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Dale A. Nance

Case Western University School of Law, [dale.nance@case.edu](mailto:dale.nance@case.edu)

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LEGAL THEORY AND THE PIVOTAL ROLE  
OF THE CONCEPT OF COERCION

DALE A. NANCE\*

This paper addresses an important problem in modern legal philosophy: the problem of identifying the proper role of the concept of coercion in a general theory of the nature of law. The present state of philosophical art on this topic is the legacy of difficulties arising from a naive positivism — generally thought to have over-emphasized the role of coercive power. The resulting reaction in modern jurisprudence against the focus upon coercion reflects a failure to come to grips fully with the underlying methodological issues of descriptive legal theory.

Basically, such descriptive theory seeks, or ought to seek, a *critically informed* understanding of law “as it is”.\*\* This pursuit requires that we make at least some effort to delineate the nature of this kind of understanding. Most importantly, one must seek to appreciate the relevance of our normative deliberations concerning the use of coercion in informing our descriptive undertakings, in particular by helping to structure the analysis of basic legal concepts. Yet much, if not most, descriptive legal theory has ignored this relevance.<sup>1</sup> Especially in re-

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\* Assistant Professor of Law, Northern Illinois University. B.A. 1974, Rice University; J.D. 1977, Stanford University; M.A. (Jurisprudence and Social Policy) 1982, University of California, Berkeley.

\*\* The author has modified the conventions concerning punctuation in quotations in the interest of accuracy. Where punctuation marks are placed within quotations, they appear in the quoted text.

1. In a review of H.L.A. Hart's recent work on Bentham, David Lyons observes:

Much of Bentham's work was concerned with the analysis of legal concepts. By this I mean not the identification and interpretation of general principles that are embedded in the law but the explanation in more fundamental terms of the very idea of law and of the more specific ideas such as that of a legal right or obligation. Thus, Bentham was concerned to reveal not just what the law of a particular jurisdiction at a given time requires and allows but also what it is for there to be law, what it is for someone to have a legal right, and so on. A good deal of work within legal philosophy was focused on such abstract

cent decades, such theory has become preoccupied with authority and rules to the virtual, though sometimes hesitant, rejection of coercion and coercive sanctions as phenomena of paramount theoretical concern.<sup>2</sup> Thus, for example, a respected modern theorist has come to assert that the use of sanctions ultimately backed by force is "not a feature which forms part of our concept of law."<sup>3</sup>

Relatedly, if not consequently, such theory displays a subtle tendency toward a potentially authoritarian conservatism, the kind of conservatism exemplified by Lord Devlin in his disposition to find the law in popular morality.<sup>4</sup> I hope to exemplify this tendency in what follows. For the present, suffice it to observe that it should not be surprising if the modern emphasis upon the structure and elements of morality and authoritative rules and deemphasis of the coercive aspect of law contribute to the distortion of the issues facing a legal decision-maker, assuming that he or she has been exposed, directly or indirectly, to the temper of modern legal philosophy. It seems to be a common, if tacit, view that such decisions proceed along something like the following moral program. First, one decides whether the extant state of affairs is optimal (or moral, or just). If not, something must be done. That something, of course, is to enact a law. Once one decides to do that, coercive sanctions must naturally be imposed to ensure the compliance of recalcitrants.<sup>5</sup> This program is flawed in a

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questions. But the connections between this seemingly pure theoretical inquiry and the moral concerns or commitments of legal philosophers have not been systematically explored.

Lyons, *Founders and Foundations of Legal Positivism* (Book Review), 82 MICH. L. REV. 722, 727 (1984).

2. The general trend of modern theory is summarized well by Jerome Hall:

There is disagreement as to whether the sanction is an essential part of law, and among those who hold that the sanction is essential, there is disagreement not only regarding its properties but also whether the sanction of positive law is unique. The puzzlement is increased by the fact that natural law philosophers like Aquinas and Kant agree with legal positivists like Austin and Kelsen that the sanction is an essential part of law. And adding to that puzzle is the recent agreement by distinguished representatives of those opposed philosophies, that the sanction is not an essential part of positive law [citing Fuller and Hart], although they also agree that there must be sanctions somewhere in the legal system.

J. HALL, *FOUNDATIONS OF JURISPRUDENCE* 101 (1973).

3. J. RAZ, *PRACTICAL REASON AND NORMS* 159 (1975). Elsewhere, however, Raz asserts, "The three most general and important features of the law are that it is normative, institutionalized, and coercive . . . . Naturally, every theory of a legal system must be compatible with an explanation of these features." J. RAZ, *THE CONCEPT OF A LEGAL SYSTEM* 3 (2d ed. 1980).

4. See P. DEVLIN, *THE ENFORCEMENT OF MORALS* (1965). The tendency remains notwithstanding criticism of legal moralism by such prominent figures of modern jurisprudence as H.L.A. Hart. See H.L.A. HART, *LAW, LIBERTY, AND MORALITY* (1963). See also Bork, *Tradition and Morality in Constitutional Law* (AM. ENTERPRISE INST.) (1984).

5. I call this the "It ain't right — there oughta be a law!" approach, although this is somewhat misleading in highlighting the populist version of the program. Certainly among jurists other versions are more common. Whatever the details of their programs, however, it is significant that "[m]odern

number of respects, most importantly in that it rests upon an unreasonable assumption that the propriety of a prohibition, injunction, or other legal action can be determined without serious regard to the sanction which is associated with the action in question. A better statement of the program which should be followed runs something like this: having identified suboptimality in the extant state of affairs, one must decide whether it is proper — morally permissible and pragmatically prudent — to use coercive force in aid of various designs to change things, given the character or kind of suboptimality involved and given the probability of improving matters by the attempt. In particular, the decision-maker cannot then ignore or slide over the fact that the decision being made is a decision about the employment or potential employment of coercive power, with all the careful reluctance that this should entail.<sup>6</sup>

It is in response to these problems that the following comments are directed. However, I will not here attempt to detail the flaws of the program of decision-making just criticized or to defend in detail the pragmatistic one suggested as a substitute.<sup>7</sup> Nor will I attempt to *prove* that any particular theory of law leads, inevitably or probably, to

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legal philosophers who exclude the sanction from their concept of law are apt to concede that the use of force is sometimes necessary, but that is minimized as a merely practical matter or as otherwise insignificant." J. HALL, *supra* note 2, at 115.

6. The pragmatism involved is quite familiar to lawyers in the form of the right/remedy distinction. It is a common observation that one cannot make much headway in the analysis of the legal rights of the parties to a lawsuit without attending to the remedy or remedies sought. This point — sometimes not initially obvious to students — is reflected in virtually every modern textbook for first-year law courses by the early introduction of materials, in greater or lesser depth, concerning remedies and (particularly in the non-criminal context) their origins in the common law writs. Compare, e.g., J. DUKEMINIER & J. KRIER, *PROPERTY* 5-8 (1981) with C. DONAHUE, T. KAUPER, & P. MARTIN, *PROPERTY: AN INTRODUCTION TO THE CONCEPT AND THE INSTITUTION* 60-66, 71-76, 90-96 (2d ed. 1983). As further examples, see J. COUND, J. FRIEDENTHAL, A. MILLER, & J. SEXTON, *CIVIL PROCEDURE* 17-19, Ch. 4 (4th ed. 1985); W. PROSSER, J. WADE, & V. SCHWARTZ, *TORTS* 1-3 (7th ed. 1982); L. FULLER & M. EISENBERG, *BASIC CONTRACT LAW* (3d ed. 1972; compare 4th ed. 1981). Of course, a sophisticated approach can *distinguish*, and might successfully *separate*, the decision as to whether a coercive remedy of *some* type is appropriate (i.e., the legal "right" issue) from the decision as to *which* coercive remedy is called for (i.e., the legal "remedy" issue). See, e.g., PROSSER & KEETON ON THE LAW OF TORTS § 1 (5th ed. 1984); cf. D. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* § 1.2 (1973). In any event, the indicated focus upon the "remedy" issue highlights the ultimately coercive aspect of the "right" issue; this is so despite the fact that the remedy is not necessarily itself a coercive act, but may only be the declaration of a (remedial) duty which is *backed by* (the threat of) coercive acts in the event of noncompliance. To avoid misunderstanding, it should be clarified that I do *not* claim that every identifiable rule which is commonly called a "law" is backed by a coercive sanction, but only that what is crucially important about the rules not so backed is their relationship to other rules which are. As an example, consider the "laws" that determine how a legislative bill itself becomes law. Cf. J. HALL, *supra* note 2, Ch. V.

7. A useful beginning point would be Lawrence Becker's "root idea of a right":

The existence of a right is the existence of a state of affairs in which one person (the right-holder) has a claim on an act or forbearance from another person (the duty-bearer) in the sense that, should the claim be exercised or in force, and the act or forbearance not be done,

the flawed program. These matters I leave largely to the reader's reasonable inference, though some suggestive comments will be made. They are mentioned primarily to motivate the discussion of the methodological problem first described. Even in that regard, I will not claim to present a complete solution to the problems presented. My efforts will be limited to outlining basic ideas which may help to defuse some long-standing jurisprudential controversies and provide a framework within which better solutions may be constructed. In part I, I begin the development of the significance of normative deliberations for the methodology of legal theory by identifying a crucial preliminary issue. That issue is the threshold question of the proper *scope of legal inquiry*, itself one aspect of the most general and persistent question in descriptive legal theory, namely "What is law?" It will be argued that coercion is a crucial element in the specification of such scope of inquiry. In part II, a critical analysis of traditional positivist and natural law theories will be used to clarify and further develop the proposed approach. Finally, in part III, the results of the analysis will be recapitulated with a discussion of some reservations and potential objections.

## I. NORMATIVE DELIBERATIONS AND THE STRUCTURE OF LEGAL THEORY

In attempting to answer the important question "What is law?", a crucial observation, though occasionally made, has yet to be sufficiently developed.<sup>8</sup> The point may be reviewed by considering the following, comparatively innocuous question: Why is the term 'house' not usually defined (or used) to include the first twenty feet of ground below the erected structure? Or, for that matter, a piece of the moon? One might respond: "Well it certainly could have been, but it just wasn't. Why ask the question? The choice, whether explicitly or implicitly made, was arbitrary, one made simply for the sake of having *some* basis for mutual understanding." Indeed, the choice does not seem to be logically necessitated. Nevertheless, the response surely misses the point, because the choice was not arbitrary, if by that one means that there is no reason (other than simply having *some* convention) not to include twenty feet of soil in the term 'house'. The crucial

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it would be justifiable, other things being equal, to use coercive measures to extract either the performance required or compensation in lieu of that performance.

L. BECKER, PROPERTY RIGHTS: PHILOSOPHIC FOUNDATIONS 8 (1977). See also Becker, *Three Types of Rights*, 13 GA. L. REV. 1197 (1979).

8. That the question posed is an important question can be established by arguments not fundamentally inconsistent with the approach developed here. See, e.g., J. MURPHY & J. COLEMAN, *THE PHILOSOPHY OF LAW* 7-13 (1984).

realization is that 'house' does not include the twenty feet below because such a concept or convention would not (ordinarily) be a *useful* one; in any event, it would not (ordinarily) be the most useful one.<sup>9</sup> In fact, most (if not all) meanings, including stipulative definitions, reflect the purposes and values which are common to some group of communicating humans. Such shared purpose is what gives the communication its value.<sup>10</sup>

Where the complexity or multiplicity of purposes which are reflected in a language, or part thereof, is great, the inherent ambiguity of the important words is also great.<sup>11</sup> This is the case with the concept of 'law' or that of 'legal system', as compared with 'house', for example. As a consequence, if one attempts to unravel, explicate, or define concepts of great corresponding complexity and multiplicity of empirical purpose, there will be a significant need for *clarification* of purpose. Any choice among various alternative purposes is itself subject to evaluation and criticism. If, therefore, one asks "What is law?" or "What is a legal system?", he might legitimately be answered at first with another question, such as: "What is the purpose of your inquiry?" Or, derivatively: "What are the criteria of success of your investigation?"<sup>12</sup>

Professor Hart is one who has recognized, though incompletely accommodated, these observations. He says of the analytical or definitional problems of jurisprudence:

. . . [t]oo little has been said about the criteria for judging the adequacy of a definition of law. Should such a definition state what, if anything, the plain man intends to convey when he uses the expressions "law" or "legal system"? Or should it rather aim to provide, by marking off certain social phenomena from others, a

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9. Of course, especially outside of everyday discourse, there *could* be circumstances in which such a concept *would* be useful. For a discussion of the ramifications of the differences in the *interpretation* of law between "lay" terminology and "technical" terminology, see B. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* (1977).

10. For example, it can be shown that the "units" for measurement of temporal and spatial intervals are "arbitrary" in the sense of not being necessitated by either purely logical considerations or empirical facts. Nevertheless, the units chosen, as well as the stipulative definitions of congruence at a distance and uniformity of time, are subject to criticism on the basis of the implications for the formulation of physical laws. *Descriptive simplicity* is the critical consideration here. See H. REICHENBACH, *THE PHILOSOPHY OF SPACE AND TIME* §§ 4-6, 17 (1958). More generally, see R. ROBINSON, *DEFINITION* (1950).

11. See H.L.A. Hart, *Definition and Theory in Jurisprudence*, 70 *LAW Q. REV.* 37 (1954).

12. The legal philosopher with probably the earliest and keenest appreciation of these observations was Hermann Kantorowicz, who summarized their import in the phrase "conceptual pragmatism". See H. KANTOROWICZ, *THE DEFINITION OF LAW* (1958). Unfortunately, his narrow purpose of developing the conceptual basis of a *history* of juristic thought led him to a slightly narrower conception of law than that developed here.

classification useful or illuminating for theoretical purposes?<sup>13</sup>

Implicitly, one purpose of an objective investigator might be to catalogue the purposes of "plain men" and how each is reflected in the linguistic "carving" of reality.<sup>14</sup> Moreover, there is no obvious reason to limit oneself to the purposes of *plain* men. A "science" of law, so conceived, should also include in the catalogue the purposes and consequent conceptions of *non-plain* men — intellectuals, politicians, lawyers, criminals(!), and so on. Each has a perspective to contribute.<sup>15</sup> The nature of *theoretical* deliberations would be clearer if this were kept in mind: one of the catalogued definitions, or yet some other, might be best for illuminating such deliberations.<sup>16</sup>

If we heed Hart's correct suggestion, we may ask what definitional lines *should* be drawn, as a "rational reconstruction" of ordinary usage,<sup>17</sup> so as to mark off 'legal phenomena' for theoretical study. And preliminarily, we may ask what criteria for making such a choice should be employed. I suggest two. First, the field of investigation should not be prematurely narrowed by the definitional borders of legal phenomena. In other words, a relatively "weak" definition or liberally inclusive scope of inquiry should be employed, within which more discriminating theories can be developed. Second, the primacy of practical deliberations should inform our theorizing. It is my thesis that these two criteria best reflect the purposes of a rational inquiry into the nature of law. The first reflects the purposes of neutrality and

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13. H.L.A. HART, *supra* note 4, at 2-3. Elsewhere, Hart gives what he optimistically considers to be the basic conception of an "educated man", but he does not investigate the purposes which underlie such a conception, and he specifically rejects it as an adequate account for his (presumably theoretical) purposes. H.L.A. HART, *THE CONCEPT OF LAW* 2-5 (1961).

