kelsen, 'constitute a unity if they have the same basis of validity.'[78] His theory is not reductionist like Austin's, or Bentham's, but rather one that conceives of laws as norms, and the legal order is constituted by norms all the way down.

'Norms all the way' down means that valid legal norms ought to be understood as having been created in accordance with a 'higher', or more authoritative, legal norm. At a certain point the authoritative chain ends, or runs out, so to speak. When this happens, one can only presuppose the most authoritative norm. For example, the chain of authority in the United States runs out at the Constitution, as it confers all law-making power in the United States. The legal validity of the Constitution must be presupposed if it is to have the authority necessary to validate the norms that flow from it. This point at which an authoritative chain 'runs out' is what Kelsen calls the 'basic norm' of a legal system.[79]

So, per Kelsen, the validity of a legal norm is not dependent on that norm being issued by a sovereign, but on its connection to a legal system's 'basic norm.' A further distinction between Kelsen's and Austin's theories is that for Kelsen, the basic *form* of a legal norm is not of a command directed to subjects of the law. Rather, he writes, 'what is commanded can only be the sanction.'[80] Thus, legal norms ought to be conceived of as instructing not the subjects, but the officials of a legal system by directing how they ought to respond when subjects of the law act in a certain way. A legal duty to not steal, then, ought to be interpreted as stipulating which sanctions are

78 H Kelsen 'The Concept of the Legal Order' (S.L. Paulson tr) [1982] *American Journal of Jurisprudence* 64
79 Kelsen (n 77) 110-1
80 Ibid 63

to be applied by officials in the event a theft occurs.[81] For Kelsen, legal orders, by their very nature, imply sanctions and yet this assertion is not in the same vein as Austin's command theory. Rather, for Kelsen the essence of a legal order is that it commands the use of sanctions by officials.

Kelsen's theory makes the further claim that coercion is a *distinguishing* feature of law: '[T]he fact that the legal order provides for sanctions and that by this very fact and only by this fact… [law] is distinguished from other social orders,' such as morality.[82] Thus, this quote from Kelsen's *General Theory* makes the assertion that law is the *only* social order that provides for sanctions. His view in the later work *Pure Theory of Law*, however, is slightly modified. His claim is not that law is the *only* social order that provides for sanctions, but rather that it is the only social order that provides for *coercive* acts in response to breaches of duties. For example, other social orders, such as morality, do provide for sanctions, but they are the type that signal social approval or disapproval for behaviours that either conform or contradict norms. *Only law*, per Kelsen, provides for coercive acts in response to behaviours that contradict legal duties.[83] It is not only that coercion is a constitutive part of our definition of law, as it is for Austin, but also, coercion is how we can identify and distinguish law from other social orders.

VI Hart

In *The Concept of Law*, HLA Hart introduces his theory of law, which rejects CNC. According to Hart, a legal system is the unity of primary and secondary rules.

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[81] Ibid 61
[82] Ibid 25
[83] H Kelsen *The Pure Theory of Law*. (M. Knight tr, University of California Press 1967) 27-28

Broadly construed, primary rules govern conduct through the legislation of prohibitions, permissions and/or obligations, while the secondary rules organize the primary ones. Secondary rules, per Hart, can take many forms depending on the structure of a given legal system; however, there are three fundamental types that all legal systems must have: [1] Rules of adjudication which serve to define the offices of the judiciary in terms of which the rules can be interpreted and instances of their violation determined and dealt with; [2] rules of change that shape the procedure by which existing primary rules may be altered; and [3] rules of recognition, which serve to identify valid rules of a given legal system. Taken together, these fundamental secondary rules replace the role of a sovereign figure to declare laws, as it is the job of the fundamental secondary rules to organize, e.g., validate, modify, nullify, or create, the primary rules.

Hart, therefore, rejects Austin's definition of law as the command of the sovereign that is backed by coercive sanctions. Like Kelsen, Hart theory is grounded in the conception that laws are essentially normative in nature. He, however, rejects Kelsen's claim that the legal system is constituted by its being 'norms all the way down'. Whereas for Kelsen the existence of a legal system rests on the presupposition of a *basic norm*, for Hart, the existence of valid legal norms rests on their connection to the rule of recognition, what Hart calls the, '*ultimate* rule of a [legal] system.'[84] To identify the rule of recognition, one traces a specific primary rule through the processes by which that rule became a valid law of that society. There can be auxiliary rules within a given legal system that validate other rules that are statutory in nature, but they themselves owe their validity to the rule of recognition, which stands on its own and

[84] Hart (n 1) 107

is validated by the internal acceptance and social practices of that system's legal officials. In *The Concept of Law*, Hart famously claims that a simplified version of the rule of recognition in England is, 'whatever the Queen in Parliament enacts is law.'[85] Identifying the rule of recognition within a legal system may not be possible in complex legal systems; the most Hart asserts is that a rule of recognition is necessary for a legal system to exist.

Put another way, the identification of valid legal norms is determined by reference to the rule of recognition that, within a given legal system, relies on being internally recognized and practiced by the officials of a legal system. All of this is to stress the point that, per Hart, a concept of an Austinian sovereign is not a conceptually necessary feature of law, nor is the mere presupposition of a basic norm. Hart also dismisses the Austinian claim that all instances of law properly so-called are in the form of a command. Like Bentham, Hart points out that there are far too many instances of law within legal systems that not only are not coercive but cannot logically *be* coercive. Within Hart's structure, the only rules that can be used coercively by the state are those primary rules that either restrict or obligate conduct – what Bentham called *imperative* laws. However, unlike Bentham, Hart denies that even those restrictive and obligatory primary rules are inherently coercive orders.

Firstly, according to Hart, having a legal obligation is not the same as being *obliged* by a coercive threat. One reason for such an assertion is the question of how predictable punishment is. If, for example, a gunman orders someone to hand over their wallet or he will shoot, and the victim has no reason to doubt he is lying, then they can reasonably predict that if they withhold their wallet, they will get shot. The

[85] Ibid

law, however, does not work in the same predictable fashion; one can speed and not get pulled over, one can get caught for speeding and not get ticketed, one can get ticketed and the fine can be negligible, and so on.

In other words, the claim that one is 'under an obligation' is not logically dependent on the likelihood that one will be sanctioned should one fail to comply with the law's directive. As Hart writes: '[W]e say that [the law punishes] a man *because* he has broken the rule: and not merely that it was probable that [the law] would…punish him.'[86] Thus, it is not the case that primary rules regarding conduct are simply the basis for a *prediction* that punishment will follow non-compliance. Rather, they provide *reasons* which purport to *justify* the application of a sanction in the event of non-compliance.[87] Second, for Hart it does not make sense to claim that coercion is a conceptually necessary feature of law because, '[w]e can, in a sense, subtract the sanction and still leave an intelligible standard of behaviour which [the primary rule] was designed to maintain.'[88] Simply put, it is inaccurate to claim that we cannot comprehend what a rule is, what behaviour the rule requires of us, without also defining how that rule enforces obedience to it.

Hart's rejection of coercion as a conceptually necessary feature of law does not mean that he thinks coercion ought to be completely disjointed from a thorough understanding of law. He writes:

> [W]e do need to distinguish the place that sanctions must have within a municipal system, if it to serve the minimum purposes of beings constituted as men are. We can say, given the setting of natural facts and aims, which make

86 Ibid 11
87 Ibid 90
88 Ibid 35

> sanctions both possible and necessary in a municipal system, that this is a *natural necessity*.[89]

Hart therefore acknowledges that human nature is *such that* coercion may be a necessary feature of a viable and sustainable modern legal system. Coercion, per Hart, is a necessary feature of legal systems in our world, a *naturally necessary* feature. Put it another way, when the concept *Law* is considered in general, independent of human fallibility and political interference, coercion is not necessary to fully understand what makes something a legally valid rule. When legal rules are interacted with by subjects, however, coercion becomes a necessary social practice for law to minimally function within human society.

VII Raz

In *Practical Reasons and Norms*, Joseph Raz sets out to clarify two questions: [1] what precisely is meant in saying that legal rules are norms? And, [2] what it is that justifies the use of normative terms to describe the law? Calling legal rules norms, as Kelsen and Hart do, implies that they are reasons for action. Thus, when Raz claims that one of his aims is to explain what precisely is meant in saying that legal rules are norms, he is looking to provide an account of how legal norms can themselves constitute reasons for action. Also within *Practical Reasons and Norms* is the final nail in the CNC coffin, so to speak: Raz's society-of-angels thought experiment, which has become ubiquitous in the literature about law and coercion.

In questioning the conceptual possibility of a 'sanctionless' legal system, Raz makes general observations about existing legal systems: all prohibit the use of force

[89] Ibid 199

against legal officials, and all, 'authorize the use of force to enforce compliance with sanctions.'[90] He asserts that an observation, no matter how universal it seems, is not evidence enough in itself to support a conceptual claim – in this case, the claim that coercive sanctions are a conceptually necessary feature of law. In order to prove his point, he describes a society of angels, where the angels are, 'rational beings who may be subject to law, who have…more than enough reasons to obey the law regardless of sanctions… It is reasonable to suppose,' Raz continues, 'that in such a society the legislator would not bother to enact sanctions since they would be unnecessary and superfluous.'[91]

Despite their perfect morality and innate desire to comply with all legal rules, the angels of such a society would still require a legal system to provide for legal institutions, such as courts, and general societal coordination. As Raz points out, courts are necessary for reasons beyond the allocation of coercive sanctions; they are, for example, necessary for the interpretation of legal transactions, because even angels could disagree over the terms of a contract.[92] Furthermore, a society of angels would require laws providing rights and duties, '[s]ince accidental damage might occur…from people [angels] acting wrongly because they misapprehended the facts or misinterpret[ed] the law.'[93] So Raz, like Hart, recognizes that coercive practices and the law always seem to converge in modern legal systems, and both suggest that this link may be constitutive of *human* legal systems. As Raz writes: 'Is it possible for there to

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[90] J Raz *Practical Reasons and Norms* (Hutchinson & Co 1975) 158
[91] Ibid 159
[92] Ibid
[93] Ibid 160. It is important to note that Raz denies such provisions of civil remedies count as coercive mechanisms because their design is to impart duties on responsible parties, and not to deter would-be lawbreakers. A more considered analysis of Raz's work on the relationship between law and coercion takes place in Chapter 3.

be a legal system in force which does not provide for sanctions or which does not authorize their enforcement by force? The answer seems to be that it is *humanly impossible* but *logically possible*.'[94]

VIII Conclusion

Following Hart's and Raz's writings, legal theorists had all but accepted the conclusion that coercion is not a conceptually necessary feature of law. However, critiques of NNC have been growing in number over the past decade, with some theorists claiming that both Hart and Raz are mistaken in both their arguments and conclusions. It seems, then, that the cycle is bound to repeat itself; perhaps a legal theorist could create a theory of law where coercion is a conceptually necessary feature, but this thesis will endeavour to explain in later chapters why that would be misguided. However, before taking up contemporary critiques of NNC, there is a matter which must first be addressed: what does it mean to say law is, in practice, coercive? None of the theorists presented in the present chapter provide a close analysis of coercion, or what it is about the law that is coercive. Rather they all take for granted the idea that because the law threatens sanctions, it is generally coercive. Indeed, the nature of coercion in general is not well understood within philosophy. For this reason, the next chapter will analyse theories of coercion. This way, the analysis of the relationship between law and coercion that follows in Chapters 3-5 will rest on a firm understanding of what it means to claim that the law is coercive.

[94] Ibid 158, emphasis added

2

Coercion as Forced-choice

I Introduction

Chapter 1 set up the 'state of play' for this thesis by explaining the theory that contemporary investigations into the relationship between law and coercion rest upon. In this chapter, I will depart from legal theory somewhat in order to engage with the concept 'coercion,' because I think that an account of the relationship between law and coercion ought to be grounded on a clear understanding of what it means to say, 'law coerces.'

Historically, legal theorists used 'coercion' as a synonym for the law's use of force to ensure compliance. Neither John Austin nor Jeremy Bentham, for example, expand their conceptions of coercion with argument or conceptual analysis. As I mentioned in Chapter 1, Bentham equates the phrase, 'to bind' with 'to coerce.'[1] Austin takes the presence of sanctions to be the core marker of the presence of coercion in the law.[2] Similarly, Hans Kelsen writes that the provision of sanctions is what gives law its coercive character.[3] In a more explicit expression of that family of ideas, Joseph Raz writes that '[law] is coercive in that obedience to it, and its application, are internally guaranteed, ultimately, by the use of force.'[4] This, however, does not clarify

1 J Bentham, *Of Laws in General* HLA Hart (ed), (The Athlone Press 1970) 53
2 J Austin 'The Providence of Jurisprudence Determined' in K C Culver (ed), *Readings in the Philosophy of Law* (2nd edn, Broadview Press 2007) 81-96
3 H Kelsen *General Theory of Law and State* (A Wedberg tr, Russell & Russell 1945) 29
4 J Raz *The Concept of a Legal System: An Introduction to the Theory of Legal System* (Clarendon Press 1970) 3

what is coercive about the law – is it the actual use of force, the *threat* of the use of force, or both?

Coercion was essentially treated like a common-sense notion, and oftentimes it still is. Contemporary authors like Kenneth Einar Himma, Frederick Schauer, and Ekow Yankah for example, use coercion as another descriptor for the law's ability to not just guide or motivate action, but also to force its subjects to act, or refrain from acting, in a certain way.[5] However, as the saying goes, common-sense is rarely common and the analysis of the relationship between law and coercion ought to engage with a clearly defined notion of coercion, not a vague understanding that coercion is just what we call an instance where someone is made to do something they'd otherwise not choose to do.

Consider the following scenarios,

> 1: An armed robber approaches a man from behind; the robber holds his gun to the man's head and says, 'Give me your wallet and I won't pull the trigger.' The man, having no reason to believe the robber is bluffing, slowly pulls his wallet out of his jacket, and holds it up until the gunman, in turn, grabs the wallet and runs off.
>
> 2: A woman has been remanded to custody by an armed enforcement unit but is violently beaten by members of the unit prior to being placed into her cell. She is later taken to an interview room where she is told that the beatings will continue until she confesses to the

[5] See: K E Himma 'A Comprehensive Hartian Theory of Legal Obligation: Social Pressure, Coercive Enforcement, and the Legal Obligations of Citizens' W J Waluchow and S Sciaraffa (eds) *Philosophical Foundations of the Nature of Law* (OUP 2013); K E Himma 'The Authorization of Coercive Enforcement Mechanisms as a Conceptually Necessary Feature of Law' [2016] *Jurisprudence* 595; F Schauer *The Force of Law* (HUP 2015); and E Yankah 'The Force of Law: The Role of Coercion in Legal Norms' [2008] *U Rich L Rev* 1195

> crimes for which she has been charged and cooperates with further investigations. Her refusal to cooperate lasts through six more beatings, after which she finally agrees to cooperate.

The first scenario is often called the 'highway robbery' or 'gunman' scenario and is generally taken to be a central case of coercion. Few would claim that the man was simply robbed, qualifying the scenario by claiming that he was *coerced* into giving up his wallet. The second scenario is more familiar as an instance of torture, where the prisoner was coerced into confessing, and then cooperating, with the authorities.

A fruitful account of coercion will explain why the two central cases are instances of coercion in addition to being instances of theft and confession. Such an account will also be able to inform analysis of non-central cases, those where it is not initially clear whether coercion occurred. This feature, in turn, further shapes our understanding of the concept. The task of isolating what it is about a certain scenario that makes it coercive is, unfortunately for the present work, easier said than done. There is a deep bench of literature devoted to the topic and, owing to conflicting intuitions and what Grant Lamond calls the 'nested conceptions' of coercion, there has yet to emerge consensus regarding the nature of coercion.[6]

Conflicts in the literature include: Disagreement over whether offers are as coercive as threats. Is a scenario identified as an instance of coercion primarily with reference to its cause (i.e., the act of the coercing-agent), or with reference to an effect (i.e., that the coerced-agent does what the coercing-agent ultimately wants)? Does the coercing-agent have to *intend* to coerce the coerced-agent? Does coercion denote success; in other words, is the notion of 'failed coercion' as absurd as a 'married

[6] G Lamond 'Coercion and the Nature of Law' [2001] *Legal Theory* 40

bachelor'? Finally, is coercion a morally charged concept? That is to say, is an instance of coercion inherently a moral wrong? Or, ought an instance of coercion only be judged as 'wrong' once it has been considered within its context?

In this chapter, rather than systematically work through each of these points of conflict, I will argue for two claims that directly bear on my understanding of what it means to say, 'law coerces.' Firstly, I will explain why instances of coercion are best defined as instances of *forced-choice*. Simply put, an instance of coercion is any instance in which a coercing-agent forces the coerced-agent into making a choice; there is no way for the coerced-agent to avoid making a choice, and the only options available are those that the coercing-agent has made available.

The case for a forced-choice account of coercion relies on the identification of two mistakes past accounts have made: one of over-inclusivity, where all instances of physical force are counted as instances of coercion; and one of under-inclusivity, which restricts instances of coercion to instances of threats alone, rendering the existence of a coercive offer unintelligible. Sections II-IV will develop the forced-choice approach through a series of distinctions: firstly, between enforcement and pressure approaches to coercion; second, between the physical manipulation of another agent as a mere means and coercion; and finally, between threats and forced-choices.

Section V will support my second conclusion: that a full analysis of coercion ought to account for what I will call its internal and external aspects. The internal aspect of coercion is subjective in nature and accounts for the experience of the coerced-agent and the intention of the coercing-agent. The external aspect of coercion is objective and accounts for the actions of the coercing-agent and coerced-agent. Briefly put: the coercing-agent's subjective experience is 'internal', and the coercive act

is 'external.' Whilst the coerced-agent's subjective experience of being coerced is 'internal', their behaviour in response to the coercive act is 'external.' Thus, my schema for analysing instances of coercion has four moving parts: the external and internal aspect of the coercing-agent and the external and internal aspect of the coerced-agent. All fours parts are easily identified in central cases of coercion whilst non-central cases are those where one or more part may be missing. Finally, the analyses from Sections II-V will be applied to law in order to explain what 'type' of coercion is of interest to my investigation into the relationship between law and coercion.

II Enforcement or Pressure?

Scott Anderson has written extensive historical analyses of coercion theories.[7] His central organising principle is that the coercion literature can be divided into two fundamental groups: works that take what he calls the 'pressure approach' to understanding coercion, or works that take the 'enforcement approach', himself being a proponent of the latter. The use of the term 'approach' is intentional; according to Anderson, authors writing about coercion are developing ways in which to best *approach*, or understand, the same concept.[8] Pressure approaches take the essence of coercion to be the fact that a coerced-agent is put under some form of extreme pressure that forces them to (not) act in a certain way against their will. Enforcement approaches, on the other hand, claim that the essence of coercion is that a coercing-

[7] All by S Anderson: 'How did there come to be two kinds of coercion?' in D A Reidy & W J Riker (eds), *Coercion and the State* (Springer 2008); 'Of Theories of Coercion, Two Axes, and the Importance of the Coercer' [2008] *Journal of Moral Philosophy* 394; 'The Enforcement Approach to coercion' [2010] *Journal of Ethics and Social Philosophy* 1; and 'Coercion' in E N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Summer 2015 Edition)

[8] S Anderson The Enforcement Approach to coercion' [2010] *Journal of Ethics and Social Philosophy* 2-3. Throughout this chapter, I will discuss accounts of coercion, using 'approach(es)' when paraphrasing Anderson's analysis.

agent enforces their will on the coerced-agent. Anderson argues that the enforcement approach provides a better understanding of coercion because it explains the origins of the pressure coerced-agent's experience. The pressure approach, Anderson claims, only has value inasmuch as it assumes one agent is enforcing their will on another. Explain what it is to enforce one's will on another, and you have explained coercion.

This initial section will explain why Anderson is a proponent of the enforcement approach, starting with an explanation of what I take to be his more successful critique of some pressure approaches. It will conclude by explaining why, despite agreeing with some of Anderson's critiques, I ultimately reject the enforcement approach. The enforcement approach may provide a very clear explanation for the coercion that manifests in central cases. It fails, however, to explain what – if anything – is coercive about those non-central cases that lack an intentionally coercing-agent.

II.i *The Baseline Problem*

Following Anderson's categorisation, pressure approaches identify instances of coercion as those where a coerced-agent is put under extreme pressure by the coercing-agent to act in accordance with the coercing-agent's wishes or demands.[9] Such theories, Anderson writes, understand coercion as, 'a way in which one agent [the coercing-agent] puts psychological pressure on another [the coerced-agent] to act or not act in some particular way by means of threats that alter the cost and benefits of [the coerced-

[9] Proponents also include: H Frankfurt 'Coercion and Moral Responsibility' in T Honderich (ed) *Essays on Freedom of Action* (Routledge & Kegan Paul 1973); H J McCloskey, 'Coercion: Its Nature and Significance' [1980] *Southern Journal of Philosophy* 335; H Oberdiek 'The Role of Sanctions and Coercion in Understanding Law and Legal Systems [1976] *American Journal of Jurisprudence* 71; and D Zimmerman 'Coercive Wage Offers' [1981] *Philosophy and Public Affairs* 121

agent] acting.'[10] Hence, an instance of coercion is identified with reference to the coerced-agent's experience of being pressured into, or out of, action against their will.

In his classic paper on coercion, Robert Nozick defines instances of coercion as threats: one (the coercing-agent) threatens to make another (the coerced-agent) worse-off by either threatening harm to their person or their situation so that the coerced-agent has no reasonable choice but to do what the coercing-agent wants. The man in the gunman scenario, for instance, is pressured by the gunman to such a degree that it would be unreasonable for him to *not* hand over his wallet. Anderson's objection to pressure approaches like Nozick's is the incorporation of a *baseline account*.

According to the baseline account, we can identify coercion whenever it threatens to harm the baseline of the coerced-agent. Baselines, per Nozick, are the, 'normal and expected course of events,' given the background characteristics and life experiences of the agent.[11] This means they are inherently subjective: my normal course of events is different from anyone else's, so what would threaten to harm my baseline is different from what would threaten another's. The thinking goes: if a proposal would lead to the worsening of one's normal course of events, then one has been coerced. If the proposal would improve one's 'normal course of events', then one has simply been propositioned with an offer and has not been coerced.

For example, consider *A*, a surgeon, and *B*, a psychiatrist. *A* has more to lose should she break her hand (she would experience excruciating pain, day-to-day mobility becomes difficult *and* her career is over) when compared to *B* (excruciating pain and day-to-day mobility becomes difficult, *but* he can still practice as a

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[10] Anderson (n 8) 3

[11] R Nozick 'Coercion' in W Morgenbesser (ed), *Philosophy, Science, and Method: Essays in Honor of Ernest Nagel.* (St Martin's Press 1969) 450

psychiatrist). Hence, act *C* (a robber threatens to break their hand if they do not hand over their life savings) would definitely be considered coercive for *A*. It would put her under considerable amounts of pressure to comply with the threat, because of her particular baseline. However, act *C* may not be as coercive to *B*: *B* can continue to practice. He would also like to retire soon, so he does not want to lose his life savings and may be willing to suffer through a broken hand. Thus, the outcome as to whether act *C* is coercive to *B* is dependent, in part, on particular facts about *B*'s life.

According to Anderson, pressure approaches that incorporate the baseline account leave us in the position where if we want to be able to answer the question, "How do you know that *X* was coerced?" we would have to ask *X*.[12] However, this connection Anderson makes between the baseline account and the claim that we would have to ask *X* if we want to know whether *X* was coerced seems to be a leap in reasoning. The baseline account, as Nozick writes about it, can serve to be an objective test for whether an agent was coerced. This is because we are meant to think about normal and expected course of events for the agent, and also about the consequences the agent would face if they complied with the coercing-agent.[13]

Nozick admits that it is sometimes unclear what the normal and expected course of events is for a given agent.[14] But, it is clear that, contrary Anderson, the baseline account does not stipulate that we know, or even ask, about an agent's *assessment* of their experience, e.g., do they feel like they have been coerced? It simply stipulates that whether an agent is coerced is dependent on the variable circumstances

12 Anderson, 'Of Theories of Coercion, Two Axes, and the Importance of the Coercer' [2008] *Journal of Moral Philosophy* 419
13 Nozick (n 11) 447
14 Ibid 449

of that person's life. To return to the surgeon, *A*, and the psychiatrist, *B*: we are able to explain how the baseline account works, and discuss the sort of coercive pressure *A* would experience when compared with *B*, without needing to invoke any assumptions, or make any claims, with regards to their subjective experiences.

Putting this point about subjective experience and the baseline account aside for the time being, Anderson maintains that pressure approaches that are supported by a baseline account do not enhance our understanding of coercion. He writes that it is possible to, 'understand why coercive threats alter behaviour without delving into particular facts about an individual's weighing of specific alterations to their costs and benefits of acting.'[15] Further on, he continues: 'So, while psychological pressure may be a common, instrumental feature of coercive threats, it does not appear to be an essential fact about their efficacy or significance.'[16]

So understood, Anderson's dissatisfaction with pressure approaches is due to his intuition that they are going about accounting for coercion in the wrong way. He claims that it is not conceptually possible to account for the type of pressure an instance of coercion *may* cause without first accounting for, 'the background conditions of power on which coercing-agents draw in order to be able to coerce others.'[17] So, it is not possible for us to discuss whether act *C* is coercive to either surgeon *A* or psychiatrist *B* without first explaining how and why act *C* came about. Thus, his enforcement approach aims to understands coercion not as an epiphenomenon,[18] but as a primary cause – as the explanation for the pressure a

15 Anderson (n 8) 24
16 Anderson (n 8) 24
17 Anderson (n 12) 394-5.
18 Anderson uses the terminology 'epiphenomenon' to make his point that pressure approaches are only really able to explain the by-product of a coercive event, that the coerced-agent is pressured into

coerced-agent *may* experience. Crucially, as the next sub-section will explain, the Enforcement Approach holds that the coerced-agent need not experience any pressure at all in order for us to identify an instance of coercion.

II.ii *The Enforcement Approach*

As the previous sub-section explained, the notion of a baseline is meant to capture the observation that what is coercive for one person is not necessarily coercive for another. Anderson worries that such an approach to coercion (one that is centred on the ultimately subjective pressure a coerced-agent feels) fails to provide a clear, objective, account of coercion. For this reason, Anderson suggests that we ought to focus analysis on an objective feature of coercion: the coercing-agent's intent to coerce *and* the power necessary to coerce. In Anderson's own words, the enforcement approach:

> [H]olds that coercion is best understood as one [coercing] agent's employing power suited to determine, through enforceable constraints, what another [coerced] agent will…or will not do, where the sense of enforceability here is exemplified by the use of force, violence, and the threats thereof to constrain, disable, harm or undermine [a coerced] agent's ability to act.[19]

Put another way, the enforcement approach is coercing-agent focused; it takes the power to enforce one's will on another to be the key to understanding, explaining, and identifying an instance of coercion.

As such, Anderson starts from the position of what it is to be a coercing-agent and tells a story about how they gain and use power to enforce their directives. According to Anderson, coercing-agents are those who either, 'enjoy a natural advantage over others,' or who, 'have to take specific steps to make themselves capable

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doing something against their will. Pressure approaches, per Anderson, fail to account for the role of the coercing-agent and, therefore, cannot successfully account for coercion. See: Anderson (n 8) 2

[19] Anderson (n 8) 6

of coercing others.'[20] If power has been harnessed and manipulated appropriately, then an instance of coercion will manifest – and at no point is it necessary to enter a problematic conversation about the coerced-agent or their baseline.

So, if we consider the state for a moment, the enforcement account explains its coercive quality with reference to its *ability* and its willingness to sanction. Not only does the state motivate behaviour by providing legal rules, but it also ensures compliance by threatening sanctions. Threats, however, only have the ability to coerce people into (or out of) certain behaviours because they are supported by enforcement mechanisms like a police force and prison system. Anderson is tapping into the thought that you are more likely to do what someone wants if you *know* their threat is not an empty one.

