The Authorization of Coercive Enforcement Mechanisms as a Conceptually Necessary Feature of Law

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One of the most conspicuous features of law, as it works in the world of our experience, is that legal norms are backed by coercive enforcement mechanisms. We know of no actual legal system, past or present, that has lacked these mechanisms. Anyone who has ever practiced law can attest that the object of any piece of litigation is to either settle the litigation or secure an enforceable court order. Anyone who has ever been on the wrong side of the criminal law can attest that the most salient feature of the criminal law is that it provides for punishment. Anyone who has been involved in a civil suit knows that the object is to secure a favorable court order that can be enforced. The ubiquity and centrality of enforcement to existing legal practice should seem, at least at first glance, obvious to anyone with practical experience with the legal system.

Despite the universality of coercive enforcement mechanisms in every known existing legal system, many legal philosophers specializing in conceptual jurisprudence believe that the authorization of coercive enforcement mechanisms is not a conceptually necessary feature of law. What seems prima facie obvious from our experience is rejected on the strength of examples of systems of norms governing beings profoundly different from us, such as a “society of angels.”

In this essay, I argue that the authorization of coercive enforcement mechanisms is a conceptually necessary feature of law. I ground the argument in (1) the Hartian claim that the sense of “law” requiring explication picks out municipal legal systems in the modern state; (2) widely accepted Razian claims about how our legal practices construct the content of our legal concepts; (3) claims showing the ubiquity and centrality of coercive enforcement mechanisms in every paradigm instance of law we have ever known; and (4) logical difficulties arising in connection with explaining legal normativity in a system without such mechanisms.

There is no pretense here that my argument “proves” that law is coercive in the sense that it is a necessary condition for the existence of a legal system that it authorizes coercive enforcement mechanisms for some violations of primary norms regulating the behavior of citizens.\(^1\) The strategy is to show that the denial of law’s coercive nature has

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\(^1\) Law provides different mechanisms for regulating the behavior of officials and citizens – though impeachment and removal would count as coercive enforcement mechanisms. Officials are, as a conceptual matter, bound by the rule of recognition in virtue of its being a social rule – although informal and somewhat weaker coercive mechanisms are present even there in the form of the social disapproval of other officials; this is not true of citizens. In any event, it should be clear that the issues as they concern officials are different and not relevant here. See, e.g., Kenneth Einar Himma, “A Comprehensive Hartian
counterintuitive implications with respect to other issues in conceptual jurisprudence. These implications, on my view, warrant rejecting any claim that implies them. Although I believe many readers will share my reactions, not every reader will. Even so, the arguments of this essay should make clear that the issue is more difficult than the comparatively brief arguments on the other side suggest.

I. What Does it Mean to Say that Law is “Coercive” in Nature?

A couple of observations should be made about the content of the claim I defend here. First, to claim that law is coercive is not to claim that there is a coercive enforcement mechanism authorized for every violation of a mandatory legal norm governing the behavior of citizens. Although this seems, as far as I can tell, universal among existing legal systems, the claim that law as such is coercive, properly construed, should not be interpreted as implying this strong result.

Second, to claim that law is coercive in the relevant sense is not to claim that a legal system ever applies those mechanisms in a particular case. It might very well be that, just as happens in ordinary legal practice, a judge chooses to decline to apply those mechanisms in a case where they are authorized. Thus, there can be legal systems in which sanctions are authorized but never applied – as where just the threat of the sanction is enough to keep people in compliance with law, a state of affairs that is surely possible, if unlikely.

Accordingly, the claim I defend here is merely that (1) coercive enforcement mechanisms (2) are authorized (3) for violations (4) of some mandatory legal norms that (5) regulate the acts of citizens. To see the plausibility of this claim, consider what Hart has to say about it:

It is surely not arguable (without some desperate extension of the word ‘sanction’ or artificial narrowing of the word ‘law’) that every law in a municipal legal system must have a sanction, yet it is at least plausible to argue that a legal system must, to be a legal system, provide sanctions for certain of its rules. So too, a rule of law may be said to exist though enforced or obeyed in only a minority of cases, but this could not be said of a legal system as a whole.

Hart ultimately rejects this idea on the strength of a claim about international “law” and a claim about what kind of laws would be needed in a society of angels, neither of which

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2 See, Note 1, above.


4 Hart took the position that a society of angels would need a legal system but not laws prohibiting violence, theft, etc. -- the so-called minimum content of natural law. H.L.A. Hart, THE CONCEPT OF LAW,
provides much illumination of the phenomenon to which Hart devotes his conceptual work.

Further evidence of the plausibility of my thesis can be seen in some of Leslie Green’s remarks on the topic. Green rejects the claim that law is necessarily coercive, but claims instead it is conceptually necessary that law can impose sanctions if necessary:

[T]here are conceptually possible legal systems that do not deploy any coercion. That leaves open other possibilities, several of which I mention below. But here is an important one: because the authority of law is comprehensive, there are no legal systems that lack norms capable of imposing sanctions if necessary.\(^5\)

Green believes that there can be systems of law that do not impose sanctions, as a conceptual matter, but none that lack norms capable of imposing sanctions.

Although Green rejects the idea that law is essentially coercive, his view seems indistinguishable from mine. There is nothing in the form of a norm that guarantees that a sanction can be applied if necessary; otherwise, this would be a conceptual requirement of all systems of norms (perhaps even of being a norm, itself) – and not a distinguishing feature of law. In the only sense that matters here, a legal norm is “capable of imposing sanctions if necessary” only if the legal system has authorized a sanction in response to a violation of that norm.

II. What Concept of Law is the Concept of Interest?

A. “Law” as Picking Out Municipal Legal Systems in the Modern States

The term “law” has a variety of different usages, and it is important to get clear about which of these usages defines the concept of interest. While there is, of course, a descriptive usage that picks out factual claims describing causal regularities in the universe (“laws of nature”), the relevant usages pick out rules regulating human behavior. But this particular sub-classification of the concept-term has a variety of different applications as well (such as, e.g., to moral rules). One familiar example is the theory of morality that conceives moral rules to be objective, defined by the nature of things, and accessible to human reason – the “natural law” theory of morality.

What we are interested in is the concept that picks out the set of what is sometimes called “positive law” or “posited law” – an institutional system of rules that constitutes what we pre-theoretically regard as paradigms of a legal system. A paradigm of an institutional system of norms that counts as a legal system is that of the U.S. In

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other words, the relevant concept of law picks out institutional systems of rules that share certain distinguishing properties of the U.S. legal system. These distinguishing properties define what Hart would call the “minimum conditions necessary and sufficient for the existence of a legal system” (CL 116).

Hart identifies “municipal law in a modern state” (CL 79) as picking out the sense of “law” that forms the subject of conceptual jurisprudence. As he puts the point, “[the purpose of this inquiry] is to advance legal theory by providing an improved analysis of the distinctive understanding of a municipal legal system” (CL 17; emphasis added).

