Is Fear Enough? Hart and the Limits of Legal Coercion

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Abstract:

When we think of law, what often comes to mind is punishment, sanctions and fear. Yet H.L.A Hart rejects this coercive view, arguing that such features are not central to the nature of modern legal systems. Hart insists that his limited emphasis on these elements is not a shortcoming, but a deliberate and compelling strength of his legal positivist theory, arguing against coercion-based accounts advanced by theorists such as Austin, Kelsen and Holmes. Hart alternatively argues that the law requires a more nuanced framework. As this paper explores, Hart's framework is grounded in social acceptance and institutional practice which transforms our understanding of legal mechanisms to better reflect society. Furthermore, this paper examines how, at the core of Hart's sociological and descriptive theory is the distinction between primary and secondary rules, respect of authority underpinned by internalised norms, and collective recognition of authority. This shifts law from a coercive tool to a system that offers a facilitative, rather than purely punitive, conception of law. Additionally, Hart also emphasises the role of judges to interpret the law and apply it to current situations ensuring the continued relevancy of the theory as times change. However, technological advancements and artificial intelligence may challenge the relevance of Hart's model, forcing the question as to whether Hart's legal positivism can adapt to systems where internal acceptance may no longer be a human trait.

Introduction:

In Hart's positivist theory the law is defined sufficiently and in a compelling manner despite the relatively little attention he pays to coercion and sanctions. His approach demonstrates that the understanding of law does not rest solely on notions of fear or compulsion. Theories that reduce legal compliance to the threat of punishment overlook the more nuanced mechanisms by which legal systems function. Hart's concepts, particularly the distinction between primary and secondary rules, the idea of social acceptance, and the centrality of the rule of recognition, provide a more robust and coherent

explanation of legal order and obligation. As Hart observes, *'If we stand back and consider the structure which has resulted from the combination of primary rules of obligation with the secondary rules of recognition, change, and adjudication, it is plain that we have here not only the heart of a legal system but a most powerful tool for the analysis of much that has puzzled both the jurist and the political theorist.'* In this way, Hart shifts the focus from external pressures to the internal features of legal systems that generate normativity and stability. [60]

Coercion and Legal Obligation: Sanction-Based Perspective

Hart begins *The Concept of Law* by challenging Austin's command theory, which asserts that law is essentially the command of a sovereign, marked by a 'sign, performance, or statement by the sovereign which serves to communicate a wish and which is backed up with a sanction for failure in performance.' [61] Therefore, the role of sanctions is considered central to this theory; it is the threat of punishment that forces people to adhere to rules and laws, according to Austin. It is not the intent to bring about good, but the power to inflict harm for non-compliance, that characterises a command as law. [62] This perspective frames law as fundamentally coercive, reducing it to a system enforced by the will of a powerful sovereign. Hans Kelsen, developing a similar view, reinforces this notion by asserting that 'the law is a coercive order... and it tries to bring about certain human behaviour by rules attaching to the contrary behaviour coercive acts as sanctions.'[63] In both accounts, the essence of law lies not in its moral content or social function, but in its capacity to compel behaviour through the threat of sanction.

Oliver Wendell Holmes famously asserted that 'the prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.' [64] His conceptualisation of law focuses on its

[60] Stuart M Brown, Jr, *Reviewed Work: The Concept of Law by H. L. A. Hart* , vols 72, No. 2 (The Philosophical Review 1963) p.95 <https://doi.org/10.2307/2183110>
[61] Duncan Spiers, 'Jurisprudence Essentials' *Edinburgh University Press* (2011) p.42
[62] John Austin, '*The Province of Jurisprudence Determined*' (Fifth Edition) (1885)
[63] Hans Kelsen and Max Knight, 'Law and Nature', *Pure Theory of Law* (First Edition) (1967).
[64] Oliver Wendell Holmes, 'The Concept of Law' Cambridge University Press (2009) pp. 26-45

practical function: society, in his view, is primarily concerned with the consequences of actions, and law serves as a means of predicting whether those actions will lead to the imposition of sanctions. Thus, coercion is central to Holmes' understanding of law, not in a theoretical or moral sense, but as a system grounded in enforceable outcomes. For Holmes, 'the legal decision is described as coming before the reasoning; the boundary of the law and the appropriate rule of decision would appear surprisingly irrelevant.'[65] This reflects his broader legal realism, where common law plays a central role and the development of legal principles emerges case by case, shaped more by judicial outcomes than by abstract reasoning.

