

Was Austin Right After All? On the Role of Sanctions in a Theory of Law*

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Abstract. In modern jurisprudence it is taken as axiomatic that John Austin's sanction-based account of law and legal obligation was demolished in H.L.A. Hart's *The Concept of Law*, but Hart's victory and the deficiencies of the Austinian account may not be so clear. Not only does the alleged linguistic distinction between being obliged and having an obligation fail to provide as much support for the idea of a sanction-independent legal obligation as is commonly thought, but the soundness of Hart's claims, as well as the claims of many legal theorists who have followed him, depend on a contested view of the nature of legal theory. If the task of a theory of law, as Joseph Raz and others have influentially argued, is to identify the essential features of the concept of law, then the theoretical possibility, if not the empirical reality, of a sanction-free legal system is what is most important. But if the task of a theory of law is to provide philosophical and theoretical illumination of law as it exists and as it is experienced, then a theory of law that fails to give a central place to law's coercive reality may for that reason be deficient as a theory of law. The question of the soundness of the Austinian account, therefore, may be a function of the answer to the question of what a theory of law is designed to accomplish.

Jurisprudence contains few axioms, but one of them may be that H.L.A. Hart's critique of John Austin's brand of legal positivism was conclusive. In arguing in *The Concept of Law* (Hart 1994) that Austin's reduction of legal

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obligation to the factual existence of sanctions (or coercion) (Austin 1995) failed to recognize the internal point of view of legal officials and failed as well to explain the normativity of law, Hart is widely understood in modern jurisprudential debate to have knocked Austin out of the ring. Neil MacCormick, for example, describes the conflation of the imperative with the normative as "one of the perennial and persistent fallacies in legal philosophy" (MacCormick 1973, 101). More recently, John Gardner has described those who subscribe to the centrality of prudential considerations in understanding law as committing a "sadly [...] familiar error" (Gardner 2008, 13–4) and Leslie Green, in addition to describing Austin's sanction-based account of legal obligation as "friendless" (Green 2002, 517), insists elsewhere that a system of norms relying solely on sanctions and incentives would not "be a system of law" at all (Green 2008, 1049).

The decisiveness of Hart's critique of the Austinian sanction theory of legal duty has become the conventional wisdom, but is the conventional wisdom correct? It is true that in identifying the phenomenon of the internal point of view, Hart located and analyzed a dimension of law and of rules that Austin unfortunately and distortingly neglected. It is less clear, however, that this dimension is as important to understanding the nature of law as Hart supposed, and less clear still that sanctions or coercion are as unimportant to the concept of law as Hart at times appeared to suggest. Austin may have misinterpreted the reality of law as it is experienced by ignoring the non-coercive dimensions of law, but his misinterpretation may have been no greater than, and was arguably less than, the misinterpretations, or at least the distortions, in the tendency of much of contemporary legal theory, seemingly under Hart's inspiration, to treat sanctions¹ as peripheral to law as it is experienced and irrelevant to the concept of law. Moreover, exploring why Austin may have been closer to depicting law accurately than Hart (and almost half a century of the jurisprudence that Hart profoundly influenced) believed may open up important methodological and scope inquiries about just what it is that a theory of law is supposed to accomplish.²

¹ Austin (1995, 24) sought to distinguish punishments from rewards, and his account of law and legal obligation rested solely on law's ability to deliver punishments and not at all on law's capacity to mete out benefits. Here I explicitly part company with Austin, and nothing in this paper depends on the tenuous distinction between the incentive of avoiding punishment and that of seeking benefit or reward.

² In seeking to excavate a few of the lost truths in Austin's account of law, I do not propose, at least here, to act as arbiter with respect to whether it is Austin's or Hart's (or some other, for that matter) account of law that is best entitled to the label "legal positivism." Both sanction-based and non-sanction-based accounts of legal obligation are consistent with the basic positivist project, whether that project is understood in terms of the conceptual separability of law and morals, or of the ultimate dependence of law on social facts, or of something else. Accordingly, although it may well be important for some purposes to determine whether it is Hart's project or Austin's that is more entitled to claim the label

1.

Explaining the Austinian picture necessitates beginning with the question of legal obligation. Like his jurisprudential predecessors and successors, Austin recognized the importance of a satisfactory account of legal obligation. And accounting for legal obligation is important because if we understand legal directives simply as descriptive propositions or abstract prescriptions, we miss what distinguishes law from other normative enterprises. It is true that law tells us what to do, but it is also true that most works of moral philosophy tell us what to do. But the fact that the enterprises of both law and moral philosophy are essentially prescriptive does not mean that the prescriptions of English law and the prescriptions in Kant's *Metaphysics of Morals* have the same status for our practical reasoning. Kant may tell us what we *ought* to do, but English law tells English people what they *must* do—what they have an obligation to do—and explaining this difference, and the consequent claim of law to create obligations,³ is one of the central tasks of jurisprudence. A successful account of legal obligation, therefore, must explain how law purports to do more than merely enlighten us (as Kant did) about the obligations that come from elsewhere. Thus we see Austin writing:

