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Christoph Bezemek
Nicoletta Ladavac *Editors*

The Force of Law Reaffirmed

Frederick Schauer Meets the Critics

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Preface

It is one of the peculiarities of legal science that the question as to its subject is (quite heavily) disputed among scholars, "a situation", as HLA Hart famously remarked, "not paralleled in any other subject systematically studied as a separate academic discipline". And yet, for the longest time (or so it seems), at least it was considered common ground that legal norms are essentially determined by their force: while it was Thomas Hobbes who most famously pointed out that "the bonds of words are too weak to bridle men's ambition, avarice, anger, and other Passions, without the fear of some coercive Power", the force of law was considered a necessary element of legality not only among contractualist political thinkers such as Hobbes, Spinoza and Locke. Following Jeremy Bentham, John Austin defined law as a "command backed by threats" and thus placed force right at the very core of the definition of the subject, a definition later echoed by Hans Kelsen's and Max Weber's general depictions of legal systems.

It was Hart who raised doubts about the existence of a necessary connection of law and coercion, by referring to the empowering, or more generally: enabling character exhibited by some legal norms. Following and refining Hart's argument, scholars like Scott Shapiro have started to build a case to exclude coercion from the essential properties of a general concept of law. Frederick Schauer, however, in his latest book, *The Force of Law*, made a powerful case to reclaim force, even if not essential to the very concept of law, as essential to our understanding of the phenomenon, arguing that "the fact that coercion is not all of law, nor definitional of law, is not to say that it is none of law or an unimportant part of law".

It was to be expected, his claims would be approved as well as opposed. Thus, a workshop within the framework of the XXVII World Congress of the International Association for the Philosophy of Law and Social Philosophy in Washington D.C., in July 2015, was dedicated to the topic, to give author and critics a chance to meet.

By giving an account of the proceedings of this workshop, this volume (which includes two additional essays) puts the resilience of Schauer's arguments to the test. It provides a platform for academics from different legal traditions to address the relation of law and force from distinct perspectives and for Schauer himself to

reply to their arguments, trying to contribute to the effort of determining whether and to which extent law and force are related.

We would like to thank the editors of the *Law and Philosophy Library* for including this volume in their series as well as Springer publishers: Neil Olivier who supported this project from the beginning and Abirami Purushothaman who diligently managed the editing process. Also we would like to thank Gisela Kristoferitsch who diligently compiled the index to this volume.

We are indebted to the authors for their fascinating and insightful contributions to this volume, in particular to Lars Vinx who from the very outset helped to shape the idea for the workshop, and we hope that this book may serve as a useful addition to the discussion on the characteristics of this much-disputed subject of jurisprudence.

Vienna, Austria — Christoph Bezemek
Geneve, Switzerland — Nicoletta Ladavac
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Bibliographical Note

In his latest book, "The Force of Law", Frederick Schauer deals with an issue-the coercive force of law-which has already been analysed in depth in numerous of his previous publications. *The Force of Law* thus provides a summary overview of a line of argument which Schauer has expounded and developed over a number of years. In one of the first articles, *Imposing Rules*, which was published in 2005, Schauer stressed that a rule-based governance requires both a rule imposer and a rule subject, but that the role which deserves most attention is that of the rule subject, since some actions are harmful to others and it is in the field of such acts that questions about the morality and rationality of rule imposition become important, i.e. how a person or an institution exercises control over agents who do not follow rules and in situations in which harm is caused.

The issue of law and sanctions as the coercive force that is characteristic of law itself was previously broached by Schauer in the article *Was Austin Right After All?* published in 2010, in which he touched upon most of the issues which he would go on to address in *The Force of Law*. The arguments are as follows: that legal obligation (enforced with sanctions) is one of the core concepts of jurisprudence, with a threat of sanctions giving the law its normative force and providing the law with its authority, consequently creating the very idea of legal obligation; that law-creating powers (duty-imposing and power-conferring) are not merely concerned with prohibitions and requirements, but also with facilitating permissive or optional conduct; if and to what extent sanctions and force are a necessary prerequisite for law; and whether law could exist without sanctions. Comparing the ideas of Bentham, Austin and Hart-authors to whom Schauer makes continuous reference-he argues that the notion of a duty or obligation is similar to a statement of deontic content, a statement as to what conduct is mandated if we presuppose some rule or system of rules. Furthermore, if we consider how law is different from other rule systems, then the sanctions provided for by law may serve this distinguishing function, and a sanction-free account of law will be an account that does not fit the facts of law and cannot be ignored.

In *When and How (If at All) Does Law Constrain Individual Action?* (2010), Schauer examines the empirical side to legal obligations, namely whether people in general, and officials in particular, really do act as if they were under an obligation to obey the law, that is to what extent they really do believe that they should obey the law and to what extent they actually do obey the law solely because it is the law. In particular, in this article, Schauer poses the question as to whether and to what extent officials take the fact that a norm is a legal one into consideration when making decisions, namely whether officials subject their decisions to the law simply because the law is the law, given that for a variety of reasons, the prospect of personal liability for officials is remote. Thus, the issue is not so much whether the essence of legal obligation is to be found in the threat of sanctions, but rather in the internalisation, also by officials, of a norm or system of norms. Above all, it is necessary to ascertain whether that internalisation depends on law's "lawness" or whether it turns out that the law is less important. In a later article entitled *Official Obedience and the Politics of Defining 'Law'* (2013), Schauer attempts to identify the phenomenon by which officials and their critics appear to have multiple conceptions of law which may be used in alleging the action is illegal and in defending against such charges.

Also on the constitutional level, both the law as force and coercion play an important role. In fact, in *Constitutionalism and Coercion* (2013), Schauer identifies a twofold function of coercion in this regard. The first views the constitution as a device for keeping bad officials from acting improperly. However, an alternative vision of constitutionalism recognises the role of imposing second-order constraints also on good officials as an incentive for better policymaking. Therefore, Schauer suggests in this article that such a role for a constitution is especially in need of strong mechanisms that ensure the enforcement of constitutional constraints. This is dependent upon the fact that people and policy-makers do not clearly distinguish between second-order constitutional constraints and first-order policy preferences because law in general and constitutional law in particular do not have a major influence on the decisions of public officials.

A further aspect related to the force exerted by law through coercion and sanctions relates to the issue as to whether or not legal authority is accepted. As Schauer explains in *Do People Obey the Law* (2014), although it is important to evaluate the normative arguments for and against the acceptance of legal authority, it is also important for practical and theoretical purposes to understand the actual acceptance of legal authority. Moreover, this importance is dependent upon the extent to which a number of important theoretical accounts of law rely on empirical claims regarding the extent of sanction-independent legal compliance.

The issue of the force exerted by law is a focus for Schauer's attention also in his most important books. In *Playing by The Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* published in 1991, Schauer analyses in detail the force of rules, their internalisation, the role of authority and thus the roots of normative force along with its influence both in practice and from the viewpoint of abstract reasoning.

Although for Schauer coercion is important in understanding law and legal phenomena, he stresses on various occasions that sanctions are not part of the concept of law at all (*Harts' Anti-Essentialism*, 2013) and are not an essential feature of law. Nevertheless, he argues that nowadays it is necessary to place our focus on recapturing the role of coercion and law's coerciveness in understanding the nature of law, as he has later sought to demonstrate in *The Force of Law*.

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Introduction: Why (Ever) Define Law and How to Do It

Isabel Trujillo

Abstract This contribution addresses some problems regarding the two core aspects of Schauer's proposal discussed by his critics in this book: the method of defining law (his proposal of anti-essentialism) and the definition of law based on the ubiquity of coercion. In this introduction, both aspects will be discussed pushing to the very limit the idea of law as a differentiated phenomenon. This means that legal theory has to take non-state law seriously. But main legal theories in the Nineteenth century are biased by the domestic assumption: law is produced by the nation-state as a coherent and rational system identified by its pedigree and supported by the state's raw force. According to this idea, theorists tend to exclude from the concept of law any legal phenomena not responding to this scheme. In the task of defining law in the twenty first century it is necessary to afford the dissolution of that paradigm. In the new paradigm of law different elements are crucial for its definition. There are sources different from the nation-state, even if states are more necessary now than before, not for the raw force, but for its goals. Law is able to obtain compliance for its virtues, because it offers reasons for action in a pluralistic cooperative perspective. All this is compatible with the idea of the ubiquitous presence of the force of law, even if law is not mainly defined by force.

1 The Domestic Assumption and the Process of Law Differentiation

In the past two centuries, the research on the concept of law has been little by little more determined by what can be called the "domestic assumption." The idea is that the most significant case of law is state-law. Every other form of law is secondary or parasitic to that. At the beginning of this period this assumption could be considered justified for many reasons, linked to the crucial role of nation states as main legal actors both in the domestic and in the international domain. But we must not forget

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that the prevalence of state law is only a chapter in the history of law, not the longest one, and probably not the last one.

To focus on just one of the expressions of law—according to the domestic assumption, state-law—is obviously less complicated than to study a variety of different phenomena, which are hard to be put together. In the same line, it would seem preferable an univocal definition, built on one central and necessary feature, that permits to classify what is law and what is not (in the absence of that/those element/s). This method has a strong classificatory potential, but its risk is essentialism. In addition, as we will see in the following paragraph, it can conceal law as it is, i.e. a differentiated phenomenon in persistent evolution. Both of these elements are in the centre of Schauer's book. But his research is conditioned, on the one hand, by the idea that the authoritative character of legal rules depends on their status: "[i]n other words, what the rule says does not matter; where it comes from makes all the difference" (Schauer 2009, 62). I would call this aptitude the legal worry of the first word. On the other hand, it is also conditioned by the legal worry of the last word: the idea that legal rules reveal their nature at the end, through the reaction to their violations (Bobbio 1993, 121). Schauer shares the first worry with the dominant trend of analytical jurisprudence (with Raz 1979, but also with Austin and Kelsen); the second one with legal realism. In his approach it seems less relevant what is law in the *meanwhile*, as I will explain later. And this is also a significant point for participants to the legal practice.

In the background of Schauer's proposal it is also possible to see more than this. Against strong moral readings of law, individual autonomy and moral pluralism seem preserved by (supposedly) neutral legal systems able to support democratic institutions like those that are possible in the nation state. States are the best (known) entities able to guarantee the legitimacy of the use of public force. Again, democratic participation legitimates in its sources the use of public force: the force that law needs. But looking at the problem of defining law from this angle, the condition of legitimacy is more important than any other, including coercion. In some way, this proves to be true, as long as it is possible to observe how law—both state law and non-state law—is always in search of legitimacy. The centrality of legitimacy is increased by insisting on the idea that law consists of content-independent rules: as long as authoritative rules interfere with individual freedom, law needs a surplus of reasons for overcoming individual judgements. Without a cooperative perspective, only democratic participation can soften the anarchical objection regarding the conflict between authority and autonomy (Wolff 1970). On the contrary, looking at law as a shared activity, and at legal rules as able to realize common goals, not necessarily in opposition to autonomy but rather to engage individuals' autonomy in practical reasoning (Rodriguez-Blanco 2014), duties appear to be supported by the rational force of means for obtaining an end. This alternative reading does not diminish the importance of legitimacy, but in this case its importance derives from law involving a social ordering characterised by moral pluralism.

All these presuppositions lead Schauer to prefer the idea that state-law supports all the other forms of law and then that state-law has to be indicated as the central

case compared to which every other kind of law must be defined. But this strategy prevents us precisely from taking non-state law seriously, and induces a distortion in the perception of law as it is: a cooperative activity. This would be a risk that a theorist could run for the love of simple and neat definitions, but it is not convenient for lawyers and legal scientists, precisely because their work is to take part in the legal practice. Theorists can be worried of the first word, i.e. of what law is from the beginning (its sources and initial legitimation), or of the last word, i.e., of what *at the end* will be law (through the force of state's sanctions). But these worries could hide what law is *in the meanwhile*.

As Schauer shows, looking at the current picture, it is difficult to deny the importance of forms of law different from state-law: European law, international law, sport rules, rules of the global market, international organizations law, and so on: all those phenomena that many theorists call with a negative name "non-state law" (Schauer 2015, passim). They belong undoubtedly to the legal field, but they neither follow the main model of state-law, nor does their compliance depends necessarily on the state's force, as we will see.

Even seeing clearly the relevance of these different phenomena, and their belonging to the legal field, it is possible to continue affirming that the most developed, the most relevant, the most evolved form of law is state-law. The result of using the "domestic assumption" is then to work taking state-law as a model and comparing every other legal phenomenon with its features. This approach leads to the identification between the central case of nation states as historically affirmed and the central case of legal systems. This time, the problem is not the inadequacy of a definition or its essentialism, but the identification of a historical case of law with its concept.

The attention to law differentiation is not in contrast with the idea according to which states play an important and crucial role in the domestic and in the international law. States are powerful actors in the international domain, the most powerful actors, and in some way now even more than in the past. It is this characteristic that justifies the idea of cosmopolitan law. Cosmopolitanism implies the existence of borders to be overcome by progressively inclusion: it does not deny the importance of states, but it integrates states in a panorama of multiple legal actors, with specific goals. Differentiation of law and cosmopolitanism fit well in an institutional theory of law, because cosmopolitanism recalls a form of social ordering able to include other social orderings of different size and nature (Trujillo 2015).

Once established that states are not the only legal actors, it is not correct to report every form of law to states and the definition of law to some characters of states. And, in fact, other features of law come up, different from the raw force, in addition to the use of legitimate force. This is true even considering international organizations as groups of states in interaction because they introduce new schemes of states' behaviour. States (have to) cooperate in the context of international organizations and this cooperation does not depend on the force of international law, or on the force of a single global institution, but on their purposes and voluntary decisions, together with the involuntary pressure of current interdependence

(Viola 2007). And, in fact, one of the most puzzling and interesting facts in the current legal picture is precisely *that states comply with non-state law*, something impossible to be explained from the only point of view of coercion. Before facing this puzzle, it is opportune to reflect on some difficulties of the method of law definition.

2 How to Define Law

In the Western tradition there are at least two relevant methods of definition, both used by legal theorists. According to the first one, to define something means to indicate genus and differentia. The indication of genus implies the choice of the general category to which the concept to be defined belongs. In other words, the first step to define law is to identify the general category within law must be collocated and regarding which law is specified. It means that at the starting point (before looking for what characterizes it) the theorist knows many things about law, and chooses what is relevant and meaningful. After that it is possible to proceed through the identification of what it is specific of the concept to be defined and distinguishes it from all the other concepts in the general category. And, inevitably, the choice of the genus determines every future development of the definition.

A definition built this way has clear classificatory implications, as well as it facilitates demarcation, because the cases in which the differential element is missing do not clearly belong to the concept *definiendum*. On the one hand, then this method will permit to distinguish what is law from what is no-law, and this distinction would be more or less neat and instantaneous. On the other hand, this method can take in consideration neither possible variants nor the evolution of what is definiendum.

The most common next genus used for defining law is that of normative systems, that can be social, moral, legal ones. The legal specific difference has been differently identified: its external character, its origin, its institutions, coercion. Each of these elements can give birth to a theory of law. The multiplicity of candidates for defining law is a key of the difficult task. In this context, Schauer contests the essentialist trend of a part of analytical jurisprudence,[1] as well as the preference for elements different from coercion. On the first point, Schauer's criticism joins other contributions according to which the definition of law must consider historical, sociological and changing institutional facts, and not only classificatory schemes (Lacey 2013; Postema 2015 against Raz 1979, 104–105 and Gardner 2012, 301).

[1]This tradition is totally dominated by the need of distinguishing law from morality, and this choice is not useful for understanding a legal context in which law and morality are really linked (Vasconcelos 2015, 788).

Nevertheless, Schauer's preference for coercion could lead to another essentialist definition. Following an idea coming from the origins of analytical jurisprudence, and in order to avoid this risk, his strategy is to affirm that coercion is just ubiquitous, not essential. But if it is correct, then, the concept must count on other features. The question is: which others? And how are these different elements related to others, and in particular to coercion?

A second method of definition still related to another Aristotelian suggestion is that of central or paradigmatic cases [preferred by Schauer, but also by Fuller (1969) and Finnis (1980)]. This way of definition is comparable with the Weberian category of ideal-type, and consonant with the idea of the Wittgensteinian family resemblance, quoted by Schauer. It aims at forming a central model of law, compatible with secondary forms of law. The richer the model is, the less classificatory power it has, as well as the less potential ability in demarcation. But this must not necessarily be a defect, because it expands theory's explanatory powers. The main problem is how these different elements hold together. A risk of this method of definition is that it is very easy to confound the central case of law with the (so considered) best historic realization of it, or the most common, or the most frequent, or the better known (as the domestic assumption presented in the former paragraph shows). This does not mean that the concept is something abstracted from reality, because law is obviously a conventional practice. It is possible to arrive at universal concepts starting from fragmented universals, but carefully distinguishing what is to be considered universal from what is supported by power (MacKinnon 2006, 52).

From both methods, state-law dominates in the current legal theory. Non-state law is no-law, or at least a secondary form of law. My aim here cannot be to offer a new definition of law. I just want to focus on some topics emerging from the observation of law as a differentiated phenomenon, as suggested by Schauer. Some important topics different from force emerge and assume importance in order to understand law, and then they would have to be taken in account in law definition. My hypothesis is that since law is a social practice, its definition needs to be referred to its goal. It is the aim that law performs to be the key of a complex definition composed by plural elements, including coercion. It is necessary then to focus on the end in order to elaborate a definition. But practical aims belong to the realm of valuable things, and this is something difficult to deal with. Two elements would be necessary to give form to law's goal: coordination and justice, or coordination according to justice. All the components of a complex definition of law (rules, institutions, a social ordering, coercion) stand together from this point of view.

3 From Non-state Law to Soft Law

In the context of law differentiation two different terms are used: non-state law and soft law. They are similar, insofar as both depend on what is considered a main form of law, its "hard" version (state-law). This "parasitic" definition depends on

the domestic assumption. The two terms then belong to the same paradigm biased towards state-law. Nonetheless, non-state law and soft law are different since the first category includes also international law, both the international law of treatises (indirectly a form of state-law) and customary law, as well as the law of international organizations, from the International Court of Justice to the World Trade Organization, passing by the law of United Nations and many others, not necessarily depending on states or reducible to state law. To say that every form of international law is soft law would not be acceptable, by international lawyers in particular.

There are at least two possible accounts of soft law. According to the first one it is considered a secondary form of law because non-produced-by-the-state. It is an account biased by the domestic assumption, or by a state theory of law. But there is another version of soft law in which it is law not enforceable, and for this reason (apparently) not legally binding, even if it is able to produce legal results (sic). This time the adjective "soft" is not referred to the origin of the law (as in the case of non-state law), but to some other characteristics as the absence of sanctions.

It is worth noticing that not every form of soft law belongs to the international domain: the self-regulation of professional categories in the domestic contexts is an example of non-state law that is not necessarily international. But it is true that soft law is well understood in the perspective of a non-state theory of law, i.e. in the perspective of a comprehension of law as a social product. From this point of view, soft law fits with an institutional theory of law.[2] Nevertheless, what is particularly interesting to observe is how states deal with soft law, because it is not correct to affirm that it is just a gentle concession of states. It is the case of a law that is neither hard law, nor mere political or moral statements, even for the more sceptics. This "middle-of-the-road strategy" (Guzman-Meyer 2010, 180) is widely used in international law, but also in transnational (as it is easy to observe in the European Union) and in domestic contexts. It consists without any doubt in rules of conduct able to produce legal effects.

Describing soft law in few lines is very difficult. My interest here is not in defining it, but in showing which kind of topics would be important to focus on in order to understand it and which contributions it can offer to understanding law. Soft law includes a very diversified world of legal phenomena. I shall just recall some data emerging from those areas in which it has become to be studied in the last twenty years, first, with suspicion and reticence, then, since ten years till now, with more openness and expectation. Our aim here is to emphasize the characteristics of this legal phenomenon, in order to identify sensible theoretical questions in the task of defining law according to the ideas coming up from it.

[2]Law is linked then to those ordering of social relationships or social bodies, including the state, but not only the state. It is the thesis at the bottom of any institutional theory of law, from Gierke to Santi Romano. Anna Di Robilant (2006) identifies one of the two possible genealogies of soft law in theories of social law and legal pluralism.

3.1 Self-regulations

One important chapter in the development of soft law is the context of global marketing regulations. It is a sector of enormous interest from the point of view of the process of differentiation of law. It is populated by non-state entities as NGOs and commercial actors, but it involves also the activity of states through the acceptance and support of national courts and legislators. The so called New Lex Mercatoria, together with the Unidroit Principles elaborated by the International Chamber of Commerce, or the Lando Principles show how soft law is able to unify a sector of activities like the global market, harmonizing from the bottom systems with deep cultural and political differences.

Apart from the common material denominator (global commerce), soft law in this field can be identified as the extend of the practicing of alternative methods of dispute resolutions of arbitral tribunals, with elected judges making decisions spontaneously executed by the parties, in competition with traditional and enforced state adjudication. The possibility of states of intervene in the process of arbitration makes an objection plausible: at the end of the day, it is the state that makes the final decision. Even if we accept the point, this does not mean that law does not exist until the final decision made by states, because it does not always arrive. The worry of the last word is not of help for those taking part in legal practice.

This wide legal sector shows to have external limits coming from international and domestic laws, but also structured by self-regulations produced by corporations, international organizations, and other entities. Rules aim not only at preventing crimes or deceiving behaviours, but also at assuring some ethical principles linked to the protection of third parts, as well as to guarantee some moral goods that can be considered public interests and not only private benefits of transactions. It is the case of "business ethics," containing rules for fair exchanges, for establishing institutional and cultural frameworks, for regulating corporations' activities (Marcoux 2008). In addition, the law of the global market is committed to an increasing demand of accountability. At least in its normative dimension, it appears to be a sort of spontaneous law, with a strong link to morality, and without the features of exclusivity and territoriality typical of state-law (Marrella 2003). It is worth noticing that it has also its proper sanctions and punishments, from boycott to the practice of naming and shaming, that sometimes are more effective than state coercion.

It is possible to establish an analogy between market regulations and (soft) law produced by professional organizations. Apart from the intuitive idea that professional organizations have the competence to regulate their performance—confirming that law is a social product—both in the case of their nature as public or private entities, professional categories are becoming more and more open to ethical standards, not only in terms of professional virtues, but also in terms of social solidarity. Those ethical standards aim at supporting the relationship of trust that professional categories need to maintain with those to which their work is devoted.

In this line it is also meaningful the adoption of diversified mechanisms of accountability (Trujillo 2013).

At the end of this short presentation it is possible to conclude that soft law as professional and marketing regulations appears to be a form of law with a strong commitment with morality (at least in abstract), able to produce legal effects, with proper sanctions. This phenomenon reduces the centrality of state sources in defining law: even if at the end of the day states can intervene in the process, it would be distorting to think that it is not law until states get involved. It refers to a form of coordination coming from the bottom.

