COERCIVE LAW*

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Abstract

In this essay I consider Kenneth Einar Himma's argument, made most forcefully and fully in *Coercion and the Nature of Law* (Oxford University Press, 2020), that law is necessarily coercive. While casting doubt on Himma's framing of the issues as well as on his specific claims in support of that conclusion, I suggest some alternate avenues for arguing that law is a coercive institution.

1) Introduction

> Legal interpretive acts signal and occasion the imposition of violence upon others: A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life.

Robert Cover, Violence and the Word[1]

In *Coercion and the Nature of Law* Kenneth Einar Himma attempts to provide philosophical support for the commonplace notion that law is a coercive institution. Commonplace that is in the popular imagination, and in sociology and critical theory. Less so among legal philosophers of a certain stripe. Indeed, part of Himma's aim in writing the book is to push back against philosophical scepticism about this ordinary intuition.

Let's start by situating the scepticism. This is, it has to be said, a recent phenomenon. Indeed, for much of the long history of theorising about law the notion that it is inherently coercive has been assumed if not explicitly argued for. In *The Laws*, for example, Plato stressed the importance of persuasion in maintaining obedience to law on the basis that force and the

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[1] Robert M. Cover, 'Violence and the Word' (1985) 95 Yale Law Journal 1601, 1601

threat thereof was its only alternative.[2] And that which was implicit in Plato was explicit in Aquinas. 'The notion of law' he suggested 'contains two things: first, that it is a rule of human acts; second, that it has coercive power.'[3] Systematic argument about law and coercion really begins with Hobbes—where coercive institutions are argued to be a rational necessity stemming from the need to escape the brutal state of nature—and can be traced through the works of Jeremy Bentham and John Austin, finding its most sophisticated articulation in the work of Hans Kelsen. For Kelsen law was to be understood as a 'specific social technique', namely that of 'a coercive order, which… consists in bringing about the desired social conduct of [individuals] through threat…of coercion...'[4]

Cracks in the coercion and sanction-centric consensus began to form with the publication of H.L.A. Hart's *The Concept of Law*. Certainly, Hart argued, not every law is a sanction imposing law. Consider laws that bestow public powers, or those allowing for the creation of deeds. Nor is it helpful to think of such norms, as Kelsen had, as only the prelude, linked by way of justificatory chain, to rules that did impose sanctions.[5] Law's first function is to secure compliance with its duty-imposing requirements, and only on its failure to do this might rules stipulating sanctions become legally relevant.[6]

Hart's arguments are widely understood to have put paid to reductive attempts to understand all laws on the model of coercive norms. What, though, of theories that treat coercion not as a property of laws, but of legal systems? On this issue the work of Joseph Raz has proved highly influential. While, Raz argues, the existence of legal systems that do not provide for sanctions is, owing to our weakness of will and conflicting interests, humanly impossible it is nonetheless a 'logical possibility':

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[2] '…legislators never appear to have considered that they have two instruments which they might use in legislation—persuasion and force; for in dealing with the rude and uneducated multitude, they use the one only as far as they can; they do not mingle persuasion with coercion, but employ force pure and simple.' Plato, *The Laws* (The Gutenberg Project).

[3] Thomas Aquinas, *Summa Theologica, Part I-II (Pars Prima Secundae)* (The Gutenberg Project)

[4] Hans Kelsen, *General Theory of Law and State* (Lawbook Exchange 1999) 19

[5] H. L. A. Hart, *The Concept of Law* (3rd edn, Oxford University Press 2012) 35-42

[6] Ibid 35-42, Joseph Raz, *Practical Reason and Norms* (2nd edn, Princeton University Press 1990) 161-162

> We can imagine other rational beings who may be subject to law, who have, and who would acknowledge that they have, more than enough reasons to obey the law regardless of sanctions... It is reasonable to suppose that in such a society the legislator would not bother to enact sanctions since they would be unnecessary and superfluous. If such a normative system has all the features of a legal system… then it would be recognized as one by all despite its lack of sanctions.[7]

The combination of Hart's arguments about the variety of laws and Raz's 'society of angels' thought experiment form the basis of the modern positivistic belief that law is not an inherently coercive institution.[8] Indeed, it is a sign of how strong this consensus is that several of the most prominent contemporary treatments of law's coerciveness proceed on the assumption that these arguments are essentially correct. Grant Lamond contends, for example, that while law is not by its nature coercive it nonetheless claims 'the right to regulate when, and under what conditions, coercion may be employed.'[9] But given that this fact is itself understood to follow from the notion that law claims an open-ended authority to regulate *any* aspect of social life it reduces the relationship between law and coercion to the same level of significance as that between law and gambling or law and competitive sports, as something that a legal system might but need not in fact regulate. More tellingly still Fred Schauer's recent book length treatment of the subject never quite goes so far as to deny the persuasiveness of the Hart/Raz consensus but instead pursues the idea that *if* law is not necessarily coercive *then* jurisprudence should shift its attention from law's essential properties to its commonplace or paradigmatic features, of which coercion is doubtlessly one.[10] It is a useful reminder that one way to win an argument is to change the subject.

Himma goes further than all of this, providing a full-throated defence of the idea that coercion is essential to law. 'Our conceptual practices', he argues, make coercive sanctions a necessary feature of legal systems. According to 'the coercion thesis'

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[7] Raz, *Practical Reason and Norms* 159

[8] I say positivistic because many influential non-positivist theories of law continue to treat coercion as essential to the enterprise. See, for example, Ronald Dworkin, *Law's Empire* (Belknap Press of Harvard University Press 1986) 108-109 and Nicos Stavropoulos, 'The Relevance of Coercion: Some Preliminaries' (2009) 22 Ratio Juris 339

[9] Grant Lamond, 'Coercion And The Nature Of Law' (2001) 7 Legal Theory 35, 55

[10] Frederick F. Schauer, *The Force of Law* (Harvard University Press 2015). See, in particular, 26-42

> it is a conceptually necessary condition for something to be properly characterized as a *system* of law that it backs certain mandatory legal norms governing non-official behavior with the threat of a sanction.[11]

Himma is careful to avoid the Kelsenian trap of holding coerciveness to be a property of *all* legal norms.[12] The coercion thesis excludes from its reach mandatory rules governing official behaviour as well as those that confer powers, either public or private.[13] Nor does he treat it as part of the identity of subject-oriented mandatory norms that they must be accompanied by the threat of force. True, on Himma's view, the legal order must back *some* such norms with sanctions, but this is a truth about the concept of a legal system, not about the concept of legal obligation.[14] Which such norms in turn depends on the ability of coercion to deliver on law's 'conceptual function'[15], a topic to which we will return later.

