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THE EFFICACY CONDITION

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ABSTRACT
"A legal system exists," Joseph Raz claims, "if and only if it is in force." By this he means to suggest that the efficacy of law—that is, its capacity to control the population to which it applies—is necessary for its identity as such. Despite widespread recognition that efficacy is a condition of the existence of law, however, little time has been spent analyzing the notion. This article begins an attempt to make up the deficit. I make the case for efficacy as necessary for law and go on to develop and defend an account of the concept that is broadly Kelsenian in spirit. In doing so I address questions concerning the relationship between obedience and enforcement in an account of the existence of a legal system as well as relating the discussion to that concerning the ontological status of international law.

Keywords: General Jurisprudence; Efficacy; Enforcement; Kelsen; Hart; International Law

INTRODUCTION

"A legal system exists," Joseph Raz claims, "if and only if it is in force."[1] By this he means to suggest that the efficacy of law—that is, its capacity to control the population to which it applies—is a condition of its identity as such. If, for example, revolutionaries wishing to replace a monarchic order with a republican one fail to bring to heel those over whom they are asserting authority then their efforts will only count as an *attempt* at a new legal order.[2] So too, if the law in a given jurisdiction loses its grip, either over

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1. Joseph Raz, The Authority of Law: Essays on Law and Morality (2d ed. 2009), at 104.

2. The example is Kelsen's. *See* Hans Kelsen, General Theory of Law and State (1999), at 118, and more generally, 117–119. Historical instances that raised the issue of legal revolutionary success in the twentieth century include Pakistan in 1958; then Rhodesia, now Zimbabwe in 1965; and Uganda in 1966. These examples bought the question of the criteria for determining successful revolutionary change before the courts and resulted in a large secondary literature, of which the more philosophically nuanced includes J. M. Eekelaar, *Splitting the Grundnorm*, 30

the whole or a substantial part of the population to which it applies, then the system in question will, to the extent of its deterioration, have ceased to exist.[3] These observations bring home the important truth that while law is in part a matter of having certain kinds of institutions—courts, and perhaps legislatures and enforcement agencies—it is also a matter of the relationship between those institutions and the population to which their rules and rulings are addressed. Law, as Hart reminds us, is most fundamentally "a means of social control" and it is this fact that sets it apart as an object of persistent moral concern.[4]

That efficacy is a condition of the existence of a legal system has long been accepted. Austin, following Bentham, built the idea into his conception of sovereignty. Law, he argued, was to be understood as the command of the sovereign where the sovereign was defined as that body to which "the bulk of [a] given society are in a habit of obedience or submission to. . . ."[5] Without submission, Austin claimed, there could be no sovereign and without the sovereign there could be no law.

Kelsen, with whom modern discussion of the topic began, held that "the efficacy of the entire legal order is a necessary condition for the validity of every single norm of [that] order."[6] While the rules of a legal system were valid "because they are created in the constitutional way," they maintained their validity "only on the condition that the total order [was] efficacious."[7] And while disagreeing with him about the details, theorists such as Hart, Raz, and Finnis have followed Kelsen in drawing this implication.[8]

Given the widespread acceptance that efficacy is a condition on the existence of law, it is perhaps surprising to find that few theorists have paid the concept much attention.[9] Raz, for example, devotes only part of one chapter of his *The Concept of a Legal System* to the question of what it means for the law to be in force, confining himself largely to criticism of Kelsen's

MOD. L. REV. 156 (1967); A. M. Honore, *Reflections on Revolutions*, 2 IRISH JURIST 268 (1967); R. W. M. Dias, *Legal Politics: Norms Behind the Grundnorm*, 26 CAMBRIDGE L.J. 233 (1968); F. M. Brookfield, *The Courts, Kelsen, and the Rhodesian Revolution*, 19 U. TORONTO L.J. 326 (1969); J. W. Harris, *When and Why Does the Grundnorm Change?*, 29 CAMBRIDGE L.J. 103 (1971).

3. A historical example of partial disintegration of this kind occurred toward the end of the Soviet Union where between 1987 and 1991 Estonia engaged in a "war of laws" with the central Soviet government, eventually reconstituting itself as a distinct legal entity.

4. H. L. A. HART, THE CONCEPT OF LAW (3d ed. 2012), at 39.

5. JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED; AND, THE USES OF THE STUDY OF JURISPRUDENCE (1998), at 193–194.

6. KELSEN, *supra* note 2, at 9, 119.

7. *Id.* at 119. Hart mirrors these points. *See* HART, *supra* note 4, at 103–104.

8. Hart suggests, for example, that one of the "minimum conditions . . . for the existence of a legal system" is that "the rules of behavior which are valid according to the system's ultimate criteria of validity must be generally obeyed." *See* HART, *supra* note 4, at 2, 116; JOSEPH RAZ, THE CONCEPT OF A LEGAL SYSTEM: AN INTRODUCTION TO THE THEORY OF A LEGAL SYSTEM (2d ed. 1980), at ch. 7; RAZ, *supra* note 1, at 104. For Finnis's discussion of efficacy as a necessary condition of law's authority *see* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (2d ed. 2011), at 246–247.

9. Notable exceptions include Eekelaar, *supra* note 2; Dias, *supra* note 2; Harris, *supra* note 2; Gerald J. Postema, *Conformity, Custom and Congruence: Rethinking the Efficacy of Law*, *in* THE LEGACY OF H.L.A. HART: LEGAL, POLITICAL, AND MORAL PHILOSOPHY 45–66 (Matthew H. Kramer ed., 2008).

account.[10] Kelsen and Hart, whose discussions of the issue were the most penetrating, nonetheless left many questions unanswered.[11] And while it is true that a theory need not be complete in order to be illuminating, it is hard not to see the question of law's efficacy either sitting behind or relating to a number of central issues in the philosophy of law. Skepticism about international law, for example, often hinges on the belief that it is unable to effectively constrain state action, at least so far as the more powerful are concerned.[12] So too issues concerning rival claims to legal authority, made famous by the pluralists of the 1970s and 80s and by the rise of supra-state institutions such as the European Union, are at their heart questions about what it means to say of systems of overlapping jurisdiction that they are each in force.[13] Perhaps most importantly, however, the question of what it means for a legal system to subject a given population to its control has important implications for the nature and justifiability of law's authority. It helps to explain why law, in its structural dimension, manifests as an instrument of social power.

