

# SANCTIONS AND EFFICACY IN ANALYTIC JURISPRUDENCE

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## ABSTRACT

*Legal theory has long grappled with the question of what features a rule system must have for it to be considered “law.” Over time, a consensus has emerged that might seem counterintuitive to most people: a legal system does not require punishment for the disobedience of its rules (“sanctions”), nor must it be obeyed by the people it purports to apply to (it need not have “efficacy”). In this Article, I do not challenge these conclusions, but instead stake out an attempt to reconcile these claims with other intuitions about law. I argue that while neither sanctions nor efficacy are alone determinative of legal validity, legal systems must at least aspire to be efficacious. Sanctions, then, may be seen as but one optional manifestation of the crucial background quality they represent: a readiness to adapt and react to the external realities surrounding a legal system’s attempted implementation.*

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## I. INTRODUCTION

The purpose of this Article is to engage in a sustained scrutiny of the various arguments made when analyzing two interrelated concepts in analytic jurisprudence. First, it is generally thought (with notable exceptions) that in order to be “law,” a rule-system does not need to back up the obligations it imposes with sanctions for disobedience.<sup>1</sup> Similarly, the efficacy of such a system—its obedience by the populace in the real world—is also thought to be unnecessary.

After surveying these arguments, though, where does this leave us? Theorists have convincingly argued that these two qualities are *not* necessary for legal validity, but these arguments do little to construct an account of legality that accords with the commonly held intuitions of most people. Most people would not think that any person with Microsoft Word could create a system of “law” simply by typing up rules and pressing “save.”

I do not claim that this means the entire analytic project should modify its methods (and become sociological, rather than conceptual);<sup>2</sup> instead, I argue that traditional analytic methods yield a more persuasive result when the debates about “sanctions” and “efficacy” are viewed side-by-side. Arguments positing the necessity or superfluity of sanctions or efficacy each individually present only a snippet view of the larger whole, and distract from something more fundamental. When read together, a common feature emerges from seemingly disparate projects—one that may be able to combine the persuasive elements of extreme positions to form a middle ground compromise.

I argue that such a middle ground is this: while sanctions or efficacy might not individually be necessary for legal validity, what *is* necessary is that a system of rules *aspire* to be efficacious and that it manifest that aspiration by adapting to the circumstances in which it expects to be applied. Thus, most legal systems will aspire to be efficacious through the use of sanctions; but this is not always the case (if efficacy can be achieved without sanctions). Moreover, a rule system may or may not be obeyed by most of its citizens, but if it is severely lacking in efficacy, we expect a “legal” system to try to do something about it. This is usually achieved by imposing sanctions, but even if such measures failed to change the way people acted, this attempt to create efficacy nevertheless imbues the rule system with legal validity.

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1. See generally FREDERICK SCHAUER, *THE FORCE OF LAW* (2015). Schauer's critique will be discussed more in Part II.

2. See generally *id.*

This Article proceeds as follows. Part I will begin with a brief discussion of the background debates surrounding sanctions and efficacy. This will lay the groundwork for the first part of the inquiry, in Part II, which will focus on a comparison of simplified thought experiments. By juxtaposing various hypothetical situations that are intuitively legal and non-legal, a tentative version of the above thesis emerges. In Part III, this inchoate position will be fleshed out by way of positive argument, creating a more nuanced theory. After this formulation, the theory will be tested in Part IV by an application to social practices that are more complicated than the hypotheticals from which it arose. From this, important but non-fatal qualifiers will be discovered.

## II. COMMON ARGUMENTS & BACKGROUND

A brief sketch of the major relevant debates in analytic jurisprudence will lay some foundation. Efficacy—the actual obtaining of a system of rules in reality, such that those rules make a difference in human thought and conduct<sup>3</sup>—has varied in its conceptual importance over time.

Hans Kelsen, coming before most of the mainline positivists who currently influence jurisprudence, made it a critical feature in his theory of law. While he agreed with later theorists that the legality of a *particular* norm is separate from its efficacy,<sup>4</sup> he argued that the validity of a *general* system does require it: “A norm is considered to be valid only on the condition that it belongs to a system of norms, to an order which, on the whole, is efficacious. Thus, efficacy is a condition of validity . . . .”<sup>5</sup>

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3. See Joshua Kleinfeld, *Enforcement and the Concept of Law*, 121 YALE L.J. 293, 301 & n.15 (2011) (discussing various uses of the term in the modern literature); Grant Lamond, *Coercion and the Nature of Law*, 7 LEGAL THEORY 35, 45 (2001) (stating that efficacy denotes a sufficient degree of conformity with the laws, but also that conformity result *from* the laws; I do not think the latter is necessary).

4. HANS KELSEN, GENERAL THEORY OF LAW AND STATE 30, 122 (Anders Wedberg trans. 1945) (“Thus, in the particular case, the rule is valid . . . even if it is without efficacy . . . .”); see also *id.* at 122 (“That the validity of a legal order depends upon its efficacy does not imply, as pointed out, that the validity of a single norm depends upon its efficacy.”).

5. *Id.* at 42. In discussing a new constitution in light of an older one, or a revolution supplanting a prior system, Kelsen writes:

[W]e find that the norms of the old order are regarded as devoid of validity because the old constitution and, therefore, the legal norms based on this constitution, the old legal order as a whole, has lost its efficacy . . . . Every single norm loses its validity when the total legal order to which it belongs loses its efficacy as a whole.

H.L.A. Hart's theory revised this latter conclusion in a nuanced, but substantial way. Hart argued that Kelsen was correct in his assessment of the particular case,<sup>6</sup> but so too should he have extended this conclusion to the system as a whole: "It would however be wrong to say that the statements of validity 'mean' that the system is generally efficacious."<sup>7</sup> While Hart felt compelled to admit that general efficacy is "the *normal context* for making statements of validity," and that without such a context "no meaningful statement of validity can be made," there were nevertheless special circumstances, such as those involving past or future systems, which could be considered valid even without efficacy.<sup>8</sup> In making what may have been intended as more of a minor point about outlier cases, though, Hart drove a definitive wedge between efficacy and legal validity: this external phenomenon or reaction did not inhere in law's meaning, and it was explicitly demoted from the "*sine qua non*" status it had earlier enjoyed.<sup>9</sup>

Other thinkers would follow suit. Two years after *The Concept of Law*, Lon Fuller stated, "What law must foreseeably do to achieve its aims is something quite different from law itself."<sup>10</sup> More recently, Grant Lamond wrote, "But that certain conditions must obtain [for existence] does not show that the law must make provision for their obtaining."<sup>11</sup> On the whole, discussions of efficacy have dropped off of the radar—it is likely that, at least in Hartian positivist circles, a general consensus has been reached and that Kelsen's wooden insistence on this feature has been abandoned.

Arguments against the essential nature of efficacy are often made alongside those denying the conceptual necessity of sanctions. Because sanctions are usually presupposed to be necessary for the purpose of achieving efficacy,<sup>12</sup> undermining the need for one tends to undermine the need for the other. While there are suggestions in *The Concept of*

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*Id.* at 118–19.

6. As Hart writes, "If by 'efficacy' is meant that the fact that a rule of law which requires certain behaviour is obeyed more often than not, it is plain that there is no necessary connection between the validity of a particular rule and *its* efficacy . . ." H.L.A. HART, *THE CONCEPT OF LAW* 103 (2d ed. 1994) (emphasis in original).

7. *Id.* at 104.

8. *Id.* at 295 (discussing this concept in the "Notes" section of the book, which supports propositions discussed elsewhere); *see also id.* at 103–04.

9. *Id.* at 295; *see also id.* at 103–04.