Suppose an act innocuous, or positively beneficial, be prohibited by the sovereign under the penalty of death; if I commit this act, I shall be tried and condemned, and if I object to the sentence, that it is contrary to the law of God [. . .], the Court of Justice will demonstrate the inconclusiveness of my reasoning by hanging me up, in pursuance of the law of which I have impugned the validity. (Austin 1995, 158)

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

In seeking to explain these legal obligations, and thus to explain how law can be binding, Austin in *The Province of Jurisprudence Determined* and then in the *Lectures on Jurisprudence* (Austin 1885) insisted that they arise because the law threatens its subjects with sanctions should they not comply with law's directives. As Jules Coleman and Brian Leiter describe Austin's central point, "Without sanctions, commands would really be no more than requests" (Coleman and Leiter 1996, 244). And, in Austin's own words, "[a] command is distinguished from other significations of desire,

"positivism," and which (if either) is the best standard-bearer for legal positivism itself, neither of these terminological and taxonomic endeavors is my concern here.
³ As Joseph Raz has insisted, law's claim to create obligations is distinct from whether the obligations the law claims to create are genuine obligations. See, e.g., Raz 1979, 154–57; 1975, 147–8; 1985, 295–324.

not by the style in which the desire is signified, but by the power and the purpose of the party commanding to inflict an evil or pain in case the desire be disregarded" (Austin 1995, 21). It is precisely the threat of sanction, therefore, which to Austin gives the law its normative force, which provides the law with its authority, and which consequently creates the very idea of a legal obligation. Thus, Austin, following Jeremy Bentham (1970) in stressing the coercive dimensions of law,⁴ held law to be binding precisely because of its ability to punish those who disobeyed its mandates. These sanctions—or at least the threat of them—were central to Austin's account of law, and to Austin the idea of legal obligation became substantially less mysterious once we understood that legal subjects had an obligation to follow the law solely because law threatened them with sanctions if they did not. By threatening or imposing such sanctions on both citizens and officials, Austin argued, law produces a habit of obedience on the part of those who would otherwise be disinclined to take law's directives as reasons for action. Legal obligation, to Austin, was thus reducible to a question of fact,⁵ the empirical fact that citizens and officials, when law exists, feel obliged by the threat of sanctions to do what the law expects.

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

II.

Hart's critique in *The Concept of Law* of Austin's picture of law, legal obligation, and legal systems remains one of the landmarks of jurisprudence. And Hart's project is especially important not only because of what

⁴ It is hardly clear that Bentham was guilty of many of the sins attributed to Austin, and it may well be that Bentham anticipated many of Hart's criticisms of Austin. See Lord Lloyd of Hampstead and Freeman 1985, 246–71.

⁵ "Reductionism" is a strongly pejorative description, and so we need to be careful when we claim that someone believes that a phenomenon, *A*, is reducible to another phenomenon, *B*. One can believe, after all, that *A* is reducible to *B* without believing that everything is reducible to *B*. Thus, even if Austin is properly understood as believing that legal obligation is reducible to coercion, he is not fairly interpreted as believing that all social phenomena are reducible to coercion or even that all normative phenomena are reducible to factual ones. On this kind of reductionism in legal theory, see Bix 2006b, 43–51; Paulson 2008.

it says about Austin's account, but also because legal positivism has come almost to be defined, often for better but sometimes for worse, by Hart in general and *The Concept of Law* in particular (Bix 2004, 32).

Hart exposed a host of deficiencies in the Austinian account, some of which are orthogonal to my central point here. It is true, for example, that Austin's (but not Bentham's) alleged attention only to duty-imposing and not power-conferring rules sees law entirely on the model of the criminal law, in which a superior gives orders to an inferior and threatens sanctions for non-compliance.⁶ But this exclusive focus on law in its vertical and duty-imposing guise ignores an important variety of legal rule, important precisely because of the omnipresence in all advanced legal systems of power-conferring rules that enable people to enter into contracts, make wills, create corporations, and engage in numerous other forms of law-constituted behavior. When the law permits suits for breach of contract, for example, it does not tell citizens whether or not they should enter into contracts in the first place. It is true that even such laws can be reduced to hypothetical imperatives, in which citizens are told what they *must* do once they have decided to enter into a contract, but such a reduction seems convoluted, missing the distinction between what the citizen simply must or must not do, on the one hand, and how the law structures and enforces the range of citizen choice, on the other. Indeed, the issue here is not just the question of enforcement of private arrangements, but rather the universe of power-conferring rules. By being the vehicle for the creation of powers in officials and citizens, the law is not merely concerned with prohibitions and requirements, but with facilitating a wide range of permissive—or optional—conduct. Moreover, and as Hart signaled as early as his inaugural lecture on "Definition and Theory in Jurisprudence" (Hart 1983, 21–48), law not only creates powers to engage in conceptually antecedent conduct, but also constitutes activities that would simply not otherwise exist. Just as the rules of football create and do not merely regulate "corner kicks," and just as "checkmate" is entirely a creature of the rules of chess, so too do the rules of law, as Hart, John Searle (Searle 1969, 33–42), and others have argued, create the possibilities of behavior that but for the law would be non-existent, in ways that Austin and his followers have seemed often to downplay, even if not totally to ignore.

