Great Expectations:

The Law and Society's Ability to Generate Behavioral Predictions

By Ian Fishback

People, who organize themselves into societies, face a moral problem. Ordinarily, there is a strong moral presumption against killing fellow humans. However, there is also a moral imperative to secure rights, and securing rights necessarily involves inflicting harms. One could try to get around this by morally justifying violence against culpable threats, that is, against those who are morally blameworthy for unjustly threatening the rights of innocents. Unfortunately, a cursory examination of the real world reveals that, on an institutional level, securing rights necessarily involves harming the innocent. War, for example, is notorious for both its necessity and the number of non-culpable people that must be killed in its prosecution. Even outside the context of war, every criminal justice system inflicts harms on the innocent through wrongful convictions. Securing rights inherently involves harming innocents.

The moral problem of securing rights through violence is largely a matter of distributive justice, where the good to be distributed is harms to innocents inherent in securing rights. The fair distribution is egalitarian; everyone should assume as equal degree of harm as possible. Furthermore, in order to secure rights, many acts of defense must be carried out in a context of uncertainty with respect to both culpability and the ultimate distribution of harms resulting from the act. Therefore, the principles for morally justifiable violence are relational claims that are reciprocal in nature. One person's obligation to refrain from violence or justification for violence depends on her expectation of what others will do. Reciprocity-based moral principles are relatively straightforward from an omniscient point of view. If person A *knows* that person B will expose A to risk Z, then A has a moral duty to treat B in way Z. Unfortunately, no one is omniscient; every person has a degree of uncertainty regarding the way others

will treat her. Therefore, reciprocity-based moral principles generate duties through reasonable expectations. In a position that is inherently uncertain, individuals have a moral duty to avoid exposing others to more risk than others would expose the individual to. They are morally justified to act violently if certain triggering conditions are met. Those triggering conditions are grounded in reasonable expectations. If person A has a reasonable expectation that person B will treat A in way Z, then person A has a moral duty to treat B in way Z.

Even this formulation is insufficient to capture the real-world morality of violence though, because societies usually create a division of labor in order to minimize the risk to everyone. Individuals are notoriously bad at using violence. They are often incompetent in the use of weaponry and fighting techniques. Most members of society are not used to the stressful situation most likely to require the use of force, therefore they are more likely to make poor decisions. Furthermore, even professionals find it impossible to develop the broad array of skills necessary to employ force in accord with the principles of discrimination and proportionality. This leads society to develop a division of labor and field professionals who are better at wielding violence than dilettante citizens. For the better protection of the rights of all, some members of society give up most of their claim to use violence in exchange for protection from professional security forces. Society must adopt a collective defense with a complicated division of labor wherein security professionals accept an increased obligation to carry out other defense and non-security professionals forfeit some of their right to act in self-defense. Justified violence becomes a matter of institutional justice where everyone ought to act in accord with principles (i.e. rules) that distribute risk as equally as possible. Ordinary citizens have moral duties to show restraint contingent upon the reasonable expectation that security professionals will act to protect them. The result is a greater prospect that one will be protected from culpable threats and a lower chance that one will be the unfortunate victim of an incompetent or overzealous defender. These result in new relational dynamics between non-culpable persons, with professionals assuming increased risk

from culpable threats and enhanced claims to use force. Conversely, non-security professionals give up much of their claim to use defensive violence and also give up much of their obligation to assume a fair share of the risk of harms from culpable threats.

This paper will focus on the way that law interacts with moral justifications for violence by generating two types of expectations. First, law generates expectations about how others will act. Primarily, the law generates expectations about how the state will employ force on behalf of certain classes of people in certain situations. Derivatively, the law generates expectations about how most people under a law's jurisdiction will behave. In this way, law can clearly lay out how far others will go to protect a person. That person can then deduce, via reciprocity, what she is morally obligated to do to others. With respect to acts of violence, it lets her know what risks she is morally justified in imposing on others. This first set of expectations also clearly communicates how a person can expect to be treated by society. If those expectations are egregiously unjust, then a person or class of people may have a justification to resort to violence in order to improve the existing political institutions. It is important to keep in mind though, that violence is only justified as a last resort. Therefore, if non-violent means have sufficient prospects for success, then violence cannot be justified. This brings us to the second set of expectations that the law generates. In addition to generating expectations about how others behave now, the law generates expectations about how to change the law and, thus, change how people will behave in the future. In a liberal democracy, for example, there are robust laws (e.g. free speech, political participation, etc.) that provide citizens with nonviolent means to change the law. Autocratic systems, on the other hand, are generally more closed and harder for some classes of citizens to change. Therefore, ceteris paribus, violence is easier to justify against autocratic regimes than liberal democracies.

