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## BOOK REVIEW

### HOW TO EXPLAIN THINGS WITH FORCE

THE FORCE OF LAW. By Frederick Schauer. Cambridge, Mass.: Harvard University Press. 2015. Pp. xiv, 239. \$35.00.

*Reviewed by Mark Greenberg\**

Frederick Schauer's provocative new book *The Force of Law*<sup>1</sup> champions the study of coercion in legal theory. Schauer holds that, though it is theoretically possible for there to be law without the use of coercion, coercion is in fact a ubiquitous feature of law, central to the everyday experience of law and to popular ideas about it. One might think that it hardly needs emphasizing that the use of coercion is an important feature of law. But Schauer believes that contemporary philosophy of law has mistakenly relegated the study of coercion to the sidelines, and his book aims to correct that mistake.

Schauer argues that a widespread confusion has led philosophers and empirical theorists to overestimate the prevalence of people who obey the law simply because it has the status of law.<sup>2</sup> The alleged confusion is to assume that, if people act consistently with law for reasons other than self-interested ones, such as the threat of sanctions, then they are obeying the law because it is the law. Schauer points out that people often act for moral reasons, broadly understood. Such reasons, he assumes, exist independently of the law. He therefore argues that, when people act for moral reasons, the law has not affected their behavior. In investigating the prevalence of obedience to law, the key question, he insists, is how common it is for there to be people who, when the law requires action that they take to be wrong, nevertheless

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<sup>1</sup> FREDERICK SCHAUER, *THE FORCE OF LAW* (2015).

<sup>2</sup> Schauer uses several formulations interchangeably: *to obey the law just because it is the law*; *to obey the law qua law*; and simply *to obey the law* (pp. 48–57). He also uses *puzzled person* and someone who has *internalized* the law as other terms for someone who obeys the law *qua* law (pp. 42, 45–52, 62–67, 73–74). H.L.A. Hart introduced the term “puzzled man” to describe someone who wants to know what the law is in order to know what he should do, as opposed to Justice Holmes’s “bad man.” H.L.A. HART, *THE CONCEPT OF LAW* 40 (2d ed. 1994).

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follow the law *simply because it is the law*. Although Schauer rightly holds that this kind of fetishism about law is possible, there is little reason to believe that it is common. Schauer draws the conclusion that coercion is the main way in which law can affect behavior.

I will show that Schauer neglects another possibility — that the law can alter morally relevant factors, thus generating moral reasons, such as reasons of fairness, for acting in a particular way. And it can do so without people internalizing legal norms or believing that they have a moral obligation to obey the law. So, if coercion is important, it is not because the use of coercion is the only way, aside from obedience to law *qua* law, that law can affect behavior. Unsurprisingly, whether coercion is important depends on what one is trying to explain. I will argue, for example, that coercion plays an important role in explaining how legal systems can generate moral reasons.

An important goal of *The Force of Law* is methodological: Schauer argues that philosophers have mistakenly adopted a narrow methodological view, according to which philosophy of law studies only the necessary properties of law — properties that any possible legal system must have. As Schauer develops the point, the nature of law may be elucidated in terms of typical properties of law rather than necessary ones. He proposes to elucidate the nature of law by what he calls “differentiation,” his alternative to the specification of necessary and sufficient conditions (pp. 154–68). The project of differentiating law seems to involve explaining what distinguishes the institutions ordinarily called “law” from other phenomena by identifying typical or ubiquitous properties of those institutions. Drawing on his discussion of the typical properties of law, Schauer proposes, somewhat cautiously, to classify a disparate collection of institutions and systems of norms as law or legal systems: the Mafia (pp. 136–37, 143); New York diamond dealers (p. 143); the American Contract Bridge League (p. 143); the World Trade Organization (WTO) (pp. 136, 160–63); tyrannies (pp. 95–96); kleptocracies (pp. 95–96); and, of course, the legal systems of contemporary democracies such as the United States and the United Kingdom. Law, thus understood, is a shallow category because the institutions in question have little in common beyond having systems of norms.

I offer two other ways of developing Schauer’s methodological idea. First, Schauer’s skepticism about the specification of necessary and sufficient conditions for law might be understood as a recommendation that philosophers engage in projects other than conceptual analysis, understood in the narrow traditional way, of the ordinary concept of law and the related project of specifying which organizations or systems count as legal systems according to ordinary usage. In my view, such a recommendation is a promising and welcome one (though I don’t take traditional conceptual analysis of law to be as prevalent in the field as Schauer does). I point out, however, that moving away

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from traditional conceptual analysis does not require giving up the project of providing an account of the nature of a phenomenon such as law. For example, such accounts can be empirically grounded and need not aim to reflect our *concept* of the phenomenon.

Second, given a proper understanding of the nature or essence of a phenomenon, properties that are not themselves essential properties of law may nevertheless figure in an account of the essential properties of law.<sup>3</sup> In particular, I emphasize that it may be part of the nature of law that law have a point or function, or that it is supposed to be a certain way. And, for example, such a point or function of law may concern the use of coercion even if using coercion is not an essential property of law.

Finally, whatever one thinks about the prospects for an account of the essence or nature of law, there are other kinds of projects in which philosophers of law may profitably engage. I highlight one option — projects driven by explanatory concerns. (As there are diverse sorts of philosophical explanation, this category is a broad one.) Moving away from a focus on the ordinary concept of law and attending instead to systems that share explanatorily potent, or otherwise theoretically important, properties can yield a fruitful account of the role of coercion. I develop an example involving systems that have a particular aim — that of solving certain kinds of moral problems. With respect to such systems, we can offer more illuminating explanations of why they need to use coercion than the simple claim that they want to get people to do things that go against those people's best judgments. Further, in order for it to be permissible for these systems to use coercion, they must change the moral landscape, for, without such changes, the morally permissible uses of coercion are limited. This constraint plays a powerful role in shaping such systems.

*The Force of Law* displays many of the strengths that readers will associate with Schauer's rich and important body of work. It is empirically informed and historically nuanced. Drawing on his broad knowledge of different literatures, he offers insightful empirical speculations, illuminating parallels, and suggestive observations. He makes novel distinctions and resists conventional wisdom. Readers bored with the usual diet of recycled examples will find refreshing the eclectic collection of phenomena that Schauer deploys to illustrate and elaborate his points. These include the recent upheavals in Egypt (pp. 83–84); President Obama's use of drone strikes in Libya (p. 89); restrictions on the production of raw milk cheese (p. 118); speed bumps

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<sup>3</sup> The *nature* of a phenomenon, say a triangle, is — on a standard philosophical usage — what it *is* to be a triangle. Also following a standard usage, I use *nature* and *essence* interchangeably. For elaboration, see *infra* pp. 1944–45. Also, for the distinction between necessary and essential properties, see *infra* note 6.

(pp. 125–26); proposals to suspend congressional salaries and to deploy federal troops in New Orleans in the aftermath of Hurricane Katrina (p. 90); norms not only of New England whalers, but also of tennis players, comedians, and tattoo artists (p. 142); and a safety device that will automatically stop the blade of a table saw before it cuts off a human finger (p. 120). Another conspicuous virtue is Schauer's avoidance of the temptation to overstate arguments, instead tending to give sympathetic consideration to both sides of an issue. As is the norm, I will focus on criticisms and points of disagreement, but beyond these there is a great deal to be admired, enjoyed, and learned from in this thought-provoking and original book.

I begin in Part I with an overview of Schauer's arguments. In Part II, I take up Schauer's argument that philosophy of law should be concerned with more than necessary properties. Part III criticizes Schauer's argument that, once morally motivated behavior is set aside, there is little evidence of obedience to law *qua* law, and, therefore, that coercion emerges as the main lever by which law can affect behavior. In Part IV, I illustrate how a project driven by explanatory goals can provide a more fruitful investigation of coercion. Part V pulls my points together in a brief conclusion.

## I. SCHAUER'S ARGUMENT

### A. Background

The book opens with a brief historical discussion designed to show that by the early 1960s, when H.L.A. Hart published *The Concept of Law*, it was widely accepted in legal philosophy that coercion is central to understanding law. Schauer focuses primarily on the legal theories of Jeremy Bentham and John Austin, who both reacted against the natural law tradition prevalent in their time. Bentham's emphasis on coercion was the result of his empirical psychological view that, without the threat of sanctions, self-interest would generally trump legal commands (p. 14). Austin, who was heavily influenced by Bentham but more interested in specifying law's essential properties, held that law was "simply the command of the sovereign backed by the threat of punishment for noncompliance" (p. 16).

Bentham and Austin were so influential that their command-coercion view of law became commonplace in the United Kingdom. Legal philosophers elsewhere, including the American legal realists of the first half of the twentieth century, came via a different route to a similar view of the importance of law's ability to impose sanctions. Thus, by the 1960s, philosophers of law generally took coercion to be central to law (pp. 20–22). And, Schauer emphasizes, outside of legal theory, the centrality of coercion to law was taken to be obvious, just as it is today (p. 22). Schauer is not especially precise, however, about

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what it means for coercion to be central to our understanding of law, collecting together under this heading a diverse group of claims (pp. 14-15, 19-23).

Having argued that legal theorists as of the middle of the twentieth century largely accepted the popular understanding, Schauer explains how coercion came, as he sees it, to be neglected by legal theorists. He traces this turn to Hart's work (pp. 2-3, 27, 42). In a way, it is ironic that the blame falls on Hart's shoulders because Schauer largely accepts the correctness and importance of Hart's views. Indeed, as we will see, he takes for granted Hart's central idea that the existence of secondary rules is necessary for the existence of a legal system. (Roughly speaking, primary rules are those that govern citizens' conduct, and secondary rules are those that concern the identification, determination, modification, and adjudication of primary rules.<sup>4</sup>)

Schauer focuses on two of Hart's insights. The first is that the model of law as commands backed up by force seems incomplete because it does not accurately capture the way in which the law confers powers, such as the powers to make contracts, wills, and trusts and the power to enact legislation. Hart emphasized that the law not only empowers people to create entities such as corporations and trusts, but also *constitutes* such entities — their very existence depends on the law (pp. 27-28). When law creates such possibilities, it does not seem to be coercing anyone to do anything (pp. 26-28).

Schauer pays careful attention to the complexity of the historical landscape. He points out, for example, that others had already made suggestions in the direction of Hart's insights, but that Hart developed the points more deeply, and his work became extraordinarily influential (pp. 24-27). Similarly, Schauer makes the best case I have seen for Austin's suggestion, anticipating Hart's objection concerning powers, that the nullity of a contract or trust can be understood as a kind of sanction (pp. 28-30).

The second, and even more important, of Hart's insights is that it is a mistake to explain legal obligation in terms of sanctions. The law uses sanctions to enforce legal obligations, but the existence of the sanction is neither necessary nor sufficient for there to be an obligation. To take Hart's famous analogy, a gunman who threatens my life does not thereby place me under an obligation to turn over my wallet.<sup>5</sup> And, as Schauer notes, we can have obligations, such as moral obligations, without the threat of sanctions (pp. 31-32).

Schauer thinks that the crucial point regarding obligations involves Hart's notion of *internalizing* a rule. To internalize a rule is, as I

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<sup>4</sup> See HART, *supra* note 2, at 94-98.

<sup>5</sup> *Id.* at 82-85.

would put it, to come to believe that it is obligatory: to accept it as a guide to one's conduct, to take departure from it as justifying criticism, and so on. Schauer argues that, if one can internalize a moral rule, thus generating moral obligation, there is no reason one cannot internalize a legal rule, thus generating legal obligation (pp. 32–35).

As a result, Schauer thinks that moral and legal normativity are much less interesting and puzzling than many theorists believe:

Whenever we are inside a rule system, we have obligations created by that system. If we understand morality as a system of rules . . . , then moral obligation is constituted by the set of obligations created by a system of rules that one accepts. . . . And if one internalizes the rules of fashion, then one is under a fashionable obligation to follow the dictates of the ever-changing rules and norms of fashion. To be under an obligation is to be being [sic] within — and thus accept, or presuppose — the rules or commands of some system . . . . As a logical matter, moral obligation, religious obligation, chess obligation, etiquettal obligation, and fashionable obligation are all species of the same logical genus.

Legal obligation is another species of this same genus. (p. 34)

Schauer takes “Hart’s basic and profoundly influential point” to be that to make judgments about the existence of obligations is to make judgments “from inside a system of rules” (p. 34). The idea seems to be that a claim that there is an obligation to act in a particular way is made true simply by the fact that one has internalized a system of rules that requires acting in that way. Consequently, Schauer thinks Hart has shown that Bentham and Austin were wrong to think that there cannot be legal obligation without sanctions (pp. 34–35). Coercion is not essential to law or legal obligation. The central question of *The Force of Law* is what the implications of this conclusion are for our understanding of law. Although Schauer endorses the conclusion — and what he takes to be Hart’s argument for it — he thinks that it is the point of departure from which contemporary philosophy of law has gone wrong.

### *B. The Mistakes that Have Led Philosophers to Neglect Coercion*

In particular, Schauer thinks philosophers have made two main mistakes, leading them to greatly underestimate the importance of coercion. The book’s first main argument focuses on the first mistake. Schauer thinks that “large parts of the contemporary jurisprudential tradition” understand the search for the nature of law to be the search for its essential or necessary properties (pp. 35–36).<sup>6</sup> He calls this idea

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<sup>6</sup> Schauer throughout seems to use “essential” as a rough synonym for “necessary” (p. 35). (In his review of Scott Shapiro’s *Legality*, he says so explicitly. Frederick Schauer, *The Best Laid Plans*, 120 YALE L.J. 586, 610 & n.89 (2010) (reviewing SCOTT J. SHAPIRO, *LEGALITY* (2011)).) This usage is somewhat confusing because in contemporary philosophy it has become widely

an “essentialist understanding of the nature of law” (p. 36). On such an understanding, if law and legal obligation are possible without sanctions, then sanctions must not be part of the nature of law. Schauer thinks that essentialism has thus led legal theorists to think that “coercion should not be considered in an inquiry into the nature of law” (p. 37).

Schauer takes essentialism to be a major obstacle to recognizing the central importance of coercion, and he therefore sets out to challenge it. To that end, he gives a very brief sketch of a range of work in cognitive science as well as philosophy that he takes to raise doubts about essentialism concerning the natures of phenomena in general (pp. 37–41). He is explicit that his goal is modest; rather than trying to show that essentialism is false, he merely wants to show that it is not obviously true: “[T]he existence of live philosophical disputes and somewhat of an empirical consensus should caution against too quickly accepting the idea that looking for the nature of the phenomenon of law must be an exercise in searching . . . for law’s essential properties” (pp. 39–40).