In what follows I will sketch an account of the efficacy of law that is broadly Kelsenian in spirit. In the first section I make the case for efficacy as an existence condition of law.[14] The second section considers the relationship between the efficacy of a legal system and the efficacy of its constituent laws. In the third I explain how the notion of obedience plays into that question, as well as saying how an account of law dependent on its capacity for control can accommodate power-conferring laws within its compass. The fourth section argues, with Kelsen and contrary to Hart, that the efficacy of law should be determined not only by its capacity to secure obedience but also through its capacity for enforcement, by way of punishment or remedies issued in response to legal wrongs. Here I also say something about how the discussion relates to the issue of the ontological status of international law.

I. LAW AND LAWLESSNESS IN YAP, MICRONESIA

That the validity of particular legal rules does not depend on their efficacy is easily recognized. The fact that many flout the speed limit, for example,

10. Raz, Concept of a Legal System, *supra* note 8, at ch. 9.

11. *See* Hans Kelsen, Pure Theory of Law (Max Knight trans., 1967), at 10–11 and 211–214; Kelsen, *supra* note 2, at 118–122; Hart, *supra* note 4, at 112–117.

12. For analyses that draw radically different conclusions from this premise *see* Noam Chomsky, Pirates and Emperors, Old and New: International Terrorism in the Real World (new ed. 2002); Jack L. Goldsmith & Eric A. Posner, The Limits of International Law (2005). For an important corrective to Goldsmith and Posner's reductive view *see* Philippe Sands, *Reasons to Comply*, London Rev. Books, July 20, 2006.

13. For an alternate approach, one that places more emphasis on the claims made by legal actors within each system in adjudicating the issue, *see* Julie Dickson, *How Many Legal Systems? Some Puzzles Regarding the Identity Conditions of, and Relations Between, Legal Systems in the European Union*, 2 Problema 9 (2008).

14. In this and what follows I treat law and legal systems as synonymous, such that anything that is necessarily true of law is necessarily true of all legal systems.

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does not transform the motorway into a rule-free zone. So too, that a statute has been ignored or overlooked in previous judicial decisions does not prevent it being the courts' continuing duty to honor its provisions. This latter point is qualified by the fact that certain legal systems contain a custom—known as *desuetudo* or the rule of obsolescence—requiring that courts treat particular rules of law as invalid by virtue of their long-term nonapplication. But to say that a rule of law may become invalid by virtue of its inefficacy is quite different from saying that it was valid in the first place *because* efficacious.[15]

From the question concerning the validity of individual rules of law we should distinguish that concerning the existence of the legal system as a whole, the legal order as Kelsen called it. Consider the way in which claims of law, that it is unlawful to consume recreational drugs, for example, depend on or can be said to presuppose the existence of an efficacious legal system. Just as it makes little sense to claim of someone that they are "in check" when not engaged in a game of chess, so too to assert that the law requires that individuals avoid illicit substances does not make sense absent the background assumption of a functioning legal order.[16] To make such a claim where the set of norms of which the rule forms a part either has never taken root or has fallen into disuse would involve a form of presupposition failure. In such a situation, Hart tells us, "the normal context or background for making [a] statement in terms of the rules of the system is missing."[17]

Considerations of this kind are standardly expressed in terms of the requirement of an "institutional context," Anscombe famously having argued that assertions of social obligation require "institutions as background" in order to be "the kind[s] of statement[s]" that they are.[18] And while this claim is good as far as it goes, what I want to stress here is that

15. *See*, on these points, HART, *supra* note 4, at 103; KELSEN, *supra* note 2, at 119.

16. For the analogy *see* HART, *supra* note 4, at 104. This helps to explain why Ronald Dworkin was wrong to hold that questions concerning "what makes a particular structure of governance a legal system" were neither of "much practical nor much philosophical interest" while the "doctrinal question" of "what makes a statement of what the law of some jurisdiction requires or permits true" was of "enormous practical and considerable philosophical significance." Because the existence of a functioning legal system forms part of that which is presupposed when we make individual claims of law, the institutional question is crucial to the doctrinal one. *See* Ronald Dworkin, *Hart and the Concepts of Law*, 120 HARV. L. REV. F. 95 (2006). For further criticism of Dworkin on this point *see* JOHN GARDNER, LAW AS A LEAP OF FAITH : ESSAYS ON LAW IN GENERAL (2012), at 270–272.

17. HART, *supra* note 4, at 103–104.

18. G. E. M. Anscombe, *On Brute Facts*, 18 ANALYSIS 69, 69 (1958). The point is taken up and developed by John Searle in JOHN R. SEARLE, SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE (1969), at 33–39, 50–53 and JOHN R. SEARLE, THE CONSTRUCTION OF SOCIAL REALITY (1995), at 27–29. For Searle the existence of "institutional facts"—such as the fact that an individual is "in check" in a game of chess or that I am liable to pay damages under a contract—depend on systems of constitutive rules, rules that make possible the relevant acts and descriptions of such acts. The argument developed here sits tangentially to Searle's central idea: the issue is not so much that legal act descriptions—that I am liable to pay damages, for example—depend on sets of interrelated institutional rules (which is undoubtedly true), but that these

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for a given society to have law it is not enough that the relevant institutions exist; they must interact in the right way with the population over whom they claim control.[19] Consider, by way of analogy, a refereed sporting game. For such an event to take place it is not enough that some individual deems themselves the game's official and judges play according to the rules. It is important, too, that their authority is actually accepted by those engaged in the match, that those playing the game defer to their decisions. In the absence of such a relationship of authority—one in which the determinations of the referee are taken as binding—we lose the sense that the game *has* an official. So too if disregard for the rules of a legal system were to become both general and protracted, for example as a result of widespread and lasting civil disobedience, the notion that the society in question actually had law would become harder to make sense of. Law, like the game, requires not just institutions and officials but institutions and officials whose activities properly affect the lives of those over whom they claim jurisdiction.