This remark should not be regarded as a slip of the pen. Elsewhere he is quite clear about the relationship between the relevant type of “legal system” and the state: “The perplexities I propose to discuss are voiced in those questions of analytical jurisprudence which are usually characterized as requests for definition: What is law? What is a State? What is a right?”6 This is the phenomenon with which lawyers, judges, legislators, and legal philosophers are concerned. There is little theorizing among legal philosophers about systems of law (apart from debates about whether international law is really law) that do not define modern states for the same reason that law schools offer little education about such other systems: they are simply not of primary interest.

This is enough to identify, as the proper topic of inquiry, those institutional systems of norms that bring certain entities into existence – namely, municipalities or supreme governing entities, such as states. The core phenomenon of interest, as we know it from our experience, is correlated with the existence of states: where there are states, there are legal systems, and conversely. Indeed, Hart’s selection of “municipal law in a modern state” (CL 79) as the subject of conceptual jurisprudence indicates the conceptual intimacy between the notion of a legal system and the notion of a state.

Here it is worth asking what a characteristic purpose of states might be.7 One common line of reasoning is that states are necessary to enable communal living among self-interested beings with significant interests that often conflict in a world where the satisfaction of wants and needs is constrained by material scarcity. The basic strategy of a social-contract theory, for example, is to justify the authority of states in virtue of (real or hypothetical) choices made by law-subjects to escape the miseries of a pre-social world where we fend for ourselves in a condition, as Hobbes put it, of a war of all against all.

6 H.L.A. Hart, ESSAYS IN JURISPRUDENCE AND PHILOSOPHY, 21; emphasis added. See, also, p. 28, 31, 32, and 34, among others.

7 By this, I do not necessarily intend to pick out a conceptual function; rather, I wish to refer to something a state can do that is most likely to figure, at least in part, into an explication of why a particular society has a state. Law can be used to do a lot of things, including enrich corrupt rulers, oppress certain classes of people, etc. But to do any of these things, there are certain tasks that it characteristically performs even in societies where law is used for these other purposes. In any event, I need not take any position here as to whether this should be considered a conceptual function of a legal system.
The idea here is not to endorse social-contract theory as a theory of legitimacy or as defining a conceptual theory of law; rather, the idea is to call attention to a problem that, in our world, characteristically creates a need for a system of law. The problem is that we are self-interested beings whose material interests can potentially create dangerous conflicts in a world in which material resources are limited, and we experience our wants and needs as urgent enough to risk conflict to satisfy them. The need for the state – and the law – arises because we get hungry, thirsty, lonely, cold, greedy, amorous, etc., and must compete to satisfy these desires with other people who can be presumed to care more about their own needs than ours.  

Indeed, in an important but underappreciated statement, Hart points out what should be obvious once we understand the purpose of the state – namely, that law is, by nature, a system of “social control” (CL 91). In discussing pre-legal forms of subject governance, Hart observes:

It is, of course, possible to imagine a society without a legislature, courts, or officials of any kind. Indeed, there are many studies of primitive communities which not only claim that this possibility is realized but depict in detail the life of a society where the only means of social control is that general attitude of the group towards its own standard modes of behavior in terms of which we have characterized rules of obligation (CL 91).

But “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 under conditions of material scarcity; one might need to regulate behavior in other circumstances, but the concept of social control, by definition, has a certain content. According to Oxford English Dictionary Online, “social control” is defined as “[c]ontrol of a person or group by wider society in order to enforce social norms, through socialization, policing, laws, or similar measures.” One cost, then, of denying that the authorization of coercive enforcement mechanisms is a conceptually necessary feature of a legal system is to distort the core content of other concepts relevant to jurisprudence.

This should not be thought to accord lexical definitions with unassailable philosophical authority; however, our lexical definitions reflect shared understandings that evolve through time and are responsive to institutional practices. “Water,” for example, is commonly defined as “H2O” – along with the traditional descriptions of a colorless, odorless, etc. liquid. That shift in our ordinary understanding of the application-conditions of “water” was the result of the scientific discovery that water is

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8 This will be true even in the most corrupt legal systems with rulers who exploit the law for selfish purposes; those purposes cannot be achieved, other things being equal, unless the general peace can be kept. A border-to-border free-for-all is, in most cases, not stable enough to allow for exploitation by a corrupt ruler – or even to make it plausible to characterize such a person as a “ruler.”

9 Enforcement, here, shouldn’t be taken to refer to formal coercive mechanisms, though it certainly includes them. The point is that social control involves backing norms with a certain kind of unpleasant social pressure, as Hart realizes, such as group disapproval.
H2O. Likewise, ordinary understandings of words denoting social institutions, like law, are responsive to institutional self-conceptions and practices – and this will be reflected in the relevant lexical definitions, including that of “social control.”

The lesson that emerges from this discussion is that one characteristic function of a state is to provide a means for resolving the inevitable conflicts that arise among self-interested beings of comparatively equal abilities who can preserve their lives only by satisfying needs in a world of material scarcity. This is why a system of “social control” is necessary – and it should be absolutely clear that one important point of a legal system is to impose a system of social control that will succeed in keeping the peace and enabling us all to reap the benefits of social cooperation.10 Such a system accomplishes this goal by providing laws as a means to guide the behavior of subjects so as to reduce the probability of these potentially dangerous conflicts.11

Hart would clearly accept most of this. The above analysis obviously parallels remarks Hart makes in the context of explaining why legal systems governing human beings must contain the minimum content of natural law. Hart characterizes the problems that give rise to a need for the state and a legal system in the same terms as I have. The problem is that conflict is likely to arise among self-interest beings who want to take advantage of the benefits of social cooperation: “without such content law and morals could not forward the minimum purpose of survival which men have in associating with each other” (CL 193). Following Hobbes, Hart locates the possibility of dangerous conflict in facts about human vulnerability (CL 194); facts about the approximate equality of all people (CL 195); facts about the limited role of altruism in human decision-making (CL 196); scarcity (CL 196); and facts about human limitations in understanding and strength of will (CL 197). Hart is clearly concerned here with law as it functions in governing the behavior of beings like us in worlds subject to conditions like ours. Law, as Hart understands it here, is a distinctively and deeply human phenomenon.

The concept of law of interest – one that picks out the essential features of “municipal law in a modern state” (CL 79) – cannot be adequately explicated without keeping in mind these facts about our condition that create the need for social cooperation and an authority to adjudicate conflicts among beings like us. That is the concept of law that is our concept of law – the one defined by our practices in our world – and it is reflected in a variety of other academic contexts, including debates about the necessary conditions for legitimate state authority.12

10 As Hans Kelsen puts this important point, “It is the function of every social order, of every society – because society is nothing else but a social order – to bring about a certain reciprocal behavior of human beings: to make them refrain from certain acts which, for some reason, are deemed detrimental to society, and to make them perform others which, for some reason, are considered useful to society.” Hans Kelsen, GENERAL THEORY OF LAW AND STATE, (Harvard University Press 1949), p. 19. (Emphasis added).