14. [O]ur common stock of words embodies all the distinctions men have found worth drawing, and the connexions they have found worth marking, in the lifetimes of many generations: these surely are likely to be more numerous, more sound, since they have stood up to the long test of the survival of the fittest, and more subtle, at least in all ordinary and reasonably practical matters, than any that you or I are likely to think up in our arm-chairs of an afternoon — the most favored alternative method.

J. AUSTIN, *PHILOSOPHICAL PAPERS* 130 (1961).

15. A similar point is made by John Finnis in beginning his perceptive analysis of the problems of descriptive legal theory. J. FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 1-2 (1980).

16. Certainly ordinary language has no claim to be the last word, if there is such a thing. It embodies, indeed, something better than the metaphysics of the Stone Age, namely, . . . , the inherited experience and acumen of many generations of men. But then, that acumen has been concentrated primarily upon the practical business of life. If a distinction works well for practical purposes in ordinary life (no mean feat, for even ordinary life is full of hard cases), then there is sure to be something in it, it will not mark nothing: yet this is likely enough to be not the best way of arranging things if our interests are more extensive or intellectual than the ordinary.

J. AUSTIN, *supra* note 14, at 133.

17. On "rational reconstruction" of legal terminology, see J. MURPHY & J. COLEMAN, *supra* note 8, at 2-4.

objectivity, a desire not to prejudice the normative and empirical connections to be developed, as well as a modesty, born of experience, with regard to our ability to cut to the heart of the matter by a simple definitional exercise.<sup>18</sup> The second reflects the belief that normative concerns cannot be ignored even in the building of a descriptive theory of law. "A general theory of law must be normative as well as conceptual."<sup>19</sup> The two dimensions must inform one another; neither can be profitably pursued in isolation. In fact, they are different components of the same general enterprise.<sup>20</sup> As Lon Fuller opined in the early fifties (and thereafter):

In attempting to outline briefly what seem to me to be the needs of legal philosophy in this country, I start with a pragmatic conception of the function of philosophy. As I see it, the object of legal philosophy is to give an effective and meaningful direction to the work of lawyers, judges, legislators, and law teachers. If it leaves the activities of these men untouched, if it has no implications for the question of what they do with their working days, then legal philosophy is a failure.<sup>21</sup>

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18. A similar point is emphasized by Professors Nonet and Selznick in distinguishing between "weak definitions" and the "strong theories" which are to be built thereon. See P. NONET & P. SELZNICK, *LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW* 8-18 (1978). Cf. H. KANTOROWICZ, *supra* note 12, at 11; *Introduction*, *THE PRINCIPLES OF SOCIAL ORDER* 16-19 (K. Winston ed. 1981). The basic idea is traced by Mortimer and Sanford Kadish to:

. . . a simple precept of what Charles Sanders Peirce called the logical conscience. In order to avoid blocking the way of inquiry, this precept warns us not to employ restrictive definitions that exclude real possibilities from consideration. Theories about the nature of legal systems, from which are derived all sorts of propositions about the entitlements of defendants, the obligations of officials, and the nature of proper judicial reasoning, run the same risk as theories about the nature of art — namely, that substantive choices of particular programs in the domain will be defended on the basis of a prescribed concept of the domain. In such a case the need for a defense has been obviated. The commitments justifying one's substantive choices have been implanted in the theory and then read out from the theory as discoveries.

M. KADISH & S. KADISH, *DISCRETION TO DISOBEY* 217-18 (1973). Cf. Honore, *Groups, Laws, and Obedience*, in *OXFORD ESSAYS IN JURISPRUDENCE* (2d series) 1-2 (A.W.B. Simpson ed. 1973).

19. R. DWORKIN, *TAKING RIGHTS SERIOUSLY* vii (1978). The implicit identification made in the text of "practical" and "normative" indicates the use herein of the term "practical" in the broadly normative sense of "with a view to decision and action" rather than the more narrowly instrumental sense of "workable" or "efficient". This follows J. FINNIS, *supra* note 15, at 12. See generally J. RAZ, *PRACTICAL REASON AND NORMS* (1975).

20. Early modern recognition of the interdependence of the social scientist's normative concerns and his descriptive theory, even (or at least) in the very selection of concepts to be employed, is to be found in the works of Weber. See MAX WEBER ON THE METHODOLOGY OF THE SOCIAL SCIENCES 24, 58, 76-82 (E. Shils & H. Finch ed. 1949); M. WEBER, *THE METHODOLOGY OF THE SOCIAL SCIENCES* (1949).

21. L. FULLER, *THE PRINCIPLES OF SOCIAL ORDER* 249-50 (K. Winston ed. 1981). As will be evident in what follows, Fuller's point is somewhat too narrow in focusing only upon the practical issues facing members of the "legal" profession. Cf. D. RICHARDS, *THE MORAL CRITICISM OF LAW* 7 (1977): "The ultimate concern of the philosophy of law . . . is to guide us in making normative decisions regarding laws and our relation, as individuals, to laws."



A derivative thesis is the following: Questions about what ought to be undertaken with the aid of coercion, or required subject to coercive sanctions, and how individuals ought to respond to such undertakings and requirements by others are critical, indeed the most important, practical concerns which underlie our study of law and which ought, therefore, to inform our theorizing, including our definitional (scope of inquiry) formulations. As Ronald Dworkin has put it:

Day in and day out we send people to jail, or take money away from them, or make them do things they do not want to do, under coercion of force, and we justify all of this by speaking of such persons as having broken the law or having failed to meet their legal obligations, or having interfered with other people's legal rights. Even in clear cases (a bank robber or a willful breach of contract), when we are confident that someone had a legal obligation and broke it, we are not able to give a satisfactory account of what that means, or why that entitles the state to punish or coerce him.<sup>22</sup>

Consequently, in order to bring legal theory to focus upon the crucial practical issues concerning law, I suggest a modification of the prevailing theories to include within the scope of inquiry all coercive human interactions, by which I mean, roughly, interactions in which either coercion is intentionally and directly employed by a person against another or there is a reasonable fear of such employment.

Before beginning to address the more serious difficulties which may be thought to occasion this suggestion, it may be helpful to make a brief comment on the present use of the term 'coercion'. Paradigmatically, by 'coercion' I refer to the direct use of physical force or the threat of such force to obtain compliance with rules, commands, directives, etc. It is not necessary for the purposes of this paper to examine in detail the nature and kinds of coercion or the relationship of the concept(s) of coercion to that of 'sanction'.<sup>23</sup> It is

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22. R. DWORKIN, *supra* note 19, at 15. Professor Hart makes the point more precisely, if less graphically:

[W]e are committed at least to the general critical principle that the use of legal coercion by any society calls for justification as something *prima facie* objectionable to be tolerated only for the sake of some countervailing good.

H.L.A. HART, *supra* note 4, at 20. See also J. FEINBERG, SOCIAL PHILOSOPHY 4-9, 20-22 (1973) (discussing "The Presumptive Case for Liberty"); cf. Westen, *Freedom and Coercion — Virtue Words and Vice Words*, 1985 DUKE L.J. — (forthcoming).

23. See generally Nozick, *Coercion*, in PHILOSOPHY, SCIENCE AND METHOD: ESSAYS IN HONOR OF ERNEST NAGEL 440-72 (S. Morgenbesser, ed. 1969); COERCION, NOMOS XIV (J.R. Pennock & J.W. Chapman, ed. 1972); J. HALL, *supra* note 2, Ch. V; Oberdiek, *The Role of Sanctions and Coercion in Understanding Law and Legal Systems*, 21 AM. J. JURIS. 71 (1976). Obviously, these citations are not intended to express agreement with everything to be found in these works. Indeed, the implications of the arguments presented here may include substantial revisions of the insights therein adduced.

sufficient merely to indicate the centrality of such examinations in an adequate jurisprudence. The most obvious distinctions which could be elaborated are (i) that between physical and non-physical coercion<sup>24</sup> and (ii) that between using coercion directly, e.g., overt or disguised threats, and indirectly, by which I have in mind the implicit "threats" which attend even the most cooperative kinds of interactions by virtue of the existence of a background set of coercively backed rules. Thus, for example, the simple sale of a nonessential consumer good may have involved the parties' reliance upon the coercively backed rules concerning theft, concerning an owner's power to alienate property, and perhaps more. Though these rules and their enforcement certainly are legal phenomena, the transaction itself is not — though, of course, it will have legal consequences by virtue of the change of ownership. Thus, even the sale of a "necessity" by a "monopolist", where some may wish to assert the employment of coercion, is not coercion in the direct sense, although there may have been or may be coercion in the creation and maintenance of the monopoly.<sup>25</sup> Of course, there will be many hard cases. As others have said, it need not be our intention to provide a "litmus test" for legal phenomena, but rather to push the fuzzy cases away from some central areas of proper concern.<sup>26</sup>

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24. Much attention is paid to this distinction in the discussions cited in the previous note, although many of these discussions suffer from too great an attachment to (supposedly) ordinary language usage. The special significance of physical coercion and the realistic threat thereof contained within most legal sanctions is manifested, to a greater or lesser extent, in a wide variety of legal doctrines. See, e.g., *Poe v. Ullman*, 367 U.S. 497 (1961) (holding not justiciable a declaratory judgment action by a doctor and several patients challenging constitutionality of a state statute prohibiting use of contraceptives). In reply to the fact of the doctor's sworn testimony that as a law-abiding citizen he was deterred by the statute, the court's opinion reads:

We cannot agree that if Dr. Buxton's compliance with these statutes is uncoerced by the risk of their enforcement, his patients are entitled to a declaratory judgment concerning the statutes' validity. And, with due regard to Dr. Buxton's standing as a physician and to his personal sensitiveness, we cannot accept, as the basis of constitutional adjudication, other than as chimerical the fear of enforcement of provisions that have during so many years gone uniformly and without exception unenforced.

*Id.* at 508 (plurality opinion by Frankfurter, J.). Cf. *Griswold v. Connecticut*, 381 U.S. 479 (1965) (subsequent criminal action brought against same doctor; criminal prohibition held unconstitutional). The general problem of non-enforcement instantiated by the cited cases is discussed in Bonfield, *The Abrogation of Penal Statutes by Non-enforcement*, 49 IOWA L. REV. 389 (1964).

25. Similar issues have been encountered by the courts in determining whether "state action" has occurred for purposes of the application of constitutional protections of certain individual rights. See generally *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978) (reviewing various theories and refusing to find requisite state action in private sale by warehouseman, pursuant to § 7-210 of New York Uniform Commercial Code, to enforce lien on goods stored). Of course, the analogy is not intended to suggest that a social phenomenon qualifying as law under the coercion test ought to be considered state action for the purposes of constitutional analysis. A more sophisticated interrelationship would have to be developed here.

26. Cf. H.L.A. HART, *supra* note 13, at 16-17 (1961). The point may be expressed by saying that we wish to delineate a fuzzy set (law or legal system) within the domain of social phenomena in such a manner as to assure that phenomena of closely related moral concerns peculiar to the law are given a

Putting this matter of the meaning of coercion aside, let us turn to issues of more frequent jurisprudential controversy.

## II. COMPARISONS TO OTHER APPROACHES

The classically positivist sound of my proposal, reemphasizing as it does the coercive element of law, may strike those who are well versed in modern legal philosophy as entailing a rejection of the great strides forward since Austin and Kelsen (the preeminent classical positivists), strides attributable to the efforts of legal theorists such as H.L.A. Hart and Lon Fuller. This would be an erroneous impression, principally because my proposed inclusion of coercive interaction is not *exclusive* of other social phenomena. In order to make plain the nature of these connections, to elucidate and substantiate the theses put forward in the previous section and to demonstrate their relevance to the controversies of modern legal philosophy, it will be useful to survey briefly some relevant features of the two principal schools of thought in Occidental jurisprudence, legal positivism and natural law. In view of the character of the present proposal, we will take as a focus the extent and rationale of the attempts by preeminent scholars within these traditions to rule "out-of-bounds" the simple coercive interaction of the robber with his victim.<sup>27</sup> Although no comprehensive critique of these scholars is intended, we will be looking to their theoretical purposes, broadly conceived, and suggesting the strengths and weaknesses in the success criteria which have been adopted, explicitly or implicitly, for specifying the scope of theoretical inquiry into law.

### A. The Positivist Tradition

The prominent legal positivist writers give us only clues as to their positions on the methodological questions raised here. One thing is clear enough: the touchstone of positivism is the distinction between description and prescription, in large part a rejection of classical teleological metaphysics.<sup>28</sup> In the context of jurisprudence, this is manifested as an insistence upon a distinction between "analytical jurisprudence" and "normative jurisprudence", the former being con-

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high grade of membership in the fuzzy set. See D. DUBOIS & H. PRADE, *FUZZY SETS AND SYSTEMS: THEORY AND APPLICATIONS* (1980).

27. In one weak sense, none of the authors to be discussed fails to include the robber within the scope of inquiry: namely, each in fact *discusses* the interaction of the robber and victim. But the discussion is rather consistently devoted to a linguistically "analytical" or definitional exclusion based upon inadequately explained grounds, as the following text will demonstrate.

28. See H.L.A. HART, *supra* note 13, at 180 *et seq.* (1961). See also J. FINNIS, *supra* note 15, Ch. II.

cerned with the analysis of the concepts and structures of "law as it is", the latter being concerned with evaluative criticism of law.<sup>29</sup> Unfortunately, there has been a temptation to overstate the distinction and thus to ignore the relationships developed in the preceding section, to believe that descriptive theory can and should be undertaken without any analytical recourse to the theorist's normative concerns. As prominent examples, we will briefly consider the work of John Austin, Hans Kelsen, and H.L.A. Hart.