10. LON L. FULLER, *THE MORALITY OF LAW* 108 (1964).

11. Lamond, *supra* note 3, at 50.

12. *Id.* at 43. Lamond writes that coercion is most often employed to explain normativity or efficacy. *See generally id.*

Law that might confuse the reader on this point,<sup>13</sup> the mainstream position in jurisprudence understands sanctions to be merely “natural necessities” external to the concept of law itself<sup>14</sup>—lamentable instruments required only in a human legal system, given the way humans seem to be constituted. As with its cousin, efficacy, the sanction is no longer seen as having any necessary import for legal validity.

In a more recent article by Scott Shapiro and Oona Hathaway, three common arguments against the conceptual necessity of sanctions are summarized: empirical studies about the motivations for law-abidingness, the existence of a large body of public law governing official action that is not directly backed by sanctions, and finally, a thought experiment.<sup>15</sup> We will focus on the third. This thought experiment, what we could call the “angelic polity,” was first referenced by H.L.A. Hart in an early talk but later incorporated into *The Concept of Law*; since then it has been similarly advanced by Joseph Raz, John Finnis, Scott Shapiro.<sup>16</sup> It goes something like this: in a hypothetical

13. For example, Hart often writes of the necessity of serious “social pressure” exerted upon the disobedient, but take note of the context of that discussion:

Rules are conceived and spoken of as imposing *obligations* when the general demand for conformity is insistent and the social pressure brought to bear upon those who deviate or threaten to deviate is great . . . . What is important is that the insistence on importance or *seriousness* of social pressure behind the rules is the primary factor determining whether they are thought of as giving rise to *obligations*.

HART, *supra* note 6, at 86–87 (emphasis added). This is not about validity, but obligation.

14. *Id.* at 199. *Cf. id.* at 200 (exempting that the need for sanctions is a contingent one—“contingent on human beings and the world they live in, retaining the salient characteristics they have”); JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 262 (1980) (stating that a legal sanction is a “human response to human needs”); JOSEPH RAZ, *THE CONCEPT OF A LEGAL SYSTEM* 156 (1970) [hereinafter *THE CONCEPT OF A LEGAL SYSTEM*] (implying that legal sanctions are outside of law when he states that every D-law does not need corresponding S-law). See also JOSEPH RAZ, *PRACTICAL REASON AND NORMS* 158 (1999) [hereinafter *PRACTICAL REASON AND NORMS*] (stating that the idea of sanctions arises from empirical generalizations and do not represent a logical feature of the concept of law; a sanctionless system is “humanly impossible but logically possible”).

15. Scott J. Shapiro & Oona Hathaway, *Outcasting: Enforcement in Domestic and International Law*, 121 *YALE L.J.* 252, 277–79 (2011). See Lamond, *supra* note 3, at 53, for a discussion of public law as sanctionless duties.

16. Jonathan Cohen & H.L.A. Hart, *Theory and Definition in Jurisprudence*, 29 *PROC. OF THE ARISTOTELIAN SOC'Y, SUPPLEMENTARY VOLUMES* 213, 253 (1955); HART, *supra* note 6, at 103; FINNIS, *supra* note 14, at 267 (“[The features of law are distinguishable] *even in the absence of any problem of recalcitrance* and hence of any need for coercion or sanctions.” Describing the main features of the rule of law without sanctions, he concludes, “All this, then, stands as a sufficiently distinctive, self-contained, intelligible, and practically significant social arrangement which would have a completely adequate rationale in a world of saints.”); SCOTT J. SHAPIRO, *LEGALITY* 167–70 (2011); *PRACTICAL REASON AND NORMS*, *supra* note 14, at 159.

community where all citizens have a perfectly law-abiding disposition, assuming that they would still indeed need law (for coordination, etc.), that system of rules has no need for sanctions. As Shapiro writes, in this angelic polity such measures would be “otiose,”<sup>17</sup> and given that the system of rules already in place is clearly legal, sanctions must be irrelevant to the question of legal validity. Sanctions are not necessary features of law.

This argument is persuasive, but has not been entirely accepted. A number of commentators have criticized the methodology underlying the angelic polity thought experiment. As Jeremy Waldron counters, “In the real world, sanctions and the deliberate and public activity of legislatures are both definitive features of law. Their prominence . . . may vary from system to system, but their presence is indispensable to the ordinary notion of law.”<sup>18</sup> The “real” world, the “ordinary” notion—these are what jurisprudence should be concerned about, because we are not angels but are human beings: “Law is a man-made institution and its central norms are human artifacts . . . . [W]hen we think of law as a mode of governance, we think of it as something humans have set up . . . .”<sup>19</sup>

Another recent objection comes from Ekow Yankah. He seems to reject outright that the angelic polity does have law. Whatever they do have is simply “different,” and to accept it as law “would radically alter our concept of law.”<sup>20</sup> He rests this proposition on something similar to Schauer: “This response is rooted in the traditional claim that the goal of jurisprudence is descriptive as opposed to prescriptive. That claim states that we should describe the law as it is, not as it could be.”<sup>21</sup>

Frederick Schauer presents a sustained treatment of his objections in a recent book, *The Force of Law*,<sup>22</sup> and does so by liberating himself

17. SHAPIRO, *supra* note 16, at 169.

18. Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 30 (2008).

19. *Id.* Shapiro sees this human-centric approach as a weakness. He states:

Social science cannot tell us what the law is because it studies *human* society. Its deliverances have no relevance to the legal philosopher because it is a truism that nonhumans could have law. Science fiction, for example, is replete with stories involving alien civilizations with some form of legal system. These examples show that it is part of our concept of law that groups can have legal systems provided they are more or less rational agents and have the ability to follow rules.

See SHAPIRO, *supra* note 16, at 406–07.

20. See Ekow N. Yankah, *The Force of Law: The Role of Coercion in Legal Norms*, 42 U. RICH. L. REV. 1195, 1237 (2008).

21. *Id.* at 1237 n.188. Lamond even hints at agreement with these objectors as well: while he ultimately accepts the angelic polity, he still says it is “not clear how to extend to such societies our concept of law.” See Lamond, *supra* note 3, at 46.

22. See SCHAUER, *supra* note 1.

from the methods of conceptual analysis that constrain the theorists he critiques. Schauer rejects Shapiro's attempt to find "law's nature" by "discover[ing] its necessary properties,"<sup>23</sup> instead arguing that we should "focus on the typical rather than the necessary features" of law.<sup>24</sup> Schauer thus admits that the concept of law "is not completely captured by a coercion-based account," given the possibility of the angelic polity, but that coercion is nevertheless centrally important<sup>25</sup>: "Coercion may be to law what flying is to birds: not strictly necessary but so ubiquitous that a full understanding of the phenomenon requires that we consider it."<sup>26</sup> This is because it will be "empirically rare" to find a society where a "critical mass of obedient subjects" will obey the law merely because it is law and not because of any sanction.<sup>27</sup>

Evaluating the soundness of these objections would take us beyond the scope of this paper, which accepts and deploys the analytic methods used by Shapiro and Hart. It is worth noting, though, that the analytic positivists would see these critiques as having fundamentally mistaken their jurisprudential project. As Raz states, the inquiry is into the features of "any legal system," and is therefore distinct from pure sociology.<sup>28</sup>

In conclusion, while Hartian positivists have essentially jettisoned efficacy and sanctions from the concept of law, some flickers of opposition do arise. The two sides have reached an impasse, though, and none seem able to bridge the gap. Raz describes the divide well in a section of *The Authority of Law* called "The Relation of Existence and Efficacy of Laws"—here he speaks of "existence" in the same way that we speak of validity. "At one extreme," Raz writes, "is the claim that a law created in the appropriate manner exists and is valid; its efficacy or inefficacy does not affect its existence and validity . . ."<sup>29</sup> On the opposite side "is the argument that the laws exist because and to the extent that they are socially accepted and followed; social customs are laws even if not enacted, whereas enacted law is not valid if it has no roots in social practices."<sup>30</sup>

In searching for a middle ground between the extremes of the efficacy-sanctions debate, something new must be introduced to break

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23. SHAPIRO, *supra* note 16, at 9.