This is how the enforcement approach explains the gunman scenario:

> [T]he gunman possesses the power to do great violence to his target... He thus converts this power into a constraint or condition on the action of his target, making the rendering of [his] wallet a necessary means to any other activity or goal [he] might wish to pursue (including keeping [his] life.[21]

Like the victim in the gunman scenario, we *know* the state is not bluffing because it has a large infrastructure supporting its threats. This is what gives the state its standing power to exert control over its subjects and why it is typically regarded as a coercive institution.

The enforcement approach, Anderson claims, is better equipped than the pressure approach to explain what coercion actually is: a relational concept that ought to be analysed with reference not to its by-product (the pressured will of the victim), but with reference to the coercing-agent and what it is *to coerce* another. Cashed out as

[20] Anderson (n 12) 402.
[21] Ibid 417

such, the enforcement approach works as an explanation of what it is to have coercive power over others, but this does not necessarily mean it works as an account of coercion. Before I am able to explain this, I first want to turn to Grant Lamond's account of coercion, which is a pressure approach that does not explicitly incorporate a baseline account. By explaining Anderson's critique of Lamond's account, the enforcement approach can then be fully cashed out and, so too, will my dissatisfaction with it.

II.iii *A Pressure Approach Without a Baseline*

On coercion, Lamond writes:

> What is common to all modes of coercion, and what makes them instances of coercion, is the underlying notion of sufficient pressure being brought to bear by one person to *force* or *make* another person do as the first wills. Hence to be coerced into doing something is to not do it voluntarily; it is to do it against one's will.[22]

According to Lamond, instances of coercion (here, speaking directly about threats), all share three features: [1] the consequence is unwelcome to the coerced-agent; [2] the coercing-agent selects *that* consequence because they know it is unwelcome to the coerced-agent; and [3] the threat is not a bluff, e.g., the coercing-agent is committed to following through with their threat.[23] His second and third feature incorporate the coercing-agent's intent as part of the analysis. Because Lamond places significant conceptual weight on the intent of the coercing-agent, he does not have to introduce a baseline account. It is inconsequential whether the coercing-agent would *worsen* the coerced-agent's natural state of affairs. What matters is that the coercing-agent intends

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[22] Lamond (n 6) 43

[23] G Lamond, 'Coercion, Threats, and the Puzzle of Blackmail' in A P Simester and A T H Smith (eds), *Harm and Culpability* (Clarendon Press 1996) 225

to pressure their victim to such a degree that the coerced-agent feels as though they have no choice but to do as the coercing-agent desires.

Anderson praises Lamond's inclusion of coercing-agent's intent into his conception of coercion.[24] Yet, he maintains that Lamond's pressure account ultimately falls short of providing a satisfactory account of coercion because it is unable to distinguish between trivial threats and coercion.[25]As Anderson points out, per Lamond's account, trivial threats meets the first, second, and third condition. For instance, imagine the gunman scenario, but the gunman has what is obviously a water gun and it is loaded with blackberry juice. You are wearing your favourite white silk top. The gunman threatens to spray your top with juice if you do not hand over your phone. The consequence is unwelcome to anyone in that position. Moreover, the unwelcome nature of being sprayed with stainable juice is why the gunman is making that specific threat. However, the threat itself *is* a trivial one – there is no threat to your life or your person, and you own other tops. As Anderson points out, something being 'unwelcome' does not necessarily, 'merit special categorization as "coercive."'[26]

Anderson further claims that Lamond's third feature is unnecessary. It should not matter whether the coercing-agent is bluffing because a good bluff can be just as coercive as a genuine threat (that is not trivial). In contrast to Lamond's account of coercion, the enforcement approach, per Anderson, can readily explain what makes a *good bluff*: that the coercing-agent is situated in a position of power over the coerced-agent. It does not matter, for Anderson, whether or not I lob bluffs around in an

[24] Indeed, the enforcement approach places intent to coerce at the heart of its analysis. Anderson writes, "'[a]cts of coercion are coincident with the activities of coercers aiming to constrain or alter the activities of others by drawing upon the distinctive powers needed for coercion.' (n 8) 7
[25] Anderson (n 12) 421
[26] Ibid

attempt to get my children to behave how I want them. What matters, what makes such bluffs *coercion* according to the enforcement approach, is that my children know I am the one with the power and I *could* bring about the consequences I am using in my bluffs if I wanted to. True, if my children happen to think I am lying, then they would be less likely to be motivated by my threat. But, the important thing for Anderson is that we can only explain such a failure by pointing to the would-be coercing-agent and concluding that they used their power to enforce their will ineffectively.

Anderson's criticisms against baseline accounts are understandable. Such an approach to coercion places too much weight on the subjective considerations of the coerced-agent and leave out any analysis of the coercing-agent. His critique of Lamond's account also seems credible – there does seem to be something more to coercion than its being 'unwelcome'. However, whilst Anderson has given us very good reasons to care about the coercing-agent, he has not given reason enough to *only* care about the coercing-agent, or for thinking that focussing analysis on the coercing-agent is the only want to understand what it is to be coerced.

II.iv *What the Enforcement Approach Lacks*

According to Anderson, an account of coercion must account for the, 'structure of the interaction' between the coercing-agent and coerced-agent.[27] Pressure approaches that account for coercion as a type of pressure the coerced-agent experiences to do something against their will, fail to explain the interaction because they place too much emphasis on the so-called effect of the coercion. This is why Anderson's enforcement approach is coercing-agent-focussed. Anderson's reasoning seems to be: if coercion is

[27] Ibid 422

an interaction, then the focus of the analysis ought to be primarily on the agent responsible for the interaction – the coercing-agent. So understood, the enforcement approach identifies coercion when a coercing-agent takes advantage of an existing or manipulated power differential in order to enforce their will on another (the coerced-agent).

The enforcement approach is cashed out with reference to central cases like the gunman scenario. It is only by starting with a central case that he is able to explain, 'what it takes for one agent to be able to coerce another.'[28] However, despite the utility of a coercing-agent-focussed account of coercion, it is not enough to tell the whole story. Understanding what it takes for one agent *to be able* to coerce another is not the same as understanding coercion and an account of coercion should do more than explain what is coercive about central cases. It should also be able to explain what if anything is coercive about non-central cases that share features similar to central cases. It should also be able to explain what the non-central cases are lacking. The enforcement approach can explain non-central cases by pointing to the coercing-agent and their failings, but I think that is only part of the whole story.

Consider this tweak to the gunman scenario:

> 3: A Good Samaritan is out walking in the evening looking to give his wallet to someone in need. The gunman approaches him with his gun raised, issues the threat, and the Good Samaritan willingly hands over his wallet.

Was the Good Samaritan still coerced? There is strong inclination to think that there is no coercion in this instance because the Good Samaritan did not feel forced into making the choice he did. The Good Samaritan does not feel threatened by the gun in

[28] Ibid

his face, only a deep sense of pity because the gunman had to resort to such means in order to get money. The enforcement approach, however, would still identify such a scenario as an instance of coercion because the gunman intended to constrain someone's course of action and used threats of violence to do so.[29] And yet, it seems mistaken that the fact that the so-called coerced-agent (the Good Samaritan) does not take themselves to *be* a coerced-agent is rejected from analysis by the enforcement approach.[30]

Recall Anderson's objection to pressure approaches that incorporate a baseline account: they introduce too much variability into their analyses owing to their reliance on the circumstances of the potential coerced-agent. Hence, the same act can be coercive to one person given her personal, moral or social situations and not coercive to another person with his different 'baseline'. Anderson's solution is to remove the focus pressure approaches place on the coerced-agent's circumstances, and instead focus on objective (he uses the term, 'concrete') considerations like, 'what exactly is being threatened, or how one agent comes to be in a position to threaten another.'[31]

Yet, we do not need to get into the Good Samaritan's mind in any troubling sense in order to conclude that he did not feel coerced. Just as Anderson infers the intent to coerce from a coercing-agent's power and actions, it seems similarly possible to infer whether someone is experiencing a threat by observing their behaviour. One explains, for instance, why the (suspected) coerced-agent's pulse is racing, and why they did something that they obviously did not want to do, by inferring the feeling of

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29 Anderson writes: '[T]he gravamen of coercion is not whether the coercee alters her course of action, but whether the coercer aims to alter or constrain it, and *uses coercive means to do so*.' (n 12) 419
30 Anderson writes: '[T]he enforcement approach holds that coercion can occur even when an agent feels no overt pressure to do as the coercer demands.' (n 8) 9
31 Ibid 6

being threatened. This is no different from inferring intention from what a coercing-agent does, e.g., sticks a gun in someone's face and utters a threat. In both instances, it seems that one can infer a mental state from externally observable behaviours – even if such inferences are not definitive.

The enforcement approach's presumption of intent offers an interesting explanation for those instances that seem coercive despite the absence of an intentionally coercing-agent. Consider the following scenario:

> 4: Adam is asked to stay late by his boss. There is no explicit threat levied by his boss; the request was made because there is an impending project deadline and Adam is the first person the boss came across. Adam, however, knows that if he works late, he will not only miss dinner and bedtime with his family, but will also miss the last train home. He also worries if he rejects his boss' request, he will be sanctioned by losing his position within the company, something that has happened to a friend at another company. Adam feels like he has no choice but to stay late and pay for an expensive cab ride home.

One might be inclined to believe that, despite Adam's genuine feelings of being threatened, Scenario 4 is not an instance of coercion because no one is doing the coercing. However, the enforcement approach tells us that Adam's boss has nevertheless taken advantage of an existing power differential. She may not have explicitly threatened him into staying late, but nor is she a neutral messenger: she has a stake in whether the project is finished and can actually change (worsen) Adam's employment situation. As such, the enforcement approach would, I think, identify Scenario 4 as an instance of coercion.

We can also imagine an alternative scenario: Perhaps Adam's boss was clueless and genuinely unaware of the pressure her request put on him. She does not have a family and cannot empathize with her employees who do. Perhaps Adam used to live five blocks away from work and his boss was simply unaware that he moved out of town. If Adam informed her of his move, she would not have reacted negatively, but rather asked someone else to work late. Tweaking Scenario 4 to make the boss clueless changes things somewhat: she still has power over Adam, but she has no plan to use it to make Adam stay late.

So, having the ability to enforce one's directives does not necessarily mean that one is drawing on that power to coerce others, nor that one plans to do so. The enforcement approach can accommodate this point and would explain the 'clueless boss' scenario as an accident:

> The reason (mis)-communication is possible is that the issuer of the demand [the clueless boss in our scenario] does in fact have the power to execute [a sanction], and hence should be careful about what [she] says… The sort of accident involved in this mistaken coercion is not a random, cosmic accident, but rather recklessness on the part of someone [the clueless boss] who should know that such words can be reasonably misinterpreted.[32]

The clueless boss, according to this analysis, *should have known* that her standing power to hire and fire, so to speak, adds coercive force to every request she makes.

Anderson seems to make two claims: [1] that recklessness might be sufficient for coercion, thus eliminating the necessity of intention; and [2] that coercion might, at least in some cases, occur if a reasonable person to whom the particular words or actions were directed would infer an intention to coerce. Both [1] and [2] are matters of objective determination. Furthermore, [2] seems analogous to the reasonable person

[32] Anderson (n 12) 417

standard used in law to assess, e.g., whether someone has been negligent. The enforcement approach treats the state of having power as indicative of intent to (ab)use that power. However, surely this is not the case. Having power seems to be a state of affairs; you either have power over another or you do not. And there seems to be little reason to use the state of 'having power' as necessarily indicative of an intent to use coercion. For instance, I have great power over my students, but I have no intention of using it against them.

Both the clueless boss and the Good Samaritan scenarios are designed to bring to the foreground the inherently subjective nature of coercion with respect to the coerced-agent's experience of the incident in question. Different people experience instances of coercion to varying degrees not only because of differences in individual psychology (including, but not limited to phobias, personality disorders, and intellectual limitations), but also because of biological and sociological circumstances such as race, sex, gender-identity, and socio-economic status. As a particularly obvious example, a poorer person is more likely to feel coerced by the threat of a parking fine than an affluent person.

Anderson is correct that accounting for the subjective nature of coercion is difficult. It is not only difficult to difficult to know what an agent's baseline is, as Nozick himself acknowledges[33], it can also be very difficult to account for the coerced-agent's experience. Anderson is also correct when he claims that the background conditions that lead to an instance of coercion, e.g., the power employed by coercing-agents, are relevant to our analysis of coercion. However, despite Anderson's contention, they alone cannot provide a *complete* analysis of coercion.

[33] Nozick (n 11) 449

The enforcement approach is designed to provide an account of coercion rooted in what Anderson takes to be its objective aspect: the presence of a power-backed coercing-agent. Yet, as I pointed out above, the presence of a power-backed agent is not necessarily indicative of anything other than an agent who in a position of power over another. Furthermore, if the Enforcement Approach uses the circumstances of a coerced-agent as evidence of intent to coerce another, as it seems to, then why can't a pressure approach do the same and infer whether someone feels coerced with reference to observable facts about their circumstances and their behaviour in the face of a coercive threat?

There are two things going on here. Firstly, I am claiming that some of the reasons Anderson gives for preferring the Enforcement Approach to pressure approaches do not stick because there seems to be little conceptual advantage to focussing on the coercing-agent and their intentions alone. Second, I think Anderson is mistaken when he tries to present an analysis of coercion rooted only in objective data. Coercion has an inherent subjective aspect to it relevant not only to the experiences of coerced-agents, but also to the intentions of the coercing-agent. Any attempt to analyse around it means much is being left out. The claim that a complete analysis ought to account for the inherently subjective aspect to coercion is central to the discussion to come in Section V. First, however, I want to finish cashing out the forced-choice conception and why I take it that the best explanation of central cases of coercion is that they are forced-choices, and *only* forced-choices.

III The Physical Manipulation of Another is Not Coercion

Whilst Anderson's and Lamond's writings on coercion ultimately diverge, both include the physical manipulation of another as a mere means as a proper extension of coercion. Examples of 'physically manipulating another as a mere means' include physically restraining an agent via barricade or ligature, or physically taking another's hand and holding it to a finger-print scanner in order to gain access to a locked vault.[34]

Some theorists do not extend coercion in such a way. For Nozick, only threats that serve to worsen the coerced-agent's baseline constitute coercion. H.J. McCloskey writes: 'The person who is subject to force [e.g., is physically manipulated]…has things happen to him… By contrast, the coerced person acts.'[35] Their reasoning centres on their intuition that coercion is a specific mode of force and not a synonym for force in general. Likewise, my forced-choice account of coercion holds that the distinction between coercion and physical manipulation of another as a mere means is categorical; they are not different types of coercion but, rather, they are different types of force. The essential difference, as I will explain it, is that the coerced-agent has had their agency reduced, not neutralised.

In his text *Coercion*, Alan Wertheimer examines how so-called coercion claims (an assertion that one has acted in a particular way because one was coerced) are adjudicated in law. His aim, he writes, is:

> [T]o explain what it is to be coerced, to act under duress, to be forced to do something[...] More specifically, I argue that an adequate philosophical theory of coercion emerges from an analysis of the way coercion claims have been adjudicated in the law.[36]

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34 Anderson calls such displays of coercion, 'direct uses of force' (n 8) 6
35 H J McCloskey, 'Coercion: Its Nature and Significance' [1980] *Southern Journal of Philosophy* 336
36 A Wertheimer *Coercion* (PUP 1987) xi

Wertheimer, thus, equates coercion with the legal term 'duress', which is how he is able to analyse the concept 'coercion' with an unambiguous databank, e.g., court rulings that have decided what does, or does not, count as 'duress'.[37]

Similar to Aristotle's treatment of force and involuntary actions in *The Nicomachean Ethics*, Wertheimer unpacks coercion[duress] by juxtaposing it to types of *in*voluntariness.[38] The first is *involuntary movement*, such as seizures or reflexes, which is a complete absence of volition and, as such, are not good examples of coercion[duress].[39] A person who suffers from Tourette's Syndrome, for example, is not under duress when they display ticks. The second is *involuntary action*, which Wertheimer concludes is an example of coercion[duress]. Here, the agent who commits an involuntary act is unable to exercise their volition because of some defect, or restriction because their will is, "'impaired" or "overborne" by some internal condition (for example insanity, [intellectual disability], or uncontrollable urges) or by external pressure (as in torture or intimidation).'[40]

The first and second type are both nonvolitional acts, according to Wertheimer. In his analysis, Wertheimer ultimately concludes that some examples of

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37 An immediate critique of Wertheimer's work is that he is simply providing a jurisprudential account of duress, and not a philosophical account of coercion. Addressing such an argument is beyond the scope of this chapter. Suffice it to say that Lamond, I think correctly, explains the distinction as follows: '[Coercion] refers to a particular means of affecting human behaviour' whereas, '[duress] refers to those situations in which coercion affects the attribution of responsibility to a party who has been coerced' (n 23, 220). Coercion, so understood, does not necessarily entail duress, but all instances of duress necessarily include coercion. Hence the usefulness of examining duress in trying to understand coercion. In recognition of this, when Wertheimer's position is being paraphrased, 'coercion[duress]' will be used.

38 In *The Nicomachean Ethics* Aristotle writes: 'Those things, then, are thought involuntary, which *take place by force or by reason of ignorance*; and that is forced of which the moving principle is outside, being a principle in which nothing is contributed by the person who acts — or, rather, is acted upon, e.g. if he were to be carried somewhere by a wind, or by men who had him in their power.' (1109a 35, emphasis added)

39 Wertheimer (n 36) 9

40 Ibid

'overborne' wills can be instances of coercion and the difference maker, for him, is whether the defect of volition is the result of another agent's action. The third, and final, type of involuntariness is *constrained volition*. The victim of constrained volition is, per Wertheimer, 'confronted with unwanted alternatives, but is quite capable of making rational choices.'[41] According to Wertheimer, central cases of coercion, like the gunman scenario, are this third type.

There is much to discuss with regards to Wertheimer's theory. For instance, surely it is not the case that acting because one is being tortured is best characterised as a *default* in ones volition. Surely torture is an example of being confronted with unwanted alternatives. Why is it that the intense pain that accommodates most conventional instances of torture can be said to impair someone's ability to make a 'rational' choice, when compared to the person who has a gun in their face as they are told, 'your money or your life!'

I bring Wertheimer up not to engage in a full-scale critique of his work, however, but to illustrate that the way in which theorists identify instances of coercion ultimately comes down to what they take to be coercion's essential characteristic. For Wertheimer, it comes down to how we makes sense of voluntariness and volition and Lamond has a similar explanation. He writes:

> What is common to all modes of coercion, and what makes them instances of coercion, is the underlying notion of sufficient pressure being brought to bear by one person to *force* or *make* another person do as the first wills. Hence to be coerced into doing something is to not do it voluntarily; it is to do it against one's will.[42]

[41] Ibid. As I will explain, I take only the third type of involuntariness to be coercion.
[42] Lamond (n 6) 43

Lamond's account distinguishes coercion into two fundamental modes: 'physical compulsion' and 'rational compulsion' where physical compulsion is physically manipulating another so that they act, or refrain from acting in a certain way; 'bodies being controlled by another person.'[43] Rational compulsion is the account of coercion as defined by Nozick and, as Lamond writes, 'arises from the sort of pressure which the threat of the infliction of some sanction brings to bear.'[44]

The categorisation of coercion into distinct modes by Wertheimer and Lamond is similar to Harry Frankfurt's account of coercion, which asserts that any limitation of freedom constitutes coercion. Whereas Wertheimer and Lamond take for granted the correctness of their accounts, Frankfurt provides reasons for why he thinks it is necessary to include physical manipulation within our understanding of what it is to coerce/be coerced. He does so with the following scenario:

> 5: 'A person is sometimes said to have been coerced even when he has performed no action at all. Suppose that one man applied intense pressure to another man's wrist, forcing him to drop the knife in his hand. In this case, which involves what may be called "physical coercion", the victim is not made to act; what happens is that his fingers are made to open by the pressure applied to his wrist.'[45]

Frankfurt continues: 'We might say that in instances of physical coercion the victim's body is used as an instrument, whose movements are made subject to another person's will.'[46]

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[43] Ibid 44
[44] Ibid
[45] H Frankfurt 'Coercion and Moral Responsibility' in T Honderich (ed) *Essays on Freedom of Action* (Routledge & Kegan Paul 1973) 65
[46] Ibid 66

The difficulty Frankfurt perceives with excluding physical manipulation from our understanding of what counts as coercion is that:

> '[T]here may be no way of discovering whether [a tortured informant] spoke the [secret] word in submission to the threat of further pain, or whether – his will having been overcome by the agony which he has already suffered – the word passed involuntarily through his lips.'[47]

Because the observed result is the same (the victim speaks the secret word), we ought to categorize the two scenarios in the same way, e.g., as instances of coercion.

It is hard, however, to conceive of an instance in which a person *involuntarily* speaks a secret that does not involve altering their physiological make-up, for instance, through the administration of a truth serum. One example may be a Freudian slip, e.g., when a person says one person's name when talking to, or about, another. However, the illustration Frankfurt gives us is not analogous to a Freudian slip. Traditionally understood, Freudian slips are the result of the subconscious slipping out, typically the result of repression and they are beyond our – or anyone else's (save a trained psychoanalyst's) – control.[48] In this way, they are akin to tics displayed by a person with Tourette's. So, if we refer back to Wertheimer's categories – a Freudian slip is an involuntary movement.

What Frankfurt is describing, however, is not an involuntary slip of the tongue. He is describing a person who is consciously trying to keep a secret, but their conscious effort is exhausted and, as such, they spill the secret. However, if the tortured agent's

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47 Ibid 65-6

48 S Freud *The Psychopathology of Everyday Life* (The Macmillan Company 1914). Freud was concerned with explaining language and recall errors (§I-IV), which presents another relevant disanalogy between Freudian slips and the informant: the informant did not forget the secret word, was not struggling to remember it. Freud also writes about 'mistakes in speech' (§V) and here too it is difficult to apply Freudian slips to the informant: mistakes in speech have to do with saying the wrong word, the informant did not. Freud did not think that it was possible to subconsciously share a secret *one wanted kept*.

conscious effort to keep the secret word secret was expended by the torture, then they would also lack any conscious ability to share the correct secret word and, again, all that would come out would be non-sensical utterances. Moreover, there does still seem to be a distinction between a person being 'made' to talk (e.g., confess) and the person who drops a knife because a specific muscle reflex was triggered. In the latter case, the agent's hand was treated as a mere means. The physical manipulation of the reflex was used to force the agent to drop the knife; the agent did not, then, drop the knife to make the pain stop, which is the only explanation for why the tortured person spoke the secret word.

So, 'physical coercion' is a confusing term. Either Frankfurt means it to capture physical manipulation, which I take to be distinct from coercion owing to its neutralisation of agency, or he means physical force used with a view to making an agent perform some action, which only reduces the agency of another. Consider the following scenario: I am alone in my room when an intruder enters. I demand that the intruder leaves but that does not work. I then tell the intruder to leave or I will call security and scream so that someone hears me. The intruder remains and at this point I call security and then endeavour to force the intruder out. I eventually incapacitate the intruder by hitting him with my lacrosse stick and push him out of the room, locking the door behind him.

The point here is that there seems to be a significant enough difference between my threat to call security and the act of pushing the intruder out of the room to suggest that they are different modes of making another act, and not different extensions of coercion, as Wertheimer, Frankfurt, Lamond, and Anderson would suggest. The reasons Wertheimer, Lamond, and Frankfurt include physical

manipulation in their accounts of coercion is because of how they conceive of the essence of coercion. For Wertheimer, it's voluntariness, for Lamond it is compulsion, and for Frankfurt it is any limitation of freedom. Because of their starting points, coercion has a wider scope for these theorists and so they end up saying that physical manipulation is one *type* of coercion and things like threats are another type. In this chapter, however, I offer a more refined starting point: coercion is the reduction of the agency of another – not the neutralisation of it.

Under the forced-choice account only the threat to call security and scream is an incidence of coercion as it forces the intruder to choose to either leave of his own volition or deal with security – and my perilously high-pitched caterwauling. My act of pushing him out the room, however, is better understood as physical manipulation as he has *no choice*, not no *reasonable* choice. This more refined conception does not lack any explanatory power, so it cannot be said to be under-inclusive, and it does not capture more than it intends to.

The suggested distinction between coercion and physical manipulation has particularly significant implications for legal theory as many accounts of law's coerciveness rely on the law's physical manipulation of its subjects as evidence for its coerciveness. If the account of coercion herein is accepted – that an instance of coercion is a forced-choice, that if there is a complete absence of agency on the part of the coerced-agent, then there is no coercion and many common examples of the law's coerciveness must be excluded. For example, barricades, restraints, handcuffs, and prison sentences are not correctly interpreted as instances of coercion per the forced-choice account. This claim does not deny the claim that physical force can be

used as a coercive mechanism, such as when one says to another: 'do *X* or else you will be physically restrained.'

My exclusion of physical manipulation in the forced-choice account of coercion may be a bridge too far for some to accept. It has been traditionally accepted by political theorists (going back to Roman Law) that coercion is akin to physical force. However, philosophy is the business of making distinctions and I have given, I think, sufficient reason for accepting a categorical distinction between physical manipulation and coercion. Whilst refusing to accept my distinction between reduction and neutralisation of agency may mean many will not accept my conception of coercion as forced-choice, it should not exclude the discussion that follows from being of interest, as such theories would (save Anderson's) accept my contention that forced-choices are instances of coercion (even if they refuse my limitation that *only* forced-choices are instances of coercion).

IV Threats and Offers

Thus far, this chapter has argued that: [1] the enforcement approach fails to provide an account of coercion able to explain non-central cases of coercion; and [2] the physical manipulation of another as a mere means is not an instance of coercion. This section will explain why I define instances of coercion as instances of forced-choice, rather than Nozick's narrower definition of coercion as threats.

For a definition of a forced-choice, I will borrow Lamond's:

> [T]he dominant party [e.g., the coercing-agent], is responsible for creating an unwelcome situation in order to engineer the victim's [e.g., the coerced-agent] choice of a less welcome option… the victim of a forced choice is not

> incapable of acting other than he does; it is simply unacceptable to him to do so.[49]

This explanation works to break down not only how a coercive threat works, but *also* explains how a coercive offer works. The desire to provide an account of coercion that is able to explain both offers and threats has to do with the desire to have an account of coercion that can explain everything it ought, and nothing it ought not. The notion of a forced-choice works on the one hand because it is not over-inclusive, primarily because it does not include the physical manipulation of another as mere means. But why does Nozick's denial of coercive offers, yield an account of coercion that is under-inclusive? Consider this example of his:

> 6: P is a stranger who has been observing Q, and knows that Q is a drug addict. Both know that Q's usual supplier of drugs was arrested this morning and that P had nothing to do with his arrest. P approaches Q and says that he will give Q drugs if and only if Q beats up a certain person.[50]

P is not intentionally threatening the supply of, nor withholding, Q's drugs in order to get Q to beat someone up. Rather, 'P is *offering* Q drugs as an inducement to beat up a person.'[51] So, returning to Nozick's baseline account introduced in Section II, P is offering to improve Q's baseline by giving him the drugs his addicted body needs. If, however, P were to say, 'beat up R or I will beat you (Q) up', then it would constitute a threat to Q's baseline and would be an instance of coercion.

That Scenario 6 is excluded as an instance of coercion illustrates that a threat-based account of coercion seems overly restrictive. P *knows* that Q is an addict and, as

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[49] Lamond (n 23) 219
[50] Nozick (n 11) 447
[51] Ibid 448

such, P *knows* that she can induce Q to act in any manner of ways with the offer of drugs as leverage. P uses that information to her advantage and manipulates Q in a way that does not seem significantly distinct from a scenario in which P is Q's usual supplier and says to Q, beat up that person and then I will give you your drugs free of charge. The forced-choice account of coercion is better able to capture why it is that Scenario 6 is best explained as a coercive offer: P is leveraging Q's addiction by pairing Q's having the drugs with beating someone up. In other words, Q could only decide to 'have drugs' if Q *also* decided to 'beat someone up for P'. Q's decision to beat someone up was a decision borne of pressure and addiction, so a severe reduction of agency – and yet, not a complete absence.