### *Austin*

Austin's conception of law is a system ("society") in which there exists a determinate group of persons, the sovereign, the general commands of which are habitually obeyed by others in the community and which is not in the habit of obeying anyone else.<sup>30</sup> Although the coercive power of the sovereign's commands is an integral part of Austin's theory, Austin might nevertheless reject the gunman's action as an instance of legal phenomena on at least three grounds. The first might be that the notion of a "command" entails authority, something which the gunman lacks. However, even though Austin does speak of "superiority" and "inferiority" as implicit in commands, he clarifies that the relationship involved must be understood in terms of power, rather than authority.<sup>31</sup> This manifests Austin's positivistic effort to define law in wholly non-evaluative terms. Indeed, building the notion of authority into the very definition of law would seem to prejudge or *require* prejudgment of crucial normative or descriptive issues, e.g., whether and to what extent a particular social rule or system *has* authority.<sup>32</sup> This surely is inappropriate if our goal is to set out the scope of an (open-minded) inquiry, as indeed the very title of Austin's work

29. See, e.g., J. MURPHY & J. COLEMAN, *supra* note 8, at 1, 22. Aside from the separation of analytical jurisprudence from normative jurisprudence, the identification of the essential features of positivism is extremely problematic. Many philosophers regard the unifying theme of analytical positivism to be the insistence upon having a purely formal test for determining the legal validity of a given rule, i.e. a test which is independent of the content of the rule. For example: "Whatever X says is the law is the law." Thus, X is said to *posit* the law. As a reaction to classical natural law, there is also a demand for a test which is independent of divine sanction (*viz.*,  $X \neq \text{God}$ ) and of authority inherent in other non-human sources (*viz.*,  $X \neq \text{Nature}$ ). See *generally id.* at 13-38.

30. J. AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (H.L.A. Hart ed. 1954) (first published in 1832).

31. *Id.* at 24-25.

32. For such reasons, Hart reconstructs Austin's terminology by referring to "orders backed by threats" rather than "commands". H.L.A. HART, *supra* note 13, at 19-20 (1961). On the controversial character of legal authority, compare Ladenson, *In Defense of a Hobbesian Conception of Law*, 9:2 PHIL. AND PUB. AFF. 134 (1980) with Raz, *Authority and Justification*, 14:1 PHIL. AND PUB. AFF. 3 (1985).

indicates.<sup>33</sup>

The second and third grounds are related: for the gunman situation to exemplify law, Austin would say, the gunman would have to be coercively dominant ("sovereign") in the "society" and proceed, at least in part, by the use of generalized orders, like "Pay over half your earnings each month." These are not usually, or at least not invariably, the characteristics of gunmen. It is Austin's use of these characteristics which leads Hart to call Austin's conception the "gunman situation writ large".<sup>34</sup> The reaction which I hope the reader will have at this point is to ask: "How are these descriptive or definitional characteristics *normatively* relevant?" The positivist's answer would presumably be: "They aren't, at least not necessarily; but they *are* relevant to a *science* of law." But what could this mean? If, as might appear to be the case, Austin is simply engaging in a reproduction of ordinary usage of the term 'law', then he is subject to the criticism, discussed in the previous section of this paper, that such an historiographic approach requires theoretical justification.<sup>35</sup> If, on the other hand, Austin's conception is intended as useful for theoretical purposes, we find ourselves at a loss as to what those purposes might be. It cannot be the basic positivist purpose of removing value-laden concepts from a descriptive theory of law; nothing "value-laden" is removed by restricting attention from the general class of commands to those involving large scale coercive dominance and generalized orders.

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33. It may be worthwhile distinguishing my approval of Austin on this point from that of many antagonists of the (supposedly) classical natural law approach. The latter would come about in something like the following way. It would be observed that the employment of an *evaluative* notion of authority (or, a purely "pedigree" notion of authority — i.e., traceability to the sovereign — coupled with an evaluative conception of sovereignty) would be subject to the same criticism as such natural law theory: they each identify law with morally good (or authoritative) law and thereby violate our (ordinary language or) common sense of the *meaningfulness* of phrases like "morally bad (unauthoritative) law." See, e.g., J. MURPHY & J. COLEMAN, *supra* note 8, at 17-19. But this argument begs the question. Unless the proper purpose of legal theory is to reproduce our ordinary language usages, i.e. to reproduce the meaningfulness of its phrases, the natural lawyer's limitation of law to authoritative regimes cannot be rejected simply on the ground that it fails to consider iniquitous regimes (like that of Nazi Germany) as involving law where (at least some peoples') ordinary language would so classify them. (Compare the similar way in which Hart begs the question of the distinguishability of the gunman from law by focusing on our common sense of "obligation". *Id.* at 24-25. Moreover, one might attempt to avoid this problem by clearly specifying a purely *non-evaluative* notion of authority. The matter is complicated (see *infra* note 58), and this very fact argues strongly for the simple, non-evaluative specification of the scope of inquiry that Austin was trying to provide, leaving these difficult questions to be resolved at the level of theory construction.

34. See H.L.A. HART, *supra* note 13, at 7, Ch. II (1961); J. MURPHY & J. COLEMAN, *supra* note 8, at 25-27, 31.

35. See *supra* text accompanying notes 11-16. In fact, Austin recognizes that his conceptualization does involve a modification of ordinary language. E.g., J. AUSTIN, *supra* note 30, at 19, 20-21.

If anything, something value-laden is *added*.<sup>36</sup>

It is important to observe that these critical questions are radically different in tenor from the now well-received criticisms of Austin's theory. H.L.A. Hart, for example, accepts the restrictions based upon coercive dominance and generality as necessary to Austin's theory, and even adds further elements so as to better reproduce our common-sense notions about law, arguing that Austin's theory is not "sufficient to account for two salient features of most legal systems: the *continuity* of the authority to make law possessed by a succession of different legislators, and the *persistence* of laws long after their maker and those who rendered him obedience have perished."<sup>37</sup> Now, the same objections which were raised above with regard to Austin can clearly be made against Hart's reconstructive elaboration of Austin's theory. And we can point to the primary source of the difficulty: Hart expects both too much and too little from a definition of law. "Too much" in the sense that there is no reason to expect a *definition* to provide us an "account" of *all* the features (even "salient" ones) of "most" legal systems, certainly not without the addition of other concepts. "Too little" in the sense that a definition should not exclude from consideration social phenomena which do not have, for example, the continuity of many modern legal systems.<sup>38</sup>

### Kelsen

Kelsen proceeds in a fashion somewhat similar to Austin, but we are able to identify something more concrete about his underlying purposes. In the first place, Kelsen rightly perceives that, despite the "constitutive" aspect of even scientific cognition,<sup>39</sup> a descriptive science of law must attempt to avoid ideological bias.<sup>40</sup> Further, he appears to distinguish between setting the scope of inquiry and developing a theory therein, for he writes: "[A] theory of law must begin by defining its object matter."<sup>41</sup> Kelsen then proceeds as follows:

To arrive at a definition of law, it is convenient to start from the usage of language, that is, to determine the meaning of the word

36. See, e.g., L. FULLER, *THE MORALITY OF LAW* 46-49 (rev. ed. 1969) (discussing the "generality" of law as one of the elements of law's "internal morality").

37. H.L.A. HART, *supra* note 13, Chs. II-IV (1961).

38. See Gibbs, *Definitions of Law and Empirical Questions*, 2 LAW & SOC. REV. 429 (1968). It can also be persuasively argued that Austin's theory is not so deficient in explaining the persistence and continuity of modern legal systems as Hart claims. See Ladenson, *supra* note 32, at 145-57.

39. H. Kelsen, *THE PURE THEORY OF LAW* § 26 (1967) (first published in 1934).

40. *Id.*

41. *Id.* at 30.

"law" as equivalent to the German word *Recht*, French *droit*, Italian *diritto*. Our task will be to examine whether the social phenomena described by these words have common characteristics by which they may be distinguished from similar phenomena, and whether these characteristics are significant enough to serve as elements for a concept of social-scientific cognition.<sup>42</sup>

Thus, taking common language merely as a "convenient" starting place, Kelsen arrives at two features of law which are characteristic and significant: (1) these "objects" are systems of norms for human behavior (i.e. "social orders"); and (2) they are coercive.<sup>43</sup> He specifically, and reasonably, rejects certain other characteristics as definitional on account of their variability.<sup>44</sup> This basic result will be seen to be similar to that at which we will ultimately arrive in this paper.<sup>45</sup>

However, from this relatively sound beginning, Kelsen goes off the track by building into his conception of a coercive social order something which is not entailed by either of the two specified dimensions. A requirement of effectiveness ("by and large") of the system arises from (i) Kelsen's claim that one cannot have a "system" of norms without a basic norm with reference to which the validity of the other norms is determined and which itself is simply "presupposed",<sup>46</sup> together with (ii) his claim that an ineffective norm cannot be presupposed. Thus Kelsen distinguishes the robber gang from a legal system in the following way:

Why is the coercive order that constitutes the community of the robber gang and comprises the internal and external order not in-

42. *Id.* at 30-31.

43. *Id.* §§ 6a-6b. Kelsen has been criticized for taking the "lowest common denominator" approach to defining law by looking simply to the one feature or set of features present in all ordinary language applications. See, e.g., J. FINNIS, *supra* note 15, at 5-6, 9-10. Although Kelsen does not explain his criteria of "significance", it is clear that *something* more is involved than this criticism admits. Kelsen, despite his well-known ethical subjectivism, must contemplate "significance" in the coercive aspect of law. That this is a *normative* significance is suggested by Kelsen's insistence that a definition of law which does not "determine law as a coercive order, must be rejected . . . because coercion is a factor of great importance for the cognition of social relationships . . . particularly, because by defining law as a coercive order, a connection is accounted for that exists in the case most important for the cognition of the law, the law of the modern state: the connection between law and state. The modern state is essentially a coercive order. . . ." H. Kelsen, *supra* note 39, at 54. This, according to Kelsen, has at least the normative significance of undercutting "one of the most effective ideologies of legitimacy" which seeks to "justify the state through the law". *Id.* at 318-19. See generally *id.* Ch. VI.

44. The existence of a monopoly on the use of force is so rejected (H. Kelsen, *supra* note 39, at 35-37) as is the securing of peace often associated therewith (*id.* at 37-39).

45. See *infra* text accompanying note 159. The principal differences will be seen to lie in my claims that (a) the two features should be expressed in terms of concrete human action rather than as an abstract system of rules, and (b) the two features should be listed in the disjunctive, specifying two sufficient conditions for identifying legal phenomena.

46. H. Kelsen, *supra* note 39, § 34. See also *id.* at 31.

terpreted as a legal order? Why is the subjective meaning of this coercive order (that one ought to behave in conformity with it) not interpreted as its objective meaning? Because no basic norm is presupposed according to which one ought to behave in conformity with this order. But why is no such basic norm presupposed? Because this order does not have the lasting effectiveness without which no basic norm is presupposed. The robber's coercive order does not have this effectiveness, if the norms of the legal order in whose territorial sphere of validity the gang operates are actually applied to the robbers' activity as being illegal behavior; if the members of the gang are deprived of their liberty or their lives by coercive acts that are interpreted as imprisonment and death sentences; and if thus the activity of the gang is terminated — in short, if the coercive order regarded as the legal order is more effective than the coercive order constituting the gang.<sup>47</sup>

It is not explained why a norm which is not "lastingly effective" is not presupposed. This appears to be an empirical claim about the behavior of "norm presupposing". If so, it holds little promise for Kelsen, who acknowledges that presupposition is person-specific; what is a legal system is, to that extent, very much in the eyes of the beholder, or rather the mind of the presupposer.<sup>48</sup> There is little warrant for a claim that individuals *cannot* presuppose a norm simply because it is not "lastingly effective". And any recourse to presupposition by a majority or by a powerful minority would raise comparably unsupportable claims of equally dubious relevancy. Such all-or-nothing conceptions are strange notions to build into a descriptive theory.<sup>49</sup> In the end, one is left to ponder the peculiarity of Kelsen's claim, based upon some notion of comparative effectiveness, that were the robbers able to dominate a given geographical region, their system could be regarded as a legal system, their community as a "state".<sup>50</sup> It would seem to reflect an unstated, unnecessary, and indefensible Austinian position that for any given region, there can be only one legal system. The normative relevance of such a counter-intuitive restriction upon

47. *Id.* at 47-48. It should be mentioned that Kelsen also argues that the single command of the gunman is not law because law is not a single norm but a system of norms. *Id.* at 47. This argument fails for the same reason that it would be wrong to say that, in mathematics, a collection of one object cannot be a "set": a single command can be a "system", albeit an extremely simple one. There is no obvious normative consideration which would serve to distinguish such a simple system from more complex ones.

48. *Id.* at 204 n.72.

49. Kelsen's argument that effectiveness is a *condition* of validity (for norms subsidiary to the basic norm) is similarly unconvincing. See *id.* §§ 4c, 34g. It has been noted that the introduction of the effectiveness requirement in its various forms undercuts Kelsen's formal-logical methodology by the introduction of contingent facts. See R. MOORE, *LEGAL NORMS AND LEGAL SCIENCE* 196-99 (1978).

50. H. KELSEN, *supra* note 39, at 48. A similar argument is made by Kelsen with regard to the status of a coercive order associated with a revolutionary insurgency. *Id.* § 34f.



the scope of legal science is difficult to discover.<sup>51</sup>

### Hart

Building upon Kelsen, H.L.A. Hart develops his theory that the distinctive feature of law is its combination of primary and secondary rules, the latter including (in particular) a "rule of recognition" analogous in some ways to Kelsen's basic norm.<sup>52</sup> In doing so, he utilizes an important set of methodological categories:

When a social group has certain rules of conduct, this fact affords an opportunity for many closely related yet different kinds of assertion; for it is possible to be concerned with the rules, either merely as an observer who does not himself accept them, or as a member of the group which accepts and uses them as guides to conduct. We may call these respectively the 'external' and the 'internal points of view'. Statements made from the external point of view may themselves be of different kinds. For the observer may, without accepting the rules himself, assert that the group accepts the rules, and thus may from outside refer to the way in which *they* are concerned with them from the internal point of view. But whatever the rules are, . . . , we can if we choose occupy the position of an observer who does not even refer in this way to the internal point of view of the group.<sup>53</sup>

Hart argues at length that a major defect in much of the earlier theory is its tendency to opt for the third delineated point of view, which Hart calls the "extreme external point of view", and is exemplified by attempts to characterize "legal obligation" as referring to no more than a prediction of the behavior of officials.<sup>54</sup> Thus, Hart writes:

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51. It may be argued that what we have before us is a problem no more difficult (in principle) than that of distinguishing the bald man from the non-bald man, a problem with which philosophers are particularly enamored. "Common sense", we are told, allows us to make the distinction, though obviously we are faced with a case of "continuous variation": there is no particular point at which one fewer hair makes a man bald. Similarly, these questions about habits of obedience (Austin), by and large effective coercive orders and public acceptance of basic norms (Kelsen) yield to our "common sense" in identifying "existing" legal orders and "objectively valid" legal orders. But surely this kind of resolution is particularly inappropriate to a theoretical perspective. We have seen the reasons already. A crucial part of jurisprudence must be to ask whether or not these "common sense" distinctions, if indeed they are such, are well-founded, and in the pursuit of an answer to such questions we would expect a legal theory to accept, at least tentatively, a perspective which recognizes the *contingency* and even *variability* of such matters as effectiveness and public acceptance. Cf. P. NONET & P. SELZNICK, *supra* note 18; see also L. FULLER, *supra* note 36, at 198-200.