24. SCHAUER, *supra* note 1, at 4.

25. *Id.* at 30–32.

26. *Id.* at 40.

27. *Id.* at 56.

28. See THE CONCEPT OF A LEGAL SYSTEM, *supra* note 14, at 168.

29. See JOSEPH RAZ, *The Nature of Law and Natural Law*, in THE AUTHORITY OF LAW 35, 85 (1979) [hereinafter *The Nature of Law and Natural Law*].

30. *Id.* at 86.

the impasse—something that can reconcile the commonly held intuition about law having real-world impact with the equally convincing thought experiments suggesting such impact is irrelevant. In what follows, I discuss what this addition might look like, and how we would come to discern it. Though I find the angelic polity very persuasive, I still find that something would be missing were we to uncritically and wholeheartedly assent to the mainstream positivist position just stated. While these thinkers have convincingly demonstrated the errors of accepting a hardline position on either efficacy or sanctions—thus refuting the theories of Kelsen and the sanction theorists—we ought not ignore the strong intuitions that seem to pull in the opposite direction, and motivate more pragmatic thinkers such as Waldron and Schauer. Facing this dilemma, it is helpful to search for a path between the divergent poles.

### III. THOUGHT EXPERIMENTS: ANGELIC POLITIES AND DEMONIC POLITIES

To work toward this, we can begin by noting a weakness in the angelic polity hypothetical. What does it really tell us? By positing a perfectly law-abiding populace, the thought experiment purports to establish that sanctions are unnecessary for legal validity, but this seems to be because *efficacy* is taken for granted.<sup>31</sup> What would we say if the angels suddenly revolted, becoming disobedient and fractious?<sup>32</sup> The conclusion probably changes: this, it seems, looks like a community of humans, but ruled over by a system that lacks the sanctions that seem so necessary given their wayward tendencies. It would be difficult to call this “law.” When efficacy is undermined, then, our conclusions about the sanctionless angelic polity come out differently, yet we know from earlier that it cannot be *efficacy* that is the touchstone of validity.

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31. The hypothetical is somewhat unclear as to why the angels obey—is it because they are perfectly law-abiding or is it because they, being angels, agree with all of the existing laws that are happily angelic in their quality? I think that angelicism in the thought experiments stands for the former. The law does therefore make a *difference* in their conduct, and they would obey it if it changed. It is not just a happy coincidence that law and disposition align: the disposition to law-abidingness is what matters. As Shapiro writes in his own version, “The islanders all accept the legitimacy of the group plans and, as a result, abide by them. And when they make mistakes, they voluntarily make amends. Sanctions would simply be otiose in such a setting.” SHAPIRO, *supra* note 16, at 169. They all accept the “legitimacy” of the plans, not necessarily their substance, and obey for that reason. This reading also accords with Shapiro’s earlier emphasis on the choice between neutral or arbitrary alternatives.

32. See Yankah, *supra* note 20, at 1236. “If one (fallen) angel inexplicably decided to disobey those edicts, the inability of any structure to even theoretically compel him to obey would cast serious doubt on the system’s claim to be the law.” *Id.*

The angelic polity is clearly of limited use. While it can defeat the claims of theorists who argue for the conceptual necessity of sanctions for the sake of efficacy,<sup>33</sup> it does so at the expense of making efficacy a given, and says nothing about why *it* is not conceptually necessary.

I propose a supplement to the angelic polity—one that can help us to understand the status of *both* sanctions and efficacy. By looking more closely at two opposite poles along a sanction-efficacy matrix, as well as their intermediaries, we can discern a feature underlying both concepts. In doing so, we see that neither are conceptually necessary to legal validity, yet there is something behind them that is (perhaps the elusive “middle ground” mentioned above). The variables we will work with are (1) law-abidingness, and (2) sanctions.

The first pole is our familiar angelic polity, but in this version the perfectly law-abiding beings have instituted a system of rules that sanctions disobedience nonetheless—we could call this “angelic-polity *plus*.” In this situation, when compared to the regular, sanctionless angelic polity, it seems that the addition of the sanctions changes nothing about the validity of the system or rules: both clearly have law. In both cases, law-abidingness is at its apex, and the legal system is perfectly adapted for the nature of its citizenry, or may even have superfluous protections.

The inverse extreme is something new—the *demonic* polity. In this situation, the entire citizenry has a content-neutral disposition to law-disobedience, and yet the legal system provides for no sanctions. Thus, the law is entirely inefficacious, and does not attempt to counteract the disobedience even in theory, let alone in actual practical application. Here, there is clearly no law. Without importing any connotations from our “demonic” label, we could draw an analogy to the existence of the conduct rules of the Catholic Church in a polity entirely composed of pagans or druids.<sup>34</sup> With law-abidingness at its nadir, and the simultaneous absence of any provision for sanctions or enforcement in the rule-system, there is no law.

So far, we have considered three scenarios: an angelic polity with sanctions, and both a demonic polity and an angelic polity without them. Now, let us turn to the final possibility, and alter the demonic polity a bit—let’s say that this new “demonic polity” provides for (but does not actually apply) sanctions. Here, law-abidingness continues to be nil, but the rule system at least makes an effort to respond to that

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33. See, e.g., Lamond, *supra* note 3, at 42–43 (discussing the variants of sanction theory).

34. Kleinfeld, *supra* note 3, at 295 (writing that law must surely be more than “political advocacy” or “moral exhortation”).

reality. I think that most would agree that this system is a legal one (we will see why later), even though it is clearly inefficacious and does not "exist." This situation is essentially the same as two of Hart's "special" examples of inefficacious but valid legal systems: "[Inefficacy] may be so complete in character and so protracted . . . in the case of a new system, that it had never established itself as the legal system of a given group, or in the case of a once-established system, that it had ceased to be the legal system of the group."<sup>35</sup> Even when a system is totally inefficacious, if it exists in theory as either a nostalgic (or hated) remnant of the past, or perhaps as a wistful project for the future, Hart believes it is still "legal." His two examples are the White Russian, hoping to one day restore the old legal regime he had lived under, and the professor of Roman law, speaking of that system as "law" even though it no longer exists at all in our time.<sup>36</sup> These systems were indeed efficacious at one time, but are no longer. We might also think of contemporary "failed states," where their promulgated rules have almost no efficacy, but are still considered laws. Importantly, the failed state, this second iteration of the demonic polity, the White Russian, and professor of Roman law all involve presently inefficacious legal systems that nevertheless make internal, theoretical *attempts* to be efficacious, usually by providing for sanctions in cases of disobedience. All of these systems make adaptations given the circumstances in which they are expected to be implemented. Were any of these systems to be sanctionless, they would probably not be considered legal. Then, they would just be like the Church code in the pagan country, or like the first iteration of the demonic polity (both non-legal systems).