During the Irish Potato Famine, there were reports of 'souperism' – Protestant Bible societies offering food to Catholics only if they converted to Protestantism.[52] Using Nozick's framework, such a phenomenon could be construed as an offer, and hence, not coercive. However here, as with P and Q, the distinction seems arbitrary. The 'offer' for food in exchange for conversion can be re-construed as a threat: convert or starve. Some may claim this is different from P and Q because the Catholics needed food to survive, Q does not, as a matter of survival, need the drugs. Such a response, however, would be to expose naivete about what it is to have a physical drug dependence. Q does actually need the drugs and the offer by P to provide Q with drugs can be re-construed as: beat up that person or experience withdrawal – which is, by all accounts, to experience enormous suffering.

[52] Reports of souperism may be difficult to verify, but the illustration works all the same. See: D Bowen 'Souperism: Myth or Reality? A Study of Catholics and Protestants during the Great Famine (The Mercer Press Ltd 1970)

Pointing out a categorical distinction between coercion and physical manipulation (such that, physical manipulation of another is not an instance of coercion), or a categorical similarity between threats and some offers (such that, both can be instances of coercion because both can be instances of forcing choice on another) is all well and good, but it actually loops this chapter back to the baseline problem Anderson tried to avoid in the beginning. Let me elaborate: what explains the point at which an offer (or a threat for that matter) becomes *coercive*? That seems to hinge on the subjective experience of the agent receiving the offer. To return to P and Q – if P were to make the same offer to R, who is not a drug addict, the offer would lose its coercive nature. R could simply walk away from P because drugs do not hold any power over them. The coercive nature of P's offer to Q hinges not only on the fact that P is making the offer in an effort to exercise control over Q, but *also* on the fact that Q is an addict and, as such, P's offer places Q under an extreme amount of pressure.

Anderson's enforcement approach is an attempt to account for coercion without needing to engage with the amorphous, subjective nature of the agent being coerced. We can, he argues, successfully account for coercion without needing to engage the subject of the coercive threat/offer at all *if* we can fully account for what it is *to* coerce. In the next section, I will explain why I think Anderson is mistaken. Firstly, I maintain that a full analysis of coercion ought to take into account the subjective experience of the coerced-agent. Furthermore, sufficiently explaining what it is to coerce another, relies on the subjective experience of the coercing-agent, specifically, that we know their intentions.

V The Internal and External Aspects of Coercion

The pressure and enforcement approaches are both tapping into fundamental features of central cases like the gunman. As the enforcement approach would explain a given scenario is an instance of coercion when a coercing-agent creates and then takes advantage of a power differential in order to make someone (the coerced-agent) do what she wants them to do. As pressure approaches would explain a given scenario is an instance of coercion when the coerced-agent is put in a position of enormous pressure where they feel as though they have no choice but to comply with the coercing-agent's demands. Both of these explanations are correct to some extent but neither of provides a complete account of coercion. This is why I claim that a complete analysis of coercion ought to account for its internal (subjective) aspect and its external (objective) aspect. In this section, I will explain how this proposed dual aspect of coercion creates a four-part schema that can be used to analyse central and non-central cases of coercion alike.

Broadly construed, the *external aspect* captures the observable features of an instance of coercion. It addresses such questions such as: How is the coercing-agent attempting to manipulate the agent they are coercing? And, how does the coerced-agent react (e.g., do they do what the coerced-agent wants, or do they ignore the threat?)? The *internal aspect* captures the subjective conditions for both the coercing-agent and the coerced-agent. It not only addresses such questions such as: is the coerced-agent threatened; scared; unaware? But also: does the coercing-agent intend to coerce the coerced-agent? Has the coercing-agent been reckless with respect to the effect their behaviour has on the coerced-agent? And so on. Thus, each aspect, the internal and external, has two further parts: how it applies to the coercing-agent, and

how it applies to the coerced-agent. This analysis is layered and contains multiple moving parts but, as Anderson points out, coercion is an *interaction*.[53] It is a relational concept an instance of which involves more than one agent. So there is a lot to account for.

In central cases, like the gunman scenario, it is easy to identify all four parts across the internal and external aspects: the coercing-agent intends to force the coerced-agent to perform a certain action (hand over a wallet or become an informant); the coercing-agent performs a coercive act (in both instances, issues a threat); the coerced-agent feels forced to act in accordance with the coercing-agent's wishes; the coercion succeeds because the coerced-agent eventually does what the coercing-agent wants.[54] Put another way, accounting for the internal and external aspects of coercion explains why our so-called central cases of coercion are unhesitatingly deemed as such.

Recall now the torture scenario from the introduction:

> 2: A woman has been remanded to custody by an armed enforcement unit and is violently beaten by members of the unit prior to being placed into her cell. She is later taken to an interview room where she is told that the beatings will continue until she confesses to the crimes for which she has been charged and cooperates with further investigations. Her refusal to cooperate lasts through six more beatings, after which she finally yields.

This is, as I stated in the introduction, generally taken to be a central case of coercion. Here, the external aspect of the coercing-agent and coerced-agent obtains because the coerced-agent's refusal to cooperate has been paired with her prolonged suffering –

53 Anderson (n 12) 422
54 See: Table I in 'Appendix to Chapter 2' 188

she is actually being tortured and she eventually relents and cooperates. The internal aspect obtains because the authorities are intentionally torturing her in an effort to force her to cooperate, and also because the torture victim is being pressured into choosing to either cooperate and give up her accomplices against her will, or be subjected to further violence.

Non-central cases, however, may only have one or two parts capable of being accounted for. Here, the distinction between the internal and external aspects of coercion becomes helpful because it provides a way in which to discuss what precisely seems coercive about a given scenario while at the same time helping us understand what it is about them that leads us to think of them as non-central. Imagine I want you to write my next lecture for me. I have a jar full of spiders, which I threaten to drop all over your head if you do not agree. Now imagine that you love spiders; the thought of them crawling around in your hair, down your neck and the back of your shirt does not creep you out but rather excites you. The external and internal aspects of the coercing-agent establish that I am attempting to coerce you: Presuming I don't know that you love spiders, I have issued a threat and I have a 'loaded' jar of spiders at the ready. And yet, this is very different from a central case for the important reason that there is no coerced-agent. It is not only that the coercion failed to get me the desired result (a completed lecture), but that it failed to put any pressure on the coerced-agent whatsoever.

Fully explaining why this is a failed instance of coercion requires more than asserting that the coercing-agent failed to utilize her power accurately and should have first figured out what actually would scare her mark, which is the explanation the enforcement account could offer. According to the proposed framework, the failed

coercion is explained by saying that the internal and external aspects do not obtain for the coerced-agent. The coerced-agent did not feel pressured, so the internal aspect of the coerced-agent is absent; the coerced-agent did not do what the coercing-agent wanted, so the external aspect of the coerced-agent is also absent.[55]

Incorporating the internal aspect of coercion into our analysis means that the experience of the coerced-agent is as relevant to our understanding of coercion as external, e.g., observable, considerations and the intent of the coercing-agent. This is important because it can enhance debates within political philosophy more generally, especially when it comes to topics such as victimisation in political life where it is impossible to identify specific agents at fault. Consider, for example, the plight of refugees. Their options are often: to remain in their home country where there is a low chance of flourishing and a high risk of death owing to famine, war, or climate change; or to leave and risk famine and death on the journey only to possibly end up in a country that will be openly hostile to their existence. Incorporating the subjective experience of the coerced-agent into the analysis does not foreclose the possibility that there are actors who are at fault for the situation affecting the refugees; it does, however, remove the burden of having to precisely identify them in order to see refugees as agents who are coerced into migrating.

VI The Internal and External Aspects of Coercion, and Law

Because of law, we oftentimes do things we otherwise do not want to do and sometimes this is with the express intention of avoiding sanctions. In this final section, I will discuss what the internal and external aspects of coercion can bring to legal

[55] See: Table III in 'Appendix to Chapter 2' 189

theory, in particular to our understanding of the relationship between law and coercion, which has long been a concern. Some theories focus on some sort of necessary connection between individual laws and coercive sanctions.[56] Others posit a connection between legal systems and the mechanisms they incorporate for the employment of coercion in achieving law's ends, whatever such ends might be.[57] We can now see that the questions posed by these theorists are fundamentally flawed insofar as they are insensitive to the distinction between being coercive and feeling coerced.

If my distinction between the internal and external aspects is viable – if, in particular, I have successfully made the case that a satisfactory account of coercion ought to account for those instances where there is an intentionally coercing-agent *and* those where there is not – then perhaps an account of the relationship between law and coercion ought to do the same, and the question of whether law is conceptually connected to coercion may simply be ill-formed. This is because the four-part analysis as presented gives rise to more specific, more illuminating lines of inquiry, such as: whether the internal *or* external aspect of coercion is a conceptually necessary feature of law; whether both are necessary; or whether neither is necessary.

There is also the question of whether the agent of interest to our analysis is the coercing-agent (the law) or the coerced-agent (the subjects of law). The relationship between law and the external aspect of coercion, where the agent of interest is the law, seems to be what we are most used to discussing. What is the relationship between law

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[56] Austin (n 2)

[57] See: J Raz *Practical Reason and Norms* (PUP 1990); Grant Lamond, 'The Coerciveness of Law' [2000] OJLS 39; Yankah, 'The Force of Law: The Role of Coercion in Legal Norms' [2008] *U Rich L Rev* 1195; HLA Hart, *The Concept of Law* (3rd ed., OUP 2012); F Schauer *The Force of Law* (HUP 2015); K Himma 'The Authorisation of Coercive Enforcement Mechanisms as a Conceptually Necessary Feature of Law' [2016] *Jurisprudence* 595

and coercive institutions, or between law and sanctions? An analysis of the relationship between the law and its subjects', the coerced-agents' experience of being coerced-agents, on the other hand, could be as fruitful as it would be difficult to engage with. In one sense, it would be appropriate to identify coercion with regards to subjects of the law anytime someone acted in accordance with the law. And yet, it would be mistaken to assume that any instance where a person conforms to the law is one in which they felt coerced. It is quite possible, for example, that an individual decided against parking illegally because they did not want to block a fire hydrant, or park in an accessible space. In such instances, the threat of a ticket was not a factor in their decision-making process and, therefore, it would be mistaken to assume that the internal aspect of the coerced-agent obtains. Thus, pointing to an outcome (e.g., an agent decides against acting illegally) does not guarantee the precise identification of coercion.[58]

Sociological factors can also play a part in whether a person is likely feel coerced by the law. A black person in many parts of the United States, especially predominantly white areas, can experience legal ramifications for doing nothing more than walking. It is fair to suggest, then, that black individuals in certain areas are likely to experience higher instances of coercion with respect to the law than a white person in the same area.

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[58] Indeed, as is commonly remarked, hopefully we do not murder one another for reasons other than the law threatens us with sanctions if we do (reasons like morality and care for our fellow humans). Though, Anderson's enforcement approach seems to draw a different conclusion: 'Although we may only notice or feel such constraints on those rare occasions when we are tempted to violate the law, such feelings or consciousness of these constraints hardly seem like they are necessary as part of our judgment that the law is coercive. Our lack of desire (for the most part) to violate the criminal law may well be, in part, an artefact of the coercive threats of punishment which back it.' Anderson (n 12) 419

To re-form a claim made earlier: different people feel coerced by legal norms in varying degrees. Importantly, the degree in difference cannot be explained by something like Anderson's enforcement approach alone. There is little doubt that a wealthy person will feel less forced by the threat of a speeding or parking ticket than a poorer person. This is because a wealthy person's interests will be less impacted than those of the poorer person. This is a problem inherent to any subjective analyses: how to account for the difference between being coerced, on the one hand, and being merely inconvenienced on the other? Consider analogous questions that arise with respect to offensive conduct: what if someone tends to take umbrage at the most trivial things that virtually no one would find offensive or in other ways problematic?

Incorporating the internal aspect of coercion with regards to subjects of the law requires complex analyses. It is, after all, entirely dependent on subjective experience and interpretation. Owing to this, a relevant question could perhaps be whether a 'reasonable person' in the same situation would also feel coerced. Such a route, however, feels incomplete. The four-part schema offered here can enhance our understanding of coercion by taking the internal aspect to be fundamental to our analysis of coercion. And yet, the identification of the internal aspect of the coerced-agent in a given scenario does not guarantee that coerced-agent's right to claim to have been victimised. Put another way: even if the reasonable person standard applied and the suspected-coerced-agent's feelings of being coerced were justified, it would not necessarily follow that that person was also a victim. Rather, it means we have to ask more targeted questions regarding the scenario, particularly concerning the coercing-agent.

There may be a way to objectify analysis when the question of victimisation arises by invoking some version of the reasonable person standard in determining which instances coercion warrant legal concern – or, in other words, which instances of coercion identified solely from the perspective of the supposed coerced-agent warrant claims of victimisation? If, for example, a reasonable person would, in the same circumstances in question, feel threatened by a similar circumstance, then and only then is the former's feelings of being victimised relevant in assessing legal responsibility.[59]

For example, the man who feels threatened by the influx of sexual assault allegations being made on other men is not entitled to whatever feelings of victimisation he may be experiencing, and anytime he utters 'it's a hard time to be a man', he is deserving of all the eye-rolls. The victimisation he is experiencing is due to his shock that behaviours *he* did not take to be problematic are actually problematic, and always have been. Whereas the woman who feels she has no choice but to appease her boss in order to secure a promotion is likely entitled to her feelings of victimisation as it has *always* been a hard time to be a woman.

Consider another example, my children would probably regularly report feeling coerced by my demands and conditional orders. I think they are justified in those feelings. You and I may not think losing bedtime stories is not a big deal, but they do and this is evident by the fact that they become very worried and upset when they think they are about to lose said bedtime story if they don't do what I want. However,

[59] Recognition of the internal aspect of coercion can also sharpen debates in other areas of legal theory beyond analysis of law. Consider tort theory and its discussions of whether and when one person might justifiably seek compensation for what she perceives to be an instance of coercion? Or, alternatively, whether a person ought to be able to use coercion as a defence in the tort context (see: John Murphy 'Duress as a Tort Law Defence?' [2008] *Legal Studies* 571).

it also matters that I am threatening to not read to them in order to get them to do things like brush their teeth. They can hardly be said to be *victims* of my coercion: the threat is objectively benign – I am not threatening their health or well-being, there would be no lasting damage in the event they actually lost one bedtime story and my aim is their overall health and well-being.

We can also return to Adam and his boss' request for him to work late. The request was sufficiently stressful for Adam that the internal aspect of the coerced-agent obtains, but in order to answer whether he was a victim requires further discussion. It is relevant, for example, that his boss has the standing authority to decide to sanction the employee if the project is not completed on time. She could also foster a work environment where employees feel free to discuss options with her, where they do not have reason to believe their job security is at risk should they refuse to take on over-time. Whether Adam was the only one under pressure to remain at work or not is also relevant. These are the sorts of questions that would contribute to whether a reasonable person standard would support Adam's feelings of victimisation.

Finally, closeted LGBTQIA+ individuals often experience a sort of social coercion to self-censor themselves. They are pressured by conservative social norms to dress in accordance with the sexual identity they were assigned at birth, or to not engage in any displays of affection with their partners in public. What laws are in place and how they are enforced can either add to or detract from the level of victimisation that LGBTQIA+ individuals feel by conservative social norms – whether they feel free to live their life openly and without fear. The present account may not see a necessary connection between being coerced and being victimised, but the language of coercion is important here (and with refugees in the previous section) inasmuch as it is

connected to our conception of victimisation and the need to identify a blame-worthy agent or institution.

Incorporating the internal aspect of coercion with relation to the intent of the coercing-agent also leads to interesting questions: Suppose *S* intends to coerce *X* into performing *y* against *X*'s will by bribing *X*. Furthermore, suppose that there is no way *S*'s threat could actually have any effect on *X*'s decision making – perhaps *X* is so wealthy she would see the intended threat as a mere inconvenience. Or, perhaps *S* intends to physically torture *X*, but *S* is actually deluded in thinking that he has the capacity to bring it about – and suppose that *X* knows this. *S*, in other words, intends to coerce but fails to do so. Do we still want to hold *S* responsible for his intentions to coerce *X*? We can compare such instances to cases of impossible attempts. Suppose I intend to kill *A* with a gun I find on a table. It turns out that the gun has no firing pin. Or even, suppose that the gun is fully functioning, but *A* is not actually before me. Rather, what's before me is an elaborate hologram. There is no way I could succeed in killing *A*. Do I intend to kill *A*? Perhaps. Should I be held legally liable for an attempt to kill *A*? Many people think not because the act was, while illegal, factually impossible to bring about. Might similar things be said when considering the internal aspect of coercion?

If a legal system were to consider incorporating such instances of attempted coercion, then it seems that it faces the types of questions the law already asks in other areas – e.g., in the law of attempts.[60] Is it enough that *S* intends to do something he

[60] There is vast literature on crimes of attempt and whether they are as culpable as successful crimes. See: R.A. Duff's *Criminal Attempts* (Clarendon Press 1996); or, Duff's 'Symposium' of Gideon Yaffe's *Attempts: In the Philosophy of Action and the Criminal Law* (OUP 2010) is also notable: *Criminal Law and Philosophy* [2012] 381. In the research into law of attempts, the question is: At what point is an attempt to commit a crime a crime itself? This discussion relates to the nature of coercion in that, at what point is an attempt to coerce coercion itself. The present analysis identifies 'attempts to coerce' as

knows to be unlawful? Or, must it at least be reasonably possible, in the circumstances in which he acts, to fulfil that intention? To take an extreme case, if we focus exclusively on intentions, should one be liable for murder solely on the ground that one intended to kill someone? Or must one actually kill the person as well? Suppose one tried to kill the person but failed to do so. Must there at least be some reasonable chance of my having succeeded? These are all questions that legal systems must address, and they would be aided by the four-part schema offered by taking the internal and external aspects of coercion seriously.

That there are inherently subjective aspects to coercion has implications for how one analyses the relationship between law and coercion. As I stated earlier, perhaps there is an argument to be made for separate analyses: one for the relationship between law and coercion, where the coercion of interest is the kind the subjects of the law (the coerced-agents) may or may not experience, and another for the relationship between law and coercion, where the coercion of interest is the law's institutionalised coercive mechanisms.

For the present thesis, the coercion of interest is entirely focussed on the law as coercing-agent. I am not analysing the extent to which there is a conceptual relationship between the law and coercion as captured by the experience of living under law. I am analysing whether there is a conceptual relationship between law and coercion as captured by the existence of coercive mechanisms like sanctions and judicial orders. So, the central case of coercion *by law* would be a scenario where a

coercive, even if they fall short of full instances of coercion. This is because identifying an 'attempt to coerce' only requires the identification of a would-be coercer trying to force the would-be coerced-agent. For an 'attempt to coerce', it does not matter whether the coerced-agent perceives the attempt to be coercive, or actually does what the coercing-agent ultimately wants them to do. More analysis is needed in order to ultimately explain at what point is the attempt to coerce *wrongful*. This is what I mean to signal when I say that a secondary analysis is required to discuss claims of victimisation.

judge issues a legal directive to a subject of the law. A judge threatening a compounded fine on an individual who refuses to pay a parking ticket is a good example of this: it is the intent of the judge, acting in her capacity as a legal official, to force the defendant into a choice: pay your parking ticket, or face increased fines. It is an unambiguous, objective and, importantly, intentional act by a legal official on behalf of their legal system.

VII Conclusion

This chapter has reached several conclusions, which I will restate accordingly. Firstly, an instance of coercion is defined as an instance of a forced-choice. The coerced-agent is one who is forced to choose amongst, or between, limited options – none of which they would freely choose for themselves were they not being coerced. The coercing-agent is the agent responsible for the forced-choice, either constructing or taking advantage of a situation in order to force the coerced-agent to choose to do something against their (the coerced-agent's) will.

The 'coercion as forced-choice' definition has two upshots; firstly, that physical manipulation of another as a mere means is not an instance of coercion. When an agent is physically manipulated, their agency is entirely foreclosed. When an agent is coerced, their agency has been limited, or manipulated in some way, but they have enough agency to choose how they respond to the coercive proposal. Second, offers can be coercive in the same way as threats because offers can result in a forced-choice in the same way as threats.

A second conclusion is my contention that a full analysis of coercion ought to account for both its objective and subjective aspects. Attempts to objectify analysis of

coercion, like that of Anderson's enforcement approach, fail because they firstly, do not appreciate the extent to which intent to coerce is a subjective characteristic. Second, they struggle to explain non-central cases of coercion, like those that hinge on whether the coerced-agent feels like they are being coerced, as in the Good Samaritan example.

For this reason, I introduce a four-part schema meant to explain what is coercive not only in central, but also non-central cases. The four-part schema includes the internal and external aspect of the coercing-agent and the internal and external aspect of the coerced-agent. The internal aspect of the coercing-agent accounts for that agent's intent to coerce whilst the external aspect of the coercing-agent is the coercive act (be it a threat, or an offer). The internal aspect of the coerced-agent accounts for that agent's subjective experience – do they feel threatened, coerced, forced to choose? Whilst the external aspect of the coerced-agent accounts for their response to the coercive act; e.g., do they do what the coercing-agent wants them to do In central cases of coercion, all four parts of the analysis obtain. Non-central cases are those where only one, two, or three parts obtain – and what is present or missing are part of the explanation for what, if anything, is coercive about a given non-central case.

When applied to the present topic of the thesis, the relationship between law and coercion, it is apparent there are multiple directions available. An analysis where the coercion is question is relevant to the coercing-agent, e.g., law, or an analysis where the coercion in question is relevant to the coerced-agent, e.g., the subjects of law. Having a clearer sense of the type of coercion involved in analysis means that there is a better-defined issue being investigated. When I ask, 'is there a conceptually necessary

relationship between law and coercion?', I am asking, 'is there a conceptually necessary relationship between the existence of law and the law's intentional application of institutionalised coercive sanctions for the purpose of motivating the compliance of its subjects with its legal norms?'

3

Can the Rule of Angels be 'Law'?

I Introduction

The first chapter explored the diachronic progression of theory regarding the relationship between law and coercion. It closed with the assertion that Joseph Raz's society of angels thought experiment represented the final nail in the coffin of classical conceptual necessity claims (CNCs) regarding law's relationship to coercion.[1] This chapter will more closely consider the arguments Raz makes against classical CNCs in his work *Practical Reason and Norms* (henceforth, *PRN*). In order to fully grasp Raz's argument against classical CNCs, it is necessary to understand its place within his wider theory of law *qua* legal systems and his work into the structures of reasons for action. Only then is it possible to understand the fundamental claim behind his denial of classical CNCs: that the coercive threat of sanction is what he calls an 'auxiliary reason' for action and, furthermore, deciding to act in accordance with the law simply because one has been coerced is deciding in accordance with, 'a reason of *the wrong kind*.'[2]

The chapter will proceed as follows: Firstly, there will be an exegesis of the arguments Raz makes within *PRN* regarding the law and its relationship to coercion, thus making it possible to fully understand Raz's denial of classic CNCs and the context of the society of angels thought experiment. That the exegesis in this chapter

[1] Those claims that assert either: [1] it is a conceptual truth that every *law*, R, is coercive – i.e., is such that it includes a coercive sanction for its violation; or [2] It is a conceptual truth that every *legal system*, L, is coercive – i.e., is such that it includes coercive sanctions for the violation of some of its rules.
[2] Joseph Raz, *Practical Reason and Norms* (Hutchinson & Co Ltd 1975) 161, emphasis added

focuses on Raz's denial of classical CNCs is significant. Whereas H. L. A. Hart, whose work predates and directly influences Raz's, suggests a replacement, so to speak, for classical CNCs in the form of what he calls *natural necessity*, Raz does not offer an explanation for how we ought to conceive of the relationship between law and coercion.[3] Raz claims that classical CNCs are false, and gives reasons for why he takes that to be the case. But the relationship between law and coercion is left unexplained, as though they are related by chance or accident.

Then the chapter will explore objections to Raz's denial of classical CNCs and defend Raz's position, focussing primarily on works by Kenneth Einar Himma. Himma argues that there is a valid CNC regarding coercion and its relationship to law: that the *authorisation* of Coercive Enforcement Mechanisms (henceforth, CEMs) is a conceptually necessary feature of law. Part of Himma's argument is that the society of angels is flawed and, as such, fails to support Raz's denial of classical CNCs. This chapter ultimately aims to accomplish both a fuller understanding of Raz's arguments and a defence of his position against Himma's powerful critiques. Such a defence will ultimately serve as part of the thesis' larger goal of demonstrating the instability not only of classical CNCs, but also of contemporary CNCs like the one Himma puts forward.

[3] In *The Concept of Law* (3rd edn, OUP 2012), Hart argues that whilst classical CNCs are false, there is a sense in which coercion is necessary to law. His claim is: given the natural facts of the world and the people who inhabit it, coercion is 'naturally necessary' to the function and practice of law. Whether there is a relationship between law and coercion, then, is "contingent on human beings and the world they live in retaining the salient characteristics which they have" (199-200). Put another way, the relationship between law and coercion originates with human nature and the natural world, not law's nature. Chapter 4 will further consider Hart's claim and its critics.

II Practical Reason, Norms, and Coercion

II.i *The Thought Experiment*

The society of angel's thought experiment is found in a section of *PRN* titled, 'Law and Force.'[4] It is an illustration of Raz's assertion that classical CNCs do not adequately explain the relationship between law and coercion and its success shows that it is possible to have a theory of a legal system without the conceptually necessary inclusion of coercive mechanisms. It is lengthy, but it is helpful to reproduce the text as it will be relevant throughout the chapter.

Raz writes:

> (1) Even a society of angels may have a need for legislative authorities to ensure coordination. Angels may be in agreement about both their values and the best policies for implementing them. But the sort of society described above [e.g., one where the authorisation of sanctions would be superfluous because the subjects have an innate respect for the law and would not break it] does not presuppose such a measure of agreement. Its members may pursue many different and conflicting goals and they may share our difficulties in settling disputes and resolving conflicts of interests by mutual agreement. They differ from us only in having universal and deep-rooted respect towards their legal institutions and in lacking all desire to disobey their rulings. They have, therefore, all the reasons that we have for having legislative authorities and an executive.
>
> (2) It might be thought that our imaginary society would have no use for courts and therefore no legal system. But this is a mistake. It would require courts for at least two reasons. In the first place there would be many factual disagreements and disputes about the interpretation of legal transactions and their legal effects. In the second place there would be many at least partly unregulated disputes, i.e. those whose solution is not uniquely determined by existing law but requires the exercise of discretion by the courts […] To settle such disputes one needs a court which is a primary organ and also has discretion. For these reasons the imagined community would have more than enough reasons for having a proper legal system with primary organs. We should not think of the imagined society as a community of self-denying saints. Its members pursue their self-interest when they think they are right to do so, and they may be wrong.

[4] Raz (n 2) 154-162

> (3) Since accidental damage might occur in our community and since damage may result from people acting wrongly because they misapprehend the facts or misinterpret the law, our society would have laws providing for remedial rights and duties […] But are the civil remedies provided for in our imaginary legal system sanctions? They are not designed to deter people from breaking the law […] and they are made with the knowledge that they will be applied only to people who fail to perform their duty through accident or ignorance, and who will be ready to comply with their remedial duties once they are convinced that these apply to them.[5]

The thought experiment can be summarised as follows: [1] claims that a society of angels would at least require a legislature to create their legal code, which in turn is needed to ensure at the very least social coordination. The angels are not entirely homogenous and would have their own agendas, so conflicts among them could arise. Their only difference from humans, per Raz, is that they take themselves to have 'more than enough reasons to obey the law regardless of sanctions.'[6] [2] goes on to claim that in addition to a legislature, a society of angels would also need courts to both interpret the legal code and resolve disputes not explicitly regulated by the legal code. Essentially, from [1] and [2], we can conclude that a society of angels would have a legal system. A further point to consider, via [3], is that civil remedies, which a society of angels would require, are not the same as criminal sanctions, which a society of angels would not need. Civil remedies, unlike sanctions, are not designed to deter or punish would-be angel law breakers. Rather, civil remedies are there to right the wrongs that could occur even within a society of angels *and* the angels would comply without hesitation because of their innate disposition to follow the law.