3.2 Cooperation Beyond the State

Another important sector in which soft law is emerging is the context of transnational states like the European Union. In order to simplify its complexity, some theorists (constitutional and EU lawyers, attracted in their professional approach by the problem of legal sources) distinguish soft law as pre-law, post-law and para-law (Senden 2004, 119). In the first group (pre-law) there are preparatory acts (green and white books, programmes, institutional statements) that have the aim of preparing or guiding other legal acts, like legislation and other regulations. It is a sort of law intended to produce (more) formal law. But it is a law binding member states' parliaments, unlike law proposals. We cannot just say that it is not law *yet*. In the second group (post-law) there are directives, guidelines, regulations following legal decisions to be applied. It is law in application of (more) formal law. Both these two groups could be seen as clearly subordinated to hard law and depending on it. But this is not sufficient to deny their legal character. A doctrine of state sources of law would pretend to define unmistakably what belongs to law and what does not before applying it. On the contrary, the characterization of these two groups suggests that law is not ready-made. It does not come up straightaway once and forever. Law is a practice, and this means that law belongs to a continuous and not instantaneous time, since law-making is an activity that requests different roles' effort and cooperation.

In the third group (para-law) there are a lot of different items, difficult to put together: resolutions, recommendations, advices, reports, self-regulations (also relevant here). This third group testifies first of all that soft law is not subordinated to hard law (as pre-law and post-law could suggest). This group is the most diversified and controversial for different reasons. Their most evident common feature is that they do not come from the traditional formal procedures of state law making, but from professional, economics, social or other sectorial categories producing law: independent authorities, international or transnational organizations, all subjects usually not legitimated to produce (formal) law in the context of a state model of law. From this point of view, what distinguishes soft law from hard law is the latter's formal character of sources. Soft law does not follow the traditional path of legislation, and this is obviously a problem, insofar as legislation ensures the

democratic control of decisions. Soft law tends to include among law-makers some actors different from those traditionally legitimate to produce law. This seems to introduce not properly legal logics in law. Giving the voice to a frequent perplexity against soft law, some constitutional lawyers have qualified it as "no-law" (Bin 2009). In this case, the worry is the prevalence of the marketing logic over public methods. This kind of criticism depends on a rigid dichotomy between the state and the market as the two only forces in field. State-market dichotomy does not contemplate the idea of other different operative actors in the legal context. On the contrary, soft law is a manifestation of the existence of plural actors, all relevant for the legal field. In part, they can be put together under the category of civil society, but this answer is not completely correct. How to consider the independent authorities, for instance? This is a good reason for considering controversial the public-private dichotomy.

In addition, that criticism does not fit completely with the current picture of the law of the global market, as we have seen above, characterized (at least in part and perhaps for the most sceptical in abstract) by a strong commitment with morality. Self-regulated professions and NGOs do not follow necessarily the logic of the market. This does not mean that law does not need to have some specific sources—according to Critical Legal Studies' supporters, just a myth—but, rather, that law making is a dynamic and complex activity in which a plurality of actors takes part.

From the sources point of view, soft law raises an important problem to the traditional setting of modern state, because it seems to corrode the principle of separation of powers. In many cases the problem arises just from the fact that soft law is a law made by the executive power. Both in international and in transnational domains the choice for soft law is sometimes justified by the fact that nonbinding agreements are easier to conclude and they can be settled by lower ranking officials, avoiding the long process of parliamentary approval. But this objection would be correct only if there exists just one and only method of legitimation, and if it coincides with that of modern democracies. From the point of view of international law, this thesis would deny the legitimacy of a wide part of international law: everything that does not come from democratic states, i.e. the law produced and supported by nondemocratic countries, or even by customs. It is clear from this point of view how the unification of the central case of political communities (democratic states) and the central case of law (state law) has made hard the understanding of the legal phenomenon in its differentiation. From this point of view, the analysis of soft law would impose to renounce not only to the exclusivity of state as the only law-maker, but also to the exclusivity of the pedigree criterion, linked to a certain form of understanding legitimacy as an input (the source democracy). Not only from where law comes is crucial (its origins), or even how law comes to existence (formal procedures), but also what law is able to produce. Legitimacy is also related to the outcomes of the exercise of any power (Nussbaum 2006, 83).

Once established that law is not only produced by the state, different paths of legitimacy must be followed, and here principles such as transparency, publicity, the "giving reasons requirement" (art. 253 Treaty on European Union), the principle

of equality and proportionality become crucial, as part of a more general and alternative form of accountability (Cohen-Sabel 1997). The current increasing demand on legitimacy covers a wider scope than in the past. It is linked to any institution or subject exercising power (from professional and economic categories to independent authorities), and not only to states. For its social links soft law seems to manifest the ability of building a sort of democratic legitimacy from the bottom (Pariotti 2009). This challenges the doctrine of sources of law as an exclusive way of legitimation. The evolution of multilevel constitutionalism leads to the understanding of legal systems in relation with others, according to the model of a network and not a pyramid. The ordering of the network has to be built from the bottom and it has to be erected in search of the consistency not formalistic but regarding the content and goals of law.

In the context of the building of the European Union soft law has become (paradoxically, considering its softness) a "powerful" instrument of harmonization. Starting from article 249 of the Treaty of European Union, that includes in its list nonbinding sources of law, soft law has increased its importance in the task of improving a certain kind of cooperation within the European Union, what can be called the process of social and political integration. Soft law has been used as a tool for equilibrating political and social integration with economics regulations (usually established through hard law methods). The recourse to soft law seems to be justified by the difficulty of the political and social integration, an ambitious task that involves sensible topics as sovereignty and the respect for constitutional traditions. In this field, soft law has demonstrated its ability of producing effectiveness on the basis of what it is worth pursuing. In this direction, the European Court of Justice has confirmed the legitimacy of soft law precisely because it proves to be able to produce those desirable effects of coordination. After the Grimaldi Case (Case C-322/88 Grimaldi [1989] ECR I-4407) national courts are obliged to include soft law as a relevant element of interpretation. This approach to soft law emphasizes its importance in the context of the activity of interpretation, and it can be considered a sort of indirect legal effect of EU law on the judiciary (Senden 2004, 384). From this point of view judges are involved in the task of EU integration. And in the absence of a duty supported by state force, the duty of consistent interpretation can be only explained on the basis of the institutional loyalty of judges and their commitments in building the EU common legal framework. This is not only the case with judges. Soft law entails a mutual duty of loyal and sincere cooperation between member states and their institutions, between the Community institutions, between the state powers, between the member states and the Community institutions (Senden 2004, 77). This is not an exclusive European development. In the context of the American Convention on Human Rights, domestic courts have the duty of interpret internal norms in accordance with the Convention, avoiding if possible domestic questions of constitutional legitimacy. It is called "control de convencionalidad" (Almonacid Arellano vs. Chile, Corte Interamericana de Derechos Humanos, 26 septiembre 2006, Serie C No. 154, §§123–125). All these elements confirm the centrality of cooperation and the idea according to which without the commitment of participants the complying with law is difficult to

explain. But this commitment is not just the result of a process of internalizing rules or obeying them because they are supported by coercion. It requires the reference to a different point of view: a cooperative or a "plural" point of view (Sartor 2001), and also a practical point of view, the idea of goodmaking (Rodriguez-Blanco 2014).

At the beginning of the age of state-law, the direction of law differentiation was verticality, through the reference to authority, with the possibility of expanding it in increasingly higher powers. Nowadays, horizontality characterizes the process of law differentiation, and its clue is coordination in progressively including wider spheres.

3.3 Soft Law and International Law

As we have said, in the international context states often prefer soft law. It is the case of human rights law, but it is not the only one. As it is well known, some important international documents—as the Universal Declaration of Human Rights (1948) or the Charter of Fundamental Rights of European Union (2000)—have been defined from the beginning as forms of "soft law." In this case, this character coincides with the lack of an apparatus of enforcement and/or with the idea of a nonbinding law. In fact, at the beginning, those documents were not recognized as mandatory, even if they were wanted by the states, and then legitimated by them. After the Universal Declaration the international community signed two treaties on Human Rights, the Covenant of Civil and Political Rights and the Covenant of Social, Cultural and Economics Rights (1966–1976), considered properly "hard law." Nevertheless, no one can deny the importance of the Universal Declaration from the beginning, and the same can be said for the European Charter or Nice Charter of Fundamental Rights in the first phase of existence. And this notwithstanding both documents were accompanied in their promulgation by the formal statement of their nonbinding status. The Universal Declaration has been considered binding for the states by the UN General Assembly and used for accusing states of violations of the duties adopted in it. The Charter of Fundamental Rights—as it is well known too—is now included in the Lisbon Treaty, but it has been the protagonist of many decisions in different European Courts before that formal recognition.

The less compromising explanation of the role of soft law from this perspective is to consider it as an epistemological source or an interpretation aid (Senden 2004, 393): soft law helps to identify what law imposes. But this does not solve the puzzle: how and why nonbinding law could help to understand what is binding law? It seems again that law is not (only) a question of force.

It is not a case that these important phenomena are related to human rights. The protection of human rights is a common aim to be realized in the international and

in the domestic domain. They also fix a threshold not to be overcome in the dynamic of coordination. From this point of view, instead of thinking of soft law as an imperfect form of law, it appears to be a kind of law particularly linked to its ends, and for this reason *particularly effective*. The law closer to its own goals becomes more important that the law farer from them. Law is again explained in terms of means to an end. Its binding character is connected to its necessity as a form of coordination.

In part, the choice for soft law can be explained in the light of the interference that human rights law means in the domestic affairs of the states, traditionally precluded. Soft mechanisms of enforcement fit with human rights international law: committees and soft practices for monitoring compliance of states, like the Human Rights Committee and the Human Rights Council (after the 2006 reform) under the International Covenant on Civil and Political Rights, with its practice of Universal Periodic Review. At first sight, it seems that the choice for soft law is harmful for the enforcement of human rights: states are requested just to send self-reports, and the Committee/Council cannot produce binding acts. But the result is surprising: states comply with these soft prescriptions, send verisimilar reports, and try to be part of those common organs. The outcome is that these organs confront states reports with other sources, hear individual complaints and NGOs criticisms, and comment state compliance establishing what is a violation of human rights. Their performance influences states' behaviour at least from the point of view of establishing what has to be considered a human rights' violation, and this is not a trivial matter. Soft law is then building a legal practice of protection of human rights shaping expectations of what constitutes compliance with binding rules. What we usually consider the effect of an ineffective law can be read on the contrary as the will of continuing cooperating in the legal context.

Over the past twenty years international lawyers have tried to offer an explanation of the "mystery" of soft law, i.e. "why states would enter into a consensual exchange of promises that represents the culmination of negotiations on an issue, but at the same time declare these promises to be nonbinding" (Guzman-Meyer 2010, 175). Apart from the idea that soft law facilitates the solution of problems of coordination, the choice of soft law is related to the possibility of reducing negative effects in case of violation. As it is well known, even if there is no an institution able to order compensation or to impose penalties in cases of violations of international agreements, when a state enters in a binding agreement, it has nonetheless to consider the costs of its violations in terms of reputation in future agreements, retaliation, and reciprocity (the other part stops performing the content of the violated agreement). Retaliation and reciprocity seem to operate in the same way in hard and soft law. But reputation does not. The reason is that the ability of states to pursue their interests in the international domain depends on the trust that they deserve when they promise to comply. A loss of reputation is then a really big cost for the states because they become less credible in the context of international cooperation. Being a treaty the most solemn promise, the loss in reputation is the

largest one. In this sense, states could prefer a soft law agreement rather than a hard one. But, paradoxically, soft law is chosen because of the aim of keeping cooperating, and the result of soft law agreements is that they increase states compliance with international law. States do not renounce to enter in agreements with other states and try not to lose the reputation as trustful parties, able to respect agreements, even if soft ones.

The consideration of this mechanism is a good topic for insisting on a characteristic of soft law, i.e. that it does not necessarily lack sanctions. The practice of "naming and shaming" used by trading organizations against those not respecting their rules or by Human Rights NGOs against states are negative consequences easily defined as penalties, and characterized by an important deterrent ability.[3] But sanctions in soft law consist mainly in the loss of cooperative agency, in a sort of exclusion from the community of agents involved in legal coordination.

From the point of view of soft law, then, we could draw a distinction between enforcement and coercion. The force of law depends on being law able to perform the goal of cooperation. Coercion implies the ability of producing negative consequences related to not cooperative aptitudes. This conclusion allows us to introduce the idea that soft law is not a law without force even in the reduced meaning of coercion. But it is clear at this point is that it is not the raw force of the state to be the crucial element for defining law.

4 Conclusion

It is easy to see how some dominant trends in legal philosophy appear to be overcome as they present law as a system of norms supported by state force and in which what counts is the doctrine of sources and rules' content-independent character (all characters linked to the "domestic assumption").

From the schematic description of soft law, it is possible to bring out some methodological advices: legal theory has to observe the social and institutional process of law differentiation in order to try to define law as it is. Looking at this process, it is easy to discover the spreading and importance of non-state law or soft law, and this raises many new theoretical questions. The study of non-state law and soft law can teach us a lot about the notion of law *tout court*. The idea of force must be revised, shifting from the use of force to the ability of obtaining compliance, from authority to coordination, from validity to effectiveness.

If law changes as it does, legal theory will have to change too.

[3] A possible objection to this idea is that this practice of applying sanctions, coming from entities different from the state, does not work with equality and certainty, as state does or might do. I am aware of this difference and this is one of the reasons for assuming that states are nonetheless important actors in the legal field. But the point is that the same objection highlights the idea that state-law is able to perform justice in the form of equality, as well as it is not in contrast with the idea that coordination is the main legal goal.

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Bad for Good: Perspectives on Law and Force

Christoph Bezemek

Abstract Typically, the 'Bad Man' who's role we have to assume according to O.W. Holmes in order to 'know the law and nothing else', is considered to be both morally impoverished and analytically deficient. This paper argues that, quite on the contrary, the Bad Man's perspective is most useful in order to doctrinally explore a legal system and to cast light on the general relationship of law and force.

1 Introduction: Full House

I have to admit that 'The Force of Law' left me slightly bemused. Not as far as the argument or the style of its presentation are concerned, of course: Fred Schauer has written a truly remarkable book.

Much rather it was the multitude of different characters I came across, signifying distinct perspectives on the concept of law and its features, I found quite overwhelming, to say the least. There was the 'Bad Man', and his counterpart, the 'Good Man', of course; who is not, however, to be mistaken for the 'Good Citizen'. There was the 'Puzzled Man', sometimes also referred to as the 'Ignorant Man' or the 'Man who wishes to arrange his affairs'. And there were the 'Moral Man' and his contemporarily reshaped twin, the 'Moral Person'. And as if this happy bunch of people, matched in number perhaps only by what the universes of Marvel and DC Comics have to offer in various masked vigilantes, was not enough, there were some of the most interesting tribes to be encountered as the 'Society of Angels' and the 'Race of Devils'.

To be fair: I came across most, but not all, of these characters and social groups in 'The Force of Law'. However, their multitude got me curious and led me to meet some more when mulling over the questions Fred so elegantly addressed. Not all of them were perfect strangers, of course. I had read Holmes's 'Path of the Law' when I was a law student in the US and was thus familiar with his concept of the

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'Bad Man' and his brother the 'Good Man'; just as I was familiar with Hart's critique of the 'Bad Man' that gave birth to the 'Puzzled' or 'Ignorant Man'. And some earlier attempts to walk in the ways of legal theory had introduced me to Kant's 'Race of Devils'. Still: The rest of the 'happy bunch', as I casually referred to them before, were new acquaintances. Or at least to me they were, as they knew each other, of course; being members of some kind of a ramified patchwork family with the 'Bad Man' as some kind of common ancestor.

As it happens with families, whether they are of the patchwork variety or not, the relationship of their members is not always without frictions. The same is the case with our clan. As, even setting aside the tribes referred to before, many of the characters listed above came to life, or, to phrase it more soberly: were developed, in the course of a wide ranging debate that originated in the effort to bring the Bad Man (or some version of him and what he stands for) to justice. The purpose of this contribution is somewhat different: What I will try to do is rather to attempt to *do* justice to 'the Bad Man'.

2 Family Ties

In order to do that, I will at first try to bring at least some order into the kinship so described and to briefly introduce the family members, starting with the Bad Man himself who, as already indicated, starts to tread the 'The Path of the Law' by way of Holmes's (1897, 459) famed statement that

> [i]f you want to know the law and nothing else you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.

More than six decades later it was Hart (1972 [1961], 39) who, discarding the Bad Man, suggested that

> law [should] be equally if not more concerned with the "puzzled man" or "ignorant man" who is willing to do what is required, if he only can be told, what it is [… o]r with the "man who wishes to arrange his affairs" if only he can be told how to do it.

Not long since, this perspective has been complemented by Shapiro's (2011, 70) conception of the 'good citizen' who

> accept[s] that the duties imposed by the rules are separate and independent moral reasons to act.

Not complementing, much less complimenting, Hart's view most recently Schauer (2015, 62) introduced the 'moral man', or rather: the 'moral person':

> the person who acts for reasons other than self-interest but who does not need the motivations or prescriptions or instructions of the law to get her to do so.

We see: Even leaving angels and devils aside for the time being, this family tree is confusing as it is, or perhaps better: it is in need of further clarification as to how exactly these characters are related and which basic approaches they stand for.

Let us start by Hart's 'puzzled' or 'ignorant' man 'who wishes to arrange his affairs' as opposed to the Bad Man Holmes contrived. Hart (1972 [1961], 88), in dismantling the Austinian theory of law as coercive orders, created this character in order to emphasize the importance of what he called the 'internal point of view' of those who accept the normativity of a given rule as opposed to the external point of view, the view of 'those who reject [the] rules [of a given group] and are only concerned with them when and because they judge that 'unpleasant consequences are […] to follow violation'. Simply put: According to Hart, the puzzled man follows the law as a matter of principle, because it is the law; the Bad Man would—if ever, only obey the law because of the threat of sanctions.

Hart's antithesis to Holmes's position proved to be exceptionally successful. To what great extent may be illustrated by the fact that even Dworkin (1986, 14) followed suit, criticizing Holmes's Bad Man as conceptually deficient, 'impoverished and defective' even, for ignoring questions about the internal character of legal argument.

Shapiro's (2011, 70) image of the 'good citizen' takes Hart's argument further; as the good citizen will not (only?) comply with the law because it is the law, but because she 'takes the obligations imposed by the law as providing a new moral reason to comply.'[1]

This is, of course, far from implausible. Quite on the contrary: Why of all normative systems should the law not 'provide […] guidance for those who want to live up to the […] obligations' the system imposes? (Shapiro 2000, 208). And why should the law in providing that guidance not embody or even promote public morality? After all, Holmes (1897, 459) himself emphasized that '[t]he law is the witness and the external deposit of our moral life. Its history is the history of the moral development of the race. The practice of it tends to make *good citizens* and *good men*' (my emphasis).

Yet precisely because of that, and Schauer, not to mention his criticism from an empirical perspective (see Schauer 2015, 57–74),[2] admirably pointed that out, such an argument actually may prove too much: Focusing on law's normativity tends to eclipse that people may, and may even to a large extent, act on moral principles detached or at least independent from legal directives; that people indeed may be, and may act as, 'moral persons' (Schauer 2015, 62). Accepting this, however, means to accept the lack of a distinctive feature that would allow for isolating the impetus to follow the law specifically in those cases and as far as legal demands and demands of morality are aligned.

[1]For a related concept of the 'good citizen' *see* Twining (1973, 281).

[2]An earlier version of this argument was offered by Kelsen (1961, 24–28) who pointed out that '[w]e do not know exactly what motive induce men to comply with the rules of law' (*id.* 24).

Therefore, in order 'to know the law and nothing else' (Holmes 1897, 459) it may indeed prove to be useful to strip our character of any normative standards of the sort; a view, it has to be added, Holmes was not the first to advance. About 100 years earlier it was, after all, Immanuel Kant (1887 [1797], 48) who stated in the 'Metaphysics of Morals' that,

> [a] strict Right […], is that which alone can be called wholly external […]. Such Right is founded, no doubt, upon the consciousness of the Obligation of every individual according to the Law; but if it is to be pure as such, it neither may nor should refer to this consciousness as a motive by which to determine the free act of the Will. For this purpose, however, it founds upon the principle of the possibility of an external Compulsion, such as may co-exist with the freedom of every one according to universal Laws.

So, to speak with Kant, to find the 'strict right', 'pure as such', it seems the Bad Man's perspective cannot casually be discarded; at least not in favor of his 'puzzled' relative or the 'good citizen' relying merely on the internalized normativity of a certain set of rules. After all, it cannot be doubted that Holmes was correct at least in this one point: 'a bad man has as much reason as a good one for wishing to avoid an encounter with the public force' (Holmes 1897, 459).

Of course, even if only allegorically, it seems to be quite a sinister picture Holmes paints, and oftentimes it was criticized for being just that; giving way, as one commentator stated, to Holmes's desire 'that lawyers should disconnect themselves from morality, to destroy their morality and faith' (Miller 2005, 231); being 'washed with cynical acid, and divorced from ethical values' as Fuller (1966, 92–93) put it, depicting an individual, as Kennedy (1976, 1773) tells us, 'concerned with law only as a means or an obstacle to the accomplishment of his antisocial ends.'

3 Breaking Bad

But perhaps the Bad Man is just misunderstood, as arguably some (or perhaps even many) men presumed to be bad are. Perhaps the Bad Man and the view of law he stands for are not as bad as it seems. To find out, the allegations thus outlined have to be addressed. A topic that luckily has attracted quite a lot of attention since the *Path* was published for the first time 120 years ago; most recently by Fred Schauer…

And it quite readily turns out: The Bad Man is not bad after all; which at second glance hardly comes as a surprise; he can't be, precisely because he is stripped from any normative standards; precisely because he is 'divorced from ethical values' (Fuller 1966, 92–93) of any kind. Holmes (1897, 459) makes that very clear by contrasting him with the 'good man' who, quite consistently covering the puzzled man, the good citizen and the moral person, 'finds […] *reasons* for conduct, [either] *inside the law* or *outside* of it' (my emphasis).

And indeed I have to admit that, at least when compared to the 'puzzled man' who only wants to get by and the zealous character of the 'good citizen', I never have been wholly unsympathetic to the Bad Man's position. As the Bad Man, for better or worse, does not act on any of the reasons of the kind; which, however, makes him an *a*moral, not an *im*moral actor (Twining 1973, 281). The 'good man', on the other hand, indeed is a *moral* actor which, of course, makes the good man not a good person per se, judged by moral standards, but rather a person *acting* on normative *reasons* of various kinds,[3] while the Bad Man, to paraphrase the way Schauer (2015, 47) expressed it, is somebody who 'plan[s] his live and his activities in the shadow of the law'. And while that is quite a shadow, it does not necessarily provide the conditions for mischief to thrive and to prosper: '[T]he 'bad man' is not a criminal' (Fisch 2006, 1595); and looking through his eyes neither 'make[s] us more effective counselors of evil' (Hart 1951, 932), nor does it 'destroy our morality and faith' (Miller 2005, 231). As—even putting aside that he lacks 'a moral compass' (Beerman 1998, 941)—the ends he intends to accomplish needn't be at all 'antisocial' (Kennedy 1976, 1773).