In contrast, Shapiro has criticised Holmes' theory for placing too much emphasis on the perspective of the so-called 'bad man;' someone who sees law solely as a threat. In a similar vein, Hart challenges sanction-centred theories more broadly, arguing 'that sanction centred accounts of every stripe ignore an essential feature of law.' [66] Hart argues that reducing law to mere coercion overlooks the broader social functions that rules perform in a legal system and instead highlights that many legal rules, such as those governing marriage or contract formation, do not involve sanctions or threats. These rules function more as facilitative mechanisms, enabling individuals to create legal relationships and obligations voluntarily. By pointing to such examples, Hart demonstrates that a theory overly focused on fear and coercion fails to capture the complexity and normative dimensions of law.

Obey or Else: Hart's Recognition of Coercion:

Hart presents the example of a gunman threatening a clerk, who orders them to hand over money or they will shoot; this illustrates the distinction between coercion and legal authority. While the clerk may comply out of fear, this act is one of coercion, not law. Hart argues that such threats, though effective

[65] Frederick R. Kellogg, 'Oliver Wendell Holmes, Jr. Legal Theory and Judicial Restraint' Cambridge University Press (2009), pp.28

[66] Scott J. Shapiro, 'What is the internal point of view?' (2007) 75 Fordham Law Review 1157

in securing obedience, lack the essential features of a legal command which connotes implications of a hierarchy; 'to command is characteristically to exercise authority over men, not power to inflict harm, and though it may be combined with threats of harm, a command is primarily an appeal not to fear but to respect for authority.'[67] Therefore, a command and a coercive statement are distinct from one another and the law is closer to that of Hart's understanding of a command, which requires respect over force. This point is further illustrated by the way most individuals follow traffic laws even in the absence of enforcement mechanisms like police or surveillance. This suggests that compliance often stems from a general recognition of legal authority, not from the fear of punishment. In Hart's view, it is respect for the rules and the system that sustains legal order, not the constant application of force. While Hart's gunman example shows that he does acknowledge the role of coercion and sanctions, he does so only to demonstrate that law cannot be reduced to coercive threats alone. A legal system requires more than isolated commands backed by force, it depends on general, publicly accessible standards such as statutes, which are designed to apply broadly rather than target specific individuals. For Hart, statutes articulate the general norms of conduct expected within a society; criminal law, for example, outlines these expectations and is followed not solely out of fear, but because it reflects accepted social standards.

Hart emphasises that law is not about compelling behaviour through threats, but about 'control by directions that are in this double sense general,' both in content and in application. [68] The gunman's threat, while effective in producing compliance, lacks the institutional features grounding law. Unlike the isolated, fear-based obedience of the clerk, legal compliance involves a broader, more stable habit of obedience to rules recognised as authoritative. Coercion cannot be central to the nature of law; therefore, the little consideration Hart gives to such notions is adequate.

The Real Foundation of the Law: Social Acceptance:

[67] HLA Hart, *The Concept of Law* (Second Edition) (Oxford University Press 1994) p.20
[68] HLA Hart, *The Concept of Law* (Second Edition) (Oxford University Press 1994) p.21

Sean Coyle argues that 'if law is underpinned by nothing except habit and fear, then one is obliged to say that the 'binding' force of the law is simply the fact that one who disobeys it is likely to suffer the application of a sanction. But this cannot be all there is to the notion of legal obligation.' [69] This critique underscores the view that law must possess a normative quality beyond mere deterrence. If legal obligation were rooted solely in fear, it would reduce law to a system of threats rather than a framework of recognised authority. In contrast, Hart contends that it is not fear but social acceptance that confers authority upon legal rules. According to Hart, laws are not moral imperatives but social constructs, emerging from institutional practices and collective human behaviour. He writes, 'When I say law is a social construction, I mean that it is one in the way that some things are not. Law is made up of institutional facts like orders and rules, and those are made by people thinking and acting.' [70]

Hart's approach is descriptive and sociological, focusing on how laws function as social rules whose legitimacy derives from their general acceptance within a community. The rule of recognition illustrates how legal systems rest on a shared internal point of view among officials and citizens. This interplay between law and social consensus is evident in historical examples such as the criminalisation of marital rape. Once legally permissible, it became unlawful only after shifting societal attitudes rendered it unacceptable, culminating in legal reform in 1992. This demonstrates that the authority and evolution of law are deeply intertwined with societal values and acceptance.

Therefore, Hart offers a compelling alternative to sanction-based theories. People largely follow the law not out of fear, but because of a perceived obligation rooted in shared norms and institutional legitimacy. In this sense, Hart's account is a more nuanced and comprehensive explanation of legal obligation.