This argument is divided into four sections. First, I will use Hart's positivism and Fuller's natural law theory to explain what I mean by 'law' and how law achieves its intermediate purpose. Second, I will divide law into two categories based on its ultimate purposes: mutually beneficial law and repressive law. Third, I will assess how the law generates expectations and how those expectations affect justifications for violence. Fourth, I will explain that I am not conflating either law or de facto power with morality.

1. Conceptions of Law, the Means of Law, and Law's Intermediate Purpose

Different conceptions of law lend themselves to disagreement about the expectations that law engenders. So, if those expectations are critical to understanding the relationship between law and moral justifications for violence intended to secure rights, then one must first outline a conception of law as a base upon which to build an argument. Perhaps the two most prominent competing theories for a conception of law are H.L.A. Hart's legal positivism and Lon L. Fuller's natural law theory.[1] Both Hart's and Fuller's theories highlight aspects of the law that are important to understanding the expectations generated by the law, so it is worthwhile to critically analyze their conceptions and complement them as necessary.

1.1 Hart's Conception of Law

H.L.A. Hart's conception of the law is the broader of the two. According to his legal positivism, two conditions are necessary and sufficient for a legal system to exist. First, "those rules of behavior which are valid according to the system's ultimate criteria of legal validity must be generally obeyed."[2] Second, "rules of recognition specifying the criteria of legal validity and its rules of change and

[1] It is arguable that Lon L. Fuller is not a natural law theorist, but many consider him one. Arguing the merits and demerits of that question would take us to far afield from our current task. It is enough to note that Fuller and Hart argued over important points inherent in a conception of law that are germane to the expectations that law engenders.

[2] H.L.A. Hart, *The Concept of Law, 2nd ed.* (Oxford: Oxford University Press, 1994), pp. 116-17.

adjudication must be effectively accepted as common public standards of official behavior by its officials."[3] The former condition is general obedience to rules of individual behavior that Hart calls 'primary rules.' Laws specifying the correct side of the road to drive on, proscribing murder, and demanding the payment of a particular amount of taxes are primary rules. They demand particular forms of behavior by particular classes of people. The latter condition is effective acceptance of what Hart calls 'secondary rules'. 'Rules of recognition' allow society to overcome uncertainty by identifying features possession of which indicates that a rule is law.[4] 'Rules of change' allow society to overcome the static quality of primary rules by providing procedures by which old rules can be altered and new rules can be introduced.[5] 'Rules of adjudication' overcome the inefficiency of social pressure by "empowering individuals to make authoritative determinations of the question whether on a particular occasion, a primary rule has been broken."[6] Laws specifying procedures for creating legislation and challenging existing laws in court are secondary rules. They explain the procedures that particular classes of people can use that ultimately lead to demands on particular classes to behave in certain ways.

For Hart, law does not necessarily generate robust expectations. The rule of recognition must be generally respected. But, if the modus operandi of the rule of recognition is inherently arbitrary, as it is in an absolute dictatorship, then it follows that the primary rules generated by the rule of recognition are inherently arbitrary as well. In such a system, the primary rules are unstable in the sense that they can be changed at any moment and the primary rules that stand at time x cannot be counted on to be the rules that will be used to judge actions committed at time x. In other words, retroactive laws are respected. Additionally, according to Hart's concept of law, secret laws are law even though persons

[3] Ibid.
[4] Ibid, p. 94.
[5] Ibid, p. 95.
[6] Ibid, p. 96.

'violating' secret laws cannot know that they are acting contrary to law. This point comes out in Hart's assertion that Nazi Germany had a legal system despite the fact that the Nazis had secret and retroactive laws that seriously undermined their legally systems ability to generate reliable expectations about primary rules. For Hart, Nazi Germany had a legal system, because 1) Germans generally obeyed Nazi edicts and 2) Germans recognized the fact that Hitler issued the edicts as a 'rule of recognition.' He claimed that the Nazi's had a legal system so long as there was a general expectation that anything the Nazi's said was law would be obeyed.[7]

1.2 Fuller's Conception of Law and the Intermediate Purpose of Law

In contrast to Hart, Fuller claimed that law should necessarily generate reliable expectations. Fuller was preoccupied with the purpose of law which he defined as "the enterprise of subjecting human conduct to rules."[8] He claimed that law had an inherent morality related to this purpose. For Fuller, laws must satisfy eight desiderata in order to be "clear, consistent with each other, and understood by those who ought to obey them."[9] The eight desiderata, or the eight ways that a legal system can fail, are as follows. First, it can fail to achieve rules so that all decisions must be made on an individual basis. Second, it can fail to make the rules available to the person intended to follow the rule. Third, retroactive rules undermine the ability of deliberating agents to act confidently under the assumption that current rules provide guidelines for which their current actions will be evaluated under over time. Fourth, rules might be incomprehensible. Fifth, rules might contradict each other. Sixth, rules might violate the 'ought implies can' principle by demanding actions that an agent is incapable of performing. Seventh, rules might change so frequently that an agent cannot use them to guide long range planning.