Still more, as it is question begging whether the Bad Man intends to accomplish certain ends at all, whether the Bad Man actually exists in his own right or whether he is just a shorthand version of an infinite multitude of different personae, inclined to 'know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves' (Holmes 1897, 457), which in an infinite process of subtraction, starting from 'the bad man [a]s the lowest common denominator' (Perry 2000, 172); 'a cognitive rather than an affective device' (Twining 1997, 202); a 'heuristic' (Rosenberg 1995, 46) that allows for a 'disenchanted' (Gordon 1997, 1014)[4] view on the law, to read its 'tea leaves' (Beerman 1998, 939), far from the limelight of normativity.

So 'the economic or 'bad man's' point of view' (Soper 2005, 233) are not necessarily to be equated; as he may be more than just a 'rational calculator' (Luban 1997, 1571), while still being just that nevertheless.

'[O]ur friend the bad man' (Holmes 1897, 461) may rather be a 'learned' friend, a scholar,[5] fathoming the law's reach and thus proving his 'prudential point of view', as Perry (2000, 165) labeled it.[6] His may be the perfect vantage point for the kind of doctrinal arguments that, introspectively analyzing and structuring legal rules, specifically trade under the name 'dogmatic' in the German-speaking jurisprudential realm (just see Dedek and Schermaier 2012, 364).[7] For it is, as

[3]According to this reading, the 'good man' is not (as Luban 1997, 1564 and 1572 argues) necessarily a 'man of conscience' (also *see* Fisch 2006, 1595).

[4]Also see Blank (2011, 641).

[5]Baird (2009, 740) similarly referred to the Bad Man as a 'scientist'.

[6]Which is why Fuller's (1966, 93) argument, that 'it is a peculiar sort of bad man who is worried about judicial decrees and is indifferent to extra-legal legal penalties, who is concerned about a fine of two dollars but apparently not about the possible loss of friends and customers' goes astray.

[7]For a more detailed analysis of 'Rechtsdogmatik' as a tool of legal analysis and the jurisprudential assumptions this approach rests on *see* Kirchhof et al. (2012).

Holmes (1897, 476) tells us, 'this body of dogma or systematized prediction which we call the law'.

Such a reading seems all but far-fetched.[8] If it proves to be correct, the Bad Man's view indeed tends and *in*tends to unfold what Lon Fuller, even if with disparaging irony, ascribed to it: '[T]he law is that which concerns one who is concerned only with the law.' (Fuller 1966, 93). And so, even if Douglas Baird may, at least from a certain normative perspective, be correct by stating that '[b]reaking a promise and then paying damages is not the same as keeping a promise in the first place' (Baird 2009, 740); from the perspective of somebody 'who is concerned only with the law', it might just be.

Of course, some may object that if that should prove to be correct

> the bad man's point of view, as described by Holmes, is rendered less than a perfectly reliable guide to the content of the law, [as] in addition to the reaction of the courts, the bad man is likely to take into account the probability of detection when deciding whether to obey the law. (Beerman 1998, 944)

I respectfully disagree. Of course: a truly Bad Man would. Still, as I have tried to establish, Holmes's Bad Man is far more curious than he is bad. And as Luban (1997, 1571) amply demonstrates, 'there is no hint in *Path* or elsewhere that Holmes's […] Bad Man "who cares only for the material consequences" […] would consider enforcement probabilities as well as enforcement outcomes.'

Sure: according to Holmes (1897, 457), '[t]he object of our study […] is prediction, the prediction of the incidence of the public force through the instrumentality of the courts'. And yet the Bad Man raises the question 'what a court would do if his conduct were litigated, [… n]ot how likely it is that his conduct will be litigated' (Luban 1997, 1571). The predictions Holmes writes about in the *Path* are 'predictions […] generalized and reduced to a system' (Holmes 1897, 458); 'a body of dogma enclosed with definitive lines' (Holmes 1897, 459). 'This', however, as Stephen Perry put it, 'is what […] law books are supposed to do' (Perry 2000, 179).

Following this reading, we found ourselves quite a tame Bad Man (also see Luban 1997, 1581), a Bad Man who rather pretends than acts (also see Twining 1997, 218–220); or perhaps: we found *ourselves*, pretending to be bad men about to act; ourselves acting "as if".

4 Angels and Demons

Still, whether the Bad Man thus tamed does indeed provide a useful analytic tool to 'know the law and nothing else' depends on whether or not the presupposition underlying this heuristic is indeed a valid one. Obviously therefore: if the Bad Man 'cares only for the material consequences which [his knowledge of the law] enables

[8]Even if it comes, as we shall see, at the price of perceiving Holmes in this regard to a lesser extent as a *realist* in the strict sense.

him to predict' (Holmes 1897, 459), the question as to the interrelation of law and coercion can no longer be avoided. Fortunately, Fred Schauer wrote a book on the topic.

Still, also focusing on law and coercion only from the angle of the specific problem at hand, it is plain to see, as Alschuler (1997, 368–369) among others demonstrated, that the Bad Man's position is particularly vulnerable to Hart's arguments against the latter being an essential element of the former.

So, does the Bad Man have any answers to Hart's questions as to the 'legality' of rules conferring the power to make trusts, wills, contracts, or laws? (Hart 1972 [1961], 26–48). Or more generally: does the Bad Man have any answer to the question whether laws not backed by (appropriate) sanctions, 'imperfect laws' (Austin 1832, 24–25) in the Austinian sense, are to be considered laws at all from his point of view? And if not, wasn't the Bad Man then rightfully discarded? After all, as Scott Shapiro, further developing Hart's arguments, extensively demonstrated, '[t]here is [overall] nothing unimaginable about a sanctionless legal system' (Shapiro 2011, 169). But then: What is the use of our Bad Man?

Sure enough: Such a sanctionless legal system may hardly be effectively established for a society of bad men in the first place; much rather it would presuppose a 'community of saints' (see Yankah 2008, 1234–1235) or maybe even a society of angels. But on the other hand: Sanctionless or not—would angels need laws in the first place? After all, legal theorists like Lon Fuller famously argued that 'in a society of Angels there would be no need for law.' (Fuller 1964, 55). Of course, he was not the first to do so: Already Madison famously stated that '[i]f men were angels, no government would be necessary' (Cooke 1961, 349).[9] And the idea has deeper roots still; as, for example, a rabbinic story shows, in which Moses convinces God to give the Torah to Israel rather than to the Angels who demanded to receive it themselves, as 'the angels do not need the law' (see Dershowitz 2000, 197).

But weren't the angels in the end right to make their claim? Indeed, it is perfectly comprehensible that they may want to have legal rules; they are, after all, as far as the Scripture is concerned not omniscient,[10] and thus in need of certain guidelines. Consistently, we may agree with Fuller (1964, 55) when he puts the above-quoted statements into perspective: Because

> if, in order to discharge their celestial functions effectively, angels need "made" rules, rules brought into existence by some explicit decision, then they need law.

What they do not need, however, as Raz (1999, 159–160) would add about 10 years later, are means of coercion in order to ensure the obedience of the angelic community, as angels, also the rabbinic story referred to above assures us of this

[9]The Federalist No. 51.

[10]See e.g. Matthew 24:36 (KJV): 'But of that day and hour knoweth no man, no, not the angels of heaven, but my Father only'.

(Dershowitz 2000, 197), lack the capacity of doing evil, of violating the law in the first place. But is this presumption actually valid?

Angels are, compared to humans, as St. Thomas Aquinas, who after all was attributed the sobriquet 'Doctor Angelicus', explains, rational 'creatures, which are more perfect and thus nearer to god', *perfectiores et Deo propinquiores* (Aquinas 1922, 94)[11]; but rational *creatures* still, lacking not only omniscience but evidently also infallibility; which characters as the devil and his fellow demons, fallen angels as they are—may well prove, united, as Aquinas explains, by their common wickedness, *ex communi nequitia*—'to carry out their own wickedness'—*ad propriam nequitiam exequendam* (Aquinas 1922, 92).[12]

Taking that into account, not only does our Bad Man, may he be the most rational of all calculators, pale in comparison to one of those demons who seem to be out and about to eventually maximize the evil they may spread; also we may have to accept that, even from the opposite angle, also angels, being *rational* and *fallible* creatures, indeed may *need* laws.

This may mean, even if we have to mend his argument a little: Thomas's revered teacher Aristotle may well have been right by stating that someone not subjected to the laws of a state must be either a 'beast or a god' (Aristotle 1895, 13). While *all* the remaining rational, but fallible creatures may indeed be in need *of* and subjected *to* the law; a subjection, however, which consistently may be achieved 'even', as Immanuel Kant in his essay on Perpetual Peace famously observed, 'for a race of devils, if only they are intelligent.' (Kant 1903 [1795], 153–154). That, however, so Kant continues, comes at the price to 'know the mechanism of nature in order to use it on men, organizing the conflict of the hostile intentions present in a people in such a way that they must compel themselves to submit to coercive laws. *Thus* a state of peace is established in which laws have force.'

5 Law and Order

By following this path where legal and political theory merge, taking into account angels, devils, their fellow demons as well as 'rational, but fallible creatures' in general, I have, it has to be admitted, long since abandoned a conceptual in favor of a sociological view, or perhaps more correctly: an anthropological perspective, quite conservatively asking for the 'why' of the municipal state and its laws; which, to refer again to Thomas Aquinas, typically leads back to the point that 'the notion of law contains two things; first that it is a rule of human acts [in any case not for gods and beasts, and effectively not for angels and demons]; secondly that it has coercive power' (Aquinas 1915, 71)[13]; the latter, of course, being a necessary

[11]Summa Theologica I Q 109, 4.

[12]Summa Theologica I Q 109, 2.

[13]Summa Theologica IIa Q 96, 5.

consequence of the former which is at the very core the anthropological presupposition underlying the concept of law so understood. Whether these 'exingencies of human nature', as Green (1996, 1703) referred to them are; (or as Shapiro (2011, 173–174) put it, 'the problem of bad character' is) based on experience (also see Hart 1972 [1961], 189) or rather, as Kant supposes, in reason, may extensively be discussed. At this point, however, it may suffice that it is quite reasonable to trust experience on that matter; making, in any case, the Bad Man quite a plausible poster boy for this perspective.

We find the locus classicus of this argument, of course, not in the writings of Thomas Aquinas or Kant but in those of Thomas Hobbes who famously argued that 'without human law all things would be common, and this community cause of encroachment, envy, slaughter, and continual war of one upon another', and that in order for 'any laws [to] secure one man from another [and thus in order to secure peace, there is a need for] laws living and armed' (Hobbes 1971, 59). Thus, 'where there is no coercive power erected […] there is no Common-wealth' (Hobbes 2010 [1651], 88). This presupposition, and its consequence: to deprive men from their rightfully employed capacity to arbitrarily use force in realizing their aims, has been emphasized and reemphasized more often than may be counted even by the most diligent scholar.

Still, the way force and peace supplement one another in this perspective (see Bobbio 1965, 326) has always been quite fascinating to me. 'Force', as Kelsen (1961 [1945], 21) observed, is employed to prevent the employment of force in society; a phenomenon asking, as it has prominently, and oftentimes, been held for a *monopoly* of force (just see von Jhering 1877, 319 or Weber 2008, 6). 'The peace of the law', so understood, to quote Kelsen (1961 [1945], 22) again, is 'a condition of monopoly of force, a force monopoly of the community' which uses this monopoly 'to bring about the desired behavior of [its members] by the enactment of […] measures of coercion' (Kelsen 1961 [1945], 18).

And yet, even if we agreed to accept this as a plausible answer as to how and why force makes its entrance to the law, we are, of course, far from inferring just from this, that definitions like von Jhering's (1877, 318) who saw 'law as the embodiment of coercive norms in a given state' (my translation) are indeed sufficient; such a perspective, as Schauer admits, 'is simply wrong' (Schauer 2015, 167). Of course, on the other hand, no one would dispute, or so I assume, that empirically, and even more so in the modern regulatory state, laws in many (quantitatively perhaps even in most) cases are indeed coercive; backed by the community's monopoly of force. But that arguably does not suffice in order to perceive, as Kelsen among others does, law as a whole as a coercive order (Kelsen 1961 [1945], 18). After all, as Hart put it, 'the legal system is surely not to be […] simply identified with compulsion' (Hart 1958, 603).

6 Conclusion: Bad Man Returns

And so it seems, rather than making progress over the last pages, I have been running circles with the Bad Man on my back; and that I should rather drop him than to continue this rather fruitless endeavor: If law is not necessarily coercive, the Bad Man who is concerned with 'the material consequences his knowledge enables him to predict' (Holmes 1897, 459) seems to have a very limited understanding of his subject; thus diverging quite significantly from Holmes's attribution he would actually 'know the law'.

Still: As even bad men deserve second, perhaps even third, chances, I will, by way of a conclusion, give it one last try, changing the perspective and asking the question anew: what if, for the Bad Man to be a useful analytical tool, it is not important whether laws *eo ipso* are coercive? What if for law to be a coercive order it is unnecessary to *identify* it with compulsion?

Of Course, Raz (1972, 834–835) is correct, just as Hart (1972 [1961], 26–48) was before him: large parts of the law are not concerned with proscribing certain actions: the laws of contracts and wills rather enable people to successfully arrange their lives in society than to coercively interfere with their designs. But that does not say anything about, much less *against*, the coercive character of the legal system as such: If the Bad Man enters into a contract with another, no matter if bad or good, Holmes explicitly states '[t]he duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it—and nothing else' (Holmes 1897, 462). A while ago I submitted that for somebody 'who is concerned only with the law' this 'focus on the material consequences' (Holmes 1897, 459) may doctrinally well be plausible. But possibly it goes well beyond grasping the isolated and immediate consequences of a given action or omission.

Think about the 'knowledge' Holmes expects our Bad Man to have in order to 'predict […] the material consequences' of his deeds in the case at hand. He has to accept and to understand the legal concept of a contract as well as the conventional structures the law provides in order to create a contractual obligation in the first place. He has to accept and to understand that a judge is endowed with the capacity to adjudicate any quarrel arising out of this contractual obligation; as well as he has to accept and to understand that the judgement putting an end to this quarrel may indeed be determined not by the contractual obligation so created by the employment of certain conventional structures as provided by law but by other legal rules created by legislative or regulatory bodies etc. etc.

Only with this knowledge the endeavors of our Bad Man in predicting 'the material consequences' of his actions will prove to be successful. This knowledge, however, not only makes our Bad Man quite a formidable doctrinal scholar. In order to obtain it, he is also required to adhere in a quite well-behaved manner to the interplay of primary and secondary rules as described by Hart (1961, 77–96).

'Puzzled' as he thus may be, he still is driven by a sting, brought about by the interdependence of those single elements he recognizes as part of the legal system; an interdependence on which the force of the law is built. And so, 'our [learned]

friend the bad man' makes an interesting observation: that law, in both meanings of the word, sanctions its rules; that in doing so, law is indeed an *organization* of force (Kelsen 1961 [1945], 21); that the legal system as a whole is to be perceived as a coercive order backed by the community's monopoly of force (see Lucas 1967 [1966], 56–62), even if its singular parts are not necessarily backed by that force (also see Rill 2011, 8); eventually that force, again in both meanings of the phrase, indeed serves as *ultima ratio regum*.

We may conclude against this backdrop: If we accept the Bad Man's capacity to grasp the legal system to such an extent, we sure should make amends. Because then, the Bad Man would indeed live up to what Dickens wrote in 'The old curiosity Shop': '[I]f there were no bad people, there would be no good lawyers' (Dickens 1850 [1841], 288).

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Coercion and the Normativity of Law: Some Critical Remarks on Frederick Schauer's *The Force of Law*

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Abstract In The Force of Law, Frederick Schauer maintains that in order to analyze the normative force of the law, one should adopt a particular strategy to 'isolate' the effect of laws in determining the behavior of citizens and legal officials. To understand the law's capacity to motivate human behavior, one should look only at the cases where the law conflicts either with a person's best moral judgment or her own self-interest in the matter at stake. In these situations, according to the argument developed in the book, it is an empirical fact that people very rarely obey the law merely by deference to its authority. My point in this paper is to discuss and criticize this methodological assumption and draw some implications about the study of the normativity of law. Firstly, I think that Schauer's argument only makes sense if we accept from the start his own conception of legality, which takes for granted the concept of law defended by exclusive positivism, and the undemonstrated empirical assumption that the people in general and the legal officials also share this conception of legal validity. To counter these hidden assumptions, I argue that exclusive positivism is just one of the plausible forms of explaining the nature of law, and that Schauer's own reservations against philosophical essentialism provide a reason to resist the conclusion that the law must always be defined in a content-independent way. Secondly, I advocate that Schauer's strategy to 'isolate' the effect of law leaves the 'core cases' of legal provisions out of the realm of jurisprudence. To understand the effect of the law and its capacity to motivate the action of citizens and officials, jurisprudence should neither focus on the individual attitudes towards a legal rule, as Schauer appears to be doing in his book, nor concentrate in the cases where the law comes into conflict with one's interests or moral convictions.

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1 Introduction

In his recent book "The Force of Law", Frederick Schauer argues that coercion is an ubiquitous feature of law, and that even though it is not a "necessary" property of modern legal systems it is so prominent in legal activity that no-one could seriously understand how the law guides human behaviour without a plausible explanation of the coercive mechanisms that legal systems possess.

Nonetheless, in addition to explaining the importance of coercion in legal activity, Schauer puts forwards a negative claim about the normativity of law. One of the core arguments of the book is that the law's effect upon citizens and officials only can be appreciated in the cases where a law contradicts these citizens and officials' own interests and moral convictions. It is only in the cases where the law does *not* coincide with a person's best judgments that her actions are actually *based* on the law. On Schauer's view, a person's action is based on the law when the law offers some kind of resistance in her practical reasoning, altering the course of this person's conduct. This implies the following methodology for analysing the force of law: in order to appreciate the difference that law makes, we must consider only the cases in which the law is at odds with one's best moral judgments or one's own interests and preferences.

On Schauer's view, once we isolate the effect of the law in this way we can see that non-coercive laws are generally irrelevant for coordinating the action of legal subjects. Legal norms, on this view, lack any mysterious type of normativity and only make a practical difference if sanctions or other coercive incentives are attached to their operative conditions.

The point of this paper is to offer a response to this negative claim.

In the first two sections, I offer a succinct explanation of the general argument developed by Schauer in the book and of his sceptical position about the normativity of law, with a view to provide the context for the critical remarks that will be presented in the third section. The gist of my argument, which will be specified in the sub-sections of the third section, is that Schauer's methodological strategy to isolate the effect of legal provisions leads him to underestimate the practical difference of legal norms, failing to explain the social character of the law and to account for the "core cases" of legal validity, which comprise the situations in which the law fulfils its moral function of coordinating the action of citizens and officials.

2 Schauer and the Normativity of Law

According to Schauer, Hart's explanation for the obligatory character of law is usually accepted by contemporary legal scholars, albeit with a nomenclature that makes it more confusing and mysterious than necessary. Legal philosophers

typically describe this issue in terms of a puzzle about the source of law's "normativity" (Schauer 2015, 33).

Schauer thinks that the nature of legal obligation is simpler than legal philosophers concede. One is under an obligation when one accepts, or presupposes, or internalizes the rules or commands of some normative system (Schauer 2015, 34). To give a concrete example, if one participates in the practice of etiquette, one has an etiquette-related obligation to follow the rules of etiquette, in the same way as a participant in the practice of playing chess has a chess-related obligation to follow the rules of the game. "As a logical matter", the argument goes, "moral obligation, religious obligation, chessal obligation, etiquettal obligation, and fashional obligation are all species of the same logical genus", and the same goes for a *legal* obligation. *The distinctive feature of a legal obligation is that it stems from what Raz has called the "legal point of view"* (Schauer 2015, 34).

While making a judgment from the legal point of view I am making a judgment "*from* and not about the norms of that system" (Schauer 2015, 34). To have a legal obligation is to be inside the law's normative system, i.e. to engage in a legal practice and operate according to the standards established by that system.

The key concept to understand the difficulties of this position about the nature of legal obligation is the notion of "legal point of view", which appears as a tool to determine the legal status of an obligation.

According to Raz, the "legal point of view" is the point of view of a hypothetical individual who accepts all and only the laws of her country as valid (Raz 2009a, 140). To argue from the legal point of view, one need not assume that such individual exists, but one must consider the norms that would bind her. When I take up this hypothetical point of view, I do not necessarily endorse the rules of the legal system, but I argue from the perspective of the law, that is, I argue on the basis of the law's autonomous criteria and standards.

The legal point of view is neither Hart's external point of view, which is taken up by the observer who limits herself to explaining certain regularities of behaviour, without inquiring into the reasons for that behaviour, nor Hart's internal point of view, which is the point of view of the "member of the group" who *endorses* a rule in the sense of *accepting* and *using* it as a guidance of conduct or as a ground for criticizing the conduct of others (Hart 1994, 88–91).[1] On the contrary, Raz's "legal" point of view is the same kind of value-free point of view that Kelsen attributed to the legal science (Raz 2009a, 142). It is the point of view of those who make "a third category of statements" (Raz 2009b, 152), i.e. "detached" statements that lawyers (including legal scholars and practising lawyers) adopt while interpreting the law and giving instructions to legal subjects (Raz 2009b, 155).

When describing the attitude of officials and law-abiding citizens, Raz seems to be fully satisfied with Hart's description of the "internal" point of view:

[1]According to Raz, "making internal statements" is a "sign of endorsement of the rule concerned. One endorses a rule if one uses it regularly in guiding, evaluating, and criticizing those actions to which the rules applies" (Raz 2009b, 154).

> It seems to me that Hart is right in saying that judges and all other officials regularly involved in applying and enforcing the law do accept and follow it. They may have reservations concerning the moral justifiability of the law but nevertheless they accept and apply it for their own reasons (salary, social involvement, etc.) or for no reason at all. Their legal statements normally reflect this attitude. They are internal, fully committed normative statements (Raz 2009b, 155).

But when it comes to explaining the usual statements of law teachers or lawyers in their advisory activity, he speaks of a very different point of view:

> Legal scholars – and this includes ordinary practicing lawyers – can use normative language when describing the law and make legal statements without thereby endorsing the law's moral authority. There is a special kind of legal statement which, though it is made by the use of ordinary normative terms, does not carry the same normative force of an ordinary legal statement (Raz 2009b, 155).