Having cleared away a methodological obstacle to investigating coercion, Schauer argues that an empirical obstacle remains. According to Schauer, contemporary philosophers of law — “those who have succeeded in relegating coercion to the jurisprudential sidelines” (p. 41) — think that there are many people who obey the law just because it is law, not because of the threat of sanctions. This empirical view leads them to neglect the importance of coercion.

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understood that essential properties are distinct from necessary ones. For a seminal discussion, see generally Kit Fine, *Essence and Modality*, 8 PHIL. PERSP. 1 (1994). An essential property of a phenomenon is one that is part of the essence or nature of the phenomenon. (On the relevant notion of essence or nature, see *supra* note 3; and *infra* Part II, pp. 1943–58.) A necessary property is one that every instance of the phenomenon must have. Not all necessary properties are essential. To use an example of Kit Fine’s, it is necessary that Socrates belong to the set containing only Socrates, if he exists. But an account of Socrates’s essence or nature would certainly not make reference to his being a member of that set. Fine, *supra*, at 4–5. (The necessity of his being a member of that set is explained by the nature of the set, not by his nature.) Again, it is necessary that a triangle can be inscribed in a circle regardless of the lengths of its sides. But, plausibly, that a triangle can be so inscribed is no part of the essence of a triangle. To put the point epistemically, one can understand what it is to be a triangle without knowing that a triangle can be inscribed in a circle regardless of the length of its sides. It is easy to provide other kinds of examples. See *id.* at 5–8. As discussed in the text, however, it is difficult to see how an essential property of a phenomenon could fail to be a necessary property, as every instance of a phenomenon must possess the phenomenon’s nature. To avoid confusion, I follow the standard philosophical usage of the terms “necessary” and “essential.” (Schauer at one point draws a distinction between essential properties and properties that “are, in addition to being essential, also important” (p. 45). He writes: “After all, the essential properties of law include that it does not play the clarinet or explode before our eyes” (p. 45). But these are not essential properties of law; playing the clarinet or not is no part of what it is to be law. The distinction between mere necessary properties and essential properties does not turn on a notion of importance.)

Schauer points out that, against Holmes's focus on the "bad man," whose concern with the law was entirely about the likelihood of sanctions, Hart suggested that the law should be "equally if not more concerned with the 'puzzled man.'"<sup>7</sup> Schauer understands the puzzled person as someone who "is disposed to comply with the law *just because it is the law*" (p. 42). He takes this to be equivalent to someone who has internalized legal obligations (p. 46). On his account, Hart and many contemporary philosophers focus on coercion-free law and neglect coercion because they believe that, as an empirical matter, such puzzled people are important in "most societies" (pp. 42, 46–47).<sup>8</sup>

Here we come to the core of Schauer's book. He maintains that theorists have arrived at the empirical view that puzzled people are common because of a philosophical mistake: they have misunderstood what it is to obey the law because it is the law. The book's central argument is devoted to clearing up this misunderstanding. Once this task is accomplished, Schauer believes, we will be able to see that there is little empirical support for the existence of puzzled people and therefore that coercion is the main way in which law can affect behavior: "[I]f those who take the very fact of law as a reason for action . . . are few and far between, then coercion resurfaces as the likely most significant source of law's widespread effectiveness" (p. 52).

Schauer's argument begins with the well-known distinction between acting in a way that happens to be consistent with the law — I will say *conforming* to the law — and complying with the law because it is the law, which Schauer calls obeying the law *qua* law or, often, simply obeying the law. When most people do not engage in cannibalism or sex with animals, they are acting consistently with the law, but the law has no impact on their behavior because they do not desire to engage in the prohibited activities. They would have acted in the same way even if there were no legal prohibition. They therefore are not obeying the law *qua* law. A puzzled person, by contrast, is one who obeys the law *qua* law.

Schauer's central point, which he thinks is widely missed, is that it does not follow from the fact that conduct consistent with the law is not motivated by self-interest or personal preferences that the conduct

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<sup>7</sup> HART, *supra* note 2, at 40. Hart introduced this label for a person who wants "to do what is required," but is not sure what this is. *Id.* at 40. Hart is not especially clear about how he understands the puzzled person, suggesting that he is someone who takes guidance from the law and uses the powers that it confers to plan his life and structure his affairs. *Id.* at 40–41. In particular, it is not clear whether Hart intended the puzzled person to be someone who wants to do what is morally required or what is legally required.

<sup>8</sup> Schauer observes that "[t]he reluctance of Hart and some others to focus on coercion in explaining the phenomenon of law thus appears to be based not only on a preoccupation with law's conceptually necessary properties but also on a presupposed existence of puzzled people in substantial quantities" (p. 94).

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constitutes obedience to law *qua* law. People can conform to the law not only because of their personal preferences or tastes, but also for moral, altruistic, or cooperative reasons. For example, moral reasons often prevent people from acting on self-interested desires to steal and to assault others. When people act consistently with the law because of morality, just as when they act for self-interested reasons, they are merely conforming to the law, not obeying the law *qua* law.

Schauer believes that the assumption of a “false dichotomy between law-governed and self-interest-governed actions is ubiquitous” (p. 51).<sup>9</sup> Because it is obvious that people often act in a way that is inconsistent with their self-interest and such behavior will often be consistent with the law, the false dichotomy leads to the mistaken conclusion that there are many puzzled people. Schauer therefore emphasizes that, in order to investigate the empirical question of how many such people there really are, we must ask how often people follow the law merely because of its existence, setting aside all self-interested and moral reasons. He equates this question with the question of how common it is for people to obey the law *even when the law requires them to do something that goes against what they think they should do* taking into account all law-independent reasons.

The final step of Schauer’s argument against the prevalence of puzzled people is to show that, once we properly formulate the question, there is no empirical basis for thinking that there are many people who obey the law *qua* law. In particular, influential research by the psychologist Tom Tyler fails to distinguish law-consistent behavior that is based on moral reasons from genuine obedience to law *qua* law (pp. 57–61). Further, Tyler’s evidence that perceptions of legitimacy affect people’s willingness to obey the law is based on situations in which people think that the laws are good laws, even if complying carries costs (p. 60).

Schauer also looks briefly at the very few studies that focus on the question of obedience to law *qua* law in his restricted sense. What research there is suggests, unsurprisingly, that many people tend to act on their own judgments of the right thing to do when those judgments conflict with what a rule or law requires. And there is some evidence that people overestimate the relevance of law to their actual decisions (pp. 64–65).

Moreover, data about compliance with the law shows, again unsurprisingly, that when legal requirements — at least ones that do not track people’s preferences — are not enforced, rates of noncompliance are high. Schauer cites rates of noncompliance of more than fifty per-

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<sup>9</sup> Schauer also notes: “Setting up this false dichotomy . . . was [Tom] Tyler’s mistake. And, earlier, it was Hart’s mistake as well” (p. 62).

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cent for various legal requirements, such as those concerning jury duty, pet licenses, high-occupancy vehicle lanes, appearing in court for traffic violations, paying fares on public transportation under the “honor system,” and paying tax on income that is not reported to the tax authorities (pp. 65–67).

### C. *The Role of Coercion*

Having removed what he takes to be two main obstacles, methodological and empirical, to recognizing the importance of coercion in understanding law, Schauer spends most of the rest of the book examining coercion. The topics that he considers include, for example, the different kinds of behavioral inclinations that require legal restrictions (pp. 101–02); the diverse techniques that law can use to motivate behavior, ranging from rewards and subsidies (pp. 114–19) to taxes, fines, reputational sanctions (such as shaming), expulsion or exclusion and other disabilities, and incapacitation (pp. 130–36); and the effect of law on social norms and vice versa (pp. 145–51).

Given the book’s overarching theme and the diversity of these topics, one might expect Schauer to provide an account of how he understands coercion and thus why these different topics belong together. He argues, however, that because he maintains that the threat of coercion is not essential to law, there is no need for him to offer an account of what coercion is — in particular, one that would enable us to distinguish coercive methods from noncoercive ones (p. 128). It is unclear why the position that the use of coercion is not essential to law has the consequence that a book centered on coercion need not address how it understands coercion.<sup>10</sup>

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<sup>10</sup> There is a large literature on how to understand coercion, which offers several meaningfully different accounts. These differences would seem to have implications for Schauer’s topic. For example, a historically important tradition understands coercion as involving the use of, or threat to use, force or violence. See Scott Anderson, *Coercion*, STAN. ENCYCLOPEDIA PHIL. ARCHIVE (Oct. 27, 2011), <http://plato.stanford.edu/archives/sum2015/entries/coercion> [<http://perma.cc/UE2-C32M>] (“In the period prior to 1969, there were of course some differences among theorists, but there seems to be a mainstream view of coercion that is more or less continuous with the view found in Aquinas and Hobbes/Locke/Kant (and some of the views of Bentham and Mill). This view identifies coercion with the use of force or violence, as well as to threats of the same.”). By contrast, an important contemporary tradition takes coercion to involve, very roughly, putting a person in a position that is worse than a normative baseline, for example what the person is morally entitled to. See generally, e.g., ALAN WERTHEIMER, *COERCION* (Marshall Cohen ed., 1987). On the former tradition, rewards, reputational sanctions, and other topics that Schauer discusses would not count as coercive. On the latter tradition, at least on the face of it, criminal sanctions such as imprisonment, which are at the heart of Schauer’s discussion, would not count as coercive as long as they are exercised in a morally permissible way. When I make arguments about coercion in my own voice, as opposed to in the exposition of Schauer, I will have in mind roughly the historical understanding on which coercion involves force or the threat of force.

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Schauer says that “[w]e need only keep in mind the basic idea that law . . . generally makes us do things that we do not want to do or not do things that we do want to do” (p. 128). Along the same lines, he offers a rough gloss: “[L]aw is coercive to the extent that its sanctions provide motivations for people, because of the law, to do something other than what they would have done absent the law” (p. 129). The bare idea of providing motivation for people to do something other than what they would have done absent the law is just the idea that law can make a practical difference — a difference to people’s behavior. Thus, if coercion were understood as anything that provided motivation for people to do other than what they would have done, it would encompass any way in which the law can have an effect on behavior. So the only way in which the gloss helps to distinguish the law’s being coercive from the law’s merely having an effect is by means of the word “sanctions.” And Schauer glosses sanctions as “what law imposes in the event of noncompliance with legal mandates” (p. 129). He is thus working with an extremely broad understanding of coercion, and indeed the reader is led to worry at some points that any way in which the law is effective is counted as coercion.<sup>11</sup>

For instance, Schauer makes the interesting point that once the law has created a particular option for achieving a goal, such as creating contracts to allow agents to bind themselves and wills to allow them to specify the disposition of their property after death, it often supersedes preexisting options for achieving that goal (pp. 28–29). Once we have a legal institution of wills, to an important extent we can no longer avail ourselves of informal, nonlegal mechanisms for disposing of property. Schauer suggests that, as a result, there is an important sense in which even the creation of options such as contracts and wills is coercive. At this juncture it would be helpful to have an account of coercion. For Schauer may well be right that there is a sense in which the law coerces by making contracts possible (distinct from the vacuous claim that the law thereby affects behavior), but it would be instructive to elaborate that sense.

Schauer offers fascinating observations, distinctions, and speculations. I will mention just a few examples. He emphasizes that law exists not just to prevent bad leaders from making bad decisions, but also to restrain well-intentioned officials from embarking on what they mistakenly believe to be good policies (pp. 108–09). He examines why

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<sup>11</sup> At another point, Schauer suggests that methods are coercive if they alter people’s preferences and motivations (p. 126). This suggestion is hard to make sense of. Creating new options can change people’s motivations, but, without more, it hardly follows that any creation of a new option is coercive. Similarly, education changes people’s preferences, but it would be peculiar to classify it as coercive for that reason.

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governments make far less use of rewards than punishments (pp. 116–19). He makes an interesting distinction between, on the one hand, cases in which the law protects well-established social norms, such as those against murder and rape, from a few outliers, and, on the other hand, cases in which the law seeks to achieve goals that are widely rejected or underappreciated, at least in particular subcultures (p. 150). (Schauer offers as examples of the latter the prohibitions on price-fixing and insider trading, and he might have added prohibitions on pirating intellectual property.)

Elsewhere, Schauer offers the insight that, when coercion is widely used in a legal system, its absence in a particular case may send a message “that the law is not serious about its prescriptions and thus that those prescriptions need not be taken seriously by its subjects” (p. 103). This point raises a related concern regarding Schauer’s claims about how important coercion is in achieving conformity to the law. In a legal system like that of the United States where legal requirements are routinely backed up by the threat of fines or imprisonment, simply removing such threats would surely have a large impact on compliance with certain requirements, such as the requirement to pay taxes. A very different question, however, is what rates of compliance would look like if an entirely different system — and an accompanying culture — were developed that did not rely on threats of fines or imprisonment. A fuller explanation of the importance of coercion would take on this latter question.

In sum, Schauer provides a rewarding and wide-ranging discussion that amply justifies his overarching claim that coercion is worth investigating. I turn now to evaluating his central arguments.

## II. SCHAUER’S ANTI-ESSENTIALISM

As set out in the previous Part, Schauer’s two main arguments are aimed at clearing away what he takes to be obstacles to investigating the role of coercion in law. In this Part, I address his argument that the nature of law may involve properties that are merely typical but not necessary. In the next Part, I consider his argument that, properly understood, there is little reason to think that a significant number of people obey the law because it is the law.

Schauer’s methodological proposal, at a high level of generality, is that philosophy of law should not merely be concerned with necessary (or sufficient) conditions for something’s counting as law:

[W]e should not too quickly accept that the domain of inquiry designated as “philosophical” should be limited to the search for essential properties . . . . [T]he various analytic and argumentative tools of philosophy might well be deployed with profit to forms of understanding other than the largely nonempirical search for necessary . . . conditions that characterizes contemporary conceptual analysis. (p. 4)

Setting aside the question of how prevalent such a narrow conception of philosophy of law is, Schauer's proposal is a sensible one.<sup>12</sup> As a great deal of both contemporary and historical work illustrates, philosophical methods can be fruitful beyond the search for essential properties of phenomena. And Schauer's core claim — that coercion is important to the study of law even if a noncoercive legal system is possible — can hardly be denied.