[7] H.L.A. Hart, "Positivism and the Separation of Law and Morals," *Harvard Law Review*, V. 71, No. 4 (February 1958), pp. 617-621.
[8] Ron L. Fuller, *The Morality of Law, Revised Edition* (New Haven, Connecticut: Yale University Press, 1969), p. 106.
[9] Ibid, p. 130.

Eighth, the rules may not be enforced in accord with their administration.[10] Law has a moral purpose of providing rules for cooperation, and if it does not satisfy the eight desiderata it cannot fulfill its purpose.

Hart's and Fuller's conceptions of law come apart in the case of arbitrary rule, and they explicity argued about whether law existed in Germany during the reign of the Nazis. Fuller disagreed with Hart, claiming that it is necessary that a legal system provide clear guidance to the citizen about permitted and proscribed behavior. He writes:

> …there is a kind of reciprocity between government and the citizen with respect to the rules. Government says to the citizen in effect, "These are the rules we expect you to follow. If you follow them, you have our assurance that they are the rules that will be applied to your conduct.[11]

Since Nazi Germany applied retroactive laws and secret laws, among other things, Fuller claims that the Nazis did not have a legal system at all. In short, he argues that the Nazis did not have a legal system, because the Nazi state failed to create and sustain expectations about the state's use of force responding to particular behavior. A retroactive law cannot do this, because there is no way for it to guide past behavior. Acts that have already been committed cannot be changed. Secret laws cannot do this, because secret laws cannot guide any behavior at all. A person cannot act in accord with a rule that she does not even know.

Fuller's conception of law generates significantly more robust expectations than Hart's, precisely because it excludes arbitrary legal systems and demands that secondary and primary rules be clear, consistent, and comprehensible. According to Fuller, law facilitates cooperation by letting them know what is expected of them, and never requiring the impossible. Therefore, if we limit ourselves to Fuller's conception, the law provides reliable expectations through primary rules about how the state will treat people for acting in certain ways. There will be acts at the margins that are open to dispute, but the

[10] Fuller, *The Morality of Law*, p. 39.
[11] Ibid, 39-40.

core of law, what Fuller would claim is law to a greater degree, generates clear expectations about how the state and individuals will interact with each other. In these legal institutions, rules generate reliable expectations. Conversely, law such as Nazi law is designed to undermine the stability expectations that primary rules generate. Those systems generate obedience through terror by creating an atmosphere of uncertainty. They intentionally undermine reliable expectations.

1.3 The Means of Law

Let us consider Fullerian legal systems, which I will treat as a subset of Hart's conception of legal systems, in greater detail. Fuller's legal systems generate expectations through primary and secondary rules by three means: salience, normative acceptance, and fear induced through threats. The first fundamental means of law is salience. Focal point theory posits that law induces compliance among those under its jurisdiction by making certain options salient.[12] The idea is that, in situations where agents want to cooperate and have a range of options for cooperating, having a salient option allows them to choose a focal point around which they can coordinate behavior. McAdams and Nadler write, "Law tends to draw attention to the behavior it demands and, in certain situations, the fact that everyone's attention is focused on a particular behavior creates an incentive to engage in it. Specifically, when the parties involved have some common incentive to "coordinate" their behavior, the law's articulation of a behavior will tend to create self-fulfilling expectations that it will occur."[13] Advocates of focal point theory do not claim that it explains a great deal of law, but they do claim that it explains some law.[14] They maintain that salience is sometimes necessary and sufficient for the law to fulfill its fundamental function. That is, a small subset of laws functions solely due to its salience, lacking backing

[12] Richard H. McAdams and Janice Nadler, "Coordinating in the Shadow of the Law: Two Contextualized Tests of the Focal Point Theory of Legal Compliance," *Law & Society Review*, Vol. 42, No. 4 (2008), pp. 865-898.
[13] Ibid, p. 866.
[14] Ibid, p. 867.

by either norms or threats.[15] My point is not to challenge this claim, although it is worth repeating that, if such laws exist, they are a very small subset of the overall population of laws. Instead, it is enough for the present enquiry to note that salience is a necessary means of Fullerian law, even if it is not sufficient.[16] If norms and threats are going to engender expectations of behavior, then the expectations must be clearly communicated and understood (i.e. salient). If an agent does not know a norm, or if competing norms are in tension, then it is difficult, if not impossible, for the agent to know how she is expected to act or how she should expect others to act. Similarly, a threat cannot persuade an agent to behave in a certain way if the agent does not know what behavior is demanded of her. The law makes norms and threats more effective at guiding action by explicitly communicating the expected prescribed behavior and the consequences of failing to act in accord with the prescribed behavior.