2) Methodology

Before moving to discuss Himma's substantive argument in favour of the coercion thesis it is worth saying something about the methodology of the book, for *Coercion and the Nature of Law* is a methodologically self-conscious work. Indeed, the book's central claim is described repeatedly and throughout as a reflection on 'our concepts' and 'our conceptual practices'. But what is this possessive intended to designate? One common way of understanding the phrase is as involving a cultural contrast, as per, for example, 'our language and yours', thereby implying that the analysis in question aims to capture only the local practices of some community: the law around here, but not law in general. This, however, is not the contrast that Himma has in mind. The 'us' in question is the human us and the contrast is not between ours and yours, but between an understanding of law dependent on 'our concepts' and 'our practices ' and one that 'seeks to explicate [the] nature [of law] as it really is independent of the conceptual framework that we impose on the world...'[16] Himma roots

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[11] Kenneth Einar Himma, *Coercion and the Nature of Law* (Oxford University Press, 2020), v

[12] Ibid, 12

[13] Ibid, 13

[14] Ibid, 2

[15] 15-16

[16] Himma, *Coercion and the Nature of Law*, 34

the methodology of his book firmly in the former, rejecting what he describes as an 'immodest' approach to analysis.[17]

Painted as such, though, it is hard to see this distinction as specifying a coherent set of alternatives. Law is a human institution, a mind dependent, socially constructed aspect of the world in which we live. The notion that it has or might have a reality independent of us and of our 'conceptual framework' is hard to reconcile with these obvious facts. But the distinction also invites the following question: if law could be understood as having such a nature—as a platonic form or Lockean real essence, perhaps—then why settle for second best? Why be content, in other words, to understand law's conceptual appearance as opposed to its objective reality? Himma's answer is that, 'for beings like us', second best is the best available.[18] We come to the world with our concepts and so any attempt to understand it is mediated by them. In turn because we can only work from *our* concepts and *our* understandings, the best theory of law available to us 'might well turn out to be objectively false.'[19]

A less pessimistic view is that because law is a social institution—an object brought into being through our intentionality—there is nothing more to know about its nature than that which can be garnered by understanding the practices that sustain it and the concepts that allow us to engage in such practices. On this way of thinking our framework of thought comes out not as a tool for understanding some extra-conceptual reality but as that part of our world about which philosophy is most centrally concerned. But this reading comes with its own puzzles. If there is nothing more to understanding the nature of law than can be gained from the analysis of our own concepts and practices then what explains the complexity that marks jurisprudence as a field of inquiry? Why, in other words, can't the truth or falsity of a thesis like the coercion thesis be read off from such practices as easily as the sentences from the page of a book? The answer has to do with the way in which the ability to engage in social practices is a practical form of knowledge—a form of knowhow

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[17] Himma takes the language and distinction from Frank Jackson but he draws from it a different implication. For Jackson conceptual analysis takes a modest role because it forms a prelude to 'serious metaphysics' i.e. the task of determining the fundamental nature of reality. For Himma the prelude is all that is possible for philosophy. See Frank Jackson, *From Metaphysics to Ethics : A Defence of Conceptual Analysis* (Clarendon Press 1998)

[18] 35

[19] 43

that, in the case of law, is the particular domain of lawyers, judges and others with legal competence— whereas the knowledge acquired through analysis of the concepts involved in such practices is theoretical or propositional—a form of knowing that.[20] The task then becomes one of translating the practical into the theoretical: we begin with our concepts and practices and end (hopefully) with a better understanding of our concepts.

3) The Coercion Thesis

So Himma's claim, if true, expresses a truth about the nature of law. What, then, are the central aspects of the coercion thesis? That law necessarily coerces, and that it does so by authorising the use of sanctions. We can take each of these in turn. First coercion. Himma says that for a directive or norm to be coercive 'is to say that it is reasonably contrived to deter non-complying behavior in virtue of being backed by a threat of detriment...'[21] Why reasonably contrived? Himma wants to exclude from his understanding those rules that are not supported by sufficient force to stand a realistic chance of preventing the behaviour they prohibit.[22] So, for example, a £5 fine for parking illegally in the London Borough of Kensington and Chelsea would be unlikely to count as coercive, at least in relation to certain of that borough's residents, whereas a £10,000 fine might. I'm not sure we need follow Himma in this regimentation of language. We can distinguish coercive acts and techniques from successful incidents of coercion. An act is coercive just in case it is designed, through threat of negative consequence, to bring about a particular course of conduct. Hence the £5 fine is coercive. An act coerces someone if it succeeds in bringing about the conduct in question through use of such a technique. Hence the £10,000 fine is likely to coerce.

Why does this matter? It matters because distinct possibilities for law's relationship to coercion are associated with the idea that law is *necessarily coercive* and with the idea that law *necessarily coerces*. For example, while Kelsen believed that the use of coercion was the law's 'specific social technique', he did not believe that a legal system's identity depended on its ability to coerce. Effective control is part of the nature of law but this can be achieved either by way of enforcement or obedience, with only the latter implying a possible role for

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[20] See Gilbert Ryle, 'Knowing How And Knowing That' (1945) 20 Proceedings of the Aristotelian Society 1

[21] Himma, *Coercion and the Nature of Law*, 5

[22] Ibid, 7

effective coercion.[23] On this way of thinking a system that leans heavily on, for example, the cult of personality as a way of securing obedience would still count as an effective legal system even if its coercive apparatus, taken alone, would be unable to secure this end. In building something approaching a success condition into his understanding of coercion Himma misses these possibilities.