Slighting the power-creating and constitutive nature of law is not Austin's only distorting over-simplification. By assuming a vertical hierarchical relationship between sovereign and subject, by seeing law as that which is "set by political superiors to political inferiors" (Austin 1995, 18),

⁶ A somewhat more charitable reading of Austin, however, would give him more credit than he has received for his discussion of "permissive laws" (1995, 32), which he emphasizes are exceptions to the proposition that "laws are a species of commands," and which without too much effort can be understood as anticipating Hart's discussion of power-conferring rules.

Austin, says Hart, neglected the very real modern possibility of a sovereign that not only created law, but was also bound by it. Contrary to Austin's picture, it is a characteristic of contemporary constitutional governance that the government as well as the governed are subject to law, and no account of modern law could be complete without taking this feature of legality into account.⁷ Moreover, when we add the complications to the sovereignty picture that are provided by judge-made common law,⁸ by federalism, by partial sovereignty, by the separation of powers, by a sometimes robust international law, and by numerous other complexities of the contemporary constitutional nation-state, we see that an attempt to model all of law on the image of an absolute monarch imposing rules on a subservient citizenry is a poor picture of the nature of law in most of today's sophisticated legal systems. Law is far more than just the "gunman writ large," Hart argued, and to fail to appreciate the distinction between the gunman writ large⁹ and a legal system of primary and secondary rules whose officials internalize those rules is fundamentally to misconceive the very nature of law itself.

With respect to these aspects of Austin's account, Hart seems substantially correct. Indeed, the convoluted nature of various attempts to force the multiple dimensions of law into a single vertical coercive model—witness, for example, the attempt, criticized by Hart, to view nullity as a sanction (Hart 1994, 33–5),¹⁰ or to see all law in terms of commands backed by sanctions to judges and other officials¹¹—underscores the essential soundness of these dimensions of Hart's criticism.

If that were all there was to the matter, there might this late in the day be little cause for comment. But Hart went further, and he did so in a way that has shaped almost all of post-Hart jurisprudence, especially in the English-language analytic tradition. By focusing on sanctions and coercion, Hart argued, Austin imagined a world populated by people much like Holmes's mythical "bad man" (Holmes 1897, 457–78).¹² But many people, Hart insisted, were not like the bad man, but more resembled the

⁷ This critique far predates Hart. See Bryce 1901, 538; Dicey 1915, 26–7.

⁸ Austin is criticized for failing to account in a satisfactory way for judge-made law in Gray 1921, 85; Maine 1914, 364–5.

⁹ Perhaps a good modern example of the gunman writ large is the "protection racket." We normally think of the gunman in an entirely particular rather than general way, but extra-legal and illegal coercion is sometimes imposed in general terms, as when the "mob" threatens all of the small business owners in some area with violence should they not make weekly payments in order to protect themselves against the threatened sanction. This is indeed the gunman writ large in the most literal sense, and the extent to which such a system (we might even imagine it with rules of recognition, rules of change, and rules of adjudication) is or is not a legal system is exactly the matter at issue.

¹⁰ For critiques of Hart on this score, see Benditt 1978, 142–57; Mullock 1974; Stith 2008, 219–32.

¹¹ See Kelsen 1961, 58–63, criticized by Hart 1994, 36–8.

¹² For useful discussion, analysis, and corrective, see Twining 1973, 275–303.

"puzzled" man, the one of good faith who seeks to know what the law is, and is predisposed to comply with it (Hart 1994, 40). By ignoring the person who has a committed internal point of view with respect to the law, who considers himself a willing participant in the legal system, and who understands the law as creating sanction-independent obligations, Austin, Hart claimed, failed to capture the essence of legal obligation and the core of what is now commonly referred to as "normativity" (see generally Spaak 2003, 469–85). Indeed, even Arthur Goodhart, Hart's predecessor in the Chair of Jurisprudence at Oxford, observed that "[i]t is because a rule is regarded as obligatory that a measure of coercion may be attached to it; it is not obligatory because there is coercion" (Goodhart 1953, 17).

Hart's criticism of Austin, and especially of Austin's view about sanctions, has been taken as axiomatic in modern analytic jurisprudence, at least in the positivist tradition, and *a fortiori* from a natural law perspective. Joseph Raz (1979; 1980; 1983; 1985), Jules Coleman (2001), John Gardner (2008), Leslie Green (2002; 2008), and scores of others have taken as one of the central tasks of jurisprudence, and perhaps even *the* single central task of jurisprudence,¹³ to explain why and how the law can claim to create obligations that would then, contingently, be enforced with sanctions, and have thus taken as a given that a sanction-dependent account of just what legal obligation is suffers from exactly the deficiencies that Hart identified in Austin's jurisprudence.

III.

