

WAS AUSTIN RIGHT AFTER ALL?:  
ON THE ROLE OF SANCTIONS IN A THEORY OF LAW

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Jurisprudence contains few axioms, but one of them appears to hold that H.L.A. Hart's critique of John Austin's brand of legal positivism was conclusive. In arguing in *The Concept of Law*<sup>2</sup> that Austin's reduction of legal obligation to the factual existence of sanctions (or coercion)<sup>3</sup> failed to recognize the internal point of view of legal officials and failed as well to explain the central cases of legal normativity, Hart has been widely understood in modern jurisprudential debate to have knocked Austin out of the ring. John Gardner, for example, describes those who subscribe to the centrality of prudential considerations in understanding law as committing a "sadly . . . familiar error,"<sup>4</sup> and Leslie Green insists that a system of norms

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<sup>2</sup>H.L.A. Hart, *The Concept of Law* (Penelope A. Bulloch & Joseph Raz, eds., 2<sup>nd</sup> ed., 1994).

<sup>3</sup>John Austin, *The Province of Jurisprudence Determined* (H.L.A. Hart ed., 1954).

<sup>4</sup> John Gardner, "How Law Claims, What Law Claims," paper presented at Conference on the

relying solely on sanctions and incentives would not “be a system of law” at all.<sup>5</sup>

The soundness of Hart’s critique of the Austinian sanction theory of duty has become the conventional wisdom, but is the conventional wisdom right? It is true that in identifying the phenomenon of the internal point of view, Hart located and analyzed a dimension of legal obligation that Austin unfortunately and distortingly neglected. It is less clear, however, that this dimension is as important as Hart supposed, and less clear still that sanctions or coercion are as unimportant as Hart appeared to insist. Austin may have distorted the reality of law as it is experienced in ignoring the non-coercive dimensions of law, but his distortion may have been no greater than, and was arguably less than, the distortions consequent upon the tendency of much of contemporary legal theory, allegedly under Hart’s inspiration, to have treated sanctions<sup>6</sup> as peripheral to law as its experienced and irrelevant to the concept of law. Moreover, exploring why Austin may have been closer to correct than Hart (and almost half a century of the jurisprudence that Hart profoundly inspired and influenced) believed may open up important inquiries of methodology and scope about just what it is that a theory of law is supposed to accomplish.<sup>7</sup>

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Work of Robert Alexy, New College, Oxford, 11 September 2008, at 13-14.

<sup>5</sup>Leslie Green, “Positivism and the Inseparability of Law and Morals,” *New York University Law Review*, vol. 83 (2008), pp. 1035-58, at p. 1049.

<sup>6</sup> Austin himself sought to distinguish punishments from rewards, and his account of law rested solely on law’s ability to deliver punishments and not at all on law’s capacity of mete out rewards. Here I explicitly part company with Austin, and nothing in this paper depends on a distinction between the incentives of avoiding punishments and those of seeking rewards.

<sup>7</sup> In seeking to excavate some of the lost truths in Austin’s account of law, I do not propose, at

As is well known, John Austin in The Province of Jurisprudence Determined sought to explain legal obligation exclusively in terms of the threat of sanctions for non-compliance with the official directives that we call the “law.” Like many legal theorists, Austin thought it important to understand how law could be binding and how it could create obligations. And to Austin, following the path laid down by Jeremy Bentham,<sup>8</sup> law was binding precisely because of its ability to punish those who disobeyed its mandates. These sanctions – or at least the threat of them -- were central to Austin’s account of law, and thus to Austin the idea of legal obligation became substantially less mysterious once we understood that legal subjects had an obligation to follow the law precisely because law threatened them with sanctions if they did not. By threatening or imposing such sanctions on both citizens and officials, Austin argued, law produces a habit of obedience on the part of those who would otherwise be disinclined to take law’s directives as reasons for action. Legal obligation, to Austin, was reducible to a question of fact,<sup>9</sup> and consisted just in the way that citizens and officials felt obliged, under and because of

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least here, to act as an arbiter with respect to whether it is Austin’s or Hart’s (or some other, for that matter) account of law that is best entitled to the label “legal positivism.” Leslie Green has written that Austin’s imperative account of law is “independent” of Hart’s project, Leslie Green, “Positivism and the Inseparability of Law and Morals,” 83 *New York University Law Review* 83 (2008). Especially if Green’s claim is sound, and to a lesser extent even if it is not, it may well be important to determine whether it is Hart’s project or Austin’s that is best entitled to claim the label “positivism,” and is the best standard-bearer for legal positivism itself. Neither of these terminological and taxonomic endeavors, however, is my concern here.