What establishes the legal validity of the rule of recognition or the basic rules of the legal system, for Raz, is not the attitude of the observer who describes the law from the "legal point of view", but the *acceptance* of the basic norms of the system by the officials who participate in the legal practice and the general attitude of acceptance of the law-abiding citizens.[2]

Schauer seems to fail, however, to sharply distinguish these two points of view. On the one hand, he thinks, as I said above, that the distinctive feature of legal obligations is the fact that they are established from the "legal" point of view. On the other hand, he argues that a legal system creates obligations only for the citizens who internalize it, in the sense of taking it as a guide to action.[3] These two propositions do not fit very well together if we distinguish the "internal" and the "legal" points of view in the way that Raz does.

I do not think that Schauer is correct, therefore, when he neglects the distinction between these two kinds of statements and equates the internal statements of legal participants, who typically endorse a legal rule and accept it as a reason for action, with the statements "from the legal point of view" that legal theorists and law teachers typically adopt. The absence of such distinction can be one of the reasons why Schauer downgrades the importance of the explanation of the normativity of law.

Although detached legal statements (or statements from the "legal point of view") are necessary to identify the content of a Legal obligation, it is impossible to

[2]I think that an important difference between Hart's original formulation of the "internal point of view" and Raz's position about the same point of view is that Raz seems to believe, unlike Hart, that this point of view is not only the point of view of judges and legal officials, but also of the ordinary citizens, at least in the most important cases. According to Raz, "the internal statements are characteristic of the judge, *and of the law-abiding citizens*", whereas the kind of statement called "detached" legal statement "is characteristic of the lawyer and the law teacher (who of course often make internal and external statements as well) for they are not primarily concerned in applying the law to themselves or to others but in warning others of what they ought to do according to law" (Raz 2009b, 155).

[3]According to Schauer, "if one accepts—internalizes, or takes as a guide to action—the system, then that system creates obligations for those who accept it" (Schauer 2015, 34).

appreciate the normativity of law (or the reasons that the law generates for someone) without considering the statements made by the people who actually use the rules of law as a pattern for their own action or for taking a critical stand on the action of others.

The issue of the normativity of law is an inquiry into the difference that the law makes in our practical reasoning, that is, into the "difference in the reasons for action that apply to those to whom the law is directed" (Coleman 2001, 69). To put it more generally, to explain the normativity of normative phenomena "consists in pointing to the way they are related to reasons" (Raz 2011, 6). The question of the normativity of law, understood as part of an inquiry into the nature of law, concerns the explanation (though not necessarily the justification) of "the ways in which the law purports to guide conduct, and what this guidance consists in" (Marmor 2012, 11).

What makes it difficult to explain the normativity of law is that the law "essentially purports to generate identity-related reasons [or 'content-independent' reasons] for action" (Marmor 2011, 63). How is it possible for the law to generate unqualified reasons to act as it says *independently of the content* of the directive that it establishes? Why should legal subjects conform to a legal standard *just because it is the law* that instructs them to do it? These are some of the major problems that a successful account of the normativity of law must resolve.

The normativity of law cannot be fully appreciated by looking at statements from the "legal point of view" in the sense of Raz. If we understand normativity as the capacity to generate reasons for action, we need more than a statement that X is legally valid in order to establish the kind of normativity that the law has. On the contrary, it refers to the law's capacity to give reasons to its addressees, that is, to the legal officials who accept the law and to the people over which it claims to have authority. It concerns, thus, the people (comprising citizens as well as officials) who take the legal rules as reasons for acting or refraining from acting in a certain way. An inquiry into the normativity of law should explain how it is that the law can give reasons for them to act. The important issue is to explain why it makes a difference in one's practical reasoning the fact that *it is the law* that requires one to act in a certain way (Marmor 2012, 61).[4]

Hence, a proper explanation of the normativity of law is *not* an account of mere "legal" reasons, understood as a sub-species of "*practice-related* reasons" that are qualitatively different from the "real" or "unqualified" reasons that one has to act in a certain way.[5] It would be insufficient to say that the law gives only "legal" reasons for action, in the sense that *from the "perspective"* or the "point of view" of the law it is obligatory to do *Φ*. To fully explain the practical relevance of a legal norm N, it is not enough to demonstrate that the law treats the existence of N as a reason for *Φ*-ing. More than this, the explanation must show that the issuance of N *in fact* gives

[4]According to Marmor (2011, 61–62), in legal cases "it always matters that it is the law (or some particular legal authority) that says so. One of the main challenges about the explanation of the normativity of law is precisely to explain this connection between reasons for action and the relevance of the answer to the 'who says so?' question".

[5]See, for instance, Enoch (2011, 16–19).

its addressees a "real" or "unqualified" reason for *Φ*-ing. An informative account of the normativity of law must explain the law's ability to generate *"robust" reasons for action*, which are reasons that trigger pre-existing independent reasons in a special way, by communicating a certain intention that can be recognized by the reason-receiver as playing an appropriate role in her practical reasoning (Enoch 2011, 16–19).

I do not think, however, that Schauer can avoid the issue of the normativity of law, either in his theoretical works about the nature of legal rules or in his more recent account of coercion and the force of law. In his two most important works about the nature of law (Schauer 1991a, 2015), Schauer considers the problem of the reason-giving capacity of law. His important point is not that the law lacks the capacity to give reasons for action in the sense specified in the previous paragraph, as it might appear from his alleged lack of interest in the normativity of law. On the contrary, his core claim seems to be that the law only can generate *prudential* reasons for action, and that the normal way to do it is through its coercive mechanisms.[6] Let us consider how he specifies this claim.

In his older studies on "rule-based decision making", Schauer describes this decision mode as based on "entrenched" generalizations, i.e. on rules which supply "reasons for decision independent of those supplied by the generalization's underlying justification" (Schauer 1991a, 51).

Schauer's method to identify the practical effect of a rule is to concentrate on the cases where the rule is over or under-inclusive with regards to its justification. A rule's factual predicate is "over-inclusive" when its generalization "encompasses states of affairs that might in particular instances not produce the consequences representing the rule's justification" (Schauer 1991a, 32). To give a few examples, the rules "No dogs allowed", "Speed Limit is 55 mph", "No one under the age of 21 shall consume alcoholic beverages" and "Thou shall not kill" can be over-inclusive "insofar as some dogs would not create annoying disturbances, some driving at greater than 55 mi/h is not dangerous, some people under the age of 21 can use alcohol responsibly, and some killing might be morally justifiable" (Schauer 1991a, 32). A rule can also be, in many cases, "under-inclusive" when its factual predicate does not encompass a case where the rule's justification would be applicable: "Just as the factual predicate may sometimes indicate the presence of the justification in cases in which it is absent, so too can the factual predicate occasionally fail to indicate the justification in cases in which it is present" (Schauer 1991a, 32).

A rule only is relevant to guide the action of someone if it is to some extent inconsistent with its justification. If the hypothetical generalization made by a rule coincides with the underlying justification of this rule, then this rule would be superfluous because it would not change one's course of action in any relevant sense. As Schauer puts it in Playing by the Rules,

[6] I come back to this point again bellow at note 7.

> When no recalcitrant experience, occupying the area of under- or over-inclusiveness, is present, the existence of a regulative rule will be neither problematic nor interesting. When a particular application of a rule does not lie within the area of under- or over-inclusion, the decision-maker could just as easily have applied the justification directly, and the rule is superfluous (Schauer 1991a, 71–72).

The distinctive feature of *legal* rules, on this view, is the proper legal authority that they possess. Schauer thinks a rule becomes practically relevant only when the rule requires us to act in a way that contradicts our own judgments about its background justification; it is only in those circumstances that our conduct is actually based on that rule. This account, in my view, is not entirely agnostic about the problem of the *normativity*—understood as the capacity to give reasons for action—of legal rules. The idea of normativity, here, is closely related to the concept of "ruleness", which is a neologism that Schauer deploys to explain the effect of a rule on someone's behaviour (Schauer 1991a, 102).[7]

A rule does *not* have the property of "ruleness" over me when my self-interest or my moral judgment already coincide with what the rule prescribes, as it happens, for instance, with the laws that prohibit me from indecent exposure or the Biblical precepts that prevent me from murdering my neighbour. It is safe to assume, for me and for most of the readers of this paper, that such rules have a low probability of altering the course of our conduct. On the contrary, rules become actually relevant —and thus acquire a certain degree of "ruleness"—when they "channel my behaviour *away* from what it would otherwise have been, making me do things I would otherwise not do", such as paying my taxes or stopping at a red light (Schauer 1991a, 102–103).[8]

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[7]The property of "ruleness" should be understood here also as the capacity that a rule possesses to give reasons for action. It is difficult to establish why Schauer uses this word instead of the familiar concept of "normativity", which is usually deployed to explain the same kind of normative capacity. Why does Schauer forge a distinct concept—in fact, a concept that appears to be even more mysterious and obscure—to express an idea that is relatively familiar to philosophers and legal theorists? A possible explanation could to be that Schauer wants to avoid the use of a nomenclature that is often associated with the moral justification of legal authority. The concept of normativity, as we will see in the next sections, is closely related to the legitimacy of an authoritative pronouncement. A law becomes normative, according to the general argument accepted by many legal philosophers, if it is able to obligate its addresses, i.e., if it is capable to give them *moral* reasons for acting in a certain way. I think that this could be an explanation for Schauer's reluctance to openly address the problem of the normativity of law. When speaking of "ruleness", he wants to emphasize that he is talking about the reasons for action that a rule is capable of generating. But there seems to be an implicit constraint on the character of these reasons. Schauer could be imagining, if this hypothesis is correct, "prudential reasons for action", but never "moral" reasons to the same effect. If this is correct, then he would owe us a justification for this constraint. At first sight, it does not appear to be unwise to admit both moral and prudential reasons to count as a basis for the normativity of law.

[8]According to Schauer, the concept of "ruleness" comprises a dimension of weight: "Ruleness will be greatest where rules commend the highest proportion of extensionally divergent results for a given agent or class of agents. Conversely, the property of ruleness will diminish insofar as a rule does not indicate, for an agent or a class of agents, actions different from those the agent would have performed in the absence of the rule" (Schauer 1991a, 104).

Thus, when Schauer considers the idea of rules he is not looking at them through the same angle as Hart. Whereas the latter is more interested in their social aspect, Schauer is primarily concerned with the psychological effect of the rules. On his view, "the existence of a rule is in an important way agent-specific" (Schauer 1991a, 103). A rule exists for an agent only to the extent that such agent internalizes it and treats it as a reason for action (Schauer 1991a, 121).[9] If we recap that Schauer is thinking about rules that establish their conditions of application "independent of their justification", we can see that "there is no reason to suppose that one who internalizes a rule must agree with its content" (Schauer 1991a, 122). To internalize a "rule *qua* rule", one must internalize its *status as a rule*, and base her decision *on the rule* rather than on her own judgment about the course of action to be adopted in the case that falls under its operative conditions.

In the case of legal norms, we wouldn't be able to classify an enactment as a rule unless that enactment were capable of constraining the behaviour of its addressees, providing some resistance against their preferred course of action in the cases to which it applies. "Because authority is content-independent", Schauer says, "its presence makes a difference only when the subject of the authority disagrees with the content of the authoritative directive" (Schauer 1991a, 129). As an authoritative practice, the law must be able to guarantee a motivating capacity for the rules that it establishes, and one of the major determinants for the normativity of law would be its ability to offer prudential reasons to its subjects by means of threats of sanctions or promises of rewards:

> If we look at the prudential reasons for action, and at the connection between sanctions and such reasons, we can see that the role of sanctions is likely to be particularly large with respect to rules. The value of a rule *qua* rule, when separated from any apparent value to its addressee for what the rule requires in this case, is likely to appear so slight that it will be difficult for many agents, but for the fear of sanctions (including criticism) or hope of rewards (including praise), to recognize it (Schauer 1991a, 104).

[9]Here we can find a very important difference between Schauer and Hart. Unlike Schauer, Hart thinks that the internalization that matters to establish a legal obligation must not be "unilateral", otherwise we would have to give up the thesis of the social source of law. As Kenneth Himma explains, "Hart does not argue it is unilateral acceptance that binds an official to the rule of recognition; that would be problematic because unilateral acceptance does not provide anything that necessarily has independent normative force given what we know about the psychology of ordinary persons. Hart argues instead that it is the joint acceptance by officials together with social pressure on each to conform to the rule of recognition that together warrant characterizing the rule of recognition as being 'obligatory'" (Himma 2013, 169). On Hart's scheme, the existence of law and legal obligation is established in two steps. First, officials must converge in taking the internal point of view towards the rule of recognition. Second, citizens must comply with the rules validated by this rule of recognition. It is the social pressure for compliance, rather than the internalization of the rule of recognition, that establishes a legal obligation for citizens. Though there might be different explanations for the root of this social pressure, it appears to me that a plausible Hartian account to explain it is Himma's view that it is the authorization of coercive enforcement (by officials) together with acquiescence on the part of the citizens that explain how citizens are obligated by the primary rules established by legal officials (Himma 2013, 172–178).

We can see, therefore, that the germ of Schauer's conception of legal coercion was already present in his earlier works about the nature of legal rules. The basic assumption of the new book, by the same vein, is the specific claim that coercion is ubiquitous in legal practices, which is also based on a *theory of legal normativity* predicated on the motivating capacity that *sanctions* and other *coercive legal instruments* exert on the subjects of the legal order. If we mean by legal normativity the law's capacity to give reasons, it becomes obvious that Schauer also has an explanation for the normativity of law. Schauer's real disagreement with the mainstream theories of legal normativity resides in his assumption that coercion is the only successful candidate to explain the reason-giving capacity (or normativity) of legal norms.

In spite of the attacks on the advocates of philosophical theories of the normativity of law, Schauer himself seems to be particularly concerned with the problem of the reason-giving capacity of legal rules. One of the main purposes of the book, as he puts it, is to explain the law's "capacity to shape and influence what people do" (Schauer 2015, 45). To understand the law's capacity to give reasons, however, Schauer adopts a method of analysis that focuses exclusively on the cases where the law contradicts its subjects' moral or self-interested reasons for action. He thinks that the pronouncements of law, "when they make a difference", are at odds with individual self-interest and individual best judgments (Schauer 2015, 98).

This strategy to isolate the effect of a legal rule is what constitutes Schauer's methodology to determine the force of law. It is this methodological choice that leads Schauer to think that the only determinant of the practical difference of the law is the coercive capacity of legal institutions.

3 The Possibility of Non-coercive Laws and the Search for the Puzzled Man

One of the important points of The Force of Law is the rejection of essentialism in the explanation of the typical features of the legal system. A good theoretical account of the law should not spend much time and energy trying to find out the "necessary features" of any possible legal system, but should focus instead on the most interesting features that explain the way that the law functions in our practical lives.

As a consequence, even though Schauer expressly admits the logical possibility of non-coercive legal norms, he claims that this category of norms is statistically insignificant and that the number of people who "take law's norms as reasons for action absent some form of coercion or incentives is so small as to be hardly worth worrying about" (Schauer 2015, 46). Coercion, for him, would be to law "what flying is to birds: not strictly necessary but so ubiquitous that a full understanding of the phenomenon requires that we consider it" (Schauer 2015, 40).

He grounds that assumption on some empirical literature about the influence that legal rules exert upon their subjects when they differ from these subjects' self-interest or moral judgments, and on a direct criticism of Hart's views on the normativity of law.

Let us consider the problems that Schauer sees in Hart's position.

Schauer is not entirely sceptical about the reach of the "constitutive capacity" of legal rules, which was one of Hart's major points to criticize the views of imperativist theories such as those of Bentham, Austin and, more recently, Kelsen.[10] According to Hart, it would be a mistake to believe that coercion is always and necessarily an ingredient in legal norms. Along with the rules and commands that guide our conduct by the threat of sanctions (or promise of rewards), the law is composed of several rules that "create possibilities that would otherwise not exist" (Schauer 2015, 27). The standard example would be the so-called "power-conferring rules", or the constitutive rules that create legal institutions such as corporations, trusts, contracts, marriage, and so on. Hart's most basic intuition, which is used to explain the conventional foundations of legal validity, is that the master rule of the legal system—the "ultimate" rule of recognition—arises as a convergent social practice among officials who accept a common criterion of legal validity from the "internal point of view", and thereby adopt a "critical reflective attitude" towards the detractors of this rule. The acceptance of this constitutive convention, for Hart, is normally independent from any coercive apparatus upon the judges and the legal officials of such system.

Schauer thinks that official acceptance of a conventional rule of recognition need not necessarily be accepted as a matter of conviction or any other coercion-independent reasons: "Judges may internalize the canons of statutory construction to avoid the penalties of reputational damage and to gain the rewards of professional prestige and advancement. And many officials may internalize and apply legal rules simply because of fear of imprisonment or death" (Schauer 2015, 41). Nonetheless, as a matter of fact, Schauer is happy to concede that it is "far more common" that the legal systems are based on social rules that are shared by legal officials who are "committed to the system for sanction-independent reasons" (Schauer 2015, 41).

When acknowledging the nonlegal foundations of the legal system—a point that he borrowed both from Kelsen and Hart—Schauer admits that the determinants of the master rule of the legal system may reside, as it has happened in many legal systems, "on a shared commitment to advance the common legal enterprise and the collective goods that it can produce" (Schauer 2015, 81), and that the ultimate rules

[10]When considering the "constitutive capacity" of legal norms, Schauer is referring to Searle's concept of "constitutive rules", which are rules that create institutions and enable us to interact with them. It is worth mentioning, here, Searle's famous distinction between "regulative" and "constitutive" rules: "regulative rules regulate antecedently or independently existing forms of behaviour […]. But constitutive rules do not merely regulate, they create or define new forms of behaviour. The rules of football or chess, for example […] create the very possibility of playing such games" (Searle 1969, 33).

of a legal system typically rest "on something that cannot be explained by coercion alone" (Schauer 2015, 85). But immediately after admitting this possibility of grounding the law on a cooperative arrangement, he moves on to claim that this only holds true for the most basic and abstract constitutional conventions of the legal system: "once we descend bellow the pinnacle of the governmental hierarchy, we see officials whose legal responsibilities are enforced not by their general agreement to obey the law *qua* law but by coercive powers designed to ensure, as it is often put, that no person is above the law" (Schauer 2015, 85).

A crucial point of Schauer's book is the contention that Hart underrates the importance of coercion in legal activity. Schauer seems to be troubled by Hart's assertion that the "principal functions of the law as a means to social control" can be found not on the official activity that imposes sanctions on the persons who fail to comply with their legal obligations, but on "the diverse ways in which the law is used to control, to guide, and to plan life out of court" (Hart 1994, 40). Even though sanctions can be vital for reassuring the motivating capacity of the law, they will always be "ancillary provisions for the failures of the system" (Hart 1994, 40). Sanctions might be important for an agent like Holmes' "bad man", i.e., for people "whose behaviour vis-à-vis the law was entirely a function of what the law would do to him or not do to him if he engaged in this or that conduct", but not for ordinary people and law-applying officials, who quite often can be regarded as "puzzled men" that are "disposed to comply with the law *just because it is the law*", i.e., who want genuinely to comply with the law once they know exactly what it requires them to do (Schauer 2015, 42).

As I will try to specify in the next section, Schauer's strategy to criticize Hart and the legal philosophers interested in the normativity of law is to cast doubt into the ideas—that he attributes to Hart—that sanctions are "ancillary" and that the majority of the citizens and officials is constituted by "puzzled men" that are willing to comply with the law once they know how the law directs them to act. He argues that this explanation of the reason-giving capacity of the law is an empirical matter, and that there is little evidence that Hart is right in his empirical assumptions (Schauer 2015, 47).

After identifying the limited situations in which he thinks that the "law *qua* law" plays a role in guiding the conduct of legal subjects (both citizen and officials), Schauer claims that, in reality, there are very few instances of "puzzled men", and that the most reasonable explanation for compliance with the law is the motivating capacity that coercion provides for legal actors.

I will try to discuss, in the following sections, some of the problems of this strategy and, in particular, of Schauer's method to determine when an action is based on the law. His method, as we have seen, is to isolate the rule from the subject's best moral judgments and self-interested strategic behaviour. It is to isolate the effect of the law by concentrating the analysis only on the cases where a law is regarded by its subject as either "immoral" or "inconvenient" (in the sense that its application contradicts the preferences or interests of the subject). This method to understand the normative effect of a law requires us to disregard (in the analysis) all the cases where such law coincides with the subject's moral judgments

or personal preferences. Laws that coincide with the subject's moral judgments or require her to act in accordance with her own interests are irrelevant because they cannot change one's course of action in any significant sense. To understand the practical significance of a law, we must take up the perspective of Holmes' "bad man", who cares not about what the law is, but instead about what the law can do to him if he complies not with his legal obligations.

4 Obedience to the Law and the Foundations of Legal Authority

The empirical arguments to show the absence of "puzzled men" in our real world constitutes the core of Schauer's objection to Hart and the legal philosophers interested in the normativity of law. But it is also the most controversial part of his theoretical construct. It has been argued, for instance, that Schauer's description of the puzzled man's motivation for obeying the law "is an incomplete explanation of the reasons one has to follow the law", which may "hide many different motivations" (Miotto 2015). To say that one obeys the law *because it is the law*, at most of the time, is only a partial answer that spares people from reflecting on the deeper strand of reasons that they have for following the law. As Miotto puts it in a clever review of Schauer's book, Hart's description of the puzzled man "is compatible with him being motivated by myriad reasons", including moral, pragmatic, patriotic, and so forth (Miotto 2015), and once we realize this possibility it becomes easier to accept that there might be more puzzled men in the real world than Schauer supposes. Schauer's empirical analysis to demonstrate that people do not comply with the law in the absence of a coercive mechanism will fail if we show that these non-coercive reasons can be genuine reasons for acting in accordance with the law.

This line of criticism is directed towards the methodological choices that Schauer made in order to vindicate his point about the irrelevance of non-coercive law.

But the difficulty of Schauer's account of the force of law can be further specified, and split into more specific problems, which I intend to address in the rest of this section.

Firstly, Schauer's argument loses traction if we don't accept from the outset his own conception of legality, which implicitly takes for granted both the assumption that authoritative legal pronouncements are identified in the strict sense defended by exclusive positivism, and the undemonstrated empirical assumption that people in general and legal officials also share this conception of legal validity. To counter these hidden assumptions, I argue that exclusive positivism is just one of the plausible forms of explaining the nature of law and that it may well be the case that either "inclusive positivism" or Dworkin's interpretivism is more appropriate to provide an accurate description of the legal practice.

Secondly, it can be argued that Schauer's strategy to "isolate" the effect of law fails to account for the social character of legal norms. To understand the effect of law and its capacity to motivate the action of citizens and officials, jurisprudence should not focus on individuals. As I argued above, "unilateral acceptance" is insufficient to establish a legal obligation.[11] It makes perfect sense to argue, for instance, that one is legally obligated to do X even if one has not internalized such obligation, and even if he chooses not to comply with it. Once the law is understood as a *social* practice, whose rules come from social sources, the obligatory character of law cannot be captured by looking only to the individual attitudes that persons may have towards the law. Adherence to legal rules is a social phenomenon, rather than the outcome of an individual action.