Hart's criticism of Austin, however, seems problematic in two distinct ways. First, the experience of modern complex legal systems may indeed be more coercive than the tone of Hart's criticism suggests. It is true that there exists the largely non-coercive and non-sanction-based realm of contract, wills, trusts, and much of private ordering. But just as the possibilities for private ordering have increased, so have the forms of state regulation, and arguably even more so. Tax laws are more complex and more intrusive, and the modern regulatory state controls numerous aspects of what would earlier have been thought of as unregulated, whether in the area of labor and employment, workplace safety, consumer transactions, the sale of securities, the conditions of competition, or any of a host of other domains. For every citizen who enters into a contract, there is likely more than one who organizes his personal and business behavior in ways

¹³ Thus Jules Coleman writes not only that "[j]urisprudence is the study, in part, of how law purports to govern conduct," but also that "[j]urisprudence is not the study of how law secures individual compliance with the rights and duties it creates by its directives"; Coleman 2001, 72. Coleman may be correct and Austin mistaken about the role of sanctions in explaining law, but to conclude, as Coleman implies here, that Austin was not even *doing* jurisprudence seems rather extreme.

that are shaped by the threat of the state to punish him if he does not. The employer who (in the United States) does not force his older employees to retire, or who refrains from statistically rational but illegal forms of discrimination (Schauer 2005a, 108–54), or who requires what seem to him to be silly precautions against worker accidents are all perceiving law in its coercive dimension. And so too with the vast numbers of Europeans who see the notorious Brussels bureaucrat of the European Union as neither empowering, facilitating, nor constitutive, but rather as coercively imposing requirements that, but for the threat of sanctions, would have nothing to recommend them. Perhaps ironically, therefore, and especially to those who think that Austin's account suffers from an empirical underappreciation of the modern world in which even he lived, the complexity of the modern world has made Austin's focus on a vertical relationship between authority and subject, and on a legal regime that seems most of all to be coercive, to be more rather than less empirically accurate. Insofar as it is (at least) one goal of a theory of law to capture the most important or most salient features of modern legal systems,¹⁴ it is not Austin's focus on sanctions and coercion, but rather Hart's emphasis on the non-coercive dimensions of law, that seems the more empirically distorting.

Insofar as Hart was concerned exclusively with the formal attributes of legal validity, then of course the empirical dimension is largely beside the point. If Hart was focused on showing that sanctions were not part of the formal or logical existence conditions for law, then the widespread existence of sanctions and coercion is irrelevant. But it is hardly clear that the formal philosophical exercise of showing that Austin was mistaken in taking sanctions to be a necessary condition of legal validity was Hart's only or even primary goal, for otherwise it is difficult to see why Hart would claim that Austin's account does not "fit the facts," and equally difficult to see why Hart asks us to focus not on the bad man but on the puzzled man, and not on the unwilling conscript into the legal system but on the willing and committed participant. Insofar as Hart is thus making what are at least partially empirical claims, and insofar as his discussion of the puzzled man is perhaps chief among them, then the actual existence or not of such people becomes relevant. Suppose, for example, that we were to discover that most citizens obey the law for reasons of sanction-avoidance and not for reasons of commitment, as even Hart acknowledges

¹⁴ I recognize that this is contested, and will return to this question presently. For the moment, however, it is important to acknowledge the extent to which the claim of empirical unreality is parasitic on a claim about the nature of legal theory. Raz 2005, for example, while recognizing that that which is essential is not necessarily that which is most important (and see also Alexy 2007), stipulates that for his purposes it is the essential and not necessarily the important or salient that is his focus. Raz's perspective is a useful one, but whether and why the focus on the logically essential rather than the empirically (but contingently) important should define the enterprise of jurisprudence, however, is very much my theme in this article.

may be true. And then suppose we were also to discover that even the judges adopted their internal point of view for pragmatic—reward and punishment—reasons rather than out of any stronger commitment to the enterprise. Hart again acknowledges this possibility, but in doing so appears to undercut his own empirical criticism of Austin for ignoring the puzzled man. If there are few or no puzzled men, but if there are significantly greater numbers of frightened or ambitious ones, then it is less obvious that it is wise to focus on the puzzled ones?

My claim is *not* that the world is as I have described it, although it may well be. Rather, it is that the value of focusing on the puzzled man in an allegedly descriptive jurisprudential enterprise—it was Hart, after all, who complained that Austin's account did not "fit the facts" (Hart 1994, 78)—is dependent upon the empirical existence of such people in significant numbers, for without just that empirical foundation, a theory of law, or even an account of the concept of law, seems distortingly detached from reality. It is central to Hart's claim against Austin that the focus on coercion is distorting precisely because it ignores the non-coercive, sanction-independent, empowering, and non-hierarchical nature of much of law as it actually exists, but if it is grounds for criticism of a descriptive theory of law that it ignores dimensions of legality and legal systems that are widely present in the world, then it seems to be also grounds for criticism of Hart's account that it ignores the coercive dimensions of law, dimensions that are no less real than the non-coercive dimensions that Hart properly chides Austin for neglecting.