<sup>8</sup>Jeremy Bentham, *Of Laws in General* (H.L.A. Hart ed., 1970). It is hardly clear that Bentham was guilty of many of the sins attributed to Austin, and it may well be that Bentham anticipated many of Hart’s criticisms of Austin. See Lord Lloyd of Hampstead & M.D.A. Freeman, *Lloyd’s Introduction to Jurisprudence* (London: Stevens & Sons, 5<sup>th</sup> ed., 1985), pp. 246-71.

<sup>9</sup> “Reductionism” is a strongly pejorative description, and so we need to be careful when we

the threat of sanctions, to do what the law expected.

Austin recognized the hierarchical nature of law, and thus for him the concept of sovereignty was central. Subjects obeyed the commands of the sovereign because of the threat that the sovereign would impose sanctions on them if they did not, and thus wherever a legal system existed there developed a habit of obedience to the sovereign on the part of the subjects. But the sovereign's sovereignty was simply a social or empirical fact, and thus Austin's so-called imperative theory of law understood the legal system as one in which the subjects had developed a habit of obedience to the commands of the sovereign, but the sovereign had developed a habit of obedience to no one at all.

## II

Hart's critique in *The Concept of Law* of Austin's picture of law, legal obligation, and legal systems remains one of the landmarks of jurisprudence. And it is especially important not only because of what it says about Austin's account, but also because legal positivism has come almost to be defined, not necessarily for the better, by Hart in general and *The Concept of Law* in

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claim that someone believes that a phenomenon, *A*, is reducible to another phenomenon, *B*. One can believe, after all, that *A* is reducible to *B* without believing that everything is reducible to *B*. Thus, even if Austin is properly understood as believing that legal obligation is reducible to coercion, he is not fairly interpreted as believing that all social phenomena are reducible to coercion or even that all normative phenomena are reducible to factual ones. On this kind of reductionism in legal theory, see Stanley L. Paulson, "A 'Justified Normativity' Thesis in Hans Kelsen's Pure Theory of Law? Rejoinders to Robert Alexy and Joseph Raz," Paper presented at a Symposium on Rights, Law, and Morality: Themes from the Legal Philosophy of Robert Alexy, New College, Oxford University, 10-11 September, 2008.

particular.<sup>10</sup>

Hart exposed a succession of deficiencies in the Austinian account, some of which are at best orthogonal to my central point here. It is true, for example, that Austin's exclusive focus on duty-imposing and not power-conferring rules ignored a very important variety of legal rule, important precisely because of the omnipresence in all advanced legal systems of power-conferring rules to enter into contracts, make wills, create corporations, and engage in numerous other forms of law-constituted behavior. And it is also a fault of Austin's account of legality that it is framed solely in terms of a vertical (or hierarchical) legal system in which a sovereign at the apex delivers orders to be obeyed to the subjects who lie below. It is a characteristic of constitutional governance that the government as well as the governed are subject to law, and no account of modern law could be complete without taking this feature of legality into account.

These shortcomings in Austin's theory are appropriate targets for Hart's attack, and I share with most writers on jurisprudence the view that Hart's criticisms in this regard were telling. But where I part company with Hart is in respect of his attack on Austin's understanding of legal obligation. In order properly to frame the argument, therefore, I will first briefly sketch the Austinian account, as well as Hart's criticisms of it. And this will set the stage for my

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<sup>10</sup> See Brian H. Bix, "Legal Positivism," in Martin P. Golding & William A. Edmundson eds., *Blackwell Guide to the Philosophy of Law and Legal Theory* (Oxford: Blackwell, 2004), pp. 29-49, at p. 32.

argument that Hart may have been less right and Austin more on target than the conventional jurisprudential wisdom fully appreciates.