11 It is commonly thought, of course, that the conceptual function of law is guide behavior.

12 Indeed, the principal, if not defining, problem of state legitimacy is how the law can be morally justified in using coercive means to induce certain behaviors; that law simply issues directives, without more, gives
As we will see, there has been much concern about whether there can be law in societies of beings with radically different psychological features from those we have. As the matter is sometimes put, law without sanctions is logically — but not humanly — possible, human nature being what it is. An institutional system of norms with a social rule of recognition and primary norms governing a society of angels antecedently motivated always to obey the law counts, on this oddly influential line of argument, as a system of law, despite lacking coercive enforcement mechanisms.

But why think that the appropriate concept of interest is one that reaches so far beyond what we can expect in the very world in which beings like us create the practices that construct our concept of law? As Raz correctly observes, it is the core features of our legal practices that construct the content our legal concepts. But Raz consistently overlooks that the practices constructing our concept of law are concerned with what beings like us do in circumstances of material scarcity that create our need for the social institution of law.

It makes sense, of course, to be open to the possibility that our real-world practices and the concepts they construct might apply to beings very different from us. But to ground our views about paradigmatic features of law in examples that involve beings and worlds that are radically different from us and ours requires a rigorous justification that is never given — and a putative counterexample involving a society of angels falls far from constituting a rigorous justification.

At first blush, I can see no plausible reason for adopting a concept of law that departs from what we are and what we do with law — when it is our practices that construct a concept that is ours, and it is clear that the paradigms motivating our inquiry are as deeply and distinctively human as the ones Hart describes above. Insofar as social practices regarded as essential to what counts as paradigms of law in our world construct the relevant concepts, I can see no plausible reason for adopting a conception of a concept that would apply to beings who lack the very characteristics that create our need for law. The society-of-angels argument is grounded in one stray intuition that profoundly changes the breadth of the concept by entailing the elimination of what is paradigmatic in every known legal system — and for no better reason than to say angels can have law. That hardly seems a strong philosophical foundation for a profound shift in how we understand an institution that, as we know it, gives rise to many important questions of philosophical interest.

rise to a moral problem that is trivial in comparison to the moral problem to which the use of coercion gives rise.


14 As Allen Iverson might put the point for me, “What are we talking about? Angels. We’re talking about angels, man. Angels.” And that reaction seems to me the correct one.
B. Legal Systems, Chess Clubs, Societies of Angels, and the “Problem of Legal Content”

One of the questions that a conceptual theory of a legal system must answer is whether there is some content common to all conceptually possible legal systems. In the Introduction to The Concept of a Legal System, Raz identifies four problems that a conceptual theory of a legal system must resolve:

From an analytic standpoint a complete theory of a legal system consists of the solutions to the following four problems: (1) The problem of existence: What are the criteria for the existence of a legal system?... (2) The problem of identity…: What are the criteria which determine the system to which a given law belongs? (3) The problem of structure: Is there a structure common to all legal systems …? (4) The problem of content: Are there any laws which in one form or another recur in all legal systems or in types of system? Is there any content common to all legal systems or determining important types of system?15

There is nothing to take issue with here; a conceptual theory of a legal system could not adequately be defended without considering whether there is some content common to all conceptually possible legal systems.

Despite the importance of the inquiry, Raz goes on to state that his analysis of a legal system will consider only the first three questions, omitting the problem of content:

This essay is concerned with the first three problems only and only in so far as they belong to the general theory of legal system. Analytical jurists, apart from Hart, have paid little attention to the problem of content, and as we have chosen to develop our systematic conclusions largely through the critical examination of previous theories it will be convenient to disregard it almost completely (CoLS 2; emphasis added).

This is simply a bizarre position for Raz to take. There are three problems here. First, it is hard to see how a theory could help to understand the nature of the legal system without addressing the problem of content if a complete theory requires addressing the problem. Second, there is no reason to think that the answer to the problem of content might not have implications for how the other three problems are resolved. Finally, neither the negligence of other theorists nor “convenience” is an adequate justification for ignoring what Raz acknowledges is one of four defining problems for the theory of a legal system.

It is instructive to reconsider Hart’s views on the minimum content of natural law to see how he addresses the problem of legal content. On his view, any conceptually

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possible legal system that governs the behavior of beings with the psychological characteristics we have must contain rules that protect against violence and theft, among other things. As he argues the point:

Reflection on some very obvious generalizations – indeed truisms – concerning human nature and the world in which men live, show that as long as these hold good, there are certain rules of conduct which any social organization must contain if it is to be viable. Such rules do in fact constitute a common element in the law and conventional morality of all societies which have progressed to the point where these are distinguished as different forms of social control. With them are found, both in law and morals, much that is peculiar to a particular society and much that may seem arbitrary or a mere matter of choice. Such universally recognized principles of conduct which have a basis in elementary truths concerning human beings, their natural environment, and aims, may be considered the minimum content of Natural Law (CL 193).

Given certain facts about human nature and features of the world in which we live, one of the purposes we have in forming societies with law will be to conduce to survival.

Nevertheless, Hart rejects that the minimum content of natural law is a conceptually necessary property of law, holding instead that it is just a “naturally necessary” property of legal systems governing worlds like ours. Hart’s rejection of the idea that the minimum content of natural law is included in the law of all conceptually possible legal systems implies that there are no norms common to every conceptually possible legal system.

Hart’s response, then, to the problem of legal content entails that there is no necessary legal content; what distinguishes a legal system from other systems of norms will not include any considerations having to do with the content of the norms. Indeed, Hart’s existence conditions for a legal system clearly confirms this:

There are therefore two minimum conditions necessary and sufficient for the existence of a legal system. On the one hand, those rules of behaviour which are valid according to the system’s ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials (CL 116; emphasis added).

As long as an institutional system of norms satisfies these two conditions, it is a legal system regardless of what content the law contains and regardless of which social problems are addressed by the norms of the system.

This view renders Hart’s analysis overbroad with respect to the class of its intended applications. For example, a chess association has a system of rules that include
both social recognition norms for making new rules governing the behavior of members and primary rules that are generally obeyed. A chess association satisfies these conditions insofar as it has a conventional rule of recognition for making, changing, and adjudicating rules governing the members, together with efficacious primary rules governing the behavior of members. Accordingly, chess associations satisfy Hart’s “two minimum conditions necessary and sufficient for the existence of a legal system” (CL 116).

Notice that the problem is not one that arises in connection with something considered a borderline case of law; it is a problem that arises with something that is paradigmatically not law if the relevant concept picks out, as Hart correctly believes, municipal legal systems in a modern state – or, quite frankly, anything remotely close to that. It is one thing to explain the concept of law in terms that imply that the Vatican has a legal system or that “international law” really is law. It is another thing to explain the concept of law in terms that imply a chess association has a legal system; while it might be a system of “law” in some sense, it should be clear that it is not law in the same sense implicated by a concept intended to pick out municipal legal systems in a modern state.