At this point, however, Joseph Raz enters the dialectic with a different kind of response. The importance of the puzzled man, Raz argues (albeit in different terminology), is not a function of how many puzzled men there are. Even if there were only a few, or only one, or perhaps even none at all, it would still be important to understand and to explain why for *those* people the law can create obligations apart from the sanctions that law can impose (Raz 2005). The task of legal theory is in part to describe the nature of law by describing its *essential* features, and as long as we can imagine a person who sees the commands of the law as content-independent and sanction-independent reasons for action, then sanctions cannot be among the essential features of law. Accordingly, the task of describing the essential features of the concept of law is not dependent upon the size of the population for whom legal obligation is distinct from the existence of sanctions. And thus the question would not be one about the prevalence of sanctions in real legal systems, but about the admittedly important question whether law could exist in a world without sanctions.

Raz is hardly alone in defining the nature of the jurisprudential enterprise to focus on the question of the possibility that law could exist without sanctions. Leslie Green goes significantly further in insisting not only that law can exist without sanctions, but also that a regime of "stark

imperatives" that simply "bossed people around," or that utilized a "price system" that "structured their incentives while leaving them free to act as they pleased" would not count as a "system of law" at all (Green 2008, 1049). And numerous others have taken something close to the same position (e.g., Coleman 2001; Gardner 2008). For Raz, for Green, and for many others, what stands in need of explanation is law's *claim* to authority. Law may not in fact *have* authority, and it certainly may not have legitimate authority, but it is essential to law that it claim authority—that it claim to be imposing obligations—and any theory of law that cannot explain law's claims will fail as a theory of law.

IV.

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

It is no fault of a philosophical theory that it does not focus on the ordinary person—the man on the Clapham omnibus, as it was quaintly and charmingly put by Lord Bowen. The philosophy of physics, after all, is uninterested in how the man in the street thinks about physics, and if the philosophy of physics seeks to explain the behavior and thought processes of physicists, that would hardly count against the enterprise or the specific theories it might generate. Much the same could be said about philosophical enterprises not dependent on the physical world or on natural kinds, and the philosophy of history is a good example. Indeed, one could—and should—say the same thing about moral philosophy. The best of moral philosophy assumes the internal point of view of the individual who wants to do the right thing, and, *mutatis mutandis*, we might offer a similar characterization about the best of legal philosophy. The best of legal philosophy, like the best of moral philosophy, might seek to explain and/or justify and/or prescribe to or for a certain kind of ideal type, and that it focuses on the ideal type and not on the more ordinary sanction-driven citizen, or even sanction-driven judge, should count for little against it.

But if this is so, then we should no longer expect of the philosophy of law that it give us a satisfactory account, even at the most theoretical or most general level, of what actual legal systems are like.¹⁵ And perhaps that

¹⁵ Part of the problem here may be the assumption that particular and general jurisprudence, as Austin and others have understood them, exhaust the field of jurisprudential inquiry. But

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

It is curious, however, that an inquiry into the concept of law should be so preoccupied with what could be the case rather than on what is the case.¹⁶ And this focus on conceivable rather than actual legal worlds is especially curious given that many of those who purport to offer accounts of the concept of law insist that their accounts are entirely descriptive. But then we are prompted to ask what it is that they are descriptive of. If these accounts are not accounts of ordinary usage, and few claim that that is what it is (Coleman and Simchen 2003), and if they are not normative (although this is a more common claim for or about conceptual analysis of the concept of law; see, e.g., Murphy 2001; Perry 2001), then the allegedly descriptive accounts must either be accounts of what is essential to the concept of law (or to the concept of legal validity) or accounts of what is in fact genuinely important about the phenomenon of law, and about the concept we use to grasp it and to describe it. If the former, however, then we lose much of the notion of such accounts as descriptive. But if the latter, then it seems especially problematic to take law's (counterfactual) sanction-independent reason-giving capacity as genuinely important and its sanction-imposing reality as much less so. To decide on what the essential features of law are, we need to make judgments of relative importance. If the judgments of relative importance are based on empirical assessments of

that is a mistake. For Austin, particular jurisprudence consisted of the exposition of actual laws in particular legal systems, and general jurisprudence consisted of the essential or necessary features of all legal systems, or at least all advanced legal systems; Austin 1885, 1071–91. What is missing from this dichotomy is the inquiry into, or exposition, if you will, of the abstract "principles, notions, and distinctions" (see Rumble 1832, xiii) that may exist in some but not other legal systems. Without taking this category of inquiry into account, we are left with a world in which legal or jurisprudential inquiry consists either of simple exposition of laws and doctrines, on the one hand, or the search for universal principles of law, on the other, but this is a world which strangely omits the possibility of abstract philosophical exploration of those principles that may be central to some but not all legal systems.

¹⁶ For some of my own skepticism about contemporary inquiries into the concept of law, see Schauer 2006; 2005b. In a similar vein, see Priel 2008.