### III

To explain the Austinian picture in somewhat more detail than summarized just above, we need to start with the question of legal *obligation*. Like his jurisprudential predecessors and successors, Austin recognized the central importance to a complete theory of law of a satisfactory account of how law creates obligations. If we think of legal directives simply as descriptive propositions or abstract statements, we miss what distinguishes law from other normative domains. It is true that law tells us what to do, but it is true as well that many books of moral philosophy tell us what to do, yet the fact that the enterprises of both law and of moral philosophy are essentially prescriptive does not mean that the prescriptions of English law and the prescriptions in Kant's *Metaphysics of Morals* have the same status for our practical reasoning. Kant may tell us what we ought to do, but English law tells English people what they have an obligation to do, and explaining this difference, and its underlying ability of law to *create* obligations,<sup>11</sup> lies at the heart of much jurisprudential writing and thinking. And in order to be successful, an account of legal obligation must explain how law can purport to *create* obligations, and not merely remind us (as Kant did) of the obligations that come from elsewhere. There may be good reasons for doing what Kant urged, but those reasons pre-exist and

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<sup>11</sup> Or at least, as Joseph Raz would put it, to *claim* to create obligations, regardless of whether the obligations the law claim to create are genuine obligations. See, e.g., Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979), pp. 154-57; Joseph Raz, *Practical Reason and Norms* (London: Hutchinson, 1975), pp. 147-48; Joseph Raz, "Authority, Law, and Morality, *The Monist*, vol. 68 (1985), pp.295 ff.

transcend what Kant himself said, in ways that differ from legal obligation. Law creates or claims to create legal obligations, and it is this obligation-creating dimension of law that Austin, along with so many others, sought to explain. Thus we see Austin writing:

Suppose an act innocuous, or positively beneficial, be prohibited by the sovereign under the penalty of death; if I commit this act, I shall be tried and condemned, and if I object to the sentence, that it is contrary to the law of God . . . , the Court of Justice will demonstrate the inconclusiveness of my reasoning by hanging me up, in pursuance of the law of which I have impugned the validity.

Austin is thus not only reminding us of law's raw power, but also of the fact that we seemingly have obligations to do things solely because law prohibits them, and not because they are otherwise beneficial, moral, or wise. And in this respect Austin's account is consistent with most of the central tenets of legal positivism, central tenets that he in fact did much to establish and perpetuate.

These legal obligations, argued Austin, arise because the law threatens its subjects with sanctions should they not comply with law's directives. As Jules Coleman and Brian Leiter describe Austin's central point, "Without sanctions, commands would really be no more than requests."<sup>12</sup> It is precisely the threat of sanction, therefore, which to Austin gives the law its normative force, which provides the law with its authority, and thus which creates the very idea

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<sup>12</sup> Jules L. Coleman & Brian Leiter, "Legal Positivism," in Dennis Patterson, *A Companion to Philosophy of Law and Legal Theory* (Oxford: Blackwell Publishing, 1996), pp. 241-60, at p. 244.

of a legal obligation.

#### IV

Hart's well-known criticism of Austin has numerous dimensions. One is that Austin, although almost certainly not his predecessor and mentor Bentham, saw law entirely on the model of the criminal law, in which a superior gave orders to an inferior and threatened sanctions for non-compliance. But law does much more than this, Hart argued, including the provision of remedies for private ordering of transactions. When the law permits suits for breach of contract, for example, it does not tell citizens whether or not they should enter into contracts in the first place. It is true that even such laws can be reduced to hypothetical imperatives, in which citizens are told what they *must* do once they have decided to enter into a contract, but such a reduction seems convoluted and indirect, missing the important distinction between what the citizen simply must or must not do, and how the law structures and enforces the range of citizen choice. Indeed, the issue here is not just the question of enforcement of private arrangements, but rather the full universe of power-conferring rules. By being the vehicle for the creation of powers in officials and citizens, the law is not just concerned with prohibitions and requirements, but with facilitating a wide range of permissive -- or optional -- conduct. Moreover, and as Hart signaled as early as his inaugural lecture on "Definition and Theory in Jurisprudence,"<sup>13</sup> law not only creates powers, but also constitutes activities that would not otherwise exist. Just as the rules of football create and not merely regulate "corner kicks," and

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<sup>13</sup> H.L.A. Hart, "Definition and Theory in Jurisprudence," *Law Quarterly Review*, vol. 70 (1954), pp. 37 ff.

just as “checkmate” is entirely a creature of the rules of chess, so too do the rules of law, as Hart, John Searle,<sup>14</sup> and others have argued, create the possibilities of behavior that would not otherwise exist, in ways that Austin and his followers have seemed quite pervasively to ignore.