52. H.L.A. HART, *THE CONCEPT OF LAW* Chs. V-VI (1961). By a "primary rule" Hart means a rule directed to all individuals in the social group indicating how the individuals should or should not act in various circumstances. "Secondary rules" are rules about the primary rules, about how the latter can be authoritatively identified, changed, or applied to specific cases. *Id.* at 89-95.

53. *Id.* at 86-87.

54. *Id.* at 79-88. See, e.g., Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897):

At any given moment the life of any society which lives by rules, legal or not, is likely to consist in a tension between those who, on the one hand, accept and voluntarily co-operate in maintaining the rules, and so see their own and other persons' behavior in terms of the rules, and those who, on the other hand, reject the rules and attend to them only from the external point of view as a sign of possible punishment. One of the difficulties facing any legal theory anxious to do justice to the complexity of the facts is to remember the presence of both these points of view and not to define one of them out of existence. Perhaps all our criticisms of the predictive theory of obligation may be best summarized as the accusation that this is what it does to the internal aspect of obligatory rules.<sup>55</sup>

These are surely reasonable observations, especially as components of a "strong"<sup>56</sup> descriptive theory of developed legal systems. Indeed, Hart often refers to his theory as going to the "distinctive" features of modern municipal legal systems.<sup>57</sup> However, when it comes to delineating the scope of inquiry, by focusing so strongly on the rule-governed aspect of the behavior of the *subjects* of investigation — the actors in a legal system — Hart seems to lose sight of a fact which the earlier forms of positivism highlighted: among the most important of the principles governing the *investigation itself* is that our concept of law should help to illuminate our underlying normative deliberations. The pages of Hart's works are filled with examples of how this latter dimension is subsumed to the point of isolation from the concerns of descriptive jurisprudence. For example, in Hart's criticism of a position commonly associated with the natural law tradition, to the effect that the positive enactments of the state are not "law" unless they satisfy certain requirements of justice or morality, Hart reasons from the following premise:

If we are to make a reasoned choice between these concepts [the broad and narrow concepts of law associated, respectively, with a rejection or acceptance of the indicated position], it must be because one is superior to the other in the way in which it will assist our theoretical inquiries, or advance and clarify our moral deliberations, or both.<sup>58</sup>

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"The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by law."

55. H.L.A. HART, *supra* note 52, at 88.

56. See *supra* note 18.

57. H.L.A. HART, *supra* note 52, at 16-17, 50, 151. It is, of course, rather problematic that Hart differentiates "distinctive" from such modifiers as "common" or "typical". The former connotes a conspicuously unexplained normative relevance. This kind of linguistic ambiguity pervades Hart's theory, leading commentators to question its descriptive (positivist) purity. See, e.g., Hill, *Legal Validity and Legal Obligation*, 80 YALE L.J. 47, 54-67 (1970).

58. H.L.A. HART, *supra* note 52, at 204-05. See also *id.* 208-09.

Hart's premise reflects the basic positivist duality, a radical separation of "theoretical" and "moral" investigations. The final "or both" in the quoted passage appears to recognize only that the choice at issue *may* involve both purposes, not that the two purposes are fundamentally intertwined in the way previously described.<sup>59</sup>

It is Hart's failure to appreciate this connection which is at the root of his arguments for rejecting the "gunman" situation as an instance of law. The details on this point are a bit involved, due to the convolutions of Hart's theory. Roughly, Hart argues that the gunman's command does not involve *obligation* on the part of his victim in the way that a law entails obligation on the part of the citizen. Though Hart repeatedly disavows giving a litmus test for the presence of law, he does say, in various forms, that where there is law, human conduct is made obligatory.<sup>60</sup> Hart suggests this, alternatively, as a fact about common language usage and as an assumption which, presumably, no one would doubt.<sup>61</sup> This sense of obligation is associated with the internal point of view toward a rule.<sup>62</sup> Yet, in developing "minimum conditions necessary and sufficient for the existence of a legal system", Hart specifies only that some number of persons — Hart calls them the "officials" of the system — must take the internal point of view.<sup>63</sup> One is led, then, to realize that, notwithstanding Hart's original argument, the only feature in the gunman situation which precludes its being an instance of a legal system is something

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59. It is not necessary to examine here in detail the argument by Hart which appears to proceed from this premise: he indicates, somewhat cryptically, that there are advantages to employing the broader concept, for example in terms of citizens' resistance to iniquitous rules. *Id.* at 203-07. For an insightful criticism of Hart's argument, with which the present author only partly agrees, see Beyleveld & Brownsword, *Law as a Moral Judgment vs. Law as the Rules of the Powerful*, 28 AM. J. JURIS. 105-08 (1983). See also *infra* note 113 and accompanying text.

60. H.L.A. HART, *supra* note 52, § V.2.

61. *Id.* at 79-80, 212.

62. *Id.* at 86-88. This association, it turns out, is extremely problematic. See Hill, *supra* note 57, at 58-75. Hill argues forcefully that Hart employs two different analyses of "obligation" in the legal context: one follows the positivist, value-free tradition and might appropriately be described in terms of a person's being "legally obliged"; the other follows the tradition of ordinary language philosophy and is better described in terms of "legal obligation". The former derives its force from legal *validity*, while the latter derives its force from principles of justice and morality. In other words, Hill argues for a distinction between that which has legal validity and that which entails legal obligation, pointing out that Hart simply assumes the coincidence of these notions. Compare the classical natural law view as interpreted by J. FINNIS, *supra* note 15, at 26. Even if we accept Hill's invitation to make this distinction, it is doubtful that Hart's theory gives even an adequate account of legal validity. Cf. R. DWOR-KIN, *supra* note 19, Chs. 2-3.

63. H.L.A. HART, *supra* note 52, at 113-14. There is, of course, a threat of circularity in using the notion of "official" in marking off legal systems from other social phenomena. See Ladenson, *supra* note 32, at 157-59. Elsewhere, Hart seems to try to avoid circularity by characterizing "officials" as simply "experts" with regard to the rule-system under consideration. H.L.A. HART, *supra* note 52, at 59.

about the attitude of the *gunman*, not the absence of a sense of obligation in his victim or in the observer of the situation, nor the absence of "genuine" obligation (i.e. from a universal but internal point of view). Apparently, if there were *two* gunmen, who agreed in advance on the rules by which their robbery would be carried out and who used those rules to criticize each other's conduct, then we *would* have a legal system. Indeed, behavior can be rule-governed even when the only person engaging in the criticism of deviations is the deviant himself. So if, for example, the gunman is willing to say to himself, "You idiot, that's not the way to rob someone!" — again we have a legal system. Hart's barricade against the gunman case crumbles before our eyes, all the faster once we generalize "rules" to "norms", and admit it to be sufficient if the gunman's actions are *purposive*, which they typically are.<sup>64</sup>

It should be mentioned that Hart specifies a second condition for the existence of a legal system: the primary rules of behavior must be "generally obeyed".<sup>65</sup> This requirement suffers from the same defect as the similar requirements discussed in connection with Austin and Kelsen, and we are given no reason for such a requirement, at least no reason besides common usage or perhaps some unspecified "theoreti-

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64. A similar criticism has been directed at Hart's distinction (H.L.A. HART, *supra* note 52, at 89-95) between the "pre-legal" regime — a (hypothetical) society which lacks recognized meta-rules for identifying, changing, and adjudicating disputes concerning the primary rules of behavior — and the genuinely "legal" system:

Hart may be right in regarding a certain degree of sophistication as essential to a regime's being a proper legal system, but a strong case could be put forward the other way for regarding primitive legal systems as genuinely legal and not merely pre-legal. In either case it is important not to allow the specific differences between the pre-legal regime and the fully developed legal system to obscure their generic similarities. Legal and pre-legal regimes differ in sophistication, but both have the hallmark of enforceability which distinguishes them from systems of morality and social custom, and both share with morality, but not etiquette, a high degree of seriousness. Hart's emphasis is different. He stresses the difference between a fully developed legal system and a pre-legal regime. The important thing, according to him, about a legal system is that it has certain meta-rules, notably a rule of recognition, and that the system as a whole is enforced. The effect of this emphasis is to play down the connection between a fully developed legal system and its roots in a pre-legal regime and other systems of social control, and to make law appear a much more abstract and autonomous discipline than it really is.

Lucas, *The Phenomenon of Law*, in LAW, MORALITY AND SOCIETY: ESSAYS IN HONOUR OF H.L.A. HART 91 (P. Hacker & J. Raz ed. 1977).

65. H.L.A. HART, *supra* note 52, at 113-14. Actually, the same qualifier ("generally") would have to be applied by Hart to the other minimum condition, the taking of an internal point of view by the officials (experts) of the system. Thus, that condition would be (to reword Hart) that the system's "rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be [generally] accepted as common public standards of official behavior by its officials." Cf. *id.* at 113. This analytical qualifier is necessitated by Hart's focus upon the existence of social rules (primary and secondary) as the primary fact of legal reality and the consequent necessity of specifying when such rules exist. The conservative implications of Hart's approach are displayed in Dworkin's criticism of Hart. R. DWORKIN, *supra* note 19, at 48-58. Dworkin points out, for example, how perfectly sensible moral discourse may include appeal to a rule which is not currently and widely followed.

cal" purpose.<sup>66</sup> It is true that such a reason *might* be brought forward. Indeed, Hart's emphasis upon reciprocity as a justification for coercing deviants who accept benefits but not burdens (of actions to which they themselves do not consent) might be the basis of a suggestion for the normative relevance of "generally obeyed" primary rules.<sup>67</sup> But Hart does not advance this argument, whatever its merits. His socio-linguistic coherence approach to the problem of the nature of law and legal systems is pursued first; his argument about reciprocity is only advanced later, as a matter apparently independent of the earlier argument. In any case, aside from the problems of making more precise the notion of "generally obeyed", the resolution of such a controversial normative question, at the very core of social philosophy,<sup>68</sup> should not be presumed in setting forth a supposedly neutral characterization of law and legal systems.

### *Positivism Reconsidered*

If we were to be uncharitable, we would accuse the positivists of premising their theories, in more and less subtle ways, upon a defense of the dominant coercive order by allowing the rhetorical power of the term "law" to that order alone.<sup>69</sup> This would be understandable in light of the intellectual's typically vested interest in "the Establishment". It might seem particularly consistent with that branch of legal positivism, exemplified by Kelsen, which reflects extreme skepticism about the possibility of a rational morality and which might be ex-

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66. Cf. H.L.A. HART, *supra* note 52, at 100-01 (queries supplied):

[A] general disregard for the rules of the system . . . may be so complete in character and so protracted that we should [?] say [?], in the case of a new system, that it had never established itself as the [?] legal system of a given group, or, in the case of a once-established system, that it had ceased to be the [?] legal system of the group. In either case, the normal context or background for making any internal statement in terms of the rules of the system is absent. In such cases it would be generally *pointless* either to assess the rights and duties of particular persons by reference to the primary rules of a system or to assess the validity of any of its rules by reference to its rules of recognition.

Just when and why it would be "generally pointless" is not adequately explained, nor is the *definitional* significance of such a contingent fact about an obviously variable efficacy.

67. H.L.A. HART, *supra* note 52, at 193. See also Hart, *Are There Any Natural Rights?*, 64 PHIL. REV. 185 (1955); Rawls, *Legal Obligation and the Duty of Fair Play*, in LAW AND PHILOSOPHY (S. Hook ed. 1964).

68. See, e.g., R. NOZICK, ANARCHY, STATE AND UTOPIA 90 *et seq.* (1974); cf. Greenawalt, *Promise, Benefit, and Need: Ties That Bind Us to the Law*, 18:4 GA. L. REV. 727, 754-69 (1984).

69. See, e.g., the similar suggestion made in M. ROTHBARD, FOR A NEW LIBERTY 55 (1973). This problem of *underinclusiveness* seems to be just the opposite of the *overinclusiveness* which natural lawyers have found to be a defect of positivism. The classic case of the latter is the positivist claim that the Nazi rule constituted a legal system. See the Hart-Fuller debate, cited *infra* notes 107-08. For a more contemporary version of the anti-positivist criticism, see J. DUGARD, HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER Ch. 11 (1978). How these seemingly contradictory criticisms can be compatible will become evident in the following discussion.

pected to oppose any claim of the relevance of normative concerns to descriptive theory.<sup>70</sup> But in fairness to Kelsen, we must recognize his emphasis upon the importance of the demystification of the state by its identification as a coercive social order, the justice of which is open to question.<sup>71</sup> Conversely, such a motivation might seem inconsistent with one of the fundamental premises of the utilitarian legal positivism exemplified by Austin: the necessity of distinguishing law as it is from law as it ought to be, in order to make possible the moral (utilitarian) criticism of law.<sup>72</sup> Yet these motivations are not necessarily inconsistent: one can understand the desire of utilitarian (and other) critics to have a position from which to pressure the dominant coercive forces in the direction of their proposed reforms without wanting to undermine general obedience to law, including especially that which they are trying to create.<sup>73</sup>

More charitably, perhaps, we could attribute the indicated attempts at definitional fiat to the influence of positivism as a general scientific orientation, one which emphasizes predictivism even with regard to *social* science methodology. Aside from the general influence of science and its methodology on modern social thought, it is worth noting that legal theorists, especially those in the Anglo-American world, are commonly very familiar with and interested in the training and functioning of the legal profession. A considerable amount of effort by many "plain men" and their attorneys goes into trying to predict and control the impact of law on their lives. The focus tends to be upon tactical issues which largely take the panoply of laws as given. There is good reason to question the desirability of such a predominantly instrumentalist conception of legal cognition among the practicing bar,<sup>74</sup> although in some cases it may be an unavoidable, defensive reaction to a significant decline in the perceived justness of the legal system as a whole. When attorneys function in the service of the state there is the even more worrisome tendency to bring the dispassionate, even Machiavellian, service of the client's "interests" to

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70. See D. RICHARDS, *supra* note 21, at 12-14.