[5] Ibid 159-60
[6] Ibid 159

II.ii *That Sanctions are Not the* Right Type *of Reason*

Raz's research is focussed on the nature of law *qua* legal system, not the nature of law *qua* valid legal norms. This is because Raz thinks that the central objective of analytic jurisprudence is to clarify the nature of the *system* that gives rise to valid legal norms and clarifies the internal relationships individual legal norms have to one another.[7] In other words, if a comprehensive theory of law *qua* valid legal norms is one of analytic jurisprudence's aims, then it is imperative to have a comprehensive theory of the systemic practices that give rise to them. The centrality of the legal system to Raz's investigations is critical to note because his denial of classical CNCs directly evolves from his investigations into the legal system as such. So, not only is coercion not a conceptually necessary feature of a valid legal norm, *but also* coercion is not a conceptually necessary feature of the legal system.

The relationship Raz defines between law *qua* legal system and coercion changed quite drastically between his work *Concept of a Legal System* (henceforth, *CLS*) in 1970 and *PRN* in 1975. In *CLS*, Raz writes that legal norms are standards of evaluation, or principles guiding behaviour, that are created by acts of will and backed by sanctions. Sanctions, in turn, are understood as a, 'standard reason for compliance,' where a standard reason, per Raz, is, 'a reason for doing that act which is present whenever the circumstances exist.'[8] Standard reasons, then, are tethered to circumstance. For example, given traditional social norms, that an individual has walked through a door with another person immediately following them is generally

[7] J Raz *The Concept of a Legal System: An Introduction to the Theory of Legal System* (Clarendon Press 1970) 121

[8] Ibid 125

taken to be a standard reason for the act of holding that door open whilst the person behind walks through the doorway.

To further stress the significance of the standard reason to the understanding of norms as such in *CLS*, Raz goes on to claim that, 'guides to behaviour exist *only if* accompanied by a standard reason for following them.'[9] In *CLS*, Raz claims that sanctions are standard reasons for compliance with the norms of a legal system which, therefore, means they are essential to the law's standing as a normative guide. This means that in *CLS*, Raz defends a type of CNC regarding the relationship between law *qua* legal system and coercion. In *PRN*, however, the sanction is no longer a standard reason for action. Rather, *PRN* contains a much more elaborate and nuanced categorization of various types of reasons for action where the sanction is construed as what Raz calls an *auxiliary reason* for action. Owing to this change, the sanction is no longer a conceptually necessary feature of law *qua* legal system.

The central project of *PRN* is an analysis into the normativity of law: How can we fully explain the law's ability to successfully guide both the structure of a society and the behaviour of its subjects? And, what gives law its action-guiding power? Not wanting to spill the proverbial ink unpacking Razian analytic jurisprudence, what follows will focus on why Raz, in *PRN,* does not take coercive sanctions to be among those conceptually necessary features of the legal system. The general thought is that the coercive sanction does not enhance our understanding of the normativity of the law because the person who is coerced into following the law because they want to avoid a sanction is simply avoiding a sanction. Put plainly, following the law because one wants to avoid being sanctioned is not the same thing as following the law in order

[9] Ibid, emphasis added

to follow the law. Fully understanding that assertion requires an idea of Raz's meticulous categorisation of reasons for action, and the type of reasons legal norms represent in our practical reasoning.

When a person engages in practical reasoning in order to decide what to do, she does so in accordance with what Raz calls the *balance of reasons*. Essentially, we can understand the decision-making process as the weighing-up of the various, sometimes conflicting, reasons for (or against) an action.[10] First-order reasons for action are reasons to act, or to refrain from acting; moral reasons and prudential reasons work in this fashion. For instance, a first-order reason to P may be because it is morally required to P; similarly, a first-order reason to Q could be because Q is viewed as beneficial by the agent. Second-order reasons for acting (or not) are reasons for (or against) acting on a [first-order] reason. Promises, per Raz, are second-order reasons in favour of, or against, acting on one or more reasons to act. That one has made a promise to Q is a reason for not acting on a reason to not Q; one who has made a promise, per Raz, could claim: 'That I have promised to visit my mother is the [second-order] reason I have to not go to the movies." In this example, I have a prudential reason to go to the movies, because I enjoy them, and my promise to visit my mother is a second-order reason to not act on my first-order prudential reason to go see a movie.

'An exclusionary reason,' per Raz, 'is a second order reason to *refrain* from acting for some reason.'[11] Promises, Raz contends, act in this exclusionary fashion because they quite literally exclude certain competing first order reasons from

[10] Raz (n 2) 36
[11] Ibid 39

deliberation. For example, if I promise to never make my children eat tofu, then, I have an exclusionary reason to never make tofu for dinner, despite first-order reasons such as, my husband and I like to eat tofu, and, tofu is very healthy. For Raz, conflicts between first-order reasons and second-order exclusionary reasons, 'are resolved not by the strength of the competing reasons but by a general principle of practical reasoning which determines that exclusionary reasons always prevail.'[12] This category of exclusionary reasons allows Raz to incorporate a notion of principled commitments and to explain how such commitments function in our decision making when they conflict with first-order reasons.

Legal norms claim to operate in our decision-making process as both first-order *and* second-order exclusionary reasons. If *x* is legally required conduct, then we have a first-order reason to *x*. Moreover, if one does not want to *x*, then the law requiring *x* claims to function in our decision-making process as a second-order reason *against* acting on reasons one might have to not *x*. The law claims to exclude our acting on those reasons. It is not that we ought to follow the law because the law is always right, or, because following the law is a moral thing to do. Rather, in the general structure of practical reasoning, legal norms *at the very least* purport to exclude many of the first-order reasons we may have for acting contrary to first-order legal prohibitions and requirements.

Where, then, do sanctions fit into Raz's schematics? Could the sanction function as an exclusionary reason not to *X*, where *X* is against the law? To be sure, avoiding a sanction gives me reason not to *X*: I want to *X*, but *X* is against the law and if I break the law then I will be punished. But the sanction is not the type of reason

[12] Ibid 40

that *excludes* other reasons in favour of *X-ing*. Rather, it is a reason that competes with whatever first order reasons to *X* I might happen to have. What serves as an exclusionary reason is the law itself. The legal norm prohibiting *X*, insofar as it purports to be authoritative and because authority purports to exclude, not merely compete with other first order reasons, is what does the excluding. In other words, the legal norm prohibiting *X* does not merely provide a reason to act as the law requires, it also *excludes* our acting on any reasons for doing what the law prohibits. The role of the sanction is, as it were, to complement the exclusionary force of the law by providing an *additional* first order reason not to *X*. Owing to this, the sanction, Raz concludes, is an *auxiliary* reason to act or refrain from acting.[13]

The sanction serves, in other words, as a first-order reason for acting as the law requires. One's practical reasoning in such a situation could go as follows: "I want to X for reason E; X is against the law, so I have an exclusionary reason not to X *for reason E*. Additionally, if I X I may be punished, so I have an additional first order reason not to X." The person who refrains from X in order to avoid punishment is not acting because of the exclusionary reason (the law), rather they are refraining from action because the auxiliary reason (the sanction) had more weight in their balancing of reasons. This is why Raz says following the law because one wants to avoid sanctions is a, 'reason of the wrong kind.'[14]

Wrong not because it is morally wrong to act on the strength of auxiliary reasons, but wrong because auxiliary reasons are not exclusionary reasons, which does its work in practical reason by excluding as opposed to outweighing. In practical

[13] Ibid 161-2
[14] Ibid 161

reasoning a valid exclusionary reason is enough of a reason to refrain from acting in a particular way because it excludes the relevant reasons against acting that way. Insofar as the law excludes acting on those reasons, we no longer have reason to act as the law prohibits. The sanction, in other words, *should not be necessary* for two reasons: [1] if the law succeeds in what it sets out to do, that is, provide us with valid exclusionary reasons for action; and [2] if we always act as the angels always do – that is, as reason requires.

This is the foundation upon which the society of angels thought experiment rests. To repeat: the thought experiment is not the argument itself, rather, it is an illustration of Raz's argument that coercive sanctions are best understood as auxiliary reasons for action and, as such, are not conceptually necessary features of law. The angels take the law to be an exclusionary reason for action and, therefore, sanctions are not needed to further motivate them to follow legal norms. As such, their legal system does not need to coerce them, and this omission does not warrant the claim that the angels do not have a legal system.

What is central to the nature of law is its claimed authority. And a mark of authority is the capacity to issue valid exclusionary reasons for action. It is not, as the society of angels is intended to illustrate, the ability, intention or willingness to impose sanctions. The next section will turn to Kenneth Einar Himma's critique of Raz's arguments against classical CNCs. We will see that, not only do his criticisms of the thought experiment fail, but he does not successfully integrate a critique of Raz's actual argument: that the sanction is auxiliary and, therefore, not conceptually necessary to the legal norm itself, nor conceptually necessary to the *normativity* of the legal norm.

III Kenneth Einar Himma's Conceptual Necessity Claim

In a series of works, Himma critiques Raz's denial of classical CNCs as a way to bolster support of his own positive thesis regarding the relationship between law and coercion. Himma's thesis is that the authorisation of Coercive Enforcement Mechanisms (CEMs) is a conceptually necessary feature of law *qua* legal system. The phrase, *the authorisation of CEMs* reflects, 'the characteristic manner in which legal systems make threats as a means of inducing certain acts or omissions.'[15] Thus, *the authorisation of CEMs* conceptually requires: [1] that the legal system has the necessary infrastructure to make use of CEMs; and [2] that some officials have the relevant authority necessary to put CEMs into practice.[16] Himma's CNC, then, does not assert that a legal norm is constituted by coercive sanctions, nor does it stipulate that CEMs must be exercised by legal officials. Rather, in restricting his CNC to the assertion that CEMs must simply be authorised by a legal system to compel its subjects into following the laws demands and prohibitions, he is making a softer claim than Austin, who asserts that a coercive sanctions are conceptually necessary features of all laws 'properly so-called.'

In order to defend his position, Himma critiques both Raz's society of angels thought experiment and the Hartian theory of legal obligation. His critiques of the society of angels thought experiment are twofold; firstly, Himma argues that the society of angels is a flawed thought experiment – that it does not actually work. The angels, according to Himma, are either morally perfect and, contra Raz, do not need a legal system, or they are not morally perfect and, contra Raz, would need a legal system that authorises CEMs. Second, Himma claims that even *if* the thought experiment did

15 K E Himma The Authorisation of Coercive Enforcement Mechanisms as a Conceptually Necessary Feature of Law' [2016] *Jurisprudence* 601-602
16 Ibid 595

work the way it is supposed to, i.e., even if it did successfully illustrate the conceptual possibility of there being a legal system that did not authorise CEMs, such a legal system would be, 'insufficiently grounded in the realities of our world' and, as such, would have very little to contribute to our understanding of our concept of law.[17]

Himma's critiques of what he calls the Hartian theory of legal obligation will be unpacked in the following chapter; for the present chapter, however it is helpful to offer a sketch of his overall thesis. Himma grounds his thesis that the authorisation of CEMs is a conceptually necessary feature of law *qua* legal systems in a series of four premises:

> (i) The Hartian claim that the sense of 'law' requiring explication picks out municipal legal systems in the *modern state*; (ii) widely accepted Razian claims about how our legal practices construct the content of our legal concepts; (iii) claims showing the centrality of [CEMs] in every paradigmatic instance of law we have ever known; and (iv) logical difficulties arising in connection with explaining legal normativity in a system without such mechanisms.[18]

Broadly construed, Himma's theory progresses as follows: Per Himma, 'Hart's selection of "municipal law in a modern state" as the subject of conceptual jurisprudence indicates the conceptual relationship between the notion of a legal system and the notion of a state.'[19] Himma then asserts that the concept of law *qua* legal system ought to be connected in some way to the function of the modern state, which, per Himma, is to provide efficient social control so that a Hobbesian state of nature is kept at bay. He writes:

> Little argument is needed to see that these conflicts of interest [stemming from e.g., material scarcity, greed, selfishness, etc.] among beings like us in such a world are likely to become violent at times. It is this natural propensity for

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17 K E Himma, 'Can There Be Law in a Society of Angels?' in *Coercion and the Nature of Law* (Forthcoming, OUP 2020) 15. Many thanks to Ken Himma for sharing the penultimate version of this chapter with me.
18 Himma (n 15) 594
19 Ibid 599

> violence in a world like ours that creates a need for keeping the peace through social control.[20]

Himma is correct that 'little argument is needed' for one to accept the claim that a means of social control is necessary for maintaining a relatively peaceful society.[21] What, however, explains the link between successful social control and the need for coercion? For Himma, it is effectiveness: 'The most effective method for deterring [violent conflicts]…is to threaten a violent legal response.'[22] Granting such a link [that the need for social control entails the need for coercion] puts Himma's claim in synch with Hart's justification for what he termed a claim of *natural* necessity (classical CNC is false, but we can say that, given the natural facts of the world and the people who inhabit it, coercion is 'naturally necessary' to the function and practice of law). Himma's theory, however, departs from the Hartian picture because Himma contends that there is enough empirical evidence to support premise (iii), that CEMs are *central* to the function of municipal law in any modern state.[23] Therefore, per premise (ii) (that legal practices construct the content of legal concepts), the authorisation of CEMs is a conceptually necessary feature of law.

Himma's application of premise (i) is an expression of his intuition that the *only* concept of interest is *our* concept of law, which is firmly tethered to *our* natural world and *our* unique social needs. When he writes that he sees, 'no plausible reason

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[20] Ibid 601

[21] It may be worth mentioning in a bit more detail that Himma takes the conceptual function of law to be 'keeping the peace'. He writes, 'law can efficaciously keep the peace only by backing some legal norms with authorized coercive enforcement mechanisms.' Therefore, a system of norms that does not authorise the use of CEMs, per Himma, cannot keep the peace, cannot function in the way that law is supposed to function and, therefore, cannot be properly identified as 'legal'. More will be said about this is Chapter 4. See: 'The Conceptual Function of Law; Law, Coercion, and Keeping the Peace' in L Burazin, K E Himma, and C Roversi (eds), *Law as Artefact* (OUP 2018) 154

[22] Himma (n 15) 601

[23] Chapter 4 will provide support for the assertion that Himma departure from Hart's theory does not adequately support his own thesis that the authorisation of CEMs is a conceptually necessary feature of the legal system.

to adopt a theory of a concept that would apply to beings who lack the very characteristics that create *our* need for law,' he is explicitly referencing Raz's society of angels, which Himma argues adds little understanding to the concept of law with which legal theory ought to be concerned.[24] To repeat, the upshot of Raz's thought experiment is that we would be incorrect in saying the angels lacks a legal system simply because their system lacked the institutional mechanisms necessary to coerce its subjects into following the law. Himma, however, disputes the theoretical significance of the thought experiment, writing: 'the society-of-angels *argument* is insufficiently grounded in the realities of our world,' and that, 'we are simply too different from the angels for the society of angels to tell us anything about the conceptual character of normative institutions designed to regulate *our* behavior.'[25] In other words, because angels are radically different from us, their system of norms is bound to be different from ours to such a radical degree that it renders any conclusions we can draw about the angels' system of norms non-transferrable to *our* concept of law.

Undercutting the effectiveness of the society of angels thought experiment is critical for Himma's argument. Himma accepts the Razian claim that the content of our legal practices informs the concept of law *qua* legal system (his premise (ii)). However, as Section 2 explains, Raz concludes that coercive mechanisms are not one of those legal practices that are conceptually necessary in order to identify a normative system as legal. His society of angels thought experiment is part of the reason why his conclusion is generally accepted by theorists today. Thus, if Himma can show that the angels in the thought experiment do not actually have a legal system, then he can

[24] Himma (n 15) 603
[25] Himma (n 17) 14, emphasis added

advocate more strongly for the validity of premise (iii), that coercive mechanisms are central to not only *our* legal practices, but to legal practices in general. And if coercive mechanisms are central to legal practices in general, then premise (ii) will successfully support his overall conceptual claim regarding the conceptual necessity of the authorisation of CEMs.

According to Himma, morally perfect angels would only need a normative system that solves coordination problems and make provisions to regulate disputes. He writes that, 'social control is only necessary where there is a significant probability of conflicts that *threaten the peace* among self-interested persons living together in a society of material scarcity.'[26] There are, however, more types of social control than merely prohibiting or requiring conduct and if we follow Raz, the law in the society of angels is a tool of social control – similar to ours – that grounds and maintains the organization of that society. That a legal system of angels is successful at keeping the peace *without* the need to authorise CEMs is down to the population being angels predisposed to doing not only what is morally right, but also what the law requires.

If Raz is correct, Himma claims we may then conclude that, 'it is not a conceptually necessary feature of a legal system that it include a system of *criminal* law.'[27] Himma takes this conclusion to be absurd – the law cannot claim to regulate conduct if it does not in some way prohibit or require certain behaviours. However, the claim that morally perfect beings would not require a criminal code depends on a particular understanding of morality as both universal and static. Part of the reason a society of angels would require law, in Raz's view, is that morality is at least partly

[26] Himma (n 15) 600
[27] Ibid 608

underdetermined. Because there are questions as to what definitively counts as a *moral* wrong, choices need to be made regarding what should count as a *legal* wrong and there is no reason to think this would not extend to criminal law. Raz argues, e.g., that it may not be certain what constitutes murder as opposed to manslaughter; we know that there are differences here, but if the lines between them are indeterminate, then we need someone to draw them for us so that we all know exactly where we stand in relation to each other.[28]

Perhaps an angel would never commit murder, but the point here is that not all questions of morality are as clear-cut as whether or not killing is wrong. To extend the point, of equal relevance are those factual disputes that need legal settlement. Whether a particular act, *X*, is an instance of some criminal category might not be obvious. And the angels may need someone to settle such uncertainties for them. Being morally perfect does not entail that the angels are perfect when it comes to empirical matters. It therefore seems intelligible to conclude, as Raz does, that even morally perfect beings would need a legal system to fill in the gaps that moral perfection cannot solve in society.

We can press this point a bit further by considering the Razian condition *comprehensiveness*, which Raz takes to be essential to the law *qua* legal system.[29] By *comprehensive*, Raz means to capture that quality of a legal system that claims the authority to regulate, 'any form of behaviour of a certain community.'[30] Whilst a legal system that lacked a criminal code would lack a great deal of regulations that we take

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[28] J Raz *The Authority of Law: Essays on Law and Morality* (2nd edn, OUP 2009) 245

[29] Whether the legal system of angels satisfies Raz's other conditions for the existence of a legal system, that they also claim supremacy and openness, does not seem to be an open question, or at least Himma's work does not hint at a worry that either of them would not apply to a legal system of angels.

[30] Raz (n 28) 151

to be central to our legal practices, the lack of a criminal code does not necessarily mean a normative system would lack comprehensiveness. Raz explicitly states that comprehensiveness does not require a legal system to regulate all forms of behaviour, only that the legal system claims the authority to do so.[31] The lack of a criminal code, then, does not in itself represent a lack of comprehension so long as that legal system has conferred the power to enact such norms on a legal official. As Raz explicitly states that the society of angels would have a legislature, it is not a stretch to presume that such legal official(s) exists.

This point about *comprehensiveness* can also respond to another critique of the society of angels thought experiment made by Ekow Yankah. In his article, Yankah defends a classical CNC by arguing that, 'the ability to use coercion under special conditions defines legal norms.'[32] In support of his claim, he points to what he takes to be a fault with the society of angels:

> If one (fallen) angel inexplicably decided to disobey those edicts, the inability of any structure to even theoretically compel him to do so would, I suggest, cast serious doubt on the system's claim to be law.[33]

Casting doubt on the legality of the angels' system of norms, however, is not the only possibility. In support of Raz's original arguments, Leslie Green points out, 'even the angelic legal system contains all the powers necessary to get a coercive apparatus up and running in short order. It is unusual only in that it does not use its necessary powers in that way.'[34] The lack of a coercive mechanisms in a society of angles is not evidence that the angels lack a legal system, but rather is evidence that either the

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[31] Ibid
[32] E Yankah 'The Force of Law: The Role of Coercion in Legal Norms' [2007] *University of Richmond Law Review* 1197
[33] Ibid 1236
[34] L Green 'The Forces of Law: Duty, Coercion, and Power' [2016] *Ratio Juris* 167

legislature has not yet conferred the relevant powers on certain legal official(s) or, that the powers have been conferred, but not yet exercised. One could therefore respond to Yankah's worry by claiming that the fallen angel has simply given the relevant official(s) of such a legal system a very good reason to create, authorise, and enact coercive mechanisms.

Worries about the content of an angelic legal system aside, Himma also questions how relevant the thought experiment actually is to legal theory. He writes, 'it seems reasonable to characterise law in a society of angels as, at best, a borderline case of law that is significantly removed from the core cases of legal systems that construct the content of our legal concept.'[35] Such a claim relies on a dichotomy between the concept of *our law* and a general concept of law that would hold in all possible worlds. He claims, per premise (iii), that the concept of law 'of interest' ought to speak to what is central and ubiquitous to all instances of law that we know – that we have ever known.[36] If it cannot, then how can it be of any philosophical use to us? What the previous discussion on the society of angels thought experiment has shown is that despite the fact that angels are very different from beings like us, they still have the need for a legal system *and also* their need for a legal system is actually similar to our need for a legal system (to organise and structure society so that we can co-exist peacefully).

Himma is analysing the concept of law *qua* legal system within the confines of our world and, as such, any CNC supported by his analysis will be bound in its application to human nature and our natural world. Raz, on the other hand, is analysing

35 Himma (n15) 604
36 Ibid 602

the legal system at its most general, at its most philosophically abstract. What seems to be missing from Himma's work is an argument for how claims regarding the *ubiquity* and *centrality* of certain legal practices, claims that can only be verified through empirical study, can promote an observation (all legal systems authorise the use of CEMs) to the level of conceptual truth (the authorisation of CEMs is a *conceptually necessary* feature of law).

According to Himma, one's inability to grasp this move is down to a conflict of intuitions. He writes, 'at the end of the day, the dispute between those of us who believe that the relevant concept of law does not extend beyond beings sufficiently like us and those who do not will rest on different intuitions.'[37] However, rejecting Himma's CNC (that the authorisation of CEMs is a conceptually necessary feature of law) is not a failure to recognise the importance, or even the centrality, of coercion to *our* legal systems, it is simply a conceptual claim about law.

IV Conclusion

In summary, Himma's critiques of Raz's arguments within *PRN* fail to support his claim that the society of angels thought experiment fails to illustrate the conceptual possibility of a legal system without coercive sanctions, which leaves little support for his own thesis that the authorisation of CEMs is a conceptually necessary feature of the legal system. Even if Himma's critiques of the society of angels thought experiment did hold, they would not be damaging to Raz's wider arguments against classical CNCs. Himma's discussion of the society of angels thought experiment does not sufficiently engage with Raz's argument against the validity of classic CNCs as explained in the

[37] Ibid 604

beginning of this chapter. Himma briefly alludes to an understanding that he would have to also find flaw with the Raz's conceptual claim that law provides exclusionary reasons for action, and points to the contentious nature of the Razian claim, but then drops the issue.[38] What this lack of engagement means is that even if Himma could sufficiently make the case that the thought experiment fails, that a society of angels would not have law, it would only be a minor victory because Raz's argument – that sanctions are reasons of the *wrong kind* – does not rely on the thought experiment for its success.

What Raz's work does not provide, however, is an explanation for how we ought to conceive of the relationship between law *qua* legal systems and coercion. If classical CNCs are not accurate, what other type of explanation is there? Is the relationship accidental? He posits that it may simply not be 'humanly possible' for a legal system in our world to lack coercive sanctions. But this is not a satisfactory explanation given the lingering intuition that there *must* be more to the story of why law and coercion always seem to go hand in hand. The next chapter will consider Hart's solution to the problem. Like Raz, he denies the validity of classical CNCs. Unlike Raz, he offers an explanation for the relationship between law and coercion: it is not a relationship grounded in conceptual necessity, but in what Hart calls *natural* necessity.

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[38] Himma (n 15) 625. Himma may be referring to works such as, Andrew Jordan's article 'Exclusionary Reasons, Virtuous Motivation, and Legal Authority' [2018] *Canadian Journal of Law and Jurisprudence* 347. In the article, Jordan argues that, 'an attractive account of moral motivation precludes the possibility that moral reasons can be excluded [by exclusionary reasons] in the way that Raz's account requires' (347). However, the examples he uses are all of conflicting first-order reasons. Jordan does not, for instance explain how a promise – the classic example of a second-order exclusionary reason – is better understood as a first-order reason alone. Moreover, one of his examples specifically uses a sanction as an exclusionary reason for action. He writes: 'Suppose there is a hate crime statute that holds that if a person assaults another for reasons of racial animosity, that person is subject to a penalty of an additional five years in prison. It follows from Raz's view that the penalty is an exclusionary reason insofar as it [is] a reason not to act for a reason' (360). Such an assertion, however, is directly refuted by the exegetical work done in Section 2.ii of this chapter.

In unfolding Hart's solution to how we can conceptualise the relationship between law and coercion, Himma's claim that legal theory ought to restrict itself to investigating the concept of law as a normative system meant to regulate *our* behaviour will be discussed. Himma's reasons for why we ought to regard the authorisation of CEMs as conceptually necessary to the concept of law are the same as the reasons for why Hart claims coercion, in any form, is a natural necessity: *we* need coercive mechanisms so that law can work efficiently. The difference, then, is the where the two theorists seem to set the bar for what counts as a conceptual truth. Hart, like Raz, takes a more classic philosophical position: conceptual truths are true in all possible worlds. If angels can have a normative system that we would feel comfortable calling 'legal', and if that normative system would not require coercive mechanisms, then the claim that coercive mechanisms are necessary cannot be a conceptual truth about 'legal systems'. Himma, however, takes the position that what counts as conceptual can be bounded to our world alone *if* it is true in all instances of that world. It does not matter for Himma what 'law' looks like in a different world containing a society of angels; if *every* legal system in our world requires the authorisation of CEMs, then we are justified in conceiving of the authorisation of CEMs as a conceptually necessary of law.

4

The Virtues and Vice of HLA Hart's Natural Necessity Claim

I Introduction

Chapter 1 explained the most prominent accounts of the relationship between law and coercion. I categorised accounts into two groups: those classic works of legal theory that promote conceptual necessity claims (CNCs), which argue that coercion is a conceptually necessary feature of law, and those that deny a conceptual relationship between law and coercion. Chapter 2 defined coercion in such a way as to provide a clearer understanding of what is meant when we say the law coerces. Then Chapter 3 defended Joseph Raz's denial of the classic CNCs against criticisms levied by Kenneth Einar Himma. This required defending the success of Raz's famous society of angels thought experiment, which he uses to illustrate his claim that law *qua* legal system could exist even if such a system did not provide for coercive mechanisms. However, Raz stops short of explaining how we ought to conceptualise the relationship between law *qua* legal system and coercion, remarking that it may simply be, 'humanly impossible' for a legal system on Earth to lack coercive mechanisms.[1] If we follow Raz's account then, the most we can say about the relationship between law and coercion is that it is merely an accident of human nature.

[1] J Raz *Practical Reason and Norms* (Hutchinson & Co 1975) 158

In a series of works pre-dating Raz's *Practical Reason and Norms*, H.L.A. Hart denies the truth of classic CNCs whilst maintaining that there is a sense in which coercion is necessary to law. He writes:

> 'Sanctions' are […] required not as the normal motive for obedience, but as a *guarantee* that those who would voluntarily obey shall not be sacrificed to those who would not. To obey without this would be to risk going to the wall. Given this standing danger, what reason demands is *voluntary* co-operation in a *coercive* system.[2]

Here Hart is specifying that coercive sanctions are not only for the purpose of coercing would-be lawbreakers into following the law, but more so for the protection of those who would voluntarily follow the law.