It is important to understand the limits of this argument. When it is suggested that statements of law only make sense in the context of a functioning legal system, the claim is not that such assertions only have *meaning* in such a situation and appear otherwise as nonsensical.[20] The argument is not about the sense but about the pragmatics of legal statements; claims of law made in absence of a functioning legal system are intelligible but they occur apart from the background that makes them truth-evaluable. The argument is, in this way, both about the pragmatics of language—what is presupposed when we make claims of legal right and obligation—and about the grounding of these very rights and obligations.[21]

But just as the significance of the argument should not be overemphasized so too its importance should not be underappreciated. The idea is not merely that legal rights and obligations are only *enforceable* in the context of an efficacious legal system, although this is of course true, but that they can only be said to *exist* in such a context. Even in reasonably well-functioning legal systems important rights sometimes go discarded and duties unenforced. However, if the law were to continue progressively to lose control over its subject set, we would reach a point at which it was no

rules must interact with their target population in a particular way for the system of which they form a part to be said to exist.

19. The point can be put differently by saying that we do not yet have legal institutions unless and until their rules and rulings are in force.

20. So Anscombe's claim must be interpreted figuratively, not literally.

21. It is sometimes suggested that claims about historical or fictional legal systems stand as counterexamples to this view, as such assertions can be true absent an effective legal order. But in the former case the statement will be relativized to a legal system that actually was in force and in the latter case it will be relativized to one that is conceived of as so being in the relevant fictional context. As such, the tension between the argument and the examples is in the end only apparent. On this point as applied to the historical example *see* HART, *supra* note 4, at 104 and J. W. HARRIS, LAW AND LEGAL SCIENCE: AN INQUIRY INTO THE CONCEPTS *LEGAL RULE* AND *LEGAL SYSTEM* (1979), at 123–124.

longer sensible to claim that those notionally under its jurisdiction had the rights or obligations pronounced on by its institutions. In the first type of situation there is a deficit in the law. In the latter there is no law.

Brian Tamanaha, a legal theorist who approaches the subject from the perspective of sociology, thinks that this claim about the conditions under which law can be said to exist is too strong. Using as an illustrative example the case of Yap, Micronesia—which was for a number of years under U.S. trusteeship—he suggests that we should drop the "requirement of general obedience" from our understanding of law.[22] "Yap," he claims, "had a legal system, with a legislature, a handful of judges and attorneys . . . and a complete legal code based in its entirety on laws transplanted from the United States." Large parts of the code, however, were completely unknown to the island's population:

> few lay people had any knowledge of the content of the laws or of the operation of the legal system, a large proportion of social problems were dealt with through traditional means without participation of the state legal system, and indeed on most of the islands there was no legal presence at all.[23]

"Although the overwhelming majority of the populace lived in general disregard of the vast bulk of the rules of the legal system," Tamanaha suggests, "it is wrong to say that their state legal system did not exist."[24] "The existence of state law in Yap," he claims, was "a social fact . . . despite its failure to meet the efficacy requirement."[25]

What should we say in response to Tamanaha's argument? The first thing to note is that a legal system may well fall far short of the jurisdiction claimed for itself and yet exist because it has control over part of its de jure subject set.[26] This much was true, for example, of the Soviet legal system in its final years and, indeed, this may have been the best explanation of the situation in Yap under U.S. trusteeship. For, as Tamanaha himself notes, although the law was ignored by many of those who lived on the island, especially in the countryside, it was nonetheless effective in regulating "the affairs of running a government" as well as much of life in the capital.[27] So even accepting that efficacy is a condition of law's existence we can say that the state legal system in Yap existed, albeit with a much more limited jurisdiction than that which it claimed for itself.

But perhaps Tamanaha's argument is of a different form. His suggestion may not be so much that the law in Yap applied to a narrower range of the general population than that over which it claimed authority, but that the

22. BRIAN Z. TAMANAHA, A GENERAL JURISPRUDENCE OF LAW AND SOCIETY (2001), at 145.
23. *Id.* at 145.
24. *Id.* at 146.
25. *Id.* at 146.
26. *See*, on this possibility, HART, *supra* note 4, at 117–123.
27. TAMANAHA, *supra* note 22, at 146.

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system's reach never extended beyond the acts of its agents and institutions. Indeed, this may be what Tamanaha means when he says that in Yap "social practices gave rise to the existence of a state legal system . . . based upon the self-identification of state legal actors."[28] Should we be willing to accept the possibility of a legal system whose power extends only to the very institutions —courts, legislatures and other officials—whose actions give rise to its requirements in the first place?

In a way the question is ill conceived because we can only make sense of questions concerning the law's de facto authority if we know what areas of social life the order in question aims to regulate: to understand whether a system of norms effectively controls behavior we have to know what kinds of behavior it sets out to control. All of this presupposes the existence of institutions whose job it is to authoritatively make, determine, and apply the law. Without, in particular, courts in place identifying what is to count as the law for a given jurisdiction, we do not have a body of rules about which we can ask: "Are they effective?" So the question of efficacy assumes but does not extend to the initial composition of legal institutions.

One way of responding to this claim is to note the possibility of self-regarding normative systems—for example, those that comprise unincorporated associations or societies—whose only function is to control the behavior of their members. Could we not try to imagine a legal system similarly confined in its scope, to the regulation and control only of the behavior of its agents? It is, I think, hard to see how we could admit this much without losing the important distinction between the rules of a club—inward facing, voluntary—and law—a system of institutional control *over* a population.[29] This distinction helps us to explain, for example, why law and not the club will always be an appropriate candidate for assessment in terms of its political legitimacy. It also helps to explain why law and not the club involves a form of social regulation that is necessarily as opposed to contingently morally hazardous.[30]

For these reasons, then, we should reject the argument that attempts to make plausible the idea of a legal system whose control encompasses only the regulation of the "affairs of . . . government."[31] All legal orders, at least to some degree, extend their authority over a population outside of the institutional or official realm and they do so as a matter of necessity. But what, more precisely, does it mean to say of a system of law that it is

28. *Id.* at 146.