Schauer goes further than suggesting that philosophical methods can be fruitful beyond the search for essential properties; he opposes the idea that the study of the nature of law should be a search for essential properties of law (pp. 35–41). Now, as I will elaborate below, there are various ways in which one might resist the project of specifying the nature of a phenomenon such as law. But, rather than resisting that project, Schauer frames his methodological proposal as an argument that the search for the nature of law may involve a search for properties that are not necessary or essential properties of law (pp. 157, 164).<sup>13</sup> I am going to suggest that this is not the best way for him to characterize his proposal. As philosophers standardly use the term *nature*, an account of the nature of a phenomenon, whether it be birds, knowledge, justice, or law, is an account of what it *is* to be an instance of that phenomenon. For example, to be a triangle is to be a three-

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<sup>12</sup> Schauer believes that many contemporary philosophers of law hold a narrow conception of their discipline, limiting it to the search for necessary properties of law (pp. 3, 4, 36). Joseph Raz is Schauer's leading example. Schauer quotes him: "[S]ociology of law provides a wealth of detailed information and analysis of the functions of law in some particular societies. Legal philosophy has to be content with those few features which all legal systems necessarily possess" (p. 3) (quoting Joseph Raz, *The Institutional Nature of Law*, 38 MOD. L. REV. 489 (1975), reprinted in JOSEPH RAZ, *THE AUTHORITY OF LAW* 103, 104–05 (1979) [hereinafter RAZ, *AUTHORITY OF LAW*]).

My reading of such remarks is not that Raz is trying to limit the scope of philosophy of law, but rather that he is trying to explain one particularly important task — that of giving an account of the nature of law, that is, of what it *is* to be law. Indeed, Raz begins the essay from which the above quotation is taken by mentioning two other main topics with which he thinks "[a]nalytical jurisprudence" is concerned and saying that his concern will be with "the idea of a legal system and the features which distinguish such systems from other normative systems." RAZ, *AUTHORITY OF LAW*, *supra*, at 103. And as Raz's own work manifests, he does not think that philosophy of law is limited to analytical jurisprudence, or that philosophy in general is limited to specifying the nature of phenomena.

More generally, as Scott Shapiro and David Plunkett have recently pointed out, although the part of philosophy of law known as "general jurisprudence" is often glossed as the study of the nature of law, it has long been concerned with far more than the nature of law; many philosophers engaged in general jurisprudence do not investigate the nature of law and are even skeptical of such inquiry. See David Plunkett & Scott Shapiro, *Law, Morality, and Everything Else: General Jurisprudence as a Branch of Metanormative Theory 1–2* (Aug. 18, 2015) (unpublished manuscript) (on file with author). Nevertheless, it is certainly healthy for Schauer to emphasize the breadth of philosophical projects.

<sup>13</sup> As noted, *see supra* note 6, Schauer seems to use "necessary" and "essential" interchangeably, but I follow standard philosophical usage according to which essential properties are those that constitute the nature or essence of the phenomenon in the sense explicated in the text below.

sided polygon; to be a grandparent is to be a parent of a parent; to be a murder in states that have adopted the Model Penal Code is, roughly speaking, to be the causing of the death of a human being with either purpose to cause death, knowledge that death will occur, or a kind of extreme recklessness. Each of these statements (assuming it is correct) specifies the nature of the phenomenon in question. (Schauer does not offer a gloss of the notion of a phenomenon's nature, so it seems fair to assume, at least provisionally, that he is using the term in the standard way.)

On its face, Schauer's argument thus appears to be suggesting that a *phenomenon* could have a nature that *instances of that phenomenon* need not have. In particular, he seems to suggest that the nature of law may include properties that an institution need not possess in order to be law. This is a problematic idea. Law's nature is what it *is* to be law. So, if we understand the *nature* of a phenomenon in the standard way, the proposal would be that something could be law despite the fact that it lacks what it is to be law.

Schauer pursues this idea by seeking to characterize the nature of law by "differentiation," which he emphasizes is not "demarcation" — the specification of necessary or essential properties (pp. 157, 164).<sup>14</sup> His explication of differentiation and how it differs from demarcation focuses on the fact that the project of differentiation recognizes the existence of vagueness — in the precise philosophers' sense of having borderline cases — and therefore gives up the attempt to draw a sharp boundary line between law and other phenomena. Because he thinks that fuzzy boundaries require rejecting necessary and sufficient conditions, his attempt to give an account of the differentiation of law involves identifying typical features or contingently universal features that are not necessary or sufficient properties of law.<sup>15</sup>

But vagueness is in no way inconsistent with the existence of necessary and sufficient conditions. Conditions of application can be vague.

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<sup>14</sup> Schauer takes the term "demarcation" from Brian Leiter. See Brian Leiter, *The Demarcation Problem in Jurisprudence: A New Case for Scepticism*, 31 OXFORD J. LEGAL STUD. 663 (2011). According to Leiter, the demarcation problem is "to identify the 'necessary' and 'essential' properties of law that distinguish it from morality in all cases." *Id.* at 666.

<sup>15</sup> That the rejection of sharp borderlines is what primarily lies behind Schauer's rejection of essential properties is explicit in his review of Shapiro's *Legality*. See Schauer, *supra* note 6, at 616–17 ("These claimed justifications for understanding . . . jurisprudence as the search for the essential (and important) features of law whenever and wherever it may exist suffer from a common flaw: the assumption that we need a precise demarcation, as opposed to a fuzzy differentiation, in order to use and understand a concept." (footnote omitted)). The book is less explicit about the role of vagueness in Schauer's reasons for rejecting essential properties. Schauer also offers the considerations discussed in note 16, *infra*, and emphasizes that his point is not merely about borderline cases (pp. 38–39). But, as set out in the text, one of the book's leading ideas is that we should reject the project of specifying essential properties of law in favor of differentiating it, where differentiation involves recognizing the absence of sharp boundaries (pp. 154–68).

To be a grandparent is to be the parent of a parent. This account specifies necessary and sufficient conditions for being a grandparent. Because parenthood has borderline cases (for example, someone who acts in the role of a stepparent for some years but does not legally adopt the child), grandparenthood inherits this vagueness. Similarly, what it is to be a bird is arguably to have a certain evolutionary history. But inevitably there will be borderline cases.

The existence of borderline cases of a phenomenon or term presents no obstacle to the existence of necessary and sufficient conditions. Rather, the conditions simply have to themselves be vague in a way that captures the vagueness of the phenomenon or term. Most natural language terms, including "human," "person," "just," and "friend," are vague, so their conditions of application will be vague. The prevalence of vagueness should make us recognize that the natures of many phenomena will be such as to allow for borderline cases; it in no way suggests that instances of a phenomenon need not have its nature. (Schauer offers some other considerations, especially from the psychological literature on how people categorize objects, to support his anti-essentialism. I discuss these considerations in a footnote as they are somewhat technical as well as peripheral.)<sup>16</sup>

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<sup>16</sup> Schauer offers various considerations that he takes to support the idea that instances of a phenomenon need not possess its nature. Properly understood, these considerations cut against a simplistic understanding of the necessary properties of a phenomenon, but not against necessary properties understood in a more sophisticated way. For example, he appeals to well-known research in psychology on the way in which people make categorization judgments (pp. 37–38). The evidence shows, for example, that at least our on-the-fly categorization judgments often make use of stereotypicality information. As Schauer explains, people reliably say that robins are more central instances of birds than penguins. And under laboratory conditions, subjects categorize robins as birds more quickly than they categorize penguins as birds. Such typicality effects are found for a wide range of categories, including ones such as *even number*, for which there is a precise and widely understood necessary and sufficient condition — being divisible by 2. For example, 4 and 6 are treated as more typical even numbers than 37,750.

Some psychologists have suggested that such research raises doubts about the existence of necessary and sufficient conditions. But such claims are simply mistaken. Research on how people make categorization judgments and the like says nothing about what it is to be an instance of the relevant phenomena. For an excellent discussion, see Georges Rey, *Concepts and Conceptions: A Reply to Smith, Medin and Rips*, 19 *COGNITION* 297 (1985); and Georges Rey, *Concepts and Stereotypes*, 15 *COGNITION* 237 (1983). The fact that people judge typical birds to be birds more quickly than they judge penguins or ostriches to be birds (or that people are much more likely to mention typical birds when asked to name birds) tells us nothing about what it *is* to be a bird, about what makes it the case that a particular object is in fact a bird. Penguins and ostriches are birds every bit as much as robins. And 37,750 is in no way less genuinely an even number than 4 or 6.

One problem with inferring from typicality effects to claims about the nature of the underlying phenomena is that our processing of ordinary judgments may make use of heuristics that do not correspond to our reflective understanding of the categories. A deeper reason that we cannot infer from evidence about psychological processing of categorization judgments to conclusions about what makes it the case that something is an instance of the phenomenon in question is that competent users of a term or concept need not be able to articulate its conditions of application.

Another possible reading is that Schauer is not using the term “nature” in the standard philosophical way; when he talks of investigating law’s *nature*, he simply means investigating law. There is a great deal more to a phenomenon than its nature. The nature of a grandparent in the philosophical sense — what it is to be a grandparent — is straightforward. A grandparent is the parent of a parent. But there is obviously much more to know about grandparents. Similarly, there is a vast amount that one can learn about murder beyond its nature, that is, beyond the fact that murder is the causing of the death of another human being while having certain culpable mental states. Indeed, almost all of our sociological, psychological, moral, and legal knowledge of murder goes beyond its nature. So perhaps Schauer’s point is simply that philosophical methods can contribute to our understanding of a phenomenon in ways other than by providing an account of the nature of the phenomenon. In particular, philosophical methods may have much to offer in studying aspects of law other than what it is for an institution to be law. This point is certainly one part of what Schauer intends.<sup>17</sup>

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Indeed, an influential idea in contemporary philosophy is that competent users of a term or concept need not have even a *tacit* understanding of those conditions of application. In trying to use the psychological research on concepts to support his claims about the nature of phenomena, Schauer makes the common mistake of conflating what a person must know in order to use a concept with what one must know to fully understand the concept or, differently, the nature of the phenomenon (p. 39). The fact that one can use the concept of an acid — for example, that one can think that acids are dangerous — without understanding that to be an acid is to be a proton donor does not imply that that account of the nature of an acid is wrong.

Schauer concludes his discussion of the psychological literature: “[A]t the very least it is neither self-evident nor universally accepted that grasping and using a concept requires knowing the necessary and sufficient conditions for its proper use” (p. 39). He seems to conflate this proposition with the claim that concepts lack necessary and sufficient conditions of application. The proposition that Schauer takes himself to have supported is in fact widely accepted. Using a concept (in the pre-theoretical sense of having thoughts involving the concept) does not require knowing the necessary and sufficient conditions for its application. The problem is that, in part for this reason, one cannot infer from facts about psychological processing to conclusions about the nature of the underlying phenomena.

Schauer cites in passing a few other kinds of work that do nothing to support his position. For example, he cites Edouard Machery’s *Doing Without Concepts*, which Schauer characterizes as arguing that there may be no concepts (p. 191 n.58). But despite the provocative title, nothing in Machery’s book is remotely relevant to the issue of whether a phenomenon could have a nature that instances of the phenomenon need not possess. Machery is explicit that the phenomena for which he uses the term “concept” are bodies of knowledge that are accessed by default, not concepts as philosophers understand them. See EDOUARD MACHERY, *DOING WITHOUT CONCEPTS* 7–51 (2009).

<sup>17</sup> In one instance, he explicitly makes this point: “Coercion may be . . . not strictly necessary but so ubiquitous that a full understanding of the phenomenon [of law] requires that we consider it” (p. 40). (He also mentions in passing the possibility that “the phenomenon of law simply has no essence” (p. 40).) A potential problem with taking the point to be Schauer’s main one is that it has the consequence that he spends several pages trying to support an obvious and uncontroversial thesis — that there is a great deal that one can learn about a phenomenon other than its nature (in

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I want to suggest, however, that there are two deeper points in the vicinity that Schauer may be reaching for. First, a case can be made for moving away from conceptual analysis, understood in the narrow, traditional way (as explicated below). We must, however, distinguish traditional conceptual analysis from the project of specifying the nature of a phenomenon. Second, a related point is that the nature of a phenomenon may include how the phenomenon is *supposed* to be or what its point or function is. Consequently, a property that is not possessed by every instance of law may nevertheless figure in an account of the nature of law because it figures in the specification of law's point or function. I will take these points in turn.

First, Schauer's skepticism about the specification of necessary and sufficient conditions may be driven by concerns about traditional conceptual analysis. As quoted above, he writes: "[T]he various analytic and argumentative tools of philosophy might well be deployed with profit to forms of understanding other than the largely nonempirical search for necessary . . . conditions that characterizes contemporary conceptual analysis" (p. 4). On a traditional conception, conceptual analysis tries to specify not just necessary and sufficient conditions for the application of a word or concept, but necessary and sufficient conditions that are part of the meaning of the word or constitutive of the concept. That is, a conceptual analysis was supposed to yield *analytic* truths — roughly speaking, truths that can be known just by knowing the meaning of the word or understanding the concept. It was traditionally assumed that analytic truths must be available a priori and, indeed, must be understood by every competent user of the concept. Moreover, the analysis must be reductive; that is, it must use only terms or concepts that are more basic than the concept being analyzed.

Influenced by W.V. Quine's well-known attack on the analytic-synthetic distinction,<sup>18</sup> many philosophers have concluded that there is no principled distinction between statements or beliefs that are part of a concept and those that are merely ordinary truths about the relevant subject matter. On this view, the project of specifying analytic truths is fundamentally misguided — there are no such truths to be identified.

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the precise philosophical sense) (pp. 37–40). Similarly, this reading renders Schauer's discussion of the psychological literature on typicality effects and the like irrelevant, as nothing in that literature supports the obvious thesis. Also, as I discuss below, Schauer seemingly goes on with the project of trying to give an account of the nature of law — just one in terms of typical properties.

<sup>18</sup> See generally WILLARD VAN ORMAN QUINE, *Two Dogmas of Empiricism*, in FROM A LOGICAL POINT OF VIEW 20 (2d rev. ed. 1980); W.V. QUINE, *Carnap and Logical Truth*, in THE WAYS OF PARADOX AND OTHER ESSAYS 107 (2d rev. ed. 1976).

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Whatever one thinks about Quine's challenge, there are many problems for traditional conceptual analysis. It turns out to be difficult to provide reductive necessary and sufficient conditions even for concepts of everyday objects and substances let alone for philosophically interesting ones. One reason is that, contrary to the traditional assumption, competent users of a term or concept need not know its conditions of application.<sup>19</sup> In many cases, discovering essential properties requires empirical investigation.

Next, the aspiration to provide *reductive* necessary and sufficient conditions may be overly ambitious in many cases. Even if a term picks out a phenomenon with a theoretically interesting nature, it may be that the conditions of application for the term cannot be stated in other terms. It might be that there is no way to express in English the property of being a person or the property of being knowledge without using the word "person" or "knowledge." One kind of possibility is that the conditions of application of the term may be a complex function of the usage of the term, and there is no guarantee that a natural language has the resources to specify such a function without using the term itself.