One can, I suppose, bite the bullet and accept that result, but it is hard to see what the motivation would be for doing so. Insofar as a conceptual analysis of law is useful, it is useful only to the extent that it distinguishes the municipal legal systems of a modern state from other institutional systems of norms. We are concerned about law because of its importance in making cooperative social living possible – and a chess association simply does not perform that function.16 Indeed, the claim that chess associations have law is, arguably, a counterexample to any theory of this concept that implies such a result. And any conceptual theory of law that denies that law, by nature, includes certain content will imply this result.

The society-of-angels argument is problematic because it also implies this result. As Raz describes this familiar line of reasoning, a society of angels will need law for a couple of reasons. First, they will need legislative authorities to solve coordination problems. Second, they will need courts to solve “factual disputes and disputes about the interpretation of legal transactions and their legal effects” (PRN 159). But there is nothing in these two needs that would even suggest, much less imply, that law must contain the minimum content of natural law or any other content, beyond authorizing the various legal agencies to address those needs. Of course, Raz suggests that conflicts might arise among “angels” because “its members may pursue many different and conflicting goals,”17 suggesting a need for law that addresses these potential sources of conflict. But whether or not members of society pursue different and conflicting goals is

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16 Again, this is not to say making cooperative social living possible by providing rules that guide behavior is a conceptual function of a legal system. I should add, though, that I see little that would be objectionable about such a claim; I just see no need to rest the case on any stronger claim than necessary.

17 Joseph Raz, PRACTICAL REASON AND NORMS (Princeton: Princeton University Press, 1990), p. 159; hereinafter PRN. It should be noted that “angels,” on any plausible conceptual view of what an angel is, does not apply to the beings Raz describes as belonging to a “society of angels.” By nature, angels always know what is morally right and do what they know to be right.
a contingent feature of a world. For this reason, Raz’s society-of-angels argument implies that there is no conceptually necessary legal content and hence without the resources to distinguish chess associations from legal systems.\(^{18}\)

One can, if one wishes, adopt a broader concept that goes beyond worlds resembling ours, but it is difficult to see what the rationale would be, other than the piecemeal rationale of defending the view that there is law in a society of angels – a view that seems utterly disconnected from the project of understanding our institution of law, as our practices construct it (and from the conception of jurisprudence that is operative among practitioners and people who teach law). As W.V.O. Quine might put it, the denial of law’s coercive nature has become a “dogma” of conceptual jurisprudence.

III. The Ubiquity and Centrality of Coercive Enforcement Mechanisms in Existing Legal Systems

One of the most conspicuous features of law, as we have seen, in every existing legal system of which we know is that it authorizes coercive enforcement mechanisms for some violations of law. The coercive character of law, as we know it from our experience, is no less conspicuous than the facts that laws consist of norms and that legal systems have law-making bodies. The authorization of coercive enforcement mechanisms is utterly ubiquitous among existing legal systems in our world. That is incontrovertible, and begs no conceptual questions; it is an empirical fact.

But it is not just that coercive enforcement mechanisms are ubiquitous in the sense of being a feature of every legal system we have ever known to exist – legal systems being identified by the very pre-theoretical criteria that enable us to begin the defining task of conceptual jurisprudence. Rather it is also that the authorization of these coercive enforcement mechanisms is utterly central to paradigm instances of legal practices among existing legal systems.\(^{19}\)

\(^{18}\) One might think that Raz has additional theoretical resources that enable him to avoid this problem. Raz takes the position that a legal system must be supreme with respect to its application, as well as comprehensive and open. See PRN, pp. 149-154. A chess association is both supreme and open in the relevant respects, as its rules are supreme with respect to membership in the association and can incorporate norms that are not promulgated as part of the system, such as standards of sportsmanship. More intriguingly, if by “comprehensive,” Raz means that law must include rules governing a wide range of behaviors, his society of angels argument suggests that, on his view, a system of norms can be a legal system without a set of norms that are comprehensive in the relevant sense. A society of true angels (i.e. morally infallible and impeccable) might need a system of rules to settle certain disputes and solve coordination problems, but it will not need rules that comprehensively constrain the behavior of such angels since they always do what is morally right. This is yet another example of the kind of theoretical mischief done by the view that there can be legal systems that do not authorize coercive enforcement mechanisms for some violations.

\(^{19}\) As Kelsen puts this important point: “If we confine our investigation to positive law, and if we compare all those social orders, past and present, that are generally called ‘law’, we shall find that they have one characteristic in common which no social orders of another kind present. This characteristic constitutes a fact of supreme importance for social life and its scientific study. And this characteristic is the only
In the U.S., for example, any piece of litigation that goes to trial is intended to secure a holding that is backed by a court order that enforces the holding – regardless of whether the case is criminal or civil in character. If the case is a criminal one, the issue is whether the defendant ought to be punished for violating a criminal law. One must decide whether the defendant is guilty before reaching the further question about the appropriate legal response; however, the legal “elephant in the room” for the defendant will be whether she will have to serve out some kind of coercive punishment. This issue looms as large in the mind of someone facing the business end of a criminal prosecution as the verdict; one can, after all, be found guilty and receive a suspended sentence. Nothing looms more central in a criminal matter than the authorization (and hence potential application) of coercive enforcement mechanisms.

Civil litigation is no different in this respect. It is true, of course, that parties might attempt to settle a case prior to trial, but the point of going to trial is to secure a favorable judgment that will be enforced against the losing party. Once the point of no return is reached with respect to the possibility of a peaceful settlement, the goal is to provide the court with sufficient reason to justify the application or non-application of such mechanisms. The judge’s power to issue a contempt sanction to induce compliance with a civil order, along with any powers the judge may have to seize property, looms as large in the mind of the parties as the content of the particular outcome. The authorization of coercive enforcement mechanisms is as central to civil law practices as to criminal law practices in paradigm instances of legal systems resembling the U.S.

Indeed, the idea that the very point of taking a case to court is to secure an enforceable judgment seems built into the legal concept of “actionable” as it functions in legal practice in the U.S., a notion intended to distinguish those claims that support a legal action from those that would not. Black’s Law Dictionary defines “actionable” as “[t]hat for which an action will lie, furnishing legal ground for an action.” The definition, then, refers the reader to the related “cause of action,” which is defined as a “fact, or a state of facts, to which law sought to be enforced against a person or thing applies.”20 The nature of an actionable cause, as this notion operates in our system, includes the idea that coercive enforcement mechanisms are available as part of a remedy – a conclusion that further reinforces the ubiquity and centrality of coercive enforcement mechanisms to legal practice.

criterion by which we may clearly distinguish law from other social phenomena such as morals and religion. This criterion is coercion” (GTLS 15).