It may be helpful to illustrate these various conclusions graphically<sup>37</sup>:

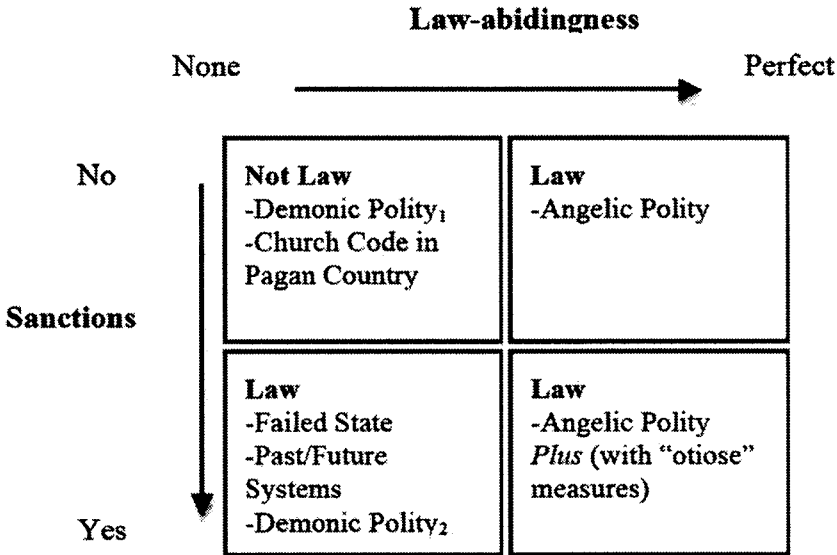
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35. HART, *supra* note 6, at 103.

36. *Id.* at 104.

37. Figure 1 was compiled by Brenner M. Fissell based on his research. See discussion *supra* Part II.

Figure 1



What seems apparent from the amalgamation of this sanction-  
 efficacy matrix, and from the various thought experiments that many  
 have found to be persuasive, is that there seems to be a hidden variable  
 at work. It is not merely external efficacy, nor is it the presence of  
 sanctions that is determinative of legality in the ultimate instance.  
 There must be something else going on—something that can explain  
 why the angelic polity that provides for no sanctions suddenly loses its  
 legal status as soon as the angels become demons. Sanctions are absent  
 both before and after “the Fall,” but legality changes. However, our  
 discussion of demonic polity<sup>38</sup> and the failed state shows that efficacy  
 cannot be determinative either. While neither efficacy nor sanctions are  
 part of the concept of law, by looking at them together we can see that  
 there is something that lies behind them that is.

I argue that this is an *aspiration* of efficacy, and its corollary, which  
 is an adaptability that seeks to further that aspiration. This manifests  
 internally—the legal system constitutes itself so as to advance efficacy  
 given its expected circumstances of instantiation (this is measured, of  
 course, at the time of the expected application). In almost all cases

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38. See discussion *supra* Part II; *supra* Figure 1, at 2.

involving human beings, this means the inclusion of critical reactions to disobedience (usually sanctions), but we can imagine many other tools.

By looking to this quality, we find a coherent way to delineate between our various hypothetical situations. What distinguishes demonic polity<sup>39</sup> from the failed state is that in the latter, the law aspires to rectify what is lacking by providing for an instrumental remedy: sanctions. The same is true of the angelic polity and the demonic polity<sup>40</sup> (after the "Fall")—in the former, the sanctionless system is already adapted to its circumstances, but its failure to respond to the exterior change in the citizenry dooms it to non-legal status. By sitting on its hands in the face of such widespread disobedience, this system has abandoned its efficacious aim. Meanwhile, in the case of the past or future systems (e.g. the White Russian, the Roman Law, etc.), their present inefficacy does not damn them to invalidity, as they *are* internally adapted to present circumstances (they have critical responses to disobedience, for example): their inefficacy flows not from an absence of such adaptations, but from external factors.<sup>41</sup>

It should now be clear why I referred earlier to the debates about sanctions and efficacy as "distractions"; by analyzing them together we find that what is really determinative of legal validity is not either in isolation, but the underlying aspiration that one variable manifests when confronted by the other. Sanctions are but means to an end—efficacy—but this end's realization is not a necessary condition for legality.

#### IV. ASPIRATIONS OF EFFICACY: THE CONCEPT

So far, we have used thought experiments to isolate what may be a hidden variable at work in legality, but more must still be said about it by way of positive argument. Just as Raz meets with skepticism when proposing that law must "claim" authority,<sup>42</sup> so too might a theory positing an "aspiration" in a legal system appear similarly suspect. Humans can aspire to something, but laws, so it seems, cannot. Like Raz, though, I believe we must take a wide-angle view of what the

39. See discussion *supra* Part II; *supra* Figure 1, at 1.

40. See discussion *supra* Part II; *supra* Figure 1, at 1.

41. I think it is unhelpful to understand the old systems as going out of "existence" after the new circumstances arise or as not "existing" before the hoped for circumstances are realized. The *systems* of rules clearly still "exist," as we can talk about them and analyze them.

42. JOSEPH RAZ, *Authority, Law, and Morality*, in *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 210, 210–21 (1994).

statutory or common law scheme is doing (and why), and that such information can inform the concept of law itself.<sup>43</sup> Unlike him, though, I do not believe that officials' statements, judges' rationalizations, or preambles need to be consulted to determine a system's aspirations.<sup>44</sup> I would look solely at how the law constitutes itself internally, such as in the theoretical provision for S- and P-laws so as to increase the efficacy of D-laws.<sup>45</sup>

This aspiration, I think, need not be for *perfect* obedience, but for something very close to it. Raz gives an extended discussion of the difficulties in determining the threshold level,<sup>46</sup> but I pass over these. The aspiration, at least, should be for near-total compliance. I say "near-total" primarily because of an empirical fact: it seems to be the case that some particular laws are enacted with the expectation that they will be broken.<sup>47</sup> The most obvious examples come from the traffic and parking context—it is often understood, and desired, that a fairly healthy amount of disobedience will result, and that the government will reap the rewards that come from the collection of a monetary sanction. Beyond this, these rules where disobedience is nearly ubiquitous are often promulgated with the intention of providing tools

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43. See JOSEPH RAZ, *Law and Authority*, in THE AUTHORITY OF LAW 1, 28–33 (1979) [hereinafter *Law and Authority*], for a discussion on law making "claims". See also Scott Hershovitz, *The Authority of Law*, in THE ROUTLEDGE COMPANION TO THE PHILOSOPHY OF LAW 18 n.33 (Univ. of Mich. Law Sch. Pub. Law and Legal Theory Working Paper Series, Working Paper No. 232, 2011), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1781271](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1781271) ("I frequently indulge a personification of the law—speaking of what it claims or is owed—that should be understood as a shorthand for what the state or legal officials claim or are owed."). To the extent that the idea of law having an "aspiration" can be challenged by reductionist theories, I answer that my theory (and, of course, Raz's theory) can profit from recent work on collective action and mental states. See generally CHRISTIAN LIST & PHILIP PETTIT, *GROUP AGENCY: THE POSSIBILITY, DESIGN, AND STATUS OF CORPORATE AGENTS* (2011).

44. *The Nature of Law and Natural Law*, *supra* note 29, at 199–201.

45. Raz uses these labels to describe the work that different rules do. S-laws are sanction-stipulating laws, P-laws are power-conferring laws, and D-laws are duty-imposing laws. His typology is even more complicated, and has other categories as well. See THE CONCEPT OF A LEGAL SYSTEM, *supra* note 14, at 147–67.

46. *Id.* at 203. Raz notes the various questions that arise: is it merely a ratio of obedience to non-obedience? Is this with respect solely to D-Laws or other types as well? Still, Raz believes the threshold question is an important one to ask, and that it should not be scrapped—he only urges caution. See JEROME HALL, *FOUNDATIONS OF JURISPRUDENCE* 170 (1973), for a discussion on the difficulty in measuring effectiveness and determining thresholds.