[69] Sean Coyle, *Modern Jurisprudence: A Philosophical Guide* (Oxford: Hart Publishing) (Bloomsbury Collections 2022) chapter 6 <<http://dx.doi.org/10.5040/9781509948932>> accessed 19 November 2024
[70] John Searle, *The Construction of Social Reality* (Allen Lane 1995)

Hart's Two-Tier Rule System:

It is not fear of punishment which offers depth to the law, rather it is the internal meanings and effects that laws have upon those following them that offer understanding. This is rooted in the distinction between rules and habits; for Hart, a habit is something which we do regularly but don't really understand why, there is no obligation to do it and therefore no threat of punishment. Conversely, a rule explains why someone performs an action and acts as a justification for that action. Rules, then are imbued with a sense of obligation and are sustained by a shared understanding within a community. A contemporary example of this can be seen in the *Voyeurism (Offences) Act 2019*[71], introduced to address issues such as upskirting, and its relationship with the *Sexual Offences Act 2003.*[72] These laws not only codify unacceptable behaviours but also provide moral and social justification for their prohibition, reflecting evolving societal norms. They exemplify Hart's theory: the law functions not merely to deter, but to articulate shared standards and to legitimise condemnation of those who violate them.

However, it is important to acknowledge that in discussing the distinction between habits and rules, Hart does engage with elements of coercion. He observes that 'in the case of legal rules, it is very often held the crucial difference consists in the fact that deviations from certain types of behaviour will probably meet with hostile reaction and in the case of legal rules be punished by officials.' [73] This reflects the reality that legal rules often carry with them the possibility of enforcement and formal sanction, distinguishing them from mere habits, which are followed instinctively and without consequence for deviation. Hart further explores this idea in his analysis of judicial reasoning, noting that judges impose punishment not arbitrarily, but by referring to a rule that guides their decision and serves as the justification for penalising an offender: the judge uses 'the rule as his guide and the breach

[71] The Voyeurism (Offences) Act 2019
[72] The Sexual Offences Act 2003
[73] HLA Hart, *The Concept of Law* (Second Edition) (Oxford University Press 1994) chapter 5, p.10

of the rule as his reason and justification for punishing the offender.' [74] While this demonstrates that the law does involve mechanisms of enforcement, Hart never suggests that coercion is the central reason why rules are followed, rather he draws a conceptual distinction not to elevate coercion but to highlight the foundational features such as rule structures, which offer a deeper explanation.

'Law itself is a union of social rules: primary rules that guide behaviour by imposing duties or conferring powers on people and secondary rules that provide for the identification, alteration, and enforcement of the primary rules.' [75] Primary rules, for Hart, are those which ordinary citizens follow; there is then a second set of rules that are for those in charge.[76] Primary rules prescribe what citizens must or must not do, they are duty-imposing. Secondary rules, on the other hand, are addressed to officials and institutions; they are power conferring, establishing the procedures by which laws are created, modified, and enforced.

This dual structure explains how legal systems function in a way that goes beyond mere coercion. Law is not simply a series of commands backed by threats, as Austin suggested, but a complex framework of interrelated rules that derive their authority from social recognition and institutional practice. As Marcus G. Singer affirms, 'In the combination of these two types of rule, there lies what Austin wrongly claimed to find in the notion of coercive orders, namely, the key to the science of jurisprudence; law is presented as the union of primary and secondary rules.' [77] This insight is significant because it reveals the limitations of theories that emphasise coercion and sanction as the core of legal obligation. Such views overlook the structural dimensions of law that make it function effectively in society. Thus, although Hart engages only marginally with coercion, this is entirely well accounted for within the

[74] HLA Hart, *The Concept of Law* (Second Edition) (Oxford University Press 1994) chapter 5, p.12
[75] Leslie Green, *The Concept of Law Revisited*, vol 96 issue 6 (1996) <https://repository.law.umich.edu/mlr/vol94/iss6/15>.
[76] HLA Hart, *The Concept of Law* (Second Edition) (Oxford University Press 1994) chapter 5
[77] Marcus G Singer, '*Hart's Concept of Law'* vol. Vol. 60 No. 8 (The Journal of Philosophy 1963) pp 197-220 <https://doi.org/10.2307/2023267>

broader explanatory power of his theory, which better captures the internal logic and practical operation of legal systems.

The Rule of Recognition and Legal Validity:

Moreover, Hart explains how it is the rule of recognition that is of the utmost importance in understanding the law and how it operates in practice. Hart imagines a system where there are only primary rules; a 'regime of primary rules unsupplemented by rules of any other type would be uncertain, static, and inefficient.' [78] It would be uncertain, as there would be no method to identify the primary rules and it would also be inefficient due to the inability to adjudicate in cases where it is necessary. Therefore, it is logical to assume there must be secondary rules that work in unison with the primary to formulate a working legal system.