20 Black’s Law Dictionary; emphasis added. See also, e.g., Federal Rule of Civil Procedure, Rule 12(b)(6), which authorizes the dismissal of a pleaded cause of action for “failure to state a claim upon which relief can be granted[.]” This, by itself, does not preclude the court from issuing purely advisory holdings, but it precludes doing so under the language of an “actionable cause.” In general, however, the courts do not give purely advisory decisions. Further, a court system that can do nothing but give purely advisory decisions starts to look like something other than a court of law; it might be an adjudicatory mechanism, but its function is so far removed from courts of law, as we understand them, as to look like something else.
What applies to a paradigm of a legal system, such as the U.S., would seem to apply to all other existing legal systems of which we are aware. Judgments and coercive consequences are inseparable in the law as we know it from experience. Indeed, insofar as we know of no past or present legal system without authorized coercive enforcement mechanisms, law and coercion have been inseparable in the actual world – a fact that should figure into articulating the reference class of the appropriate usage of “law.”

Given the results of the last section, this should not be thought surprising. Law as it has always existed in this world deals with beings that have psychological characteristics that create a need for the mediation of a state authority to make the benefits of social cooperation possible while keeping the peace. People are self-interested, and do not always do what they should do even under the threat of coercive consequences – as is tragically demonstrated by the phenomena of “deadbeat dads” and, more recently, Kentucky Court Clerk Kim Davis’s unlawful refusal to comply with court orders to issue marriage licenses to gay and lesbian couples.

What this suggests is that, in every legal system known to have existed, the authorization of coercive enforcement mechanisms is both ubiquitous and central to legal practice – a feature that is deeply entrenched in the very legal practice and ordinary conceptions of legal practice that construct our concept of law. While there are, of course, cases in which certain acts have been decriminalized and hence made immunized from the application of coercive mechanisms, there is no known case where the authorization of coercive enforcement mechanisms has been wholly repealed for a violation of a law that is left unrepealed or struck down by a court. Even decriminalized municipal offenses are punished by an enforceable financial penalty.

One might object that these are simply claims about every existing legal system that do not imply anything of interest about every conceptually possible legal system. Just because law, the thinking goes, is always coercive (i.e. in our world) does not mean that law is necessarily coercive (i.e. in all conceptually possible worlds).

But the claim that law is, by nature, coercive does not rest on just the empirical observation that every paradigmatic legal system (in our world) authorizes coercive enforcement mechanisms. It also rests on the ubiquity and centrality of such practices in every known legal system. It is further grounded in paradigmatically entrenched legal practices that seem to presuppose that the authorization of coercive enforcement mechanisms is a conceptual prerequisite for a lawsuit. It is the combination of these features in every known legal system, which includes paradigm instances such as that of the U.S., that makes a strong prima facie case that the authorization of coercive enforcement mechanisms is a paradigm feature of law – one that grounds the foundational intuitions and practices that construct our legal concepts and hence form the touchstone for evaluating conceptual theories of law.

The ubiquity and centrality of coercive enforcement mechanisms in existing legal systems helps to explain why even theorists who reject that law is essentially coercive continue to look for a place within a conceptual theory of law for coercion. Hart’s
ambivalence on the issue is noteworthy. Hart gestures in the direction of thinking that a coercive response of some sort to violations of law is somehow relevant in determining whether a system of norms counts as a legal system:

Rules are conceived and spoken of as imposing obligations when the general demand for conformity is insistent and the social pressure brought to bear upon those who deviate or threaten to deviate is great…. It may be limited to verbal manifestations of disapproval or of appeals to the individuals’ respect for the rule violated; it may depend heavily on the operation of feelings of shame, remorse, and guilt. When the pressure is of this last-mentioned kind we may be inclined to classify the rules as part of the morality of the social group and the obligation under the rules as moral obligations. Conversely, when physical sanctions are prominent or usual among the forms of pressure, even though these are neither closely defined nor administered by officials but are left to the community at large, we shall be inclined to classify the rules as a primitive or rudimentary form of law (CL 86; emphasis added).

While Hart is clearly struggling to avoid what he takes to be the Austinian mistake of equating obligation with the probability that sanctions will be applied (which is a different notion than the notion that coercive enforcement mechanisms are authorized), he recognizes the relevance of coercive enforcement mechanisms in determining whether an institutional system of norms is a legal system.

Hart seems, in this passage, to suggest that whether a system provides for “physical sanctions” is one of the factors we must consider in determining whether that system counts as law, albeit he hedges his bets with the modifiers “rudimentary” and “primitive.” In the case above, the informal physical sanctions are relevant but do not rise to the level of the formality that would be needed for a paradigmatic system of law: such informal physical sanctions imply a system that is only primitively or rudimentarily law. Even so, it should be clear how much Hart is struggling to find a place in his theory for the conspicuous ubiquity and centrality of coercion in existing legal systems.

We have seen, of course, that Hart rejects that idea that law must contain coercive enforcement mechanisms. In discussing the minimum content of natural law, Hart rejects what he takes to be an unsatisfactory dichotomy between saying the availability of sanctions is part of the “meaning” of the word “law” and saying that “it is ‘just a fact’ that most legal systems do provide for sanctions” (CL 199). Here is what he takes to be a statement of a third alternative:

There are no settled principles forbidding the use of the word ‘law’ of systems where there are no centrally organized sanctions, and there is good reason (though no compulsion) for using the expression ‘international law’ of a system, which has none. 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*; 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 indispensible features of municipal law (CL 199).

It is worth noting here that Hart is hedging his theoretical bets again here: he realizes that there is nothing in the relevant term that “compels” its application to international law.

This argument is problematic – even apart from the overbreadth problem to which this analysis gives rise.\(^{21}\) If, on the one hand, by the use of “principles” in his statement that “there are no settled principles forbidding the use of the word ‘law’ of systems [without] sanctions” Hart means shared patterns of usage, such as those recorded by lexicographers in a dictionary, then he is incorrect. According to Oxford Dictionaries Online, the word “law” means “[t]he system of rules which a particular country or community recognizes as regulating the actions of its members *and which it may enforce by the imposition of penalties.*”\(^{22}\) (It should be clear that “may” here is intended to connote “authorized” rather than merely “logically possible”). This should not be thought surprising as one quite easy way of distinguishing law from other norms, at least as far as existing legal systems is concerned, is to define “law” in terms of certain manufactured norms enforced by the state.\(^{23}\)

If, on the other, Hart intends to refer to the use of “law” in “international law,” he is correct, as people do casually (though not usually in a deliberative manner intended to imply any conceptual commitments) use the term “international law.” But more than fifty years after the publication of the first edition of CL, the question of whether “international law” is *really* law remains unsettled – at least partly because of the absence of a centrally organized authority authorized and able to efficaciously apply coercive enforcement mechanisms in response to violations. It remains eminently plausible to view “international law” as a primitive or rudimentary form of law, and give roughly the same kinds of argument that Hart gives to show that a system of customary norms backed by informal physical sanctions constitutes only a primitive or rudimentary form of law. To take what is at best a borderline case of law and conclude that the authorization of coercive enforcement mechanisms is not a conceptually necessary feature of law is deeply problematic. Conceptual claims of these sorts must, from the standpoint of a conceptual methodology, be grounded in what are paradigms from a pre-theoretic vantage point – and not in borderline cases of what might be characterized as “law.”