The second aspect of the coercion thesis involves the idea that law's coerciveness is secured by way of sanctions, where 'the notion of a sanction… is conceptually linked to punishment.'[24] In making this move Himma associates himself with a number of theorists—most prominently Bentham and Austin—who associate law's coercive power with its ability to punish. But need we? Certainly, the paradigm of law's coerciveness is the deprivation of life or liberty through operation of the criminal law. Certainly too, private law remedies—such as damages for breach of contract, or restitution of property—are not best thought of as involving sanctions. The focus in such cases is on remedying wrongs, not punishing wrongdoers. Is it really true, however, to say that such norms are not coercive? Himma suggests as much. 'The norms authorizing compensatory damages for breach of contract' he argues

> are not, as a general matter, reasonably contrived to deter… non-compliance since they require no more than that the breaching party pay the value of the performance required by the contract; since the party paying the damages will be made no worse off by paying the ordered damages than she would have been had she complied, the threat of having to pay compensatory damages for breaches of contract is not reasonably contrived to… deter… non-compliance.[25]

Consider a contract to deliver machinery to a factory for £500,000. Himma's argument is that the possibility of being compelled to pay damages on failure to deliver would not count as coercive because the individual whose duty it was to deliver would be no worse off for paying than had they provided the machinery. Actually as a matter of positive law this might well be wrong. A court may require, for example, that the deliverer account not only

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[23] Hans Kelsen, *Pure Theory of Law* (Max Knight tr, University of California Press 1967) 11, and see more generally 10-11 and 211-214

[24] Himma, *Coercion and the Nature of Law*, 7

[25] Ibid, 59

for the cost of the machinery but also for the factory owner's lost profits consequent on non-delivery. This issue aside the bigger problem is that Himma's analysis involves the wrong comparison. To work out whether compensatory damages are coercive we shouldn't compare remedies with fulfilment—which, sometimes at least, will be a zero-sum game—but the presence of remedies and the framework for their enforcement with the absence of such rules.[26] The law essentially says this: keep your promise. If you don't, pay damages. And if you don't do this then state power will be used to extract their equivalent. This makes private law remedial duties coercive in the same way that criminal law primary duties are, both as instructions backed by the threat of force.[27]

These, then, are two ways in which the coercion thesis, by regimenting the very concepts it aims to track, in fact *narrows* our understanding of the relationship between law and coercion. Law must not only be coercive but must be 'reasonably contrived' to coerce. Moreover, it must do so not through the general logic of deterrence—a logic which in fact runs through all of the law's subject facing doctrines—but through the particular logic of punishment. Notice too how these constraints operate on Himma's theory as conceptual conditions on the existence of legal systems. No system of social regulation can be understood as law, on this view, unless its coercive apparatus is well placed to secure compliance. So too no system for the enforcement of compensatory duties is deserving of the title because missing the punitive function associated with the idea of sanctions.[28] Certainly, we might think, the criminal law is both a paradigm of coercive control and the archetype of legal regulation but is it really a necessary feature of a legal system? Perhaps apples are the paradigmatic fruit. It is still a fruit bowl, however, if it contains only oranges and pears.

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[26] For discussion of moralised versus non-moralised approaches to the analysis of threats see Robert Nozick, 'Coercion' in Sidney Morgenbesser, Patrick Suppes and Morton White (eds), *Philosophy, Science, and Method: Essays in Honor of Ernest Nagel* (St Martin's Press 1969), 447-451

[27] In fairness to Himma he is not oblivious to the ways in which private law involves itself with force. 'Regardless of where or not the… compensatory damages authorized by civil law are properly characterised as coercive sanctions' he suggests 'there is an indisputably coercive aspect to civil law practice.' He cites as evidence of this both mechanisms for the enforcement of secondary duties as well as contempt sanctions. The million-dollar question, left unanswered by Himma, is whether the law's remedial duties would be intelligible as part of a framework of legal regulation if unaccompanied by mechanisms for their enforcement. See Himma, *Coercion and the Nature of Law*, 60

[28] Ibid, 255-262

Given its ontological demandingness we need good reason to accept as plausible the strictures implied by the coercion thesis. What is Himma's argument in favour of this thesis? Law, he suggests, is an artifact and artifacts are defined by their functions[29]. In turn, we understand law's function by considering what 'foundational problem a legal system is contrived or used to solve':[30]

> In an anarchic state, rationally competent self-interested subjects like us cannot live even a minimally satisfying life because we have to expend too much of our time and energy defending ourselves and our belongings against the violent infringements of others. The foundational problem that a legal system is needed to solve… is to keep the peace among rationally competent self-interested subjects like us in worlds of acute material scarcity like ours because, as a practical matter, the peace cannot be kept in our world without a legal system.[31]

Based on this Hobbesian analysis Himma concludes that it is only a system of sanction imposing rules targeted against such 'violent infringements' that is capable of fulfilling law's peacekeeping function, and so only such a system that counts as law.[32]

There are reasons to question each step in this argument. Take first the notion that law is an artifact. Sometimes we use this phrase loosely to designate anything that is an intentional human creation—and in this sense law is clearly an artifact—but in a more specific sense the term is used to denote an object onto which a specific function has been imposed. On the wider reading both governments and paperweights are artifacts, but on the narrower reading only the latter are. The idea that law is an artifact gets most of its intuitive appeal, I think, from its association with the former sense of the term. But the distinctive payoff that comes from describing law as an artifact depends on bringing it under the reach of the latter, hence the felt need to analyse legal systems as functional kinds.[33] Letting go of the idea that

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[29] Ibid, 82

[30] Ibid, 82

[31] Ibid, 86

[32] Ibid, 92

[33] See, for example, Luka Burazin, 'Law as an Artifact' in Mortimer Sellers and Stephan Kirste (eds), *Encyclopedia of the Philosophy of Law and Social Philosophy* (Springer Netherlands 2019)for just such a transition between wide and narrow senses of the term.

law *must be* such a kind because law *just is* an artifact we can ask whether legal systems are best understood in light of their functions.