Referring to the legal system as a *coercive* system is brow-raising given Hart's insistence that there is no conceptual relationship between law and coercion:

> [T]he traditional question whether every legal system *must* provide for sanctions can be presented in a fresh and clearer light… There are no settled principles forbidding the use of the word 'law' for systems where there are no centrally organized sanctions.[3]

He then goes on to claim,

> On the other hand, we do need to distinguish the place that sanctions must have within a municipal system, *if it is to serve the minimum purposes of beings constituted as men are.* We can say, given the setting of natural facts and aims, which make sanctions both possible and necessary in a municipal system, that this is a *natural necessity*.[4]

Hart's claim is that given the natural facts of the world and the people who inhabit it, coercion is *naturally* necessary to the function and practice of *our* law. The category *natural necessity* is an important conceptual tool, particularly within Hartian jurisprudence, which captures those contingent relationships law has with other

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2 HLA Hart *The Concept of Law* (3rd edn, OUP 2012) 198
3 Ibid 199
4 Ibid, emphasis added

features that don't cash out as being conceptually necessary to the existence of law, and yet are stronger than accidental.[5]

The present chapter will analyse critiques of NNC as it applies to the relationship between law and coercion. In Section II, I analyse a pair of contemporary pieces that attempt to reinstate variations of the command theory. In Section III, I return to Kenneth Himma's revised CNC, that the authorisation of coercion enforcement mechanisms (CEMs) is a conceptually necessary feature of law. Despite Himma's contention that he is making a conceptual claim about law and its relationship to coercion, there seems to be very little practical difference between Himma's conclusions and Hartian NNC. There is, however, a significant conceptual difference: Himma thinks that conceptual analysis of law must be anchored to ordinary language and empirical truths about *our* law whereas Hart conceives of conceptual analysis in a more traditional way: it is after conclusions that hold in *any* logical space, not just within our world.

Sections II and III together work to preserve Hart's claim that CNCs (classic and contemporary variations) are false. The chapter will then conclude by claiming that the critics are right on one important point: NNC does not satisfactorily account for the relationship between law and coercion. Paradoxical though it may seem, given the claims to come in Sections II and III, Hart's mistake is that he too readily dismisses

[5] See also: morality. The remainder of the quote in which Hart first mentions the category *natural necessity* is as follows: 'and some such phrase is needed also to convey the status of the minimum forms of protection for persons, property, and promises which are similarly indispensable features of municipal law' (ibid). Thus, when Hart talks about the minimum content of natural law as necessary for law *qua* legal system, it is appropriate to think of it as *naturally* necessary for the successful functioning of legal systems in our world, and not conceptually necessary for the existence of law *qua* legal systems.

the possibility of *any* conceptual relationship between law and coercion, leaving the relationship problematically undefined – a problem Chapter 5 will then seek to rectify.

II Contemporary Command Theory Revivals

To briefly recap John Austin's command theory of law as covered in Chapter 1: Austin defines an instance of law *qua* legal rule and tells us how we can identify laws in a given society. He writes that, '[a] law, properly so called, may be defined in the following manner… a command which obliges a person or persons.'[6] The identification of a law 'properly so called', according to Austin, rests on two conceptually necessary components: firstly, that the command is issued by a sovereign, where the sovereign is defined as one who is habitually obeyed and habitually obeys no other. Second, that the command contains a sanction, otherwise we cannot understand how subjects of the law are obliged to follow it: 'it is only by the chance of incurring evil that I am *bound* or *obliged* to compliance.'[7]

In his critique, Hart writes that the command theory of law 'obscures' much of the variety in forms legal rules can take. He categorically rejects Austin's claims that laws are best conceived of as commands of a sovereign, and that the best way to conceive of legal obligation is with reference to a legal sanction. Hart's arguments are generally accepted as successful, but recently two pieces in particular have disputed this success in order to resurrect versions of the command theory. Andrew Stumpff Morrison attempts to raise the sovereign from the dead, whereas Joseph D'Agostino argues that the law, via legislators, inherently intends to threaten violence against those

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[6] J Austin, 'The Providence of Jurisprudence Determined' in Keith C. Culver (ed), *Readings in the Philosophy of Law* (2nd edn Broadview Press 2007) 87
[7] Ibid 84

who break it. This section will briefly explain some of their missteps, throughout which the strength of Hart's arguments should become clearer.

II.i Re-*heading the Sovereign?*

Andrew Stumpff Morrison attempts to re-establish the traditional command theory conception of law.[8] He defends two claims: [1] contra Hart, power-conferring laws are commands, specifically, they are *conditional* commands; and [2] that if our conception of the sovereign is sufficiently abstracted, it can stand up to Hart's arguments against the Austinian sovereign. I will take his claims in reverse order.

As I explain in Chapter 1, the ultimate source of law, per Austin, is the sovereign. The sovereign of a given legal system can be either an individual, or body of individuals, '[who is] *not* in the habit of obedience to a like superior, [and who] receive[s] *habitual* obedience from the *bulk* of a given society.'[9] The number of objections Hart raises to this simple definition is astonishing. Hart finds Austin's use of the concept 'habitual' to be exceptionally problematic because it cannot account for the persistence of law across generations nor the continuity of authority.[10] Hart also points out that there is no necessary connection between habitual obedience and the *right* to make law.[11] A new sovereign will not have been in power long enough to secure the habitual obedience of her subjects, but that is not a requirement of her sovereign right to proclaim new laws.

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8 A S Morrison 'Law is the Command of the Sovereign: HLA Hart Reconsidered' [2016] *Ratio Juris* 364
9 Austin (n 6) 94
10 Hart (n 2) 51
11 Ibid 54

Another point Hart makes is that the vertical structure of Austinian sovereignty cannot account for constitutional limitations on power, which would have been part of the legal framework at the time Austin was writing.[12] Per Austin's command theory, laws are commands from a Superior to an Inferior – so it would be logically impossible for a Sovereign to make laws that command themselves because they are not their own inferior. And, even if it were possible for a sovereign to create a law over themselves in what sense could we really say that such a law was binding in the traditional sense of the word? A more serious problem with Austin's conception of the sovereign as she who is habitually obeyed is that habits are not normative in the way we take legal rules to be.[13] Firstly, they do not require an internal point of view as is required for the existence of a social rule. It does not matter for the existence of a habit, whether anyone accepts them as standards of behaviour. Second, habits can exist without anyone being aware of them whereas law-abiding behaviour, Hart points out, is often conscious. Sometimes, as with paying one's taxes to use Hart's example,[14] law abiding behaviour takes real effort on behalf of the subject.

In an attempt to avoid Austin's mistakes, Morrison redefines the sovereign at what he calls, the 'highest level of abstraction.'[15] Morrison's solution is to define 'sovereign' in such general terms that it encapsulates all legislative, judicial, and executive officials of a given territory. The *sovereign*, according to Morrison, is best understood as: '[the] source of synchronizing signaling information identified by the prevailing locked-in political ruling pattern.'[16] In a democracy, for example, the

[12] Ibid 50
[13] Ibid 60
[14] Ibid 52
[15] Morrison (n 8) 362
[16] Ibid 375

sovereign is identified with reference to what Morrison calls a, 'locked-in signaling convention' where, 'every member of the group recognizes that every other member of the group recognizes the current ruling pattern as the controlling one.'[17] Legal commands in a democracy, then, originate from this locked-in pattern of legal institutions functioning in accordance with what Morrison calls a 'group-recognized information source' – in the US, for example, that source is the Constitution.[18]

This is not Austin's sovereign. Rather, it is a conception of sovereignty as government, one that Morrison hopes will ground a conception of a command theory of law and also avoid Hart's critiques against the Austinian sovereign. However, Most Hartian scholars at this point may give pause; Morrison has essentially abstracted the concept *sovereign* to such a degree that it is very similar to the rule of recognition. For Hart, the rule of recognition is fundamentally a social rule that is not itself authorised by a more basic legal norm. Morrison's account of sovereignty works in much the same way: it is fundamentally a convention as it relies on group recognition and acceptance, and he leaves open the possibility for different governments, those with so-called 'information sources' like written constitutions and those without.[19] In fact, the only remaining requisite for the existence of a sovereign, according to Morrison, is that there is a, 'locked-in prevailing ruling pattern,' e.g., stable government, within a, 'territorially distinct area', e.g., borders.[20] If such an extreme level of abstraction is necessary to raise the sovereign from the dead, one cannot help but wonder: is the philosophical yield worth it?

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[17] Ibid 373-4
[18] Ibid 374
[19] Ibid 374
[20] Ibid 375

Hart did not only critique Austin's command theory because there was a problem with Austin's conception of the sovereign. He also noted that Austin obscured too much of the law – specifically power-conferring norms, which Austin categorises as 'imperfect' laws for the simple reason that they are not backed by coercive-sanctions.[21] Of power-conferring norms, Hart writes: 'they are more like *instructions* how to bring about certain results than mandatory impositions of duty… To represent [power-conferring norms] as fragments of duty-imposing rules is to obscure their distinct normative character.'[22]

Morrison, however, claims that power-conferring norms are best understood as *conditional* commands. Specifically, they take the form of the following: 'If you enter into an agreement that meets the prescribed requirements of a contract, you must honor the agreement or pay damages.'[23] It is a conditional matter whether or not someone is playing chess. It is therefore a conditional matter whether the rules of chess apply to a person.[24] This is what Morrison is tapping into when he writes that we can understand power-conferring law as conditional commands – the terms of a certain contract only apply to you if you choose to enter into that contract. The difference, however, is that the notion of such rules being 'conditional' is built into the conception of a power-conferring rule.

So, Morrison has to explain why it is that such conditional rules are also best understood as commands. However, this contention does not draw on theory, argument, or logic. He does not explain why, for instance, conceiving of contract law

21 J Austin (n 6) 89 (See also: Chapter 1, 22-4)
22 HLA Hart *Essays on Bentham: Studies in Jurisprudence and Political Theory* (OUP 1982) 219
23 Morrison (n 8) 371
24 The distinction between law and things like Chess associations will be expanded in Section III.

as conditional commands is superior to Hart's conception of contract law as secondary power-conferring rules. Rather, it is a puzzle to be solved so that the command theory can work. For instance, Morrison claims that contract laws specify, 'a set of conditions and further specify, if those conditions are met [if the contract is legally valid] an order to do something [maintain the terms of the contract]: an order backed by the force of the state.'[25] Under this conception, according to Morrison, we can understand the sovereign's (conditional) command as follows:

> If the statutorily prescribed promise has been made, and the promisor fails to perform, and the promisee brings suit, I, the sovereign, command the promisor to pay the promisee some form of damages, most likely money. If the promisor does not pay then I command the sheriff to seize the promisor's property to satisfy that judgment.[26]

And so on, until the promisor is eventually ordered to prison by the sovereign for refusing all prior commands. Morrison's support of the claim that power-conferring norms are conditional commands essentially draws on a certain conception of human nature. Of wills, for instance, he writes: 'The reason a testator complies with the statutory forms of the will is to prevent, by force of the state, any competing claimant from taking her property.'[27] And of contract law he writes:

> Recourse to the force of the state is the *point* of contract law: It is the reason I comply with forms of contract. I do so so that if the other party does not comply I can invoke the full force of the state in order to coerce her compliance.[28]

Since his reasoning relies on claims about human nature, specifically his own, he is left open to counter-claims that amount to anecdotes. I can just as easily reply that the reason my grandfather wrote a *very* specific will was because he was concerned with

25 Morrison (n 8) 369
26 Ibid
27 Ibid
28 Ibid

achieving fairness with regards to how his assets will be allocated across his children, grandchildren, and great-grandchildren. Furthermore, *he* wanted to be the one to determine what counts as 'fair.' The point of *his* will, then, was to not only aid in the smooth transition of his assets, but also so that he could have a say in what that looked like.

The most one seems to be able to claim about the point of legislation surrounding the creation of wills is that the law is saying: if you want a valid will, this is how to do it; and this is what Hart's conception of power-conferring rules allows for, and what the command theory (Morrison's included) distorts. Whatever one's *motivations* may be in creating a will or a contract is simply beyond the scope of general jurisprudence.[29]

Ultimately, my responses to Morrison's conceptions of abstracted sovereignty and of power conferring rules is not unlike Hart's response to Kelsen's claim that legal orders command the use of sanction by officials. As I wrote in Chapter 1:

> [F]or Kelsen, the basic *form* of a legal order is not of a command directed to subjects of the law. Rather, he writes, 'what is commanded can only be the sanction.'[30] Thus, legal orders ought to be conceived of as instructing not the subjects, but the officials of a legal system by directing them how to respond when subjects of the law act in a certain way. A legal duty to not steal, then, ought to be interpreted as stipulating which sanctions are to be applied by officials in the event a theft occurs.[31]

Hart's response to Kelsen's attempt to reconstruct laws as fragments of commands to judges is quite simple: Kelsen's theory distorts the law for the sake of uniformity by

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[29] This follows from the same line of argument in Chapter 3, that recourse to human nature alone cannot determine the concept of law or trump sound and valid conceptual arguments. Even if a survey confirmed Morrison's claims about the motivations behind the creation of wills (and contracts), the law that stipulates *how* wills and contracts are created are for the purpose of legal validity. What one decides to do with a legally valid will or contract is up to them.

[30] Kelsen *General Theory of Law and State* (A. Wedberg tr, Russell & Russell 1945) 63

[31] Chapter 1 34-5

obscuring the fact that not all laws exist to discourage conduct under the threat of sanction.[32] Morrison is committing the same sort of error: in an attempt to preserve the command theory of law, he is not only distorting the traditional conception of the sovereign, but also power conferring rules. Power conferring rules do not exist to discourage illegal behaviour. Rather, they exist to facilitate our ability to do things that we want to do, like enter into contract with another, own property, and so on.

Consider the difference between Ptolemaic and Copernican systems of cosmology. Ptolemy's system might be made to work; perhaps, if enough epicycles upon epicycles were added, it could be made to account for all the celestial phenomena. But, would the theory be acceptable in light of the fact that there is a far simpler, more illuminating theory – Copernicus' – that also accounts for the relevant phenomena? The answer is likely to be no. And the same could be said of any theory – such as Morrison's or Kelsen's – that needs to translate power-conferring laws into fragments of 'real' laws commanding judges to apply sanctions when the conditions of a law fragment are met.

II.ii *'Law's Violence' – Necessary in What Way?*

Joseph D'Agostino claims that one of legal theory's focal challenges is to account for the difference between a law and exhortation, e.g., advice, especially when such exhortation comes from a legal authority, such as judges. He claims that, where *this* puzzle is concerned, positivists were wrong to abandon the command theory of law and its conceptually necessary employment of coercion.[33]

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[32] Hart (n 2) 38-42

[33] J D'Agostino, 'Law's necessary violence' [2017] *Texas Review of Law & Politics* 130

D'Agostino writes that if legal exhortation, say from a judge, were to contradict standing law (which has a corresponding sanction), any good lawyer would suggest that their client obey the law and not the exhortation, for the simple fact that there is no penalty attached to disobeying legal exhortation.[34] However, this conclusion is not logically dependent on a particular understanding of law, but rather on the fact that neither the subject nor legal officials regard advice as something that must be obeyed. The very nature of advice is that we can take it or leave it. The same cannot be said of law, whether it is conceived of as a command or not.

This is precisely what Hart's work tells us: we do not need to think of a law as a command to conceive of it as a standard of behaviour that we ought to abide by because it is law. A lawyer telling her client to ignore the advice of a judge because such advice contradicts a legal norm is a lawyer *being a good lawyer*.[35] There are too many contingent factors at play (maybe, for instance, the judge is a bad judge?) for this scenario to tell us anything about legal norms and their conceptual connection to coercive sanctions. This is merely a single point within D'Agostino's argument, but without this core idea, the rest of his claims lack foundation.

D'Agostino tries to rectify what he sees as a gap in the positivist story (that it cannot account for the theoretical distinction between laws and legal exhortation without conceiving of laws as inherently coercive) by bringing Hart's concept of law together with the command theory. D'Agostino writes that, 'nonlegal social rules of recognition mandate coercive intent's inclusion behind any positive law for it to be

[34] Ibid 157

[35] Alternatively, perhaps it is advantageous to do the thing the person deciding your fate says you should do?

recognized as law by all reasonable subjects.'[36] By 'nonlegal social rule' D'Agostino is referencing the essential feature of rule(s) of recognition, that they are the foundation upon which the identification of valid law rests. The rule(s) of recognition in a given legal system offer 'conclusive identification' of that system's primary rules.[37] The rule of recognition is a social rule – as D'Agostino points out – that is to say, its own origin is rooted in social behaviours, specifically, the social behaviours of officials within the legal system. Rule(s) of recognition are created and sustained by the legal officials who reference them when seeking to find out if a given rule is a valid legal norm, and who accept them as the standard of 'conclusive identification' of primary rules within their legal system. That is to say, legal officials must, as a matter of conceptual necessity, hold the internal point of view with regards to their legal system's rule(s) of recognition; they must, as Hart writes, accept the rule(s) of recognition as providing the definitive test for identifying valid primary rules within their legal system.

D'Agostino, however, seems to be discussing the internal point of view of subjects, not officials. His suggestion is that for subjects of a legal system to accept that a legal norm stands as, 'a standard for the appraisal of their own and others' behaviour,' then it *must* be accompanied by a coercive sanction. Without a corresponding sanction, D'Agostino claims, rational subjects will not take that legal norm as satisfying a test for validity. However, in a Hartian account of the concept of law *qua* legal system, there is no need to discuss the internal point of view of subjects of the law.

[36] Ibid 144
[37] Hart (n 2) 95

Hart clearly states that the two minimum conditions of the legal system are that the primary rules ought to be generally obeyed by the subjects of the legal system, and that the secondary rules ought to be accepted by officials as standards of official behaviour. Only the officials must, as a matter of conceptual necessity, have an internal point of view of secondary rules. As a matter of the existence of a law *qua* legal system, or law *qua* primary rule, it is inconsequential whether reasonable subjects regard the primary rules as standards of behaviour, whether they hold an internal point of view in respect of them. *All* that matters, is that they generally obey the primary rules, and the subjects of the legal system can do that for whatever reason they like.[38]

Is there a way to use Hart's second requirement in order to defend a conceptual relationship between law and coercion? In other words – if it is a conceptual requirement of the existence of a legal system that most of its subjects actually follow the law, is it not also a conceptual requirement for the existence of a legal system that it enforce its directives by coercing its subjects? The answer here must be no. The particular mechanisms that are needed within a particular society to ensure its subjects follow the law are contingent to that society and those subjects and this is why Hart describes such coercive mechanisms as naturally necessary. The category 'natural necessity' is meant to capture those relationships law has to other elements that are necessary for its maintenance here in our natural world, but not conceptually necessary for its identification as valid law.

When D'Agostino wonders what a legal norm needs to be like for reasonable subjects to accept it as a standard of behaviour, he is not asking about the nature of

[38] Ibid 116. Hart adds that in a healthy society, a majority of subjects will accept the laws as standards of behaviour.

law. Rather, he is asking about the nature of humans as subjects of law. This is made clearer when D'Agostino writes: 'I am confident that short of an eschatological event, human political societies always will need coercion to maintain law and order.'[39] This is, of course, not significantly different from Hart's position. Hart concludes that whilst coercive mechanisms are not a conceptually necessary requirement of a legally valid norm, given what we know about 'human political societies', the inclusion of coercion is a *natural* necessity. They are necessary for *our* legal systems, not out of any conceptual necessity wherein it is impossible to conceive of a legal system without such mechanisms, but because of what it takes for law to successfully guide conduct in a world like ours filled with people like us.

D'Agostino's method of conceptual analysis is to get a sense of what law is by looking at how people employ the term and associated concept. So, if our shared understanding of law is that nothing counts as law unless it is accompanied by sanctions, then D'Agostino has grounds for claiming that our concept of law renders the possibility of sanctions a necessary feature of law. However, which coercive norms count as law is determined by the rule of recognition which is grounded in what officials believe and do, and not necessarily in what subjects believe and do.

D'Agostino's and Morrison's works both fail at their shared aim of reinstituting a command theory of law. Morrison's piece has the unintended consequence of further explicating the extent to which the command theory of law must contort legal practices if it is to be successful. D'Agostino's attempt to explain how, 'a socially recognizable coercive intent behind a legal statement or enactment' is conceptually, not naturally, necessary to the concept of law fails because he fails successfully to establish that the

[39] D'Agostino (n33) 17

existence of law is dependent upon the sentiment of its subjects, let alone one that responds to the possibility of coercive sanction.

The next section will return to Himma's claim that the authorisation of coercive enforcement mechanisms (CEMs) is a conceptually necessary feature of law. As was introduced in Chapter 3, Himma thinks a conception of law that attempts to account for more than our municipal legal systems is bound to be too disconnected from our sense of law to be of any use. This next section will discuss Himma's claims about conceptual analysis as they relate to the relationship between law and coercion and argue that his CNC is founded on flawed analysis.

III The Authorisation of Coercive Enforcement Mechanisms and *The Concept of Law*

Chapter 3 introduced Kenneth Einar Himma's CNC that the authorization of CEMs is a conceptually necessary feature of law. Himma grounds his CNC in a series of premises:

> (i) The Hartian claim that the sense of 'law' requiring explication picks out municipal legal systems in the *modern state*; (ii) widely accepted Razian claims about how our legal practices construct the content of our legal concepts; (iii) claims showing the centrality of [CEMs] in every paradigmatic instance of law we have ever known; and (iv) logical difficulties arising in connection with explaining legal normativity in a system without such mechanisms.[40]

In Chapter 3, I argue that whilst premises (ii) and (iii) may be true, they do not support the claim that the authorisation of CEMs is a conceptually necessary feature of law. The chapter did this by defending Joseph Raz's society of angels thought experiment against Himma's critiques.[41] Contra Himma, the chapter concluded, the society of

[40] K E Himma, 'The Authorisation of Coercive Enforcement Mechanisms as a Conceptually Necessary Feature of Law' (2016) *Jurisprudence* 594
[41] Raz (n 1) 159-60

angels thought experiment illustrates why it is that the authorisation of CEMs is not central to a general theory of law *qua* legal system. This section will evaluate premises (i) and (iv) and dismiss both. In Chapter 3, I suggest that there is little reason to accept Himma's contention that the Hartian project is to provide a concept of law restricted to municipal legal systems within the modern state. Before I elaborate on this claim, however, premise (iv) will be discussed.[42]

III.i *What's Normativity Got to do With It?*

The claim that 'law is normative' is how legal theorists capture the sense in which the law is action guiding. As Himma phrases it, 'law is typically thought to be normative in the sense that it provides reasons to do what the law requires.'[43] A simple example is sports; their rules are inherently action guiding because if you want to play *this* sport, then you must follow *these* rules. So, if, you want to play netball, you have a good reason to follow the authoritative rules of netball. Similarly, if you don't want to play netball, then the rules of netball do not provide you with any reasons for action. This means that the rules of a game providing someone with reasons for action is contingent upon that person opting-in to the practice, opting-in to playing that game in accordance with its rules.

The law is taken to be action guiding because within a given territory, the law tells its subjects what permissions they have, how to do things so that they are legally valid (e.g., how to enter into contract), and what subjects must refrain from doing. However, unlike with sports, the law's normativity is unconditional. Law does not say:

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[42] Himma (n 40) 594
[43] Ibid 620

if you want to be law abiding, then you should not *x*. Rather, it says to everyone within its jurisdiction regardless of whether they accept the law as an authority: '*Do not* x.'

In this sub-section, I will explain why Himma claims that there are logical difficulties associated with explaining the legal normativity of a legal system that does not authorise CEMs. Himma strives to explain what I will call the Strong Normativity Thesis, which asserts: 'It is a conceptual truth that laws are normative in the sense that they *actually* provide reasons for action.'[44] His defence of the Strong Normativity Thesis, in turn, grounds his claim that, 'the authorisation of [CEMs] constitutes a mandatory nom as legally obligatory.'[45] I will also explain my concern: that investigations into the nature of law cannot adequately support the Strong Normativity Thesis. Being able to precisely state how the law actually provides its subjects with reasons for actions is dependent not only on how we conceive of the nature of law but also on understanding the ways in which humans can be motivated to act, or not act.

There are two senses in which norms can be 'reasons for action.' Firstly, there is an objective sense according to which S can have a reason to do *x* independently of whether *x* is considered by S. That my daughter, who cannot swim, will drown if she jumps into the deep end of a pool is an objective reason for her to not enter the water. This is so even if she mistakenly thinks that the water is very shallow or, that she is secretly a mermaid and, therefore, will be safe. That she cannot swim is a reason that exists independently of her awareness of it and is independent of her beliefs, attitudes, and so on about the depth of the water or any secret powers she may/may not have.

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[44] K E Himma, 'A Comprehensive Hartian Theory of Legal Obligation: Social Pressure, Coercive Enforcement, and the Legal Obligation of Citizens' in W Waluchow & S Sciaraffa (eds), *Philosophical Foundations of the Nature of Law* (OUP 2013) 155

[45] Ibid 181

My daughter's belief that she is secretly a mermaid and, therefore, will be fine if she jumps into the deep end is also a 'reason for action'. This, however, is a reason in the subjective sense wherein the normative (e.g., action-guiding) character of a norm depends on whether that norm is taken by an agent to actually provide a reason for action. My daughter believes she is secretly a mermaid and, therefore, she believes she has a reason to jump into the deep end of a pool. In this case, the subjective sense of normativity can explain why she jumped into the deep end, but it cannot *justify* her actions in the same way an objective reason for action can. She would only be justified in *not* jumping in the pool, and that is because she cannot swim.

What does this all have to do with legal theory and claims about the nature of law? As Himma points out, we do not know what mechanism(s) drive the normative character of law and this is an important inquiry for legal theory.[46] Positivists, for instance, have a lot to say about conditions of legal validity, and about the necessary and sufficient conditions for the existence of law *qua* legal system. When it comes to explaining legal normativity, or, how it is that a legally valid norm is an objective reason for action, Himma thinks we have not quite succeeded.

He takes the task of providing such an explanation as consisting in the answering two questions: [1] why is it that when law says: 'you must not *y*', you have a reason to 'not *y*'?[47] And, [2] what *kind* of reason for action is the law providing? Himma thinks that [1] can only be sufficiently answered with a defence of the aforementioned Strong Normativity Thesis. Again, it claims: 'It is a conceptual truth that laws are

[46] Ibid 154-5

[47] As will be shortly discussed, Himma takes himself to be explicating a particular interpretation of the Normativity Thesis: 'It is a conceptual truth that laws are normative in the sense that they *actually* provide reasons for action.' (Ibid 155)

normative in the sense that they *actually* provide reasons for action.'[48] This *Strong* Normativity Thesis is importantly different from what I will call the *Weak* Normativity Thesis introduced in Chapter 3: the law *claims* to be a legitimate authority, *claims* to provide us with objective reasons for action. This claim includes the further claims: legal norms claim to be first-order reasons for action that are also exclusionary in nature. So, a law prohibiting *x* claims to be a first-order reason to not *x*. It *also* claims to exclude all other reasons to *x*.'[49]

There are two different claims we can take the Weak Normativity Thesis to be making. Firstly, as thesis about how the law presents itself and what it claims (e.g., that the law claims to provide exclusionary reasons for action). It can also be interpreted as a thesis about subjects of the law and law-abiding behaviour, explaining what it means to take the law as providing us with objective reasons for action. So, a valid legal norm prohibiting *y* would be taken by us as excluding our acting on other reasons we may have to *y*. It is not, however, necessarily the case that every legal norm actually serves this purpose in our practical reasoning. This is because, following the Weak Normativity Thesis: the answer to whether law actually provides objective reasons for action depends on the merits of the law in question.