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

Thus, the importance of the puzzled man, assuming that puzzled men are in the distinct minority, is significantly dependent on the resolution of an issue that goes back to the exchange in the mid-1950s between Hart and Jonathan Cohen (Cohen 1955; Hart 1953; 1955). In response to Cohen's claim that sanctions were one of the three necessary criteria for the existence of a legal as opposed to some other kind of rule, Hart drew the distinction between what was logically necessary and what was present in the standard or normal case. Without coming down firmly on one side or the other of whether we should be concerned with what is essential or instead with what is present in the standard, normal, or paradigm case of law, Hart at least urged us to recognize the difference, and to acknowledge that that which seems now present in all of the paradigm cases of law might not be essential to the concept of law (Hart 1955, 251-3). And thus the issue was joined more than half a century ago about the goals of a theory of law. It may be no more necessary now than then to resolve the issue, but it is nevertheless important to recognize that focusing on the puzzled man who is in no need of sanctions rather than on the real men who are not "more like angels than they are" (*ibid.*, 253) is to take a position on one side of a longstanding controversy as to which the side restricting jurisprudential inquiry to the search for the essential features of the concept of law is hardly self-evidently preferable to a view that would recognize the jurisprudential importance of identifying the non-logically-necessary features of the standard, normal, and paradigm cases of law as we know it.

V.

But we still need to attend to the question whether legal obligation can or should be *defined* in terms of sanctions, as Austin would have it. And thus we must turn to the argument from law's language, an argument on which Hart and many of his followers rely so heavily in distinguishing being obliged from having an obligation, in distinguishing law from the gunman writ large, and in concluding that a sanction-based account of law is deficient just because it cannot explain the difference between being obliged and having an obligation (Green 2008, 1049). But whether there *is* such a difference is exactly the matter at issue, so the only non-question-begging way to understand the claim is by asserting that the distinction is so deeply embedded in our language and our conceptual apparatus that it must rest on solid foundations.

But was Hart's ordinary language claim really sound? He asserts that being obliged is different from having an obligation, but it is far more common in ordinary language to treat an "obligation" as simply the noun form of the verb "oblige," as we can see from the thousands of times (according to a recent LEXIS search) that, for example, American courts have done just that. When the United States Supreme Court says that "the heir in virtue of his liability as heir for the obligation of his ancestor would be obliged to respond for all the fruits and revenues as heir if not possessor" (*Longpre v. Diaz*, 237 U.S. 512, 528 (1915)), or when the United States Court of Appeals for the Ninth Circuit announces that "[a]s the Order did not make that independent obligation delegable, CDSS was obliged to comply with it" (*California Department of Social Services v. Leavitt*, 523 F.3d 1025, 1035 (9th Cir. 2008)), they join numerous others in ignoring, as a linguistic matter, the distinction that provided the springboard for Hart's analysis. It is no linguistic error to say in English that I am obliged to honor my parents, nor that I have a sanction-compelled obligation to pay my taxes or obey the speed limit.¹⁷ Perhaps there is such a distinction, and perhaps the gunman-writ-large explanation of law is unsound, but it is not clear that Hart's linguistic intuitions get him as far in reaching that conclusion as he supposes. This is not to say that there is *not* a distinction between being (coercively) obliged and (non-coercively) having an obligation. But the linguistic data for that conclusion are thin, and if the conclusion is sound it must rest on something other than it being a distinction embodied in our language and the concepts that our language reflects.

Much the same can be said about John Gardner's complaint that a sanction-focused theory of law cannot explain "law's talk of obligations, rights, permissions, powers, etc.," and that "such categories have no place in the [...] discourse of threats and incentives" (Gardner 2008, 14). As with Hart's linguistic evidence, Gardner's too is open to question. Even the gunman might use the language of permission, and there seems no linguistic error in the gunman saying "I'll permit you to do it this time, but if you try it again I'll shoot," or in a parent saying "I gave you the right to stay out past ten, but you abused it, so you're grounded for a month." Again, these examples are not designed to say that there is nothing to a non-sanction-based account of obligations, right, permissions, and powers. But if there is a sound account, it must justify itself on non-linguistic grounds. The language of obligations, rights, permissions, and powers is indeed used in moral discourse, but once we see that it is widely used in non-moral discourse as well, it is a stretch to take the admittedly common

¹⁷ At least in the United States, it was common in the 1960s and 1970s, when conscription into the hugely unpopular Vietnam War was pervasive, for people to use the expression "military obligation" in precisely this sanction-driven way.

moral use of these terms as very much evidence that the law in using such terms must be making moral or other deeply normative claims.

Moreover, even if such categories were part of traditional legal understanding, and even if the traditional understanding were sanction-independent, it is difficult to see how the status as traditional of some of law's concepts, categories, and language differs in terms of the authority of that traditional status from the traditional status of God-given natural law. Indeed, the language that Gardner references could be etymologically understood as a manifestation of a now-rare strong version of natural law theory in which the permissions, obligations, rights, and powers of law are ones that emanate from God. But if in the face of this plausible view of the historical origins of law's language we are nevertheless free to search for accounts of law that do not need God as part of the explanation, even though a God-focused natural law account was dominant when much of law's language and conceptual apparatus emerged, then there appears little reason for us not to be similarly free to challenge or even jettison the language and categories that may well have emerged from just that now-frequently-discredited understanding of the nature of law. As with the argument from ordinary language, therefore, the argument from law's language may not take us nearly as far in rejecting the Austinian account as many theorists have often supposed.