Another reason that one might recommend moving away from conceptual analysis of ordinary, nontechnical concepts is that our ordinary classifications tend not to carve the world in explanatorily deep ways. Thus, even if we do succeed in finding a necessary and sufficient condition of application for an ordinary term or concept, it may well be a complex and disjunctive one. Given the pervasive polysemy of natural language, nontechnical terms such as "law" often have such conditions of application.<sup>20</sup> The more that the phenomenon picked out by a term consists of a heterogeneous collection of items, the less likely we are to be able to discover nonaccidental generalizations and therefore the less theoretically promising it is to study the phenomenon. (It would be a highly unpromising research project to study together all of the different phenomena lumped under the English word "law," for example, laws of physics, laws of California, law of the jungle, Murphy's law, Moore's law.)

For these and other reasons, many philosophers have abandoned traditional conceptual analysis (though a significant group of philosophers of law continue to profess to follow the methodology). One must proceed delicately, however. To begin with, philosophers in recent years have proposed projects that are descendants of traditional conceptual analysis, but without some of its baggage. For example, influ-

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<sup>19</sup> See *supra* note 16.

<sup>20</sup> Polysemy is the property of having multiple, related meanings; for example, consider the meanings of "door" in "I came in through the front door" and "I banged my head on the door."

enced by the seminal work of Hilary Putnam, Saul Kripke, and Tyler Burge, philosophers have developed accounts on which the meaning of a word or the content of a mental representation may depend on the word or representation's relations to the natural or social world, not just on connections between the thinker's concepts or beliefs.<sup>21</sup> From a different direction, Noam Chomsky's work has suggested the possibility of giving an empirical basis to the distinction between analytic or semantic beliefs and ordinary beliefs. The basic idea is to understand linguistic meanings to be principles of, or semantic instructions from, the language faculty.<sup>22</sup> More generally, many philosophers now accept that serious analyses may require empirical investigation, need not be available to ordinarily competent users of a concept, and may not be fully reductive — for example, they may involve explanatory circles large enough to be illuminating. Analyses may take sophisticated forms, such as recursive definitions or so-called “Ramsey sentences.”<sup>23</sup>

Moreover, it is important to distinguish between a conceptual analysis of a concept and an account of the nature of a phenomenon. A central difference is that the latter is not constrained by our concept of the phenomenon. Therefore, while conceptual analysis may go beyond what ordinary users of a concept know, an account of the nature of the phenomenon may go beyond even what someone with *complete* understanding of the concept knows. For example, arguably one can fully understand the *concept* of pain, of an emotion, of a convention, or of a promise without knowing a true account of the nature of the relevant phenomenon.<sup>24</sup>

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<sup>21</sup> See, e.g., CHRISTOPHER PEACOCKE, *A STUDY OF CONCEPTS* 10–11, 12–13 (1992); GILBERT HARMAN, (*Nonsolipsistic*) *Conceptual Role Semantics*, in REASONING, MEANING, AND MIND 206 (1999). For general discussion, see Mark Greenberg & Gilbert Harman, *Conceptual Role Semantics*, in THE OXFORD HANDBOOK OF PHILOSOPHY OF LANGUAGE 295, 295–98 (Ernest Lepore & Barry C. Smith eds., 2006). For accounts of meaning or content that appeal only to relations to the external world, see, for example, JERRY FODOR, *A Theory of Content, II*, in A THEORY OF CONTENT 89 (1990); and FRED I. DRETSKE, KNOWLEDGE AND THE FLOW OF INFORMATION (1981).

<sup>22</sup> See Paul M. Pietroski, *Concepts, Meanings and Truth: First Nature, Second Nature and Hard Work*, 25 MIND & LANGUAGE 247, 247–52 (2010). Drawing on Paul Pietroski's development of a suggestion by Chomsky, Georges Rey proposes construing analyses of meaning as explanatorily basic default instructions from the language faculty to the conceptual system that can be overridden by other considerations — and therefore may be false. See generally Georges Rey, *Analytic, A Priori, False — and Maybe Non-Conceptual*, 11 EUR. J. ANALYTIC PHIL. (forthcoming 2016).

<sup>23</sup> For a contemporary exposition, see David Lewis, *How to Define Theoretical Terms*, 67 J. PHIL. 427 (1970). For F.P. Ramsey's original presentation, see F.P. RAMSEY, *Theories*, in PHILOSOPHICAL PAPERS 112, 112–36 (D. H. Mellor ed., 1990).

<sup>24</sup> Schauer fails to make this distinction, equating an account of a concept with an account of the nature of the phenomenon (“[t]o understand the nature of something, or, as some would put it, to understand the *concept* of something” (p. 35)).

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Many of the reasons why one might move away from traditional conceptual analysis do not apply to accounts of the nature of a phenomenon. For example, such accounts need not be a priori, do not purport to specify truths that are conceptual or analytic, and are in no way bound by what even expert users of a concept believe or understand. Moreover, rather than being tied to ordinary classifications, one can study explanatorily deeper phenomena in the neighborhood of those ordinary classifications.

To make matters more complicated, if one wants an account of the nature of a phenomenon — of a convention, say — one will need to do at least some kind of conceptual work in order to identify the subject matter to be studied.<sup>25</sup> Even if a theorist of convention ultimately rejects ordinary usage in favor of a deeper classification, in order to know which phenomena to study in the first place, she has to begin with the concept of a convention. In sum, it is not a straightforward matter to dismiss the project of giving an account of the nature of a phenomenon such as law, or that of giving an account of the corresponding concept.

I come now to the second point mentioned above, about Schauer's idea that the nature of a phenomenon may involve typical properties. One might think, flat-footedly, that if there are instances of law that are not coercive, then coercion does not feature in an account of the essential properties of law. But essential properties can be more complex than this simple line of thought imagines. The essence of a phenomenon might be given by something more complex than a conjunction of garden-variety properties. It could be, to take a simple example, a disjunction. Or the necessary and sufficient condition might be to have many or most of a set of features; and the features might have different weights in the overall calculus.<sup>26</sup> (Family resemblance concepts, which Schauer mentions (p. 38), might be captured along these lines.) The general point is that a property that is not a necessary property of law may be a constituent of a more complex property that *is* necessary.

Most importantly, for present purposes, the essential properties of a phenomenon can include how the phenomenon is *supposed* to be. More generally, a norm or standard of correctness may be built into the nature of the phenomenon. For example, it is plausibly an essential property of a fiduciary relationship that the fiduciary is supposed to act in the interests of the beneficiary. This is not to say, of course, that all fiduciaries always do so. Rather, the point is that the nature of the fiduciary relationship has a normative component — what it is to

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<sup>25</sup> Frank Jackson has emphasized this point. FRANK JACKSON, FROM METAPHYSICS TO ETHICS 30–37 (1998).

<sup>26</sup> Rey's proposal, described above, *supra* note 22, can be seen as providing another example of a complex essential property.

be a fiduciary includes how one is *supposed* to act, with the consequence that a fiduciary relationship is defective to the extent that the fiduciary fails to act in the interests of the beneficiary.

An important type of example of an essential standard of correctness is that it can be part of a phenomenon's nature to have a certain aim, point, or function. Part of what it is to be a clock is having the function of telling time. So the property of telling time figures in an account of the nature of a clock. But there are defective clocks that do not tell time. Similarly, many philosophers take the intuitively plausible view that it is of the essence of belief that belief aims at truth — or, to put it the other way around, that a false belief is defective. But of course many beliefs are false. It is plausibly part of the nature of sperm cells that their function is to fertilize ova, yet the vast majority of sperm cells do not do so.

In the case of law in particular, many philosophers have thought that it has a function, or more generally, a standard of correctness, built into its nature. It has often been proposed that law has a function of coordination, of promoting the public welfare, or of settling disagreements. Such claims are by no means limited to natural-law or nonpositivist theories. Shapiro claims, for example, that it is part of the nature of law that it aims to improve our moral situation.<sup>27</sup> Raz holds that it is part of the nature of law that it claims to have legitimate authority.<sup>28</sup> And there is a plausible argument that Raz's claim implies that law is defective to the extent that it fails to have legitimate authority.<sup>29</sup>

Most relevantly, Ronald Dworkin claims that the most abstract and fundamental point of law is to ensure that force is not used against individuals except to the extent that it is authorized by past political decisions.<sup>30</sup> Thus, one of the most influential contemporary philosophers of law makes coercion central to his account of law — though not in the simple form of a claim that any legal system must use coercion. It is a surprising omission, therefore, that Schauer, in a book arguing that philosophers of law should give more attention to coercion, does not

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<sup>27</sup> On the nonpositivist side, I hold a view similar to the one attributed to Shapiro in the text. Compare SHAPIRO, *supra* note 6, at 172–75, 213–14, with Mark Greenberg, *The Standard Picture and Its Discontents*, in 1 OXFORD STUDIES IN PHILOSOPHY OF LAW 39 (Leslie Green & Brian Leiter eds., 2011) [hereinafter Greenberg, *The Standard Picture*], and Mark Greenberg, *The Moral Impact Theory of Law*, 123 YALE L.J. 1288, 1294, 1319 (2014) [hereinafter Greenberg, *Moral Impact Theory*].

<sup>28</sup> See RAZ, *AUTHORITY OF LAW*, *supra* note 12, at 28–33.

<sup>29</sup> See Greenberg, *The Standard Picture*, *supra* note 27, at 91–95; Mark C. Murphy, *Natural Law Jurisprudence*, 9 LEGAL THEORY 241, 261 (2003).

<sup>30</sup> See RONALD DWORIN, *LAW'S EMPIRE* 93, 109 (1986) (“Law insists that force not be used or withheld, no matter how useful that would be to ends in view, . . . except as licensed or required by individual rights and responsibilities flowing from past political decisions about when collective force is justified.” *Id.* at 93.).

mention this view. Dworkin's account perfectly illustrates that coercion can be central to an account of law even if the account does not claim that every possible legal system must use coercion to enforce its norms.

There are other possible essential aims or functions of law in which coercion figures. It might be thought, for example, that an important function of law is to prevent unjustified violence, to maintain a monopoly on the use of force, to ensure that no one is invulnerable to the law's use of force, or to use coercion to achieve conformity with legal requirements.<sup>31</sup> A different example of how force might enter into an essential property of law is provided by the idea that legal obligations are those obligations that courts should use force to vindicate.<sup>32</sup> Still another example is the idea that a constraint on the proper functioning of a legal system is that legal obligations must be ones that it is permissible to vindicate with force.<sup>33</sup>

In sum, I think that Schauer is on to something important when he suggests that a property can be part of the nature of law even if there are legal systems that lack that property. Necessary properties can include ones that determine a standard of correctness, such as the property of having an aim or function. A merely typical property of law can figure in an account of that aim or function and, therefore, in an account of law's nature, even if that property need not be instantiated in every case of law. In Part IV, I will illustrate the potential explanatory fruitfulness of the hypothesis that a target phenomenon has an essential aim or function.

On the other hand, one could reasonably have concerns about the project of specifying the nature of a phenomenon such as law. For one thing, though law may be an artifact, because of the complex way in which it has evolved, it is much more difficult to identify its essential function or functions than in the case of straightforwardly designed artifacts. More fundamentally, the success of natural sciences, such as

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<sup>31</sup> Sam Bray suggested to me that a function of ensuring that no one is invulnerable to the law's use of force is more plausible than the often-proposed function of maintaining a monopoly on the use of force. Rebecca Stone raised the idea (without endorsing it) of a function of using force to ensure conformity. I don't intend to take a position on the plausibility of the various examples of possible functions or other standards of correctness for law mentioned in the text.

<sup>32</sup> In the brief final chapter of *Justice for Hedgehogs* and a posthumous article, Dworkin offers a different view of law on which coercion again plays a central role. On this account, roughly speaking, legal obligations are those that the courts morally ought to enforce. See RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 405–07 (2011); Ronald Dworkin, *A New Philosophy for International Law*, 41 PHIL. & PUB. AFF. 2, 12 (2013). For some wrinkles and a brief sketch of the difference between Dworkin's well-developed main theory in *Law's Empire* and his late view, see Greenberg, *Moral Impact Theory*, *supra* note 27, at 1299–1300, 1299 n.28; and Mark Greenberg, *The Moral Impact Theory, the Dependence View, and Natural Law*, in THE CAMBRIDGE COMPANION TO NATURAL LAW (forthcoming 2016).

<sup>33</sup> See Greenberg, *The Standard Picture*, *supra* note 27, at 84–95, 85 n.52.

chemistry, in discovering essential properties cannot be assumed to carry over to non-natural kinds such as law. It may be that law — the complex social phenomenon picked out by the ordinary term — lacks a theoretically interesting nature. Schauer gestures at such concerns. Differently, it might not be possible to give a *reductive* account of the nature of law. There might be no way to say what it is to be law without using the term “law” or cognate terms.

Whatever one thinks of the prospects for an account of the essential properties of law, there are certainly other fruitful projects for philosophers to undertake. From his own example, we can infer the sorts of projects Schauer favors. I have already mentioned Schauer’s enterprise of “differentiating” law. Rather than abandoning the project of giving an account of the nature of law in other terms, he wants to offer such an account — only one in terms of “differentiating” properties rather than necessary properties.<sup>34</sup> He identifies four types of typical differentiating features in addition to the use of coercion: sociological, procedural, methodological, and source-based. “[I]t may well be that . . . law’s coercive power, its sociological differentiation, its procedural differentiation, its methodological differentiation, and its source differentiation have a role to play in explaining just how it is that law is different . . .” (p. 159).

Given that Schauer eschews trying to identify necessary and sufficient conditions for something’s being law, one might expect him to move away from the question of which kinds of institutions, systems, or practices count as law or legal systems. But he returns repeatedly to this question throughout the book. Without an account of the essential properties of law, his classificatory efforts end up relying on suggestions about how things appear, on observations that systems have many features of law, on what we would ordinarily say, and on the assertion that we shouldn’t “assume” that properties others have argued to be essential to law are in fact essential:

[I]f one believes, with Shapiro and Raz, for example, that it is definitional of law that the ultimate legal authority at least *claim* to give its subjects moral reasons for action, then the Mafia may not qualify. But from a more strictly positivist perspective, one that is as unconcerned with the moral goals of a system as with its ultimate moral worth, then in many respects we might just say, without losing very much, that the Mafia is simply a legal system, even if a nonstate one. (p. 137)<sup>35</sup>

<sup>34</sup> See *supra* pp. 1933, 1945.