The upshot is that Hart, like other theorists who deny that law is essentially coercive, senses that the authorization of coercive enforcement mechanisms is so

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21 See the discussion of chess associations, above, at 10-11.

22 Available at http://www.oxforddictionaries.com/definition/english/law.

23 See the discussion, above, at 5-6, on the relationship between lexical definitions and philosophical analysis of concepts.
ubiquitous among and central to existing legal systems that it might be a paradigm for a conceptually necessary feature of law. His acknowledgement that the movement from the pre-legal to rudimentary forms of law depends, in part, on the availability of physical sanctions unambiguously indicates its conceptual relevance and theoretical importance. Against the background of these features of law that suggest the paradigmatic character of coercion in law, Hart’s subsequent rejection on the strength of the case of international law is far too thin to be persuasive.

Hart is not the only major theorist who struggles with the problem of locating a conceptual role for coercion in law; we can see similar struggles in the works of other theorists. Green’s work evinces a similar ambivalence. On the one hand, Green rejects the idea that law necessarily deploys coercive enforcement mechanisms but, on the other, senses that coercion is so central and ubiquitous to legal practice as we know it that an explication of the concept of law must include reference to the possibility of utilizing coercive enforcement mechanisms. But why the norms of a legal system governing a society of angels should be, so to speak, coercion-ready is just not clear; in the absence of some reason to think there will be significant disobedience, it is hard to see why a system would have to be coercion-ready. The ability to coerce becomes important only in systems where it is reasonably likely that law-subjects will disobey. Once one has dismissed the idea that the concept of law applies only to such beings, it is hard to see why there would be any conceptually necessary role for coercion – beyond strong discomfort with the idea that something so central and ubiquitous to existing legal practice is not a conceptually necessary feature of law.

Unfortunately, these and similar theoretical contortions attempting to locate coercion in a conceptual theory of law seem to result in nothing that would add to our understanding of the topic of jurisprudence, as lawyers, officials, and law-school teachers understand it. No one has ever thought to theorize more deeply about the distinctive features of “law” in a society of angels – and with good reason: we learn absolutely nothing of value about law that would be relevant to our legal practices or to our concern with jurisprudence. Indeed, the whole enterprise is so clearly without value as to be fairly characterized as “frivolous.” As for “international law,” the purely terminological disputes continue, contributing nothing to conceptual jurisprudence beyond relegating the role of coercive enforcement mechanisms to something of a philosophical twilight zone: coercion is not an essential feature of law, yet there must be some significant role for coercion to play in the conceptual theory of law. It should be evident that the resulting confusions are both pernicious and without a cogent justification that would warrant biting the bullet on them.

IV. Explaining Law’s Normativity in Terms of Properly Basic Reasons: Moral and Prudential Reasons for Action

It is taken for granted that, as a conceptual matter, law is normative in the sense that it provides reasons to do what the law requires. Although it is not always clear how properly to understand this claim, one plausible interpretation is that laws giving rise to legal obligation provide *prima facie* reasons for doing what law requires. As *prima facie*
reasons, these reasons are defeasible; however, the normativity of law seems to entail that law provides some kind of reason for action, even if the reason can be defeated by other reasons.

The question of law’s normativity, one of the major problems in conceptual jurisprudence, presents at least two problems: (1) to explain how legal norms can provide reasons for action; and (2) to identify the kind of reason for action, if any, law characteristically provides. Unfortunately, despite much discussion in the literature about reasons for action, the discussion on the normativity problem frequently glosses over the issue of what exactly is meant by the term “reason.”

There are different ways to conceive of a reason for action. One such distinction differentiates between a reason qua motivation for an action and a reason qua justification of an action. One can have a number of false beliefs for performing an action; those false beliefs motivate action and are reasons in that respect, but obviously cannot justify his action. Another distinction is between internal (or subjective) reasons and external (or objective reasons). Internal reasons refer to the agent’s subjective reasons for performing an act, while external reasons refer to reasons that apply to the agent regardless of what her subjective reasons might be.

This essay assumes the relevant species of reasons that explain law’s normativity are external reasons that ought to provide some motivational force. Insofar as law is thought, as a conceptual matter, to be normative in character, law’s normativity cannot be explained in terms of purely subjective reasons, as it is a wholly contingent matter as to whether one cares at all about law’s requirements. There are people who do not care about the law and for that reason do not feel motivated by law; and what is contingently true of one is logically possible for all persons. This does not mean the law will fail to be efficacious since people might nonetheless conform their behavior to law’s requirements for reasons having nothing to do with the fact that law requires it, such as a purely moral motivation. The relevant notion of normativity must pick out considerations that a person should, as a matter of practical rationality, be motivated by. Thus, the relevant notion of reason here would, it seems reasonable to surmise, be external reasons qua motivation.

However conceived, the structure of reasons resembles the structure of sentences, as defined by sentential logic. In sentential logic, there are two kinds of statement: atomic and compound statements. An atomic statement is one that does not contain any logical connectives; it cannot be reduced to some more basic statement by removing connectives. In contrast, a compound statement is composed of one or more statements conjoined by one of the available logical connectives; if A and B are atomic statements, then ~A, (A v B), etc. are compound statements. Likewise, there are at least some reasons that are atomic in the sense that they are basic and cannot be reduced to, or constituted by, other more basic reasons. On this view, there are at least some reasons that are compound in the sense that they are constructed from the atomic reasons.

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According to a common view that began with Immanuel Kant, the class of atomic reasons is limited to two types: moral and prudential. As Kant conceived it, prudential reasoning is concerned with maximizing happiness, while moral reasoning is concerned with acting according to maxims that can be derived from rationality itself, trump prudential reasons, and are universalizable.\textsuperscript{25} Expressed in more modern terms, prudential reasons are concerned with maximizing the agent’s self-interest, while moral reasons are concerned with satisfying the overriding requirements of morality (or “categorical rationality,” as translations of Kant typically put it). It is a commonplace that if there are compound reasons (as opposed to sets of atomic reasons that will be, or have been, weighed), they are constructed out of these more basic materials.

This means that law’s normativity will ultimately have to be explained either in terms of atomic moral or prudential reasons or in terms of compound reasons constructed out of moral and prudential reasons. Insofar as a law is normative, it issues directives that tell subjects what they ought to do, and statements about what subjects ought to do define reasons. As Raz puts this important point, “statements of the form ‘x ought to φ’ are logically equivalent to statements of the form ‘There is reason for x to φ’” (PRN, 29). And the characteristic form in which law provides reasons for action is by issuing directives that create legal obligations; as Hart puts the point, “where there is law, there human conduct is made in some sense non-optional or obligatory” (CL 82). The question of law’s normativity, then, will ultimately come down to explaining what kinds of reasons a legal obligation provides; and this account will ultimately require explaining legal normativity in terms of only moral and prudential reasons.