Finally, Schauer's methodology for identifying the force of law has led him to concentrate only on the cases where the law comes into conflict with the interests and the moral principles endorsed by its addressees. Law is relevant only in the exceptional cases where it is regarded by its subjects as "immoral" or "inexpedient". Though there may be a non-negligible set of cases that fit this description, these cases are probably marginal and peripheral.

Let us consider these issues in more detail.

4.1 On Schauer's Conception of Law

When Schauer inquires whether *the law* makes a practical difference on people's judgments independently of its coercive apparatus, he takes for granted the superiority of "exclusive positivism" over both the "inclusive" version of legal positivism and the Dworkinian conception of "Law as Integrity".

Despite the fact that Schauer asserted, towards the end of Playing by the Rules, that he believes that inclusive positivists are right when they argue that the legal system may contingently incorporate moral criteria of validity into its rule of recognition (Schauer 1991a, 198), it seems doubtful to me that his account of law as a system of rules is compatible with any conception of inclusive positivism. As Schauer himself explains, the only constraint that inclusive positivism places upon the concept of law is the conceptual point that the determination of law's content is "made by the community", in a way that there is no *necessary* connection between law and morality (Schauer 1991a, 196–197).

If inclusive positivism is right, then we must admit the possibility that moral values and principles are brought into the heart of positive law. According to inclusive positivism, "moral values and principles count among possible grounds that a legal system might accept for determining the existence and content of valid laws", as it happens, for instance, when the rule of recognition contains "explicitly moral tests for the legal validity of Congressional or Parliamentary legislation"

[11] See above at note 9.

(Waluchow 1994, 82). Hence, as Hart has put it in the Postscript to The Concept of Law, inclusive positivists hold that there is nothing in the rule of recognition that prevents principles and moral values from being transformed into authentic legal norms (Hart 1994, 250–254).

This possibility is precluded when the law presents itself in the way that Schauer thinks that it should be: as a system of rules that are binding in a relevant way only when they are over or under-inclusive. Though Schauer is aware that it is not necessarily the case that the legal system will be, as a descriptive matter, a system of rules, the *typical* and *desirable* form of the legal system should be constituted by rules (Schauer 1991b, 645). Laws should allow, according to Schauer, for a rule-based decision-making in which the conduct of the legal subjects is guided by "entrenched generalizations", which always provide reasons for action independent of their underlying justification (Schauer 1991a, 51).

Nonetheless, this is not the main problem that inclusive positivism poses for Schauer's conception of law. Inclusive positivism is incompatible not only with the type of legal system that Schauer deems most desirable, but also with Schauer's methodological strategy for isolating the effect of legal norms. If, as inclusive positivists believe, it is possible that the content of the law is dependent on moral evaluations, then Schauer's method to determine when a decision is "based" on the law is likely to fail. Schauer believes that an action is based on the law only when that action differs from the agent's own moral judgments. His methodology to identify an action as legally obligatory presupposes a test for establishing legal validity that is entirely independent from morality and only is compatible with exclusive positivism. Inclusive positivists admit the possibility—which should not be regarded as unusual in legal systems with a written constitution and some form of judicial review of legislative enactments—that the rule of recognition incorporates abstract principles that make it impossible to determine the content of the law without making a moral judgment. In these cases, it is impossible to determine the content of a specific legal proposition without referring to moral considerations. The very possibility of isolating the law from the moral judgments of the citizens and legal officials, which is the condition that Schauer considers essential for assessing the effect of a law, seems to be at odds with the kind of reasoning that inclusive positivists would deploy to identify the law when it incorporates moral principles in the rule of recognition. If inclusive positivism is correct, then Schauer's methodology to determine the obligatory character of a legal rule is untenable in many important cases, like the all the hard cases and the vast majority of cases where constitutional interpretation is at stake.

By the same token, Schauer's attempt to "isolate" the effect of law from its justification, provided by the moral principles of the community, is also incompatible with Dworkinian interpretivism. In Dworkin's conception of legality, the law is constituted not only by the legal materials established in the sources of law, but also by the principles of political morality that underlie the legal system and provide its moral justification. To understand the law, one must adopt a constructive interpretation of the legal materials (and the legal practice) to make the law the best it can be from the standpoint of the moral principles that are embedded in the

Constitution (Dworkin 1986). The content of the law, for Dworkin, is not identical to what Ruth Gavison has called "first-stage law".[12] On the contrary, it is established by an interpretive reasoning informed by the political value of "integrity", which applies in the following way in the dimension of adjudication: "judges who accept the interpretive ideal of integrity decide hard cases by trying to find, in some coherent set of principles about people's rights and duties, the best constructive interpretation of the political structure and legal doctrine of their community" (Dworkin 1986, 255).

A supporter of Dworkin's conception of law, therefore, would probably raise an objection to the type of empirical analysis that Schauer is offering in his book.

> If the very idea of 'law' included a wide range of political, moral, empirical, and policy considerations, then making any attempt to isolate the effects of a narrower conception of positive law would be a fundamentally misguided enterprise (Schauer 2015, 67).

Does Schauer have a reasonable answer to this objection? In the book, he replies by saying that the Dworkinian objection "defines away what would otherwise be a range of important questions" (Schauer 2015, 70). He thinks that Dworkin's conception of law "makes it virtually impossible to determine the effect on the decisions of judges, policy makers, and the public of what *the ordinary person and the ordinary official take to be the law*: the category of materials largely dominated by statutes, regulations, reported judicial decisions, written constitutions, and the conventional devices of legal analysis" (Schauer 2015, 70).

He provides, therefore, an empirical argument in reply to a philosophical one. Is this a plausible strategy to counter the objection of the hypothetical supporter of Dworkin's philosophy of law?

Before we answer this question we must notice that the same kind of worry could affect a defender of inclusive positivism, since that position, too, makes it difficult to isolate the effect of the law from the moral judgments of the interpreter, at least in the cases in which the rule of recognition incorporates moral values into the criteria of validity of the legal system.[13]

But let us come back to the question: Does Schauer's empirical claim do any work to assess the soundness of Dworkin's theoretical conception?

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[12]Gavison uses the terminology "first-stage" law to identify what Dworkin would characterize as the pre-interpretive legal materials that stem from the sources of law (Gavison 1987, 30–31). Schauer's account of the force of law is intended to explain, however, just what Gavison would classify as "first-stage law". He thinks that in his book he does not to need to explain "whether first-stage law is all or just some of law" because what most people, including most famous practitioners of civil disobedience, think of law is not the set of norms resulting from Dworkinian interpretivism, but rather the type of 'first-stage' law that exclusive positivists are talking about (Schauer 2015, 70).

[13]A milder version of the objection presented in the quote above could be adduced with regards to inclusive positivism: "If the rule of recognition could include political, moral, empirical and policy considerations, then, whenever this incorporation occurs, making any attempt to isolate the effect of a narrower conception of positive law would be a fundamentally misguided enterprise".

For some critics this might be a major problem, since in order to raise the question of the force or the impact of the law one must already presuppose a theoretical position on the conceptual problem of determining which theory is to be preferred. A theoretical conception must be assumed before the empirical point is raised. Under this view, an answer to the problem of the nature of law is logically prior to any further inquiry on the empirical point of its social efficacy or its practical difference. Schauer would be guilty of a category mistake. He would not be able to prove that his conception of law is better than Dworkin's merely with empirical data about what people think that the law is. After all, it may well be the case that the majority of citizens and officials are simply wrong or haven't had a proper chance to reflect about this theoretical question. To dismantle a philosophical argument about what the law is, one would need also a philosophical argument.

Nonetheless, it is not difficult to imagine an answer that Schauer could offer to this objection. Schauer's strategy to juxtapose an empirical analysis to philosophical theories of law becomes much more plausible if one rejects Dworkin's idea that legal philosophy is itself a constructive interpretation of the legal practice—which is, in Dworkin's view, itself informed by the abstract principles of political morality that provide reasons to understand the law in a certain way—and accepts the view that the point of legal philosophy—or at least of the "analytic" type of legal theory in which Schauer is interested—is to make a conceptual analysis of ordinary legal practices, taking our intuitions as starting point. If we accept Raz's point that our ordinary legal practices and understandings construct legal concepts, then it makes sense to think that while legal officials can be occasionally mistaken about the law they cannot be systematically confused about the nature of law (Raz 1994, 217).[14] If we accept this position, then Schauer will have a good point against Dworkin if he can show that the ordinary understanding of citizens, lawyers and legal officials is the same as that of the theory that he supports.[15]

The strongest way to criticize Schauer's argument in support of exclusive positivism, therefore, is to argue on the basis of this approach to conceptual analysis and suppose that it is indeed possible to evaluate the plausibility of a conception of law on the basis of the type of empirical data that Schauer is arguing for.

In contemporary philosophy we can find some efforts to establish criteria or virtues to determine the soundness of an explanation, a conception, an account or a theory. A promising attempt to provide a set of virtues or criteria to evaluate

[14]I owe this point to Kenneth Himma, who prevented me from making the bad mistake of ignoring this answer that is available to Schauer.

[15]Conceptual analysis, according to the view defended by most legal positivists, "presupposes that the concepts central to law are social constructs arising from the common core understanding of legal practice by legal practitioners" (Himma 2013, 154). In this sense Kenneth Himma assumes, with Raz, "that legal practitioners cannot be systemically mistaken about the nature of the core practices of law", and therefore that "an adequacy constraint on any theory of legal obligation is that it conforms to the ordinary core understanding of judges, lawyers, and legislators" (Himma 2013, 154).

explanatory hypotheses is found in Quine and Ullian's book The Web of Belief, where they suggest 6 virtues that a sound explanation should pursue: *conservatism,*[16] *modesty*, *simplicity*, *generality*, *refutability* and *precision* (Quine and Ullian 1978). To these criteria, it might be wise to add the criteria of *consilience*, which refers to "how much a theory explains" (Thagard 1978, 79) or how comprehensive is the explanation provided by it. Could these criteria offer us any guidance on this matter?

Perhaps an advocate of Schauer's position could argue that these criteria allow us to test the plausibility of an explanation on the basis of the empirical evidence and the previous knowledge that we have.[17] A good conception of legality would have to "fit the facts", and the proper way to evaluate such conception would be to examine it in the light of these (or other) criteria of theoretical legitimacy.

Nonetheless, none of this does any work to assess Schauer's assumptions in his reply to the supporters of Dworkin, because Schauer does not offer any evidence of the truth of his empirical claim that the "ordinary person" and the "ordinary official" are in agreement that the law is constituted only by the materials contained in the "formalistic" sources of law, with no further appeal to the type of interpretive reasoning that Dworkin is calling for. Schauer is assuming, as a matter of fact, the undemonstrated premise that the ordinary citizen and the ordinary official are adepts to exclusive positivism, but he fails to provide any warrant for that assumption.

In order to be consistent with his reservations against philosophical essentialism, Schauer would have to admit that exclusive positivism, like any other conception of legality, lacks a privileged metaphysical status. Just like any other theory, it is just one of the explanations of the legal practice. Hence, to determine whether exclusive positivism, inclusive positivism or Dworkinian interpretivism is the dominant conception of legality among citizen and officials, one needs to look to the practice of officials and citizens. But to look at this practice does not mean only to ask them a general and a-contextual question about what they think that the law is. It is not something that can be achieved by making surveys or counting heads. On the contrary, it is to consider the cases where conceptions of law play any practical role. One should look not to the easy cases, which will be resolved in the same way no matter which theoretical conception of law is advocated by the decision-makers, but rather to the so-called "hard cases", where the judge's conception of legality makes a practical difference and does some work in the reasoning of the decision-maker. One of the greatest contributions that Dworkin has made to jurisprudence, in fact, was to show that in pivotal cases there may be multiple theoretical disagreements—i.e. disagreements with regards to the grounds of law or criteria of legality—among the participants of the decision-process. In effect, only in the so-called "pivotal" or "hard" cases can we find genuine theoretical disagreements among judges, and the

[16]The virtue of "conservatism", for these authors, is interpreted in a very specific way, and means only that we should avoid an explanation which conflicts with our previous set of beliefs.

[17]Leiter, for instance, tried to argue along these lines in order to claim that exclusive positivism can provide the best explanation for the kind of theoretical disagreement that Dworkin is talking about in Law's Empire (Leiter 2009, 1239).

actual consequences of the different conceptions of legality that the judges might adopt.

Once we focus on these cases, it becomes visible that Schauer's empirical assumption that the ordinary person and the ordinary official think that the law is constituted only by "the category of materials largely dominated by statutes, regulations, reported judicial decisions, written constitutions, and the conventional devices of legal analysis" (Schauer 2015, 70) is far from evident.[18] In order to prove that his project is feasible, Schauer would need empirical evidence to uphold this point, especially because his advice to interpret the law without regard to its justification is not as intuitively appealing as he claims. If it turns out that most citizens and officials, in controversial cases, apply criteria to identify the law that are not limited to the realm of exclusive positivism, then his claim that the content of law is always independent from political morality remains ungrounded. It is only on "hard" or controversial cases that any conception of law matter in adjudication, since it is only on such cases that citizens and officials might be required to apply different validity criteria that different legal theories try to establish when they purport to explain the nature of law. It does not matter, here, whether hard cases are rare or exceptional in the daily activities of lawyers and judges. Easy cases can be the majority, but they are irrelevant for one to choose a legal theory over another because all of these theories explain the decision of easy cases in the same way. Easy cases are always resolved without the need to address any theoretical questions about the nature of law, so we cannot expect participants in an "easy" legal dispute to reflect about the particular features of the appropriate test for identifying the law. Hence, in order to be able to ground his empirical claim that officials and citizens believe that the law is constituted only by legal materials that are generally designated as "first-stage" law, Schauer must explain what these citizens and officials do in hard cases, rather than simply assume that they all share an exclusive positivist conception of legal validity.

Furthermore, if we look at the explanation that exclusive positivists offer for the presence of moral concepts in the legislation or in constitutional provisions, we can see how utterly implausible their view about the content of the law is. Whenever the written law employs concepts like "public interest", "equal protection of laws", "due process of law", "best interest of the child", "fair use", "cruel punishments", "good faith" and many others, exclusive positivists will argue that the law has run out and that judges and citizens are required to decide on the basis of "extra-legal" considerations. Moral concepts in legislation are thus read as "mandates" authorizing legal officials to decide the case on the basis of their own moral judgments, rather than on the valid law. In the exclusive positivist story, "while the rule referring to morality is indeed law (it is determined by the sources thesis), the

[18]Schauer assumes that these materials—that can be designated as "first-stage" law in the sense of Ruth Gavison (see above at note 12) or "pre-interpretive" law in the sense of Dworkin (1986)—are exhaustive of the concept of law: "only with something like the category of first-stage law in hand can we understand the perspective on law not only of most ordinary people but of the legal system itself" (Schauer 2015, 70).

morality to which it refers is not thereby incorporated by law" (Raz 2009c, 46). The legal rule that requires citizens and officials to make moral judgments would be analogous to the norms of municipal law that require one to apply foreign laws to resolve a conflict of laws from different legal systems (Raz 2009c, 46). Adjudication on the basis of moral considerations would be like the cases where judges apply foreign norms to solve municipal legal disputes. In both cases, "the distinction between normative systems is preserved even when one system borrows from the other" (Shapiro 2011, 272).

Elsewhere, I have called this argument the "Moral Mandate Thesis", and I argued that it is not free from some very uncomfortable consequences:

> Though this thesis is elegant from the analytical point of view, it pays a high price when we consider its practical implications. In effect, most of the normative requirements contained in the texts of contemporary Constitutions and Charters of Rights would be classified as 'non-legal' or merely 'law-like' provisions. When the 14th Amendment of the American Constitution forbids states to 'deny to any person within its jurisdiction the equal protection of laws', it would be merely granting judges a 'mandate' to engage in further social planning. In European Human Rights Law, for instance, the entirely of the European Convention of Human Rights would not be labelled 'law', and we would be left with a European Court of Human Rights whose competence would be to legislate nearly from scratch. It would be a court of non-law, who would be very tempted to regard itself as free to engage in sheer judicial activism (Bustamante 2012, 239–240).

The Moral Mandate Thesis, as Dworkin rightfully argues, is not only counter-intuitive, but also victim of a "heroic artificiality":

> That thesis stands ordinary opinion on its head: most lawyers and laymen think not that school segregation laws were perfectly valid until the Supreme Court decided they should not be enforced, but rather that the Court struck these laws down because it rightly found them constitutionally invalid (Dworkin 2006, 209).

Schauer's method to identify the law, which is implicit in the way that he frames the question of the force of law—i.e. in the way that he understands that a decision is based on the law—is based on a theory of law, namely "exclusive" positivism, that is different from the ordinary understanding of citizens, lawyers and legal officials.

The first problem of Schauer's account of the force of law, thus, is that it lacks both a conclusive philosophical argument for his own concept of law and the empirical evidence that would be necessary to demonstrate that his concept of law is shared by officials and citizens in controversial cases.

4.2 On the Social Character of Legal Norms

The controversial character of Schauer's conception of law is not, however, the only difficulty that his account of legal coercion faces. It can also be argued, as I will try to do next, that his view on the practical difference of law is problematic because his account of law fails to acknowledge the social character of legal norms.

One of the reasons for the success of Hart's legal theory is its capacity to explain the *social* character of the law. In The Concept of Law, Hart presents a theory that depicts the law as a system of "social rules in a double sense: both in that they govern the conduct of human beings in societies and in that they owe their origin and existence exclusively to human social practices" (MacCormick 2008, 31). According to MacCormick, two features distinguish the law from the general class of social rules, in Hart's project: (*i*) the fact that they are concerned with "obligations" and "duties", that makes them "peremptory" reasons for action; and (*ii*) the fact that, unlike moral rules, "they have a systemic quality depending on the relationship of two kinds of rules, 'primary' and 'secondary' rules, as Hart calls them" (MacCormick 2008, 31).

Hart's contribution to this topic was immense. He taught us, for instance, that what establishes the law is a "shared attitude" of legal officials towards a constitutive convention that defines the terms and the limits of legal validity. The acceptance of that convention from the internal point of view is the main source of legal validity in any given society. "A social rule exists when convergent behaviour is conjoined with a critical reflective attitude towards that behaviour" (Coleman 2001, 82). It is this critical attitude, according to Hart, that makes the law *normative* and distinguishes a genuine obligation from the orders of a gunman that obliges you to deliver him your money under the threat of violence.[19]

After Hart, it became very difficult to neglect the social and the distinctively normative dimension of law.

Nonetheless, this is precisely what Schauer does when he focuses exclusively in the action of individuals—rather than groups—in order to measure the law's capacity to determine the behaviour of citizens and officials. When considering the ruleness of a given directive, Schauer focuses, as I mentioned above, on the psychological aspect of rule-based decision-making, and treats the existence of a rule as "agent-specific". The attribute of ruleness is a feature that an entrenched generalization has *for the agent whose conduct it purports to guide*, without considering the social dimension of the rule in question. A rule R, for Schauer, would exist only for the individual whose action is guided by it, and not for the other members of the social group that has created it. Schauer seems to be thinking that the law only may generate, if at all, purely subjective reasons for its addressees. And this sounds implausible, for me, because the social group that lives under certain laws can only coordinate their actions in accordance with a rule if that rule exists in the

[19]One can argue, at this point, that while the rule of recognition is a social rule, the primary norms produced in accordance with it are not. Although the idea that the rule of recognition is a social practice can explain how the secondary rules become normative for officials, it cannot explain how primary norms become obligatory for private citizens. The real challenge for a Hartian (or post-Hartian) theory of legal normativity would be to explain how it is that the law becomes normative for the ordinary citizen. Schauer could still have a good account, therefore, to explain how coercion can provide for the ordinary citizen a good set of prudential reasons for acting in accordance with the law. Though this argument is sound, I will contend, in the final section of this paper, that the most it can do is to show that coercion is a strong determinant of the normativity of law, and not that the law is superfluous in the absence of coercion, as Schauer seems to believe.

social world and is capable of giving reasons for action that the members of the legal community can share. Even if I don't acknowledge the existence of a legal rule, or I don't see this rule as legally obligatory, the rule at issue will still be valid if it passes the test provided by the rule of recognition, and will still be capable of creating a legal obligation. This rule can still provide a reason for me to act, and as soon as I become aware of its existence I will be able to acknowledge this fact. I might, by mistake, fail to take this reason into consideration, but this affects neither the existence nor the practical significance of the rule.[20]

This poses a problem for Schauer's theory of legal normativity. While assessing the reason-giving capacity of legal norms, Schauer never considers the way that rules affect the behaviour of the *group* or the co-ordination of its members to a common goal. The effect of the legal norms is analyzed on the basis of its capacity to provide a directive for each individual, instead of the group.

Furthermore, as I mentioned at the end of Sect. 2 of this paper, Schauer's methodological strategy to show the effect of a law is to provide empirical evidence for the claim that both people in general and officials do not follow the law in the absence of coercion, at least in the cases when such law contradicts their self-interest or their moral judgments about a particular issue. This is how he summarizes the argument:

> Because the commands of law, when they make a difference, are typically two steps removed from individual self-interest, and even one step removed from even individual best judgment, coercion appears necessary to motivate both citizens and officials to take actions so removed from their own interests and their own considered judgments. This is why coercion in law is so ubiquitous, and it is why coercion may be the feature that, probabilistically even if not logically, distinguishes law from other norm systems and from numerous other mechanisms of social organization (Schauer 2015, 98).

Schauer seems to be endorsing, thus, what Raz has described as the "*no difference thesis*", i.e. "the view that authority does not change people's reasons for action" (Raz 1986, 31). According to Schauer, what can change the reasons for action that a person may have is not the content-independent directive established by a legal authority, but only the threat of coercion that a de facto authority can pose.

Contrary to Schauer, I think that something is lost when we try to explain the normativity of law in this way. Instead of explaining the practical difference or the normative force of law, Schauer ends up with a theory of the normativity of coercion. The law as such, for him, always counts for nothing. When obeying the commands of a legal official, one is acting in the same way as he or she does when the gunman requires one to deliver one's money. What actually does the work here is not the law, but the mechanisms of coercion. To put it in very crude terms, a person obeys the law *because* of the incentives that coercion provides. The reason

[20] I think that Himma is correct, thus, when he argues that the acceptance required to establish the obligatory character of a social norm cannot be "unilatteral", as Schauer seems to think. See above at note 9.

that most legal philosophers do not see this point is that they normally have difficulty to isolate the effect of the law, which only can be appreciated when the legal rules offer a resistance for us, i.e. when they alter the course of our behaviour and coincides neither with our self-interest nor with our own moral judgment about a particular matter.

We can see two separations here: first, the normativity of law is separated from the shared acceptance of legal conventions; and second, the normativity of law is separated from the moral reasons that one might have to adjust her conduct to the legal directives.

Perhaps the best example in favour or Schauer's point is the legal obligation to pay taxes. It is reasonable to assume that for most people it is against their self-interest to pay taxes on the income that they earn. Furthermore, few are the people who are so strongly committed to a normative theory of justice as to regard themselves as morally obligated to pay heavy taxes on their income. It is not absurd to think, therefore, as Schauer does, that the only reason why people pay taxes is the desire to avoid the sanctions that the legal system is able to apply if they resist to fulfil their fiscal obligations.