29. For criticism of Tamanaha's argument along similar lines to those developed here *see* Postema, *supra* note 9, at 48–49 and for discussion of law's "Janus-faced" nature, "looking both towards obedience by ordinary citizens and to the acceptance by officials of [certain] rules as . . . standards of official behaviour," *see* HART, *supra* note 4, at 116–117.

30. On which *see* Leslie Green, *Positivism and the Inseparability of Law and Morals*, 83 N.Y.U. L. REV. 1035, 1052–1054 (2008).

31. TAMANAHA, *supra* note 22, at 146.

in force in this way? What are the conditions under which we can claim that the law has effective control over its subjects?

There are three aspects to this question. The first involves specifying the relationship between the effectiveness of individual legal rules and that of the system as a whole. While a legal system being in force is not the same thing as each and every rule of the system being efficacious, the analysis of the effectiveness of individual legal norms must play into the analysis of the existence of the institution as a whole. The second issue concerns what it means to say of law's obligation-imposing requirements that they are, generally speaking, effective. This includes saying something about how power-conferring rules fit into an analysis of law premised on its capacity for control. Finally, it needs to be considered whether, and if so in what way, enforcement—dependent, as it is, on a breakdown of obedience to the law's primary obligation-imposing requirements—plays into the question of the system's efficacy. I treat each of these issues in turn.

II. THE EFFECTIVENESS OF THE LAW AND THE EFFECTIVENESS OF ITS LAWS

A partial failure of the law to effect control no more calls into question the existence of the system than the failure on the part of one person to move their bishop diagonally means they are no longer playing chess. But, equally, just as a near total disregard for the rulebook does raise the question of whether we can sensibly say of someone that they are playing the game, so there exists a limit in terms of the noncompliance that the law can tolerate while maintaining its identity. Kelsen put the point this way: a legal system exists just in case "its norms are *by and large effective*."[32]

What should we make of this definition? As noted earlier the criterion is not one that needs to be satisfied in relation to the law's claimed or de jure jurisdiction. A legal system may well exist even if it effectively regulates only part of the population to which its norms are addressed; the failure of the state or other political organization that rules through law may be fractional and is at any rate not a binary matter.[33] The idea is that effective control determines the limits of the legal system and a legal system must control some more than de minimis population in order to exist.

The second point to note about the definition is that it marks only a vague boundary between situations in which the law is in force relative to a target population and those in which it is not. But this should come as no surprise. Most distinctions worth marking in the philosophy of social and political institutions—for example, between legitimate and illegitimate forms of government—are similarly vague. Moreover, we should not expect

32. KELSEN, PURE THEORY, *supra* note 11, at 212. *Cf.* HART, *supra* note 4, 103–104.

33. For discussion of this issue in relation to the Rhodesian/Zimbabwean case *see* Eekelaar, *supra* note 2, at 173–174.

more from this aspect of the theory of law than we do from others. Just as the boundary between legal and other kinds of institution—for example, religious or revolutionary forms of association—is imprecise, so too is the distinction between a society that is effectively ruled by law and one that is not.[34]

Finally, the definition specifies a particular relationship between the efficacy of individual rules of law and of the legal system as a whole. Because the effectiveness of the system is construed in terms of the by and large effectiveness of its norms—a term of art for Kelsen, about which I will say something below—the analysis of the former will depend on the analysis of the latter. But which kinds of legal rule bear on the law's capacity to control conduct and under what conditions can we assert that they effectively do?

III. LAW'S DOMINION

Kelsen embraced a reductive theory of legal norms according to which all such rules were ultimately to be understood as instructions to judges to apply sanctions in concrete cases ("if such and such conduct has come to pass then the judge must apply the specified sanction").[35] The model most closely tracks our understanding of the criminal law, intimately concerned as it is with punishment. Even here, however, there are problems. Such laws are first and foremost *instructions to the public* not to commit the relevant wrong and only in their second act—the one it is hoped will not come to pass—do they function as premises in judicial decisions designed to sanction the wrongdoer.[36] Further issues arise when attempting to assimilate power-conferring laws—such as those involved in the formation of contracts, for example—into the model without losing sight of the point or purpose of such institutions: to allow individuals to create binding obligations, as opposed to forming part of a set of conditional instructions to judges to award damages in the case of breach.[37]

These are problems in Kelsen's understanding of the individuation of legal norms, but what he said about the effectiveness of legal rules was more illuminating:

34. The vagueness inherent in the distinction puts pay to criticisms of Kelsen's theory for its failure to clearly determine whether a new legal system has come into existence in the aftermath of attempted revolutionary change. To this question there will often be no clear answer. *See*, for the criticism, Dias, *supra* note 2 (1968), at 253 and Harris, *supra* note 2, at 120–121. For discussion of the contrast between philosophical analysis of legal concepts and their role "within the ordering of human life in society" and lawyers' use of language, often in such a way as to attempt to "read off a definite solution to definite problems—in the final analysis, judgment for one party rather than the other in a litigable dispute," *see* Finnis, *supra* note 8, at 279–280.

35. *See* Kelsen, *supra* note 2, at 58–63.

36. *See* Hart, *supra* note 4, at 35–42, Joseph Raz, Practical Reason and Norms (2d ed. 1990), at 161–162.

37. *See* Hart, *supra* note 4, at 27–32.

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> By effectiveness of a legal norm, which attaches a sanction to an certain behaviour and thus qualifies the behaviour conditioning the sanction as illegal, two facts may be understood: (1) that this norm is applied by the legal organs (particularly the law courts), which means, that the sanction in a concrete case is ordered and executed; [or] (2) that this norm is obeyed by the individuals subjected to the legal order, which means, that they behave in a way which avoids the sanction.[38]

Shorn of the trappings of Kelsen's reductive theory of legal norms we arrive at the following: first, that the effectiveness of legal rules is determined either by submission to their requirements on the part of the law's subjects—"that this norm is obeyed by the individuals subjected to the legal order"—or by their enforcement in the courts—"that this norm is applied by the legal organs."[39] Second, and as an implication of the first condition, that the question of the effectiveness of legal rules is confined to those that impose obligations, for laws that create powers—for example, those that allow us to make contracts or deeds—cannot be *obeyed* although they can of course be *complied with*. As the question of enforcement raises a range of relatively independent issues I will discuss it in the next section. Here I want to focus on the notion of obedience as well as issues around power-conferring laws.