The rule of recognition is one of those secondary rules that is of 'special importance,' being a set of rules that officials use to identify what rules are part of the legal system, thus providing a criterion of legal validity. [79] This means that 'parliamentary enactments are law, then, not because of their moral credentials or because of any logical presupposition, but because an actually practiced customary rule recognises them as such.' [80] This illustrates how legal validity stems not from coercion or morality, but from an accepted institutional practice.

For Hart it is the combination of primary rules and secondary rules working in unison that offers a workable understanding of law that moves far beyond a simplistic theory grounded in fear and punishment. 'Hart defines law; that is, he specifies the necessary and sufficient conditions for the use of

[78] Stuart M Brown, Jr, *Reviewed Work: The Concept of Law by H. L. A. Hart* , vols 72, No. 2 (The Philosophical Review 1963) 250–253 <https://doi.org/10.2307/2183110>
[79] Leslie Green, *The Concept of Law Revisited*, vol 96 issue 6 (1996)
[80] Leslie Green, *The Concept of Law Revisited*, vol 96 issue 6 (1996)

the concept. A set of primary rules is one necessary condition. A set of secondary rules is another. These two conditions together are sufficient.'[81] The rule of recognition, then, offers a clear and logical explanation of how legal systems maintain coherence and authority. It provides a more nuanced and persuasive account of law than any model based solely on coercive enforcement.

Building on Hart's framework, Scott Shapiro conceptualises the rule of recognition not merely as a test for legal validity, but as a duty imposing norm. According to Shapiro, what Hart meant by the rule of recognition was that it 'imposes a duty on officials to apply rules that bear certain characteristics.'[82] Shapiro illustrates this with the example of officials within the British legal system who recognise and apply rules enacted by the Queen in Parliament. In this way, the rule of recognition serves as a directive, binding legal officials to recognise and uphold the norms defined by the legal system. Shapiro acknowledges, however, that this interpretation raises the question of which officials the rule applies to and resolves this by arguing that the rule of recognition is primarily directed at courts, 'while the rules of change and adjudication are directed at the official parties who are empowered by these rules.'[83] Shapiro provides a detailed account of how institutional roles and responsibilities are distributed within the legal system, enhancing our understanding of the internal logic and function of secondary rules following Hart's jurisprudential theory.

Running out of Rules: Judicial Judgement and the Open-Texture of the Law:

[81] Stuart M Brown, Jr, *Reviewed Work: The Concept of Law by H. L. A. Hart* , vols 72, No. 2 (The Philosophical Review 1963) 250–253 <https://doi.org/10.2307/2183110>.
[82] Scott J. Shapiro, 'What is the rule of recognition (and does it exist)?' (2009) Yale Law School Public Law & Legal Theory Research Paper Series Research Paper No. 181, pp. 240
[83] Scott J. Shapiro, 'What is the rule of recognition (and does it exist)?' (2009) Yale Law School Public Law & Legal Theory Research Paper Series Research Paper No. 181,pp. 241

At a first glance, Hart's theory may appear ill-equipped to cope with novel situations that the rule of recognition cannot adhere to. One could argue that because society inevitably includes elements of fear and uncertainty, a theory that pays minimal attention to sanctions may struggle to adapt to evolving social contexts. Hart successfully remedies this concern with the 'open texture of law,' whereby he acknowledges that lawmakers cannot foresee every possible future development or consequence, and therefore legal rules cannot be exhaustively precise. In these cases, Judges must exercise discretion, not by resorting to coercion, but by interpreting laws in light of their underlying purpose and the specific circumstances at hand; 'the open texture of the law means that there are, indeed, areas of conduct that must be left to be developed by courts or officials striking a balance, in the light of circumstances, between competing interests that vary in weight from case to case.' [84]

David Lyons draws attention to Hart's example of a local ordinance banning vehicles from a public park, raising the question of whether a bicycle qualifies as a vehicle under this rule. [85] Hart distinguishes between the *core* of determinate meaning in language and its *penumbra* of indeterminate meaning, noting that 'the rule banning vehicles from the park likewise has a core of determinate meaning and a penumbra of indeterminate meaning.' [86] This means that until the law is clarified, a bicycle falls within this penumbra, it is neither clearly banned nor allowed.