<sup>35</sup> Similarly, Schauer argues: “But although tyrannies are plainly not good societies, they do appear to have what looks like law. Their laws may be substantively flawed and procedurally defective, but their subjects nevertheless understand them as law. And it is far from clear that these subjects are mistaken in doing so” (p. 95). Noting that many prominent legal theorists have argued for essential features of law that would exclude such systems because they do not have any moral aim and do not even claim legitimate authority, Schauer dismisses such arguments with the

Schauer has valuably focused us on the question of illuminating projects for philosophers of law other than specifying necessary and sufficient conditions for something's being law. I would like to highlight a broad alternative: philosophers can undertake projects that are driven by explanatory goals other than explaining the nature of a phenomenon or explaining the contours of our concepts.<sup>36</sup> Explanation in philosophy can take many forms. For example, there is a fundamental distinction between types of explanation that are relative to our knowledge and interests, and a kind of metaphysical explanation that is independent of our knowledge and interests.<sup>37</sup> To take just two prominent examples of very different kinds of explanatory projects in philosophy of law: central to Raz's work in legal theory is the goal of explaining how law could have legitimate authority; and central to Dworkin's is the goal of explaining how theoretical disagreement — disagreement about the grounds of law — is possible. Raz's explanation is a normative one; by contrast, Dworkin seeks to explain an empirical phenomenon by hypothesizing that law is an "interpretive concept." I will illustrate other types of explanation in philosophy of law below.

An explanatory project can also drive a classificatory enterprise. Theorists aim to divide the world up into explanatorily significant divisions, grouping together entities that share explanatorily powerful properties, and separating ones that do not. For different explanatory purposes, different properties may be important. So different explanatory purposes may yield different theoretically important classifications, which may not correspond neatly to ordinary language classifications. Rather than classifying organizations together because they are ordinarily called "law," we can classify them together because they share explanatorily powerful properties. We might or might not end up using the term "law" for one of the resulting categories, but that is not the important thing.<sup>38</sup> (The objects now classified as stars include

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comment that "to adopt either of these constraints on the definition of the legal seems to exclude too much. After all, many alleged legal systems . . . claim nothing or little more than the power to do bad things to their subjects in the event of disobedience" (p. 95).

<sup>36</sup> I don't mean to suggest that all philosophical enterprises need to be driven by explanatory goals. For example, one type of project is to develop an account of a good legal system. Another project is to provide a Dworkinian interpretation of law. There are projects with practical goals. Perhaps there are projects that pursue forms of understanding other than that offered by explanation.

<sup>37</sup> An example of such a metaphysical explanation: the fact that there is water in this glass obtains in virtue of the obtaining of certain microphysical facts and the fact that water is H<sub>2</sub>O. For discussion of such metaphysical explanations, see Mark Greenberg, *Troubles for Content II: Explaining Grounding*, in *METASEMANTICS: NEW ESSAYS ON THE FOUNDATIONS OF MEANING* 169 (Alexis Burgess & Brett Sherman eds., 2014).

<sup>38</sup> See Mark Greenberg, *Hartian Positivism and Normative Facts*, in *EXPLORING LAW'S EMPIRE* 265, 270 (Scott Hershovitz ed., 2006); Mark Greenberg, *How Facts Make Law*, in *EX-*

some, like the sun and white dwarf stars, that were not originally labeled “stars” and do not include others, such as planets, that were. Astronomy could not have made progress had it treated the ordinary classification of objects as “stars” as definitive.)

There are many potentially theoretically interesting properties in the neighborhood of law. Examples include: having the aim of promoting the public good; claiming legitimate authority; having the point of ensuring that coercion is not used unless it is licensed by past political decisions; having secondary rules; satisfying what I have elsewhere called “the rational-relation requirement” — that the content of legal norms be rationally explicable in terms of their determinants;<sup>39</sup> operating under a constraint that the system’s obligations are supposed to be binding;<sup>40</sup> and so on. We can identify theoretically interesting categories in terms of such properties. Now it might be that some properties turn out to be so powerful and important for a range of explanatory purposes that it seems natural to say that they are essential to law. But answering the question of which properties are essential to the phenomenon picked out by our ordinary concept of law — and therefore which systems count as law — seems to me less interesting than identifying the theoretically interesting properties and the corresponding theoretically interesting phenomena.<sup>41</sup>

It should be emphasized that philosophers who study the essential properties of a phenomenon do not do so merely because of peculiar prevailing norms among professional philosophers, as Schauer sometimes suggests.<sup>42</sup> Rather, essential properties have great explanatory power. To begin with, they provide a kind of explanation of why particular entities are or are not instances of the phenomenon.<sup>43</sup> A case in point: Schauer’s catalog of typical “differentiating” features of law cannot support his classificatory proposals, for example, that the rules of the Mafia, New York diamond dealers, and the American Contract Bridge League are law, but those of etiquette and fashion are not (pp. 143, 161–63). Since Schauer’s differentiating features are, by hypothesis, not necessary or sufficient properties of law, the fact that an institution has or lacks various of these features doesn’t tell us much about whether the rules of the institution are — or are not — law. (Perhaps

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PLORING LAW’S EMPIRE, *supra*, at 225, 240; Greenberg, *The Standard Picture*, *supra* note 27, at 95–96.

<sup>39</sup> See Greenberg, *Hartian Positivism and Normative Facts*, *supra* note 38, at 265; Greenberg, *How Facts Make Law*, *supra* note 38, at 232.

<sup>40</sup> See Greenberg, *The Standard Picture*, *supra* note 27, at 84–96.

<sup>41</sup> See sources cited *supra* note 38.

<sup>42</sup> Schauer, *supra* note 6, at 610; see also pp. 3–4, 35–40.

<sup>43</sup> To take a different kind of example, Fine argues that modal truths — truths about necessity and possibility — are ultimately to be explained in terms of essence. See generally Fine, *supra* note 6.

because of this problem, he expresses his conclusions cautiously and with various hedges: “[L]ittle is lost if we talk about the law of the Catholic Church, the law of the American Contract Bridge League, the law of the New York diamond dealers, or even the law of the Mafia, as long as we understand that we are not talking about the state” (p. 143).<sup>44</sup>) Indeed, Schauer’s implicit assumptions about the essential properties of law seem to do all the work in producing his classificatory conclusions. As noted, Schauer takes for granted throughout that having systematicity — secondary rules — is an essential property of law. Since he does not recognize any other essential properties, he is driven to classify anything that he takes to have secondary rules as law (pp. 95–96, 136–37, 143–44, 160–63).

Moreover, we can often explain *why* certain properties are typical or stereotypical of a given phenomenon by appealing to essential properties of the phenomenon. We can explain why grandparents (stereo)typically have white hair by appealing to what it is to be a grandparent as well as to certain contingent facts about the length of human generations and the effect of age on hair pigmentation. To take a different kind of example, it is extremely plausible that it is an essential property of cars that they have a function involving transportation. And we can explain why cars typically have wheels, axles, fuel tanks, and so on by appealing to this transportation function. To return to Schauer’s example, the fact that birds typically fly might be explained by appealing to the distinctive evolutionary history of birds, which, according to leading biological theories, is what makes them birds. One might hypothesize that flight played a central role in that evolutionary history, thus explaining why birds typically fly. So an interest in essential properties need not exclude an interest in typical properties; rather, we can study essential properties in order to explain typical properties.

<sup>44</sup> Again:

[W]hat does it mean to say that there is “nonstate” law? It means, in large part, that all of the features we typically or even universally see in the legal systems of modern nation-states are represented in vast numbers of associations, organizations, and institutions whose physical boundaries are not those of the nation-state . . . . Sometimes . . . these are private associations. Sometimes they are religious organizations, especially hierarchical ones like the Catholic Church. Sometimes they are corporations . . . . Sometimes they are cross-border organizations *of* nation-states, as with the WTO, the United Nations, and the European Union. . . . And sometimes they are organizations, like the Mafia and Al-Qaeda, whose own law is unlawful under the laws of the nation-states within which they physically exist. (p. 161)

He continues: “To observe that organizations such as those just listed appear to have legal systems is not to deny the importance of the very idea of the nation-state” (p. 161). But:

[A]lthough all nation-states have their own legal systems, . . . it seems a mistake to make too much of the connections between legal systems and nation-states. . . . Nonstate law is not like chess without the queen, football with nine players on a side, or a dinner party without dessert — bastard variants on an accepted central case. (p. 162)

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Thus, a turn to explanation is consistent with an interest in typical properties. Indeed, some typical properties may help to explain others. Flight — in particular, the hypothesized role of flight in the evolutionary history of birds — may explain many features of the physiology of birds, even of birds that do not fly. Those features may, for example, be adaptations for flying. Analogously, one might appeal to law's widespread use of coercion to explain other properties of law.

At several points, Schauer argues that an account of law should explain why coercion is so characteristic of law, so much a part of the ordinary experience of law (p. 165). And Schauer's explanation, in a nutshell, is that law regularly tries to make us do things that go not only against our self-interested desires, but also against our best judgment of what we ought to do. There is surely something right in this answer as far as it goes. But it raises other questions. Why does law try to make us do things that go against our best judgment? Why does law resort to force when other normative domains such as fashion, chess, and etiquette, whose reason-giving force Schauer places on a par with law, do not (pp. 34–35)?

As I elaborate in Part IV, there is a great deal more explanatory potential that could be realized. I illustrate the possibility that an explanatorily important property — the aim of solving certain kinds of moral problems — can help to explain why systems with this property need to use coercion. Moreover, the need to use coercion imposes a major burden on systems that have this property, shaping how they can operate. There is also a moral explanation of why we have systems of this kind. Thus, there is the potential for a rich explanatory story that both explains the use of coercion and appeals to the use of coercion to explain other features of the relevant systems. If this is right, then systems with the relevant moral aim form a theoretically interesting phenomenon, one that is worthy of study.

### III. OBEYING THE LAW BECAUSE IT IS THE LAW

The centerpiece of the book is the argument that contemporary philosophers of law have failed to investigate coercion because they have greatly overestimated how common the “puzzled person” is. And central to that argument is Schauer's claim that a widespread misunderstanding of what it is to obey the law *qua* law has led to that empirical mistake.<sup>45</sup>

A preliminary point is that Schauer gives scant reason to think that — and I am dubious that — contemporary philosophers of law

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<sup>45</sup> As noted above, Schauer uses *puzzled person*, one who *obeys the law qua law*, and one who *obeys the law just because it is the law* interchangeably. See *supra* note 2. I follow that usage here.

who have not focused on coercion have done so *because* they think that people who obey the law *qua* law are common. First, even if there are a substantial number of people who obey the law *qua* law, it is obvious that there are many who, in many circumstances, will not obey the law absent the threat of sanctions. So the existence of people who obey the law *qua* law in no way suggests that sanctions are not a crucial mechanism for the law to ensure compliance. And I am not aware of any contemporary philosopher who thinks otherwise.<sup>46</sup>

Schauer seems to assume that because Raz, Shapiro, and others do not devote much attention to coercion in their work on the nature of

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<sup>46</sup> Shapiro is the contemporary philosopher whom Schauer gives as his main example of someone who claims that there are many people who obey the law *qua* law (p. 42). To begin with, it is unclear that Shapiro makes this claim. In the passage of Shapiro's *Legality* that Schauer cites, Shapiro says that "many people" understand the law "to consist of legitimate standards of conduct that give reasons to comply over and above the penalties associated with disobedience." SHAPIRO, *supra* note 6, at 69. Similarly, he says that a "good citizen" accepts that legal duties "are separate and independent moral reasons to act." *Id.* at 70. But he says nothing about how often such a person complies with the law because of these reasons, still less that she does what the law requires even when it conflicts with her best judgment of what she should do all things considered. Part of the problem is that Schauer slides back and forth between three different understandings of the puzzled person or someone who obeys the law *qua* law: someone who merely takes the law as providing some reason for action; someone who (often?) actually complies with the law because of such reasons; and someone who (often? always?) obeys the law just because it is the law even when it conflicts with her all-things-considered judgment of what she should do. *Compare* pp. 51–52 (giving the strong formulation), *with* pp. 53, 55 (stating that only a prima facie reason is required). Schauer tries to minimize the importance of the distinction between these formulations by suggesting that if people genuinely take the law to provide reasons, then we would expect those reasons to make a difference in some cases (p. 53). But this point does not come close to making irrelevant the difference between the three formulations. For example, the law could make a difference in cases in which a person has no considered moral view of how to act independent of the legal reasons without ever outweighing a person's law-independent, all-things-considered moral judgment. *See infra* p. 1963 (discussing Schauer's equating the puzzled person with one who obeys the law even when it conflicts with her on-balance judgment).

Setting aside whether Shapiro maintains that good citizens are common, there is no reason to think that Shapiro's views about the existence of good citizens have led him to think that coercion is not needed, not important, or not worthy of philosophical discussion. Shapiro says, in fact, that it is "likely that life would be poor, nasty, brutish, and short without legal systems maintaining order through threats of coercion." SHAPIRO, *supra* note 6, at 175. The brief discussion of the "good citizen" that Schauer points to comes in Shapiro's explication of the defects of Austin's theory of law, rather than in an argument why coercion should not be the subject of philosophy of law. He claims not that sanctions are unimportant, but that they are not the only way in which the law can affect behavior: "Sanctions, in other words, are only one kind of tool that the law may use to motivate behavior. Duties are another; rewards yet a third type. A general theory about the nature of law must adequately represent all of the techniques that the law has at its disposal . . ." *Id.* at 71. Indeed, far from thinking that coercion is not important, in an article published soon after *Legality*, Shapiro along with his coauthor Oona Hathaway develops the importance of a type of coercion — outcasting — in international law. *See generally* Oona Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 *YALE L.J.* 252 (2011). Schauer does not identify by name any contemporary philosopher who claims that coercion is not worthy of philosophical discussion because obedience to the law *qua* law is common.

law, they must think it is not important. But importance is relative to what question one is trying to answer or what one is trying to explain. Because Raz and Shapiro, like Schauer, do not think that coercion is an essential feature of law, their work on what it *is* to be law does not appeal to coercion. But it hardly needs stating that this fact indicates nothing about whether they take coercion to be important for other purposes.

Setting aside the question of why some philosophers have not focused on coercion, let us turn to Schauer's argument that widespread confusion about what it is to obey the law because it is the law has led theorists to overestimate the prevalence of such obedience to law. Schauer's central point, which he thinks is widely missed, is that it does not follow from the fact that conduct consistent with the law is not motivated by self-interest or personal preferences that the conduct constitutes obedience to law *qua* law. People may conform to the law — that is, act consistently with it — not only because of their personal preferences or tastes, but also for moral, altruistic, or cooperative reasons. For example, moral reasons often prevent people from acting on self-interested desires to steal, assault others, and engage in insider trading (pp. 48–50). “[W]e know that when people perceive a form of behavior to have substantial moral (or religious) or ‘prosocial’ implications, they will often relegate their own personal interest to secondary importance behind what they believe is the right thing to do” (p. 58). When people act consistently with the law because of morality, just as when they act for self-interested reasons, they are merely conforming to the law, not obeying the law *qua* law (pp. 48–51, 58–60).