Law also generates expectations because it is an indicator of normative internalization, which is analogous to Hart's 'internal perspective' of the law. The law can create expectations and induce cooperation if it is underpinned by normative internalization, in which the members of a group use the law to judge their own behavior. When people internalize the law, they choose to obey the law out of a sense of obligation independent of any coercive threat. Furthermore, they see violations of the law as a

[15] McAdams and Nadler use an example of law dictating which side of the road people ought to drive on. Everyone has an interest in obeying a rule where everyone drives on a particular side of the road, but there is not an obvious reason for choosing one side over the other. Therefore, they need a salient option. According to McAdams and Nadler, the law provides the salient option independent of norms and threats, and the law coordinates behavior *solely* because of its salience. Although the 'pick a side of the road' case is a thought provoking example, it is unclear that laws related to it are salient independent of norms and threats. There are, after all, norms of law abidingness pervasive in most societies and such laws prescribe punishments for offenders who drive on the 'wrong' side of the road. If salience independent of norms and threats are all that is needed, why make law? It should be possible to induce a stable cooperation equilibrim without legal institutions. One possible answer is that laws about driving on a particular side of the road are not primarily about influencing people to drive on the 'right' side of the road. Rather, they are about inducing conflict resolution behavior. The law against driving on the 'wrong' side of the road provides a means of legal redress to punish violators and it proscribes extra-legal, vigilante forms of conflict resolution. If that is the case, then even laws about driving on a particular side of the road need norms and threats to function.

[16] Hart, because of his position on Nazi law does not claim that salience is necessary for law. This is one key distinction between Fuller and Hart that is grounded in their disagreement about Nazi law.

reason for the legitimate use of state violence against the violator.[17] Internalization simultaneously instills a desire to obey the law in an agent; it also legitimizes punishing those who do not obey the law. The agent who normatively accepts a law believes that the law prescribes how a class of people 'ought' to behave. It need not consist of normative acceptance independent of the law. Many primary rules track moral judgments outside the law. The prohibition of murder is one such example. Most people believe that murder is wrong even if there is not a law against it. In such a case, law is designed to reflect the antecedent moral judgments of the people under its jurisdiction. In other cases, though, the law acquires normative acceptance only after it is adopted in accord with existing secondary rules. Take the case of choosing a side of the road to drive on. Prior to the existence of a law prescribing which side of the road to drive on, there is no reason to choose the left over the right side of the road. There is only a reason to choose one side or the other. But, after a law is passed, many people think that everyone 'ought' to follow the law because it is the law. Thus, a norm of law-abidingness maps onto all laws, even laws that did not have a normative foundation prior to their acceptance via rules of recognition.

The third fundamental means of law is the existence of a credible threat that legal infractions will be punished. The importance of threats to law is questioned by Hart, who attempted to distinguish between commands and coercive orders. According to Hart, coercive orders are supported only by threats, but commands, although they can include a threat of harm, are "primarily an appeal not to fear but to respect for authority."[18] Even if we accept Hart's differentiation, it seems like law includes coercive threats and commands. In societies with a high degree of internalization, the law might best be described as commands. But, in other societies, particularly in authoritarian states where the law is an instrument of terror and oppression, it seems like law can be more akin to a coercive threat. When the

[17] Ibid, p. 90.
[18] Hart, *The Concept of Law*, p. 20.

law motivates a habit of obedience in this way, it takes the form of a coercive threat and induces what Hart calls the 'external perspective'. He writes, "After a time the external observer may, on the basis of the regularities observed, correlate deviation with hostile reaction, and be able to predict with a fair measure of success, and to assess the chances that a deviation from the group's normal behavior will meet with hostile reaction or punishment. Such knowledge may not only reveal much about the group, but might enable him to live among them without unpleasant consequences which would attend one who attempted to do so without such knowledge."[19] Here and in other places[20], Hart openly acknowledges that some laws are designed to affect obedience through coercive threats and the external perspective. He also acknowledges the presence of a threat implicit in his notion of a command.