VI.

That the arguments from ordinary or legal language fail to defeat Austin's claim does not, of course, make his claim sound. But in order to see whether his claim is in fact sound, we must look more carefully to see just what Austin's claim actually is. At its most extreme, Austin's argument is that without a threat of sanction there is no obligation and no duty. And if understood as claiming that the threat of a sanction is an essential feature of a duty or obligation of any kind, then that view, as Austin's critics have pointed out over the years, is simply confused. But understanding Austin's position in this uncharitable way is unfaithful to Austin's project, which was about *legal* obligation and not about obligation *simpliciter* (see Bix 2006a).¹⁸ And if we are thinking about legal obligation, then the claim that the threat of sanctions is a central feature of legal duty, and the distin-

¹⁸ It is important to recognize that much of Austin's discussion of sanctions and obligations takes place in the context of his analysis of commands, but he makes clear that although laws are a species of commands (Austin 1995, 21), he is insistent that commands are to be distinguished from the rules created by social opinion, by morality, and by the law of God (Austin 1995, 20). At no point does Austin say that there cannot be obligations created by social opinion, morality, or the law of God, and thus there is little warrant for concluding that what Austin says about the obligations created by commands is true, in his opinion, of all obligations.

guishing feature between legal and moral duty, makes considerably more sense.

In order to see why this is so, it may be necessary to start with the basics of rule-created obligation. Legal rules do create obligations, but the vehicle by which they do this is simply the fact that legal rules, principles, maxims, canons, etc. are examples of prescriptive language. And it is a feature of prescriptive language that regardless of whether it is prohibiting, commanding, authorizing, or engaging in some other deontic modality, there is still some act that any item of prescriptive language is about. Some prescriptions may forbid ϕ 'ing, others may mandate ϕ 'ing, and still others may permit but not command ϕ 'ing, but it is still the case that there is some act— ϕ —that any prescription will be about. Let us call this act the *deontic content* of any prescription.

Once we see that the deontic content of a prescription is simply an act, we can demystify much of the talk of duties and obligations by understanding such language as merely a restatement of the very idea of a prescription. Prescriptions, after all, are "ought"-based speech acts, and any prescription entails the idea that someone ought to do something, where the "something" is the deontic content of the prescription. But as Kant made clear, ought statements are either categorical or hypothetical. Within the category of the hypothetical, however, we might usefully distinguish instrumental from internal statements. An instrumental statement is one such as, "if you wish to please your mother, then you ought to send her a card on Mothers' Day," but an internal statement, also hypothetical, is more comprehensive. "If you are playing football, then you should not use your hands unless you are a goalkeeper." "If you are Muslim, then you should not eat pork products." And thus the status of being inside a legal system, like being inside the football system or inside the system of Islam, is simply a statement that from the perspective of a certain system of rules or norms or prescriptions—the internal point of view—some conduct is prohibited, other conduct mandated, and still other conduct permitted but not required.¹⁹

From this vantage point, we can understand the notion of duty or obligation as a similar kind of statement of deontic content—a statement of what conduct is mandated if we presuppose—are inside of—some rule or system of rules. And thus the idea of a legal duty is the legal analogue of a football duty or an etiquette duty or a chess duty or a familial duty or whatever. A duty or obligation can consequently be understood as neither more nor less than a restatement of the deontic content of a prescription,

¹⁹ And thus the perspective gained by being inside some system—a different way of characterizing the internal point of view—is a variation on the idea of a role obligation. See Hardimon 1994, 333–63. Roles create obligations for those who accept the roles, although it is deeply contested whether those obligations can supersede the moral obligations that exist independent of particular roles. See Luban 1988; 1999.

arguably with the important gloss that using the words "duty" or "obligation" entails that the one under the obligation accepts the rule or rule system within which the prescription exists.

Insofar as this understanding of duty and obligation is correct, then it is true that we can make sense out of those ideas without need of a sanction, and that the duty or obligation is logically prior to the penalty for violating it, as Goodhart properly insisted and as Hart so importantly elaborated. But once we see that this analysis applies as straightforwardly to football and religious duties as to legal duties, we have not made much progress in trying to understand the institution of law, other than it being just one more system of rules. Austin's contribution, and arguably Austin's sole intended contribution, was in maintaining that an elaborate array of sanctions is what distinguished *legal* from other sorts of duties. Sanctions may not be essential components of duties *simpliciter*, and Austin was mistaken if he is best interpreted as claiming otherwise. But if we are looking for how law is different from other rule systems, then the legitimate sanctions that law has available to it may serve this distinguishing function, and in that sense may well be essential components of *legal* duty, rather than being essential components of all duties. It is true that we can make sense of legal duty in a sanction-free way, just as we can do the same with football duty and familial duty. But if doing so offers an empirically unsatisfying account of how law, contingently, is understood and experienced, then a sanction-free account of law, even if not of duty, is an account that does not fit the facts of law as we know it. Or so Austin appears to have been arguing, and in a way that may have much to be said for it if the picture it portrays corresponds with the legal reality the picture is intended to capture.