If the right social facts obtain (e.g., legislative enactment by the appropriate body), then there can be a valid legal norm that prohibits mothers from hugging their sons in public. Most would, I hope, agree that such a law would be cruel and lack any merit. Here, the Weak Normativity Thesis would explain that whilst such a law *claims* to provide mothers with an exclusionary reason for refraining from hugging their sons

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[48] Ibid

[49] Raz *The Authority of Law* (2nd edn, 2009 OUP) 30. For a brief explanation of Razian schematics with regards to how legal norms claim to operate in our practical reasoning, see: Chapter 3 93-7

in public, and may be accepted and acted upon by some misguided mother, it, in fact, fails to provide a genuine, objective reason for action. It seems reasonable to claim that not even the law could exclude the strong primal reasons a mother would have for hugging her son who had fallen off of his bike and was in need of comfort. And this is true whether or not the law claims that it could, and whether or not any mothers actually believe that it does and act accordingly.

Himma rejects the Weak Normativity Thesis because he thinks positivists must say more about the normative nature of law than the Weak Normativity Thesis allows. In order to defend the Strong Normativity Thesis, Himma needs to be able to explain how it is that legal obligations are objective reasons for action that we all have independently of their merit, and independently of our beliefs or our own reasoning. Before I explain my discontent with Himma's argument, I want to briefly explain how I take it to work and what it has to do with coercion.

Because legal norms are social constructions, they owe their normative character to other sorts of more basic explanations. I agree with Himma when he writes that there is a, 'limited palate of basic reasons to choose from: […] prudential, moral, and possibly aesthetic.'[50] Here is an example: religious norms are reasons for action, but they are not basic reasons for action. This is because religion is a social construction. Its norms are grounded in more basic reasons for action including moral reasons for action (e.g., the norm 'thou shalt not kill' is a basic moral reason for action that takes on a religious character because of its incorporation into the Ten Commandments), and prudential reasons for action (e.g., if you do not comply, then you risk going to Hell).

[50] Ibid 181

When it comes to explaining the objective normativity of law, Himma claims that legal norms reduce to prudential reasons for action alone. According to Himma, a conceptual feature of law is that it keeps the peace.[51] Law is the thing that keeps us from a Hobbesian state of nature where we fallible humans would be constantly at war with one another over limited resources. If this is correct, then law does provide us with objective reasons for action, even if we disagree with it. Furthermore, those reasons are prudential because regulating our behaviour in accordance with valid legal norms keeps the peace in our society and also keeps the state of nature at bay.[52]

Following from this idea, Himma offers what he calls the Equivalence Thesis: 'It is a conceptual truth that *P* is legally obligated to do *a* in circumstance *C* if and only if there is some legal norm that, in circumstance *C*, requires *P* to do *a*.'[53] The Equivalence Thesis can be illustrated using the law prohibiting mothers from hugging their sons in public: It is a conceptual truth that mothers in society *Z* are legally obligated to not hug their sons in public *iff* there is a legal norm that requires Mothers, when in public, to not hug their sons. Because society *Z* has such a legally valid norm, mothers in society *Z* are legally obligated to refrain from hugging their sons when they are in public.

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51 K E Himma, 'The Conceptual Function of Law; Law, Coercion, and Keeping the Peace' in L Burazin, K E Himma, and C Roversi (eds), *Law as Artefact* (OUP 2018)

52 St Thomas Aquinas makes a similar claim in *Summa Theologica* when he writes that there may be reason to abide by unjust laws (e.g., human laws that are corruptions of the natural law) in order to, 'avoid scandal or disturbance [within the community] for which cause a man should even yield his right' (Q96. A4). The obligation Aquinas writes of is not prudential in nature, but rather is moral. Here is how the thinking goes: abiding by unjust laws serves to avoid scandal and disturbance in the community, which in turn protects the very existence of the legal system. The existence of a legal system is required by the natural law; as I wrote in Chapter 1, human laws are necessary because they are how we 'train' one another in the perfection of virtue (Q95. A1). Therefore, an unjust law is not, in itself, a reason for action. Rather, the need to preserve the legal system by avoiding scandal and disturbance provides the natural law grounded, e.g., moral, reason for action.

53 Himma (n 44) 161

The Equivalence Thesis, for Himma, is not only a claim about legal obligation, but also about the law as an objective reason for action. Himma's thinking seems to go like this: legal obligations are *genuine* obligations, in the same vein as moral obligations. If you have a moral obligation you really must, all things considered, do what it requires. Its very existence is, in other words, an objective reason for action. Legal and moral obligations may have different properties (depending on which theory of law you ascribe), but if both are said to be types of *obligations* then they must have some similar features and, for Himma, that is the idea that both mandate conduct.[54] If *a* is mandated of you, is *required* of you, then you have a reason to *a*. As Himma writes: 'genuine obligations are necessarily normative and hence are normative reasons for action.'[55] So, another way to explain the Equivalence Thesis is as follows: It is a conceptual truth that *P* as an objective reason to *a* in circumstance *C* if and only if there is some legal norm that, in circumstance *C*, requires *P* to *a*.

Himma then fills in the sense in which legal obligations can be objective reasons for action, *independent of the legal norm's merit*. As was just explained, the Equivalence Thesis holds that it is a conceptual truth that legal norms are obligations that are normative in the strong sense – that legal norms are, by virtue of their existence, objective reasons for action. This claim must be compatible with any other claim one makes about the nature of law and since Himma is a positivist, the Equivalence Thesis must be compatible with the Separability Thesis.[56] What this means is, *if* the validity and content of legal norms is necessarily separable from their merit,

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[54] Ibid 162

[55] Ibid 163. As Himma is defending the Strong Normativity Thesis (that law *actually* provides objective reasons for action), I think it is save to presume that when he writes genuine obligations are 'normative reasons for action', he means normative in the objective sense.

[56] The separability thesis claims that it is a conceptual truth that the validity and content of legal norms is separable from their merit.

and also legal norms are genuine obligations in that they are objective reasons for action, *then* the normativity of legal norms cannot be explained with regards to their merit. Doing so would violate the separability thesis.

So, how does Himma link-up his claim that a legally valid norm is an objective reason for action with his claim that the authorisation of CEMs is a conceptually necessary feature of law? It comes down to the way in which Himma conceives of legal obligation. For Himma, the existence of a social obligation, including legal ones, requires some form of social pressure. He takes this claim directly from Hart who writes: 'For the violation of a rule is not merely a basis for the prediction that a hostile reaction will follow but a *reason* for hostility.'[57] Rules, Hart writes, not only guide conduct (if you want to know how to act, then consult the rules), they also provide a means of *appraising* conduct. The person who does not comply with the rules is wrong.

Himma extends this Hartian claim to conclude that, 'some form of social pressure is a necessary condition for social obligation.'[58] To have a social obligation, then, is to be subject to a social norm the non-compliance with which is a reason for others to be hostile with you. Consider a town with social norm, *SN*, requiring *a*. A family moves into town, and they observe people *a*-ing, but they mistakenly think it is a strange habitual behaviour on the part of the town's people. The new family then notices that they are being socially shunned for their failure to *a*. This social shunning is a form of social pressure that not only expresses the town's people's hostility towards the family for their failure to adopt social norm *SN*, but also forces the family to ultimately adopt *SN* themselves. Without this social pressure, there would be no way

57 Hart (n2) 90; Hart's conception of legal obligation is also explained at: Chapter 1 at 32-3
58 Himma (n 44) 179

to tell whether *SN* is a social norm the town's people are obligated to adopt, or whether what we have here is merely a case of habitual behaviour.

Since a legal obligation is a social obligation, Himma claims, the same reasoning applies: some sort of social pressure is required for the existence of a legal obligation.[59] Importantly, in our legal systems, the best way to engineer social pressure to comply with the law is through the authorisation of CEMs. So, to return to the beleaguered mothers who are prohibited from hugging their sons in public: not only does the existence of a legal norm give them an objective reason to refrain from hugging their sons in public, but it is a reason that is wholly prudential in nature. Firstly, they have a general reason to do what the law says because the only way the law can keep the peace in their society is if most of its subjects willingly comply with most of its laws. Therefore, each mother has prudential reason to help facilitate peace thereby avoiding a Hobbesian state of nature. Second, if they do not comply with the norm, then they risk legal officials authorising the use of CEMs against them.

Thus, the authorisation of CEMs is a conceptually necessary feature of legal systems for two separate reasons. Firstly, because it gives assurances to those subjects who would voluntarily comply with the law that the legal system will not allow law-breaking to go unanswered.[60] Second, because such authorisation sends a message to its subjects: law χ is critically important to the maintenance of peace in our society, so we will punish anyone who refuses to comply.

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[59] Ibid

[60] These reasons mirror Hart's explanation for why coercion is important to the existence of *our* legal systems, why he takes it to be a *natural necessity*, as explained on 85. Again, Hart writes: 'To obey [law], without [sanctions], would risk going to the wall. Given this standing danger, what reason demands is *voluntary* cooperation in a *coercive* system.' (n 2) 198

My reconstruction of Himma's theory of legal obligation is somewhat cursory, but I hope I have conveyed the main contours of his argument. There are, I think, two parts of Himma's argument surrounding legal normativity and his claim that the authorisation of CEMs is a conceptually necessary feature of law. First, that the Strong Normativity Thesis is true. This is grounded in the Hobbesian claim that we have an objective reason to regulate our conduct in accordance with the law because the law is the thing that keeps the peace. This is what seems to explain what it means to say that legal norms are mandatory. Second, is the quasi-Austinian claim that the authorisation of [CEMs], 'constitutes a mandatory [legal] norm as legally obligatory.'[61] This is a particular understanding of what it is to be subject to law: you have an objective reason to follow the law, indeed are obligated to follow the law, because if you do what the law says, then you won't get hurt. You won't get hurt because [1] the law won't have reason to use CEMs against you and [2] if most people do what the law says, the society will be a peaceful one.

I think that this conception of legal normativity ultimately fails in part because Himma does not adequately support the Equivalence Thesis. Again, the Equivalence Thesis states that the existence of a valid legal norm necessarily (conceptually speaking) creates a *real* obligation (i.e., an objective reason for action). So put, the validity of legal norm z is conceptually tethered to legal norm z being an objective reason for action. Himma supports the thesis with the observation that legal practitioners and theorists all talk, think, and act as though this is the role legal norms play in our reasoning – as though they actually are obligations rooted in objective reasons for action.[62] And if this

[61] Himma (n 44) 181
[62] Himma (n 44) 155-6

is how we all actually talk and think (that legal obligations are *real* obligation), then our theory ought to reflect that.

However, that theorists and practitioners take there to be such a class of obligations, and talk as though they necessarily arise from valid legal norms, does not establish the truth of what is believed or said. There may be other explanations. For example, it is obviously of rhetorical advantage for a prosecutor to speak and argue as though the law provides genuine reasons for action that warrant conviction of the defendant.[63] Similar things are true of a judge whose role is to adjudicate the fate of litigants, often with seriously negative consequences for the losing party. The fact that such talk pervades legal practice provides us with little reason to think that valid law always does provide the genuine reasons for action legal rhetoric presupposes. There are plausible, alternative explanations for this fact, such as the one provided by the Weak Normativity Thesis.

There is a sense of the term 'obligation' according to which to be under legal obligation simply means that that one is subject to a mandatory rule. One that, by its terms, *claims* to impose an obligation. And it is one that legal practitioners will take to provide genuine obligations when they engage in legal practice. This is the sense we might have in mind if we said that under South African Apartheid law, white persons were under obligation not to associate on beaches with black persons. There was a valid legal norm to that effect, and so there was a legal obligation not to associate. And yet the moral repugnance of the rule and the ideology it helped sustain entails that it provides no genuine reason for action. Indeed, its content was such that there was

[63] This response is inspired by the one Hart gives in 'Postscript'. In response to Dworkin's claim that lawyers and judges all speak of the law as though it is gapless, Hart writes that it is, 'familiar rhetoric.' (n 2) 274

every reason to ignore it, or perhaps attempt to subvert it. So, to say, 'one is under legal obligation' might mean nothing more than, 'valid law requires a certain type of conduct.' How exactly anyone should actually respond to that rule is an entirely different question.

If it is not the case that the existence of a valid legal norm necessarily entails that such a law is actually an objective reason for action, then the Equivalence Thesis is false. Without the Equivalence Thesis, the Strong Normativity Thesis collapses. If the Strong Normativity Thesis collapses then there is no reason to prefer it to the Weak Normativity Thesis. And, if that is the case, then Himma's premise (iv) – that there are insurmountable difficulties with explaining the legal normativity in a legal system that does not authorise CEMs – is not valid.

Explaining what law means when it claims to provide us with reasons for action may be complex, but this does not mean that it is hard to understand the reasons people follow the law. The observation from Chapter 2 that pointing to an objective outcome (e.g., a person does not park illegally) does not always guarantee the precise identification of an instance of coercion, can be fruitfully applied to this point. Different people follow the law for different reasons: some may think an action is right (or wrong) independent of its legality, some (like the angels) think it is simply right to follow the law in general, some may fear being socially shunned for breaking certain laws, and yes, some will follow a law simply because they do not want to get in trouble. From the standpoint of legal theory, perhaps it simply ought to be accepted that most people follow most laws most of the time.[64]

[64] Those familiar with the philosophy of international law literature will recognize this phrase as a re-imagination (or, perhaps, bastardization) of Louis Henkin's famous phrase: 'Almost all nations

What, then, should we make of Himma's assertion: '[t]he most effective method for deterring … conflicts, though it will clearly not always be successful, is to threaten a violent legal response.'?[65] It is an empirical claim that municipal law in a modern state cannot efficiently motivate compliance without the authorisation of CEMs. But is it entirely accurate? Just a simple example to consider: access to education has been demonstrated time and again to dramatically reduce crime rates.[66] While it would be very interesting to know, for example, the extent to which education serves to reduce crime rates compared with the law's authorisation of coercive mechanisms, we do not have access to such data.

For this reason, then, explicating the normativity of law to the degree that Himma is after (e.g., the Strong Normativity Thesis) necessarily requires leaving the purview of analytic legal theory. The explanation Himma is after requires focussing on those areas where legal theory intersects with behavioural and social psychology, at bare minimum. It requires thinking about not only the nature of law, but also about our natural world, the nature of humans, and what *kinds* of things law needs to do in order to conclusively, actually, be the authoritative reason-giver it purports to be in a given society. It also requires inquiries into what, morally, the law ought to be and what it ought morally to include. These are important inquiries. The main point being made here is simply that even *if* Himma is right, that the most effective method for deterring conflicts is to threaten violent legal responses, he is right *only* about law in our world.

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observe almost all principles of international law and almost all of their obligations almost all of the time.' From: *How Nations Behave: Law and Foreign Policy* (CUP 1979) 47

[65] Himma (n 40) 601 (I will evaluate of the truth of this statement in the following section)

[66] See: Economic Opportunity Institute, 'The Link between Early Childhood Education and Crime and Violence Reduction'; and, Brian Bell, Rui Costa, and Stephen Machin's article, 'Why Education reduces Crime' [2018], which discusses the causal link between mandated education and reduction in crime rates: <https://voxeu.org/article/why-education-reduces-crime> accessed 6 May 2020.

The question then becomes: even if the threat of a sanction sometimes, or even reliably, serves to coerce a person into complying with the law, then does that necessarily mean, as premise (iv) contends, that there are 'insurmountable difficulties' associated with explaining normativity in a system that does not authorise CEMs? The best answer here seems to be that any such explanation is contingent, i.e., dependent, on the facts of the matter. Of those legal systems that have authorised CEMs, it is appropriate to say that the authorisation of CEMs in part explains that system's normative character. However, saying that the authorisation of CEMs in part explains that system's normative character does not mean either that the system's normative character is entirely dependent on the authorisation of CEMS, nor that such authorisation constitutes the normativity of law in general – even if all the systems we can point to have integrated such authorisation. This can all be explained in terms of Hart's NNC: the relationship between law and coercion is a contingent one; it is 'necessary' only inasmuch as it is necessary for a given population within a given space.

A strength of Himma's argument is the fact that all present-day examples of municipal law that we know of authorise CEMs. As such, it is correct, in a sense, to conclude that the authorisation of CEMs is a significant part of understanding the normative force of our municipal law in our modern states. However, per the discussion regarding conceptual analysis, when law in general is being considered there do not seem to be any reasons to accept the conceptual necessity of the authorisation of CEMs.

Himma's explanation of legal normativity suffers because his analysis of law, and what that entails, relies too heavily on empirical assertions about not only human nature and the natural world, but also about what legal practitioners and theorists

think. Whilst there is very good reason for thinking that some kind of incentive is necessary for law, there is little reason to claim the incentive must take the form of CEMs. This is ultimately because Himma does not successfully explain why legal theorists ought to be primarily concerned with accounting for *our* law, and not law *in general*.

III.ii *Which Concept and Whose Law?*

In this final section, I want to return to Himma's premise (i) and discuss the differences between the conceptual analyses *this* work engages in as compared to the kind with which Himma engages. Premise (i) is, '[t]he Hartian claim that the sense of 'law' requiring explication picks out municipal legal systems in the *modern state*.'[67] Himma thinks his is a Hartian position because, 'law, as Hart understands it… is a distinctively and deeply human phenomenon.'[68] As I write in Chapter 3, 'Himma's application of premise (i) is an expression of his intuition that the only concept of interest is our concept of law, which is firmly tethered to our natural world and our unique social needs.'[69]

Recall Hart's minimum conditions for the existence of a legal system mentioned in Section II.ii of this Chapter. They are: [1] that the primary rules are generally obeyed by the subjects of the legal system, and [2] that the secondary rules are accepted by officials as standards of official behaviour.[70] According to Himma, this is *too* minimal an account because it is over-broad and renders things like chess

[67] Himma (n 40) 594
[68] Ibid 602
[69] Chapter 3 100
[70] Hart (n 2) 116. Hart adds that in a 'healthy' society, a majority of subjects will accept the laws as standards of behaviour.

associations as legal systems. In other words, it is one (acceptable) thing to remark that chess associations have law *of some kind*, it is quite another (and wholly unacceptable) thing for the minimum conditions of a legal system to apply in such a way that we must conclude that chess associations have law *in exactly the same way* as municipal legal systems.[71] Himma proposes that the way to fix the overbreadth problem is to treat the concept of law, 'as applying only to beings like us' with the sole intent of picking out the essential features of municipal legal systems in the modern state.[72] Such a move, Himma claims, would not only fix the overbreadth problem, but would also mean that all of the features of legal systems that Hart concluded were *naturally* necessary are actually *conceptually* necessary.

However, it is mistaken to think that the two minimum conditions actually apply to chess associations in any meaningful sense. Recall the discussion about the rules of netball. They are only mandatory if a person wants to be playing netball. The same kind of reasoning can apply here in such a way that we can say that the minimum conditions of a legal system may apply to chess associations, but only because the minimum conditions for the existence of a chess association are actually *more* stringent than for a legal system. To begin, there is a non-optional (unconditional) character to law that is absent from clubs/associations, which are in part constituted by voluntary membership. So, Hart's first minimum condition does not apply to such associations because it is not the case that members of a chess association 'generally obey' the rules of chess for *any* reason whatever. Rather, the members must actually accept the rules of chess as standards of appraisal for good/bad behaviour of other members. This is

71 Himma (n 40) 606
72 Ibid 606-7

explicitly rejected as a condition for the existence of a legal system because the legal system, for the reasons mentioned in Section II.ii, does not require, for its existence, that its subjects have an internal point of view with regards to the primary rules. To repeat: all that matters is that the subjects of the law generally obey the law, and they can do that for whatever reason.

Other theorists, most notably Raz, impose conditions for the existence of a legal system which, if added to Hart's, would clearly rule out chess associations and, if Raz is right, virtually all other normative orders/systems. Legal systems, according to Raz, all make claims to the following characteristics: Comprehensiveness, supremacy, and openness. A legal system claims to be *comprehensive* in that, 'there is no sphere of private or social conduct that is immune to the systems claim to authority to regulate in some way.'[73] Legal systems also claim *supremacy* over all other norm-applying institutions. This means that a legal system can determine the conditions for the creation of private associations, like chess associations. Finally, a legal system claims to be *open* in that it can support other norm-applying systems by either 'adopting' their norms or certifying (permitting) them to operate within the legal system. It is, therefore, the *nature of a legal system* (not the consequence of having one) that it is the, 'most important institutionalized system governing human society.'[74]

Not only are these minimum existence conditions of a legal system, but they are characteristics that are unique to legal systems. No other normative system can logically possess them and not also be a legal system. No normative system that purports to be legal is actually legal if it lacks any of them. Chess associations, then,

[73] K Culver & M Giudice *Legality's Borders: An Essay in General Jurisprudence* (OUP 2010) 43
[74] Raz (n 49) 116

are clearly ruled out as possible legal systems as they lack comprehensiveness (chess associations do not claim to regulate the behaviour of non-members[75]), openness (chess associations cannot claim the capability of adopting or supporting the norms of a checkers association), and also supremacy (chess associations cannot claim supremacy over checkers associations[76]).[77]

Let us return for a moment to Himma's premise (iii) which draws on, 'claims showing the centrality of coercive enforcement mechanisms in every paradigmatic instance of law we have ever known.'[78] In Chapter 3, this is the premise to which I refer when I accuse Himma of grounding a conceptual claim (that the authorisation of CEMs is a conceptually necessary feature of law) in empirical observation. There, Himma is making a straightforward empirical claim: all instances of law on Earth exhibit a certain characteristic (they authorise the use of CEMs). My claim in Chapter 3 is that he is incorrect to infer from that empirical claim that such a characteristic

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75 And, ever if one were to make such a claim, it could not effectively enjoy the de facto authority to regulate the behaviour of non-members.

76 Though their members may claim some sort of supremacy over the members of checkers associations who do not understand the rules of chess.

77 In 'Why the State', Raz has softened his views and seems to find legal systems everywhere (universities, voluntary associations, etc). The laws of interest to legal theory are 'uncontroversially normative,' he writes, and are found in traditional legal systems and voluntary associations alike (138). See: J Raz, 'Why the State?' in N Roughan & A Halpin (eds), *In Pursuit of Pluralist Jurisprudence* (CUP 2017). I do not think this more recent piece by Raz changes anything as far as this chapter, or the last, is concerned. At issue in Chapter 3 was whether a society of angels would have law. 'Why the State?' may give reason to suspect the laws of a voluntary chess association share the same essential features as the laws of a state's legal system, but such suspicion has no bearing on whether the society of angels' normative system is law. The idea that chess associations have laws is a general claim about the characteristic of laws – that they are normative, that they are applied and enforced by institutions of a normative (legal) system, and they are, to borrow from Raz, 'binding even if mistaken' (142; see also: *Authority of Law* (2nd edn, OUP 2009) 108). He considers two tests for legal systems: 'extensive responsibility within its domain' and 'freedom from external legal constrains' (138) and suggests that the reason the state is the primary focus of legal theory has to do with a belief that only the state meets both of those tests, e.g., is the most comprehensive. Chess associations may meet the first test – they may be institutions that apply and enforce normative rules, but they would fail at the second.)

78 Himma (n 40) 594

(again, the authorisation of CEMs) is, therefore, central to the concept of law. When accounting for the normativity of law, however, he changes tactics slightly.

He suggests that legal theorists ought to, 'adopt the common views among legal practitioners about legal obligation and then to find appropriate mechanisms that would adequately line up with those common views.'[79] We can take Himma to be saying that legal practitioners, as experts in law, understand law in such a way that they would not view something as law if it did not also possess Y (here: the authorisation of CEMs). He is not relying on empirical observations as such, but rather on the shared intuitions of legal experts to inform a particular concept of law. He further writes,

> [T]he burden of proof is on the theorist to explain the unusual move (in conceptual analysis, traditionally understood) of utterly rejecting the ordinary core understandings of legal practitioners that are usually thought to help fix the content of *our* concepts – a burden that, to my knowledge, dissenters have not even attempted to meet.[80]

In what follows, I will attempt to meet that burden.

Firstly, it is important to note that the 'ordinary core understandings of legal practitioners' are not 'utterly rejected' as Himma claims. Conceptual analysis does rely on empirical observations and shared intuitions and, as such, it is very important to legal theorists how lawyers and judges think about the law. Their understandings cannot, however, be simply accepted as *truth*. There is bound to be disagreement amongst the core understandings of legal practitioners and, for that reason, there needs to be critical reflection in order to determine whether such 'common views' are contingent (e.g., true only in the legal system within which they work) or conceptual (e.g., true in all possible legal systems in all possible worlds).

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79 Himma (n 44) 154
80 Ibid 154

Philosophical theories of adjudication, for example, rely heavily on judicial rulings and the first-hand account of judges. The distinction between inclusive and exclusive legal positivism (which lies in how the two schools of thought answer the question: how can positivism best explain what is happening when a judge uses moral considerations in her decision?) is parsed out in this realm. The answer, however, does not lie in whatever the common view of judges is. Any conclusion reached by polling judges in order to find the common view is an empirical consideration alone. However, it is an empirical consideration that can have argumentative force.

For example, let's say six of the nine American Supreme Court Justices say that exclusive legal positivism's directed powers theory more accurately captures their judicial decision making in hard constitutional cases. This would not mean the end of the road for inclusive legal positivism, nor should it. Rather, an ILP theorist would have to explain why that empirical statistic does not carry conceptual weight. We would expect them to point out, for example, that the statistic only tells us something about how current American judges think about their relationship to the American Constitution and, as such, has little to offer the *conceptual* disagreement between ILP and ELP.

One way to think about what Hart and Raz are doing when they deny that coercion is conceptually connected to law is that they are explaining why the empirical statistics that support the classic CNCs (that all legal systems coerce in some way) are not conceptually conclusive. Frederick Schauer, however, maintains that their denials are too detached from reality; he writes:

> Without [an] empirical foundation, a theory of law, or even an account of the concept of law, seems distortingly detached from reality. It is central to Hart's claim against Austin that the focus on coercion is distorting precisely because it ignores the non-coercive, sanction-independent, empowering, and non-

> hierarchical nature of much of law as it actually exists, but if it is grounds for criticism of a descriptive theory of law that it ignores dimensions of legality and legal systems that are widely present in the world, then it seems to be also grounds for criticism of Hart's account that it ignores the coercive dimensions of law, dimensions that are no less real than the non-coercive dimensions that Hart properly chides Austin for neglecting.[81]

From Chapter 1, we saw that Hart's rejection of Austin's CNC is – as Schauer claims – due in part to the ways in which the command theory obscures more of the law than it explains. The only way Austin can explain the existence of power-conferring laws is by relegating them to the category of *imperfect laws*. Hart's account is one that purports to explain a rule at its most general, where the addition of a sanction does not enlighten our comprehension of what it is to have an obligation.

Both Himma and Schauer essentially co-opt Hartian natural necessity into a conceptual claim about law. Schauer writes: 'Indeed one of the facts that an account of law must fit is the fact of human failing.'[82] Again, as with the discussion of Himma's work here and in Chapter 3, what *kind* of account of law is Schauer speaking of? If Schauer is talking about an account of law at its most general, unbounded to our natural world, then there is no logical reason to take into consideration human characteristics or failings. If, however, he is simply talking about *our* law, an account of law bounded to our world, then he is right – it must 'fit the fact of human failing'. But this is exactly what Hartian natural necessity does. It is a statement about the nature of *our* law: coercion is not a conceptually necessary feature of law, but it is necessary to our legal practices.

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81 F Schauer, 'Was Austin right after all? On the role of sanctions in a theory of law' [2009] *Ratio Juris* 9

82 F Schauer *The Force of Law* (HUP 2015) 165

IV Conclusion

And so, we are at a significant impasse. For those theorists who pursue the study of law at its most general, beyond the confines of our natural world, it does not seem possible to defend the claim that coercion is a conceptually necessary element of law. The arguments in this chapter, along with those in Chapters 1 and 3 explain why the classical CNCs are false. And yet, as Himma rightly claims, the relationship between the law and coercion *is* ubiquitous and so we do want to be able to parse out why this is.