Fuller also resisted the idea that violent threats are an inherent part of law.[21] However, he allowed that law must be backed by violence in order to be effective at achieving its purpose. He says that violence is to law as a measuring apparatus is to science. Just as measuring apparatus are necessary for science but not part of the definition of science, so too violence is necessary for law but it is not part of the definition of law. He writes, "What law must forseeably do to achieve its aims is something quite different from the law itself."[22] For present purposes, it is enough to agree with Fuller that law must ultimately be backed by violence in order for law to be effective at achieving its purpose.

There is another argument that much of law does not include a threat of force. Proponents of this argument point out that many laws merely provide a framework for individuals to enter into special

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[19] Hart, *The Concept of Law*, p. 89. Here Hart claims that the external perspective allows an observer to *predict with a fair measure of success* actions that will be met with state violence. Some might claim that this statement is in tension with his claim that the Nazis had law, but I will not assert or support that claim here. Instead it is enough to acknowledge that Hart's external perspective works this way within Fuller's conception of law, which is a subset of Hart's conception.

[20] H.L.A. Hart, "Positivism and the Separation of Law and Morals," *Harvard Law Review 593*, v. 71, No. 4 (Feb. 1958).

[21] Fuller, *The Morality of Law*, p. 108.

[22] Ibid.

relationships with each other, such as marriages, contracts, etc.[23] If this point withstands scrutiny then the relationship between law and coercion is weaker than I claim. It is not clear, however, that contractual law does not constitute an expectation backed up by the threat of force by a political institution. It is certainly true that individuals are not inherently obligated to do anything according to contractual law. They are free to refrain from entering into contractual relationships. But, once they enter into a legally binding contractual relationship, they invite political institutions, and the force that political institutions promise to bring to bear, into the relationship. In this way, contract law allows specific groups to bring the threat of the coercive power of the state to bear on each other in a limited context. The parties to a legal contract agree to abide by the terms of the contract and they acquire the full power of the coercive apparatus of political institutions if the other party fails to live up to the terms. Sometimes though, parties to a contract are not concerned with threatening each other. Instead, they are constructing a relationship with certain advantages, such as tax exemptions. It is not at all clear, though, why rights such as tax exemptions, should be regarded as distinct from coercive threats. After all, these exemptions are merely the communication of an expectation that an otherwise standing threat will not be carried out in a particular situation. In this respect, contract law explains exceptional situations in which, where the force of political institutions would normally be applied, it will be withheld for a certain class of people (i.e. the contractors). Threats of violence are very important to maintaining these 'rights' of contracting parties.

2. The Ultimate Purpose of Law

With the notable exception of Nazi-like legal systems, legal systems generate expectations by means of salience, internalization, and coercive threats. It remains an open question how those three means interact with each other to generate expectations in a give legal system. Salience is clearly an

[23] Hart, *The Concept of the Law*, p. 27.

important aspect of the law, but it seems that it almost always works in conjunction with legitimacy and sanctions, and only rarely independently of them. For the vast majority of law, when salience is reliant upon internalization and coercive threats, normative acceptance and fear of violence are not mutually exclusive, they often work together in varying degrees on different members of a political community. For most law to generate expectations that induce cooperation it must combine normative internalization with the threat of coercive force. It is hard, if not impossible, to identify exactly what degree obedience is attributable to acceptance and what degree is attributable to fear of repression. The means reinforce each other when the law generates more obedience, and all means tend to regress when any one of the means underlying the law suffers. The interaction between the means that generate expectation is highly complex and it is not uniform within or between legal systems. Within and across legal systems, different categories and even individual laws can benefit or suffer from different degrees of salience, internalization, and credibility of threat. The difference is not only a matter of the proportionate degree to which a legal system relies on different means. There are also significant differences in the way that the means interact to generate expectations. Furthermore, the nature of these interactions affects the expectation that legal systems generate. These different interactions are too diverse and too complicated to analyze every permutation of the potential varieties of legal systems. However, there are two broad patterns of interactions in law. In what follows, I will analyze these two patterns and the expectations that they create.

Fuller claims that all legal institutions have an inner morality directed toward the purpose of inducing rule governed behavior. This purpose induces cooperation by creating a convergence of behavior in accord with rules. This function cannot be the ultimate purpose of law though, because cooperation will be directed towards some additional end. For clarity, I will refer to the end that Fuller refers to – generating rule-governed behavior - as an intermediate purpose. The analysis of law can be broken down further to reflect ultimate purposes or ends. Just as some types of knives are designed to

cut bread and other knives are designed to commit murder, even though both are designed to cut, some laws are designed to oppress and others are designed to produce mutual advantage, even though all law is designed to foster rule-governed cooperation. The two ultimate ends of law – mutually beneficial cooperation and repression – require very different institutional designs. As a result the interaction of salience, internalization, and threats are very different between the two types of law and the systems generate divergent expectations.