No doubt individual legal rules and doctrines can be analysed in terms of their point or purpose. For example, the *Metropolis Management Act 1855* was created to co-ordinate the construction of infrastructure in Victorian London. The law of contract aims to ensure that people keep to their agreements. But can law *as such* be identified with a generic point or purpose? Himma says that law's conceptual function must be 'related to regulating behavior through the governance of norms…'[34] Why? Because 'legal norms are contrived to govern behavior by guiding it' and 'there cannot be legal systems without legal norms'.[35] There is then the further question, he suggests, about the 'ultimate end for which legal systems are characteristically used to regulate the behavior of…subjects.'[36] But in recognising that law is essentially bound up with the guidance of conduct have we not already said all that there is to say about the 'function' of law in general? Hart thought so. It was, he suggested, 'quite vain to seek any more specific purpose which law as such serves beyond providing guides to human conduct and standards of criticism of such conduct.'[37] Much more central to the identity of law, Hart argued, was the way in which it makes provision 'for the identification, change, and enforcement of its standards' through institutional norms.[38] Only facts of the latter kind, he suggested, would allow us to distinguish legal rules from those of, for example, organised gangs or a society's social morality. Each functions to guide conduct but only law does so through the specific logic of adjudication in accordance with institutional standards. Nascent in this is a claim that is more pronounced in the work of Kelsen: that law is to be identified first and foremost not by its ends but by its means (and indeed, that the extent to which law can be said to have a generic end is a downstream consequence of the fact that it operates as a specific kind of means):[39]

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[34] Himma, *Coercion and the Nature of Law*, 82

[35] Ibid, 82

[36] Ibid, 82

[37] Hart, *The Concept of Law* 249

[38] Ibid 249

[39] Kelsen, *General Theory of Law and State* 20

> [By] recognising law as [a] specific social technique…we can contrast it sharply with other social orders which pursue in part the same purposes as law, but by quite different means. And law is a means, a specific social means, and not an end.[40]

Famously, Hart and Kelsen disagreed about how to characterise the distinctive instrumentality of law. For Hart law's guidance function was achieved through 'the union of primary and secondary rules' and for Kelsen through the mechanism of coercive order. It is striking to recognise, however, that what is for Himma a background assumption in light of which we might go on to enquire about what the 'ultimate… end' of law is, was for both Hart and Kelsen, the beginning of the end of enquiry about law as a functional kind.

Let us grant for the sake of argument that law might be usefully understood in terms of a generic function and that this function maintains some relative independence from law's means.[41] The question then becomes: how to identify it? In order to determine 'the foundational problem a legal system is needed, characteristically used, and hence supposed to solve', Himma suggests, we should consider 'what we believe that life would be like for us without law' and what, in such a situation, we would most need it for.[42] Actually, I'm not sure this is a good way of identifying the functions of artifacts. Take knives, for example. In a world without such objects the most pressing or important things we might need implements of this kind for plausibly includes defending ourselves from wild animals and freeing others from difficult situations. But no one would think that either of these tasks specify the *function* of knives. Indeed, they presuppose it.[43] That knives are single bladed tools used for cutting enables them to be utilised to fend off unwanted intruders or to cut people free from danger. But it also enables them to be used to prepare wild garlic, or to carve wood into ornamental shapes. So even if we accept as plausible Himma's claim about the principal benefit that we understand law to deliver for us there remains a further question about whether this can be read across into an analysis of law's function. Indeed, it might well be thought that Himma's argument runs together three distinct sets of issues: for what, in its absence, law would be 'needed', for what in our world it is 'characteristically

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[40] Ibid 20. For helpful discussion see Leslie Green, 'Law as a Means' in Peter Cane (ed), *The Hart-Fuller Debate in the Twenty-First Century* (Hart Publishing 2010)

[41] As Himma needs it to, for as he himself notes, law's means cannot be reduced to the imposition of coercive sanctions.

[42] Himma, *Coercion and the Nature of Law*, 83-84

[43] But cf ibid, 75-78 for a more careful exposition of functional kinds.

used' and what 'foundational problem' law is 'supposed to solve.'[44] Plausibly there are different answers to each of these questions. Perhaps, as per Himma's analysis, legal systems are most needed in order to keep the peace. It is consistent with this to hold that law is characteristically used, for example, to stabilise and legitimise existing relations of production. And it is consistent with both of these claims to hold that the 'foundational problem' that law speaks to is the question of how to control the behaviour of individuals.

What are we to make of the substance of Himma's state of nature argument? Recall he suggests that law would appear to us 'in an anarchic state' as the rational response to 'the violent infringements of others.'[45] But given that law, on Himma's understanding, means coercive sanction-imposing law his point is really that we prefer the perennial threat of institutionalised force to the unplanned and sporadic use of violence that might accompany its absence. And perhaps that's right. But I suspect that any answer to this question is going to depend heavily on context: what the law around here does for and to us, and what forms of social organisation are truly viable in its absence. Quite possibly the anarchist utopia is really just that, a utopia. And so perhaps we are bound to the law-state not out of love but out of necessity. Be that as it may I don't think that these are questions that philosophy alone can resolve, dependent as they are on matters of historical experience and political as opposed to conceptual possibility.

4) Objections

Having set out and defended the coercion thesis in the first four chapters of the book Himma moves in its second half to consider a range of objections to his view: (1) that it fails to explain the normativity of law (2) that it does not recognise international law as law and (3) that it is vulnerable to Raz's society of angels thought experiment.