47. Mich. Law Review Ass'n, *Laws That Are Made to be Broken: Adjusting for Anticipated Noncompliance*, 75 MICH. L. REV. 687, 688 (1977), <http://www.jstor.org/stable/1287911>.

for policing, like a “drag net” to enable greater discretion.<sup>48</sup> In both of these cases, though, it is expected that the *system* will be fully efficacious. Achieving the purposes of the money-driven parking laws, after all, depends upon the total obedience of the citizen after the violation: he is expected to answer the summons, and to pay the fine when requested. Moreover, the judge is expected to do his duties in assessing that fee. While one can imagine examples of particular laws whose *raison d'être* is some further goal in which disobedience is an instrumental means, these are anomalies, and they depend upon the efficacy of the overall system for the fulfillment of that goal. It would be impossible to imagine an entire *system* that presupposes and hopes for inefficacy. Given these considerations, we can say that all legal systems aspire to *near-perfect* efficacy through *near-total* obedience.

What has just been said is probably uncontroversial, but what I hope to add in this paper is something more—if this “aspiration,” as we have called it, is really genuine and present, then the legal system will *necessarily* adapt to the circumstances in which it expects to be applied. Because the change in the form of a legal system can never guarantee any external results, the best manifestation of adaptability that is possible is an internal one. But precisely because it is within the power of a legal system to internally change its form so effortlessly (i.e., theoretically including P-laws or S-laws in addition to D-laws), it does not seem odd to expect that a system of rules, if it indeed aspires to near-total efficacy, *must* use this power to work towards that aspiration. If no positive effort is made towards the accomplishment of an aspiration, yet an attempt is itself easily within reach, it makes sense to conclude that the aspiration is absent. This would be like an individual who, claiming to have a deep-seated goal of attending university, never even bothers to sign up for the admissions test.

It is difficult to demonstrate this proposition by way of argument. If an individual or an entity genuinely possesses a goal, then it seems obvious that it must work towards its fulfillment (absent other considerations). A failure to do so would belie the commitment to the underlying goal. Recall that we are not asking much in requesting that a legal system make “internal” adaptations—this does not demand

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48. This instinct has been voiced in a recent U.S. Supreme Court decision. See *generally* *Florence v. Bd. of Chosen Freeholders*, 566 U.S. 318, 334–35 (2012) (“People detained for minor offenses can turn out to be the most devious and dangerous criminals. Hours after the Oklahoma City bombing, Timothy McVeigh was stopped by a state trooper who noticed he was driving without a license plate. Police stopped serial killer Joel Rifkin for the same reason. One of the terrorists involved in the September 11 attacks was stopped and ticketed for speeding just two days before hijacking Flight 93.” (citations omitted)).

actual application, only codification. These will almost never set back the goal of efficacy—they can only tend to advance it, even if the amount that they do so is not necessarily certain or guaranteed to be great. Thus, I go beyond what Lamond proposes—that law always “claims the right to authorize [] enforcement”<sup>49</sup>—and think that law must actually exercise that right, to whatever effect, in circumstances where the authorization of enforcement is necessary to advance efficacy. This theory does not say that the vagaries of obedience by external forces can validate or invalidate law (this is the common objection), but that the law’s *ex post* reaction to those vagaries, in the form of an internal adaptation, is evidence of anterior conceptual legal validity. It is proof positive of a genuine aspiration of efficacy.

Internal adaptations can take various forms. One is more institutional and *ex ante*: it seeks prevention. We might imagine a legal system providing for a framework whereby all citizens are gradually habituated towards law-abidingness. If the angelic polity’s denizens had fallen from law-abidingness, but required only that newly born generations be (compulsively) re-educated, and these beings were amenable to such molding, such a sanctionless system of rules still seems legal; it contemplates the institution of a re-education mechanism that is the least invasive alternative. Many other *ex ante* or preventative measures might be imagined, and I only caution that for them to manifest a true “legal” aspiration, as we have defined it, these measures must be directed at the entire political community, and be generally indexed to the actual circumstances on the ground. Were the newborn angels incorrigible, such institutions would hardly be sufficient.

The most common adaptations, though, will be those of an *ex post*, corrective nature. These will provide for legally constituted responses or reactions to behavior with respect to the primary conduct rules. They could take the form of rewards or praise for compliance, or various critical reactions in the event of disobedience: punishment, nullity, shaming, expressions of disapproval, outcasting, supervision, and beyond.<sup>50</sup> Again, though, the choices of one of these over another (or

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49. See Lamond, *supra* note 3, at 55 (emphasis added and in the original).

50. Discussions about the forms sanctions and critical responses can take abound. See HALL, *supra* note 46, at 108–12, where he suggests that beyond physical force, public confession, admonishments, warnings, social censure, and psychological coercion. He gives many actual examples of such critical responses in social practice. *Id.* The choice of how the law reacts can vary contingently with the circumstances. See Hans Oberdiek, *The Role of Sanctions and Coercion in Understanding Law and Legal Systems*, 21 AM. J. JURIS. 71, 73 (1976); Norberto Bobbio, *The Promotion of Action in the Modern State*, in LAW, REASON, AND JUSTICE 189, 199 (Graham Hughes ed., 1969). Bobbio urges that law

perhaps a combination) must in some way reflect the reality of the type of beings upon whom the system of rules is being imposed.<sup>51</sup> Thus, in our contemporary criminal law, ruling as it does over human beings constituted a certain way, if the critical response imposed for disobedience were simply one of a letter of reprimand, this would be no real adaptation at all. However, were such seemingly toothless measures actually geared towards the circumstances in which they were applied, I would not think that system to be non-legal. In a small indigenous community where shame is considered worse than suffering and death, the imposition of such a critical response is actually more appropriate than one of physical punishment.

In saying that adaptations must be appropriately indexed to the actual circumstances in which the legal system is expected to be instantiated, we have so far focused only on the character of the citizen over which the system will rule. Closely related is the type of conduct rule with which the critical (or positive) response deals. We already see such distinctions made in the gradations of punishments in our contemporary criminal law—some offenses are met with fines, others with prison, and still others with execution. In less “humane” societies, there are many more gradations between the latter two. Similarly, there are distinctions between criminal punishment and the civil imposition of money damages, and public law involves even more subtle mechanisms.<sup>52</sup> Different conduct rules demand different legal responses in the event of disobedience, because the value protected by the rules are not all of equal import.

Somewhere in between the matrix of the type of the conduct rule and the character of the citizen there coalesces an appropriate response

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can also seek to stimulate conformity, encourage desirable acts, make prohibited acts seem repugnant, and give great rewards to those who go above and beyond. He calls these forms “active control” instead of “passive control,” which waits for disobedience to kick in. Bobbio, *supra*, at 200. See JEREMY BENTHAM, *OF LAWS IN GENERAL* 134 (H.L.A. Hart ed., 1970), for an early discussion of rewards. For a recent discussion of rewards, see SCHAUER, *supra* note 1, at 7–8.

51. Here we could borrow a concept from Hart. In his discussion of what gives rise to obligation, he notes that the “seriousness” of the social pressure brought to bear in the critical reaction is what is important. HART, *supra* note 6, at 86. These do not necessarily need to be physical, but must be serious, and should involve a sacrifice of something of self-interest. *Id.* While Hart was speaking of obligation, we could transpose this notion of “seriousness” to our current discussion of adaptations to advance efficacy. See THE CONCEPT OF A LEGAL SYSTEM, *supra* note 14, at 148, on the issue of seriousness.

52. Compare Shapiro & Hathaway, *supra* note 15, at 278–79 (mentioning judicial review, impeachment threats, elections, supervision by higher officials, and defunding or budget control), with Yankah, *supra* note 20, at 1215 (stating that there are no sanctions in public law because they are “impractical” and officials obey out of a sense of duty anyway).

for disobedience. While differing circumstances—coming from an amalgamation of factors, most importantly the two just mentioned—warrant differing responses from a legal system so as to advance efficacy, what is common in every case is the adaptation, the manifestation of the underlying aspiration.