Ignoring the power-creating and constitutive nature of law is not Austin’s only distorting over-simplification, Hart argues. By assuming a vertical and hierarchical relationship between sovereign and subject, Austin, says Hart, neglected the very real modern possibility of a sovereign that not only created law, but was also bound by it. And when we add the complications to the sovereignty picture that are provided by federalism, by partial sovereignty, by the separation of powers, by a sometimes more robust international law, and by numerous other complexities of the contemporary constitutional nation-state, we see that an attempt to model all of law on the image of an absolute monarch imposing rules on a subservient citizenry is a poor picture of the nature of law in modern and sophisticated legal systems. Law is far more than just the “gunman writ large,” Hart argued, and to fail to appreciate the distinction between the gunman write large<sup>15</sup> is fundamentally to misconceive the very nature of law itself.

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<sup>14</sup> John Searle, *Speech Acts: An Essay in the Philosophy of Language* (Cambridge: Cambridge University Press, 1969).

<sup>15</sup> Perhaps a good modern example of the gunman write large is the “protection racket.” We normally think of the gunman in an entirely particular rather than general way, but extra-legal and illegal coercion is sometimes imposed in general terms, as when the “mob” threatens all of the small business owners in some area with violence should they not make weekly payments in order to protect themselves against the threatened sanction. This is indeed the gunman writ large in the most literal sense, and the extent to which such a system (we might even imagine it with rules of recognition, rules of change, and rules of adjudication) is or is not a legal system is exactly the matter at issue.

Hart was not alone in his criticism of Austin along these lines, and with respect to these aspects of Austin's account Hart seems plainly correct. Indeed, the convoluted nature of numerous attempts to force all of dimensions of law into a vertical coercive model – witness, for example, the attempt, criticized by Hart, to see all of law in terms of commands backed by sanctions to judges and other officials – underscores the essential soundness of these dimensions of Hart's criticism.

If that were all there was to the matter, there might this late in the day be little cause for comment. But Hart went further, and he did so in a way that has shaped almost all of post-Hart jurisprudence, especially in the English-language analytic tradition. By focusing on sanctions and coercion, Hart argued, Austin imagined a world populated by people much like Holmes's mythical "bad man."<sup>16</sup> But many people, Hart insisted, were not like the bad man, but more resembled the "puzzled" man, the one of good faith who seeks to know what the law is, but is predisposed to comply with it. By ignoring the person who has an internal point of view with respect to the law, who considers himself a willing participant in the legal system, and who understands the law as creating sanction-independent obligations, Austin, Hart claimed, failed to capture the essence of legal obligation, and the essence of what is now commonly referred to as "normativity."<sup>17</sup> Indeed, even Arthur Goodhart, Hart's predecessor in the Chair of Jurisprudence

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<sup>16</sup> Oliver Wendell Holmes, "The Path of the Law," *Harvard Law Review*, vol. 10 (1897), pp. 457-78. For useful discussion, analysis, and corrective, see William Twining, "The Bad Man Revisited," *Cornell Law Review*, vol. 58 (1973), pp. 275-303.

<sup>17</sup> See generally Torben Spaak, "Legal Positivism, Law's Normativity, and the Normative Force of Legal Justification," *Ratio Juris*, vol. 16 (2003), pp. 469-485.

at Oxford, observed that “[i]t is because a rule is regarded as obligatory that a measure of coercion may be attached to it; it is not obligatory because there is coercion.”<sup>18</sup>

Hart’s criticism of Austin, and especially of Austin’s view about sanctions, has been taken as axiomatic in modern analytic jurisprudence, at least in the positivist tradition, and *a fortiori* from a natural law perspective. Joseph Raz,<sup>19</sup> Jules Coleman,<sup>20</sup> John Gardner,<sup>21</sup> Leslie Green,<sup>22</sup> and scores of others have taken as one of the central tasks of jurisprudence, and perhaps even *the* single central task of jurisprudence, to explain why and how the law can create obligations that are then, contingently, enforced and reinforced with sanctions, and have thus taken as a given that a sanction-dependent account of just what legal obligation *is* suffers from exactly the deficiencies that Hart identified in Austin’s jurisprudence.

## V

Hart’s criticism of Austin, however, seems at the outset to be empirically problematic,

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<sup>18</sup> Arthur L. Goodhart, *English Law and the Moral Law*, p. 17.