Law as such, then, provides a certain kind of reason for action that might be distinctive to law, but that reason must ultimately be explained in terms of (or reduced to, in some non-analytic sense) moral and prudential reasons, since these are the only possible sources of reasons. As we will see, this creates trouble for the view that some conceptually possible legal systems do not authorize coercive enforcement mechanisms for any violations.

Notice that there is no plausible reason to think that legal norms are the source of atomic reasons. No one has ever maintained such a claim because no one could plausibly defend it; law is a social construct contrived for reasons that are antecedent to any reasons law itself could create. Whatever reasons legal norms give rise to will have to be a compound reason (which might amount to no more than a set of atomic reasons\textsuperscript{26}) constructed out of atomic reasons that presumably reflect, in some way, the reasons for implementing a legal system.


\textsuperscript{26} No claim is made here about the metaphysical structure of compound reasons, if there are any such things. But if there are not, then the only reasons that remain will be atomic reasons and combinations of atomic reasons.
No conceptual account of legal reasons can succeed if it explains legal reasons, in the relevant sense, even partly in terms of moral reasons for action. It is a commonplace – among anyone not holding the most implausibly strong natural law view – that law as such does not provide even *prima facie* moral reasons for action.\(^\text{27}\) The point doesn’t originate with Raz, but he accepts it and, indeed, argues for a much stronger skeptical view about law and moral reasons. As he describes the view:

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I shall argue that there is no obligation to obey the law. I shall suggest that there is not even a *prima facie* obligation to obey it….. I shall argue that there is no obligation to obey the law even in a good society whose legal system is just (AL 233).
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Notice that Raz is not just arguing that law as such does not give rise to *prima facie* moral reasons to obey.\(^\text{28}\) He argues for the stronger position that there is not even a *prima facie* moral reason to obey the law of a *reasonably just state*. Either way, it follows that whatever law’s distinctive normativity is, it cannot be explained in terms that imply law *as such* provides moral reasons for action.

The only other type of atomic reason is the one to which the authorization of coercive enforcement mechanisms appeals: prudential reasons. Coercive enforcement mechanisms do not necessarily involve what are called “sanctions,” which are thought of as punishment. They can involve mechanisms to enforce – or not to enforce – civil remedies. And they need not be available for every violation of law.

However, in every existing legal system of which we know, the judge has the power to impose a contempt “sanction” on defendants who fail to comply with a court order that allows the judge to incarcerate the defendant, not as a punishment, but as an inducement to comply. Now the prospect of being incarcerated may not strike every individual, subjectively, as providing even a *prima facie* reason to avoid it; however, the authorization of such enforcement mechanisms is *reasonably contrived*, and *characteristically regarded*, as a prudential disincentive to do whatever it is that would trigger such a consequence.

\(^{27}\) It should be noted that the strong natural law theorist has a related problem. It might be that it is a conceptual truth that only properly promulgated norms that satisfy moral constraints are legally valid and hence law, but that does not imply that the norms that are applied by officials and enforced against subjects actually satisfy those moral constraints. For this reason, officials can be mistaken in thinking what they enforce as law really is law. Accordingly, the corresponding issue for the strong natural law theorist is whether there is a *prima facie* moral reason to obey what officials apply and enforce as law. Since officials are not morally infallible, they may apply what does not pass the requisite moral tests and mistakenly enforce what is not law, as an objective matter, against subjects. Thus, it might be that, on the strong natural law theorist’s view, people have a conclusive moral reason to obey what objectively satisfies the relevant procedural and moral standards; but there is little reason to think there is even a *prima facie* moral reason to obey the pronouncements of morally fallible officials concerning what is law. One cannot solve substantive problems of moral legitimacy simply by moving the content of concepts around.

\(^{28}\) Although Raz specifically refers to moral *obligations*, the considerations that Raz adduces also apply to moral reasons. Clearly, the law of Nazi Germany did not give rise to even *prima facie* (content-independent) moral reasons to obey law.
No more than that is needed. The issue is not whether everyone does, as an empirical matter, regard avoiding coercive enforcement mechanisms as a prudential reason for doing what the law requires; it is surely possible for it to be in a person’s interest to put herself on the business end of such mechanisms. The issue is, rather, one of practical rationality: whether, as a general matter, one should regard the avoidance of such mechanisms, by itself, as a prima facie reason, even if decisively defeated by other reasons, for doing what the law requires. The answer to that seems obviously affirmative; avoiding coercive mechanisms is something that should be avoided in the absence of special circumstances that would make it prudentially rational to incur the consequences of the application of these mechanisms to achieve greater benefits.

This is why enforcement mechanisms are reasonably contrived, and characteristically regarded, as reasons to do what law requires. Even if the probability of an encounter with these mechanisms is very low, the fact that one must even consider the probability of such an encounter shows that the very authorization of such mechanisms is relevant with respect to deliberations regarding what one ought to do, as a prudential matter. That is, the needed recourse to the probabilities shows that the authorization of coercive enforcement mechanisms provides a prima facie prudential reason for action; probabilities are commonly used by self-interested agents – often in ways that seem morally dubious or prudentially confused – to try to assess the strength of the prima facie reason provided by the authorization of such mechanisms relative to the strength of other reasons.

Indeed, it is sometimes prudentially advantageous to break the law. I am a serial illegal parker because it is economically advantageous. The cost of getting a parking ticket provides a prudential disincentive for parking illegally and hence provides a reason for not parking illegally. The benefit is that parking illegally saves me considerably more money than it costs because I rarely get a parking ticket. But, without more knowledge of the specifics of a situation, the authorization of a fine, by itself, provides a prudential reason for doing what law requires. More than this cannot be needed to justify the claim that a legal system provides a prudential reason for doing what the law requires by authorizing coercive enforcement mechanisms for violations. No more than this seems presupposed by the relevant legal practices themselves or assumed in the views of those officials and practitioners whose views and practices construct the content of our legal concepts.

Consider, in contrast, an alternative account of what reasons law provides – in the form of Raz’s theory of legal obligation. According to Raz’s account, X is legally obligated to do p if and only if, from the legal point of view, X is morally obligated to do p (PRN 35-84). Assuming that “the legal point of view” is constituted by some set of acts or beliefs of officials, the question is: what kind of reason could a legal obligation, thus conceived, provide to comply with its requirement?

\[29\] See, more recently, Scott Shapiro, LEGALITY (Cambridge, MA: Harvard University Press, 2011), at 232. Shapiro puts the view somewhat more explicitly, but he inherits the view from Raz and others.
None that can be explained in terms of the two atomic reasons. In the absence of some sort of consequence for flouting the “legal point of view” that is characteristically regarded, without more, as undesirable from the standpoint of self-interest, the claim that an act is legally obligatory, on Raz’s analysis, provides no general prudential reason to comply. Although it is possible for a person to fetishize anything, including the beliefs of legal officials, the beliefs of persons who simply happen to have the status of legal officials, without more, cannot, as an objective matter of practical rationality, provide a prudential reason for action. Further, in the absence of some reason to think these legal officials have a special moral insight (which is obviously not a conceptual requirement for law), the claim that an act is legally obligatory, on the Razian analysis, provides no moral reason for action for anyone.