A) Normativity

Law is a normative phenomenon. It places demands on our conduct, mandating certain forms of behaviour and prohibiting others. Lying behind this truism are two quite different ways of fleshing out the basic idea. On one view explaining the normativity of law means

[44] Ibid, 83

[45] Ibid, 86

explaining the way in which law is composed of norms, what it means for behaviour to fall under its requirements, and what it is to accept and apply such standards. This way of thinking treats the question of the normativity of law as continuous with that of other rule-governed phenomena such as languages and games.[46] There is, however, another way of understanding the concept which treats normativity not as the property of being *rule-governed* but as the property of being *reason-giving*, the most obvious exemplar of normativity in this sense being morality.[47] The so-called problem of the normativity of law comes about through the insistence that this latter way of parsing the concept is the only real or relevant one, and then by noting how various otherwise plausible understandings of law fail to satisfy the constraint.[48] So, for example, Lon Fuller asked of Hart how it was possible that an 'amoral datum called law' could ever have 'the peculiar quality of creating a moral duty to obey it'.[49] Viewed from the perspective of other rule-governed domains, however, it is the constraint itself that seems implausible, not the theories that fail to satisfy it. Consider in this regard the rules of language. Doubtless we often have reason to comply with such requirements, but this is not because language is itself a reason-giving phenomenon. It is because we have cause to communicate with those around us and the most effective way in which we can do this is by accepting and maintaining a common language. This makes the practical relevance of the norms of language both conditional and contingent and marks a distinction in kind from moral reasons which, by their nature, are subject to neither constraint.

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[46] See, for example, Andrei Marmor, 'How Law Is Like Chess' (2006) 12 Legal Theory 347 and Jeffrey Kaplan, 'Attitude and the Normativity of Law' (2017) 36 Law and Philosophy 469

[47] For the distinction see Derek Parfit, *On What Matters* (Oxford University Press 2011) 144-145

[48] See Lon L. Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' 71 Harvard Law Review 630, 631-633, Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1978) 48-58, Raz, *Practical Reason and Norms* 56-58 and Stephen Perry, 'Hart on Social Rules and the Foundations of Law: Liberating the Internal Point of View' (2006) 75 Fordham Law Review 1171. For discussion and criticism see David Enoch, 'Is General Jurisprudence Interesting?' in David Plunkett, Scott Shapiro and Kevin Toh (eds), vol Dimensions of Normativity : New Essays on Metaethics and Jurisprudence (Oxford University Press 2019) and Kaplan, 'Attitude and the Normativity of Law'. For scepticism about the notion that there is a problem of the normativity of law see Leslie Green, 'The Normativity of Law: What is the Problem?' (unpublished manuscript)

[49] Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart', 656

Why think law is different? Most answers hinge on an admixture of two considerations. First, the categorical nature of law's demands, a fact which distinguishes law from other rule-governed practices such as languages and games and which brings it closer to the universal jurisdiction of morality. Second, that law shares with morality, but not with other rule-governed phenomena, the language of rights, duties and obligations.[50] But, of course, categorical demands are not the same as categorical reasons. And, indeed, it is the unconditional nature of law's authority which most obviously explains its terminological affinity with morality. To be under an obligation is to be *required* to perform some action, and in their different ways both law and morality require things of us; one through mandatory system of social control and the other through the requirements of reason.

So we should approach questions concerning law's normativity in a suitably sceptical light. Does Himma? Yes and no. He helpfully dissects several of the biggest myths associated with the notion that law is a reason-giving practice: the Razian monolith that law presents itself as giving us exclusionary reason for action[51] and the notion that law provides intrinsic reason to comply with its requirements.[52] Nonetheless he believes that there remains a 'conceptual problem of normativity' that any adequate theory of law's nature must respond to. 'It is', Himma suggests,

> a conceptual truth that the practices constituting something as a system of law are normative in the sense that they are reasonably contrived to give rise to… motivating reasons to comply… The only practices… that are minimally equipped to explain how… a system of law [can] give rise to… motivating reasons to comply are those that back mandatory legal norms governing non-official behavior with the threat of a coercive sanction.[53]

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[50] Hence Raz says that the problem of the normativity of law consists in explaining how we use normative language—the language of rights and obligations—to make statements of law. See Raz, *Practical Reason and Norms* 170-177

[51] This is the idea that in addition to giving us reason for action the law also gives us reason to disregard certain other reasons that apply to us. See Himma, *Coercion and the Nature of Law*, 155-177

[52] The notion that accepting law's authority means doing what the law requires purely because the law so requires it is a myth that has long bedevilled legal philosophy and Himma does a good job dispatching it. See ibid, 188-195

[53] Ibid, 127

As such, he concludes, 'any conceptual theory of the metaphysical nature of law that does not include the coercion thesis cannot explain' the normativity of law.[54]

Doubtless coercion affects our reasons for action. Indeed this is its point—to change the cost-benefit calculus of the coercee for the sake of the coercer. But its capacity to do so depends both on the perceived likelihood that the threat which accompanies the coercers demand will be made real and on the aims and interests of the coercee. A breakdown between these aspects is not unfamiliar in the case of law. For some the coercive power of the state is too far removed from the particulars of their position to affect their decision-making and for others—political protesters, for example—the punishment is the point. This makes the practical relevance of coercive norms both conditional and contingent in the same way as is true of the rules of language. Coercion, moreover, is not the only technique available to law that affects our reasons to behave in one way or another. Consider in this regard Article 2 of the United States Constitution which prescribes that only natural born citizens aged over 35 are eligible to be president. This provision, much like most constitutional norms, is not backed by any sanction. Nonetheless it is designed to furnish reasons to comply with its requirements, most obviously because appointment in breach of its provisions would be liable to be set aside by the courts.[55] Coercion, then, is neither necessary nor sufficient to explain law's ability to give rise to reasons when law does give rise to reasons. This is reason enough to doubt that it provides a solution to the 'conceptual problem' of the normativity of law.