Before moving on, it is worth briefly adding two clarifications. In saying that law must aspire to be efficacious, I am not saying that this aspiration is merely a “claim” to efficacy, nor am I saying that it is derivative of law’s claim to authority. The feature I identify must manifest itself in a more concrete form than a “claim”—it often demands substantive modification of the legal system. Moreover, authority is a separate category of analysis entirely. While Raz convincingly argues that law must “claim[] legitimate authority,”<sup>53</sup> he emphasizes that efficacy is “not entailed” by a conceptual analysis of the notion of authority.<sup>54</sup> Thus, even a “claim” to efficacy, to the extent that this makes any sense (efficacy is an empirical reality unaffected by mere claims), would be unrelated to a claim of legitimate authority. Efficacy’s relationship to the claim to authority is that of a mere byproduct: the legitimacy-claim leads to efficacy through its persuasive influence.<sup>55</sup>

#### V. ASPIRATIONS & INDIVIDUATION: SOCIAL PRACTICE

Now that the theory has been discerned from the comparison of thought experiments and also given more nuance by way of positive argument, it is appropriate to test it in the more complicated area of

53. *Law and Authority*, *supra* note 43, at 28.

54. *Id.* at 8–9 (“I share the belief that a legitimate political authority is of necessity effective at least to a degree. *But this is a result of substantive political principles* (e.g. that one of the main justifications for having a political authority is its usefulness in securing social co-ordination, and that knowledge and expertise do not give one a right to govern and play only a subordinate role in the justification of political authority). *It is not entailed by a conceptual analysis of the notion of authority*, not even by that of the concept of political authority.” (emphasis added)); see also *The Nature of Law and Natural Law*, *supra* note 29, at 87–88. Raz noted that:

acceptance of a claim to legitimate authority is . . . a logically necessary condition for the existence of a *de facto* authority. . . . A common factor in all kinds of effective authority is that they involve a belief by some that the person concerned has legitimate authority. Therefore, the explanation of effective authority presupposes that of legitimate authority.

*Law and Authority*, *supra* note 43, at 28–29.

55. *Law and Authority*, *supra* note 43, at 28–29 (“A common factor in all kinds of effective authority is that they involve a belief by some that the person concerned has legitimate authority. Therefore, the explanation of effective authority presupposes that of legitimate authority.” (footnote omitted)).

social practice. First, we will look at different types of law, and will find that the theory adequately explains why there are both sanctionless and sanctioning bodies of law within most existing legal systems. After this, we will turn to a comparison of clearly non-legal rules systems with that of law, and similarly find that the theory can do much of the delineating work. Finally, certain ostensible anomalies will be addressed, and important but non-fatal limitations upon the theory will emerge.

Beginning with the different *types* of law within a single legal system, the most ubiquitous example of the dichotomy between sanctioning and sanctionless codes existing side-by-side is that of the criminal and the public laws. Can the aspiration of efficacy explain why the former almost always relies upon harsh critical reactions, and the latter is nearly devoid of them?

Conduct rules delineating what we think of as “criminal” conduct almost certainly require coercive sanctions because they deal with beings subject to the “problem of bad character,”<sup>56</sup> and with conduct that—through force or fraud—is usually a direct temptation to that “infirmity of human nature.”<sup>57</sup> A complex idea, the problem of bad character was most crucially relied upon (and fully developed) in Hobbes, Locke, and Hume.<sup>58</sup> Shapiro summarizes the variants of this theory well:

Hobbes argued, for example, that the state of nature is a state of war because men are greedy and vain. In their desire to dominate others as well as protect themselves, they inevitably disregard their covenants of nonaggression and launch preemptive attacks against those who might attack them first. Locke also thought that individuals in the state of nature would act aggressively. Unlike Hobbes, however, he did not think they would do so out of callous disregard for the natural law but rather as a result of self-deception. Since people are often biased in their own favor, each side in a dispute will judge themselves justified and hence be unwilling to yield . . . Similarly, Hume believed that, in the absence of government, people will tend to ignore the principles of justice. Hume attributed this noncompliance largely to irrationality: people often heavily

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56. SHAPIRO, *supra* note 16, at 173.

57. *Id.* at 174.

58. *Id.* Of course, it is prevalent throughout the history of political thought, and was there even at the beginning. See Brenner M. Fissell, *The Justification of Positive Law in Plato*, AM. J. JURIS. 89, 89 (2011).

discount the future and seek to maximize short-term benefit over long-term gain.<sup>59</sup>

Finnis also highlights the justification for these types of laws, writing, "The 'goal' of the familiar modern systems of criminal law can only be described as a certain . . . quality of communal life in which the demands of the common good indeed are unambiguously and insistently preferred to selfish indifference or individualistic demands for licence . . ." <sup>60</sup> I hesitate to boil down this problem into any one human characteristic; instead, these thinkers have placed their fingers upon a constellation of deleterious qualities, all of which seem to form the *raison d'être* of the criminal law.<sup>61</sup>

It is no surprise that the conduct flowing from (and most gratifying to) the problem of bad character is also that which the criminal law most commonly prohibits; here the "solution" is usually simple "prohibition" (the criminal law rarely asks us to *do* anything absent other factors), and the violation of a prohibition is perhaps the most egregious form of law-breaking, and strongly deserves retribution.<sup>62</sup> Hart also reminds us, importantly, that sanctions in these cases of antisocial behavior speak not merely as prohibitive warning to violator, but as guarantor to the obedient:

"Sanctions" are . . . required not as a normal motive for obedience but as a *guarantee* that those who would voluntarily obey shall not be sacrificed to those who would not. To obey, without this, would be to risk going to the wall. Given this standing danger, what reason demands is *voluntary* cooperation in a *coercive* system.<sup>63</sup>

In these cases, then, the character of the citizen and the type of the conduct at issue (our two primary criteria for judging internal adaptations) both strongly militate in favor of the most serious of critical reactions the law can level. The problem of bad character leads to conduct that threatens the social fabric, and the violation of such

59. SHAPIRO, *supra* note 16, at 174.

60. FINNIS, *supra* note 14, at 261.

61. Of course, human motivations are infinitely complex, and the "interests" that a criminal code protects can be similarly divergent from our core case—I am speaking, like Finnis, of most cases most of the time, in the "familiar" and "modern" criminal law.

62. See MICHAEL S. MOORE, ACT AND CRIME 54–56 (Tony Honoré & Joseph Raz eds., 1993), for a discussion of omissions as less wrongful from a retributivist standpoint.

63. HART, *supra* note 6, at 198. This is also echoed in Lamond's article, where he discusses the need to restrict socially destructive violence. Lamond, *supra* note 3, at 45–46.

prohibitions gravely undermines these laws' purposes. Because of this, anything less than serious sanctions would be greatly insufficient (given the circumstances), and would not count as a true manifestation of the aspiration.

The public law—that body of rules governing officials—however, is generally agreed to lack anything comparable to the harsh sanctions of the criminal law.<sup>64</sup> This is not because the public law possesses no aspiration to be efficacious, but is because the different circumstances alter the calculus.

Here the body of law similarly rules over human beings afflicted by the problem of bad character, but the type of conduct it regulates seems far less titillating to that infirmity. In the ordinary cases, the official *qua* official has little to gain by violating the public law (either through failure to enforce, or through a perverted version of enforcement). Yes, under-the-table corruption will always present private or personal temptations, but from a purely institutional perspective, an official has no personal stake in violation. The police chief and the judge, *in their official capacities*, gain nothing by failing to do their jobs or doing them wrong. While temptation might exist, it exists in a greatly diluted form when compared to the conduct proscribed by the criminal law: one would need hyper-realist eyes to see a President's unconstitutional act as merely existing on a spectrum alongside the robber's crime.