The denial, then, that the authorization of coercive enforcement mechanisms is a necessary feature of a legal system leaves the theory of law unable to give a plausible account of law’s normativity that coheres with core understandings that officials and legal practitioners have about the practices in which they engage that construct our concept of law. The claim that the authorization of coercive enforcement mechanisms provides what would characteristically be regarded, other things being equal, as providing reasons for action is an important feature in its favor – even if those reasons are prudential in character.

Raz acknowledges, as he must, that coercive enforcement mechanisms provide a reason for action, but argues that “it is a reason of the wrong kind” (PRN, 161). The problem, on Raz’s view, is that a prudential reason of this kind is just a first order reason, while it is a conceptual truth that “mandatory [legal] norms … are exclusionary [or, as he put it subsequently, “pre-emptive] reasons as well as first-order reasons” (PRN).

This is not a topic that can be addressed in much depth here, but Raz’s view is presumptively problematic. First, if this is grounded in an intuition, it is far from one that is universally accepted; many theorists, including Stephen Perry, deny that it is a conceptual truth that law provides pre-emptive reasons. Second, if this is not grounded in intuitions, it would seem to be the conclusion of an invalid inference from the way in which law is enforced. Law is clearly enforced in an exclusionary fashion in the sense that it is enforced against the subject regardless of the desires that explain her non-compliance. But to infer a claim about what reasons law provides, as a conceptual matter, from a claim about how law is enforced – indeed, a contingent one, on Raz’s view – is straightforwardly fallacious. Whatever other arguments Raz might have would have to be examined separately, but it remains noteworthy that Raz’s view falls well short of enjoying a consensus among legal theorists.

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30 It should not be thought surprising that Raz’s theory of legal obligation inherits problems from other areas of his thought. Once a theorist has taken a conceptual position on coercion (or on the nature of legal obligation), that position will have logical implications that constrain what can be said about other legal concepts.
Nevertheless, as Raz implicitly acknowledges, the authorization of coercive enforcement mechanisms provides a prudential reason for action in every existing legal system of which we have ever known. And nothing in law apart from some sort of presumptively unpleasant consequences, such as are entailed by the application (or non-application, in some circumstances) of coercive enforcement mechanisms, can do that work. I suppose one could take the position that an informal social ostracism might take the form of such prudential considerations, but it cannot be part of the nature of law that subjects express disapproval of other subjects for violating law any more than it could be part of nature of law that subjects accept their legal system as legitimate. Further, it simply makes more sense to think of a system of rules backed only by informal social disapproval as “pre-legal” than as “legal” in character.

One can, of course, deny that law as such provides reasons, and claim instead that law merely “purports” to provide reasons for action. There are a number of concerns with this familiar view. To begin, it is simply not clear how a legal system could “purport” to do anything in a rigorous metaphysical sense – and it is all too frequently forgotten that conceptual jurisprudence is concerned with the metaphysics of law. The term “purports” here, in the absence of a serious piece of metaphysical explanation, is, at best, a suggestive metaphor that simply cannot bear the weight that someone tempted by it would need it – and similar locutions31 – to do. The idea that an abstract object like a legal system can perform communicative acts that only personal beings can perform is implausible and has never gotten anything remotely close to an adequate explication or defense.

Further, and more importantly, the enforcement of law presupposes that law provides some kind of reason for complying. The violation of a valid legal norm provides the legal justification for applying the relevant coercive enforcement mechanisms to the party in violation. The violation of a legal obligation provides the grounds for invoking the application of these coercive enforcement mechanisms, but that makes sense only insofar as the existence of a legal obligation as such is viewed as a reason for action (which is a view, again, that Raz endorses32).

31 Another such locution occurs in Raz’s view that every conceptually possible legal system claims morally legitimate authority. As abstract, non-personal objects, legal systems do not seem to be the kind of thing to which claims can be, in any metaphysically rigorous sense, attributed. See Kenneth Einar Himma, “Law’s Claim of Legitimate Authority,” in Jules L. Coleman (ed.), HART’S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW (Oxford: Oxford University Press, 2001); and Kenneth Einar Himma, “Why Law Can’t Claim; What Law Would Claim If It Could”; available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2624340. The logical relationship between that claim and the claim that law purports to provide pre-emptive reasons should be obvious if, as appears, Raz believes that the only true source of pre-emptive reasons is morality. “Purporting” and “claiming” (as well as attributing a “point of view” to law) pick out characteristics that are rigorously attributed only to personal beings.

32 As will be recalled, Raz argues that, “statements of the form ‘x ought to φ’ are logically equivalent to statements of the form ‘There is reason for x to φ’” (PRN, 29). To say that one has an obligation to do φ is to say that x ought to do φ. Thus, for what it is worth, Raz seems committed to claiming that law provides reasons for action and does not nearly “purport” to do so.
But it is not just that legal practice presupposes that valid legal norms provide reasons for action (and do not merely “purport” to do so, whatever that means); it is rather that this the associated practices are paradigmatic – regardless of whether one takes only existing legal systems as paradigmatic or includes conceptually possible legal systems. Given this, and that it is utterly uncontroversial in legal practice that mandatory legal norms create legal obligations, the view that law merely “purports” to provide legal obligations or reasons is inconsistent with a practice that is as central to law as any other suggests that, if true, officials are systematically confused about a concept that is formed by their beliefs and practices – something which cannot happen, on Raz’s view. More argument, of course, would be needed to fully make out the case for this result, but this is sufficiently plausible that this result cannot simply be dismissed as false.

V. Summary and Conclusions

The case for thinking it is a conceptually necessary feature of law that it authorizes coercive enforcement mechanisms for at least some violations of law depends on two planks. First, it rests on the centrality and ubiquity of these mechanisms in every existing legal system and the equally ubiquitous practice among paradigmatic legal systems of equating the notion of an actionable cause with the availability of a remedy that can be coercively enforced. In every legal system ever known to exist, there is perhaps no more salient feature of legal practice in its system than the authorization and application of coercive enforcement mechanisms to induce subjects to do that deemed socially desirable or to refrain from doing that deemed socially undesirable. As our core practices define our legal concepts, it is reasonable to take these legal systems reliance on coercive enforcement mechanisms as paradigmatic and hence a necessary constituent of a legal system.

Second, it rests on the inability of a conceptual account of law that treats coercive enforcement mechanisms as inessential to provide the resources to explain legal normativity. Once the authorization of coercive enforcement mechanisms is taken out of the picture, it is hard to see what prudentially rational considerations could arise from legal directives that should function as a reason to obey the law. But the normativity of law cannot be expressed in terms of moral reasons because, as Raz concedes, law as such does not even give rise to prima facie reasons to act.