2.1 Mutually Beneficial Law

The first type of law is designed to engender mutually beneficial cooperation. These types of law usually arise out of and constitute more symmetric balances of power and they create expectations that 'cheaters' will not undermine cooperative ventures and ruin 'cooperators.' They are solutions to collective action problems, such as the prisoner's dilemma. The background for these types of problems is that two agents can choose to cooperate (C) or defect (D). If two agents cooperate (C, C), then they will achieve a mutually beneficial outcome. However, if one side defects when the other cooperates (C, D), the defector (D) reaps a greater reward than she does from mutual cooperation and the cooperator (C, C) suffers costly losses. If both sides defect (D, D) then neither defector reaps any advantages, but neither suffers the costs of a cooperator in a (C, D) situation. In these collective action problems, agents often behave like (D,D) instead of (C,C). They do this in order to avoid being victimized by the defection of the other side. The result is tragic though, because both sides would have benefitted from mutual cooperation. The only way to achieve mutual cooperation is to overcome the fear of defection. In other words, both sides must have an expectation that the other will not defect and/or that the costs of suffering defection will be mitigated. Mutually beneficial law solves the dilemma by creating the prerequisite expectations. It represents standing credible threats that the political institutions will punish defectors and standing credible promises that victims in (C,D) outcomes will be compensated.

This lowers the risk of defection occurring by increasing the costs of defecting. It also reduces the costs incurred by a cooperator when she is victimized by a defector.

In mutually beneficial law, salience, internalization, and threats interact with each other to create a synergy that results in reliable expectations about behavior across society. Indeed, they often reinforce each other so that, for example, increased internalization leads to increasingly credible threats and vice versa. The claim that increased internalization leads to increased threat for non-compliance is relatively straightforward. When members of society internalize a particular law, they are generally more likely to police themselves and turn in suspected violators. It is also possible that increased internalization could lead to political pressure to increase the harshness of penalties for violating a particular rule. It is less obvious that increased coercive threats lead to increased internalization. However, there is considerable evidence that individuals are more likely to comply with a law if they perceive that others are also complying. This phenomenon is attributable to a psychological respect for fair play; 'so long as everyone else is doing their part, I feel obligated to do mine.' It follows from this fair play phenomenon that increasingly credible threats of punishment for violators leads to increased perceptions of fair play. This, in turn, generates greater internalization. In this way laws can gain a synergy where internalization begets more credible threats, which beget more internalization, etc. The net effect of this synergy is to increase the salience of the legal rule as the 'thing to do' and to greatly increase the reliability of expected behavior across society. As internalization and the credibility of threats increase it becomes more and more likely that behavior across society will converge to general obedience to the legal norm.

Secondary rules are very important to establishing and maintaining a mutually beneficial legal system. In such a system, the secondary rules reflect and constitute a relatively symmetric balance of power. Those members of the political community afforded the benefits of mutually beneficial legal

arrangements usually have political rights that facilitate political participation. The extreme version of a mutually beneficial system is liberal democracy with its rights of free speech, voting, free assembly, and the right to run for elected office. Among the classes of people that these types of secondary rules apply to, these rules generate expectations that non-violent methods can change the primary rules through elections and judicial review. They also generate expectations that people under the rules will be tried under fair 'rules of adjudication.'

2.2 Repressive Law

Mutually advantageous cooperation usually occurs in relatively symmetric balance of power situations though. When there is an asymmetric balance of power, there is unlikely to be a mutually beneficial equilibrium outcome. Instead, there is likely to be coerced cooperation (i.e. repression). The stronger party will oppress the weaker in order to secure the weaker's cooperation and exploit her. The stronger party strives to achieve a (C, C) outcome in which cooperation for the weaker side reaps the benefit of not being the object of the stronger's violence. The situation is clearly disadvantageous for the weaker side, but the weaker side is not a credible threat to defect. If the weaker side threatens to defect and create a (D,D) outcome, the stronger side will repress the weaker until the weaker cooperates. In this situation, the law facilitates the weaker side's cooperation with the stronger by creating expectations of political coercion in response to certain behavior. This 'coercive law' usually resembles an order from a stronger party to a weaker party backed by the threat of force. Such laws are not merely reinforced by coercive threats though. Privileged groups also create social norms that justify repression (e.g. black people are inferior, therefore they ought to be subordinate to white people) and work to ensure that those norms are internalized.[24] Privileged groups also structure the secondary rules

[24] See Charles Tilly, *Durable Inequality* (Berkeley : University of California Press, 1998).

so that the oppressed cannot restructure the law into a more egalitarian form.[25] Thus, 'repressive law' also generates an expectation that the oppressed do not have legal recourse to justice.