<sup>19</sup> Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979); Joseph Raz, *The Concept of a Legal System* (Oxford: Clarendon Press, 2d ed., 1980); Joseph Raz, “Authority, Law, and Morality,” *The Monist*, vol. 68 (1985), pp. 295-324; Joseph Raz, “Hart on Moral Rights and Legal Duties,” *Oxford Journal of Legal Studies*, vol. 4 (1983), pp. 123-31.

<sup>20</sup> Jules L. Coleman, *The Practice of Principle* (Oxford: Oxford University Press, 2001).

<sup>21</sup> Gardner, *op. cit.* note \_\_.

<sup>22</sup> Green, *op. cit.* note \_\_.

and in two distinct ways. First, the experience of modern complex legal systems may indeed be more coercive than Hart supposed. It is true that there exists the largely non-coercive and non-sanction-based realm of contract, wills, trusts, and much of private ordering. But just as the possibilities for private ordering have increased, so have the forms of state regulation, and arguably even more so. Tax laws are more complex and more intrusive, and the modern regulatory state controls numerous aspects of what would earlier have been thought of as unregulated, whether in the area of labor and employment, or workplace safety, or consumer transactions, or the sale of securities, or the conditions of competition, or any of a vast number of other domains. For every citizen who enters into a contract, there is likely to be more than one who organizes his personal and business behavior in ways that are shaped by the threat of the state to punish him if he does not. The employer who (in the United States) does not force his older employees to retire, or who refrains from rational but illegal forms of discrimination,<sup>23</sup> or who requires what seem to him to be silly precautions against worker accidents are all perceiving law in its coercive dimension. And so too with the vast numbers of Europeans who see the notorious Brussels bureaucrat of the European Union not as empowering, or facilitating, or constitutive, but rather as coercively imposing requirements that, but for the threat of sanctions, would have nothing to recommend them. Perhaps ironically, therefore, and especially to those who think that Austin's account suffers from an under-appreciation of the modern world in which even he lived, the complexity of the modern world has made Austin's focus on a vertical relationship between authority and subject, and on a legal regime that seems most of all to be

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<sup>23</sup> See Frederick Schauer, *Profiles, Probabilities, and Stereotypes* (Cambridge, Massachusetts: Harvard University Press, 2005).

coercive, to be more rather than less empirically accurate. Insofar as a theory of law seeks to capture the most important or most salient features of modern legal systems, it is not Austin's focus on sanctions and coercion, but rather Hart's on the non-coercive dimensions of law, that seems most empirically distorting and unrealistic.

Even more important is another side of the empirical nature of Hart's criticism. Hart asks us to focus not on the bad man but on the puzzled man, and not on the unwilling conscript into the legal system but on the willing and committed participant. But does it then become relevant how common such individuals in reality are? Suppose we were to discover not only that most citizens obey the law for reasons of sanction-avoidance and not for reasons of commitment, as even Hart acknowledges may be true but which, for him, would not undercut the core of his account? But then suppose we were to discover that even the judges adopted their internal point of view for pragmatic – reward and punishment – reasons rather than out of any stronger commitment to the enterprise? Hart again acknowledges this possibility, but in doing so appears to undercut his own criticism of Austin for ignoring the puzzled man. If there are few or no puzzled men, but if there are significantly greater numbers of frightened or ambitious ones, then what point would be served by focus on the minuscule number of puzzled ones?

My claim here is *not* that the world is as I have described it, although it may well be. Rather, my claim is that the value of focusing on the puzzled man in an allegedly descriptive jurisprudential enterprise is dependent upon the empirical existence of such people in significant numbers, for without just that empirical foundation, a theory of law, or an account of the concept

of law, would seem to be 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, but if it is grounds for criticism of a 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.

At this point, however, Joseph Raz enters the dialectic with a different kind of response. The importance of the puzzled man, Raz argues (albeit in different terminology), is not a function of how many puzzled men there are. Even if there were only a few, or only one, or perhaps even none at all, it would still be important to understand and to explain why for *those* people the law can create obligations apart from the sanctions that law can impose. The task of legal theory is to explain law from the perspective of the person who sees the commands of the law as content-independent and sanction-independent reasons for action, and perhaps for the benefit of such people, and this task is not dependent on the size of the population of such people.