71. See *supra* note 43.

72. D. RICHARDS, *supra* note 21, at 14-16.

73. This explanation fits well with Friedrich Hayek's interpretation of legal positivism as a part of, or at least readily embraced by, a broader nineteenth and early twentieth century movement to undermine the "Rule of Law" — i.e., the set of social restraints upon governmental power. These social restraints (which Hayek calls "meta-legal"), once deprived of *legal* authority by the positivists' insistence upon pedigree for a valid law (see *supra* note 29) could be effectively ignored in the effort to launch the Welfare State. See F. HAYEK, *THE CONSTITUTION OF LIBERTY* Ch. 16 (1960). Cf. M. KADISH & S. KADISH, *supra* note 18, Ch. 5.

74. For a good discussion, see L. FULLER, "The Needs of American Legal Philosophy," *supra* note 21, at 249-60.

the tactical design of statutes and legal institutions to achieve the goals of "social policy".<sup>75</sup> And the intensity and insularity of legal education cannot but strongly affect those legal theorists who turn to consider broader questions.<sup>76</sup> The result can be distortion, as exemplified by the legal realist movement.<sup>77</sup>

Hart, we have seen, eschews the behaviorist "extreme external point of view", presumably in favor of a "theoretical" approach which entails a *non-extreme* external point of view.<sup>78</sup> But it is not clear whether he does so in the spirit of those critics of positivism in social science who emphasize the importance of a realist understanding (*Verstehen*) with regard to social phenomena,<sup>79</sup> or whether he does so merely as a recognition of superior *technique* in the construction of social theory within the predictivist/positivist model.<sup>80</sup> In any event, positivist theorists who take prediction (and the associated power of control) as the success criterion for a descriptive or scientific theory of law could harbor the unstated premise that (qualitatively? significantly?) different predictive models are appropriate, useful, efficient, etc., for such social phenomena as criminal gangs, on the one hand, and modern bureaucratic states on the other — the term "law" being applied (for some reason) only to the latter. The premise seems questionable on its face, given the history of such states, but much more could be said on the matter.<sup>81</sup> Suffice it here to say that it is questionable whether superior predictions can be identified as consequences of accepting these positivist views. Certainly, the relevance of such a distinction to practical concerns — aside from the prudential importance

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75. See R. DWORKIN, *supra* note 19, at 2-6. See also Summers, *Professor Fuller's Jurisprudence and America's Dominant Philosophy of Law*, 92 HARV. L. REV. 433, 442-44 (1978), in which Summers discusses the role of social science in the dominant "pragmatic instrumentalism" of American law and contrasts Lon Fuller's views on the matter.

76. The distortions of legal theory which tend to arise from the training of professional advocates and representatives have been noted by H. KANTOROWICZ, *supra* note 12, at 16, and by J. FINNIS, *supra* note 15, at 279-80. It is worth noting, for example, that Holmes's much-criticized predictivist theory of law (*supra* note 54) was presented in a dedication address at a law school and was directed to a professional audience.

77. The so-called "legal realists" were members of a complex school of thought which, in its quest to demystify the law and its judges, is sometimes thought to have amplified the prediction of the behavior of officials into a comprehensive jurisprudence within the positivist tradition. See R. SUMMERS, *INSTRUMENTALISM AND AMERICAN LEGAL THEORY* (1982); for a more sympathetic analysis, see W. TWining, *KARL LLEWELLYN AND THE REALIST MOVEMENT* (1973).

78. See Hill, *supra* note 57, at 54-58, esp. 57 n.45.

79. See, e.g., P. WINCH, *THE IDEA OF A SOCIAL SCIENCE AND ITS RELATION TO PHILOSOPHY* (1958); A.R. LOUCH, *EXPLANATION AND HUMAN ACTION* (1966).

80. See, e.g., R. RUDNER, *PHILOSOPHY OF SOCIAL SCIENCE* 4-5, Ch. 4 (1966). This ambiguity concerning Hart is mirrored in that concerning his analysis of legal obligation. See *supra* note 62.

81. See the works cited *infra* note 145. See also G. POGGI, *THE DEVELOPMENT OF THE MODERN STATE* (1978).

of paying special attention to the behavior of the strongest bully in town — is unestablished. Moreover, the predictivist orientation as the basis of *any* social science needs serious critical attention.<sup>82</sup>

Perhaps the simplest way to avoid the import of the queries developed here would be to accept the positivist's distinctions as nothing more than discretionary exercises in the selection of social phenomena to investigate. Thus, for example, picking coercive orders "by and large effective" would be no more or less defensible than the biologist's picking, say, "particularly large" dogs to study. We would want to know more precisely what the biologist considers "particularly large", but otherwise we would be inclined, in the spirit of free inquiry, to accept the biologist's choice. Yet we would not believe there to be any normative (or other!) significance to the choice — unless, for example, we were in substantial accord with W.C. Fields on the worth of small dogs. Similarly, the positivists may be viewed as saying: we want to study *this kind* of social phenomenon, and we will call it law simply because of the facial similarity to ordinary language usage. But nothing of a prescriptive character then follows — certainly not, for example, any right to rule or obligation (*prima facie* or all things considered) to obey the law.<sup>83</sup> For at this point we have slipped into a pure conventionalism with regard to the specification of scope of inquiry, looking at most to some form of investigational convenience as a criterion of selection.<sup>84</sup>

### B. The Natural Law Tradition

The natural law tradition encompasses a wide range of theories, from the classical theories of the Greek philosophers, to the theologically based theories of the Middle Ages, to the natural rights theories of the Enlightenment, and on to the work of several contemporary

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82. Consider, e.g., H. Marcuse, *Industrialization and Capitalism in the Work of Max Weber*, in NEGATIONS: ESSAYS IN CRITICAL THEORY 223-24 (1968):

Not only the application of technology but technology itself is domination (of nature and men) — methodical, scientific, calculated, calculating control. Specific purposes and interests of domination are not foisted upon technology "subsequently" and from the outside; they enter the very construction of the technical apparatus. Technology is always a historical-social project: in it is projected what a society and its ruling interests intend to do with men and things.

See generally UNDERSTANDING AND SOCIAL INQUIRY (F. Dallmayr & T. McCarthy ed. 1977); R. UNGER, LAW IN MODERN SOCIETY (1976).

83. The extent to which positivists endorse such notions is often difficult to determine. As for Austin, see *supra* note 30, at 126-27; re Hart, see *infra* note 107 and accompanying text. See also J. RAZ, THE AUTHORITY OF LAW, Part IV (1979), and *supra* note 32.

84. Compare the similar treatment of conventionalism in M. GOLDING, PHILOSOPHY OF LAW 8, 18-20 (1975). Note also the differences between such conventionalism and the "conceptual pragmatism" employed here. See *supra* note 12 and accompanying text.



legal philosophers.<sup>85</sup> It is difficult, therefore, to identify a unifying theme. One to which reference is commonly made is the claim that there exist rules or principles for the governance of human affairs which are not of the deliberate making of any human lawgiver. These rules or principles may be found in divine origin or derived from values inherent in the nature of man, but such theories "agree that all positive law derives its validity from some rules that have not in this sense been made by men but which can be 'found' and that these rules provide both the criterion for the justice of positive laws and the ground for men's obedience to it."<sup>86</sup>

In this subsection we will consider the relevant implications of the natural law approach for the specification of the scope of inquiry in jurisprudence. We will take as our sample the theories of Lon Fuller and John Finnis, two modern scholars identified with this tradition who have written extensively on its implications for descriptive legal theory.

### Fuller

Fuller argues for a broadly inclusive concept of law as the "enterprise of subjecting human conduct to the governance of rules."<sup>87</sup> He insists that positivism, by focusing exclusively on the rules which are the product of this process, fails to attend to law as an ongoing *purposive activity*.<sup>88</sup> In the course of making his argument, Fuller is generally more explicit about the methodological issues which we have considered, no doubt partly because of his concern about the underpinnings of positivism as a general philosophical orientation.<sup>89</sup> Thus, Fuller rejects behaviorism (the extreme external point of view) but appears to remain within a basically scientific perspective.<sup>90</sup> For example, he argues for the inclusion within the ambit of law of various human activities, not commonly thought of as legal, but which also exemplify the enterprise of subjecting human conduct to the governance of rules: for example, the development of rules governing the internal affairs of non-state institutions like churches, clubs, and trade

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85. See generally A.P. D'ENTREVES, *NATURAL LAW* (1951).

86. F. HAYEK, *supra* note 73, at 237.

87. L. FULLER, *THE MORALITY OF LAW* 96 (rev. ed. 1969).

88. *Id.* Ch. 5, e.g., at 193.

89. *Id.* at 241-42. In particular, Fuller compares his enterprise theory of law with the theorizing of philosophers and sociologists of science, suggesting that the best way to look at law or science is as an activity. *Id.* at 118-22.

90. *Id.* at 18n, 141, 145-51, 162-67. These passages suggest that Fuller would be appropriately considered within the *Verstehen* tradition of social science methodology. See *infra* notes 79-82 and accompanying text.

associations. His defense of this inclusion primarily consists of arguing that:

... a sociologist or philosopher interested primarily in the law of the state, might study the rules, institutions, and problems of this body of parietal law for the insight he might thus obtain into the processes of law generally.<sup>91</sup>

It is, then, precisely because the law is a purposeful enterprise that it displays structural constancies which the legal theorist can discover and treat as uniformities in the factually given.<sup>92</sup>

In so arguing, Fuller explicitly displays a healthy refusal to worship at the idol of ordinary language.<sup>93</sup> Moreover, he provides us with a connection, of the sort called for in this paper, between the normative concerns of the investigator and the criteria of success of the investigation. Namely, Fuller posits the undeniably legitimate purpose of developing a jurisprudence to "analyze the fundamental problems that must be solved in creating and administering a system of legal rules."<sup>94</sup> This purpose is the organizing principle behind Fuller's "internal morality of law" — the set of normative principles which can be discovered as implicit in, and thereby limiting the effective use of, the different forms of social ordering, such as legislation, adjudication, contract, and elections.<sup>95</sup>

We may now inquire why this limited normative concern, which his critics have attacked as a concern for mere efficacy,<sup>96</sup> should exhaust the quest for the proper scope of inquiry. As Fuller is prompt to point out, "the purpose [he has] attributed to the institution of law is a modest and sober one, that of subjecting human conduct to the guidance and control of general rules."<sup>97</sup> Assuming, however, that such modesty with regard to a generic institutional purpose of law is appropriate, there is no reason to translate this limitation directly to the study of law. In that context, the more general purpose includes, to paraphrase, the "analysis of fundamental problems that must be solved in creating and administering a just system of legal rules". That in turn requires us (also) to focus attention upon the substantive aims of legal rules and the coercive sanctions which are typically associated with them.

91. L. FULLER, *supra* note 87, at 125.

92. *Id.* at 151.

93. *Id.* at 122, 129, 195-96, 199, 207.

94. *Id.* at 122.

95. *Id.* Ch. II. See also L. FULLER, *THE PRINCIPLES OF SOCIAL ORDER* (K. Winston ed. 1981).

96. L. FULLER *supra* note 87, at 200 *et seq.*

97. *Id.* at 146.

This step Fuller refuses to take.<sup>98</sup> He rejects coercion as "a distinguishing mark" of law.<sup>99</sup> If this rejection were taken simply to be a denial of the *necessity* of coercion as a component of any phenomenon upon which jurisprudence is to focus, one could easily agree, in view of Fuller's legitimate concern for the comparative study of institutions whose rules are not backed by (direct) coercive sanctions. But Fuller's argument appears to be much stronger, for he denies that the presence of such coercion is *sufficient* to bring the matter within the scope of inquiry. This aspect of Fuller's approach is strikingly incongruous with his expressed interest in comparative study. If there is a moral and empirical continuity worthy of study between the social processes of a rule-governed church organization and those of the law of the state, why is there not a similar continuity — resulting in a similarly broad inclusiveness — between reasonably just law of the state and acts of confiscation behind the facade of "published rules and robed judges"?<sup>100</sup>

Fuller's apparent response to this question is not convincing. He observes factors which quite reasonably suggest an identification of law with the use of coercion, but argues that these factors fall short of a justification for such identification:

In the first place, given the facts of human nature, it is perfectly obvious that a system of legal rules may lose its efficacy if it permits itself to be challenged by lawless violence. Sometimes violence can only be restrained by violence. Hence it is quite predictable that there must normally be in society some mechanism ready to apply force in support of law in case it is needed. But this in no sense justifies treating the use or potential use of force as the identifying characteristic of law. Modern science depends heavily upon the use of measuring and testing apparatus; without such apparatus it could not have achieved what it has. But no one would conclude on this account that science should be defined as the use of apparatus for measuring and testing. So it is with law. What law must foreseeably do to achieve its aims is something quite different from law itself.<sup>101</sup>

But could not the same argument be made about all manner of purposive human activity which could not possibly be within our scope of inquiry? Could artistry be efficacious if it "permits" itself to be challenged by "lawless" violence? Is it not then predictable that there

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98. What Fuller *does* do is to explore the ways in which the normative principles inherent in the forms of legal ordering constrain the substantive aims attainable through law. *E.g.*, *id.* Ch. IV.

99. *Id.* at 108.

100. Paraphrasing from *id.* at 109.

101. *Id.* at 108.

must normally be in society some mechanism ready to apply force in support of artistry? Yet it is law, not artistry, which provides this mechanism.<sup>102</sup>

There is, thus, a peculiar tendency in Fuller's work to focus on the noble ideal of law and to ignore its coercive reality. It is as if the latter side of law were shunted aside to avoid contaminating the former.<sup>103</sup> Indeed, this is manifest in the argument with which Fuller continues:

Let us test this identification with a hypothetical case. A nation admits foreign traders within its borders only on condition that they deposit a substantial sum of money in the national bank guaranteeing their observance of a body of law specially applicable to their activities. This body of law is administered with integrity and, in case of dispute, is interpreted and applied by special courts. If an infraction is established the state pursuant to court order levies a fine in the form of a deduction from the trader's deposit. No force, but a mere bookkeeping operation, is required to accomplish this deduction; no force is available to the trader that could prevent it. Surely it would be perverse to deny the term "law" to such a system merely because it had no occasion to use force or the threat of force to effectuate its requirements.<sup>104</sup>

This rather bizarre failure to recognize the significance of the coercion directly employed in conditioning the foreign trader's ability to come within the national boundaries on the deposit — i.e. threatening coercive acts in the event the foreigner attempts to trade without making it<sup>105</sup> — confirms that Fuller has a separate normative criterion of suc-

102. Compare Roberto Unger's remark, drawing on the work of Talcott Parsons:

Many things besides law may fit into the category of normative order; for example, a society's religion and art. To the extent that law can be differentiated from these other aspects of normative order, it is distinguished by its primary emphasis on externally observable behavior and on the use of secular sanctions to penalize or redress deviant conduct.