What, then, does it mean to say of duty-imposing rules that they are effective?[40] More than that the behavior of individuals *coincides* with their requirements. As Donald Regan puts the point: "obedience involves something more than . . . behavioral compliance with [a] directive."[41] Mere congruence between the activities of individuals and the stipulations of the law—as per, in partial modification of the original story, the tide happening to turn at the appropriate moment in King Canute's performance—is not enough to show that the latter effectively regulates the former. For this to be the case the law must play a role in determining the behavior of those subject to its rules.[42]

38. KELSEN, PURE THEORY, *supra* note 11, at 11.

39. *Id.* at 11.

40. There is a large literature on the psychology of why people obey the law, of which the most important work is probably TOM R. TYLER, WHY PEOPLE OBEY THE LAW (rev. ed. 2006). This body of scholarship largely takes for granted or assumes an answer to the question being considered here, namely, what it means to obey duty-imposing laws. For criticism of some of the assumptions made by Tyler and others *see* FREDERICK F. SCHAUER, THE FORCE OF LAW (2015), at 57–61.

41. Donald H. Regan, *Reasons, Authority, and the Meaning of Obey: Further Thoughts on Raz and Obedience to Law*, 3 CAN. J. L. & JURIS. 3, 15 (1990). *See also* SCHAUER, *supra* note 40, at 48–49.

42. It is clear that Hart thought of obedience in cognitive terms, that is, as involving knowledge of the law: *see* Hart, *supra* note 4, at 112, 115 (although *cf.* Postema, *supra* note 9, at 50 & n.1 for a different interpretation). Kelsen, on the other hand, appears not to have done. Although he describes willing submission to a legal rule as "the ideal case of the validity of a legal norm" Kelsen also countenances the possibility of "obedience to [a] legal norm caused by other motives," such as the wish to avoid "religious sanction." *See*, on this, KELSEN, PURE THEORY, *supra* note 11, at 11–12. Kelsen's failure to distinguish between behavioral coincidence

Equally, however, obedience should not be seen to imply that the relevant behavior comes about simply *because* the law mandates it. Most people, for example, avoid killing or doing serious injury to others quite apart from the fact that these acts are criminalized.[43] Nonetheless, it would be wrong to say of such individuals—on the assumption that they are in general law-abiding—that they do not obey the law.[44]

How, then, to square the circle? Obedience to law should be thought of as setting a background condition on permissible action. While the law may be effective in certain types of cases because individuals treat its existence as supplying their primary reason for action—for example, when they act only to avoid the punishments associated with the breach of its rules—many act consistently with the law's requirements at least in part for reasons that stand apart from the fact that they are legally mandated. And for these people the law's effectiveness should be gauged counterfactually, based on whether they would comply with its requirements even if the reasons that otherwise compel their action were not present. In this way obedience involves taking the law to count decisively in favor of the action it prescribes, although this need not in fact involve the law making a practical difference to behavior.[45]

Where does this analysis leave those aspects of the law that confer powers as opposed to imposing duties? It might be thought that defining efficacy in terms of obedience leaves large swaths of the law—for example, the institution of contract or the law-making powers of legislatures—unaccounted for

with the requirements of the law and intentional compliance owes itself to his insistence on the separation of philosophical study of the law not only from ethics but also from psychology; this is the "purity" of his pure theory, the attempt to avoid "the uncritical mixture of methodologically different disciplines." *Id.* at 1. Kelsen's notion of purity here goes one step too far, however. He is right that the psychological study of law is different from philosophical understanding of the subject, and that the concerns that illuminate the former will not be the same as those that illuminate the latter. But this is distinct from saying that the philosophy of law should pay no attention to psychological concepts. As Raz has argued, "it is beyond doubt part of the task of legal philosophy to explain the methods by which the existence and content of the law are ascertained [and that] they cannot be ascertained without regard to the practices and manifested attitudes of legal institutions . . . ." When considering the question of whether the law is in force the point applies *mutatis mandis* to the "practices and . . . attitudes" of the law's subjects. *See*, for the criticism, Raz, *supra* note 1, 294–295. For more general discussion of the notion of "purity" in Kelsen's work *see* Stanley L. Paulson, *The Purity Thesis*, 31 Ratio Juris 276 (2018).

43. For discussion of some of the theoretical issues engendered by this fact *see* Joseph Raz, Ethics in the Public Domain: Essays in the Morality of Law and Politics (1994), at 342–346.

44. In making this claim I depart from Fred Schauer's recent treatment of the issue according to which individuals should be classified as obeying the law only if it makes a causal difference to their behavior. "If we are interested in obedience to law," he suggests, "we must focus on law's effects on people who, but for the law, would have done something other than what the law commands." In making this claim Schauer confuses a sufficient condition for obedience—that one performs some action simply because the law requires it—with a necessary one. *See* Schauer, *supra* note 40, at 49.

45. I thank my anonymous reviewers for getting me to clarify my thoughts on this issue, especially in relation to the wider literature.

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in determining whether or not a legal system is in force.[46] Such a result would indeed be counterintuitive, but does it follow?

Take private powers first. While the rules that determine how to form legally binding agreements cannot themselves be analyzed in terms of their ability to control behavior—the law does not require that individuals contract and so it does not count against the efficacy of the system if they do not—a consequence of the use of such rules is the creation of new duties. A contract to pay £20 for the delivery of a box of fruit, for example, creates obligations on the part of one party to pay the money and on the part of other to deliver the fruit. The efficacy of the institution can then be measured, in the first instance, by the extent to which people *keep to their contracts*. It is, in other words, the duties created as a consequence of agreement by which we first measure the effectiveness of contract law.[47] Even specifying the efficacy of law in terms of control, then, we can still sensibly talk of the force of institutions that involve private powers.[48]

What of public powers? The efficacy of these laws can be measured, again, not by the extent to which the relevant power is exercised—how many times, for example, should a legislative body use its law-making power in a particular session for that procedure to count, in the relevant sense, as efficacious?—but by the extent to which the laws that are created as a result of its exercise are themselves effective within the system.[49] A power to create law is not rendered ineffective because it is not used. It is, however, if the rules created through its use fall on deaf ears.