The Melian dialogue provides a historical example of coercive cooperation. The stronger Athenians dictate their terms to the weaker Mileans with the statement, "For you have not in hand a match of valor upon equal terms… but rather a consultation upon your safety."[26] Coercive cooperation is not wholly one-sided though, even if it is disproportionately so. The weaker side can always refuse to accept the stronger's terms, thereby exacting a cost from the stronger, even if the cost is merely the opportunity cost of the weaker not doing the stronger's bidding. The stronger side therefore benefits when the weaker side 'agrees' to do its bidding and the stronger can refrain from carrying out the threat. After the Melian dialogue, Melos refused Athens' terms, Athens laid siege to Melos for several months and ultimately killed ever male Milean citizen of military age. Melos clearly suffered losses, but Athens also lost resources expended in the siege and the potential benefits of Melos as a military ally.[27] Had Melos allied with Athens, both would have been better off. So, coercive cooperation is also mutually beneficial in that the stronger side gets something it wants from the weaker and the weaker side avoids something it does not want. When I say that the law facilitates cooperation, I am referring to cooperation that occurs in both symmetric and asymmetric balance of power relationships. The law induces a stable equilibrium where general obedience to rules converges expected behavior in order to achieve cooperation.[28]

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[25] Ibid.
[26] Michael Walzer, *Just and Unjust Wars* (New York: Basic Books, 2006), p. 5.
[27] Walzer, p. 6.
[28] The term 'mutually beneficial' within the context of co-optive cooperation is open to criticism. Some would maintain that only the stronger party derives benefit from the arrangement. Some of those still agree that when law functions in this way it is still law. In "Positivism and the Separation of Law and Morals," *Harvard Law Review 593*, v. 71, No. 4 (Feb. 1958), p. 624, H.L.A. Hart writes, "…law and morality are distinct. This is so because a legal system that satisfied these minimum requirements might apply, with the most pedantic impartiality as between the persons affected, laws which were hideously oppressive, and might deny to a vast rightless slave population the minimum benefits of protection from violence and theft… Only if the rules failed to provide these essential

Coercive cooperation can be viewed as a negotiated settlement between antagonistic parties.[29] According to negotiation theory, conflicts arise when opposing parties have different assessments and disagree about the outcome of violent conflict (i.e. different expectations). In those situations, belligerents confront each other in order to determine which side is correct. As the conflict wears on, expectations of opposing sides change and the conflict ends when expectations converge and a settlement is negotiated. This model applies equally well to law as it does to violent conflict. It is often the case that opposing parties have different assessments and disagree about the outcomes of litigation. In those situations, litigants confront each other in order to determine which side is correct. As the litigation wears on, litigants' expectations change, and when they converge, either at a negotiated settlement or the ruling of a court. Importantly, norms of law-abidingness are not necessary for this process to work. So long as the legal institutions influence the use of the overwhelming force of the political community, any expectation about the ruling of the court is causally related to the expectation that either party could win a violent conflict. On this model, parties vie for the backing of the coercive power of the state through the legal process and the victor of the trial achieves an asymmetrically dominant capacity to use force.

3. The Law, Expectations, and Justifications for Violence

As we have seen, the law engenders two broad types of expectations. The first type of expectation, associated with H.L.A. Hart's primary rules,[30] predicts whether and how political institutions will apply coercion in response to certain types of behavior by certain classes of people. The

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benefits and protection for anyone – even for a slave-owning group – would the minimum be unsatisfied and the system sink to the status of a set of meaningless taboos. Of course no one denied those benefits would have any reason to obey except fear and would have every moral reason to revolt." While I deny that the oppressed have every moral reason to revolt, I agree that the oppressive law is law and that if it ceased to coordinate behavior in a way that is somehow beneficial to someone then it would cease to be law. Law does not have to induce mutually beneficial cooperation that rational or reasonable free and equal agents would agree to.

[29] Alastair Smith and Allan Stam, "Bargaining and the Nature of War," *Journal of Conflict Resolution* V. 48, No. 6 (December 2004); pp. 783-318.

[30] H.L.A. Hart, *The Concept of Law, 2nd ed.* (New York: Oxford University Press, 1994), p. 85.

second type of expectation, associated with H.L.A Hart's secondary rules,[31] predicts whether the first set of expectations can be changed and way in which changes will be recognized and respected by political institutions. These expectations will vary, depending on whether the law is coercive law or mutually beneficial law.