Nonetheless, I think that this is too simplistic an explanation for the normative force of the laws that require one to pay her taxes. What is missing in Schauer's reasoning is an explanation of the social foundation of legal norms, and the way that they relate to the moral justification for the authority of the law.

In order to see what is missing in Schauer's explanation, let us consider some alternative views. We can begin with the question of when it becomes attractive, for a community, to coordinate people's actions according to the law. The "logic of circumstances" may be of some help here. As Waldron has argued in support of the normativity of legislation, what makes the laws relevant and worthy of respect, in a political community, is the important achievement of "action-in-concert" that they allow in spite of the deep disagreement about the proper political action to be adopted. Waldron explains this problem with the concept of "circumstances of politics". The circumstances of politics obtain where there is a "felt need among the members of a certain group for a common framework or decision or course of action on some matter, even on the face of disagreement about what that framework, decision or action should be" (Waldron 1999, 102). It is under the circumstances of politics that a legislative procedure that produces a common norm becomes a legitimate option to coordinate the action of the community at stake.

Shapiro argues along similar lines in order to establish the normativity of the law. He adopts the same logic of circumstances and refers to the social conditions which make social planning according to the law desirable and justified as the "circumstances of legality". For Shapiro, "the circumstances of legality obtain whenever a community has numerous and serious moral problems whose solutions are complex, contentious, or arbitrary" (Shapiro 2011, 170). It is under the circumstances of legality that guidance according to the law becomes the best moral option for coordinating the action of the members of the community. In these circumstances, for Shapiro, "the benefits of planning [by the law] will be great, but so will the costs and risks associated with nonlegal forms of ordering behaviour,

such as improvisation, spontaneous ordering, private agreements, communal consensus, or personalized hierarchies" (Shapiro 2011, 170). One of the central claims of Shapiro's own account of the nature of law, thus, is that the moral aim of the law is to "remedy the moral deficiencies of the circumstances of legality" (Shapiro 2011, 214).

A good explanation of the normativity of law must offer, therefore, an account of the social source of legal normativity and of the moral reasons that provide an adequate justification for the authority of law.

A similar strategy to resolve this problem is Coleman's attempt to apply Bratman's idea of "shared cooperative activity" (SCA) as an explanation for the normative force of the rule of recognition of a legal system. According to Coleman (who followed Shapiro's earlier thoughts on this point), "SCA is something we do together", such as "taking a walk together, building a house together, and singing a duet together" (Coleman 2001, 96).

There are at least three characteristic features of SCA: (i) "mutual responsiveness", in the sense that "each participating agent attempts to be responsive to the intentions and actions of the others"; (ii) "commitment to the joint activity", in the sense that "each have an appropriate commitment to the joint activity"; and (iii) "commitment to mutual support", in the sense that "each agent is committed to supporting the efforts of the other to play her role in the joint activity" (Coleman 2001, 96). All these features, for Coleman, appear in the practice of officials of being committed to a set of criteria of legality comprised in the rule of recognition.

Hence, if one accepts this model to explain the normativity of law, it is probable that "the social practice constituting a conventional rule of recognition" has the "normative structure of SCA" (Himma 2001, 129–135). The rule of recognition becomes, therefore, a duty-imposing rule, which is capable of explaining the source of the normativity of law, as Himma explains in the fragment bellow:

> The notion of an SCA might contribute to an explanation of how a social practice can give rise to obligations. The notion of an SCA involves more than just a convergence of unilateral acceptances of the rule or recognition. It involves a joint commitment on the part of the participants to the activity governed by the rule of recognition … And there is no mystery … about how joint commitments can give rise to legal obligations; insofar as such commitments induce reliance and a justified set of expectations (whether explicitly or not), they can give rise to obligations" (Himma 2001, 134).

As we can see in the example of Coleman's strategy to explain the normativity of law, one cannot understand the proper practical difference that rules of recognition make on the basis of an analysis of how norms affect the behaviour of an individual, without considering the social commitments of this individual. To fully understand the normative effect of a legal system, we must provide an explanation of how legal officials and people in general share their acceptance of a constitutive convention that works as the source of legal obligations. Without this explanation

of shared agency one cannot offer a satisfactory account of the normative force of a legal system.[21]

We can now come back to Schauer's example and see that the normativity of tax laws comes from its social background. It is not enough to consider how the tax statutes generate reasons *for me* in the absence of sanctions. Tax laws, wherever they exist, are always backed by heavy sanctions placed upon those who refrain from doing what the law commands them to do. But this does not mean that we can explain their normativity only by pointing out to the fact that these sanctions provide prudential reasons for compliance with the law. The point of a theory of legal normativity is not only to explain the instrumental role that sanctions play in reassuring the application of law to the detractors of the legal order. On the contrary, its major point is to explain how laws become normative in a social way and why both officials and the people in general regard the state as authorized to impose a sanction on the subjects who resist complying with their legal obligations. This is the difficult issue behind the discussion of the normativity of law or the practical difference that law makes.

Hence, if the tax laws enforced by a political community are based on a law-making procedure internalized by the community and accepted as a legitimate source of legal norms, then the motivating capacity of the law will be established even if there are individuals who do not adjust their conducts to the law in the absence of sanctions and a coercive apparatus. Even though sanctions will be required to enforce the tax laws of the political community, coercion is merely instrumental and should not be regarded as a foundation for the motivating capacity of law. Coercion might explain how an individual finds a reason to act in a certain way, but does not suffice to explain how the social group shares the norms that are broadly recognized as valid reasons for action in the political community. Nor can it explain why officials have reasons to inflict sanctions on the subjects who do not comply with their legal obligations. An account of the normativity of law is incomplete if it lacks an explanation for this.

4.3 On the Moral Foundations of Legal Authority and the Obligations of Legal Officials

A further comment could be made on Schauer's scepticism about the moral foundations of legal authority and on the way that law obligates legal officials. As I have already commented above, Schauer's strategy for isolating the effect of laws is to eliminate from the analysis all cases in which the laws coincide with the subject's

[21]I hope that it is clear to my reader that I am not claiming that we necessarily need to rely on the idea of the rule of recognition as a form of SCA in order to explain the normativity of the law. All that I am trying to do is to show that the normativity of the law (or at least of the rule of recognition) must be explained in a social way, and that Schauer's strategy to explain the practical effect of the law focusing in how an individual internalizes a given rule is problematic.

interests or moral judgments. We could only understand the role that laws play when these laws are immoral or inexpedient. This hypothesis, as Schauer argues, purports to be valid not only for citizens in general, but also for officials, who are said to be guided by law only if such law is capable of coercing them in some way.

Against this general picture, one can argue that Schauer's theory of the normativity of law focuses not on the vast majority of cases in which the application of law is at stake. The cases on which Schauer concentrates are marginal and peripheral, and not the central cases of legal obligations. When Schauer analyses the resistance that a rule exerts upon a given individual, he implicitly assumes that laws create only *prudential* reasons for action. This implicit assumption underestimates the importance that moral reasons have for the maintenance of any given legal system, and the moral value of the rule of law. It is important here to recall Raz's point that it is a necessary feature of all legal systems that they purport to be morally authoritative upon their subjects.

Legal systems claim, for Raz, not merely de facto authority, but also *de jure* or "legitimate" authority (Raz 1994). Without assimilating this important connection between law and morality—at the level of the justification of legal authority, not at the level of the identification of each valid norm—it becomes very hard to see the effect that laws exert upon citizens and officials. The law becomes morally obligatory, as Marmor explains, "if its claim to legitimate authority is morally warranted" (Marmor 2011, 72).

Once we understand this, we can see that jurisprudence should be more interested in explaining how the law works in general, or in the vast majority of "central cases" where it is fit to achieve its moral aims, than in dealing with the exceptional cases of flawed legal systems in which the efficacy of the law is based solely on violence or coercion. To explain the normativity of law, one must explain the functions of law, or the values that make law itself morally important. One of the candidates for this explanation is the value of social coordination and of the legal procedures for dealing with "questions of common concern" that affect the polity as a whole. Unless a citizen understands the value of social coordination in the face of disagreement, she will not be capable of accepting the decisions that she dislikes and "submitting her own sense of what the best option might be in order to join in with the group on *some* option" (Waldron 2003, 69). And the same goes for legal officials. It is because they can understand the value of social coordination that they "ought to be prepared to swallow hard and refrain from issuing contrary directives, even when they are convinced (perhaps rightly) that it would be better for the citizens to coordinate on their directive than on the basis of the one that has already been issued" (Waldron 2003, 69).

This is the distinctive type of normativity that the law possesses. Sanctions may be extremely useful to reinforce these legal obligations and to coerce detractors. To be sure, they may even be strictly necessary in the logical sense. But they do not constitute the *source of the normativity of law*, and we do not need to accept Schauer's scepticism on the practical difference of law in order to understand their importance. Schauer's theory of "coercion" is not enough to explain the normativity of law. Its methodological strategy to isolate the effect of the law misses some

important cases where the law is capable of giving reasons precisely because of the moral value of lawful decision-processes or the moral legitimacy of legal rules.

Against Schauer, I think that jurisprudence should not concentrate on the marginal cases where the law contradicts the moral judgments of citizen and officials, for the law always purports to be morally authoritative, and even though it may fail to do so on a significant number of situations, it cannot fail to do that all the time. As history has shown us several times, defective legal systems that base their authority solely on coercion are unstable and do not have the appropriate resources to maintain such authority over time. Illegitimacy, in itself, is not only a moral fault, but also a legal fault and a sign that the law is not functioning very well. Instead of focusing on the role that violence plays to support the efficacy of flawed law, we would have a better account of the normativity of law by looking at its moral justification, as it is perceived by the legal community, and its social origins, which explains how a legal system's rule of recognition is internalized in the practice of officials.

Hence, to understand the attitude of legal officials towards the law one must consider the importance of moral values in the establishment of *legal* authority, which is considered as a special case of political authority and thus of *public* authority. Public authority, as Raz argues in his normative theory of authority, "is ultimately based on the moral duty which individuals owe to their fellow humans" (Raz 1986, 72). Without some degree of moral affiliation of an individual to his or her community it is impossible to establish his or her *prima facie* obligation to abide by the laws established by the political authority.[22]

A theory of authority might be useful not only to answer the moral question whether there is a moral obligation to obey the law, as political philosophers normally try to do, but also to explain the empirical question of how in a real political community citizens can accept the obligatory character of legal norms. Whenever we can establish, with enough sociological evidence, that most officials of a given community recognize the value of social coordination and internalize the moral reasons for public settlement of matters of common concern, we can say that the law of such community will exert some normative pressure upon these officials even if it is not always backed by the threat of sanctions or other forms of social coercion.

Perhaps the situation of legal officials is analogous, to some extent, to that of the actors of the international legal order. It is helpful to recall, here, Hart's explanation for the "general pressure for conformity" with the rules of International Law. According to Hart, there is no mystery why International Law retains its normativity in spite of the absence of an organized system of sanctions enforced by a central power. The international community, as a community composed primarily

[22]This seems to be a point of consensus between legal positivists and Dworkinian interpretivists. Though Dworkin avoids the term "normativity" to explain the normative force of the law, he has a very similar view, since he bases the normative force of the legal principles on the associative obligations that citizens have towards each other in a political community. See Dworkin (1986, 195–216).

of states and international organizations, is very different from the states, which are usually "societies of individuals" with approximately equal strength and vulnerability (Hart 1994, 216–220). According to Hart, sanctions are much more crucial in communities of individuals than in a community of sovereign states. "Among natural individuals living in close proximity to each other, 'opportunities for injuring others, by guile, if not by open attack, are so great, and the chances of escape so considerable', that the mere natural deterrents are seldom adequate to restrain interpersonal violence" (Waldron 2013, 383).[23]

Aggression between states, on the other hand, has a greater cost for the aggressor, and is more likely to inspire criticism both at the domestic and the international level.

> The use of violence between states must be public, and though there is no international police force, there can be very little certainty that it will remain a matter between aggressor and victim, as murder or theft, in the absence of a police force, might. To initiate a war is, even for the strongest power, to risk much for an outcome which is rarely predictable with reasonable confidence … Against this very different background of fact, international law has developed in a form different from that of municipal law… Yet what these rules require is thought and spoken as obligatory; there is general pressure for conformity to rules; claims and admissions are based on them and their breach is held to justify not only insistent demands for compensation, but reprisals and counter-measures (Hart 1994, 219–220).

To establish its normativity, therefore, International Law requires less coercive measures than municipal legal systems do, since the public exposure of the aggressor and the risks associated with the illegal activity are always great, even for the strongest powers and in the most favourable situations. International sanctions, in this context, "add little to the natural deterrents" that are already placed upon states (Hart 1994, 219). International aggression, by its very nature, implies a greater risk and a greater cost for the aggressor, and the law is much more likely to play its coordinating role by providing mechanisms for cooperation and solving Prisoner's Dilemmas than by applying coercive measures on the violators of international obligations.

The position of states with regards to International Law has at least one common point with that of officials with regards to Municipal Law. Legal officials, in municipal legal systems, and states, in the International Legal Order, share approximately the same level of independence from legal sanctions. Legal officials, as I have been arguing in this paper, necessarily raise a claim to legitimate authority for the directives that they issue in their official capacity. Their very status as legal officials depend on their ability to ground the claim to authority that they stake or to convince others that their legal authority is morally justified.

To retain their status of legal officials, they must take up the Hartian "internal point of view" towards the secondary rules of the legal system and convince the people over whom they claim authority that they are acting for the right reasons when they purport to coordinate the action of these people. While acting in their

[23]The quotation within the quotation is from Hart (1994, 214).

official capacity, they must even "claim authority to punish people, and to use coercion (partly to enforce punishment, but often for other purposes)" (Raz 2003, 263).

Their capacity to act as a public authority—and as a legal authority, which is one of its special cases—is vindicated by their success to provide a moral justification for the authority to punish in a large range of issues and over a large range of people, as Raz explains in the following excerpt:

> A person or institution may enable me, should they be willing to guide me, to track reason better than I can without following their directives, but to constitute anything like a legal-political authority they need, first, to issue directives over the matters which they have that advantage, and, second, to have authority to enforce their directives and punish disobedience (and the will to do so). But to have that additional authority, the authority to punish and to use coercion, they need to meet the normal justification thesis regarding an additional range of issues, and over other people, those who will be required to enforce their directives, adjudicate disputes, and apply sanctions (Raz 2003, 264).

The power to coerce and inflict sanctions, therefore, is not the source of the normativity of law. On the contrary, it is itself dependent, in part, on the moral justification of legal authority. As Raz shows it in the fragment above, the legal authority to impose sanctions, itself, depends on the ability of the coercing institution not only to constrain the actions of the person whose conduct it purports to direct, but also, in an important measure, to justify *to other people* its prerogative to impose sanctions on anyone. One of the challenges of a theory of the normativity of law is to explain how the law can give these other people reasons to accept its authority, which includes the authority to coerce and impose sanctions when they become necessary to enforce the obedience to legal norms. According to the most influential conceptions of legality—including Natural Lawyers, Dworkinian Interpretivists, Inclusive Legal Positivists and Razian Exclusive Legal Positivists—political morality appears as the strongest candidate to offer this type of reasons for actions. What all of these divergent conceptions of law have in common is the belief that political morality can provide good reasons in favour of the practical difference that the law purports to make. Schauer's methodological strategy, however, makes him indifferent to this important class of reasons for acting in accordance with the law.

4.4 Individuals and the Normativity of Law

I hope to have shown, so far, that it is inaccurate to assume that legal officials do not obey the law in the absence of coercion and that the threat of sanctions or promise of rewards constitute the main (if not the only) reason why officials base their decisions on the law and comply with the secondary rules of the legal system.

If I am right about this, then Schauer's claim that officials do not obey the law in the absence of coercion is untenable and we need a more sophisticated theory to explain the normativity of law.

But even if this is true it remains possible that Schauer is right about the way coercion works for the ordinary citizen, and that the law only makes a practical difference for its addressees because of its capacity to inflict sanctions on its detractors. As an important commentator of Hart's theory of obligations has argued, Hart's explanation of the social foundations of the rule of recognition provides only a partial explanation of the normativity of law, inasmuch as it is at pains to explain how the acts of the officials can obligate citizens (Himma 2013, 170). The main problem to explain how the law becomes obligatory for the ordinary citizens is that according to Hart citizens *do not accept the law from the internal point of view*. Although laws can create legal obligations for them, they do not take the critical reflective attitude towards the law which is characteristic of the officials who take the internal point of view towards the legal practice.

Once we consider this problem, Schauer's argument for the importance of coercion becomes a very strong one, since it is evident that coercion can provide legal subjects with strong *prudential reasons for action*, and that it is very unlikely that any other candidate could be equally effective to generate this type of reasons for action.

Schauer's assertion that coercion is ubiquitous seems to be actually too moderate, rather than excessively bold. He could have safely assumed, as Himma recently did, that the authorization to deploy coercive mechanisms is not only a typical feature of modern legal system, but is instead a "conceptually necessary feature of law" (Himma 2015).[24]

My point in this essay is not to contest this kind of positive claim about coercion, but only the *negative claim* that Schauer tries to derive from it, which argues that no law makes a practical difference in the absence of its coercive mechanisms. The problem with this negative claim is that it misses an important aspect which is necessary to maintain the social pressure for conformity with the law.

In effect, this negative claim only becomes plausible if we take up Schauer's methodological strategy and concentrate only on the laws which are either immoral or inconvenient for one of its addressees. In such cases, it is nearly obvious that without some coercive enforcement very few people could have any reason to obey the law.

Nonetheless, no-one can understand how the law works by concentrating only on these exceptional situations where the law is immoral and does not help the people to act in accordance with their own interests in the social world. In the vast majority of cases, laws exist both to protect moral principles that are highly valued by the political community, likes the basic values of liberty and equality, and to enable people to do certain things that they want and cherish and that would be impossible without the legal institutions, like getting married, celebrating enforceable contracts, creating legal persons, and so on.

[24]Himma is not making, however, the implausible contention that all norms of every legal system are coercive in nature. The authorization of coercive enforcement is presented as a necessary feature of law, not of every norm that is part of it.

Once we consider these moral and instrumental functions that the law performs, it becomes clear that there is no reason to accept Schauer's negative claim. Most of the time, laws are legitimate and have a moral justification, and the people who are bound by these laws are well aware of the value that the law possess in the political community. Most of the time, law is there to *protect* its subjects and to *enable* them, instead of constraining their actions. To ignore this aspect of the value of legality is to miss the important connection between law, morality and reason, which should be accepted even by the most enthusiastic proponents of legal positivism.

As Joseph Raz puts it,

> Authorities are legitimate only if they facilitate conformity with reason. *The law's task, put abstractly, is to secure a situation whereby moral goals which, given the current social situation in the country whose law it is, would be unlikely to be achieved without it, and whose achievement by the law is not counter-productive, are realized* (Raz 2009d, 178)

In most of the cases, the law does comply with this task, and the people have both moral and prudential reasons to recognize the authority of law. If we look for the reasons why the bulk of the population acquiesce with the law, even when they happen to disagree with some of its provisions, moral legitimacy and expediency are at least as good a candidate as coercion to explain the source of the normativity of law.

Even Hart recognizes that although citizens need not to "accept"—in the strong sense of taking a critical reflective attitude, as officials do when they take up the internal point of view—they must "acquiesce" with the authoritative pronouncements of legal officials. It is this acquiescence that maintains the social pressure of the law over time and that distinguishes the legal obligations from the commandments of a gunman.[25]

Furthermore, even though Hart is not very clear about it, citizens must internalize at least the very abstract rules that empower officials to enforce the law and to provide the authoritative settlement of our disagreements about the law. As I anticipated in the example of the obligation to pay one's taxes, it is obvious that the coercive mechanisms that the law possess constitute the source of important prudential reasons for action for individual taxpayers. Nonetheless, the official acts that impose such sanctions, when they become necessary to guarantee the compliance with a legal obligation, must also be recognized as legitimate by the bulk of the population. Once we shift the focus from the *isolated individual* to the *members of the group* or the *citizens* that (together with the legal officials) form the political community, the claim that coercion is the sole (or, if not, the only one that matters) determinant of the normativity of law becomes much less plausible.

Coercion only would be the sole source of reasons for acting in accordance with the law in extremely unjust legal systems, where legitimacy is a distant ideal and most reasonable people would agree that the law is morally unjustified. In such system, the normativity of law is very low, and people only have reasons to comply with the law when they are under strong surveillance. In the central cases, however,

[25]See above note 9.

things are very different. Citizens recognize at least some degree of legitimacy, either because the laws have been produced by a democratic government or because there are certain values associated with the "Rule of Law" that make it better to resolve a conflict through the law than through other means of settling disputes among the members of a community. Once we recognize this, it becomes obvious that at least in these central cases there will be some content-independent moral reasons for compliance with the law.[26]

It is very implausible to think that people acquiesce with the law only because of its power to inflict sanctions or other coercive mechanisms in case they comply not with the commandments of the law. Although that might work for an isolated individual, the social group normally need more than this to recognize the authority of the law and to invest legal officials with the power to enact rules in the name of the law.

5 Conclusion

Though Schauer attempts to get rid of the problem of the normativity of law, his own conception of law and coercion does not avoid to take a stand on the theoretical issue of the normativity (or the reason-giving capacity) of law and legal orders. Even though the methodological choices that he made in The Force of Law led him to underestimate the practical difference that the law makes and the normative force of legal authority, he still has a theory about the normativity of law, although it is an imperfect theory because it fails to understand the specific difference that non-coercive laws make in practical reasoning.

To understand the law's ability to generate content-independent reasons for action, which is the core of the debate about the normativity of law, one should take a few methodological steps that Schauer avoided in his book. First, one needs to take into account the critical attitude that citizens and officials have towards the law from the internal point of view of legal practice, and not only from the "legal point of view" that Raz has in mind when he explains the perspective of law teachers and legal theorists. One must understand not the law's ability to provide redundant "legal" reasons, but real or unqualified reasons for action that are perceived as binding by the participants who take up the internal point of view. Second, one must provide a justification for the conception of law that one is upholding. In the case of Schauer, he owes us an argument for his exclusive positivist conception of legality, since he was unable to provide a good reason to think that his concept of law is superior to other conceptions such as inclusive legal positivism and Dworkinian interpretivism. Third, one must understand the social aspects of the normativity of law, which relate not only to individuals, but to the communities that

[26]None of this implies, however, that these rules constitute irrefutable reasons to comply with the law. The law can create reasons for action even if these reasons are "prima facie" or overridable.

abide by a given legal system. And fourth, one must consider not only the exceptional cases where the law is at odds with people's self-interest and moral judgments, but the central or ordinary cases where the law is accepted as legitimate from the moral point of view.