Raz disagrees with this point, holding that the failure to exercise power may itself be directly relevant to the efficacy of the system. He asks us to consider a situation in which "members of some racial or ethnic group are considered as second-class citizens and do not enjoy political rights":

46. Raz, for example, takes this to be an important criticism of traditional accounts of the efficacy of law: "The principle of efficacy is concerned only with obedience and disobedience to [duty-imposing] laws. But is not the way in which people do or do not make use of powers conferred on them by [power-conferring] laws of equal importance to the existence of the legal system?" *See* RAZ, CONCEPT OF A LEGAL SYSTEM, *supra* note 8, at 204.

47. It is important to be clear that here, as per above, the question is whether the law itself plays a decisive role in the reasoning of the individual. People's moral and prudential reasons to keep to their promises, taken in isolation from the law, do not count in favor of the efficacy of the institution of contract. On the other hand, keeping to a contractual obligation because mandated to do so by law does.

48. Raz wants to go one stage further. "If" he says, the "violation of certain contracts affects the existence of the legal system, so does the fact that the population refrains from making certain types of contract." But this does not follow. There is a difference, after all, between repeatedly moving the bishop in a straight line in a game of chess and refusing to use it at all. Only the former of these actions threatens the integrity of the game. *See* RAZ, CONCEPT OF A LEGAL SYSTEM, *supra* note 8, at 204.

49. The efficacy of these rules in turn being analyzed as above: depending on the extent to which their duty-imposing components are complied with.

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> Suppose that the government appoint some of their members as a semi-autonomous legislative assembly, and that these persons, in protest against the regime, refuse to make use of their powers. Is not their action as detrimental to the existence of the legal system as any act of violating duties in civil disobedience?[50]

I think the right response here is to say that it might be but not because the legislative body has failed to exercise its law-making powers. The failure of the assembly to carry through on its agenda no more brings the system into disrepute than the famous logjams in the United States Congress question the efficacy of American law. The crisis is in the first place one of politics and just so long as the rules that each institution has produced remain efficacious, so the law retains its authority. Protest of the form that Raz describes might, however, lead to a situation in which ordinary forms of deference to the system are disrupted. The actions of the minority members are presumably intended to delegitimize the legislature and if effective could interfere with obedience to its laws on the part of the more general population. Disobedience of this kind would uncontroversially go to the efficacy of the system. It is, in other words, a possible consequence of the act of protest on the part of the minority members of the assembly that speaks to whether the law retains its force, but not the bare refusal to legislate in and of itself. By distinguishing between the fact and consequence of inaction in this context, then, we can allow Raz the intuitiveness of his example while at the same time maintaining that the efficacy of a legal system is to be gauged in terms of its capacity for control.

IV. ENFORCEMENT

I have argued that the law's effectiveness is to be measured in the first place by adherence to its primary obligation-imposing requirements: whether people keep their contracts, for example, or whether criminal activities are avoided. Is this, however, the only register by which we are able to discern the law's efficacy? Kelsen, as we have already seen, thought not: the efficacy of a legal norm was to be measured either by obedience or in the alternative by its "application in a concrete case," that is, by its enforcement in the courts.[51] For Kelsen the law's effectiveness does not run out if individuals fail to keep to their bargains, for example, just so long as the courts are in a position to ensure that damages are paid. So too the law retains its force even when subjects disobey the requirements of the criminal law if the associated punishments are imposed.

Hart thought otherwise. While distancing himself from many aspects of Austin's austere command theory of law—in accordance with which

50. Raz, Concept of a Legal System, *supra* note 8, at 204.
51. Kelsen, Pure Theory, *supra* note 11, at 11.

law was to be understood as the command of the sovereign backed by force—he accepted that Austin's criterion for the existence of the sovereign, "the . . . formula of a general habit of obedience to orders[,] does designate one necessary condition [for the existence of a legal system]: namely, that where the laws impose obligations or duties these should be generally obeyed or at any rate not generally disobeyed."[52] Because the fact of obedience is on this conception necessary for the existence of law, and because questions of enforcement arise only on the breakdown of obedience to the law's primary norms of obligation, so Hart did not countenance answerability in the courts—the imposition of punishments or liabilities—as a means to law's efficacy.

Who had the better view? I think that the obvious answer here is Kelsen but that the account requires some modification. First, though, I need to explain why we should reject Hart's approach. The theory, based as it is entirely on the notion of obedience, has the implication that a legal system in which the law effectively, even ruthlessly, punishes or otherwise coerces those who fail to honor the system's primary rules of obligation is, to the extent to which it does so, inefficacious. But a legal order does not cease to be effective just because large numbers end up behind bars or subject to other kinds of penalties. If it did, the United States of America, a country whose per capita prison population remains the highest in the world, would be, to the extent that it engages in the practice of incarceration, inefficacious. No one, however, doubts the effectiveness of that legal regime and a large part of the reason for this has to do with its capacity for enforcement.

The same point can be put differently: if Hart's view were right any legal system that fell below a baseline requirement of general obedience would, by virtue of this fact, cease to exist. This would be so, moreover, regardless of whether the regime in question were able to effectively respond to the fact of noncompliance by sanctioning wrongdoers. So on the Hartian approach there is an equivalence between a system that is widely disobeyed and that cannot bring to heel those over whom it asserts authority and one that, despite widespread disobedience, is able to do so. In both cases we would have to say that the legal system has lost its force. But while we might have reason to consider a legal system that controls behavior primarily through its mechanisms of enforcement to be pathological or unhealthy it seems wrong to deny it the title of law simply on this basis. The failing of Hart's understanding is that it refuses to countenance the occurrence of the legally stipulated response to the fact of wrongdoing for what it is: a sign of the *functioning* of the legal system.[53]

52. HART, *supra* note 4, at 112.

53. The mirror of this argument also puts pay to Jim Harris's suggestion that the aspect of Kelsen's theory having to do with obedience should be dropped in favor of an account focused only on enforcement. To hold, as he does, that "the first criterion (obedience) should be eliminated" from our understanding of the effectiveness of law fails to accommodate the fact that a

So Hart's approach ought to be rejected. The efficacy of law should be measured either by the fact of obedience, or in the alternative, through the notion of enforcement.[54] But how should the latter concept be understood? Kelsen seems to have thought of the idea in factual terms, requiring that a "sanction in a concrete case [be] ordered and executed" in order to satisfy the criterion.[55] In this way the law would count as efficacious either if it was obeyed or if those who had offended against its requirements were brought before the courts and effectively sanctioned.