All of which brings us to the question of why Himma insists on their being such a problem in the first place. When Fuller complained to Hart that his theory was unable to account for our reasons to obey the law he did not mean the sort of reasons which depend upon the wish not to end up behind bars or that might arise consequent on the need to avoid leaving one's family destitute in the aftermath of a judgment for debt. He meant an obligation of fidelity that flowed from the positive values associated with legal forms of regulation. But once we've abandoned the notion that law has an inner morality it becomes much less clear why we should continue to insist on an understanding of law's normativity motivated by

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[54] Ibid, 125

[55] Why doesn't this consequence of the failure to abide by power-conferring rules constitute detriment sufficient to render such norms coercive? Because the perceived detriment is really just the failure to achieve some benefit, in this case the ability to maintain the office of the presidency.

parallels between the legal and moral domains. Understood in this light Himma's treatment of the normativity of law begins to look like a solution in search of a problem.[56]

B) International law

Himma is on safer terrain when he turns to consider the applicability of his argument in the context of international law. Late 20th Century legal philosophy had an uneasy relationship both with international law and in particular with international lawyers because of its perceived ambivalence about the status of public international law as law. This has mostly to do with the enormous influence of *The Concept of Law*, chapter ten of which explores a range of reasons to doubt the 'legal character' of international law before settling on the idea that the international legal order is related to municipal law not by identity but by analogy. Among the sources of doubt that Hart considered were the perceived absence of an international legislature, of courts of compulsory jurisdiction and of centrally organised sanctions in the international realm.[57] The former two of these he translated into concerns about the dependence of the international order on the consent of states and about whether international law had the form of unity we associate with a system, as opposed to a set, of rules.[58] The third he dismissed as dependent on a mistaken understanding of legal obligations and an over-emphasis on the importance of coercion to the identity of law. Such an approach is, of course, not open to Himma whose coercion thesis forces him either to deny international law its titular status or else to reappraise the allegation that the international order does without sanctions. In the end he does a bit of both. While officially maintaining Hart's ambivalence with regard to the legal status of the international order

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[56] Partial explanation for Himma's belief that jurisprudence must make good on the problem of the normativity of law stems from his recognition that law is an actually existent system of social control. Because legal systems are designed to affect the behaviour of individuals, he suggests, so the theory of law must explain the mechanism by which they do so. But actually it's not clear that jurisprudence faces an explanatory burden of this kind. A legal system exists only if it is in force and it is in force only if a sizeable number of its rules are either obeyed by its public or enforced by its officials. But these concepts—obedience and enforcement—are agnostic as to the reasons for which individuals might be willing to make themselves law's subject or servant. Perhaps some obey out of fear, other out of a belief in law's moral authority. Either way the law would continue to feature dispositively in their decision-making. So to explain the efficacy of legal systems we need not settle for what reason people obey the law. For Himma's argument see Himma, *Coercion and the Nature of Law*, 99

[57] Hart, *The Concept of Law* 214

[58] Ibid 220-226, 232-237

Himma nonetheless sets out to show that international law operates with a system of centrally organised sanctions. As such and 'regardless of whether it counts as a system of law' the international order 'is consistent with the Coercion Thesis and is hence not a counterexample to it.'[59]

Himma begins by distinguishing enforcement measures in general from sanction imposing norms in particular. This is of importance for his purposes because one of the most prominent ways in which the international order utilises force—through authorisation under chapter VII, article 42 of the United Nations charter of 'such action by air, sea or land forces as may be necessary to maintain international peace and security'—is not designed to punish malefactors but only to bring an end to hostilities between nations.[60] This fails to satisfy the coercion thesis which, as we have already noted, places a premium on compulsion achieved through the threat of punishment. Nonetheless such measures are clearly coercive. As Himma himself notes, the possibility of an armed response to invasion is designed to induce compliance with international norms and hence can be thought of as a deterrent.[61] The more interesting question about article 42, however, is not whether it authorises coercion but whether actions ostensibly taken under its auspices can themselves be understood as incidences of enforcement attributable to the international system. Famously when this article was drafted it was intended that national troops would be lent to the UN to form a standing army that would be deployed at the direction of the Security Council. In large part because of the cold war this never happened and so the current system exists as one in which the UN, after determining that there has been or is likely to be a breach of the peace, authorises nations to involve themselves in hostilities.[62] The question is then whether such actions can be ascribed to the international system—as taken because of

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[59] Himma, *Coercion and the Nature of Law*, 204

[60] Himma does not explain why his analysis focusses only on collective measures in international law and not additionally on unilateral measures by individual nations but I think the answer has to do with a tacit belief that enforcement means institutional enforcement. For a critique of this way of thinking see Oona Hathaway and Scott J. Shapiro, 'Outcasting: Enforcement in Domestic and International Law' (2011) 121 The Yale Law Journal 252, especially 282-349

[61] Himma, *Coercion and the Nature of Law*, 212

[62] In the case of the Korean war, for example, the Security Council recommended that 'members of the United Nations furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area.' See UN Security Council, *Security Council Resolution 83 (1950) [Complaint of aggression upon the Republic of Korea]*

its authorisation and for the sake of its norms and expectations—or whether at least some such armed interventions are really just the independent actions of member states given post-hoc support by resolutions of the Security Council.[63] This is an important concern about enforcement in international law and one that Himma, through laser-focus on the explicit features of his own account, fails to engage with.

Doubts of this kind are easier to set aside when it comes to the deployment, under chapter VII, of diplomatic and economic sanctions as these are more clearly orchestrated and co-ordinated at the level of the United Nations. They are also, as Himma notes, punitive.[64] Nonetheless such sanctions involve a particular logic which distinguishes them from their counterparts in national law. As Himma explains:

> The enforcement mechanisms of municipal law are contrived to inflict painful detriment on only the person whose conduct violates a criminal law or court order... In contrast, the economic measures authorized by the Charter are not contrived to inflict the most painful detriment on the authority responsible for violating Charter norms; rather they are contrived to inflict detriment on other people by causing harm to the economy of the offending nation.[65]

So while the sanctions attached to criminal law will ordinarily target the perpetrator of the relevant wrong, economic sanctions instrumentalise the individual in order to deter the state from breaching international law. But actually the distinction is not always as sharp as Himma suggests. Economic sanctions are often targeted at state actors and their associates[66]