Raz is hardly alone in this regard. Leslie Green insists that a regime of "stark imperatives" that simply "bossed people around," or that utilized a "price system that "structured their incentives while leaving them free to act as they pleased" would not count as a "system of

law” at all.<sup>24</sup> And numerous others have taken the same position. For Raz and for Green, and for many others, what stands in need of explanation is law’s *claim* to authority. Law may not in fact *have* authority, and it certainly may not have legitimate authority, but it is essential to law that it claim authority – that it claim to be imposing obligations – and any theory of law that cannot explain law’s claims will fail as a theory of law.

## VI

Raz, Green, Coleman, and others thus make clear what Hart did not: That the question of the importance of sanctions is parasitic on the answer to the question of what a theory – or *account*, to make the issue less pretentious – of law is designed to accomplish, and thus what criteria distinguish a satisfactory account of law from an unsatisfactory one. And this is illuminated once we see, as we have, that the focus of much of contemporary analytic legal philosophy is on an individual who may be, and almost certainly is, a scarce presence in modern legal systems and in modern society.

It is no fault of a philosophical theory that it does not focus on the ordinary person – the man on the Clapham omnibus, as it was quaintly and charmingly put in the English law of the early twentieth century. The philosophy of physics, after all, is stunningly uninterested in how the man in the street thinks about physics, and if the philosophy of physics seeks to explain the behavior and thought processes of physicists that would hardly count against the enterprise or

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<sup>24</sup> Leslie Green, “Positivism and the Inseparability of Law and Morals,” *New York University Law Review*, vol. 83 (forthcoming 2008).

the specific theories it might generate. Much the same could be said about philosophical enterprises not dependent on the physical world or on natural kinds, and the philosophy of history might be a good example. Indeed, we might – and should – say the same thing about moral philosophy. The best of moral philosophy assumes the internal point of view of the individual who wants to do the right thing, and, *mutatis mutandis*, we might offer a similar characterization about the best of legal philosophy. The best of legal philosophy, like the best of moral philosophy, might seek to explain and/or justify and/or prescribe to or for a certain kind of ideal type, and that it focuses on the ideal type and not on the more ordinary sanction-driven citizen, or even sanction-driven judge, should count for little if anything against it.

But if this is so, we should no longer expect of the philosophy of law that it give us a satisfactory account, even at the most theoretical level, of what actual legal systems are like. And perhaps that is why the concern with the puzzled man and not with most men is invariably conjoined with the enterprise of giving an account of the *concept* of law. Raz and many others freely acknowledge that most of the legal systems we actually encounter are ones in which coercion looms large, or at least in which a system of rewards and punishments looms large, and in which the actual functioning of the system depends on the threat of imposition of sanctions of considerable size and with considerable frequency. But we can nevertheless imagine that there *could* be a legal system “properly so called” (to borrow Austin’s terminology) in which sanctions played a limited role, or perhaps even no role at all. And if this is so, the argument continues, then sanctions, even if important to the actual functioning of actual legal systems, are not essential to the concept of law.

It is curious, however, that an inquiry into the concept of law should be so preoccupied with what could be the case rather than on what is the case.<sup>25</sup> And this focus on possible rather than actual legal worlds is especially curious given that those who purport to offer accounts of the concept of law insist that their accounts are entirely descriptive. But then we are prompted to ask what it is that they are descriptive of? If these accounts are not accounts of ordinary usage, and few claim that that is what it is,<sup>26</sup> and if they are not normative (although this is a more common claim for or about conceptual analysis of the concept of law<sup>27</sup>), then the allegedly descriptive accounts must be accounts of what is in fact genuinely important about the phenomenon of law, and about the concept we use to grasp it and to describe it. But if that is what an inquiry into the concept of law is, then it seems especially problematic to take law's (counterfactual) sanction-independent reason-giving capacity as genuinely important and its sanction-imposing reality as much less so. To decide on what the essential features of law are, we need to make judgments of relative importance. If the judgments of relative importance are

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<sup>25</sup> For some of my own skepticism about contemporary inquiries into the concept of law, see Frederick Schauer, "(Re)Taking Hart," *Harvard Law Review*, vol. 119 (2006), pp. 852-83; Frederick Schauer, "The Social Construction of the Concept of Law: A Reply to Julie Dickson," *Oxford Journal of Legal Studies*, vol. 25 (2005), pp. 493-501.

<sup>26</sup> See Jules Coleman & Ori Simchen, "Law," *Legal Theory*, vol. 9 (2003), pp. 1 ff.