If we circumvent the need to seriously consider these aspects of legal practice, we end up with an incomplete account of the normativity of law that is incapable of explaining the relation between law and reasons for action, which is the central problem of the inquiry into the normativity of law. I hope to have shown, in this analysis of Schauer's stance on the normativity of law, that the debate on the normativity of law is an important part of general jurisprudence, and that one cannot avoid it if one is willing to understand the nature of law.

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Supporting *The Force of Law*: A Few Complementary Arguments Against Essentialist Jurisprudence

Pierluigi Chiassoni

Abstract In *The Force of Law*, Frederick Schauer launches an attack on a contemporary variety of jurisprudence that looks after law's essential properties, boasts a Hartian pedigree in doing so, and claims coercion not to be part of the very nature, or essence, of the law. The present chapter is meant to supplement Fred's argument against that sort of essentialist jurisprudence, first, by contesting its pretended Hartian pedigree, so far as Hart's meta-philosophy and legal theory are concerned, and, secondly, by suggesting, by means of a Benthamite argument, that it is a mistaken enterprise.

1 Introduction

The Force of Law (Schauer 2015) is a book dedicated to certifying the importance of coercion, of threatening and using force, of coercive sanctions, in order to explain and understand what law is; meaning by "law" *positive law*, the law made by humans for regulating their social behaviour.

After thousands of years of philosophical reflections upon the law, in which the element of coercion has commonly been recognized as an important feature of law(s), the whole enterprise may appear to be a weird, paradoxical, perhaps even annoying, waste of time. Why dedicate *a whole book* to tell everybody what everybody knows?

Fred provides the reader with two good reasons for his undertaking.

The first of Fred's good reasons is that there is a need to cope with what I shall call the new "essentialist jurisprudence" or "jurisprudence of essences". There are in fact influential legal theorists who make three claims: (*i*) the proper task of jurisprudence is looking for the essential, necessary, properties of the law; (*ii*) coercion is not an essential, necessary property of law; (*iii*) claims (*i*) and (*ii*) can

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both be found in Herbert Hart's legal philosophy, so that essentialist jurisprudence may build on, and boast, a Hartian pedigree. Essentialist theorists pose a serious challenge to on-going jurisprudential practice. Are they right? Should we endorse their picture of law, provided that such an endorsement would involve endorsing also a certain meta-philosophical conception of jurisprudence, as an enterprise that *either* looks for necessary truths, for essential or necessary properties of law, *or* is worth nothing?

The second of Fred's good reasons is that there is a need to conclusively settle the claim about the coercive nature of law. The champions of law's coercive character—Bentham and Austin—have somehow overstated their case: They have created a "mystique" of law as a coercive enterprise that apparently over-emphasizes *that* feature, which surely the law has, to the detriment of *other* features, that it has too—as Hart suggested in well-known chapters of *The Concept of Law*. Accordingly, following the lead of Hart, this mystique of coercion must be made the object of a careful scrutiny, taking advantage of the more recent advancements of learning in the fields of cognitive science and the social sciences (Schauer 2015, ix–xi, 1–5, 37–42).

To these two reasons I would add a third one which—as I perceive it—is not openly pointed out by Fred, though it is clearly suggested by what Fred does in his book: We should *never* forget Bentham's definition of jurisprudence. As it is well known, according to Bentham, "Jurisprudence is the art of systematically ignoring what everybody knows". Of course, this sentence can be read as bearing a derogatory sense: as a display, by Bentham, of his disapproval, if not distaste, for such an enterprise. That, however, would be a bad reading. The good reading is different: it suggests that, if we want to do a good job as legal philosophers, we must systematically ignore the commonplaces, the apparent truisms, around us. We must go and see whether such commonplaces are really sound, as pieces of true information about the law. Now, this is precisely what Fred does with force and coercion in law. It is a commonplace to say that law "is coercive"; that it "has to do with the use"—the "legitimate use", in Max Weber's terms—"of force in a society", be it a society of individual humans, or a society of states, as it happens with international law; that "it is supported by force"; that "it regulates the use of coercive sanctions". Fred purports to cast light on all these truisms and commonplaces relying on, besides jurisprudence, cognitive science, sociology, politics and the social sciences in general.

Leaving aside the (worthwhile) experiment in methodological eclecticism Fred makes in the book, let us focus on the fact that *The Force of Law* originates from an interest in advancing our understanding of law in front of, and against, *two jurisprudential exaggerations*: the exaggeration by those who tend to belittle the role that force and coercion play in the law on the one hand; the exaggeration by those who seem to make too much of that role on the other hand.

Here, we must pause to ask a paramount question: Has Fred succeeded in his task? Has he won his case?

On the whole, I think that Fred has won the case. Perhaps however—this is my opinion, of course—he could have won it in a more complete, thoroughgoing, way.

The following remarks of mine—just a few disordered remarks—are meant to provide a few complementary arguments in favour of Fred's case, in order to make it stronger. They concern, in particular, the refutation of "essentialist jurisprudence": the approach of seeing the proper task of jurisprudence in discovering essential properties and necessary truths about the law. My supplementary arguments divide in two sets. The first set of arguments purports to reject the vindication, by essentialist jurisprudents, of a Hartian pedigree for their own view. The second set of arguments purports to complement Fred's arguments to the effect that essentialist jurisprudence, aside from any pedigree issue, is just wrong.

2 How to Get Rid of Essentialist Jurisprudence 1: Essentialists' False Pedigree

Contemporary supporters of essentialist jurisprudence claim to be following the lead of Herbert Hart. According to them, it was Hart who, in his criticism to Austin and Kelsen, opened the way for denying coercion to be a necessary or essential property of law.

Apparently essentialist jurisprudents pretend to draw from Hart's jurisprudence a double lesson, and a double support to their own view.

The first lesson belongs to the realm of the metaphilosophy of law. It runs as follows: the jurisprudence of essence is, in general, a good, valuable enterprise. All things considered, it is indeed the *only* sort of jurisprudence that is worthwhile to be carried out, if we want to preserve the difference between philosophical inquiry upon law, on the one hand, and sociological, political, historical, anthropological, cognitive science inquiries, on the other.

The second lesson belongs instead to the realm of legal theory. It runs as follows: the big mistake Bentham and Austin made, was that of losing sight of the real, essential, necessary properties of law, wrongly considering coercion as being one of them.

Now, in my view, the essentialist jurisprudents' vindication of a Hartian pedigree is to be considered as abusive. It is abusive, I would argue, under two counts: both from the standpoint of Hart's *metaphilosophy of law*, and, more precisely, of Hart's *meta-legal theory*, on the one hand; and from the standpoint of Hart's *theory of law*, on the other hand.

2.1 Hart's Meta-Theory Takes a Radically Anti-essentialist Stance

To begin with, it may be argued that Hart's meta-theory of law cannot provide any support for those who favour a jurisprudence of essences. Indeed—as Fred Schauer

knows very well (Schauer 2013, 237–246)—Hart's meta-theory of law can very reasonably be characterized as containing an outright *rejection of essentialism*: as claiming that looking for necessary or essential properties, at least so far as the law is concerned, is wrong; it is a pointless waste of time capable, furthermore, of bringing about misleading and dangerous outputs.

In order to show how far Hart seems to be from endorsing the idea of a jurisprudence of essences, it is sufficient to consider briefly three principles that, in my view, characterize his meta-philosophy of law. These are the Clarification Principle, the Principle of Philosophical Analysis, and the Mystery-Avoidance Principle (Chiassoni 2013, 248–257).

The Clarification Principle claims that the proper *purpose* of legal theory *should be the clarification or elucidation («explanatory elucidation») of the structure of legal phenomena and the general framework of legal thought* (Hart 1961, vi). By pursuing such a purpose, Hart expects two basic, interconnected, advantages: first, the promotion of «clear thought» in the province of law (Hart 1983, 12); second, the «furthering» of our «understanding» of the social phenomenon of law, in its relations to rules, coercion, and morality. Now we must pause to notice that *nowhere*—while stating the purpose and considering the advantages of legal theory, as he sees it—Hart presents legal theory as having to do with casting light upon *the necessary, essential properties of the law in any possible world*. On the contrary, Hart seems to cherish the pursuit of a more down-to-earth ambition. Following Kelsen, he thinks that we should aim at understanding what is ("our") law, and, in order to do so, we must understand, to begin with, «the distinctive structure of municipal legal systems» and, in the light thereof, the structure of international law.

The *Principle of Philosophical Analysis* claims that *clarification of the general framework of legal thought is to be carried out by proper philosophical analysis of legal language and legal concepts*. To what seems to be a fair reconstruction, Hart endorses the view according to which the philosophical analysis of legal language and legal concepts, in order to be theoretically fruitful, must be performed by employing *tools of three different sorts*: (1) *linguistic tools*, that include an ordinary language philosophy theory of natural languages, a theory of definition (geared on definitional pluralism, the notion of explanatory definition, and the reject of the definitional fallacy), and a theory of concepts; (2) *hermeneutic tools*, that include the well-known distinctions between the internal and external point of view, participant and observer, and the technique of "putting oneself in somebody else's shoes"; (3) a set of proper *principles of philosophical inquiry*, that include the principle of methodical distrust, the principle of prudent reductionism, and the (Strawsonian) principles of descriptive and constructive metaphysics, which require therapeutic analysis (aiming at puzzle-solving), systematic analysis (aiming at the building up of clearer and more precise conceptual apparatuses), and mental experiments (or experiments in "philosophical imagination") (Chiassoni 2013, §II).

In my view, an anti-essentialist stance is ubiquitously at work in the several sets of tools that characterize Hart's philosophical analysis. Hart's theory of concepts, however, seems to provide direct evidence to the point. Such a conclusion seems in fact to be supported by the six backbone ideas that, in my view, make it up.

One, concepts are a matter either of convention, or of stipulation. Conventional concepts depend on, and mirror, linguistic usages. Contrariwise, stipulated concepts are speculative entities: they are always the outputs of speculation and conscious endorsement and commitment.

Two, outside of the realm of the common uses of words (whether by ordinary speakers or by experts), there are no *true* concepts. Indeed, against the jurists of *Begriffsjurisprudenz* (the 'Jurisprudence of Concepts'), Hart claims that (legal) concepts are *not* to be found in some rarefied dimension of «real essences» (Hart 1970, 265–277).

Three, conventional concepts are typically riddled with vagueness. Furthermore, as the theory of natural languages suggests, they may be puzzling, obscure, confused, and «many-sided» (Hart 1958, 79). In order to overcome such inconveniencies, stipulated concepts must be worked out to any rational purpose and pursuit.

Four, stipulated concepts are *neither true nor false*. Stipulations are to be assessed, instead, in terms of whether they are, or not, *pragmatically justified*. Their value, if any, depends on two factors: (*i*) on *the goal(s)* they are meant to serve, and, accordingly, (*ii*) on whether, and to what extent, they are *suitable to those goals*.

Five, concepts in legal theory should be *stipulated concepts* informed by an *overall explanatory goal*; they should, accordingly, be *weak stipulations*. They should not to depart altogether from ordinary usages of words and phrases, but provide improved, puzzle-solving, elucidations of conventional usages and concepts (by «making explicit», «examining», and inspecting the «credentials» of the criteria or «principles that have in fact guided the existing usage»[1]). For instance, the concept of law, to be in line with the foregoing tenets of Hartian conceptual analysis, must be something, at the same time, «consistent with usage», and useful to «advance or clarify either theoretical inquiries or moral deliberation» (Hart 1961, 214, 207 ff.).

Six, if the concept of law is a *stipulated concept*, one that draws its justification from its adequacy to some previously stipulated purpose, any talk of necessary or essential properties of the law must reflect the theorist's own evaluation about which properties of the social phenomenon of law *are to be considered* necessary, or essential, and why. Necessity, essentiality, is, so to speak, in the eye of the beholder.[2]

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[1]See Hart (1961, 213f, 215, 1967, 90–91), where 'stipulative', 'pragmatic' or 'constructive' are contrasted to definitions of 'law' and 'legal system' aiming at «the characterization or elucidation of […] actual usage»; Hart (1970, 269–271).

[2]Hart (1983, 6): «The methods of linguistic philosophy […] are […] silent about different points of view which might endow one feature rather than another of legal phenomena with significance»; later on, Hart claims that, in order to cope properly with jurisprudential controversies, it is necessary «first, the identification of the latent conflicting points of view which *led to the choice or formation of divergent concepts*, and secondly, reasoned argument directed to *establishing the merits of conflicting theories*, *divergent concepts or rules*, or to showing how these could be made compatible by some suitable restriction of their scope» (italics added, ndr).

Notice that Hart's theory of concepts, as I have recounted it now, has a *double edge*. On the one hand, it is evidence of Hart's anti-essentialist stance. On the other hand, it has a direct anti-essentialist import. In the light of it, essentialist jurisprudence's talk in terms of necessary or essential properties, of necessary truth about law, appear to rest on an altogether mistaken and misleading theory of concepts. The theory is mistaken for it overlooks the stipulated nature of theoretical concepts; the theory is misleading, for it suggests legal theory to be an enterprise that can *discover* what, in fact, cannot be the simple output of a discovery.

The third principle of Hart's meta-philosophy of law to be considered for the present purpose is, as I said, the *Mystery-Avoiding Principle*. According to it, *while doing jurisprudence, one should be careful in avoiding any resort to mysterious, metaphysically suspect, expressions*. This principle provides direct evidence of Hart's rejection of essentialist jurisprudence. Indeed Hart makes the following points:

1. Due mostly to the influence of natural law theory, jurisprudence is sometimes thought of as an investigation about the «nature», or the «essence», of law. This assumes that the law does in fact have one true «nature», one true «essence», which adequate inquiries will succeed in unveiling.
2. These essentialist conceptions of jurisprudence, however, are metaphysically suspect. They misleadingly surround law with a needless halo of mystery, which shows up in the very way in which such driving questions as 'What is *the nature of* law?' or 'What is *the essence of* law?' are phrased. However, Hart claims, there is no such thing as the one true nature, or the one true essence, of law. All we have is a general social phenomenon that we call "law" ('*derecho*', '*diritto*', '*droit*', '*Recht*').
3. As a consequence, any serious philosophical inquiry into the social phenomenon of law is to be conceived simply as purporting to answer plainer (and metaphysically safer) questions like 'What is law?' or 'What is the concept of law?' (These questions, of course, are in turn to be understood against the background of Hart's clarification and philosophical analysis principles, discussed above). If we do nonetheless go on using such traditional phrases as "the nature of law" or "the essence of law", we should at least be sure to surround them with a *cordon sanitaire* of scare quotes (see Hart 1961, 155, 1967, 89–91).

2.2 *Hart's Legal Theory Does not Belittle the Role of Coercion in the Social Phenomenon of Law*

Coming to the second strand of my argument against the pedigree claim of essentialist jurisprudence, it may be argued that Hart's *theory of law*—as soon as one looks at it without the distorting glasses of essentialism—is a sample of a theory that pretends to explain law *also* in terms of a structure of primary and secondary rule, *without*, at the same time, *explaining away* the element of coercion. Hart was not fond of theoretical exaggerations: indeed, his criticism to Austin and

Kelsen looks inspired by the goal of neutralizing theories of law that provide a misleading picture of law because of their unjustified, dogmatic, irrational, pretence of reducing the complex social phenomenon of law, where rules, coercion and morality combine in multifarious ways, just to *one basic ingredient*. Accordingly, *The Concept of Law* can be safely read as meaning to redress the unbalance in favour of coercion, *without* replacing it with another unbalance, this time in favour of secondary rules. Fred, to be sure, is well aware of that. I think, however, that it is worthwhile adding a further line of argument. This line has to do with Hart's theory about what he calls the "minimum content of natural law" in positive law.[3]

As it is well-known, this part of Hart's legal theory has its starting point in the following problem: "Can positive law have any content whatsoever?"

Natural lawyers understand that question as a *moral*, *normative* question: "As a matter of morality, is it permissible for positive legal orders to have any content whatsoever?" They ask, accordingly, whether positive law is allowed to, can legitimately, by way of moral correctness, have any content whatsoever. And, as it is well-known, they provide a negative answer: positive law is not allowed, morally speaking, to have any content whatsoever. On the contrary, if a given positive legal order happens to have certain morally vicious contents, that legal order is not a legal order in a proper, central, sense, or, to take a more radical view, it is no *legal* order at all.

Contrariwise, Hans Kelsen—the champion of legal positivism—understands that question as an *empirical* question: "As a matter of fact, is it possible for positive legal orders to have any content whatsoever?" Pointing to what has happened in the course of human history, he provides a positive answer. As a matter of fact—Kelsen claims—positive legal orders *can,* and *do, have* whatever content. As a matter of fact, positive legal orders can settle the unavoidable, fatal, un-relentless *conflicts of interests* among the several components of a society *in any way* that the ruling side, from time to time, may consider proper. In fact, Kelsen remarks, positive legal orders can settle such conflicts in ways that, so to speak, try to strike a balance, make some sort of compromise, between the interests of the several parties involved; this is a typical feature of democratic legal orders. But they can also settle conflicts of interests in ways that, uncompromisingly, sanction the full victory of one side over the others, as it often happens under autocratic governments. In the latter case, Kelsen suggests, the arrangement can be, as a matter of fact, less stable than a compromising arrangement: more liable to social unrest and upheaval.

Overlooking this *real-politik* side of Kelsen's view, Hart, as we all know, purports to provide a different answer from both the natural lawyers, on one side, and Kelsen, on the other side. On the one hand, Hart refuses to understand the question "Can positive law have any content whatsoever?" as natural lawyers do, that is to say, as a *moral* question belonging to normative ethics. On the other hand, Hart wants to resist to Kelsen's plain "yes" to that question, if understood as an empirical question (which by the way, as we have seen, is not "plain" at all—but this is

[3]Another line of argument can be drawn from Hart's theory of international law (Hart 1961, ch. X); I will not consider it here.

another issue which for the time being must be left aside). In order to do so, Hart works out an «empirical» theory of the natural law content of positive law, on the basis of the *current* human condition, as characterized by (1) human vulnerability, (2) approximate equality, (3) scarcity of resources, (4) limited altruism, (5) limited capacity of understanding and foresight, (6) limited force of will, and (7) general inclination to survival, which makes of human societies, at least ordinarily, something different from suicide clubs. Now, this theory has its gist in the following claim: if a human society does not want to be like a suicide club, if it wants to promote the survival of—most, or at least, the ruling part, of—its members, then it must establish, and *enforce*, a minimal system of protections concerning individual life, limbs, liberty, property, and contracts. From this standpoint, notice, coercion is a *necessary* ingredient of positive law: *necessary*—to be sure—as an *empirical necessity*, provided the way we, here and now, are; *necessary*, accordingly, by way of an *instrumental necessity* that reason points to humans to help them, and keep them, out of the Hobbesian state of nature (Hart 1958, 79 ff., 1961, 189 ff.).

One thing is worthwhile remembering before proceeding. Precisely in reaching that conclusion, Harts makes a mockery of those philosophers who may waste their time in considering whether such an *empirical*, *instrumental*, "*necessary*" *connection between law and coercion*, like a similar empirical, "necessary", connection between law and morals, does indeed partake of a higher metaphysical status: is a *conceptual*, *logical*, *necessity*; belongs, as essentialist jurisprudents would say, to the *very nature* or *essence* of the law.[4]

3 How to Get Rid of Essentialist Jurisprudence 2: Essentialists' Wrong Track

Fred suggests that essentialist jurisprudence is wrong, on the basis of two arguments.

First, he makes an argument from cognitive science: essentialist jurisprudence endorses a view of concepts, of our way of creating, modifying and using concepts, that is at odds with the outputs of empirical research by cognitive science. Essentialist jurisprudence is built on a false picture of the way concepts are and work.

Second, he makes an argument from the analytical (and Wittgensteinian) theory of concepts: essentialist jurisprudence endorses a view of concepts that is at odds with the influential ideas, within the analytical tradition, about "family resemblance" concepts and "cluster" concepts, which cast light on the fact that concepts (and the categories they refer to) are not necessarily identified by sets of necessary or essential properties (Schauer 2015, 37–42).

[4]Hart (1958, 79): «The connection between law and moral standards and principles of justice is therefore as little arbitrary and as 'necessary' as the connection between law and sanctions, and the pursuit of the question whether this necessity is logical (part of the 'meaning' of law) or merely factual or causal can safely be left as an innocent pastime for philosophers».

These are—to my view—very good arguments. Indeed, they can be considered sufficient to raise doubts about essentialist jurisprudence, to suggest how profoundly mistaken such an enterprise is. They are, furthermore, perfectly in tune with Fred's mode of philosophical argument, which is inspired, if I may say so, by an elegant, "light touch".

Essentialist jurisprudence, however, constitutes a very serious threat to philosophical progress in jurisprudence. It represents, in fact, the return to a pre-analytical theory of concepts, which all those of my generation were inclined to think as something fortunately gone forever. Sadly, we were wrong. Consequently, a light touch is perhaps, all things considered, not sufficient. What is needed here is, rather, a "spider touch". Surely, I am not the one capable of such a skilful venture. I will accordingly limit myself to evoking one more argument that could help in the way of a radical refutation of essentialist jurisprudence. This is a "Benthamite argument".