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[63] Hart raised a different objection to the notion that chapter VII measures should be thought of as a scheme for the coercive enforcement of international law. 'Wherever their use is of importance', he suggested, 'the law enforcement provisions of the charter are likely to be paralysed by the veto', the power of permanent members to block any resolution of the security council. As a result, he suggested, such norms 'must be said to exist only on paper.' Doubtless it is true that the veto afforded to permanent members of the security council weakens the integrity of the international system. It is not clear, however, such concerns go so far as to question to the existence of enforcement mechanisms. Because the veto power rests only in the hands of the few there will always remain states vulnerable to the use of such measures. See Hart, *The Concept of Law*, 217

[64] Himma, *Coercion and the Nature of Law*, 214-223

[65] Ibid, 218

[66] Importantly too sanctions are increasingly applied against non-state actors without the intention that this discipline the action of states. In the post 9/11 world individuals and organisations are themselves the objects of punishment under international law.

and the criminal law has the capacity to ruin the lives not only of criminals but also of those in their orbit. Nonetheless at their most expansive economic sanctions can have the effect of paralysing entire economies, deliberately and overwhelmingly affecting the innocent alongside the blameworthy. This does not mean, of course, that such measures are beyond justification—indeed, as Himma notes they have been a crucial tool in preventing armed conflict in the aftermath of the second world war—only that they must pass a special threshold of urgency and seriousness in order to be justified. At a minimum such measures must be designed to prevent a greater crisis than that which they precipitate.

C) The Society of Angels

Taking international law to be the genuine article does not, then, call into question the coercion thesis. But similar such peaceful coexistence cannot be found as between Himma's central claim and Raz's society of angels thought experiment. Recall that according to Raz's argument we are to imagine beings with an inhuman and absolute disposition to obey the dictates of their ruler. In such a situation sanctions would be motivationally superfluous and hence would not need to be enacted. Nonetheless such beings would require institutions to both create and clarify for them the meaning of the rules they are disposed to obey (the angels are motivationally but not epistemically or coordinationally superhuman). Because such a society would have a need for both legislative and adjudicative institutions, Raz suggests, so it would have law. But it would not have coercive law.[67]

How does Himma respond to Raz's argument? Essentially by denying its relevance. 'The psychological features of the "angels" are', he suggests, 'too far removed from what is remotely probable for rationally competent self-interested subjects like us…to tell us anything of theoretical significance about the content of *our* conceptual practices':[68]

> The idea that we can learn something worth learning about the concept of law as *our* social practices determine it from a thought-experiment in which otherwise competent subjects characteristically behave with respect to an authority in a manner that is objectively irrational is epistemically illegitimate—and obviously so.[69]

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[67] Raz, *Practical Reason and Norms* 159

[68] Himma, *Coercion and the Nature of Law*, 232

[69] Ibid, 249

Because we would not, perhaps could not, behave like Razian angels so Raz's argument tells us little about 'the content of *our* conceptual practices with respect to the term *law*.'[70]

This is, at first blush, a confusing response because the whole point of Raz's hypothetical, and of thought experiments more generally, is to test *our* concepts. Such exercises involve the construction of artificial scenarios designed to reveal something about the inferences we either are or are not willing to draw based upon them. So it does not matter if the beings involved in such scenarios are unlike us—we aren't testing the angels' concepts, after all—or that the scenarios themselves are in various ways far-fetched or implausible. What matters is that we have a clear sense of that which is involved and are able to draw appropriate implications. Consider in this regard Frank Jackson's famous knowledge argument against physicalism.[71] According to this we are to imagine a scientist, Mary, who lives in a black and white room with access to complete physical information about the nature of colour but no actual experience thereof. The question is then whether, upon her release into our world, she would acquire new knowledge. Jackson's suggestion is that she would and that as a result knowledge is not limited to knowledge of the physical world but includes also our subjective experience of it. The implications of Jackson's thought experiment continue to be debated but of all the objections to it the most obviously unhelpful and derailing are of the form that Mary's initially colourless life would be impossible, for example because she would experience colour in her dreams or when pressing her eyes with her fingers.[72] That the background assumptions of such a thought experiment are in this way implausible is neither here nor there though when the question is whether, given such assumptions, particular inferences are or are not licensed. Similarly it does not matter for the relevance of Raz's argument that the psychology of the angels he asks us to imagine is 'objectively irrational' or far removed from our own unruly disposition. What matters is whether the institutional rules and structures for which the angels have need are recognisable to us as law. This is a question about our conceptual practices.

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[70] Ibid, 232

[71] Frank Jackson, 'Epiphenomenal Qualia' (1982) 32 The Philosophical Quarterly 127

[72] See, for this objection, Evan Thompson, *Colour Vision : A Study in Cognitive Science and the Philosophy of Perception* (Routledge 1995) 263-286

There are of course limits to the viability of thought experiments, for example if the situations described therein are not merely implausible but incoherent (it is not obvious how to respond to questions about married bachelors or four-sided triangles, for example). And equally it is possible for us to be distracted by extraneous details or to assent to the implied argument associated with an imagined scenario based on only a partial grasp of that which is involved. Nothing in Raz's argument approaches the level of incoherence—however improbable the notion of absolute adherence to authority is not inconceivable—but I think it is at least possible that the argumentative force of the society of angels thought experiment depends upon our maintaining only a partial image of that which is being described.

To see this consider a variation on Raz's argument: a situation in which a society such as our own suddenly develops the angelic disposition. Having previously been faced with the necessity of securing order through sanctions this society would be ruled, at least initially, by coercive institutions, but institutions that would now have no need to avail themselves of the coercion involving aspect of their authority. Perhaps over time the now superfluous norms by virtue of which the society's social code had been enforced would be repealed. In this way the dead letter of their law would be removed. But I think it is at least plausible to argue that with this would also go the distinctly legal aspects of social life. That if this were not quite the dismantling of the state, that it might nonetheless involve the dismantling of the law-state. Why? Because the distinct logic of the law *is* the logic of enforcement and, at least so far as legal subjects are concerned, that logic is one of coercive enforcement. It is worth considering in this regard just how integral to our understanding of distinct doctrinal areas of the law this idea is: if there are no norms for the enforcement of promises then there are no contracts, and if there are no punishments associated with wrongs then there are no crimes.[73] And while law is not defined by the particulars of any one of its branches, there is a