<sup>27</sup> See Liam Murphy, "The Political Question of the Concept of Law," in Jules L. Coleman, *Hart's Postscript: Essays on the Postscript to The Concept of Law* (Oxford: Oxford University Press, 2001); Stephen Perry, "Interpretation and Methodology in Legal Theory," in Andrei Marmor, ed., *Law and Interpretation: Essays in Legal Philosophy* (Oxford: Clarendon Press, 1995); Stephen Perry, "Hart's Methodological Positivism," in Jules L. Coleman, ed., *Hart's Postscript: Essays on the Postscript to The Concept of Law* (Oxford: Oxford University Press, 2001).

based on empirical assessments of the actual world, the task, even if difficult, does not seem so mysterious. But if the judgments are based on something other than actual presence in the world, then locating the criteria for importance and unimportance appears to be substantially more problematic.

## VII

But perhaps I have dismissed too easily the argument from law's language. Leslie Green, for example, follows Hart in concluding that a sanction-based account of law is deficient because it cannot explain the difference between being obliged and having an obligation. Whether there *is* such a difference is exactly the matter at issue, so the only non-question-begging way to understand the claim is as asserting that the distinction is so deeply embedded in our language and our conceptual apparatus that it must rest on solid foundations.

But was Hart's ordinary language claim really sound? He asserts that being obliged is different from having an obligation, but it is far more common in ordinary language to treat an "obligation" as simply the noun form of the verb "oblige," as American state and federal courts have done thousands of times according to a LEXIS search. When the Supreme Court says that "the heir in virtue of his liability as heir for the obligation of his ancestor would be obliged to respond for all the fruits and revenues as heir if not possessor,"<sup>28</sup> or when the United States Court of Appeals for the Ninth Circuit announces that "[a]s the Order did not make that independent

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<sup>28</sup> Longpre v. Diaz, 237 U.S. 512, 528 (1915).

obligation delegable, CDSS was obliged to comply with it,”<sup>29</sup> they join numerous others in ignoring, as a linguistic matter, the distinction that was central to Hart’s analysis.

This is not to say that there is *not* a distinction between being (coercively) obliged and (non-coercively) having an obligation. But the linguistic data for that conclusion is remarkably thin, and if the conclusion is sound it must rest on something other than it being a distinction that is embodied in our language and the concepts that our language reflects.

Much the same can be said about John Gardner’s complaint that a sanction-focused theory of law cannot explain “law’s talk of obligations, rights, permissions, powers, etc.,” and that “such categories have no place in the . . . discourse of threats and incentives.” As with Hart, Gardner’s linguistic evidence is open to question. Even the gunman might use the language of permission, and there seems no linguistic error in the gunman saying “I’ll permit you to do it this time, but if you try it again I’ll shoot,” or in a parent saying “I gave you the right to stay out past ten, but you abused it, so you’re grounded for a month.” Again, these examples are not designed to say that there is nothing to a non-sanction-based account of obligations, right, permissions, and powers. But if there is a sound account, it must justify itself on non-linguistic grounds. The language of obligations, rights, permissions, and powers is indeed used in moral discourse, but once we see that it is widely used in non-moral discourse as well, it is something of a stretch to take the admittedly common moral use of these terms as very much evidence that the law is using such terms must be making moral claims.

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<sup>29</sup> California Department of Social Services v. Leavitt, 523 F.3d 1025, 1035 (9<sup>th</sup> Cir. 2008).

Moreover, even if such categories were part of traditional legal understanding, and even if the traditional understanding were sanction-independent, it is difficult to see how this traditional status differs from the traditional status of God-given natural law, or why these categories and their language could not be etymologically understood as a manifestation of a now-rare strong version of natural law theory. If we are free to look for accounts of law that do not need God as part of the explanation, why are we not similarly free to challenge or even jettison the language and categories that may well have emerged from just that now-frequently-discredited understanding of the nature of law?