In such cases, courts must interpret the statute purposively, determining whether bicycles should be classified as vehicles in light of the law's intent. Hart's theory addresses the challenges posed by novel or unforeseen circumstances, ensuring that courts play an active role not merely in enforcing punishment but in shaping the law through reasoned interpretation. By focusing on a system of primary

[84] HLA Hart, *The Concept of Law* (Second Edition) (Oxford University Press 1994) chapter 5, 129-135
[85] David Lyons, *Open Texture and the Possibility of Legal Interpretation*, vols 18, No. 3 (Law and Philosophy 1999) 297–309 <https://www.jstor.org/stable/3505245>
[86] David Lyons, *Open Texture and the Possibility of Legal Interpretation*, vols 18, No. 3 (Law and Philosophy 1999) 297–309 <https://www.jstor.org/stable/3505245>

and secondary rules, Hart provides a framework that is both practical and adaptable, capturing the complexity of legal systems more effectively than theories reliant solely on coercion and sanctions. This makes Hart's account a robust and logically coherent understanding of law's nature and operation.

Legal Positivism in the Age of AI:

According to Hart's positivist theory the law is not solely coercive and has instead facilitative elements and an internal compass which forces us to adhere to the rules. How does this cope when faced with modern developments of AI? If legal authority depends on internal acceptance it is unclear whether non-human agents, regardless of their sophistication, can genuinely participate in this practice. Ulgen in their argument use Floridi's distinction of 'moral agents' and 'moral patients' to explain that AI systems cannot be moral patients since they cannot experience moral harm and consequently they cannot take in the social-acceptance aspect of Hart's theory. Ulgen further discusses how attributing legal responsibility and establishing liability requires human consciousness and freedom of action. More specifically, even if AI is eventually able to have 'functional morality' to perform these tasks it will still not amount to human moral agency. Therefore, following Ulgen's logic, an automated system without consciousness that cannot establish liability and attribute legal responsibility properly, is unlikely to be accepted by society in the same way that current law enforcement is accepted[87].

Moreover, the distinction Hart draws between officials and citizens may become blurred by increasingly autonomous systems making decisions; if AI were to replace human officials in judicial roles who would count as an 'official' for the purpose of the rule of recognition and would the concept of legal validity need to evolve? Zalnieriute analyses how AI as an 'authority' varies, from a tool to helping humans make decisions to a decision-making process with the absence of humans. This is illustrated in multiple case studies including the Robo-Debt Program in Australia which faults in the algorithm lead to serious unfairness and the COMPAS system which in Wisconsin v Looms the US Supreme Court granted

[87]Ozlem Ulgen, 'A 'human-centric and lifecycle approach' (2021) 26 CL 97.

permission for partial reliance on the system but only with human supervision as the ultimate authority[88]. These examples demonstrate that without human agents providing a deep understanding of legal context behind decisions there will still faults within the system. A human-centred approach as we currently have may be imperfect but it is still a well-respected functional system that society has 'agreed' to follow. Removing the human factor from legal authorities will undoubtedly lead to systems incapable of reaching the standard of equality under the law. This itself will inherently undermine the authority of legal decision-making, consequently society will not appreciate a non-human agent making decisions, and Hart's theory fails.

In a future where AI systems play a greater role in legal reasoning, Hart's model may require reinterpretation as it currently sits at odds with the idea that non-human agents can participate meaningfully in legal creation and interpretation. In *The Mandatory Ontology of Robot Responsibility* the author highlights that we expect legal authorities to justify their actions and mentions Shoemaker's tripartite theory of attributability, answerability and accountability. Champagne adds that such principles will eventually need to applicable to artificial agents.[89] While Hart offers a deep understanding of the law without being overly concerned with elements of force and pressure, legal positivism in the age of AI must appropriately grapple with the possibility that legal systems could function without internal acceptance, leading to questions arising about the future of legal theory entirely.

[88] Monika Zalnieriute, 'The Rule of Law and Automation of Government Decision-Making' (2019) 82 MLR 425.
[89] Marc Champagne, 'The Mandatory Ontology of Robot Responsibility' (2021) 30 *Camb. Q. Healthc. Ethics* 448.

Conclusion:

The roles of sanction and coercion are not essential to a full understanding of the law. Theories that centre on these notions risk overlooking fundamental elements of legal systems, most notably, social acceptance and the interplay of primary and secondary rules. Approaches that reduce law to mere force are overly simplistic and fail to account for the nuanced functions of courts as interpreters and creators of law, rather than mere enforcers of punishment. Hart's theory deliberately downplays fear and coercion, emphasising instead the internal acceptance of rules and the structural role of secondary rules in defining and sustaining legal order. This invites a profound question: *Do we truly need to be afraid of the law in order to follow it?* According to Hart, the answer is a clear and resounding no, suggesting that the power of law lies not in fear, but in its social foundations and institutional legitimacy. Nevertheless, with current technological advancements within the system legal theory and mechanisms will need develop.