R. UNGER, *supra* note 82, at 57. My point here is not to deny that reflections on the purpose of institutions can sometimes be used to isolate an "essence" thereof, but rather to point out that in the analytical process of that isolation for legal institutions, the instrumentality of coercion is a defining consideration. Any "essence" of law, if one *can* be identified, must focus upon the problems of coercive interaction among people.

103. Consider L. FULLER, *supra* note 87, at 156:

We [colonial Americans] were fortunate that we had learned from our British teachers something of the need for law and for preserving its integrity and force. Much of the world today yearns for justice without having undergone a similar tutelage. There was never a time that could reveal more plainly the vacuity of the view that law simply expresses a datum of legitimated social power. Nor was there ever a time when it was more dangerous to take that view seriously.

104. *Id.* at 109.

105. It should be clear that Fuller's argument and the present criticism thereof are distinct from controversies concerning the *individuation* of laws, i.e. the determination of which and how much legal material makes up *one* law. See J. RAZ, *THE CONCEPT OF A LEGAL SYSTEM* Ch. IV (1980).

cess in specifying his notion of law. This criterion does not appear on the face of the formula, "the enterprise of subjecting human conduct to the governance of rules", nor in an untortured interpretation of his underlying normative concern about the fundamental problems that must be solved in creating and administering a system of rules.<sup>106</sup>

In fact, there is an underlying requirement that the notion of law entail a moral obligation of fidelity thereto, an obligation which Fuller takes as axiomatic. It is this requirement which leads Fuller to balk at the inclusion of the gunman within the domain of legal phenomena. And it is striking that Fuller, so at odds with the positivists for their more subtle attempts, nevertheless similarly attempts to delimit the scope of inquiry by a kind of definitional fiat. Fuller's logic in this regard can be most easily seen in his earlier debate with Hart in the *Harvard Law Review*. There, Fuller observes that Hart, while denying any necessary connection between law as it is and law as it ought to be, nevertheless accepts the *prima facie* moral duty of "fidelity" to law.<sup>107</sup> Fuller's reaction to this oddity is to assert the necessary connection rather than to give up the obligation.<sup>108</sup> While that is a conceivable remedy for the inconsistency apparent in Hart's position, it is obviously not the only one.<sup>109</sup> Fuller argues as though it were.

We may suggest a resolution of this conflict which, though it might not be entirely to Fuller's liking, is nonetheless a happy one. It is based once more upon the distinction between definition and theory, or, as we have developed it here, between the scope of the inquiry and the theoretical formulations therein. We may take Fuller's liberalizing extensions to be related to scope of inquiry, and his delimitations as related to his theoretical formulation based upon aspirations toward an "ideal" form. If one takes such an approach, Fuller's rejection of coercive interaction as a type of legal phenomenon falls away. Moreover, within the domain of inquiry legal phenomena may more easily be understood as manifesting the variable "legality" (internal morality) which Fuller emphasizes.<sup>110</sup> Of course, that does not eliminate the

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106. Fuller characterizes this "procedural" natural law as an elaboration of seventeenth century English law of due process, distinguishing its concerns from issues of substantive justice. L. FULLER, *supra* note 87, at 96 *et seq.*

107. See Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958). This is a problem which has afflicted legal positivists generally. See SOCIETY, LAW AND MORALITY 435-37 (F. Olafson ed. 1961). It should be noted that Hart's position on this matter *seems* to have changed. See Lyons, *supra* note 1, at 730-33.

108. Fuller, *Positivism and Fidelity to Law — A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

109. See Hill's resolution of Hart's confusions, *supra* note 57.

110. L. FULLER, *supra* note 87, at 122-23, 198-200. Such variable legality can be important in a variety of ways, not the least of which is as a component of the determination of the existence of an obligation to obey a given rule of law. There is no reason to *identify* such a determination with the

fundamental difference of opinion between him and the positivists at the level of theory construction.<sup>111</sup> Perhaps the extent to which those persons taking an internal point of view have or ought to have a positivist view of law or the non-positivist view of law which Fuller instantiates is itself a matter for empirical and normative inquiry into the emergence and decay of two (perhaps among many) ideal types, in this case types of legal ideologies.<sup>112</sup> If so, we may take Fuller's argument as one to the effect that his view of law is a superior working conception, especially for those with the internal point of view, because of the attention it focuses upon certain aspirational ideals.<sup>113</sup>

Before leaving our discussion of Fuller, and notwithstanding the reconciliatory suggestions just made, it will be helpful to illustrate how Fuller's minimization of the significance of coercion leads to analytical peculiarities suggestive of the decisional program criticized in the introduction of this paper.<sup>114</sup> In discussing the relation of morality and law, Fuller considers the example of gambling, indicating the mode of analysis that a "hypothetical moral legislator" would employ in deciding whether or not gambling should be condemned as immoral, in the sense of its constituting a breach of a moral duty.<sup>115</sup> After developing this analytical approach, involving primarily considerations of the harmfulness of gambling to oneself and others, Fuller continues:

How is such a moral judgment related to the question of whether gambling ought to be prohibited by law? The answer is, very directly. Our hypothetical legislator of morals could shift his role to that of lawmaker without any drastic change in his methods of judgment. As a lawmaker he will face certain questions that as a moralist he could conveniently leave to casuistry. He will have to decide what to do about games of skill or games in which the outcome is determined partly by skill and partly by chance. As a statutory draftsman he will confront the difficulty of distinguishing between gambling for small stakes as an innocent amusement and

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determination of whether "law" or "legal system" exists, although Fuller occasionally seems to be suggesting identity. See, e.g., *id.* at 39-41. Also, in making his arguments that substantial failure along some of the dimensions of internal morality can result in no law at all, Fuller identifies "law" and "legal system" and conflates the existence of an enterprise to make rules with the rules which the enterprise is attempting to make. *Id.* at 41, 122, 197-200. Perhaps it is more reasonable to reserve the concept of "legal system" to refer to a *successful* enterprise, though there would be serious problems in identifying the criteria of "success" in this context, as the preceding discussion of positivist views has demonstrated.

111. See Fuller's discussion of the "ideal types" constituted by the positivist "managerial theory of law" and his own "intendments" or "reciprocity" theory of law. *Id.* at 207 *et seq.*

112. See Nonet, *The Legitimation of Purposive Decisions*, 68 CALIF. L. REV. 263 (1980).

113. Fuller's arguments often suggest such an interpretation. See, e.g., Fuller, *supra* note 108, at 631-32, 637.

114. See *supra* notes 5-6 and accompanying text.

115. L. FULLER, *supra* note 87, at 5-9.

gambling in its more desperate and harmful forms. If no formula comes readily to hand for this purpose, he may be tempted to draft his statute so as to include every kind of gambling, leaving it to the prosecutor to distinguish the innocent from the truly harmful. Before embracing this expedient, often described euphemistically as "selective enforcement," our moralist turned lawmaker will have to reflect on the dangerous consequences that would attend a widened application of that principle, already a pervasive part of the actual machinery of law enforcement. Many other considerations of this nature he would have to take into account in drafting and proposing his statute. But at no point would there be any sharp break with the methods he followed in deciding whether to condemn gambling as immoral.<sup>116</sup>

What is peculiar about this passage is that there is no clue as to why the hypothetical lawmaker must face these "certain questions" which the moralist could avoid. It seems clear that the coercive sanction is the source of the additional concern, but it is hard to find this in Fuller's explanation.<sup>117</sup> On the whole, Fuller suggests no serious discontinuity between the "legislative" considerations of (non-legal) moral duty and those of legal duty. This can easily be associated with a view that any act constituting a breach of a moral duty is appropriately proscribed by law, aside from certain, seemingly incidental matters ("casuistry") concerning the fair administration of the proscription.<sup>118</sup>

### *Finnis*

The final theorist to be considered is John Finnis, who has attempted to revitalize and improve the classical natural law of Aristotle

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116. *Id.* at 7-8.

117. One might be tempted to say that there are obvious considerations of constitutional law, or its analogues in the jurisprudence of non-constitutional states, which constrain the lawmaker differentially. But that, of course, only pushes the inquiry back a step, requiring us to explain the reason(s) for the constitutional concerns.

118. In fairness to Fuller, it should be pointed out that another part of his theory illustrates his concern about moralistic authoritarianism and provides something of a barrier thereto. Indeed, the main thrust of the gambling example is to illustrate the difference between "the morality of aspiration" (based upon the effort to live fully and well) and "the morality of duty" (based upon the effort to limit one's actions in the minimal ways necessary for communal life). For Fuller, the former bears a close affinity to the substantive aims of law, the latter to the "internal morality of law". L. FULLER, *supra* note 87, Chs. I-II. If Fuller's only point is that the moral considerations concerning the substantive aims of law are properly much more like those of the morality of duty than those of the morality of aspiration, then perhaps the present criticism is misdirected. Moreover, since Fuller deplores much of the moral escalation by which moral aspirations become moral duties (*id.* at 10), it is clear that his general inclination is to keep the category of moral duties relatively small and thereby restrict the category of candidates for the duties of citizens under substantive law. See also *id.* at 132-33, Ch. IV; Fuller, *Two Principles of Human Association*, in *THE PRINCIPLES OF SOCIAL ORDER*, *supra* note 21, at 67.

and Aquinas.<sup>119</sup> Finnis displays a highly developed appreciation of the interaction of normative theory and descriptive theory. Although there are serious points of disagreement between Finnis and the present author on the requirements of "practical reasonableness" (the foundation of natural law), Finnis's approach to the relevance of such a normative theory to descriptive theory is in substantial accord with that employed here. As we shall see, however, Finnis does not take his approach quite far enough, at least not explicitly.

In reviewing the trend of jurisprudence in this area, Finnis recognizes the progressively greater incorporation of attention to the practical point of legal institutions into the theoretical constructs of modern jurists, including in particular Austin, Kelsen, Hart, and Fuller.<sup>120</sup> He explains this natural impetus by way of a general principle, drawn from Aristotle and Weber, for descriptive analysis of social phenomena: description can best proceed by way of comparison of extant legal practices, conceptions, and institutions with the "central case" (or "focal meaning") thereof, i.e. the legal conceptions and institutions hypothetically developed by the exercise of practical reasonableness.<sup>121</sup> His definition of law,<sup>122</sup> evolving over several chapters of his book, constitutes what he claims to be such a central case, "not as an approximation of the term 'law' in a univocal sense that would exclude from the reference of the term anything that failed to have all the characteristics (and to their full extent) as the central case."<sup>123</sup> Contrasts with this central case are not properly employed "to banish the other noncen-

119. See J. FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980).

120. *Id.* § I.2. It should be remembered that the term "practical" is used by Finnis, as by the present author, in the sense of "with a view to decision and action", not in the sense of "workable" or "efficient". *Id.* at 12.

121. *Id.* at §§ I.3-I.4. For reasons which are not entirely clear, Finnis restricts the viewpoint from which to hypothetically elaborate his conception to that "in which legal obligation is treated as at least presumptively a moral obligation". *Id.* at 14. This restriction may be unnecessary. See Beyleveld & Brownsword, *supra* note 59, at 115-17.

122. The full characterization is as follows:

[T]he term 'law' has been used with a focal meaning so as to refer primarily to rules made, in accordance with regulative legal rules, by a determinate and effective authority (itself identified and, standardly, constituted as an institution by legal rules) for a 'complete' community, and buttressed by sanctions in accordance with the rule-guided stipulations of adjudicative institutions, this ensemble of rules and institutions being directed to reasonably resolving any of the community's co-ordination problems (and to ratifying, tolerating, regulating, or overriding co-ordination solutions from any other institutions or sources of norms) for the common good of that community, according to a manner and form itself adapted to that common good by features of specificity, minimization of arbitrariness, and maintenance of a quality of reciprocity between the subjects of the law both amongst themselves and in their relations with the lawful authorities.

J. FINNIS, *supra* note 119, at 276-77. As already mentioned, I have some serious problems with the details of this characterization, in particular as to the supposedly rational nature of the need for "complete community". See *id.* § VI.6. Discussion of these problems must await another occasion.

123. *Id.* at 277.



tral cases to some other discipline."<sup>124</sup> Finnis explains:

There is thus a movement to and fro between, on the one hand, assessments of human good and of its practical requirements, and on the other hand, explanatory descriptions (using all appropriate historical, experimental, and statistical techniques to trace all relevant causal interrelationships) of the human context in which human well-being is variously realized and variously ruined. . . . There is thus a mutual though not quite symmetrical interdependence between the project of describing human affairs by way of theory and the project of evaluating human options with a view, at least remotely, to acting reasonably and well. The evaluations are in no way deduced from the descriptions; but one whose knowledge of the facts of the human situation is very limited is unlikely to judge well in discerning the practical implications of the basic values. Equally, the descriptions are not deduced from the evaluations; but without the evaluations one cannot determine what descriptions are really illuminating and significant.<sup>125</sup>

Indeed, unless some such normative theory is developed, Finnis argues:

analytical jurisprudence in particular and (at least the major part of) all the social sciences in general can have no critically justified criteria for the formation of general concepts, and must be content to be no more than manifestations of the various concepts peculiar to particular peoples and/or to the particular theorists who concern themselves with those people.<sup>126</sup>

This much seems reasonable and is at least consistent with the approach taken here.<sup>127</sup> Moreover, it purports to resolve the tension between Fuller and the positivists which we left incompletely resolved in our earlier discussion.<sup>128</sup> Finnis here seems to argue — rather convincingly — that practically relevant, and hence adequate, descriptive theory construction must proceed in conjunction with an increasingly refined elaboration of the ideal manifestation of law, precisely in the sense that the better one's development of such an ideal conception of law, the more informative can be one's description of existing legal

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124. *Id.* at 278.

125. *Id.* at 17, 19.

126. *Id.* at 18.

127. Finnis's argument is not without its ambiguities. His reliance upon Weber, in particular, is confusing in that Weber held that his "ideal type", though formed inevitably under the influence of a theorist's perceptions of importance, does not entail a moral judgment that it is *normatively* ideal. See Gavison, *Natural Law, Positivism, and the Limits of Jurisprudence: A Modern Round* (Book Review), 191 YALE L.J. 1250, 1264-70 (1982).