3.1 Expectation of Repression and Protection

The overarching principle of reciprocity in justifications of violence is affected by the fact that the law generates expectations. The law generates expectations in two ways that affect justifications for the use of violent force. First, primary rules generate expectations about how the state will use force against and on behalf of certain classes of people. These affect justifications for violence because if the state generates an expectation that it will use violence to repress a class of people, then, so long as the use of force is the lesser evil, the agents of the state forfeit the right not to have violence used against them. In short, if the law clearly generates an expectation of oppression, the oppressed have a right to use violence against the oppressor, all other things equal. The other expectation that primary rules generate is an expectation of when the state will employ violence to protect the rights (i.e. morally valid claims) of certain classes of people. If the state does not create a reasonable expectation that it will employ force to protect all members of society equally, then the neglected members of society have an enhanced moral right to resort to extra-state violence in self-defense.

3.2 Expectations of the Efficacy of Non-Violent Methods

Secondly, the law generates expectations through secondary rules. Secondary rules create expectations about the necessity of force. If the law allows for political rights that give citizens a reasonable chance of pushing claims in the public forum and changing the primary rules to reflect morally valid claims, then violent methods of resistance cannot be morally justified. The costs of violent

[31] Hart, *The Concept of Law*, p. 94.

resistance are so high relative to non-violent resistance, that violent resistance cannot be justified as a lesser evil vis. a vis. non-violent resistance. Violent resistance tends to escalate, generates enormous collateral damage, and impairs prospects for the development of liberal institutions. Once violence is directed towards security forces, those security forces tend to develop an antipathy for the perpetrators of the violence. This is so, regardless of the justice of the cause underlying the violence. As violence escalates, the antipathy intensifies and reduces the prospects for reconciliation and constructive progress toward a just peace. For this reason, civil strife tends to rend the fabric of society and lead to a less just society where fewer rights are secured than in the society that preceded the conflict. On the other hand, if resistors use non-violent methods, they often gain the empathy and support of the security forces which tips the balance of power in favor of the resistors without a resort to war. This heads off the escalation of violence and prevents the slide into civil war. It also reinforces norms of nonviolent conflict resolution that underlie liberal political institutions.[32] These points are critical, because the justified use of violence is aspirational. It is a means to the end of a better state of affairs in which more rights are secured for more people. The best way to secure rights is through liberal political institutions; therefore, any resistance that undermines the development of liberal institutions will be less preferable to one that is more likely to foster liberal institutions.

4. Does this Account Conflate Law and Morality?

It might be argued that, by giving the law such an important role in moral justifications for violence, I am conflating law and morality. There are two variants of this argument. The first variant is the argument that legal positivists, such as H.L.A. Hart, might be inclined to make. Positivists like to draw a sharp distinction between law and morality in order to, among other things, leave space for moral arguments against the law. Perhaps a positivists would point out that some law (according to the

[32] Erica Chenoweth and Maria J. Stephan. *Why Civil Resistance Works: The Strategic Logic of Nonviolent Conflict* (New York, NY: Columbia University Press, August, 2011).

positivist conception), such as Nazi law, does not generate expectations. Such a point would misrepresent my argument. I am not arguing for a particular conception of law. Rather, I am arguing that, regardless of whether one accepts positivism or natural law theory, a large portion (at the least) of the law generates expectations. Furthermore, my argument explicitly rests on the premise that law and morality can come apart, a point that is important to a potential second line of criticism.

The second variant is an argument that a certain type of just war theorist, such as Jeff MacMahan, might be expected to make. According to MacMahan, the law represents de facto power, which does not necessarily coincide with morality. Any moral argument that rests on the law is thus akin to an objectionable Hobbesian realism variety of morality. This objection would also fundamentally misconstrue my argument. I am not claiming that law and morality are the same thing. I do, however, accept that the law reflects and constitutes de facto power relations. This is morally important, not because de facto power is moral, but because the application of de facto power affects morality by affecting reciprocal relations. By generating expectations about how others will use violent force, the law generates moral prohibitions and justifications for the use of force by different classes of people in certain types of situations.

Additionally, it is important to note that this argument does not argue for a positive account of morality to compare to the law. Obviously, one must have such an account in order to determine whether a particular act of violence is justified. Of what practical use is this argument then? I would argue that it is of great practical import. The underlying principle of reciprocity which justifies the use of violence to secure rights is dependent upon expectations, and, in the real world, many, if not most, expectations about the use of violence are generated through legal institutions. To the degree that A will protect B, B is obligated to protect A and this is usually captured in law.