## VII

The objection to taking the existence of sanctions and coercion as central to the concept of law, or as central to the law and legal institutions with which we are most familiar, can thus be seen as dependent on a view not so much of law itself, but of the philosophy of law as an enterprise. And in this respect Hans Kelsen appears to emerge as the major figure. In urging a “pure theory of law,”<sup>30</sup> Kelsen did not, as it has been felicitously put, urge a theory of pure law, because he was as clear as anyone in insisting that law as a social phenomenon simply did not exist in pure form. Indeed, Kelsen, more than anyone, made clear that for him no legal act could be completely determined by the law. As a result, Kelsen was concerned with the purity of a theory and not the purity of what the theory was a theory of, and thus he exposed, far more than

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<sup>30</sup> Hans Kelsen, *Introduction to the Problems of Legal Theory*, trans. Stanley Paulson & Bonnie Litschewski Paulson (Oxford: Clarendon Press, 1992).

did many of his successors, that the focus of legal theory is dependent on a conception of what a legal theory is supposed to accomplish.

This focus on the goals of legal theorizing is no more apparent than in the concern among modern legal positivists with conceptual analysis, with what law claims rather than with what law is, with the minimization of the importance of sanctions, and, perhaps most notably of all, with legal normativity.<sup>31</sup> The normativity of law, especially if it is important that it not collapse into an alleged moral obligation to obey the law, or at least into a moral commitment to the law, seems to many legal theorists these days to be an important question, but it is not clear *why* it is an important question. It cannot be, *pace* Hart, that it is important because we commonly draw a distinction between what one is obliged to do and what one has an obligation to do. Indeed, it is hardly clear, as I argued above, that the distinction being obliged and having an obligation is as plain in English as Hart made it out to be. It is no linguistic error to say in English that I am obliged to honor my parents, nor that I have a sanction-compelled obligation to pay my taxes or

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<sup>31</sup> Some of these have surfaced in the contemporary debates about jurisprudential methodology. See, for example, Julie Dickson, "Methodology in Jurisprudence: A Critical Survey," *Legal Theory*, vol. 10 (2004), pp. 117 ff; Brian Leiter, "Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence," *American Journal of Jurisprudence*, vol. 48 (2003), pp. 17 ff.; Joseph Raz, "Can There Be a Theory of Law?," in Martin P. Golding & William Edmundson, eds., *Blackwell Guide to the Philosophy of Law and Legal Theory* (2004); Joseph Raz, "Two Views of the Nature of the Theory of Law: A Partial Comparison," *Legal Theory*, vol. 4 (1998), pp. 249 ff.; Joseph Raz, "On the Nature of Law," *Archiv für Rechts- und Sozialphilosophie*, vol. (1996), pp. 1ff.; Veronica Rodriguez Blanco, "The Methodological Problem in Legal Theory: Normative and Descriptive Jurisprudence Revisited," *Ratio Juris*, vol. 19 (2006), pp. 26-54. Many of the modern debates have emerged out of concerns first expressed in John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), ch. 1. And for skepticism about the importance of explaining law's normativity at all, see Frederick Schauer, "Positivism Through Thick and Thin," in Brian Bix, ed., *Analyzing Law: New Essays in Legal*

obey the speed limit. Perhaps there is such a distinction, and perhaps the gunman-writ-large explanation of law is unsound, but it is hardly clear that Hart's linguistic intuitions get him nearly as far in reaching that conclusion as he supposes.

Ordinary usage aside, the question of law's normativity, and thus of law's obligation-creating capacity, cannot plausibly be understood as part of the enterprise of offering an accurate account of the centrally important features of law. It may well be part of the enterprise of examining an ideal type of practical reasoning,<sup>32</sup> and there is no reason to detract from the value of that enterprise. Or instead the philosophy of law, and the question of the normativity of law, may be a component of the enterprise of moral philosophy, and if that is the case than the focus on the morally-motivated subject, however rare he or she may be, is consistent with the very nature of the enterprise. But if the goal of the philosophy of law is offer a philosophically astute account of what makes law different from other prescriptive enterprises, then the dominant place of coercion and sanctions in law as it is experienced and as it exists in the world cannot so easily be ignored. In shifting the focus of legal philosophy from the common nature of law to the so-called essential features of law, Hart's focus on the puzzled man has helped expose the goals of much of modern jurisprudence. But if the effect of those goals is to detract from recognizing the importance of a feature – coercion -- that is present in all real legal systems and largely absent from most other normative systems, then it is hardly clear that Hart's efforts have been for the better.

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*Theory* (Oxford: Clarendon Press, 1998), pp. 65-78.

<sup>32</sup> See Gerald J. Postema, "Jurisprudence as Practical Philosophy," *Legal Theory*, vol. 4 (1998), pp. 329-57.