The best we have is Hart's claim that coercion is a naturally necessary feature of law, which means that the relationship between law and coercion is explained entirely with reference to human nature, our natural world, and the needs of our societies. Coercive mechanisms, so understood, are a function of the kind of thing a legal system is, and how, in virtue of that, it is capable of (sometimes) fulfilling our most pressing needs. This furthermore means that investigations into law will have nothing to contribute to our understanding of the conceptual relationship between law and coercion. And yet, such a claim, particularly as justified within Hartian jurisprudence, seems inadequate. In an early work, Hans Oberdiek writes: 'Even if Hart is correct [about natural necessity], this only tells us something about humans and the human predicament; it tells us nothing about the concept of law.'[83] The suggestion that coercion is simply naturally necessary to our legal practices, Oberdiek suggests, does nothing to enhance our understanding of law.

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83 H Oberdiek 'The Role of Sanctions and Coercion in Understanding Law and Legal Systems' [1976] *American Journal of Jurisprudence* 74

To essentially brush aside a consistently observed feature of legal systems as merely a human fact and exclude it from analytic jurisprudential inquiry is, I think, a central worry for Himma. It seems intuitively wrong that Hart's claim of natural necessity is used by theorists to dismiss a seemingly universal character of law as outside the scope of general jurisprudence, and it is these nagging worries that seem to be behind the recent resurgence in works defending the conceptual necessity of coercion to law. The question, then: is there a way to explain the ubiquitous relationship law has with coercion at the highest level of abstraction of the legal system, where not even the authorization of CEMs is conceptually necessary for the identification of a legal system? The goal is to provide an account of the relationship between law and coercion as originating from law, and not solely the nature of humans. It is to this that we now turn.

5

The Coercion-aptness of Law

I Introduction

The first four chapters of this thesis have been in service of setting up the positive claim that this final chapter will explore. To recap, the first chapter presented the diachronic progression of philosophical thought regarding the relationship between the nature of law and coercion. It showed an ebb and flow to the nature of the debate with consensus shifting over time. From the late 1700s with Immanuel Kant, the late 1800s with John Austin, and right through to the mid-twentieth century with Hans Kelsen, consensus was that there is a conceptual relationship between law and coercion, such that one would not be able to say *L* is law if *L* did not also incorporate coercive mechanisms. Chapter 1 called such assertions conceptual necessity claims, or, CNCs.

Chapter 1 also introduced H.L.A. Hart's and Joseph Raz's arguments, which deny the truth of CNCs. Their arguments are powerful and largely because of them, it is generally held as a truism that there is no conceptual connection between law and coercion. Raz does not offer an explanation for why law and coercion seem to always link-up in our societies, simply stating that it may be humanly impossible to have a legal system that lacks coercive mechanisms.[1] Hart, however, does offer an explanation; he claims that the relationship between the law and coercion is best

[1] J Raz *Practical Reason and Norms* (Hutchinson & Co 1975) 158

conceived of as *naturally* necessary. By 'natural necessity' Hart means to capture the sense in which it is correct that coercion is necessary to law: it is necessary to *our* legal practices given natural facts about our world (such as resource scarcity) and human nature. Thus, Hart denies the classic CNCs explored in Chapter 1 in favour of an NNC (a natural necessity claim).

Presently, legal theory is undergoing an uptick in the number of theorists flirting with the idea that Hart and Raz may be mistaken. Works by theorists like Joseph D'Agostino, Andrew Stumpff Morrison, Frederick Schauer, and Ekow Yankah critique Hart's and Raz's arguments, ultimately claiming that their rejections of classic CNCs are mistaken. In Chapter 4, I explain why I take their various arguments to be unsuccessful. Kenneth Einar Himma also critiques Hart's and Raz's arguments in order to support his own CNC: that the authorisation of coercion enforcement mechanisms (CEMs) is an element conceptually necessary to the nature of law. Himma's claim is more nuanced than the classic CNCs offered by Austin and Kelsen because he is asserting that law *qua* legal system must authorise CEMs (and therefore, must, as a structural matter, have coercive mechanisms in place) if it is to be recognisable as law *qua* legal system.

Himma's project spans multiple papers and book chapters and is more comprehensive than the other pieces discussed throughout this thesis. For this reason, large parts of Chapters 3 and 4 were devoted to presenting, and refuting, Himma's criticisms of Hart's and Raz's arguments as well as his positive claim. The core of my rejection of Himma's CNC is the observation that his claim is bounded to our natural world and particular considerations about the nature of humans. The reasons Himma gives for why he thinks that legal theorists ought only to be interested in explicating

the nature of *our* law, fall flat. In the end, I concluded that there is no discernible difference between his own conclusions regarding the law's relationship to coercion and Hart's.

The thesis is not, however, a full-tilt defence of Hart's NNC as the best conceptualisation of the relationship between the law and coercion. At the conclusion of Chapter 4 I suggest that Hart does not get it quite right. His critiques of the traditional CNCs (Austin and Kelsen) are correct and are applicable to Himma's CNC. However, Hart goes too far in asserting that the relationship between law and coercion can be entirely explained with reference to human nature and natural facts like resource scarcity. This Chapter, then, will explain what I take to be the best explanation for the conceptual relationship between law and coercion: that the nature of law is such that law is, of conceptual necessity, *coercion-apt*.

In order to clarify this particular variation of a CNC regarding the relationship between law and coercion, this Chapter will endeavour to answer the following questions: Firstly, what about the nature of law makes it coercion-apt (related: what *is* coercion-aptness)? Second, is coercion-aptness a *distinguishing* feature of law; that is to say, is it the case that law is the *only* normative system that is coercion-apt? And lastly, is coercion-aptness particularly suited to our conception of the nature of law in a way that other means of motivating behaviour (e.g., offering rewards, shaming) are not? Conceiving of law as coercion-apt can, I think, give theorists a way to think about and discuss a facet of law's nature that legal theory has hitherto struggled to explicate.

II What Does it Mean to Say, 'Law is Coercion-apt'?

Another way to put the claim, 'law is coercion-apt' is to say that law is constituted (in part) by potential coercion. The allusion to potential energy here is intentional. Potential energy, as present in a drawn bow for example, does not necessarily result in kinetic energy in any conceptual sense and yet potential energy both accounts for and explains kinetic energy when it occurs. Likewise, conceiving of law as being (in part) constituted by potential coercion can help account for the seemingly ubiquitous institutionalisation of coercive mechanisms. But it can do so without logically entailing the claim that the presence of coercive mechanisms (or even the authorisation of its use) is a precondition for the existence of law.

The potential energy of a bow is the consequence of it being drawn, or pulled, by an archer. Therefore, a bow at rest has no potential energy. Unlike a bow, however, the law is never 'at rest'; it does not require an 'archer' in order for it to contain potential coercion. One way to cash this out is to appeal to the essentially normative character of law: legal systems are systems of norms and the essence of a norm is that it aims to guide conduct. So, if a person wants to know how to act (how to buy a property, or to enter into contract with another person), then they should consult the law for answers.

In Chapter 4 I explain why it is a mistake to think that a general theory of law can provide a conceptual account of the law's normativity if what is being asked is, 'how is it that laws *actually* provide reasons for action?' Questions surrounding whether the law actually *is* a normative authority, that is to say, whether it actually provides reasons for action in a given society, or, whether law-subjects actually regard the law as an authoritative guide, are contingent questions and require engagement with the

intersections of legal theory and political theory, social psychology, and behavioural science. These are important inquiries, but beyond the scope of investigations into the nature of law.

The problems faced with trying to explain how it can be a constitutive feature of law that it *actually* provides reasons for action disappear if we accept the Razian claim that the law merely claims to be an authority, claims to provide its subjects with reasons for action. As Chapters 3 and 4 briefly mentioned, a legal system's claim to authority can be broken into three sub-claims to *supremacy, comprehensiveness*, and *openness*.[2] That it claims comprehensive authority means that it claims the right to regulate any type of behaviour. Raz gives no reason to suspect that such a 'right to regulate' is restricted to any specific *type* of regulation. This means the claim to comprehensive authority includes regulation via the institutionalisation of norms that prohibit or require conduct, the institutionalisation of power-conferring norms, and also the institutionalisation of coercive mechanisms. Though none of these forms of regulation is individually necessary, the law claims the authority to adopt any combination of them. Law, therefore, claims the comprehensive authority to institute

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[2] J Raz *The Authority of Law* (2nd edn, OUP 2009) 116-120
Research into legal pluralism (the phenomena that multiple legal systems regulate the same territory/population) and international gives reason to suspect that *supremacy* may not be necessary for law. This is because, especially within international law, there appear to be legal actors who are not - state actors, e.g., private corporations who operate within the international community (participating in treaties) in the same way as states. The characteristic of *supremacy*, then, does not aid in our understanding of what it is to be 'legal' when the complexities of international law are concerned. For the present thesis, I think the characteristic of supremacy is helpful in explaining what about normative-systems are coercion-apt – they claim to be supreme over a certain population regarding a certain set of norms. That there may be rival supremacy claims does not detract from the claim, it simply means we need to do some forensic work in order to ascertain whether a normative system is indeed the supreme guide regarding a certain population/concern. The problem of course, especially in international law, is that even a forensic analysis of which legal system or corporation is actually the supreme authority for a specific concern may not yield a definitive result. See: K. Culver & M Giudice, *Legality's Borders* (OUP 2010) especially Chapter 4; and: N Roughan & A Halpin (eds), *In Pursuit of Pluralist Jurisprudence* (CUP 2017)

and utilise coercive mechanisms and – because of this – we can say it exists in a constant state of being 'pulled', of being coercion-apt.

It can also be helpful to flesh out the picture by contrasting law with something that is not coercion-apt, like conversation. Conversation, understood in its typical use, is an information-sharing opportunity; it has the aim of making your thoughts as explicit as possible so that your interlocutor understands you.[3] Conversation does not have any underlying normative quality as the goal is not, again in typical cases, to guide behaviour but rather to achieve mutual understanding.[4] Even if a conversation were to slip into an argument, we should resist any urge to claim that such a verbal exchange, no matter how heated it may become, is coercion-apt. The point of argument is to persuade and for that, you must (ideally) [1] fully explicate your position to your interlocutor in order to [2] convince them that your position is the better one. A successful argument would convince your interlocutor to agree with you of their own volition and, logically speaking, there cannot be any type of coercion involved. For example, if a speaker were to say to their interlocutor: 'if you agree with me, I will do

[3] I say *typical use* because it is possible to use an assertion to mask things like threats. E.g., saying to my child in *that* tone, as she sits on the couch watching TV in the early evening: 'This homework looks like it will take you a long time' is my attempt to signal to her my expectation that she get on with her homework sooner rather than later, or there will be consequences – even if they are natural ones like, she won't have time to read in bed because she finished her assignment too late in the evening.

[4] Inferentialist theories of language, like that of Robert Brandom [see: *Making it Explicit* (HUP 1998)], take norms to be implicit in our linguistic practices. By this Brandom, in particular, means that our linguistic practices are grounded in normative appraisals of how we ought to use language, e.g., that we ought to use the concept *car* to refer to an enclosed vehicle with a motor that runs on four wheels. Philosophers tend not to have trouble understanding this claim because we argue over the *proper use* of concepts all the time. For instance, when we talk about *cars* do we mean concept vehicles or just those that are roadworthy? The whole of general jurisprudence discourse revolves around understanding what we *ought to mean* when we say *Law* so that we can use the concept correctly. So, when I say that conversation lacks a 'normative quality' I do not mean to contradict inferential semantics, but only to point to the typical understanding of conversation as a speech-act that is meant to share information, to make one's thoughts, emotions, ideas, explicit with one's interlocutor. That this speech act has a normative foundation of the type Brandom proposes does not mean that he would take conversation to be 'overtly normative' in the sense of trying to guide someone's conduct.

X for you' or, 'agree with me, or else,' then the exchange has fundamentally shifted in character from an argument to a coercive threat.

That argument has the capability to slip into a coercive exchange is not a sufficient reason to claim that its nature is coercion-apt. This is because once such coercive threats are exchanged the argument has ended – it has morphed into something else, something of a very different nature to 'argument'. Contrast this with law: if a coercion-less legal system triggers its coercion-aptness by instituting coercive mechanisms, it does not cease to be 'law', does not morph into something of a different nature. Rather, it can be said to have tapped into its coercion-aptness. To claim that *X* is *coercion-apt* is to not only claim that *X's* nature will not change even if it is never coercive, but also that *X's* nature will not change if it does eventually become coercive.

From this preliminary description, it seems that aptness is nothing more than that which is possible. A car can be blue or not blue and its nature will not change; is it correct to say that a car is blue-apt? I do not mean coercion-aptness to be as anaemic as that and yet there does seem to be something about the nature of a car that it is apt to be decorated or customised. It has the potential to be blue, or yellow, or red, or wrapped in a metallic or matte film, etc. The claim 'concept *y* is apt to *x*', at its most crude, may be said to be nothing more than a claim about what is merely possible for *y*, but I mean for it to signal something more like *y*'s *disposition*.

I take this notion of *aptness* to be similar to Leslie Green's when he writes that law is necessarily justice-apt.[5] Green takes this claim to support a 'non-derivative' connection between law and morality, justice being a moral concept. Derivative

[5] L Green 'Positivism and the Inseparability of Law and Morals' [2008] *New York University Law Review* 1050-1052

connections are understood to be similar to Hartian natural necessity – necessary to law given human nature and the natural facts of our world.[6] I, too, am identifying (to use Green's terminology) a non-derivative connection, but between law and coercion.

Green writes: 'Law is the kind of thing that is *apt* for inspection and appraisal in light of justice; we might say, then, that it is *justice-apt*.'[7] If we follow Green that the function of law, at its most basic, is the regulation of legal obligations, then, as Green notes, we ought to ask whether law is just – not only individual laws, but also its institutions and procedures.[8] Moreover, returning to the Razian conception of legal systems, given the nature of law and its comprehensiveness, it is appropriate for us, as subjects of law, to appraise how just it is, and also to demand reform when we take it to come up short.[9] Furthermore, just as Green writes that, 'not all human practices are justice-apt' I similarly do not think that all normative systems are coercion-apt *in the same way as law* – I hope to make clear what I mean by this in the coming sections.[10]

II.i *Law & Morality*

In this section, I will explain how the claim 'law is coercion-apt' can refine the distinction between law and morality. This is because I do not think that morality, be

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[6] Ibid. 1034
[7] Ibid. 1050
[8] Green takes the regulation of legal obligations to include their creation and enforcement (ibid.). This, of course, does not conflict with the overall claim of this thesis: that there is no conceptually necessary connection between law and coercion *as such*. As Chapters 3 and 4 discussed, that the enforcement a legal system implements is coercive has to do with the character of the subjects it is seeking to regulate and the natural world within which they live, and not the nature of law.
[9] There is also a connection between law's justice-aptness and its coercion-aptness. Presumably, a legal system's, or norm's, appraisal as *just* will include an appraisal of its coercive practices – the types of coercive practices legal systems and norms incorporate, the frequency with which the coercive practices are utilised, and the procedures that authorise the use of coercive practices. Put another way, the extent to which a legal system triggers its disposition to be coercive will have ramifications for how, or even whether, it is appraised in light of justice.
[10] Ibid. 1050

it ideal or positive, is coercion-apt. What is true at the most general level, despite the many different ways in which 'coercion' cashes out as noted in Chapter Two, is that coercion is a distinctive way in which a coerced-agent is compelled to (not) act. Law is not concerned with whether or not its subjects think it is a legitimate authority, or that what is legal is also moral, or even that doing the legal thing is the same as doing the 'right' thing. On the contrary, law is very concerned with being obeyed. Morality, however, hinges on voluntary compliance and appeals to reason. Once coercion is co-opted into its normative sphere, it becomes something very unlike morality. Here I have in mind what Hart writes in *Law, Liberty, and Morality*: that using coercion to enforce positive morality does not actually serve to preserve its moral character, but rather corrupts it so that it is no longer moral in character.[11]

Positive moral norms are customary norms widely accepted and practiced within a community. Unlike law, they are not systemic in nature; there are no officials, no institutions, no formal procedure for introducing, changing, removing norms, etc. Rather, norms of positive morality endure when they are internalised – when they are voluntarily adopted and practiced; they endure when those who adopt them do so because they believe such norms to be correct. This is why Hart writes that the preservation of positive morality is done through argument, advice, and exhortation.[12] He does not deny that coercion has an instrumental value where the maintenance of positive moral norms are concerned. Rather, Hart denies that what is protected or promoted is the norms' moral character. He writes: 'Much morality is certainly taught without [fear of legal punishment], and where morality is taught with it, there is the

11 HLA Hart, *Law, Liberty, and Morality* (OUP 1971)
12 Ibid 75

standing danger that fear of punishment may remain the sole motive for conformity.'[13] Moreover, if at a certain point in time the only motive for conformity with a moral norm is fear of punishment, then there is good reason to believe that morality no longer plays a role in practical reasoning.

So, positive morality appeals to reasons and reasoning. Its very nature relies on voluntary compliance motivated by the recognition of the legitimacy of the reasons behind moral principles and duties. This is why there seems to be an *inappropriateness* attached to using coercive means to force compliance with moral norms – an inappropriateness that does not attach to legal norms. If, for example, someone said: 'We should sustain our moral practices by coercing people into complying,' a suitable reply would be: 'But morality is not the kind of thing for which this is an appropriate option. Once one has resorted to coercive mechanisms, you are no longer playing the morality game and have transformed morality into something else - something more like law.' However, if someone said, 'We need to sustain our legal system by coercing people into complying because, in the circumstances in which we find ourselves, this is the only way the system can be sustained,' it would not make sense to reply that law isn't the kind of thing for which this could ever be justified.

The point that positive moralities are not coercion-apt can also extend to social customs. Social customs are not the product of a normative system; they are not intentionally created, changed, or altered by officials in accordance with norm-applying institutions. Rather, they reflect the values of those who voluntarily adopt certain practices. Their value, like the value of moral norms, is that they are voluntarily accepted and adopted by those who practice them. However, unlike moral norms, one

[13] Ibid 58

cannot always provide reasons for the existence of social customs, as anyone who has ever tried explaining to a small child why it is polite to shake hands upon greeting someone will attest.

Imagine if one person in a community explicitly refused to shake hands when greeting others, and the others became so incensed at this rejection of their social custom that they decided to shun that person in an effort to force him to assimilate. What started out as a social custom, willingly followed by those whose behaviour it governed, seems to have turned into a norm of customary law, where coercion *may* be appropriate depending on circumstances. Importantly, this is not the case with law, where there is no sense that something has gone wrong when coercion occurs or threatens to become realized.

There is an even stronger case to be made if 'ideal' morality, or morality *as such*, is considered. 'Ideal' morality is the notion of morality that preoccupies moral theory: a universal, unchanging, objective, true sense of right and wrong – a standard of morality that is valid independently of whether it is accepted or even practiced within the community. It is the notion of morality captured by Aquinas' natural law theory, the true ideal of morality that preoccupied ancient philosophers and Immanuel Kant. Another way to put the distinction: whereas 'positive moralities' aim at social order through the voluntary adoption of norms, ideal morality aims only at truth, even if recognition of such truth destabilizes social order, and truth, like reason, is not coercion-apt.

Appealing to coercion to enforce the norms of ideal morality seems particularly inept. The appropriate way to motivate someone to comply with her moral obligations is to reason with her, not coerce her. Another way to put the distinction: moral norms

can only be internalised once an agent has accepted the norm as morally correct. Legal norms *can be* internalised in the same way, a subject can internalise a legal norm as being correct or good in some way, and others can argue that one ought to happily adopt a given legal norm that one may be inclined to reject as reasonable. However, the legal validity of a norm is not dependent on its being internalised. If compliance with a legal norm can only be achieved with recourse to sanctions, the legal norm does not cease to be legally valid.

The point being advanced is that there is a distinction in *appropriateness* between the realms of morality on the one side and law on the other where coercive mechanisms are concerned. Morality, positive and ideal, aspires to voluntary compliance with its norms grounded in nothing more than the recognition that its norms are morally required. If coercion is invoked to motivate compliance with norms of ideal or positive morality, then compliance is rooted in pressure or fear, not in a recognition of moral reasons. The distinction between law and morality, where coercion is concerned, is such that one ought to be hesitant to bestow the characteristic 'coercion-apt' on either positive or ideal morality. Morality, then, is the kind of thing that excludes resorting to coercion; when it comes to law, however, questions relating to the incorporation of coercive mechanisms are always live.

II.ii Non-*legal Normative Systems*

What of non-legal normative systems (traditionally construed), like voluntary associations or universities? Universities, like law, are norm-applying institutions grounded in social conventions. They claim to have some regulatory authority over their employees and students and that authority is backed by institutionalised coercive

mechanisms like plagiarism tribunals and campus police. Voluntary clubs and associations are also normative systems; they are grounded in social convention and have officers, norm-generating procedures, and, sometimes they have coercive mechanisms.

This is perhaps especially true in the higher echelon of professional sports like FIFA (the International Federation of Association Football). FIFA has a very specific disciplinary code that relates to its players' conduct both on and off the pitch, but it is restricted to the normative sphere of football as regulated by FIFA.[14] Alongside these rules of membership and conduct are complex sanctioning procedures. Moreover, it seems entirely appropriate for universities, voluntary clubs, and associations to have and use coercive mechanisms.

My own understanding of what it is for a thing to be coercion-apt warrants the conclusion that universities and clubs are coercion-apt. This is because, contrasted to what I claimed about morality in the previous subsection, non-moral normative systems do not necessarily aspire to voluntary compliance based on the recognition of reasons, based on subjects' recognition that their norms are 'right' in some sense. Non-moral normative systems aspire to compliance with their norms and sometimes the only way compliance can be realised is through the institutionalisation of coercive mechanisms. When that happens, the character of the norm does not change, and this is because its status as a valid norm of a given system is not grounded in a conception of right or good. But rather, as a generated social norm imposed on members.

[14] Fédération Internationale de Football Association 'FIFA Disciplinary Code 2019' Available at: https://resources.fifa.com/image/upload/fifa-disciplinary-code-2019-edition.pdf?cloudid=i8zsik8xws0pyl8uay9i

So understood, coercion-aptness is not a feature that distinguishes law from other normative systems. Rather, coercion-aptness is a feature of some normative systems in general. The claim that law is coercion-apt because it is a normative system that does not necessarily aspire to voluntary compliance is not a troublesome implication for it does not support, on its own, the conclusion that universities and clubs/associations are indistinguishable from law. As I note in Chapter 4, a conceptually relevant distinction between law and other normative systems, like universities and sporting associations, is that their membership is voluntary, which cannot generally be said of law.[15]

It would also be incorrect to say that the authority universities or clubs claim is comprehensive or supreme, in the Razian sense. For example, consider FIFA again. Its claim to authority, like the legal system, is limited to its members and to the particular sphere of activity over which it governs. FIFA can even add penalties, suspensions, etc., on top of state sanctions for players' and coaches' misbehaviour off the pitch. But, the 'on top of state sanctions' is critically relevant here. It would be a strange use of power for FIFA to expect its players to, for instance, drive 10 miles per hour slower than posted speed limits – but that is possible. What is *not* possible, however, is for FIFA to contradict the law in some way, to claim that because its players and coaches can afford luxury cars that handle better at higher speeds with more reliable brakes, they can drive 20 mph *over* the speed limit without being sanctioned by the state.

[15] I say 'generally' because it is a truism of our global life that those with the means can pick and choose which legal system they live (and pay tax) under. Even in those cases where an individual may set up residence for tax purposes, they are still bound by the law where they actually live. For instance, your money may live and be taxed in the Cayman Islands, but if you and your family live in London, the laws of the United Kingdom apply to your actions in London.

II.iii *Law & Organised Religion*

According to Ekow Yankah, law and coercion are conceptually related.[16] He furthermore argues that coercion delineates law from other normative systems and, in explaining his claim, he uses the Catholic Church as an illustration. Yankah may be correct that coercion delineates law from normative systems like the Catholic Church. However, organised religion is a special case where coercion-aptness is concerned. In one sense, organised religions are normative systems – they have officials and norm-creating/-applying institutions. However, they are also meant to be rooted in a sense of *right*, in ideal morality, and not solely in social norms like the normative systems of law or a chess association. Compliance with the norms of an organised religion is meant to be grounded in faith and a belief that the religion's norms are the best way to behave. In this sub-section, I will explain why it is that organised religion presents a special case, when compared to the normative systems discussed in the previous section. I will ultimately conclude that normative systems that are rooted in religious doctrine are not coercion-apt in the same way as law, for the same reasons morality is not coercion-apt.

Yankah writes: 'The difference [between the law and the Catholic Church] is the Catholic Church cannot, at least in modern liberal states, coercively enforce obedience to its religious norms except by appealing to the law.'[17] There are grounds for doubting whether this particular assertion is accurate. In one sense, one could argue that the Catholic Church does not need to coercively enforce its norms because of the omnipresent threat of eternal damnation along with the institutionalized sacrament of

16 E Yankah 'The Force of Law: The Role of Coercion in Legal Norms' [2008] *U. Rich. L. Rev.* 1195
17 Ibid 1234

Confession. According to the Church, so long as one confesses and then completes restitution as ordered by the priest, one has no longer sinned – the slate is wiped clean.

Consider a practicing Catholic who steals goods from a local shop. She is aware that what she did was wrong, and of the penalties, both legal (arrest, trial, punishment) and religious (Purgatory, or Hell). To avoid damnation, she goes to her local priest for the rite of Confession. The priest tells her to return the stolen goods, apologize to the store owner, confess to the authorities, and to say ten *Hail Mary's* and an *Our Father*. What is interesting is how similar the routine sacrament of Confession is to the paradigm case of coercion in law as discussed in Chapter Two. The priest is effectively saying, 'you *must* do these things or you still risk going to Hell', which is similar to a judge compelling a defendant to pay their fine or risk further sanction. The fact that the thief would also then have to deal with legal ramifications, as she had broken a law of the State and not just sinned, does not support the claim that there is a difference in terms of the presence of coercion between the two socio-normative orders. This confession example provides reasons to think not only that the Catholic Church does coercively enforce obedience, but also that it does so in a manner similar to legal institutions.

Perhaps Yankah is making a more specific claim: that the Catholic Church cannot coercively enforce the obedience of *non-believers* whereas Canada's legal system *can* coercively enforce the obedience of non-Canadian citizens or residents who break the law whilst in Canada. However, the Catholic Church does not claim authority over non-believers, so there is no reason to think that it would attempt to coerce non-

believers into accepting its norms.[18] It is true, then, that the Catholic Church may not work *like* municipal legal systems, but the utilization of coercion seems to have little to do with delineating the two systems. Further, if it is generally correct (as I claim in the previous subsection) that other normative systems do utilize coercive mechanisms, then the most we can conclude is that coercion individuates normative systems from non-normative systems that do not seek to guide or direct behaviour. Indeed, it would seem strange for a non-normative system, such as the eco-system, to employ coercion.

There is a further question here, however, because what I am interested in is not whether the law *does* coerce, but how to explain the nature of the relationship between law and coercion. The claim that law is coercion-apt is a claim that the nature of law does not change if it institutionalises and utilises coercive mechanisms. The distinction between law and organised religion is similar to the distinction between law and morality. To be sure, it can be said of organised religion that there is instrumental value in resorting to coercive mechanisms to force others to comply with one's normative goals, similar to the instrumental value that can attach itself to threatening someone so that they agree with you in an argument or abide by a moral norm. The priest wants their parishioners to go to Heaven. However, despite this instrumental value, there seems something inappropriate in using coercive mechanisms in such contexts. Organised religions are systems, but they are grounded in a particular conception of 'right', of ideal morality. Were they to rely on coercive mechanisms, and not on faith, to motivate compliance with their norms, it would distort their nature and make them less like religion, and more like law.

[18] Notwithstanding, The Roman Inquisition and incidents like the Galileo Affair.