128. See *supra* text accompanying notes 111-13.

systems.<sup>129</sup>

Nevertheless, at least one crucial modification is necessary. It must at some point be specified for which social phenomena one is developing a central case to use as a standard for comparison. One needs, in other words, a specification of the scope of inquiry. The argument presented here is that this specification should be based not simply upon the unfocused usages of ordinary language but upon a more critical reflection. It is itself a matter for the resonant "movement to and fro" of normative and descriptive theory. Finnis has little to say about this, but he does recognize the "main features" of a legal order out of which to construct the focal meaning:

So it is that legal order has two broad characteristics, two characteristic modes of operation, two poles about which jurisprudence and 'definitions of law' tend to cluster. They are exemplified by the contrast between Weber's formal definition of law and his extensive employment of the term 'legal'; and they can be summed up in two slogans: 'law is a coercive order' and 'the law regulates its own creation'.<sup>130</sup>

Thus Finnis appears to take a very liberally inclusive domain within which one can examine particular social phenomena "without ignoring or banishing to another discipline the undeveloped, primitive, corrupt, deviant, or other 'qualified sense' or 'extended sense' instances of the subject matter."<sup>131</sup> Indeed, Finnis accepts the intelligibility and usefulness of speaking of the law of a "gang",<sup>132</sup> although there is little to suggest that Finnis would be willing to extend that usage to include the interaction of the "gang" with outsiders.<sup>133</sup>

Had Finnis examined this matter more extensively, perhaps he would not have played down the significance of coercion as much as

129. The point was presaged by Fuller, at least with regard to the various *forms* of social ordering characteristic of law. See Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 357 (1978). Contrary to at least one of Finnis's critics on this point, he does not claim that one cannot (logically) have any conception of law or legal systems which is not proffered as a normatively (morally) ideal conception. Cf. Gavison, *supra* note 127.

130. J. FINNIS, *supra* note 119, at 270.

131. *Id.* at 11.

132. *Id.* at 148. It has been known for some time, for example, that:

[I]n the Mafia and Camorra, rules are adopted and orders are issued; there are regular ways of hearing charges of violation and rendering judgments, as by the Grand Council of the Camorra of Naples, followed by the action of previously designated personnel imposing very severe physical sanctions, including death, razor slashes across the face, severe beatings, and the like, sometimes with the approval and support of the community.

J. HALL, *supra* note 2, at 110 (citations omitted).

133. It is worth mentioning, for example, that Peter Reuter has studied the mafia as a service agency for the resolution of disputes *between outsiders* arising from transactions in "illegal" markets. Informal talk, Center for the Study of Law and Society, U.C. Berkeley (October 3, 1980).

he does. This section concludes with an (unavoidably lengthy) example which serves to illustrate how Finnis seems to fall into a potentially authoritarian strain of jurisprudence, manifesting the kind of flawed decisional process described in the introduction to this paper.<sup>134</sup> In his interesting discussion of the concepts of justice, Finnis rightly criticizes a certain miscategorization (based upon a sixteenth century misreading of Aquinas by Cajetan) of the types of justice, which leads to the erroneous conclusion that "distributive" justice pertains only to relations of the state to its citizens, whereas "commutative" justice pertains only to relations among the citizens.<sup>135</sup> The error is seen by recognizing that there are issues of distributive justice in the relationships among citizens, and that there are commutative justice issues in the relationship of the state to the citizen. Though this point is fairly obvious, Finnis argues that missing it continues to be a common part of modern thinking. As confirmation of this claim, Finnis cites Robert Nozick's arguments in favor of an "entitlement" theory of justice in holdings and the argument against redistributive taxation that is derived therefrom.<sup>136</sup>

Nozick's principle of justice in holdings is that holdings are just which are justly acquired from an unowned state or justly received from someone else who held them justly. Moreover, the only justification for taking such just holdings from someone to give to another arises under a principle of "rectification" for a (sufficiently serious) wrong done to the recipient by the person being taken from, with appropriate accounting for wrongs done between predecessors. Finnis criticizes this theory as manifesting the previously described erroneous view, in particular the view that relations between citizens invoke only commutative justice concerns.<sup>137</sup> There are several things wrong with Finnis's criticism.<sup>138</sup> Most importantly, for our purposes, Nozick fre-

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134. See *supra* text accompanying note 5.

135. J. FINNIS, *supra* note 119, § VII.6. Actually, the criticized view has a third dimension, not relevant to the present discussion: "legal justice" concerns the relationship of the citizen to the state and "is little more than the citizen's duty of allegiance to the State and its laws." *Id.* at 186. For readers unfamiliar with the distinction between commutative and distributive justice, Finnis provides a good discussion. *Id.* §§ VII.3-VII.7.

136. See R. NOZICK, *supra* note 68, Ch. 7.

137. J. FINNIS, *supra* note 119, at 186-88.

138. A point not directly germane to the present discussion but obvious enough to be mentioned is that Nozick clearly does not endorse the view that Finnis apparently attributes to him, for Nozick explicitly indicates a role, albeit a subsidiary one, for the principles of distributive justice in dealing with special problems of rectification — namely, situations in which the principle of rectification unaided by such distributive principles yields a non-unique prescription. See R. NOZICK, *supra* note 68, at 153n. Strikingly, Finnis ignores this caveat in exactly the kind of situation to which presumably it was directed — the case of multiple creditors of an insolvent debtor. See J. FINNIS, *supra* note 119, § VII.7. Conversely, outside the context of wealth transfers, Nozick's arguments emphasize the "moral side-constraints" which limit the legitimate actions of everyone, including the state (R. NOZICK, *supra* note

quently reminds the reader that justice in terms of what may be required of someone under threat of coercion is distinct from justice in terms of what one ought *voluntarily* to do; his entire book is concerned with the limitations upon the use of coercion as a means to various ends.<sup>139</sup> So it is hard to imagine Nozick denying that relations between citizens may indeed invoke distributive justice concerns. Yet, according to Nozick, such concerns do not figure directly in the justification of *coercive* transfers of just holdings, *not* because such concerns are unthinkable in this context, but primarily because if they were employed in this context, it would amount to a kind of enforced servitude.<sup>140</sup>

With these points in mind, consider the continuation of Finnis's criticism:

[T]he plausibility of . . . [Nozick's] argument comes entirely from its focus on the coercive nature of the State's intervention as the agent of (re)distributive justice. Suppose we abandon this perspective. That is to say: leave the State out of consideration for a moment, and ask instead whether a private property-holder has duties of (re)distributive justice. (The question is strictly inconceivable in the post-Cajetan tradition.) Then we will find that Nozick has little indeed to say in favour of his assumption that what one has justly acquired one can justly hold without regard for the needs, deserts, or other claims of others (except such claims as one has actually created, e.g. by contract, which one has a duty to satisfy in what I, not Nozick, would call commutative justice). If we see no reason to adopt his assumption that the goods of the earth can reasonably be appropriated by a few to the substantial exclusion of all others, and if we prefer instead the principle that they are to be treated by all as for the benefit of all according to the criteria of distributive justice though partly through the mediation of private

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68, Part I, esp. Ch. 3); the obvious commutative justice concerns involved here belie the claim that Nozick adheres to a view giving no scope to such concerns in relations of the state to the citizen. Beyond these points, I will avoid excessive digression by simply stating, without defense, that Finnis misunderstands Nozick's claim that "things" come into the world already attached to people having entitlements over them, so that both "distribution" and "redistribution" are misleading paradigms to invoke in describing the state's activities in the large scale transfer of wealth. See J. FINNIS, *supra* note 119, at 187, esp. n.30. Moreover, Finnis's discussion fails to appreciate the significance of Nozick's endorsement of a "Lockean proviso" limiting acquisitions. See R. NOZICK, *supra* note 68, at 174-82.

139. Nozick writes in his Preface: "Two noteworthy implications are that the state may not use its coercive apparatus for the purpose of getting some citizens to aid others, . . . [O]nly coercive routes toward these goals are excluded while voluntary ones remain . . . ." R. NOZICK, *supra* note 68, at ix. And at the beginning of his discussion of "distributive" justice, he adds: "a principle of justice in holdings describes (*part of*) what justice tells us (requires) about holdings." *Id.* at 150 (emphasis supplied).

140. *Id.* at 167-74. Finnis explicitly recognizes this as the main thrust of Nozick's argument. J. FINNIS, *supra* note 119, at 186.

holdings, then the question of State coercion, which dominated Nozick's argument, becomes in principle of very secondary importance. For in establishing a scheme of redistributive taxation, etc., the State need be doing no more than crystallize and enforce duties that the property-holder *already* had. Coercion, then, comes into play only in the event of recalcitrance that is wrongful not only in law but also in justice.<sup>141</sup>

In view of Finnis's claim about conceptual confusion, he must be doing more here than simply disagreeing with Nozick's opinions about distributional equity. It seems that Finnis is straightforwardly arguing that a moral obligation, at least if falling within the rubric of justice, is *ipso facto* an obligation which may properly be backed by coercive sanctions, such sanctions being "of very secondary importance." In so doing, it is clear that it is Finnis, not Nozick, who has stumbled as the result of a conceptual confusion. For even if one assumes that under appropriate circumstances a just (according to Nozick's principles of just acquisition and transfer) holder of entitlements has a moral duty (in justice) to distribute holdings to others, it does not follow (without more) that it is permissible to coerce him into making such a distribution.<sup>142</sup> At the very least, Finnis's criticism presupposes an unspecified resolution of the long-standing controversy about the enforcement of morality.<sup>143</sup>

### III. SOME ELABORATION OF THE THESIS AND POTENTIAL OBJECTIONS

In the theories discussed in the preceding section, one witnesses two countervailing tendencies. On the one hand there is the inclination, well explained by Finnis, to narrow the concept of law by progressively incorporating more of the "practical point" of proper legal enterprise into the very articulation of the nature of law. On the other hand there is the tendency, reflected variously in the works of the writ-

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141. J. FINNIS, *supra* note 119, at 187.

142. I take it to be uncontroversial, or at least not controverted by Finnis, that while justice is not coextensive with morality, justice is also not coextensive with the morality of law. That is, there are moral concerns relevant to law which are not matters of justice, and there are justice concerns in many non-legal matters. See H.L.A. HART, *supra* note 52, at 153-63; cf. J. FINNIS, *supra* note 119, § VII.1. Thus, Finnis's conclusion is not *analytically* true by virtue of the meaning of 'justice'.

143. See, e.g., J. FEINBERG, *supra* note 22, Chs. 2-3. The "something more" might be entailed in Finnis's peculiar reference in the quoted passage to the recalcitrance being "wrongful . . . in law", but if so there is much more to be said than Finnis does here. It should also be clear that the foregoing criticism of Finnis, and *pro tanto* defense of Nozick, does not presume that Nozick's theory of justice in holdings is correct, though in fact I believe it largely to be. Finally, it has *not* been my purpose to argue that Finnis's conception of law *logically requires* the mistaken criticism of Nozick; just as Finnis was trying to show (in Nozick) the continuing influence of a sixteenth century mistake, I have tried to show (in Finnis) the continuing influence of a twentieth century mistake, a mistake of emphasis.

ers discussed, to open up the conception to comparative study which does not limit the connections to be developed or prejudge important practical issues. The present essay attempts to resolve this tension by accepting that these theorists have actually been pursuing two distinguishable but interrelated goals: that of specifying the scope of legal inquiry — the “province of jurisprudence”, in Austin’s terms — and that of developing, within such “province”, more elaborated theories of law which can be useful in the analysis of the practical issues of concern to the theorist.<sup>144</sup>

By focusing upon the former goal, the attainment of which is analytically prior to the attainment of the second, it has been argued that coercion is indeed as important as the early positivists seemed to suggest, though not perhaps in exactly the way they suggested. We have observed the evolution of modern jurisprudential thought to a point where the imposition of rules by a robber gang is accepted, at least by some theorists, as an instance of legal phenomena. This reflects a subtle forward stride in the process of unmasking putatively authoritative, but undeniably coercive, actions by the state.<sup>145</sup> Speculative legal thought, whether descriptive or prescriptive, must indeed take more seriously the *normative* question of the distinguishability of the gunman and the taxman as those persons are encountered in reality. We must, even if only as a tentative analytical device, look upon the emperor without the clothes of “authority”.<sup>146</sup> Accordingly, legal theory should map out a domain of inquiry which properly reflects the quintessential normative questions for legal philosophy, including in particular the justification of coercion<sup>147</sup> and of responses thereto.<sup>148</sup> It should be clear, then, that a much closer connection must be stressed

144. See *supra* note 18. It is, of course, plausible to use the term “definition” to refer to either of these two goals; one can, for example, point out that elaborated descriptive or prescriptive theories attempt to “gain definition” with respect to law.

145. This revision process has a long and distinguished history. See, e.g., A. SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* (1976) (first published in 1776); F. BASTIAT, *SELECTED ESSAYS ON POLITICAL ECONOMY* (1964) (first published between 1845 and 1850); A. HERBERT, *THE RIGHT AND WRONG OF COMPULSION BY THE STATE* (1976) (first published between 1880 and 1908); A. NEW HISTORY OF LEVIATHAN (R. Radosh & M. Rothbard ed. 1972); F.A. HAYEK, *LAW, LEGISLATION AND LIBERTY* (Vol. 1 1973) (Vol. 2 1976) (Vol. 3 1979) (containing voluminous bibliographical notes). It has already been noted that Kelsen should be viewed in this light. See *supra* note 43.

146. See, e.g., Nisbet, *Cloaking the State's Dagger*, *REASON*, October, 1984, at 42, an adaptation from the forthcoming *FAIR OF SPEECH: THE USES OF EUPHEMISM*, (D.J. Enright ed., Oxford U. Press).

147. See generally J. FEINBERG, *supra* note 22. On the right to rule, see the articles by Ladenson and Raz, *supra* note 32, and R. NOZICK, *supra* note 68. Of course, one descriptive element within the normative inquiry, which would be central in the view of descriptive legal theory presented here, is the matter of the effectiveness of coercive sanctions in establishing conduct in conformity with rules. See, e.g., M. ROTHBARD, *POWER AND MARKET: GOVERNMENT AND THE ECONOMY* (1970); C. STONE,

between legal theory and political theory than has been generally recognized in modern legal philosophy.<sup>149</sup>

It may be objected, however, that I have misconstrued the controversy surrounding the question, "What is law?" The main methodological thesis presented here focuses upon the *sufficiency* of coercion to place the interaction in question within the domain of inquiry. But many have taken the question to call for a specification of the "essential qualities" of law, or the *necessary* features of law. Indeed, it would seem that the criticism directed in this paper at legal decision-making programs which do not keep firmly in mind the coercive reality of the decision to be made presupposes that coercion is a necessary feature of law, if not of particular laws.<sup>150</sup> Moreover, several theorists have developed arguments demonstrating that social phenomena which lack coercion, yet ought to be considered law, can be hypothetically identified by focusing upon the needs of a society of angels. The general argument is that, even though sanctions would not be necessary to assure compliance in such a society, nevertheless basic coordination problems would still exist, due to honest differences of opinion, which would generate the practical need for authoritative resolutions sufficiently "legal" in character to be appropriately called law. Consequently, it is argued, coercion is not a conceptually (analytically) necessary feature either of law or a legal system, though it may be a naturally (pragmatically) necessary feature under any set of conditions mere mortals are likely to encounter.<sup>151</sup> This is an important point, according to Professor Oberdiek, because we may come to see

that coercion and sanctions are over-used techniques for insuring compliance and that they may be largely replaced by promotional techniques. We can . . . say now, on conceptual grounds, that law

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WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOR (1975); J. KAPLAN, *THE HARDEST DRUG: HEROIN AND PUBLIC POLICY* (1983).