VII.

The objection to taking the existence of sanctions and coercion as central to the concept of law, or as central to the law and legal institutions with which we are most familiar, can thus be seen as dependent on a view not so much of law itself, but of the philosophy of law as an enterprise. And in this respect Hans Kelsen can be helpful. In urging a "pure theory of law," Kelsen (1992) did not, as Iain Stewart has felicitously put it, urge a theory of pure law (Stewart 1986, 127), because Kelsen was clear in insisting that law as a social phenomenon simply did not exist in pure form. Indeed, Kelsen, more than anyone, emphasized that no legal act could be completely determined by the law. As a result, Kelsen was concerned with the purity of a theory and not the purity of what the theory was a theory of, and thus he exposed, more than did many of his successors, that the focus of legal theory is dependent on a conception of what a legal theory is supposed to accomplish. This focus on the goals of

legal theorizing is no more apparent than in the concern among modern legal positivists with conceptual analysis, with what law claims rather than with what law is, with the minimization of the importance of sanctions, and, perhaps most notably of all, with legal normativity.²⁰ The normativity of law, especially if it is important that it not collapse into an alleged moral obligation to obey the law, or at least into a moral commitment to the law, seems to many legal theorists these days to be an important question, but it is not clear *why* it is an important question. It cannot be, *pace* Hart, that it is important because we commonly draw a distinction between what one is obliged to do and what one has an obligation to do. Indeed, it is hardly clear, as I argued above, that the distinction between being obliged and having an obligation is as plain in English as Hart made it out to be.

Ordinary usage aside, the question of law's normativity, and thus of law's obligation-creating capacity, cannot be understood as part of the enterprise of offering an accurate account of the salient or centrally important features of law. And here it is crucial to distinguish the enterprise of identifying the distinctive features of law from the enterprise of identifying the important features of law as we know it (Priel 2008). The effort to identify what is important about law may well be part of the enterprise of examining an ideal type of practical reasoning (Postema 1998), and there is no reason to detract from the value of that enterprise. Or instead the philosophy of law, and the question of the normativity of law, may be a component of the enterprise of moral philosophy, and if that is the case than the focus on the morally-motivated subject, however rare he or she may be, is consistent with the very nature of the enterprise. But if the goal of the philosophy of law is to offer a philosophically astute account of what makes law different from other prescriptive enterprises, then the dominant place of coercion and sanctions in law as it is experienced and as it exists in the world cannot so easily be ignored. In shifting the focus of legal philosophy from the common nature of law to the essential features of law, Hart's focus on the puzzled man has helped expose the goals of much of modern jurisprudence. But if the effect of those goals is to detract from recognizing the importance of a feature—coercion—that is present in all real legal systems and largely absent from many other normative systems, then it is hardly clear that Hart's efforts have been as unqualifiedly positive as many legal theorists now suppose.

²⁰ Some of these have surfaced in the contemporary debates about jurisprudential methodology. See, for example, Dickson 2004; Leiter 2003; Raz 1996; 1998; 2005; Rodriguez Blanco 2006. Many of the modern debates have emerged out of concerns first expressed in Finnis 1980, chap. 1. And for skepticism about the importance of explaining law's normativity at all, see Schauer 1998.

VIII.

It is more than plausible that jurisprudence, like much of philosophical and theoretical inquiry generally, is not and should not be directed to helping us understand and navigate the world in which we now live. A deeper and less practical understanding may still yield long-term benefits even if it has no immediate payoff. But jurisprudence has for generations claimed, in part, to be descriptive of the actual social reality that is law. To the extent that this aspiration is genuine, then it may be time for jurisprudence to grapple with the fact that law exists in Zimbabwe and North Korea as well as in Canada and New Zealand, and that law's coercive dimension is not only how vast numbers of people see the law, but also why so many people, including officials, do what the law says. The phenomenon of law as it is experienced is overwhelmingly coercive (Yankah 2008), and there appear to be actual legal systems in which little reason for obedience on the part of citizens or of officials exists outside of fear of sanctions, often sanctions meted out solely on the whim of a single individual. Insofar as a common view of the enterprise of legal theory treats ignoring this highly salient dimension of law as largely non-problematic, it may, as Hart put it, fail to "fit the facts" (Kramer 1999). But then the question shifts to a question about the nature and value of that view of the task of legal theory. Thus, if the soundness of a theory of law that ignores law's coercive and sanction-dependent dimensions depends on a particular view about what legal theory is designed accomplish, then we can—and should—ask why that is a view of legal theory—especially if it is a view about the exclusive goal of legal theory—that it is in fact desirable to have.

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