One complication with this proposal is that the law in many jurisdictions contains mechanisms that place within the hands of individuals or institutions the decision as to whether to pursue wrongs in the courts. State authorities, for example, will often have the discretion not to prosecute crimes and the law does not compel individuals to vindicate their rights in civil cases. This raises the possibility of situations in which the law is neither complied with nor enforced despite the fact that the latter option remains available. Such cases fail to satisfy Kelsen's understanding of efficacy, but intuitively there is a difference between a situation in which the law remains unenforced because it cannot be and that in which it is unenforced because it has been decided that it should not be.

How, then, to accommodate this distinction? Instead of understanding the notion of enforcement in factual terms we can think of it as a capacity. On this reading the law will count as efficacious either if it is actually enforced or if it is capable of being enforced. So a discretionary decision on the part of the state not to pursue a crime, for example, would not count against the law's effectiveness just so long as it could be punished. So too the civil law would not count as inefficacious merely because people choose not to pursue their rights in court as long as they would be able to do so effectively if they so decided.

This modification of the account also helps us to deal with a further problem. Kelsen appears to have assumed that the notions of obedience and disobedience were binaries, that the subject necessarily either obeyed or

legal system that achieves widespread submission makes good on its primary function of controlling behavior. As Hart notes, "it is of course very important, if we are to understand the law, to *see* how the courts administer it when they come to apply its sanctions. But this should not lead us to think that all there is to understand is what happens in courts. The principal functions of the law as a means of social control . . . [are] to be seen in the diverse ways in which the law is used to control, to guide, and to plan life out of court." *See* Harris, *supra* note 2, at 120–121. For Hart's criticism of theories focused only on law's secondary or ancillary functions *see* Hart, *supra* note 4, at 40.

54. As enforcement is here understood to count as an "in the alternative" way of securing the efficacy of law so the argument I am making stops short of suggesting that coercive enforcement is itself an essential property of law. For arguments against the conclusion that it is *see* Raz, supra note 36, at 157–162 and Scott Shapiro, Legality (2011), at 154–170. For discussion of the practical and philosophical import of these claims *see* Schauer, *supra* note 40, at 93–98 and, on Schauer, Leslie Green, *The Forces of Law: Duty, Coercion, and Power*, 29 Ratio Juris 164 (2016).

55. Kelsen, Pure Theory, *supra* note 11, at 11.

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disobeyed the law.[56] But the account of obedience sketched earlier, being cognitivist in character, opens up a third possibility. If, as I have suggested, obedience depends on intentional submission to the law then there will exist a category of cases in which the individual neither obeys nor disobeys the law, for example where they happen to comply with the law's requirements in ignorance of its terms.[57] How to judge efficacy in such cases? Here too I think we can point to the possibility of enforcement. The law will count as efficacious in such a situation if, were the individual to fail to conform to its requirements, the law *could* be effectively enforced against them. This makes the question of the law's efficacy in large part one about its potential for control.

Applying the account systematically we can say that a legal system will count as effective if most of its laws are either obeyed, enforced, or otherwise stand capable of being enforced. In the standard case a legal system will secure its efficacy through a combination of these techniques. Some laws will be effective because the population submits to their requirements and others will be honored in the breach, through answerability in the courts. The relationship between these aspects is dynamic. Legal systems may at times be able to achieve widescale obedience, a possibility that will often be secured in part through the *threat* of enforcement and consequent incentive to respect the law. At other times the actual mechanisms of enforcement will themselves become a bigger part of the picture; the less that the law can extract from its subjects in the way of compliance the more reliant it will become on the possibility of force to ensure its survival.[58] Indeed, the disjunctive nature of the account raises the following possibility—that a legal system might secure its existence almost entirely through enforcement with next to no compliance with its primary norms. The coming to be of such a reality is admittedly farfetched (although it is worth noting that in many actual legal systems aspects of the law are experienced in this way by a subset of subjects).[59] Some might worry, however, that the possibility of a system of pure enforcement—a system in which there has been a near total breakdown of respect for the law's primary rules of obligation—is so far removed from our ordinary

56. *See*, on this, *id.* at 11–12.

57. As Donald Regan notes, "obedience and disobedience . . . are not contradictories. They are merely contraries." *See* Regan, *supra* note 41, at 15.

58. This observation helps to explain Leslie Green's somewhat cryptic remark that "it is a feature of our concept of law that it is coercive if necessary, though not necessarily coercive." The property of law that makes it in the last place dependent on coercion is the fact that if all else fails it must turn to this mechanism to secure its existence. *See* Green, *supra* note 54, at 167.

59. Part of the reason why such a system is highly unlikely to come to pass has to do with the costs associated with enforcement. The less the state can get by on the goodwill of its subjects, the more its resources will be eaten up through the imposition of punishments, liabilities, etc. The point at which this would become practically unsustainable for the existence of the institution will usually be reached long before we arrive at the hypothetical situation we are considering.

understanding of law so as to count as a *reductio* against a theory that countenances the possibility.