[73] It might be objected that these are reductionist understandings of contract and crime. For example, it has been suggested that public accountability as opposed to punishment is the mark of the criminal domain. For the most part, however, theorists who make this argument are interested in stressing the relative importance of the trial in fulfilling the social functions of criminal law, not in explicating its nature. To the extent that such scholars treat public accountability instead of punishment as the defining feature of crime, however, they face objections in terms of the possibility of in absentia or closed criminal proceedings—violations of natural justice perhaps, but not conceptual confusions—as well as difficulty in explaining why accountability matters so much in the criminal domain. The most obvious answer to this question is, of course, the going possibility of punishment. For the accountability based argument see Antony Duff, *The Realm of Criminal Law* (Oxford University Press 2018) 15. For discussion see James Edwards, 'Theories of Criminal Law' <https://plato.stanford.edu/entries/criminal-law/>

logic that runs through all of its subject-facing doctrines which tells us something about its nature. In each it is a condition of the existence of the primary norm as legal norm—as specifying, for example, contractual duty or crime—that it is accompanied by a secondary norm identifying the negative consequence that follows from failure to comply—that rendering the individual liable to enforcement or punishment.

Is this not just to deny the force of Raz's argument? In one way it is, but it is also an attempt to call into question what is brought to mind when we imagine the society of angels. Is it a society like our own, except one in which the coercive power of the law, although present, need not in fact be deployed? If this is the angelic society to which we are willing to attribute law then this shows us that the *actual use of coercion* forms no necessary part of our concept of law. But it is a further and more radical step to say that a society that has abandoned all means for the coercive enforcement of its norms still speaks the language of law. I am certain that the first kind of society has law. I am not at all convinced that the latter does.

5) *Coercion* and the Scholarly Community

Coercion and the Nature of Law is a surprising and original book. Surprising in its insistence that we should think about law as a tool whose telos is central to its nature, rather than an institution whose means are. Surprising also in the avenues it chooses to take in defence of its central thesis—in attempting to meet rather than reject the so-called problem of the normativity of law, and in its denial of the relevance as opposed to the force of Raz's society of angels thought experiment. But the book is, in addition to this, surprising in its absence of engagement with existent scholarship surrounding its central themes. Himma makes, for example, not one mention of the most prominent recent contributions to the literature on law and coercion[74] and little if any reference to important scholarly work on the nature of

[74] See Lamond, 'Coercion And The Nature Of Law' and Schauer, *The Force of Law*

coercion,[75] jurisprudential methodology,[76] the nature of artifacts,[77] the philosophy of international law[78] or the normativity of law.[79]

Now, of course, what matters in philosophy is not being well read or referenced but getting things right. And equally it would be a disaster to see the norms of citation in US law journals further cannibalise anglophone legal philosophy. In pushing back against a culture of mass citation as well as the felt need to engage the latest or most fashionable work in the latest and most fashionable terms Himma's book is a reminder of the centrality of thought to jurisprudence. But it is hard not to come away from reading *Coercion and the Nature of Law* without the belief that it would have gained something through more explicit engagement with the works of others who have also thought about its central questions. Philosophy is a way of thinking but it is also a conversation. In playing down the latter for the sake of the former Himma loses out on that aspect of reflective equilibrium achieved not by trading one's theory off against one's intuitions but by trading one's theory off against the theories of others. In this he misses a check on some of his more idiosyncratic ideas.

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[75] See, most importantly, Nozick, 'Coercion' and for a useful summary of recent debates see Scott Anderson, 'Coercion' <https://plato.stanford.edu/entries/coercion/>

[76] See, as relevant to Himma's methodological discussion, Brian Leiter, *Naturalizing Jurisprudence : Essays on American Legal Realism and Naturalism in Legal Philosophy* (Oxford University Press 2007), especially chapters 4 and 6 and the postscript to part two, Joseph Raz, *Between Authority and Interpretation : On the Theory of Law and Practical Reason* (Oxford University Press 2009) chapters 2 and 3, Julie Dickson, 'On Naturalizing Jurisprudence: Some Comments on Brian Leiter's View of What Jurisprudence Should Become' (2011) 30 Law and Philosophy 477 and Hillary Nye, 'A Critique of the Concept–Nature Nexus in Joseph Raz's Methodology' (2016) 37 Oxford Journal of Legal Studies 48

[77] See, for general discussion, Beth Preston, 'Artifact' <https://plato.stanford.edu/entries/artifact/> and of particular relevance to Himma's methodological discussion Amie L. Thomasson, 'Artifacts and Human Concepts' in Eric Margolis and Stephen Laurence (eds), *Creations of the Mind : Theories of Artifacts and their Representation* (Oxford University Press 2007)

[78] Many useful pieces are collected in Samantha Besson and John Tasioulas, *The Philosophy of International Law* (Oxford University Press 2010). See also Hathaway and Shapiro, 'Outcasting: Enforcement in Domestic and International Law' and Oona Anne Hathaway and Scott Shapiro, *The Internationalists : How a Radical Plan to Outlaw War Remade the World* (Simon & Schuster, 2017)

[79] See David Enoch, 'Reason Giving and the Law' in Leslie Green and Brian Leiter (eds), *Oxford Studies in Philosophy of Law Volume 1* (Oxford University Press 2011) and Green, 'The Normativity of Law: What is the Problem?'

But there is a further risk associated with the form of scholarly isolationism evident in *Coercion and the Nature of Law* and this is that the book will be engaged with less than it might otherwise have been. Having failed to bring itself into conversation with the views of others there is a danger that it might be left out of future such conversations. This would be of some regret given that there is much to be learned from the volume. Although I did not find *Coercion and the Nature of Law* to be an easy read[80] I nonetheless found it to be a profitable and provocative one. To do it justice we should make it part of the very conversations that it refuses for itself.

[80] This too came as a surprise to me as I enjoy the snappy and down to earth style in which Himma ordinarily writes. *Coercion and the Nature of Law*, by way of contrast, contains many long and highly repetitive sentences.