II.iv *Are We Better Off Saying, 'Law is Motivating Compliance-apt'?*

A question worth exploring at this point is whether law is apt for different types of motivation, or whether coercion is a type of motivation appropriate to law in a way other means of motivating compliance are not? For example, some people may be motivated to follow the law only because they fear societal repercussions, like harm to their reputation. However, we cannot discuss the ways in which the law is *apt* to protect reputations in the same way it is coercion-apt because the law cannot intentionally generate social pressures in the same way that it can intentionally generate and institutionalise coercive mechanisms.[19]

In Chapter 2, I observed that one of the difficulties with analysing coercion is its inherently subjective nature: what is coercive to one person may not be for another, so it seems strange to identify a particular threat as an instance of coercion where the potential coerced-agent does not feel threatened. Attempts to analyse coercion using strictly 'objective' features, e.g., Anderson's Enforcement Approach, may succeed at identifying core cases of coercion without integrating the subjective aspect, but it fails to explain what is coercive about many non-central cases. This is why I argue that a complete analysis of coercion ought to account for its internal (e.g., subjective) and external (e.g., objective) aspects. I further claim that analysis ought to be further segmented to account for the internal and external aspect of the coercing-agent and the coerced-agent; hence my calling it a 'four part' schema. The internal aspect of the coercing-agent applies if there is an intent to coerce or if the coercing-agent is reckless with respect to the effect their behaviour has on the coerced-agent. The external aspect

[19] Though it tries, e.g., propaganda.

applies if there is an identifiable coercive act, e.g., a threat. The internal aspect of the coerced-agent applies if they feel coerced, and the external aspect applies if their behaviour changes due to the coercion.

At the conclusion of Chapter 2, I stated that the question 'What is the relationship between law and coercion?' is poorly formed. There are different relationships one can analyse and the focus of this thesis is the relationship between law and coercion, where law is an intentionally coercing-agent. This thesis, in other words, is not looking to analyse the relationship between law and coercion relative to the internal aspect of the coerced-agent. It is looking to explain the relationship between law and the existence of coercive mechanisms within legal systems; it is not looking for an explanation of the relationship between law and the coercion its subjects may/may not experience living under its laws.

To return to the matter at hand, societal pressures to follow the law – or even to break the law, as in occurrences of civil disobedience – are not grounded in legal mechanisms, but in societal norms and opinions. Societal pressures may converge with legal norms, legal norms may track societal pressure, but such convergence/tracking is neither predictable nor necessary to the existence of law in any sense of the word. Law may be social-pressure-apt, but it would be dependent on the subjective nature of the subjects of law and not on legal mechanisms. Put another way, it would be an *-aptness* similar to coercion-aptness if the focus of analysis were the internal aspect of the coerced-agent, where one person may feel more coerced by the law because they are poor and cannot afford the minimum parking fine or speeding ticket.

Rewards can also motivate compliance, so is law reward-apt in the same way that it is coercion-apt? The answer to this is relatively complex because in some sense,

yes, law is reward-apt, but there is a kind of inappropriateness that attaches to reward-aptness that does not attach to coercion-aptness. Rewards can serve as powerful incentives but, as Bentham points out, a reward-based system of law (that only used rewards, never pubnishment) would look absurd and could not be depended on in the same way as a legal system that only utilised punishment-based coercive mechanisms. For example, if a reward for not stealing were offered, would individuals be paid per day they did not commit an offense? For every instance you do not steal, are you to be rewarded a credit to the store in question? Would rewards be universally applied, or only issued to those who have broken laws in the past in an effort to get them to 'reform'? And, if in the latter case, wouldn't such a system lead to more law breaking because everyone would want to claim rewards?

The law could, conceptually speaking, rely on rewards to serve as motivation for compliance. However, it may be irrational and/or futile to rely on reward mechanisms alone. It would be entirely inappropriate for a legal system to try to motivate compliance via rewards alone. In this sense, law is coercion-apt in a way that it is *not* reward-apt, e.g., as a matter of institutional appropriateness.

Here, I am using a different notion of appropriateness from the previous sub-sections. I do not mean that it would be inappropriate for law to institute a reward-based enforcement system because it would alter law's nature, turn it into something *unlike* law. This is the sense of inappropriateness that attaches to morality where coercion is concerned, as discussed in the previous subsection: it would be inappropriate for anyone, or any institution, to try and coerce compliance with moral standards in the sense that it would turn them into something of a different nature to morality.

Whereas the notion of a coercive morality is conceptually incoherent (once you have coercion, you necessarily have something other than morality), the same is not true of the relationships between law and rewards or of law and social pressure. It would, however, be *instrumentally* inappropriate for a legal system to enforce compliance with recourse to rewards alone because it would be a bad way to motivate compliance. So, just like there are different senses of *necessity* (e.g., conceptual and natural), there are different senses of appropriateness. It is true that the law can piggy-back off of reputational or moral motivations, and also can motivate compliance by offering rewards. However, the point being pressed in this section is the following: what makes law distinctive from morality is that moral norms are not apt for invoking coercive force in order to motivate behaviours in the same way as legal norms. It is not an open question whether moral norms can be enforced coercively, because morality is the kind of thing that excludes resorting to coercion.

III Angels, Again

If we return to Raz's society of angels, the claim that law is coercion-apt can further develop Hart's NNC. As I mentioned in Chapter 3[20], Yankah writes that Raz's thought experiment should cast serious doubts on whether the angels actually have a legal system:

> If one (fallen) angel inexplicably decided to disobey those edicts, the inability of any structure to even theoretically compel him to do so would, I suggest, cast serious doubt on the system's claim to be law.[21]

[20] Chapter 3 103-104
[21] Yankah (n 16) 1236

The lack of coercive mechanisms in a society of angels, however, is not evidence that the angels lack a legal system, but rather evidence that either: [1] law has not yet conferred the relevant powers on certain legal official(s); or [2] that such powers may have been conferred, but not yet exercised.

Conceiving of law as coercion-apt allows us to make the following conclusion: were the angel-officials to institutionalise coercive mechanisms in an attempt to redeem the fallen angel, the possibility exists that they would be instrumentally justified in doing so. This would be a productive measure to take in securing the desired aim of successfully motivating the compliance of the fallen angel and protecting the law-abiding angels from other fallen angels. And considering law's nature (and its claim to being a normative authority in particular), authorising coercive mechanisms would not only be instrumentally justified, it might well be naturally necessary. That is, it might be a necessary means of maintaining the rule of law given the basic facts about the world Hart cites. This is not a moral claim, as instrumental value is independent of moral value. There are obvious examples of wicked legal systems, and wicked laws, for which there can be no moral justification for the use of institutional coercion. Yet, there is a sense in which it is instrumentally justified, or appropriate, for even a wicked legal system to authorise coercive mechanisms to sustain the rule of *its* law.

IV Conclusion

The present chapter has attempted to explain my contention that coercion-aptness is a conceptually necessary feature of law. Put another way, 'law' and 'coercion-aptness' are conceptually connected in the sense that we would not identify *L* as an instance of law if we are not also able to identity *L* as coercion-apt. This thesis, then, is proposing

a CNC as it is claiming that law and coercion are conceptually connected, just not in such a manner that the fact of coercion (or its authorisation) are necessary for the existence of law.

Law is coercion-apt *because* it is a normative system that does not aspire to voluntary compliance based on the recognition of reasons alone. How does this square with my discussion of Raz's society of angels in Chapter 3? There, I pointed out that his denial of classic CNCs (that claim there is a conceptually necessary connection between law and the presence of coercive mechanisms) was explained, in part, by his claim that following the law out of fear of sanction is following the law for the wrong kind of reason. Where the law is a legitimate authority, it takes into consideration those first-order reasons that apply to us, its subjects, and issues legal norms that are consistent with them. Can we not, following this, say that law *does* aspire to voluntary compliance based on recognising the reasons for its legal norms?

Perhaps, but again, unlike morality, the reasons laws are rooted in (if we continue with Raz's story of legitimate authority) are not only moral ones and are not taken to be universal or unchanging. Laws are also rooted in contingent facts about social life, particular facts about science and technology, social customs and habits, all of which are not universal, but are, rather, very much in flux. Also, to recall Green on the justice-aptness of law, very unlike morality, we – the law's subjects – can appraise the legal norms that apply to us and demand better where we see fit. Moreover, that there are 'reasons of a wrong kind' where law is concerned does not mean acting on those reasons means one is acting any less legally. Acting in accordance with the law because one fears sanctions may be acting on reasons of the wrong kind, but it is still acting legally.

Unlike law, if coercive mechanisms were introduced in order to ensure compliance with moral norms, they would cease to be moral in character. This is because morality aspires to voluntary compliance based on the recognition of its moral correctness. It follows, I claim, that normative systems that are rooted in morality – like organised religion – are not coercion-apt because they, like morality, aspire to voluntary compliance based on the recognition of reasons, not coercive measures.

Law's innate potential for the institutionalisation of coercive mechanisms is rooted in the sense of appropriateness that attaches to authoritative decisions to institute coercive mechanisms into legal procedures and practices. *Appropriate* in the sense that transforming a once non-coercive legal system into a coercive one would not transform the legal character of the system in any way. It may affect its effectiveness, but it was already law before the institutionalisation of coercive mechanisms, and it remains law afterwards. Coercion-aptness, therefore, is present even in a legal system for angels. Whether, why, and how it is triggered are crucial questions, but they are also beyond the scope of my concern, which is to show why coercion in the case of law is appropriate, and why it is not appropriate in the case of other normative systems.

Conclusion

Throughout this thesis, I have defended the claim that there is a conceptual relationship between law and coercion such that it would be incorrect to call *y* 'law' if *y* is not coercion-apt. Across five chapters, I explained why the relationship between law and coercion is of paramount importance for legal theory; what it means to say, 'law coerces'; what is wrong with some of the most well-known accounts of the relationship between law and coercion, be they inaccurate or incomplete; and why I think my claim about the coercion-aptness of law is the most successful explanation of the relationship.

This thesis is meant to be an extension of the Hartian story, but, as I wrote in the introduction, I see no reason why it should be thought of as limited to the tradition of Hartian positivism. The distinctions I draw between law and morality where coercion-aptness is concerned are not predicated on any one understanding of legal validity, or legal content, as being conceptually distinct from morality, though some of the explanations I offer are rooted in positivist theory. In this conclusory chapter, I will re-state the main conclusions from each chapter, and how they come together in support of the final claim. I will also briefly touch upon some avenues for further development.

I Relevant Conclusions

In Chapter 1, I provided an historical gloss of some of the most prominent writings on law and coercion, going back to Plato. It served to not only clarify what was said

by whom and what they meant, but also to illuminate the cyclical nature of theory with consensus wavering between accepting and then denying the claim that there is a conceptual connection between law and coercion such that one would not say *y* is law unless *y* included coercive mechanisms. Consensus for at least the past half century has been that such Conceptual Necessity Claims (CNCs) are erroneous and the relationship between law and coercion is, as HLA Hart wrote, one of *natural* necessity. Natural necessity claims (NNCs) hold that the relationship between law and coercion is necessary, not as a matter of law's existence, but as a matter of its success in our natural world. The natural world has finite resources, and human nature can be selfish. As such, our law needs coercive mechanisms for it to function as an authoritative guide for behaviour.

I explained why it is I take Plato and Aquinas to assume something *like* an NNC; that Austin and Kelsen definitively support versions of a CNC; that, despite how Bentham is written about, he was not an advocate of a CNC but rather, more closely aligned with a Hartian NNC; and that Hart and Raz give fatal arguments against the validity of CNCs as they have been traditionally understood. I also pointed out in Chapter 1 that some of the most prominent theories on the relationship between law and coercion use coercion in a loose sense, where it encompasses the way in which law enforces its directives on those who do not voluntarily abide by its norms. As such, Chapter 2 had the aim of being more specific about what coercion is and, following that, what it means to say, 'law coerces'.

An instance of coercion, I argued, is best defined as a forced-choice. The coercing-agent forces the coerced-agent to choose amongst, or between, limited options – none of which the coerced-agent would freely choose from were they not

being coerced. Coercion, so understood, limits the agency of the coerced-agent; it does not neutralise their agency. The coerced-agent may be forced, in a sense, to do something against their will, but that is only because they are put in a situation where they have to *choose* to do something against their will. The claim that coercion is a forced-choice gives rise to two upshots. Firstly, that the physical manipulation of another as a mere means is not an instance of a coercion because it necessarily neutralises the agency of the person being manipulated. Second, some offers can force choice on others in the same way as threats, which are typically taken to be central-cases of coercion. Therefore, some offers can be instances of coercion.

In Chapter 2, I also argue that a full analysis of coercion ought to account for the internal and external aspects of coercion. Attempts to objectify analysis of coercion, like that of Scott Anderson's enforcement approach, fail because they do not appreciate the extent to which intent to coerce is a subjective characteristic. They also struggle to explain non-central cases of coercion that hinge on whether the coerced-agent *feels* coerced. For this reason, I introduced a four-part analysis meant to explain what is coercive about central and non-central cases alike.

The four-part analysis takes into account the internal and external aspect of the coerced- and coercing-agent. The internal aspect of the coercing-agent accounts for that agent's intent – are they out to coerce another, are they being reckless with regards to their behaviour towards another, or is the coercion that materializes accidental? The external aspect of the coercing-agent is the coercive act. The internal aspect of the coerced-agent accounts for their subjective experience – do they feel coerced by the coercive act, do they recognise the attempt to coerce them? Finally, the external aspect of the coerced-agent accounts for their response to the coercive act;

e.g., do they do what the coercing-agent wants them to do? In central cases of coercion, all four parts of the analysis obtain. Non-central cases are those where only some aspects may be accounted for. Moreover, identifying which parts are present or missing is part of the explanation for what, if anything, is coercive about a given non-central case.

The internal/external distinction as presented in Chapter 2 gives rise to more specific lines of inquiry where the relationship between law and coercion is concerned, such as: whether the internal *or* external aspect of coercion is a conceptually necessary feature of law; whether both are necessary; or whether neither is necessary. Also, which agent is the relevant agent to analysis, the coercing-agent (law) or the coerced-agent (subjects of law)? As I wrote at the conclusion of Chapter 2, the relevant agent of interest for this work is the law as an intentionally coercing-agent. As such, when I ask, 'is there a conceptually necessary relationship between law and coercion?', I am asking, 'is there a conceptually necessary relationship between the existence of law and the law's application of intentionally institutionalised coercive sanctions'?

Chapters 3 and 4 were largely critical in nature. Given the strength of works, primarily by Hart and Raz, that deny a conceptually necessary connection between law and coercion, the best way to argue that such a necessary connection exists is to explain where those arguments went wrong. I therefore explain in Chapters 3 and 4 why I think the theorists Joseph D'Agostino, Kenneth Einar Himma, Andrew Stumpff Morrison, Frederick Schauer, and Ekow Yankah largely fail to successfully critique Hart's and Raz's arguments against the validity of classic CNCs. Therefore, they necessarily fail to instantiate their own CNC.

Chapter 3 focussed on Raz's arguments and his society of angels thought experiment. Raz's thought experiment demonstrates that coercive sanctions are not a conceptually necessary feature of law. Himma argues that the thought experiment fails but, as I point out, this is largely because Himma does not see any parallels between the law of angels and the law of humans. Therefore, that angels are motivated to follow *their* law because it solves critical coordination problems for them is irrelevant with respect to what is necessary for the existence of *human* law. For one thing, Himma points out, our law does far more than solve coordination problems (e.g., it includes criminal law). Moreover, our legal systems requires the authorisation of coercive enforcement mechanisms (CEMs) in order to motivate compliance because we are selfish and resources are scarce. However, as I point out in Chapter 3, this claim is consistent with Hart's NNC – that the relationship between law and coercion is one of *natural* necessity, not *conceptual* necessity.

I concluded Chapter 3 by pointing out that whilst Raz offers us a strong argument against the validity of CNCs, he does not offer an adequate explanation for the relationship between law and coercion. This is why Chapter 4 focusses on Hart's writings and his critics. Not only does Hart offer successful arguments against the validity of CNCs, he attempts to explain the seemingly ubiquitous relationship between law and coercion by appealing to natural necessity. Again, in Chapter 4, I focus for some time on Himma's CNC that the authorisation of CEMs is a conceptually necessary feature of law – furthering my claim that his arguments are consistent with Hart's and that he fails to explain why the only concept of law we ought to be concerned with, philosophically speaking, includes within its extension *our* law.

Despite my disagreeing with contemporary theorists that argue Hart and Raz were mistaken in their dismissals of CNCs, I acknowledged at the conclusion of Chapter 4 that those theorists are tapping into something quite significant – that the natural necessity explanation Hart offers is lacking. 'It seems intuitively wrong,' I wrote, 'that Hart's claim of natural necessity is used by theorists to dismiss a seemingly universal character of law as outside the scope of general jurisprudence, and it is these nagging worries that seem to be behind the recent resurgence in those works defending the conceptual necessity of coercion to law.'[1]

Thus, in Chapter 5, I explained how it is that law and coercion can share a conceptual relationship. Rather than claim that law and the existence or authorization of coercion are conceptually related, I claim that, as a matter of conceptual necessity, law is coercion-apt. Coercion-aptness not only confirms the conceptual separability of law, on the one hand, and the existence or authorization of coercive mechanisms, on the other (and therefore is consistent with Hart's and Raz's arguments against the validity of CNCs), it also acknowledges that the concept of law itself, distinct from what is true about humans and their environment, has the innate capacity to *be* coercive.

There are several distinctions wrapped up in the arguments surrounding my case for this claim: between law and positive moralities, law and custom, law and ideal morality and law and religion, as well as a distinction between coercion and other means of motivating compliance law may adopt. Law is coercion-apt, I maintain, because it is a normative system that does not aspire to voluntary compliance with its

[1] Chapter 4 147

norms based on recognition of the reasons generated or constituted by those norms. This is very unlike ideal morality, positive morality, and organised religion – all of which do aspire to voluntary compliance based on its subjects recognising them to be grounded in moral truth. Ideal morality seeks compliance by argument, by convincing its subjects that its norms are morally true or correct and should be adopted for no reason other than this moral truth. The same can be said of positive morality and organised religion: they seek compliance with their norms based on nothing but the position that they are morally correct. In this way, were they to rely on coercive mechanisms to motivate compliance with their norms, then they would not be preserving their moral character, as Hart points out.[2] Rather, their character would transform to something of a legal character – where norms do not necessarily aspire to voluntary compliance, but compliance full-stop.

II Further Developments

There are two areas of further development I want to briefly highlight before ultimately concluding this work. The first originates from the analysis presented in Chapter 2. My analysis does not recognise a direct correlation between feeling coerced and being entitled to claim one is a *victim* of coercion.[3] The internal-aspect of the coerced agent is entirely subjective. This means that if an agent feels forced to choose to do something against their will, then the internal aspect of the coerced-agent obtains and the instance is recognised at least as a non-central case of coercion. However, to claim

[2] HLA Hart, *Law, Liberty, and Morality* (OUP 1971) 58
[3] Chapter 2 80-83

one has been coerced in this sense is not sufficient to support the further claim that one has been victimised.

Victimisation is a problem for legal theory that goes beyond concerns about the nature of coercion, but the problem is similar: how can we objectively identify something that is rooted so deeply in variable subjective experiences? If an act against me is unwelcome, then in some sense it seems reasonable for me to claim that I have been a victim. If that same act against another is not unwelcome, then it seems reasonable to say that they, unlike me, have not been a victim. This variability in subjective experience and circumstance does not, however, mean that an account of victimisation is impossible to come by, just as it does not mean, for analogous reasons, that an account of coercion is impossible to come by. It simply means that the account must somehow deal with the variable, subjective aspect of the concept. And this means that whether an act, X, is one which victimizes the person who suffers its effects will depend on the subjective states of both the agent and the putative victim, and the context in which the act occurred. Who performed the offending act? What was their motivation? Was the act welcome or unwelcome? How do we know? Should the agent who performed the act have known that it would be unwelcome? Put another way – an analysis of victimisation might well require a multi-layered approach similar to the one I adopted for coercion in Chapter 2.

Another area of further development is directly related to my claim that law is coercion-apt. As I see it, there is one immediate area of application: the philosophy of international law, and in particular the question whether or not international law *is* law 'properly-so-called'. One of the central criticisms of conceiving of international law as law properly so called (to echo John Austin) is that international law is ineffective and

unenforceable. This, the claim goes, is primarily because what is taken to be international law lacks the systemic qualities of most municipal legal systems, among the most significant of which are institutionalised coercive mechanisms. If the claim that law, by its very nature, is coercion-apt but not necessarily coercive is generally applicable, then international law may well be a full-instance of law even in the absence of any such mechanisms. If my analysis in this thesis is accurate, the focus in deciding whether international law is law properly so-called should not be on the absence of coercive mechanisms, but on whether international law is like municipal legal systems in being coercion-apt. In other words, is it recognized as a kind of normative order or system in respect to which resorting to the use of coercive mechanisms is conceptually appropriate, and possibly justified?

Understanding the relationship between law and coercion as suggested in this thesis could also make it possible for legal theory to re-evaluate with greater precision questions concerning the validity of legal pluralism, the nature and role of legal officials, and the distinctions between law and other normative orders and systems. This is because the focus would be on the *aptness* the normative system in question has for the institutionalisation of coercive mechanisms, and not on whether the system actually does include coercive institutions and officials entitled to invoke them in motivating compliance. In the previous chapter I proffered that normative systems are coercion-apt, but morality is not. And I went some way towards explaining why this is so. I did not, however, expand on what it is that might further distinguish legal from non-legal normative systems, like associations and clubs.

Like law, FIFA is a normative system. Unlike law, FIFA does not claim comprehensive authority over its members. This means, it does not claim the authority

to regulate every aspect of its members' lives as it sees fit. This limitation in the scope of its claimed authority means it cannot legitimately resort to same sorts of coercive mechanisms as law. For instance, most legal systems integrate prison sentences, and many think that prison sentences are justified responses to some law-breaking behaviour. The use of prison sentences by law may be apt for its own appraisal by asking questions like: what sorts of infringement justifies a prison sentence; how long ought they be; or, should prisons be for profit? But, for the most part, the integration of a prison network by a legal system is thought to be an appropriate use of force.

This does not seem to be the case for non-legal normative systems even though they are, I conclude, coercion-apt. Even the most ardent soccer fans would (I hope) agree that it would be wildly inappropriate for FIFA to create its own prison network and incarcerate underperforming players or managers. Similarly, a neighbourhood chess association or book club may threaten to exclude members for failing to follow their rules, but if they threatened to lock members in their houses, that would be an overreach of coercive power. As such, even if other normative systems are coercion-apt, there clearly seem to be limits to the types of coercive measures it is appropriate for them to invoke.

Non-legal normative systems may be coercion-apt, but a possible distinction between them and law, where coercion-aptness is concerned, may be the types of coercive mechanisms available to them. Such a distinction would be contingent, e.g., grounded in facts about existing normative systems and how we evaluate their institutions, their claims to authority, and their enforcement mechanisms. Determining precisely why there is this difference between normative systems like FIFA, on the one hand, and legal systems, on the other, could shed further light on the nature of law, and in particular its coercion-aptness.

To sum up, the arguments defended throughout the thesis are all clearly within the scope of analytic jurisprudence and the questions it pursues: What is the relationship between law and coercion? Why it is that coercion in the case of law is appropriate whereas it is not appropriate in the case of some other normative orders like positive and ideal morality and organised religion? There are, as I have briefly explained, also multiple avenues for further research should the arguments in this thesis be generally acceptable. Avenues to further refine the conceptual work done in Chapter 2 on coercion and to apply such work to other related, though similarly problematic, concepts like victimisation. Avenues for further research in analytic jurisprudence with the project of further refining the nature of law and for investigations into the nature and validity of legal pluralism. And, finally, avenues for research into applied theory with the aim of determining which forms of coercion are justified for particular normative systems, legal or otherwise.

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Appendix to Chapter 2

This Appendix contains simple tables that show how the four-part schema introduced in Chapter 2 can be used to explain central and non-central instances of coercion.

I Central Case of Coercion

	Internal	External
Coercing-agent	X	X
Coerced-agent	X	X

Central cases of coercion, e.g., the gunman scenario or torture, are those where all four parts of the schema are easily accounted for.

II Coercion of Interest to this Thesis

	Internal	External
Coercing-agent (Law)	X	X
Coerced-agent (Subjects	n/a	n/a

The 'coercion' in question when investigating the relationship between law and coercion is exclusionary of the internal and external aspect of the coerced-agents – the subjects of law. This is because the internal aspect of the coerced-agent is entirely subjective and, thus, makes for shaky analytic foundation. Furthermore, if the external aspect of the coerced-agent applies – if they follow the law – it is not certain that it was because they felt coerced by the law and weren't motivated by other considerations (e.g., perhaps they think following the law is good, or they take themselves to be complying with non-legal social norms). As I write in Chapter 2: 'When I ask, 'is there a conceptually necessary relationship between law and coercion?', I am asking, 'is there a conceptually necessary relationship between law and the law's intent to incorporate coercive

sanctions, and the application of said coercive sanctions, in order to motivate the compliance of its subjects?'[1]

III Failed Coercion

	Internal	External
Coercing-agent	X	X
Coerced-agent	X/-X	-X

Failed coercion are instances where the coercing-agent intends to coerce (internal aspect obtains), makes a coercive attempt (external aspect obtains), but the coerced-agent is either not threatened at all (e.g., the internal aspect does not obtain) or, is threatened (internal aspect obtains) but not enough to do as the coercing-agent wants.

IV Accidental Coercion

	Internal	External
Coercing-agent		X
Coerced-agent	X	X

Accidental coercion are those instances where the internal aspect does not obtain for the coercing-agent; they do not mean to make the coerced-agent feel coerced with their proposition, or as though they have no reason but to do as the coercing-agent wishes.

In order to assign blame for such instances, then it is necessary to explain why it is that the coercing-agent should have known that their proposition would have made the coerced-agent feed coerced (e.g., is the coercing-agent in a position of power over the coerced-agent? Was the coercing-agent reckless in respect of the effect on the coerced agent? Here, Anderson's enforcement approach has a lot to offer.)

[1] Chapter 2, 64

V Social Coercion

	Internal	External
Coercing-agent (Social Norms)	n/a	X
Coerced-agent (Minority group)	X	X

With social coercion, social norms are the coercing-agent and minority groups are the coerced-agent. The internal aspect of the coerced-agent is met when members of a minority group feel as though they have no choice but to assimilate with social norms. The external aspect obtains when they do attempt to assimilate in order to avoid perceived prejudice or danger.

Regarding social norms as a coercing-agent: The external aspect of social norms can be met by empirical evidence of actual oppression a certain minority group faces, including micro-aggressions. Furthermore, only the external aspect of the coercing-agent must obtain for the identification of social coercion. Let me attempt to explain: Where there are institutional rules that support the oppression of a minority group, the internal aspect can be said to obtain because such institutional rules can signal intent to oppress the minority group. In some populations, social norms may be so entrenched that identifying intent is difficult. But, if the oppression is brought to light, any failure to remove it would be sufficient to ascribe intent. This is, however, largely irrelevant. If the external aspect of the coercing-agent obtains, if there is a rule that actually oppresses a certain population, then the minority group has reason enough to assimilate in order to avoid perceived harm or danger.

VI Nudging

	Internal	External
Coercing-agent	X	X
Coerced-agent		X

Nudging is a distinct way to influence the behaviour of others without their awareness.[2] It is often taken to be non-coercive because there is no feeling or awareness of being coerced into or out of anything against your will. It is the

[2] See: Richard H. Thaler & Cass R. Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (2nd edn, Penguin Books 2009)

point of nudging that you think you are still making a 'free' decision. Despite its 'non-coercive' nature, the four-part schema can offer an explanation of nudging. The internal and external aspects obtain for the coercing-agent (the nudging agent) because they want to manipulate the behaviour of the coerced-agent and, thus, put into practice tools to do so. With successful nudging, the coerced-agent (the nudged agent) will behave as coercing-agent wants them to, but the coerced-agent will be unaware of the manipulation, so the internal aspect for the coerced-agent does not obtain. Furthermore, that the coerced-agent remains unaware of the manipulation is the coercing-agent's aim.