148. See, e.g., Symposium, *The Duty to Obey the Law*, 18:4 GA. L. REV. (1984); M. ROTHBARD, *THE ETHICS OF LIBERTY* (1982), esp. Chs. 12, 24. For an interesting analysis of the significance of such questions for descriptive legal theory, see M. KADISH & S. KADISH, *supra* note 18, esp. Ch. 5.

149. A noteworthy recent publication is generally responsive to the call made in this paper. Philip Soper's *A THEORY OF LAW* (1984) seems to carry the argument made here beyond the stage of determining the scope of inquiry to elaborating a theory (which unfortunately he calls a "definition"; see *supra* note 144 and accompanying text) of law which also attempts to draw lines of normative relevance. In doing so, Soper criticizes the modern positivists and natural lawyers on grounds similar at many points to those presented here. He also demonstrates the necessity of integrating legal and political theory by focusing upon the practical issues of the citizen's and the official's choices of what to do. The relative newness and depth of this work has precluded major treatment of its constructive component here. For a critical review, see Raz, *The Morality of Obedience*, 83 MICH. L. REV. 732 (1985).

150. See *supra* text accompanying note 5.

151. See, e.g., Oberdiek, *supra* note 23, at 71; J. RAZ, *supra* note 3, at 158-60; J. FINNIS, *supra* note 119, Chs. IX-X, esp. 260-61.

is not necessarily coercive, and we help establish systems in the future which are noncoercive *in fact*.<sup>152</sup>

Replying to these objections will allow us to complete the definitional structure for legal theory proposed here. First, it has been recognized for some time that "[i]t may well be the case that there is *no* essence of a legal system in the sense of a single set of individually necessary and jointly sufficient conditions for the truth of 'A legal system exists in S.' There may instead be several different, though overlapping, sets of sufficient conditions. In other words, there may be more than one way for something to qualify as a legal system."<sup>153</sup> Advocates of the "necessary conditions" approach may argue that one ought not to give up the search for necessary and jointly sufficient conditions absent a proof that they do *not* exist. Indeed, the argument that coercion is not necessary is usually framed in such a way as to suggest what *is* necessary. Thus, as in the recurring hypothetical society of angels, the concept of *coordination problems* seems to isolate the necessary condition.<sup>154</sup> Yet, it would seem that another hypothetical society can be imagined in which there is no need for authoritative determination of rules — because everyone agrees on what they are and should be — but in which occasional weakness of will makes sanctions practically necessary.<sup>155</sup> The argument against coercion, assuming it is sound, thus seems equally applicable to the most likely other candidate for a necessary condition.<sup>156</sup> It remains rather problematic,

152. Oberdieck, *supra* note 23, at 74. Similarly, Philip Selznick has made comparisons of legal development to Piaget's notion of individual development from a morality of constraint to a morality of cooperation. See P. SELZNICK, *LAW, SOCIETY, AND INDUSTRIAL JUSTICE* 18 *et seq.* (1969). Of course, one must be suspicious of suggestions that *seem* to entail a reduction in the coercive aspect of a legal system; they may entail merely shifting of the situs of coercion. For example, one could imagine a system employing "positive incentives" or "rewards" for persons to act in ways considered *non-criminal*, rather than imposing sanctions for criminal acts. But if one asks where the money to pay these rewards is to come from, one discovers that the coercion is simply to be shifted from the would-be criminals to the taxpayers opposed to the program — unless, of course, the reward system pays for itself by virtue of savings attributable, for example, to *not* having to put the criminal through the possibly more elaborate legal process necessary to impose a sanction.

153. M. GOLDING, *supra* note 84, at 8. Professor Golding's approach in fact instantiates the possibility described in the quoted passages, although his sufficiency conditions do not resemble those described here. *Id.* at 9-17. His approach is not considered in detail here, in part because one of his conditions (it turns out to be a *necessary* condition) is the existence of *laws*, a condition which presents difficult problems of circularity.

154. See generally E. ULLMAN-MARGALIT, *THE EMERGENCE OF NORMS* (1977).

155. Note that arguments in favor of the abdication of autonomy can be grouped into two analogous categories: "(1) autonomy-abdication in exchange for significant benefits; (2) autonomy-abdication to protect against self-acknowledged irrationality." Kuflik, *The Inalienability of Autonomy*, 13:4 PHIL. & PUB. AFF. 271, 284 (1984). Compare Aquinas' two reasons for positive law, discussed in J. FINNIS, *supra* note 119, at 28-29.

156. There are other reasons to doubt the definitional centrality of the coordination function of law. See Green, *Law, Coordination, and the Common Good*, 3 OXFORD J. LEGAL STUD. 299 (1983).



therefore, whether *any* condition or feature is *conceptually* necessary to law.<sup>157</sup>

Moreover, even if one or more necessary conditions, or even an "essence", can be identified at the level of construction of a full-blown theory of law, it can still be best to endorse the above-quoted view at the level of scope of inquiry determination.<sup>158</sup> The present paper does so, emphasizing one of the overlapping sufficiency conditions: the employment of coercion. In the process, we have adverted to another: the enterprise of subjecting human conduct to the governance of rules.<sup>159</sup> Following the advice of Fuller, the formulation of each condition emphasizes the *practical* focus by use of an active terminology, thus reflecting the significance of human action in our normative deliberations.<sup>160</sup> If, therefore, one were to seek a slogan to characterize the theory presented here, (part of) it would be something like "law as the

157. Much more can be said on this point. See the very interesting article by Professors Beylerveld and Brownsword, *supra* note 59.

158. Some of those who make the "necessity" argument appear to be aware of the separate need for a proper delineation of the scope of inquiry. Professors Beylerveld and Brownsword, for example, in setting the stage for their analysis of the positivism/natural law debate as a controversy over the proper "real" (i.e., "transcendental") definition or conception of law, specify that (following Fuller) "the general subject matter of the study of law is the enterprise of subjecting human conduct to the governance of rules". Beylerveld & Brownsword, *supra* note 59, at 100. On the other hand, reflecting the other sufficient condition endorsed here, their recharacterization of the debate as "morally legitimate power" vs. "socially organized power" retains the crucial concept of *power* as a common denominator for these rival "real" definitions. *Id.* at 81. Indeed, their natural law definitions include the following definition of the nature of a law: "Rule X is a law (is legally valid) if, and only if, there is a moral right to *enforce* X." *Id.* at 82 (emphasis supplied).

159. Fuller has demonstrated, in effect, that this second sufficiency condition satisfies the two criteria developed in the first part of this paper. See *supra* text accompanying notes 18-20, 87-95. Of course, such an "enterprise" may include recourse to various "secondary" rules, principles, policies, and perhaps more. See, e.g., R. DWORKIN, *supra* note 19, Chs. 2-4. Though there may be other sufficient conditions, it would appear likely that most of the theorists considered in the foregoing pages would be satisfied with these two, assuming they were to take the overlapping-sufficiency-condition approach at all. In addition to the discussion in Part II of the text, see the compilation of other philosophers who have shown similar inclinations, though usually in the form of *conjunctive* necessity conditions rather than *disjunctive* sufficiency conditions, in Oberdiek, *supra* note 23, at 71-73. One conspicuous exception is Raz, who points to *three* features: normativity, coerciveness, and institutionalization. J. RAZ, *supra* note 3. However, institutionalization is a complex attribute the normative relevance of which is not at all obvious; it seems to be more appropriately considered as a contingent feature which legal systems, and other social phenomena, may have in varying degrees. See *supra* note 51. In any event, most "institutions" will have component features which satisfy the sufficiency conditions given here for the existence of law.

160. See *supra* text accompanying note 88. Compare Jerome Hall's use of the term "law-action", *supra* note 2, at 150 *et seq.* See also A. GEWIRTH, REASON AND MORALITY (1978). This characterization of the scope of inquiry appears neutral as between a focus upon 'laws' and one upon 'legal system', but Raz is probably correct (at least in many cases and at the level of theory construction) in arguing that the concept of a law is best approached through an understanding of the concept of a legal system. J. RAZ, *supra* note 3, at 2 (1980). But there are some analytical puzzles arising from the potential clash between a systemic focus, on the one hand, and the methodological individualism possibly latent in an active, purposive conception of law, on the other. See *supra* note 110.

union of coercion and the use of rules".<sup>161</sup>

Under such a view of the matter, it is accurate to say, for example, that coercion is an essential concept in the *understanding* of law.<sup>162</sup> Further, one may characterize the satisfaction of *both* sufficiency conditions as generating a category of *paradigmatic*, though not necessarily optimal, legal phenomena: *viz.*, "law as the *intersection* of coercion and the use of rules."<sup>163</sup> Put less abstractly, the practical concerns which constitute the reasons for the study of law are the most pressing just when the enterprise of subjecting human conduct to the governance of rules involves or encounters the employment of coercion.<sup>164</sup> And with such a characterization, it would also make sense to say that coercion is a (logically) necessary feature of (paradigmatic cases of) law — a proposition quite distinct from, but possibly confused with, the claim that law is in some definitional way required to employ coercion or that an instance of legal phenomena cannot be conceived which does not involve the employment of coercion. While a legal "system" may have components which fall within the non-paradigmatic categories, it is within these paradigmatic contexts that the important decision-making has occurred in the past, occurs today, and will occur for the foreseeable future.<sup>165</sup> To that extent, at least, the views of the classical legal theorists, who emphasized the role of coercion, are vindicated.<sup>166</sup>

161. The phrase is reminiscent of Hart's "law as the union of primary and secondary rules". See *supra* note 52. However, Hart uses "union" in the common language sense of "combination", whereas I have used it in the set-theoretic sense indicating disjunctive sufficiency conditions for membership in a set.

162. Oberdiek criticizes (supposedly) similar claims made by Aquinas and Kant. Oberdiek, *supra* note 23, at 72.

163. One finds partial confirmation of this notion in anthropological and sociological definitions, such as Weber's definition of law: "An order will be called *law* if it is externally guaranteed by the probability that coercion (physical or psychological), to bring about conformity or to avenge violation, will be applied by a *staff* of people holding themselves specially ready for that purpose." M. WEBER, *LAW AND ECONOMY IN SOCIETY* 5 (M. Rheinstein ed. 1954).

164. Notice that the overlap, or intersection, concerns not only the governance *through* rules backed by coercion, but also the governance of coercion *by* rules. The former points, for example, to Fuller's (external) morality of duty (as to law), the latter to his (internal) morality of aspiration (as to law). See *supra* note 118.

165. Compare Ronald Dworkin's comment about uses of the term "law" which make the positivists' claims true "by stipulation":

But I [am] concerned with what I [take] to be an argument about the concept of law now in general employment, which is, I take it, the concept of the standards that provide for the rights and duties that a government has a duty to recognize and enforce, at least in principle, through the familiar institutions of courts and police.

R. DWORKIN, *supra* note 19, at 47.

166. See *supra* note 2. It is worth pointing out that identifying a certain social system, process, rule, etc. as coercive does not necessarily mean that the social phenomenon in question is by and large *repressive*. Oberdiek has argued, for example, that to see legal systems as necessarily coercive is to miss the point that such systems *can* have a profoundly *liberating* effect. Oberdiek, *supra* note 23, at 92. But

It is manifestly sensible to take such an overlapping sufficiency approach, particularly when the issue is simply whether or not a given social phenomenon is properly within the scope of our legal inquiry, the scope which identifies the foci of our inquiry. The early positivists, we have seen, focused upon what we have called "paradigmatic" cases of law, while the modern positivists and natural lawyers tend to add an emphasis upon the non-coercive relatives of the paradigmatic cases. The present argument is that there is no good reason not to extend this consideration to the more purely coercive cousins. The extension provides a nice symmetry to the modern arguments, preserving the paradigmatic category as that into which the ordinary language sense of 'law' falls. It reminds us of the seriousness of the Janus-faced quality of law with which positivists and natural lawyers alike have struggled.<sup>167</sup> Perhaps most importantly, it encourages us to consider the possibility that a developed theory — prescriptive or descriptive in character — may (or may not!) be significantly different if it addresses the paradigmatic category than if it addresses either non-paradigmatic category defined by the satisfaction of one, but not the other, sufficient condition.

As a final comment, one may be concerned that in this scheme there is an analytical priority of "ought" over "is" which may, if extended, lead to distortions of an "objective" picture of things. Certainly, the present proposal entails the acceptance of a certain kind of primacy of practical deliberations, particularly those of the official decision-maker, the person facing the legal system's commands, and the social critic. And there are precedents of policy-oriented theorists who allow a particular normative theory to structure, perhaps excessively, their descriptive theory. The main example that comes to mind is Bentham, who has been criticized for allowing his utilitarian reformism to lead him to mischaracterizing, for example, what it means to have a legal right.<sup>168</sup> However, before one can say what is or what ought to be in certain kinds of relations between people, one must often get a better picture of what the common subject matter of these issues is. In any event, the limited dimensions of the proposal made here suggest a demurrer to this challenge until such time as more controversial components of a normative theory are introduced.

It seems unlikely that recognition of the centrality of coercion, its

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this confuses "coercive" with "repressive" or "oppressive"; there is nothing incoherent or even implausible about a coercive system which has an overall liberating effect. See, e.g., F.A. HAYEK, *supra* note 145. Cf. Dewey, *Force and Coercion*, 26 INT'L J. ETHICS 359 (1916).

167. Cf. H.L.A. HART, *supra* note 4, at 113.

168. See David Lyons's useful discussion of Hart's criticism of Bentham along these lines. Lyons, *supra* note 1, at 727-32.

justification, and the justification of responses thereto, commits one in advance to any particular social philosophy or theory of justice, except insofar as it commits one to choosing among those theories which take the matter of coercion very seriously. It is to be hoped that legal theory will benefit by the constant reminder that the practical purposes to which law is put, and thus as to which even descriptive legal theory is ultimately relevant, must satisfy the normative restraints which a just society would place upon the use of coercion.