There is another consideration, though, that buttresses this observation—alongside the problem of bad character there is another human impulse that comes into play with public law. This is the desire to fulfill one's official duties, or at least to be seen as doing so. The possibility of this reward of esteem does not have an analogue in the criminal context, as merely obeying the norms of the criminal law generally brings no approbation.

The robes of office, then, both reduce temptation and inspire duty—they replace public concerns with private, thus helping to suppress the problem of bad character while encouraging the potential for good character. To these, we can add the presence of a multiplicity of soft alternatives to sanctions: elections, managerial oversight, budgetary

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64. Again, the repeated reference to "sanctions" should not confuse. The aspiration of efficacy does not collapse into a simple test of whether or not sanctions are present; if it appears this way, it is only because the most common examples I have of a legal system's adaptability all involve these critical responses. This is itself a function of their common *human* setting, where sanctions are so necessary and appropriate. If we remember, with Hart, though, that the concept of law is not dependent upon "human nature," then it is clear that there are other possible ways for a system to manifest its aspiration to be come efficacious: the notion does not map simply onto the presence or absence of sanctions. *See generally* HART, *supra* note 6.

powers, and impeachment all work to ensure greater compliance.<sup>65</sup> In such a setting, coercive sanctions become far less necessary, with the variety of factors described above all creating an atmosphere of efficacy that is not mirrored in the regulation of private conduct.

In both the criminal and the public law, the aspiration of efficacy is present, but the circumstances of each code's application changes the form of the efficacy-aimed adaptations each chooses to use. Changing the assumptions of our examples, we find that the conclusions might change as well. Were a drug invented that eradicated "the problem of bad character," much of the criminal law would need to respond with far less than coercive physical sanctions, and it would still retain its legality. Similarly, if the execution of one's official duties within the public law came to be seen as a distressing burden, greater incentives (or disincentives) would be required to save the system from slipping into invalidity. We might, with Shapiro, summarize the dichotomy as one of different levels of trust: "plans . . . are sophisticated devices for managing trust and distrust: they allow people to capitalize on the faith they have in others or compensate for its absence."<sup>66</sup> Certain subjects of legislation will allow for trust-capitalization, while others need trust-compensation. The reasons will always be complicated, and I highlight only two salient examples.

Just as this idea can help to account for the differing types of law within an existing legal system, so too does it help delineate between that system and other clearly non-legal bodies of rules. An important foil for any discussion of legal validity is the proliferation of elaborate religious codes of conduct. Almost all of these codes are normative, and most claim authority over the entirety of the human race.<sup>67</sup> How can

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65. Shapiro & Hathaway, *supra* note 15, at 278. With these authors, I place such mechanisms outside the category of "sanction," in that they are not automatically and legally specified as responses to the given conduct. The possibility of criminal liability for officials' omissions is very small. Most related statutes punish *actions* taken under "color of law," see 18 U.S.C. § 242 (2006), but it is possible to conceive of a conspiracy whereby some officials' omissions protect or conceal harmful actions through their non-enforcement of law. See Shapiro & Hathaway, *supra* note 15, at 278. In any case, these are far and away the rarest forms of responding to official action and inaction, and my claim is only that the public law *generally* does not stipulate sanctions.

66. SHAPIRO, *supra* note 16, at 334.

67. See, e.g., CATECHISM OF THE CATHOLIC CHURCH (2d ed. 1997) ¶¶ 2032–36.

"To the Church belongs the right always and everywhere to announce moral principles, including those pertaining to the social order, and to make judgments on any human affairs to the extent that they are required by the fundamental rights of the human person or the salvation of souls."

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these clearly non-legal systems be differentiated from law, when they seem to possess so many similar characteristics? The notion of the aspiration of efficacy is helpful. A nearly ubiquitous feature of these religious systems of rules is that they are routinely disobeyed and are extremely inefficacious, but even in the face of such realities the codes make no provision for any adaptations that are appropriately measured towards rectifying this deficiency. The most that any religious systems do to respond to disobedience is something like excommunication—the incorrigible heretic or atheist is merely *told* he will burn in Hell, and is denied membership in the religion. The former (damnation), given the experience of history, clearly no longer carries enough weight to constitute a genuine adaptation towards efficacy, and the latter (ostracism), while somewhat coercive, is similarly too easy a pill to swallow in a pluralist society where community identities are only weakly tied to churches.<sup>68</sup> These are essentially toothless responses to disobedience. To the extent that we could imagine (or, in the case of history, recall) religious systems where their critical responses were much more acutely felt, we might even be ready to call those systems “legal.”<sup>69</sup>

Turning to social rule systems outside of the religious context, the concept of the aspiration of efficacy has similar delineating power. With most non-legal social groups, and most non-legal social rules (such as etiquette), it seems absent. With groups and clubs, the greatest critical response they can muster is expulsion, and this seems insufficient for the same reasons mentioned above. Social rules, moreover, respond to

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The authority of the Magisterium extends also to the specific precepts of the natural law, because their observance, demanded by the Creator, is necessary for salvation.

*Id.*

68. Yankah, *supra* note 20, at 1241. In communities characterized by a homogeneous and non-mainstream ideology (especially where geographic isolation results), the coercive force of course increases. This is not the case in most modern jurisdictions. *But see* Morris B. Hoffman & Timothy H. Goldsmith, *The Biological Roots of Punishment*, 1 OHIO ST. J. CRIM. L. 627, 637 (2004).

Protestants carried on many of the most severe forms of ostracism, especially the Lutherans and Calvinists. Indeed, in Calvin's own Geneva, the most severe form of excommunication combined the ecclesiastical *excommunicato major* with a complete barring of social relations and expulsion from the city-state. Remnants of this severe form of Protestant ostracism found their way to our shores with the Pilgrims, and persist in modern times in the shunning, or “meidung,” practiced by the Old World Amish.

*Id.* (footnotes omitted).

69. Certainly, whenever the rules of the religion take on such an important role in the community that they are enforced by the State, as in a theocracy, those rules have become laws.

disobedience only with the collective visitation of obloquy, and in today's society, again, this is not enough.<sup>70</sup> As Yankah writes, "A person's decision to regard as necessary the esteem of his friends or social peers seems closer to a set of personal reasons from which he may opt out than those reasons that are imposed regardless of his relationship."<sup>71</sup> There doesn't seem to be enough "bite" in these responses for us to regard them as proper adaptations.

There is one non-legal system of rules that does seem to aspire to be efficacious, though, and a consideration of this system provides an opportunity for the introduction of an important limiting qualifier to our thesis. This is the jurisprudential trope of the Mafia boss, and the strictures he imposes upon his henchmen. While we could try an easy attempt at distinction, and take note of the Mafia boss's somewhat limited aspiration (he aims only to control his own group, not the entire political community), at least within that group, it seems as if he does meet the test. When the criminal organization's member disobeys, often even in the slightest way, it is met with harsh physical punishment. This ruthless use of physical force in the event of disobedience, usually to serve utilitarian ends of general deterrence within the group, shows clearly that the "code" is entirely serious about its aspiration of near-total efficacy. Still, Mafia bosses' rules are no "law."<sup>72</sup> By bringing the Mafia system into the discussion, an important limitation upon the thesis is exposed, but one that I do not hesitate to accept. I make a weaker claim than that of the sanction or coercion theorists—while I think that the aspiration of efficacy is *necessary* for a legal system's validity, I do not believe that it is entirely *distinctive* of legality. Thus, any failure to easily delineate between law and other systems of rules is not fatal. Like the quality of normativity, legal systems need this aspiration but do not hold a monopoly on it.