Schauer believes that the assumption of a “false dichotomy between law-governed and self-interest-governed actions is ubiquitous” (p. 51).<sup>47</sup> Because it is obvious that people often act in a way that is inconsistent with their self-interest, and such behavior will often be consistent with the law, the false dichotomy leads to the mistaken conclusion that there are many puzzled people. Schauer believes that once he exposes the false dichotomy, it will be clear that there is little or no evidence for the existence of a significant number of people who obey the law because it is the law (pp. 51, 61, 63).

If Schauer's concern is with how important coercion is in practice, one might think that the appropriate question is how often it is necessary to use coercion to get people to conform to the law. And, in that case, the crucial inquiry is not how many people comply with the law *qua* law, but how often it is that people would not conform their behavior to the law, for whatever reason, if they did not fear sanctions.

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<sup>47</sup> Again: “Setting up this false dichotomy . . . was [Tom] Tyler's mistake. And, earlier, it was Hart's mistake as well” (p. 62).

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From a practical standpoint, it doesn't matter why people are conforming to legal requirements; coercion is not needed when they conform, whatever the reason. (And, as mentioned above, if our interest is in the practical question of whether coercion is an important means of ensuring compliance, the answer is obviously yes, so the whole question of what it is to obey the law *qua* law seems a red herring.)

But Schauer explains that he is interested in the question of what difference the law can make:

Our interest in law is largely an interest in law insofar as it is causally consequential, and for that purpose the distinction between law that makes a difference to behavior and law that makes no difference is of central importance. If we are interested in obedience to law, we must focus on law's effect on people who, but for the law, would have done something other than what the law commands. (p. 49)<sup>48</sup>

Accordingly, the point of Schauer's empirical inquiry into the frequency of obedience to law *qua* law is to advance his main argument concerning the importance of coercion to law's ability to affect behavior. He considers a hypothetical objector to Hart and his followers who claims that "unsanctioned law does not actually influence human behavior" (p. 46). "Hart's rejoinder," according to Schauer, is the puzzled person (p. 46). Thus, Schauer's argument proceeds, in order to establish whether law without sanctions influences behavior, we need to determine whether puzzled people in fact exist in significant numbers (pp. 46–48). Accordingly, once he reaches the view that there is little evidence for such puzzled people, he draws the conclusion that coercion is the main way in which law can affect behavior: "[I]f those who take the very fact of law as a reason for action or reason for decision are few and far between, then coercion resurfaces as the likely most significant source of law's widespread effectiveness and its longstanding appeal in achieving various social goals" (p. 52). In other words, once we eliminate obedience to law *qua* law as a significant tool for affecting behavior, coercion is needed because it is the remaining alternative (p. 47).<sup>49</sup>

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<sup>48</sup> "[O]ur principal interest in law and legal systems lies in their capacity to shape and influence what people do" (p. 45). "[O]ur interest here is in whether, absent sanctions, the very fact of law makes a difference to the reasoning and decision-making processes of ordinary people" (p. 61). See also pp. 51, 52, 54, 59.

<sup>49</sup> "[W]e may still wonder how important law without coercion really is. And when we do, the answer to that question turns out to depend largely on the extent to which people actually do take the law's commands as reasons for action, sanctions aside" (pp. 47–48). "[M]uch of the argument for treating coercion as decidedly secondary in understanding the phenomenon of law is the view that in the typical advanced society law's unenforced obligatoriness . . . is a substantial determinant of human behavior" (p. 45). Again: "[C]oercion's nonnecessary importance is a function of the relative scarcity of so-called puzzled people and puzzled officials" (p. 97).

Schauer argues that, in order to determine whether law makes a practical difference — a difference to how people act — we must set aside all law-independent reasons — reasons that would exist even if there were no law. He takes for granted that moral reasons are independent of the law, so that to the extent that people act for moral reasons, the law is not making a difference (see, for instance, pp. 50–52).<sup>50</sup> (Like Schauer, I use the term *moral* broadly to encompass, for example, preventing harm, helping people, and improving welfare as well as values such as fairness, democracy, and freedom.) He therefore emphasizes that, in order to investigate the empirical question of whether law without sanctions influences behavior, we must ask how often people follow the law merely because of its existence, setting aside all moral reasons (and, indeed, prudential or self-interested reasons):

The question is thus refined: If we distinguish the reasons provided by law from the reasons provided by morality, policy, prudence, and everything else, and if we distinguish the reasons provided by law from the various forms of enforcement that law typically employs to assure actual decision according to those reasons, then to what extent do these sanction-independent legal reasons actually influence decisions? (p. 54)

Schauer's emphasis on setting aside moral reasons might even suggest that he thinks that someone who complies with the law because she believes she has a general, defeasible moral obligation to obey the law (for example, because she believes it would be unfair for her not to play by the rules given the benefits she has received from the system) is not obeying the law because it is the law (pp. 50–51, 52). But I think this would be a misreading of the book. A few passages implicitly acknowledge that obeying the law for this reason qualifies as obeying the law *qua* law (for example, p. 55). Given this point, Schauer's characterizations of the puzzled person are often misleading, suggesting as they do that the puzzled person must have a kind of fetish for the law, obeying merely because of "its very status as law" (pp. 52, 61). For example, he says that the question of whether people obey the law *qua* law can be recast as the question of whether lawbreaking *qua* lawbreaking "violate[s] a social norm in the same way that [talking] with your mouth full, not cleaning up after your dog, wearing a white suit in winter, or speaking to the Queen before she speaks to you does" (pp. 151–52). Such comparisons obscure the possibility of obeying the law *qua* law because one believes that one has a moral obligation to do so.

Similarly, Schauer repeatedly characterizes the puzzled person as someone who thinks that she ought to act in a particular way on the

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<sup>50</sup> "The distinction between legal and all other reasons is thus a construct designed to isolate the question whether law figures in the decisions and actions of law's subjects" (p. 54).

basis of the full array of law-independent reasons, including moral reasons, yet, on discovering that the law requires a different course of action that she believes wrong, proceeds to take that action without regard to the possibility of coercion (pp. 51–52). “Will people do what they believe is wrong . . . just because of the law and without regard to the threat of sanctions?” (p. 62).<sup>51</sup> But if a person believes that what the law requires is an important moral consideration — indeed, believes that she has something like a defeasible moral obligation to obey the law — then the person’s behavior is less peculiar than Schauer makes it sound. For those who believe that they have a moral obligation to obey the law, their law-independent reasons leave out a crucial moral reason. So it is not that the law trumps their on-balance moral judgments, but that their on-balance moral judgments depend in an important way on the law. It is not that they do what they believe is wrong, but that the law affects what they believe they ought to do, all things considered.

Moreover, there are a wide variety of plausible motivations for adopting a policy of obeying the law other than, on the one hand, believing that one has a general moral obligation to do so and, on the other, law fetishism, that is, taking the mere fact of something’s being law to be a reason. Hart himself pointed out that people could adopt the internal point of view for any of diverse reasons, including “calculations of long-term interest; disinterested interest in others; an unreflecting inherited or traditional attitude; or the mere wish to do as others do.”<sup>52</sup> A natural example is that a person might decide that, rather than making case-by-case decisions about whether to obey the law — taking into account in each instance how to best help others, act fairly, advance her own interests, and so on — she would do better in the long run to adopt a general policy of obeying the law. Such a person does not believe that she has a moral obligation to obey the law, just that following such a policy is a good strategy for acting on her moral and other reasons, given limitations of time and information and her

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<sup>51</sup> The passage from which this quotation is taken reads:

The question now is whether people, when they have reached this all-things-except-the-law-considered judgment, will, sanctions aside, subjugate *that* judgment to the prescriptions of the law. Will people do what they believe is wrong . . . just because of the law and without regard to the threat of sanctions?

Hart’s puzzled person is thus someone who follows the law just because it is the law even when what the law requires seems not only not in her best interest but also contrary to her best judgment. There is a reason that philosophers grappling with the issue are fond of imagining “Stop” signs in the middle of the desert, and that is because the example creates a situation in which the likelihood of apprehension and punishment is close to zero and in which acting in accordance with the law *appears otherwise pointless*. (pp. 62–63) (final emphasis added) (citations omitted)

<sup>52</sup> HART, *supra* note 2, at 203.

own cognitive and motivational limitations.<sup>53</sup> When she obeys the law, there is an important sense in which she may be motivated by moral reasons that are independent of the law, such as helping others, yet the law has undeniably affected her behavior.

So far, one main point is that Schauer's characterizations of obeying the law *qua* law often seem to suggest, misleadingly, that it is a bizarre kind of law fetishism and leave out a range of plausible reasons why people might adopt a policy of obeying the law *qua* law. Such characterizations may unfairly lend support to the view that obedience to the law *qua* law is uncommon.

Even more importantly, Schauer neglects an interesting and significant way in which the law can affect behavior — by changing moral obligations, powers, permissions, and so on. (I have coined the term *moral profile* for the panoply of obligations, powers, permissions, and the like;<sup>54</sup> for convenience, however, I will sometimes write simply of obligations.) As I will elaborate, legal systems have a variety of tools for changing the moral profile.<sup>55</sup> Now, if there were a general moral obligation to obey the law, then a legal system could change the moral profile simply by changing the law. But in the circumstances of most contemporary legal systems, it is not plausible that there is a general moral obligation to obey the law, and the tools for changing the moral profile that I have in mind operate without the need for a general moral obligation to obey the law. The general idea is that legal institutions can take actions that change the relevant circumstances. Given various background moral principles, these changes in circumstances generate changes in the moral profile. The significance of this point for Schauer's argument is that if there is an important way for law to affect behavior distinct from obedience to law *qua* law and the use of sanctions to generate prudential reasons, then it is not right that “how important law without coercion really is . . . turns out to depend largely on the extent to which people” obey the law because it is the law (p. 47).<sup>56</sup> Coercion is not the only alternative.

I can best explain how law can change the moral profile by developing an example.<sup>57</sup> The example illustrates several tools that legal in-

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<sup>53</sup> Stone offers a subtle analysis of different motivations for internalizing the law and argues that such motivational differences can be relevant to the law's control of behavior. See Rebecca Stone, Legal Design for the “Good Man” (Nov. 15, 2015) (unpublished manuscript) (on file with author).

<sup>54</sup> See Greenberg, *The Standard Picture*, *supra* note 27, at 56–57.

<sup>55</sup> One might wonder why it would be desirable to change the moral profile. As I elaborate in the text below and in Part IV, without law, there is much room for improvement in the moral situation. Law can provide a crucial service by changing the moral profile for the better.

<sup>56</sup> See *supra* note 49 and accompanying text.

<sup>57</sup> I develop similar points at greater length in Greenberg, *Moral Impact Theory*, *supra* note 27, at 1310–19.

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stitutions have for creating moral obligations to participate in specific schemes for the public good, such as an obligation to pay taxes. Without a legal system, people may have general moral obligations to help others. But there will often be no moral obligation to give any particular amount of money to any particular scheme or otherwise to participate in any one scheme. For one thing, especially when it comes to problems of any complexity, many different solutions are likely to be beneficial. Suppose that the community faces a problem for which some solutions are better than others, and it matters to people which solution is chosen. Different people support different solutions, and no one solution has any kind of consensus behind it. Moreover, the nature of the problem is such that participating in a particular solution will do little or no good unless many people, perhaps a majority, participate. In this situation, it is plausible that I do not have a duty to contribute to any particular solution. Nothing determines which possible scheme is the one that people should participate in. In addition, there is no mechanism for people to participate in one common scheme.

Now suppose that the legal system specifies a particular scheme and sets up a mechanism for implementing that scheme. In addition, the legislature prescribes penalties for not participating. The solution that is chosen, let us suppose, is not the best possible one, but having this scheme in place would be much better than the current situation. Consider now the effect on my reasons. The actions of the legal system may well succeed in making it the case that, quite apart from the self-interested reasons that I have for avoiding the penalties, I have powerful moral reasons for participating in the particular scheme that the legal system specifies. There is now a strong likelihood that a majority of people will participate in the scheme. As a result, participating in this scheme will make a difference, and participating in other schemes is unlikely to do so. My general moral reasons to help others are therefore channeled into moral reasons to help with this particular scheme. Moreover, the fact that others are likely to participate may make it unfair for me not to participate. Thus, the reasons that I have for solving the particular problem, the general moral reason to help, and reasons of fairness all come together to support my participation in the scheme. My awareness of the altered moral reasons may motivate me — and many others — to participate in the scheme.<sup>58</sup> Schauer emphasizes that there is good empirical evidence that people

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<sup>58</sup> I have elsewhere taken the view that moral obligations generated by the law in the kind of way developed in the text constitute *legal* obligations. *See id.* For present purposes, it makes no difference whether the moral reasons or obligations generated by the law constitute legal reasons or obligations. Whatever position we take on that issue, the law has made a difference to people's motivations by changing the moral reasons that apply to them.

often act for moral, cooperative, or altruistic reasons (pp. 48–51 & n.21, 58–59 & nn.8, 10, 61–62 & nn.21–22), so he should have no quarrel with the motivating force of the reasons in the example.

Democracy offers an additional tool for changing the moral profile. To the extent that people have the ability to participate equally in governance, legal institutions can harness democratic reasons to alter the moral landscape. Promises and agreements provide a useful analogy. By making promises and entering into agreements, people change their moral obligations. The fact of agreement has moral force. Even if what was agreed on is an arrangement that is seriously morally flawed — a different arrangement would have been much fairer, for example — the fact that the arrangement was agreed on may be sufficient to create a moral obligation.

Similarly, the fact that a decision is reached by a procedure that is part of a system of governance in which everyone has an equal opportunity to participate has moral force. For it is a general moral truth that, to the extent that people have equal opportunity to participate in procedures of governance, they acquire *pro tanto* moral reasons to comply with the decisions that are reached through those procedures. (I will generally refer to such moral reasons as “democratic reasons,” “reasons of democracy,” or the like.) Because reasons of democracy flow from general moral principles (as opposed to being grounded in contingent features of particular legal systems such as framers’ intentions or customs), they are relevant in all legal systems, not just those with democratic traditions. Of course, to the extent that a legal system is part of a system of government that does not allow people to participate, it will not be effective at harnessing democratic reasons.