Jeremy Waldron articulates a concern of this type. We need to be able to distinguish, he suggests, "between a legal system [and] the activity of an occupying army":

> An occupying army may have a chain of command and an organizational apparatus of its own . . . but it may not be appropriate to say that that apparatus exists as a legal system among the members of a social group that comprises not only the occupiers but also those whose lives they govern, . . . those who feel nothing but the sharp end of their bayonets.[60]

A legal system should not be said to exist, Waldron suggests, "unless most of the population do abide by the . . . rules of the system."[61] If they do so "only to the extent (say) that cats and dogs do," that is "to the extent that their physical behavior is actually forced into conformity by leashes, chains, muzzles, kicks, etc.," then they cannot be thought of as governed by law.[62]

Waldron is right, I think, to distinguish between law and the situation of the occupying army; a legal system is importantly different from a system of pure force. But he is wrong to believe that it is only through the notion of generalized obedience that we are able to do so. Even in a situation where law makes contact with the population almost entirely through its mechanisms of enforcement, its so doing is importantly different from the naked application of force. Enforcement, for example, functions as a response to the breach of a rule addressed to a wrongdoer. Mere force does not. So while the army's bayonet may be brandished for many purposes, the law involves the use of its instruments of control in a way that is reactive to a predetermined wrong. Enforcement, moreover, is by its nature mediated by formal mechanisms that determine the appropriateness of this as opposed to any other reaction. The law's response is in this sense institutionalized whereas the acts of the army need not be. That is enough to distinguish even a legal system that operates principally through "leashes, chains, muzzles [and] kicks" from a system of pure force.[63]

None of this is to suggest that life under law is going to be preferable to life under an occupying army, and for some it might not be. The bayonet after the breach may be no less painful than that which comes unannounced. What it is to say, however, is that although enforcement might

60. Jeremy Waldron, *All We Like Sheep*, 12 CAN. J. L. & JURIS. 169, 176 (1999).
61. *Id.* at 176.
62. *Id.* at 176.
63. *Id.* at 176. The point is not that an occupying army cannot use enforcement mechanisms—and indeed they may, for example in upholding martial law—but that their use of force is not necessarily of this type. I thank one of my anonymous reviewers for forcing me to clarify the above remarks.

manifest as a subspecies of force it is not its equivalent. As such we can continue to countenance the possibility of a legal system almost entirely dependent for its effect on its mechanisms of enforcement, while at the same time holding that an occupying army that makes contact with a population only through "the sharp end of [its] bayonets" does not for this reason rule them through law.[64]

A further objection to the account involves the idea that it concedes too much to the reductionist aspects of Kelsen's theory of law. While we have been careful to distinguish Kelsen's conception of the individuation of laws from his theory of efficacy, it might still be suggested that by adopting aspects of the latter we engage in a similar form of reductionism to that which is involved in the former. If Kelsen's account of individuation—that all laws must ultimately be understood as conditional instructions to judges to apply sanctions—misses out on the way in which the law aims, for example, to secure compliance or facilitate exchange, is it not similarly distorting to hold that law is in some sense indifferent as between individuals keeping to their contracts and having damages orders enforced against them, or between the criminal law securing obedience and punishing wrongdoers?

The objection involves a misunderstanding of the claim being made. The argument is about the existence conditions for law as a social kind and not about the point or purpose of particular legal doctrines. We can consistently hold that the law counts as efficacious, for example, if people either stick to their bargains or the courts are in a position to ensure apposite remedies for breach while also recognizing that the aim of the law of contract is to ensure that agreements are honored. So too we can maintain that punishment goes to the effectiveness of the legal system while also understanding that the criminal law aims to ensure compliance. The problem with Kelsen's argument was that his structural claims obscure our ability to comprehend the telos of the law, in preventing wrongs or ensuring that agreements are upheld. But the question of force, with which we are here concerned, is independent of that of the law's purpose.

Finally, it is worth considering where this account of the relationship between efficacy and enforcement leaves institutions such as international law that are famously lacking in enforcement mechanisms, at least when compared with state law.[65] How does the conception of efficacy that we have been developing apply to institutions of this kind? I think that the answer is as follows: such systems, because missing, for example, courts of compulsory jurisdiction, will be far more dependent on obedience than national legal systems to secure their existence. This makes the question

64. *Id.* at 176.

65. Although note Oona Hathaway and Scott Shapiro's recent work that suggests that international law in fact secures relatively broad enforcement, albeit by methods that depart from those associated with the modern statist paradigm. *See* Oona Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 YALE L.J. 252 (2011).

of whether primary rules of obligation are respected much more central to the integrity of the international order than national law because in the case of default the latter can usually turn to institutionalized mechanisms of enforcement to secure its existence whereas the former cannot.

What does this tell us about the normative status of international law?[66] Just so long as a minimum standard of obedience is met it will count as an existent system of law, albeit one whose standing as such is more fragile than that of its national counterparts. This strikes me as the right explanation of the international order, as distinctly legal but nonetheless more dependent on acquiescence, and in this way more unstable, than other systems of law.[67]

V. CONCLUSION

In this paper I have sought to argue for the importance of efficacy to our understanding of the nature of law, as well as to develop and defend an account of that concept against a number of important objections. In doing so I hope to have reinforced the importance of understanding law not only as a system of rules but also, and equally as important, as one of domination or control.

66. On the question of whether international law is *really* law there is a long and in some ways dispiriting literature. Most modern discussion of the topic begins with HART, *supra* note 4, at 213–237 (although *cf.* Jeremy Waldron, *International Law: 'A Relatively Small and Unimportant' Part of Jurisprudence?*, *in* READING HLA HART'S *THE CONCEPT OF LAW* (Luís Duarte d'Almeida et al. eds., 2013). For a recent positive answer to the question *see* SAMANTHA BESSON & JOHN TASIOULAS, THE PHILOSOPHY OF INTERNATIONAL LAW (2010), at 6–13.

67. Notice that this argument differs from Ken Himma's recent suggestion that law, of necessity, authorizes the deployment of coercive enforcement mechanisms. For Himma the (relative) absence of such mechanisms in international law calls into question its normative status as law. By way of contrast the argument that efficacy is necessary to law (and may in the alternative be secured through enforcement), does not, just so long as the system in question is able to secure widespread obedience. *See* Kenneth Einar Himma, *The Authorisation of Coercive Enforcement Mechanisms as a Conceptually Necessary Feature of Law*, 7 JURIS. 593 (2016), and especially 615–618 for discussion of the international case.

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