To conclude, testing the theory by an application to social practice has been instructive. The theory of the aspiration of efficacy—far from being defeated (like sanction theories) by the dichotomy presented by public law and criminal law—accounts for both codes and helps to explain their differing features. With respect to delineation between legal and non-legal systems, I believe that the aspiration of efficacy can also do a great deal of this work, and is able to distinguish law from

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70. However, we *could* imagine cases where it might be, as in the indigenous tribe mentioned earlier.

71. Yankah, *supra* note 20, at 1241.

72. *But see id.* at 1240. Yankah thinks that the Mafia actually aspires to issue laws and that its rules seem somewhat law-like. *Id.* If it were to abscond to the desert, he argues, it would probably be seen as something like a separatist or revolutionary movement that indeed promulgated laws for itself. *Id.*

religious and other social rule systems. One place where the theory falls short is in the context of organized crime. What this tells us is that the aspiration is quite important in determining legality, but has some limits: it is necessary but not distinctive. Overall, by looking at actual social practices, the theory that was first hinted at by a juxtaposition of more simplified thought experiments is confirmed and made more elaborate.

#### VI. SOCIAL PRACTICE CONTINUED: UNMANIFESTED ASPIRATIONS

While a look to social practice has helped to confirm the thesis, it also complicates it. There are at least two cases in which genuinely extant aspirations of efficacy will nevertheless be *unmanifested* (even in the case of widespread disobedience), and while neither doom the thesis, both reveal important qualifiers on it.

The first situation is one that we could call a case of *competing aspirations*. It seems to be true that in some cases a particular law will not manifest its aspiration of efficacy in a substantial enough way, but its drafters nevertheless expect it to be obeyed. This is not like the traffic and parking codes discussed above, where violations are deliberately anticipated as salubrious—in these cases, rather, a bona fide aspiration of efficacy is outweighed by competing aspirations that temper the manifestation. Thus, many trivial offenses are widely disobeyed, but the law, balancing the interests served by the rule and the downsides of certain forms of critical reactions (such as affronts to privacy or dignity), deems it inappropriate to impose Draconian measures to enforce them.<sup>73</sup> The prohibition on marijuana usage is widely inefficacious, but it is likely that efficacy could be greatly enhanced by providing for caning in the event of a violation. Our system does not do this, though, and for good reasons.

Cases like these do not defeat our theory. These are not cases of an absent aspiration of efficacy—it is present but is merely overborne. The complexities of social life force us to recognize that there are many societal aspirations at work, and while efficacy usually trumps, that is not always true. These two statements, then—that the necessary aspiration of efficacy will always tend towards the creation of manifestations *and* that in some cases no manifestations will in fact

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73. See Douglas Husak, *The Criminal Law as Last Resort*, 24 OXFORD J. LEGAL STUD. 207, 234 (2004), for a general discussion of this intuition as it relates to the imposition of criminal sanctions. “The criminal law is different and must be evaluated by a higher standard of justification because it burdens interests not implicated when other modes of social control are employed . . .” *Id.* (footnote omitted).

occur—are not irreconcilable. As with the marijuana case, one should not believe that the failure to provide for caning reflects an absence of a desire for obedience. Instead, it is that human dignity has been judged to be of a higher value in the specific case.

The second case of a non-manifested aspiration is that of the *external emergency*. External crises, usually temporary in nature, might result in widespread disobedience—most especially through the use of coercion.<sup>74</sup> Imagine the angelic polity, but with the forced imposition of a tyrant's edicts after an invasion. The angelic citizens would be coerced into disobeying their own law, but we do not expect that system of rules to adopt a more severe version of sanctions so as to maintain legal validity. We would not think that the original system no longer aspires to be efficacious, either; it is simply that supervening external forces have suppressed it (just as the countervailing aspiration had done so in the earlier case).

Such extreme situations reveal an important feature of the theory. In order to show a genuine aspiration, the legal system must be responsive only to those *normal*, internal circumstances that obtain most of the time. If the inefficacy is not related to the character of the citizen or the type of the conduct rule (or the other normal internal factors at work), but is imposed by some external emergency, a manifestation is not expected. By incorporating this qualifier, our picture of the "circumstances" of law's instantiation becomes more nuanced.

The two cases of unmanifested aspirations reaffirm something that has already been hinted at: in the end, the adaptations or manifestations are mainly of *evidentiary* value, and are not themselves touchstones of validity. While still tremendously important, and in almost all cases they can and must be present in order for the observer to validly infer that a genuine aspiration of efficacy exists, as we have just seen there will be narrow instances where they are properly eschewed.<sup>75</sup>

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74. Another possible example would be the changed rational calculations that follow from emergent circumstances such as a natural disaster. We might imagine a scenario in which the entire community was flooded. Previously, the use of watercraft was restricted to those with a license or permit, and this was enforced through a nominal fine. Now, during the flood, everyone turns to boats and violates the law. We hardly expect the legal system to react by providing for harsher sanctions to counteract this disobedience. This is less pure of a case than that of external coercion, though, as it is not as clear that there is still an aspiration of efficacy here.

75. By opening the door to these exceptions, though, a more general qualifier should be added: this theory does not purport to establish a necessary feature of legal validity in all possible worlds, where only the dictates of logic remain fixed. I only hope to argue that it makes sense in all "close" worlds, where the spectrum of possible conditions is cabined

In sum, by looking at actual social practice our thesis has been confirmed, but it has also become more precise. Important qualifiers have been discovered: (1) the aspiration can at most be for near-total efficacy, (2) it is necessary for legality but is not distinctive of it, (3) it is not the only aspiration in a political community, and can be outweighed (resulting in an absence of any manifested changes), and (4) internal adaptations that manifest the aspiration need only be indexed to the normal circumstances of application, which do not include external emergencies.

## VII. CONCLUSION

Analytic debates surrounding the necessity of sanctions and efficacy in contemporary jurisprudence are somewhat distracting: these questions could be derivative of something lurking in the background. Read together, discussions of sanctions and efficacy reveal what may be an underlying aspect of the concept of law, and one that can help to bridge the gap between the two extreme positions that have been taken by theorists. This aspect is the *aspiration* of efficacy. This is hinted at by a juxtaposition of various thought experiments, and it provides a coherent way to delineate between them, but it is confirmed and elaborated by an application to social practices. A legal system must aspire to be efficacious, and this is manifested by internal adaptations appropriate for the circumstances of the legal system's instantiation. These internal adaptations can take many forms, either *ex ante* preventative or *ex post* corrective, so long as they are indexed to advance efficacy in a way that accurately reflects the world in which they will be applied. The aspiration, then, is an internal quality that is evidenced by the rule system's actual provisions, and is not merely a claim that is derivative of law's larger claim to legitimate authority.

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to something somewhat similar to our own lived reality. See generally JOHN DIVERS, POSSIBLE WORLDS (2002), for a discussion of "close" and "distant" worlds. Thus, by using the labels "angels" and "demons," I do not mean some wholly different being—not something like Shapiro's aliens. See SHAPIRO, *supra* note 16, at 406–07 ("Social science cannot tell us what the law is because it studies *human* society. Its deliverances have no relevance to the legal philosopher because it is a truism that nonhumans could have law. Science fiction, for example, is replete with stories involving alien civilizations with some form of legal system. These examples show that it is part of our concept of law that groups can have legal systems provided they are more or less rational agents and have the ability to follow rules."). They are merely labels used to describe an otherwise human-like citizen who happens to be perfectly obedient or disobedient. For beings mostly like humans, then, in a world that is mostly like our own, the thesis holds true. To claim that law must aspire to efficacy is not a statement about the intrinsic *meaning* of law, but rather about the *nature* of law in this or in close worlds.