The mechanism that I am describing does not depend on people, for democratic reasons, internalizing the law — that is, obeying the law because it is the law. There is a widespread consensus that there is no general moral obligation to comply with directives of popularly elected representatives in the circumstances of contemporary nations, and I think that this consensus is correct.<sup>59</sup> And I want to grant, for purposes of argument, that most people do not believe that they have such an obligation. Rather, to the extent that self-government results in an arrangement, there are moral reasons for people to abide by the arrangement, and, as Schauer emphasizes, there is strong evidence that people respond to moral reasons. Although there is no general moral obligation to comply with all directives of legal institutions in democratically constituted governments, democratic considerations can rein-

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<sup>59</sup> See Greenberg, *The Standard Picture*, *supra* note 27, at 99–100. Indeed, I have elsewhere argued that one of the attractions of my account of law is that it explains how legal systems can generate morally binding obligations despite the fact that there is no general moral obligation to obey directives from legal authorities. See *id.* at 84–102.

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force other factors of the sort illustrated by my example of the community scheme, yielding moral obligations in particular cases. In general, in real cases, legal systems use multiple tools to generate mutually reinforcing moral reasons.

In the example of the community scheme, the law channels the preexisting duty to help others into a more specific obligation to participate in a specific arrangement. As I elaborate in Part IV, morality frequently offers general and vague principles, leaving a great deal on which morality has nothing to say. (Moreover, even when morality is determinate — that is, there is in principle a correct moral answer to the relevant question — there is often much *uncertainty* about what morality requires.<sup>60</sup>) Just as law channels the obligation to help others into a specific obligation to participate in a particular arrangement, so it can channel moral principles about, for example, promising, property rights, avoiding harm to others, and procedural justice into much more specific schemes of contract, property, tort, procedure, and so on. Consider Schauer's claim that, when he abstains from shoplifting and insider trading, he acts consistently with the law, but not because of the law (p. 50). It is true, I assume, that even if shoplifting and insider trading were not prohibited, he would not engage in them. But it is too quick to conclude that the law has not shaped his behavior. The property rights that he is respecting — both in kind and in distribution — are the result of complex legal norms about how (and which) property rights can be acquired, transferred, and lost, not to mention legal regimes concerning securities, tax, and much else.

In the community scheme example, the law makes a practical difference. It does so by changing the morally relevant circumstances, thereby generating moral reasons, which, as Schauer accepts, motivate many people. Schauer is right that, in order to understand what difference the law makes, we need to set aside law-independent reasons — that is, ones that would exist even if it were not for the law (except

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<sup>60</sup> Given the problem of uncertainty, law can make a practical difference by *informing* us of the existing moral reasons, as opposed to changing them. In many situations, people are unsure of which solution is supported by the existing reasons. For example, people may be unsure which kinds of landscaping are best for conserving water. By codifying permissible kinds of landscaping, the law may not be changing the existing reasons — the landscaping that is specified to be permissible may already have been supported by the relevant reasons. But the law may affect behavior by eliminating uncertainty. Of course, in many real cases, the law may simultaneously change reasons and inform people of already existing reasons, and it may be a difficult question to what extent the law is doing each. In the text, I focus for the most part on generating moral reasons.

Schauer mentions approvingly in a footnote the possibility that law can be causally efficacious by “indicating to the uninformed or the unsure what their law-independent responsibilities are” (p. 193 n.8). But his argument that “how important law without coercion really is . . . turns out to depend largely on the extent to which people” obey the law because it is the law seems to neglect the point (pp. 47–48).

to the extent that they motivate people to adopt a policy of obeying the law). In practice, however, he neglects the possibility that moral reasons can be generated by the law, proceeding as if all moral reasons exist independently of the law. If we are to understand how the law can affect behavior, we must not neglect its ability to do so by changing moral reasons. Just as, in trying to isolate what difference the law makes, we do not set aside prudential reasons that the law generates, such as those created by sanctions, we should not set aside moral reasons that the law generates.<sup>61</sup>

The lever for influencing behavior that I have explicated does not involve obedience to the law *qua* law. In the case of the community scheme, for instance, the moral reasons for obeying the law are specific to the scheme, and the example does not invoke a general policy of obeying the law. Therefore, in addition to the two ways of affecting behavior that Schauer focuses on — using coercion and relying on people's acceptance of the law — the law has another important tool.

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<sup>61</sup> It is important to distinguish the way that the legal system influences behavior discussed in the text — by changing the moral profile — from the very different possibility that the legal system can lead people to believe that behavior is immoral simply by making it illegal. (Schauer briefly considers the latter possibility and concludes that the issue is complex and the evidence inconclusive (pp. 71–73).) In the latter case, the mechanism involves prohibiting an activity, thereby causing people to come to believe, typically over a long period of time, that it is immoral. No change in moral reasons, or the moral profile more generally, need be involved; rather, recognition of what the law requires directly affects beliefs about morality. (The mechanism is therefore more closely related to law's performing an epistemic function — informing people of what morality requires — than to generating moral reasons. Schauer doesn't connect his discussion of this mechanism to his brief note on the possibility that law is causally efficacious because it performs an epistemic function. *See supra* note 60.) By contrast, the mechanism discussed in the text involves the legal system's changing moral obligations, powers, and so on. When people recognize the new moral situation, their behavior may be affected.

Perhaps the closest that Schauer comes to contemplating the possibility discussed in the text is in a brief discussion of the law's "settlement function" in a chapter on the different ways in which the law uses coercion to achieve obedience. He points out that law often has a function of "settling deep moral and political disagreements for purposes of action" (p. 106). Rather than "changing people's moral or policy views," law can simply dictate a practical resolution (p. 104). In this context, he mentions the possibility that law can achieve such a practical resolution without coercion in the special circumstances "when widespread agreement on the need for settlement is combined with little of consequence turning on the substance of the settlement," for example with respect to the question of which side of the road people should drive on (p. 104). But he argues that when such special circumstances are not present — in particular, when people care about which solution is selected — coercion will be needed to enforce the settlement (pp. 105–06): "It is precisely because of deep underlying disagreement that settlement is often necessary, but at the same time, underlying disagreement is what makes effectuating the settlement without coercion virtually impossible" (p. 105). Schauer does not seem to recognize that law can do more than dictate a settlement where there is disagreement — it can change the relevant reasons to make a particular solution the one that all or most people have reason to follow, thus potentially eliminating disagreement. As elaborated in the text, the capacity for law to change moral reasons is far more general than the special circumstances in which little of consequence turns on the solution chosen.

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One consequence is that even if obedience to law *qua* law is in fact rare, it doesn't follow that coercion is the only alternative.

The basic point also has consequences for Schauer's critique of Tom Tyler's empirical analysis. Schauer points out that Tyler focuses on "the minor prohibitions of the criminal law, such as shoplifting, littering, making excessive noise, and the laws regulating driving and parking" (p. 60). Schauer dismisses the relevance of this work on the ground that "in almost all the cases in which Tyler finds that people claim they would follow the law for reasons other than fear of sanctions, the laws are ones the followers likely think are good laws" (p. 60); therefore, they may be acting on moral reasons. In these kinds of cases, however, as with insider trading, the relevant moral reasons have been brought about in part by law. People may generally agree that the minor prohibitions of the criminal law are supported by moral reasons, but when people follow rules concerning how long and where one may park, how much noise one may make, how one may drive, and who has property rights in what (and therefore what counts as shoplifting), these precise rules have been shaped by legal institutions, so law has made a difference to those people's behavior. We can put the point in terms of Schauer's test of whether people would have acted in the same way "but for the law" (p. 49): do we really think that people who conform to the minor prohibitions of the criminal law because they think those prohibitions are good would act in exactly the same way — parking in the same places for the same lengths of time, following the same rules of the road, respecting the same property entitlements, and so on — if there were no law and they were merely consulting their prelegal moral intuitions?<sup>62</sup>

A related point is that Schauer's framing of the question of law's ability to affect behavior without sanctions is mistaken. At a crucial point in his discussion of Tyler's work, Schauer dismisses Tyler's conclusion that the "perception of legitimacy" is an important factor in influencing behavior: because people think the laws are good, Tyler's work on the importance of a perception of legitimacy teaches us "little about the extent to which the fact of legality leads people to obey laws they think wrong and not merely costly, frustrating, or inconvenient" (p. 60). I argued above that it is misleading to characterize the puzzled person as one who, on discovering that the law requires her to act

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<sup>62</sup> This essay is not primarily concerned with Schauer's analysis of the empirical data. He cites rates of noncompliance of more than fifty percent for various legal requirements that do not track people's preferences and are not enforced (pp. 65–67). These studies and statistics are, however, consistent with the existence of substantial numbers of puzzled people. Perhaps for this reason, Schauer summarizes his discussion of the studies by saying that the evidence shows that puzzled people are much less common than theorists presuppose, rather than low in absolute terms (p. 67).

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against her on-balance moral judgment, nonetheless complies with the law. A similar point applies even more strongly here. If our goal is to understand how and whether the law can affect behavior without sanctions, it is unclear why the crucial question is whether the law can get people to obey legal requirements they think wrong. Indeed, to the extent that the law modifies behavior by altering the relevant moral considerations, it will never get people to do what they *ex post* — after taking the law into account — believe is wrong. Rather, it affects behavior precisely by changing moral reasons, thereby changing what people believe is the right thing to do.

Not only is generating moral reasons an alternative way to motivate people (as opposed to using threats of sanctions to generate prudential reasons), but the law can also use *coercion* to generate such moral reasons. In my example,<sup>63</sup> the legal system uses the threat of sanctions to increase the likelihood of widespread participation in the scheme. The fact that many others are likely to participate generates reasons of fairness for participating. It also has the effect that this scheme is the one that has the most chance of solving the underlying problem, thus channeling generalized moral reasons into this scheme.

To take a different kind of example, without legal institutions, it may be morally permissible in a relatively wide range of circumstances for people to use violence against others.<sup>64</sup> It would be better, however, if it were not permissible to do so. “By maintaining a monopoly on the use of force, effectively protecting people against violence, and reliably punishing wrongdoers, a legal system can make violence morally impermissible, except in a very narrow range of circumstances.”<sup>65</sup>

In sum, not only can a legal system motivate people by generating moral reasons, but it can also use coercion as a tool for generating such reasons. Schauer takes for granted throughout the book that coercion works only by generating prudential reasons for complying with the law. Given the topic of the book, it is especially noteworthy that coercion has an important role in generating moral reasons.

#### IV. AN ALTERNATIVE APPROACH

We have seen that Schauer’s project runs into several problems. He misses the possibility that the use of coercion, though not itself an essential property of law, might figure in an account of law’s essential properties — because, for example, those properties might include an aim or function related to the use of coercion. He neglects the law’s ability to generate moral reasons — and the important role of coercion

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<sup>63</sup> See *supra* pp. 1965–66.

<sup>64</sup> I discuss this example in Greenberg, *Moral Impact Theory*, *supra* note 27, at 1311.

<sup>65</sup> *Id.*

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in doing so. His explanatory ambitions are modest, as exemplified by his cataloging of ways in which law typically differs from other institutions (pp. 154–59); partly as a result, he lacks theoretical resources to support his classificatory proposals.

These different problems have a common source in Schauer's picture of law. Based on his discussions of what counts as a legal system, it appears that he sees a legal system as simply any institution, whatever its purposes, that offers systematic norms (roughly speaking, norms that include secondary rules). Presumably because of his skepticism about essential properties, he does not countenance the idea that law might have an essential aim or function. When it comes to law's normativity — the reasons that it provides — he compares it with chess, etiquette, and fashion. "Legal obligation can be like chessal obligation. If one accepts — internalizes, or takes as a guide to action — the system, then that system can create obligations for those who accept it" (p. 34). He maintains that this approach eliminates any puzzle about legal normativity. Perhaps as a result, he assumes that there is no more to say about how law could generate reasons other than the prudential reasons created by the threat of sanctions. He takes legal and moral reasons to be entirely distinct, so that to the extent someone acts on moral reasons, the law has not made a difference.

Given this picture on which legal requirements are just arbitrary (systematic) requirements, Schauer's explanation of why the law needs coercion cannot go much beyond the idea that law makes people do what they don't want to do and, particularly, what goes against their best judgment. If law is simply any old system of requirements, then although it is possible that someone could commit herself to override her on-balance judgment of what she should do and obey the law just because it is the law, it is empirically unlikely that many people will do so. People will instead be motivated to do what is in their interest or what they take to be the right thing. So the law will have to use coercion to get them to comply.

Now, why would the law need people to comply, to the extent of using force to ensure that they do? And why is it permissible, and even right, for law to use force to this end (if it is)? After all, etiquette, fashion, chess, and the like don't use force to ensure compliance, and it wouldn't be right for them to do so. Schauer offers no answers. Indeed, he could not give a general answer in part because the institutions he wants to encompass are so disparate, including, for example, kleptocracies, tyrannies, the National Football League, New York diamond dealers, and the WTO, along with the law of the United States and other contemporary democracies.

Some tension is evident. Schauer assumes that angels would obey the law because it is the law (pp. 93–94, 97).<sup>66</sup> But given his picture of law and of what it is to obey the law *qua* law, this assumption is puzzling. Why would angels obey an arbitrary system of requirements simply because it exists? Why would they obey even when doing so goes against their on-balance judgment of the right thing to do? Schauer mentions various moral functions that law might happen to serve. For example, it can restrain well-meaning officials from following their shortsighted policy goals when they conflict with the general and long-term good (pp. 107–09). And it can serve the function of settling disputes (pp. 104–06). But, on his picture of law, such roles are no more part of what law *is* than the role of lining the pockets of a kleptocrat. An angel would act *consistently* with the law when the law happens to promote the good, but why would angels obey the law *qua* law given Schauer's picture of law?

In this vicinity, positivist legal theorists, such as Raz and Shapiro, have struggled to maintain two claims simultaneously: that the law's content can be morally arbitrary and that one could accept or internalize the law for moral reasons. If the law's content can be morally arbitrary, then why internalize the law, when you could instead merely conform to the law when it happens to be good? Raz's answer, for instance, involves the radical idea that one is morally obligated to follow strategies that in the long run best promote conformity to reasons *even when they require action that is inconsistent with what the balance of first-order reasons requires*.<sup>67</sup> I suggested above that considerations of bounded rationality could provide a different kind of explanation,<sup>68</sup> though it might not apply to angels with perfect information. Schauer simply ignores the difficulties.

If one takes law to be a disparate collection of institutions, rejecting the idea of essential properties of law (except for that of having secondary rules) including essential aims or functions, then one has carved out such a shallow phenomenon that it is difficult to develop explanations with much depth.

In closing, I offer a brief sketch of a very different kind of picture. In the absence of law, there are a range of what I will call *moral problems*. One kind of problem is that it would often be better if our obligations, powers, and so on were different from what they are. Morality frequently offers general and vague principles, leaving much

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<sup>66</sup> At one point, he notes that angels might lack information and therefore fail to obey for that reason (p. 106). But, on his account, there is no reason why even angels with perfect information would obey the law *qua* law.

<sup>67</sup> See RAZ, *AUTHORITY OF LAW*, *supra* note 12, at 27; see also JOSEPH RAZ, *PRACTICAL REASON AND NORMS* 194 (Oxford Univ. Press 2d ed. 1999) (1975).

<sup>68</sup> See *supra* note 53 and accompanying text.

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unspecified; in other cases, morality simply has nothing to say; finally, in some cases, it would be better if what was permitted or required were replaced with a different set of permissions or requirements, but this change cannot come about without some kind of lawlike institution.

Morality plausibly includes some obligation to help others, but it does not specify exactly what help should be provided to whom. Morality generally requires us to keep promises, but it leaves a lot of questions unresolved. (Which promises are not binding? When is the obligation to keep a promise outweighed?) Morality is arguably highly indeterminate about the conditions under which one acquires property rights and about the bundle of rights to which a property holder is entitled. Similarly, there are prelegal moral principles about procedural justice (for example, about the need for notice and a hearing), tort (for example, about avoiding harm to others), and family and citizenship responsibilities, but most of the detail is left open.

Prelegal morality is especially problematic with respect to remedies. What remedy must be provided when a promise or agreement is broken, either justifiably or unjustifiably? When one person's activity causes harm to another? Morality may also allow a wide latitude for self-help, though it would be better if there were a central source of remedies and the permissibility of self-help were consequently quite limited.

My example of the community scheme illustrated a situation in which people have generalized, diffuse obligations to help, but no obligation to participate in any specific solution. More generally, there are a great many problems that cannot be solved without complex cooperation, but cooperation will often not be morally required (or practically feasible) in the absence of law.

The point is not just that morality, unsupplemented by law, is sometimes vague and it would be good to have more specificity. In many of the cases just outlined, morality has little or nothing to say, or if it does, the prelegal moral profile could be improved by changing what is morally obligatory and permissible in ways that do not involve simply increasing specificity. Morality independent of law may allow people to acquire property rights — in real property, say — simply by virtue of being first to stake a claim. But it would arguably be better to have a more nuanced scheme of distribution. To take an example I mentioned previously, without legal institutions, it may be morally permissible in a relatively wide range of circumstances for people to use violence against others. It would be better, however, if it were not permissible to do so.

A different kind of problem is that self-interested behavior by unscrupulous people needs to be deterred by the threat of punishment. But given the great moral importance of advance notice of punishment, the indeterminacy — or at least uncertainty — with respect to

which punishment is morally appropriate for a specific wrong, and morality's lack of clarity about who is authorized to administer punishment, punishment is in general morally problematic without law. Another example is the need for settlement of disputes, as even well-meaning people will often disagree about the best course of action.

Because it would be morally better if such problems were ameliorated, there is a sense in which morality requires the construction of an institution for solving them.<sup>69</sup> What is needed is an institution that can both change the moral profile — altering what is morally required and permissible and what moral powers people have — and deter or otherwise constrain the behavior of those who are not morally motivated.

As discussed in the previous Part, legal systems can change the moral profile, and it is no surprise that they can deter or constrain those who are not morally motivated. I want to consider, however, not merely an institution that can solve the relevant problems, but an institution that has, as part of its nature, the point or function of solving these problems. It is obviously controversial whether it is part of the nature of law to have this point or function. In order not to beg any questions, let's call the institution *law\**.

I won't try to argue here that law is *law\** — that is, that it is part of the nature of law to have the relevant point or function. Consider, by way of comparison, the case of cars. As discussed above, it is extremely plausible that it is an essential property of cars that they have, as part of their nature, a function that involves transportation. (Of course, having this function is not the only essential property of cars.) Notice that it may well be that most actual cars are broken-down wrecks, stacked in junkyards and unable to transport anything. This fact, if it is a fact, would not undermine the plausibility of the claim that cars by nature have a transportation function. Someone might point out, however, that there are objects that are ordinarily called "cars" that do not have a transportation function: toy cars, ornamental cars, design models, perhaps crash-test cars. Therefore, the objector might argue, since there are cars that lack a transportation function, having such a function cannot be an essential property of cars.<sup>70</sup>

One tempting response is that having an essential function of transportation is such an explanatorily powerful property that we

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<sup>69</sup> See Seana Valentine Shiffrin, *Promising, Intimate Relationships, and Conventionalism*, 117 PHIL. REV. 481, 522 n.53 (2008). See generally SHAPIRO, *supra* note 6, at 170–75, 213–14; Barbara Herman, *Imperfect Duties* (unpublished manuscript) (on file with the Harvard Law School Library).

<sup>70</sup> See, e.g., Brian Leiter, *Why Legal Positivism (Again)?* 5–6 (Univ. of Chi. Law Sch. Pub. Law & Legal Theory Working Paper Series, Paper No. 442, 2013), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2323013](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2323013) [<http://perma.cc/CC6L-FQ6P>].

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should maintain that, despite ordinary usage, nothing really is a car unless it has the relevant point. Think of all the features of cars, even the ones in junkyards that can't transport anything, that are explained by their transportation function. Even the explanation of some typical features of toy cars, ornamental cars, and the like — for example, that they have wheels — will ultimately trace back to the transportation function, despite the fact that toy cars and their ilk lack that function. (And, of course, part of the explanation of why we call such things “cars” is that they have some salient features of real cars.) On this line of thought, toy cars are cars merely by an extended use of language — by courtesy, so to speak.

But one might sensibly think that not much turns on whether toy cars and ornamental cars really are cars. A theorist might reasonably be more interested in studying a theoretically interesting class of objects — call it *car\** — that has the essential property in question (among others) than in capturing the phenomenon picked out by the ordinary use of the word “car.” Rather than pursuing the debate about whether having a transportation function really is an essential property of cars — by, for example, pressing the tempting response outlined in the previous paragraph — the theorist could simply set aside the question of what phenomenon is picked out by “car” and investigate the theoretically interesting phenomenon *car\**, which will include a subset of cars.

My approach in the case of law and law\* is similar. For one thing, establishing a point or function of a complex social phenomenon like law is a difficult business and well beyond the scope of this essay. Though law may be an artifact, it was not designed in the straightforward way that cars are, so it is much harder to identify its function or what it is supposed to do. More importantly, I am less interested in capturing accurately the contours of the phenomenon picked out by the ordinary term “law” than I am in investigating a phenomenon unified by theoretically interesting properties. (In my view, many legal systems, including that of the United States, are instances of law\*. But I won't try to argue even that claim here.)

Law\* may often need to resort to coercion to achieve its aim of solving the relevant moral problems. Coercion is useful in reining in those who, for example, would be tempted to free ride on the efforts of others and those who do not care sufficiently about the interests of others. As I have explained, it will also be useful in changing people's moral obligations — for example, by ensuring that others will cooperate, it can create powerful reasons of fairness for cooperation.

Now the fact that law\* may need to use coercion generates an extremely important burden on the institution. For there are stringent

constraints on when it is morally permissible to coerce people.<sup>71</sup> For example, it will typically be morally impermissible to coerce people to take actions that it is morally permissible for them not to take.<sup>72</sup> Therefore, in order for coercion to be morally permissible, it will often be necessary to alter the moral reasons that people have, or the moral profile more generally. Indeed, because law\*, by its nature, is *for* solving moral problems, the use of morally impermissible coercion will make law\* defective *qua* law\*.<sup>73</sup> That is, it is not just a bad thing if law\* uses morally impermissible coercion (as it would be for any institution); rather, like a clock that fails to tell time, law\* then fails to live up to the standards internal to its nature.

A central problem for law\* will thus be to ensure that legal\* obligations are ones that it is morally permissible to enforce with coercion. Law\* not only employs coercion, but also seeks to change the moral profile in a way that makes coercion morally permissible. Making punishment permissible is a central example. As noted above, punishment has an uncomfortable status within (law-independent) morality; it seems both needed, yet generally not provided for.<sup>74</sup> In addition to using the techniques for changing the moral profile described above to create moral reasons not to engage in the prohibited conduct, legal\* systems try to make punishment permissible by familiar means: giving clear advance notice of which conduct is prohibited and of the corresponding penalties; making prohibitions generally applicable; and giving those charged with wrongdoing a hearing and other procedural protections. Furthermore, totalitarian regimes, tyrannies, and other governments that lack the moral aim of law\* often seek to clothe themselves in the trappings of law\*. Consequently, just as we may explain why ornamental cars have wheels by appeal to a transportation function that they lack, so we may be able to explain common features of such governments — for example, the superficial indicia of rule of law, democracy, and due process — by appeal to a moral aim that they lack.

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<sup>71</sup> Moral constraints on the use of coercion are explored in, for example, discussions of Mill's "harm principle" and the vast literature on the justification of punishment.

<sup>72</sup> This claim glosses over some difficult issues, for there is doubtless a gap between what it is permissible to coerce people to do and what those people are morally required to do. See Greenberg, *The Standard Picture*, *supra* note 27, at 85 n.52. For present purposes, the important point is that it will often be necessary to alter the moral profile in order for it to be morally permissible to coerce people.

<sup>73</sup> I can't defend this claim fully here, but the idea is that law\*'s moral aim imposes a constraint on the means that law\* can use. One reason is that a system's ability to generate moral reasons will be impaired to the extent that it takes morally impermissible action. Another reason is less instrumental: a system does not count as achieving the relevant moral aim to the extent that it resorts to morally impermissible means.

<sup>74</sup> See *supra* pp. 1973–74.

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Having law\*'s moral aim is one factor that can explain why a system, by its nature, is constrained to operate in a morally permissible way, but it is not the only one. Thus, many philosophers who would not accept that legal systems have law\*'s moral aim would nonetheless take legal systems to be defective to the extent that they act in a way that is morally impermissible. I have already mentioned, for example, Dworkin's claim that the fundamental point of law is to ensure that state coercion is not used except to the extent that it is justified by past political action.

More generally, a legal system may recognize important reasons for acting in a way that is morally permissible even if it is not part of the nature of that system to be so constrained. And this recognition can explain features of the legal system.

I have argued elsewhere that, in large part because of the law's use of coercion, law — or at least a theoretically interesting subset of legal systems — operates under a constraint that its obligations are *supposed* to be binding (or at least that they must be such that it is permissible to enforce them with coercion).<sup>75</sup> This constraint, I have argued, provides an argument against a picture of law like Schauer's on which legal obligations are simply whatever is announced by authorities who are part of an arbitrary system.

In a book devoted to arguing that coercion has been widely neglected and to demonstrating coercion's importance, it is peculiar that Schauer never considers the major burden that the ubiquitous use of coercion places on law — or at least on the theoretically interesting subset of legal systems that are constrained by their nature to operate in a morally permissible way — and the way in which that burden shapes law.

Now there may not be much more to say about why a kleptocracy needs to use coercion, other than that it wants to make people do what they don't want to do. But in the case of law\*, matters are more interesting. To begin with, there is the above-mentioned argument that law\* itself is morally required, so we have a kind of moral explanation of the institution's existence. Next, given what law\* is for, we can see why it must use coercion. By contrast with, say, etiquette or fashion, whose aims do not require that coercion be used even if people will not comply otherwise, the aims of law\* — of improving the moral situation in the way sketched above — often cannot be fulfilled unless there is a high degree of conformity with law\*'s requirements. Law\* doesn't just happen to want to get people to do what goes against their best judgment — getting them to do so is necessary in a wide range of circumstances to fulfill its aims. Thus, we have an explanation of why

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<sup>75</sup> See Greenberg, *The Standard Picture*, *supra* note 27, at 84–95, 85 n.52.

coercion is needed that goes beyond the bare fact that people will not comply without it.

Moreover, the need to use coercion — and therefore the need to alter the moral profile so as to make coercion permissible — can then be used to explain many features of law\*. For example, values such as legality, publicity, generality, and rule of law are typical of law\* precisely because it must operate in a way that creates obligations that it is permissible to enforce. I do not mean to suggest, of course, that law\* will generally succeed in making the use of coercion morally permissible. The point, rather, is that many features of law\* can be explained by the pressure to change the moral profile in a way that makes the use of coercion permissible. Finally, coercion itself is a useful tool for altering the moral profile.

## V. CONCLUSION

*The Force of Law* is important in part because of the questions that Schauer puts on the table. What role can the use of coercion play in an account of law's nature if law's use of coercion, though ubiquitous in practice, is not necessary in principle? What projects other than investigating the essential properties of law might philosophers fruitfully undertake? In what ways can merely typical properties figure in illuminating philosophical projects? How can law influence behavior — and, especially, what tools does law have for doing so other than the use of coercion? I have suggested answers to these questions that I believe go beyond what is possible on Schauer's approach.

I have developed several themes. Rather than deferring to the ordinary classification of institutions or systems as law, we can investigate phenomena — types of institutions — that are unified by theoretically important properties. We can pursue diverse projects that are driven by philosophical explanatory goals (beyond the goal of explaining ordinary usage or of identifying essential properties), where philosophical explanation is understood to cover a broad range of types of explanation. These projects may include explaining why a phenomenon has certain typical properties — in some cases by appealing to its essential properties — as well as using certain typical properties to explain others. The essence of a phenomenon can involve a point or function or, more generally, a standard of correctness. We can learn much about a phenomenon by examining what it does when it operates as it is supposed to. I emphasized the complexity of the relation between law and morality. Moral reasons that are independent of law can lead a person to adopt a policy of obeying the law — indeed, can make it rational to adopt such a policy — even if that person does not believe that she has a general moral obligation to obey the law. Law has the capacity to change the moral profile, and exercising this capacity is an important way in which law can affect behavior — distinct

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both from relying on obedience to law *qua* law and from using coercion to create self-interested reasons for compliance.

These different themes are interrelated in complex ways. For example, if we insist on encompassing all of the systems that are called “law” in the phenomenon we study, we may miss essential properties, such as an essential aim or function. An essential function provides a way in which the use of coercion may figure in the nature of law, even if the use of coercion is merely a typical property of law. A nuanced understanding of the relation between moral reasons and legal reasons offers an additional way in which law may use coercion — to generate moral reasons. In general, there is more explanatory potential in Schauer’s topic of the role of coercion in law than the book delivers. We can offer a moral explanation of why we need an institution that has the function of solving certain moral problems and a related explanation of why such an institution needs to resort to coercion. And, in turn, we may be able to appeal to law’s use of coercion to explain certain typical features of legal systems.

At the start of *The Force of Law*, Schauer writes that the book “seeks not only to resituate law’s coercive dimension into the . . . philosophical understanding of law but also to begin to pursue some of the multiple paths of inquiry that this resituation reveals” (p. 10). I have taken up his implicit invitation to explore some of these paths. In doing so, I hope to have vindicated a central idea of Schauer’s fine book — that philosophy of law can fruitfully investigate the role of coercion in law.