3.1 The Benthamite Argument

The Benthamite argument is a direct supplement to Fred's argument from Wittgenstein & C. While doing jurisprudence, it is worthwhile remembering Bentham not only for the theory of law he developed, but also for his sophisticated meta-theory of law: particularly, for his ideas concerning the proper tools for useful and demystifying inquiries upon the law. Now, as it is well known, the Benthamite toolbox for universal expository jurisprudence contains, among other valuable instruments of analysis, two items: (*i*) the distinction between real terms and fictitious terms, and (*ii*) the method of paraphrasis. The former distinction points to the fact—which was, and still is, overlooked by many people—that, in our discourse, we use two very different kinds of terms. On the one hand, there are real terms: these are the terms that refer to real entities. "Lion", "table", "house", "water", "judge", "happiness", "melancholy", etc., all are real terms referring to real entities. On the other hand, there are fictitious terms: these are the terms that do not refer to real entities, but, rather, to fictitious entities, that is to say, to entities that owe their very existence to language. "Fortitude", "justice", "duty", "right", etc., are all fictitious terms referring to fictitious entities. The distinction is relevant, according to Bentham, because fictitious terms cannot be usefully defined by means of the traditional mode of definition by genus and specific difference. Of course, we may say that, for instance, "Fortitude is the virtue of being resilient to adversities": we may point, accordingly, to some genus and some specific difference. Unfortunately, however, the *definiens* genus is likely to appear, in turn, as mysterious and baffling as the *definiendum*. For, indeed, what is a "virtue"? The failure of the traditional method urged Bentham to work out a method for coping with the definition of fictitious terms (and concepts)—the method of paraphrasis—that will be known, later, as method of "contextual definition" or "definition in use". The method of paraphrasis, as it is well-known, consists in clarifying the meaning of the

definiendum (say "legal duty") by clarifying the meaning, and particularly, the truth conditions, of the sentences in which, in ordinary speech, the *definiendum* is being used (like, for instance, "Italians have the legal duty to pay yearly an income tax").[5] Notice that definitions by genus and specific difference are definitions that pretend to identify the set of necessary and sufficient properties for the correct use of the defined word and the correct identification of the objects to which it refers. The necessary properties that are captured by the definition are in fact tantamount to the necessary properties making of something a table, a lion, water, and not another thing. Of course, the same thing has different necessary properties according to the different concept-term by which it is being referred to: one thing is, at the same time, a "table", a "piece of wood" (if made out of wood), a "precious XVIth century artefact", a "dangerous item according to the local Fire Brigade", etc. Speaking of necessary properties with regards to fictitious terms and fictitious entities is, by contrast, not viable, since, as we have seen, they are not suitable to definitions by genus and specific difference. Now, in Bentham's view, the term "law", when it refers to *the law*, is a fictitious term referring to a fictitious entity; if it refers to something real, it refers to the set of *individual laws* that, at any time, with regard to a certain society, make up the fictitious entity we are used to call "the law". As a consequence, if we take Bentham's stance seriously, speaking of the necessary or essential properties of *the law*, to make any sense, cannot but be an indirect, misleading, way to refer to the necessary or essential properties of *the individual laws* conceived or adopted by a certain sovereign for a certain set of subjects. Now, as Bentham makes clear in his magisterial, posthumous, treatise *Of Laws in General* (Bentham 1970, 2010), there is a wide variety of laws, each kind of which presents some property that differentiate it from other kinds. There are, for instance, non-imperative, permissive norms (non-commands, non-prohibitions) and imperative norms; there are simple imperative norms, which command some behaviour to a generality of subjects, and subsidiary punitory laws, which establish that a certain coercive sanction ought to be ordered by a judge against those who have been found guilty of a certain behaviour. So, in this innocent way, we can speak of the necessary or essential properties of *laws*. Clearly, a punitory law is a law that, necessarily, i.e., conceptually, establishes a penalty; establishing a penalty is its "essential property", what makes of a law a punitory law, and not another sort of law. We cannot speak, however, of the necessary or essential properties of *the law*. These considerations boil down to the following conclusion: essentialist jurisprudents set their task as consisting in identifying the essential, necessary, properties of *the law*; there is, however, no such a thing as *the law*, while, to be sure, there are laws, and judges, and legislatures, and sheriffs, and tax-payers, etc. Accordingly, the task essentialist jurisprudents set to themselves appears to be the weird, ill-conceived, task of nailing down the essential properties of something that does not exist.

[5]I provide an account of Bentham's jurisprudential toolbox in Chiassoni (2009, ch. I).

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Coercion and Sanctions as Elements of Normative Systems

Nicoletta Ladavac

Ignorantia legis non excusat.
If it is not necessary to make a law, then it is necessary to refrain from making a law.

(Montesquieu)

Abstract In this paper I shall attempt to demonstrate the role that sanctions and coercion have played in legal systems and still play within normative systems. Starting from continental law, namely the theory of law developed by Hans Kelsen and Norberto Bobbio, I shall summarize the concept of coercion as a possible but not a necessary element of law, while nonetheless being an essential feature of the coercive order. I shall then demonstrate how Kelsen and Bobbio considered the law to be comprised by coercive norms and legal norms operating in their function as coercive norms, and state as coercive *apparatus* holding a monopoly on the use of force. I shall then seek to stress how the conception of coercion and force endorsed by Frederick Schauer is in many senses similar to the classical model of the coercive order. Revisiting a normativist conception of the law, for Schauer too coercion is an unequivocal and necessary element of modern legal systems, thus demonstrating that coercion distinguishes law from other rules.

1 Introduction

In his latest book *The Force of Law* (2015) Frederick Schauer presents detailed reflections on the nature of law, asking in particular what is its defining characteristic which distinguishes it from other types of rules that regulate the life and conduct of individuals and society as a whole, because since ever there have been debates over whether people should obey the law simply because it is the law. Despite the common understanding of law as coercive, a number of important legal

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theorists, including Hart and Raz, have considered that law is not inherently coercive. This position stems from the rejection of earlier jurisprudential models, forwarded by Austin and Bentham, which described law as little more than coercion sponsored by the state. In noting what was wrong in the older models, that law is importantly normative and authoritative, Schauer reintroduces what other theorists have dismissed what was right, that law is inherently coercive.[1] Consequently, Schauer identifies force as a key element which characterises the law, a force which is not external to the law but rather inherent within and correlated to it. Contrary to many legal theorists who argue that the efficacy of the law results from the influence of external forces and factors, including in particular the fact that the law and rules are internalised by human beings on the basis of a complex social process, and that this internalisation occurs without any constraint or coercion, Schauer reassesses the role of the force that is inherent within the law, thereby seeking to demonstrate that coercion, namely the constraint inherent within the law, establishes a profound distinction between the function played by the law and the role played by internalised rules, thereby seeking to demonstrate that the force inherent within the law is greater than the influence of social rules that impinge upon the thoughts and actions of human beings.

Carrying out a detailed empirical and philosophical analysis, Schauer presents a social reality which conforms to the law on the basis of the sanction and respect for legal obligation, thereby demonstrating that the efficacy of the law is fundamentally dependent upon its coercive force, claiming that the law provides individuals with an indication of how they must behave by threatening to subject them to negative consequences and sanctions in the event that the behaviour demanded is not complied with. For Schauer, coercion thus performs an essential function within society, even though human beings in general comply with the law more out of respect for authority than for fear of sanctions, thus demonstrating that its force is more pervasive than the efforts of the state to control a minority of disobedient citizens. Schauer thus asks whether what the law commands differs from what people think is the right thing to do, i.e. should they follow the law just because it is the law. To evaluate the real effect of the law, self-interest and law-independent reasons must be removed from the equation. The real problem, is "whether people, when they have reached this all-things-except-the-law-considered judgement, will, sanctions aside, subjugate *that* judgement to the prescription of the law" (Schauer 2015, 62). That means, will people do what they believe is wrong just because the law tells them to do, and in the absence of the threat of sanctions?

For Schauer there is also an important empirical question as to whether people actually obey the law simply because it is law. While much behaviour undoubtedly complies with the law, it is important to distinguish between engaging in behaviour because of the law and engaging in behaviour because of what the law may do to us if we do not comply. Thus, the important point is what people think in relation to

[1]The roots of normative force date back in a previous book, "Playing by the Rules", that Schauer published in 1991.

the behaviour that is required, i.e. whether or not it is right to obey the law. In his concluding arguments, Schauer argues that when human beings believe that the action they should take differs from that required by the law, compliance with the law is less widespread than might be assumed. Coercion, along with force, thus becomes a necessary element of the law and the dismissal of the importance of coercion in much of modern jurisprudence is a mistake which needs to be corrected.

2 Rules, Legal and Social Norms

However, before talking about actual coercion it is necessary to differentiate between the various types of rules to which coercion attaches. For our present purposes this means the rules of the legal system, which are rightly defined as legal rules in that they are able to determine the general legal order, i.e. objective law, on a generally stable basis. In general, the aim of a legal norm is to establish common conduct according to values that are shared throughout society. The goal is to regulate the behaviour of individual members of a group in order to ensure its survival and to pursue the purposes considered by it to be pre-eminent. And in general, legal norms are considered to be equivalent to rules of behaviour, i.e. to a command requiring a certain course of action from an individual. The coercive nature of the legal norm is thus indispensable. This central element of the legal norm is decisive in differentiating it from other types of norms, such as moral or religious rules, which belong to a non-coercive sphere in the sense that they are not commands associated with a requirement of compliance.

The fundamental characteristics of a legal norm are: its general nature, in that it does not relate to an individual person but to a class of persons; its abstract nature, in that it does not refer to a specific individual case; its imperative (or coercive) nature, in that the norm laying down a substantive requirement is associated with a rule imposing a sanction; its coercive nature, in that it must mandatorily be complied with and failure to comply with it will be punished by the imposition of a sanction on the transgressor; its positive nature, in that it is posited by the state or another public authority; and its bilateral nature, in that it recognises a right as being vested in one party while imposing a duty or obligation on another.

The legal norm must not under any circumstances be confused with the law. The legal norm is a general and abstract prescription which identifies and asserts the interests associated with a social group and defines the procedures governing their protection and specific satisfaction, and which compliance must therefore be guaranteed. Legal norms are such because they emanate from legal authority as they are issued by the competent state authority and properly promulgated. In that sense they have a strict normative meaning. As regards their normativity they regulate the conduct of individuals, and as regards their generality they are binding on an indefinite number of people and in an indefinite number of cases, and may be enforced by the power of the state. State laws rely on enduring effectiveness; therefore legal norms are based on effectiveness.

Today the meaning of the legal norm has thus expanded, precisely thanks to the abandonment of the understanding of the normative as prescriptive (mandatory, imperative). In fact, the term norm is no longer used within legal language solely to refer to prescriptive propositions, but also to permissive and empowering rules. Permissive rules, which negate the effects of previous imperative rules, give permission to do something which would otherwise be prevented by another norm: permissive norms thus grant a power, while prescriptive rules deprive power. It must be noted also as regards the meaning of norm as a prescription that prescriptive force is not implemented with equal intensity by all legal norms. There are in fact unconditional norms as the obligation to which the addressee is subject is not conditional, as well as conditional norms in which the obligation is by contrast subject to a condition.

Aside from legal norms which prescribe conduct that is binding as a matter of law, there are also ethical, social, moral or religious norms which only bind the *internal forum* of our conscience. Social norms are perhaps the most widespread and the sociological analysis of social norms by sociologists and sociologists of law has taken on particular significance over the last few decades. Sociologists describe norms as informal understandings that regulate the behaviour of individuals (Marshall 1998) (social psychology has however adopted a more general definition, recognising smaller social units that may endorse norms separate or in addition to societal expectations). Such norms are considered to exist as collective representations of acceptable group conduct as well as individual conduct (Lapinski and Rimal 2005). Within social psychology, the role of norms is emphasised by guiding behaviour as a mental representation of appropriate behavior (Aarts and Dijksterhuis 2003) through the promotion of pro-social behaviour. According to a psychological definition of the behavioural component of social norms, there are two dimensions to norms: the extent to which certain behaviour is displayed, and the extent to which the group approves that behavior (Jackson 1965). Both of these dimensions can be used in normative messages to alter norms and subsequently alter behaviour.

Although they are not considered to be formal laws, social norms still promote a great deal of social control. Social norms can be enforced formally, that is through sanctions, or informally through language and non-verbal communication. Because individuals often derive physical and psychological resources from group membership, groups are said to control and stimulate individuals. Social norms also allow an individual to assess what behaviour the group regards as important for its existence. Norms create conformity that allows people to become socialised within the culture in which they live. Social norms are learned through social interaction. Groups may adopt norms in a variety of ways. Norms can arise formally where groups explicitly set out and implement behavioural expectations. However, social norms are much more likely to develop informally, emerging gradually to control behaviour. Informal norms represent generally accepted and widely sanctioned routines that people follow in everyday life (Gerber and Macionis 2011, 65). These informal norms, if broken, may not provide for formal legal punishment or sanctions, but do encourage reprimands and warnings. Deviance from social norms is defined as non conformity to a set of norms that are accepted by a significant number of

people in a community or society (Applebaum et al. 2009, 173), that is if group members do not follow a norm, they become labeled as deviant (labeling theory). In sociological terms they are considered outcasts of society. Group tolerance for deviation varies across membership; not all groups receive the same treatment in the event of norm violations.

According to the theory of normative conduct, social norms may be divided into descriptive norms and injunctive norms. Descriptive norms depict what happens, while injunctive norms describe what should happen. A descriptive norm defines people's perceptions of what is commonly done, and signifies what most people do without assigning judgment. An injunctive norm, on the other hand, transmits group approval concerning a particular pattern of behaviour, that is, it dictates how an individual should behave (Schultz et al. 2007). Unwritten rules that are understood and followed by society are prescriptive norms that indicate what we should do. Proscriptive norms, by contrast, are similarly society's unwritten rules about what one should not do (Wilson et al. 2001).

3 The Role of Coercion Within Continental Legal Systems and Common Law

3.1 The Definition of Coercion

First and foremost, what is coercion? Derived from the Latin *coercio*, it means a pressure, a constraint that is exerted on a person in order to bring about a particular form of behaviour which would not otherwise be engaged in, or a change in that person's intention. Coercion is thus associated with repression, constraint or inhibition. It involves various types of forceful actions that violate the free will of an individual in order to bring about the desired response. In general, it is based on the threat of physical or other violence with the aim of conditioning a person's behaviour. These actions can include, but are not limited to, extortion, blackmail, torture, and threats. Such actions are used as leverage to force the person to act in a manner contrary to her own interest. Coercion may involve the infliction of physical pain or psychological harm in order to enhance the threat. The threat may secure cooperation by or the obedience of the person being coerced. The purpose of coercion is to substitute one's own aims for those of the person being coerced. Various forms of coercion may be distinguished, depending upon the type of injury threatened, its aims and scope and its effects, each of which will have different legal, social, and ethical implications.

It is said that legislation is based on coercion and that the threat of sanctions aims to ensure that people do not commit unlawful acts out of fear for the negative consequences imposed by law. Legal coercion is a typical element of law and involves the imposition of sanctions which are applied in the event that individuals violate certain norms imposing limitations on behaviour. In other words, in order

for a norm to be considered as legal, it must be supported by a coercive power which provides for the use of force against any breaches. In order to explain and justify the necessary function of coercion within law, Schauer draws above all on the Anglophone legal tradition (common law) and the ideas of Jeremy Bentham and John Austin, including in particular their conceptions of sanctions and coercion as effective means of fulfilling the goals of the law. In an important article from 2010 (Schauer 2010), Schauer sketches out the problems which he would go on to consider in greater detail shortly afterwards in *The Force of Law*. Analysing Austin's theory of sanctions and coercion along with Hart's criticism of that theory, Schauer reassesses Austin's ideas concerning the role of the sanction and coercion within law, proposing a synthesis between Austin's position and the criticism brought by Hart and other philosophers of law writing in the Hartian tradition. Thus, the two opposing positions appear to be reconciled.

Schauer stresses first and foremost that part of the misunderstanding between the two theories that results from a misinterpretation of the linguistic distinction between being obliged and being under an obligation. The claim of law and one of the central tasks of jurisprudence—as Schauer rightly claims—is to create obligations, or most specifically legal obligations, which must not however be confused with other types of obligation such as moral obligations (Schauer 2010, 3) In fact, commands without sanctions—as Austin argues—lack coercive force and would deprive the law of its power to impose itself as law, and consequently of its status as a source of legal obligations. Schauer points out that it is the threat of sanctions, therefore, that gives the law its normative force and authority, and which consequently creates the idea of legal obligation (Schauer 2010, 4). In fact, the law is binding because of its capacity to punish in the event that its dictates are disobeyed. However, according to Schauer, if the law is reduced to an instrument for creating only duty-imposing and not power-conferring rules, the account of law as law will provide only a partial description of its function, offering a highly restricted perspective on the law. Schauer thus criticises Hart and modern analytical jurisprudence for having limited and underestimated the role played by sanctions within the law, reducing their task to a mere contingent function, as had by contrast been correctly established in the past by Austin. Schauer explains that this is due to the following misunderstanding, namely the notion that most human beings obey the law out of commitment to the law and not in order to avoid sanctions, as Hart and most of modern legal theory seeks to argue, which is however a distortion of reality (Schauer 2010, 9). Schauer thus poses a question which is more than legitimate, asking what legal theory is designed to accomplish, and thus what criteria distinguishes a satisfactory account of law from a limited one. Thus, the task of the jurist is to decide on the essential features of law, and not simply to provide a descriptive account of law on the basis of its factual externalisation. This means that it is necessary to establish the relationship between legal obligations and sanctions.

Schauer is very clear about the fact that, in order to understand the relationship between legal obligations and sanctions it must first and foremost be reiterated that when referring to an obligation in relation to the law, we are not referring to an

obligation *sic et simpliciter*, but rather a legal obligation. It is precisely the fact that the obligation is a legal obligation and not a simple obligation which sets apart legal obligations from all other obligations that do not form part of the legal system, whether they be moral or any other kind, and which thus makes the sanction an essential feature of the legal obligation itself. More specifically, the legal obligation is a statement of what conduct is mandated if we presuppose some rule or system of rules. Furthermore, Schauer specifies that sanctions are not essential components of duties *simpliciter*, although if law is different from other rule systems, then it is legitimate that sanctions serve to distinguish the law because a sanction-free account of law is an account that does not fit the facts of the law as we see them (Schauer 2010, 16). "And thus—says Schauer—the question would not be one about the prevalence of sanctions in real legal systems, but about the admittedly important question whether law could exist in a world without sanctions" (Schauer 2010, 9).

However, to assert that sanctions and coercion are central to the concept of law means to define the law as normative, i.e. to assert that the law externalises itself as legal normativity. The reason why normativity is an important aspect of the law, i.e. law's obligation-creating capacity, lies for Schauer in the fact that it is crucial to distinguish between the identification of distinctive features of law and important features of law. And if the purpose of legal philosophy is to determine what makes law different from other systems, then coercion and sanctions must have a dominant place in law (Schauer 2010, 17). Jurisprudence should not just provide a descriptive empirical account of what law actually is, but should seek a deeper and less practical understanding of it.

3.2 *The Continental View of Hans Kelsen and Norberto Bobbio*

Two centuries later, in the 20th Century, the sanctions theory of law—typical of Bentham and Austin—was revisited and elaborated with greater theoretical vigour by continental legal theorists. Two of the greatest and most authoritative jurists from the continental tradition, the Austrian Hans Kelsen (1881–1973) and the Italian Norberto Bobbio (1909–2004), both stressed the central role in legal systems of coercion and sanctions within their legal theory writings. This aspect of the continental legal tradition, which is by no means distant or different from the Benthamite and Austinian Anglophone tradition, is undoubtedly significant and useful in achieving a full understanding of the argument presented by Schauer in *The Force of Law*. Although Schauer does not expressly refer to the coercion and sanctions models from the continental tradition, the similarities between his conception of the need for coercion within law and the continental conception are evident.

Every legal order, whether part of the common law or civil law traditions (although the common law lacks a genuine theoretical conceptualisation of its legal order,[2] as has by contrast been provided within the civil law tradition), is rooted in a particular conception of the legal order, i.e. the body of legal norms that regulate the life of a community, the organisation of the state and legal relations between the state and its members. There is thus a close connection between the legal order and a social group. One of the main characteristics of the legal order is its mandatory status. It represents the overall body of legal imperatives that are binding for a particular collectivity. The legal order lays down the general body of institutions on which civil life is based and its purpose is to set rules of conduct to discipline the collective life of individuals. Every legal system is thus an organisation of rules and behaviour. It draws on institutions and a coercive apparatus (parliament, courts, etc.) in order to guarantee its own existence and that of the community.

The theory of the legal order has a particular importance within the civil law tradition. There are essentially three different conceptions of the legal order: the normative, the institutional and the relational. The normative theory to which we refer here and that is represented by Kelsen and Bobbio, defines the legal order as a complex or system of general positive legal rules (formal laws) or individual rules (administrative acts or court rulings), ordered according to a basic norm, and stresses above all the objective aspect of the legal order, that is the foundation of the law in the state. Its main characteristic is the division between branches of the state (separations of powers) and the control over its acts and laws.

In the search for parallels with Schauer's ideas concerning the role of coercion in law, it is important to set out the view of Kelsen and Bobbio on the role of force and coercion within law, with particular reference to Kelsen's, which has turned into something of a benchmark in the tradition of Continental Law and also served as an inspiration for Bobbio, along with many others. Both before and after Kelsen, eminent philosophers described the legal order as a coercive system based on sanctions (Kant 1797; Jhering 1877; Bentham 1782; Austin 1879; Röhl and Röhl 2008, 190 ff.; Thon 1878, 8; Schmitt 1934, 18; Binding 1885; Bierling 1877, 139 et seq.; Windelband 1884, 211 et seq.) and Kelsen himself elaborated a genuine "*Zwangstheorie*" (theory of coercion). First of all, Kelsen explains that "[Law] is a specific social technique which consists in bringing about the desired social conduct of men through the threat of a measure of coercion which is to be applied in case of contrary conduct" (Kelsen 1945, 19). Coercive orders—according to Kelsen—are a reaction with a coercive act to certain events which are considered to be undesirable as they are negative for society. They command a certain human behaviour by attaching a coercive act to the opposite behavior (Kelsen 1960, 33). Above all, in describing the legal order as a coercive order, Kelsen insisted at root on the coercive act, explaining the characteristics of *Zwang* as early as 1911 in his first fundamental work, *Hauptprobleme* (Kelsen 1911, XII, 22, 45, 128, 131, 205 et seq., 212 et seq., 341), which he also developed further in his later

[2]Legal order: The whole system of rights and duties relating to law and jurisprudence and to the administration of justice.

major publications. In an important essay (Kelsen 1921, 226) he asserts that the specific content of norms is *Zwang*, i.e. coercion. "The law—according to Kelsen—is a norm *that prescribes the use of force (zwangsanordnende Norm)*" (Kelsen 1921, 226), by which he means that it is comprised of prescriptive norms, or ought propositions ("Soll-Sätze", or normative propositions) expressing a command requiring obedience (*Gehorsam*). The law must be followed because "the law is in fact a coercive order, i.e. a norm prescribing the use of force" (Kelsen 1921, 235).

After arriving in the United States in 1940, Kelsen revisited and elaborated that idea further in various writings, analysing above all the concepts of coercion, coercive order and sanction in his two fundamental works *General Theory of Law and State* (Kelsen 1945) of 1945 and in the second edition of *Reine Rechtslehre* of 1960 (Kelsen 1960). In an important article (Kelsen 1957b, 231–256) published in 1941 Kelsen writes that "[A] social order that seeks to bring about the desired behaviour of individuals by coercion is called 'coercive order'" and this type of order is opposed by "all other social orders that provide reward rather than punishment as sanctions. Those that enact no sanctions at all rely on the technique of direct motivation and their efficacy rests not on coercion but on voluntary obedience" (Kelsen 1957b, 235). Moreover, he writes, "coercive orders are based on measures of coercion as sanctions and orders that have no coercive character (moral and religious orders) rest on voluntary obedience" (Kelsen 1957b, 235), the law being a specific social technique and not an end consisting in the establishment of a coercive order by means of which a community can apply measures of coercion established by the order itself. Coercive orders, he explains, command a certain human behaviour by attaching a coercive act to the opposite behaviour, that is, they react against certain situations that are regarded as undesirable insofar as detrimental to society (Kelsen 1960, 33). Alternatively, he adds, coercion amounts to action taken by the legal community against a socially detrimental fact (Kelsen 1960, 34), because it is a function of every social order to bring about certain reciprocal behaviour amongst human beings and to ensure that they refrain from certain acts deemed detrimental to society (Kelsen 1945, 15). According to Kelsen, "[The] order may attach certain advantages to its observance and certain disadvantages to its non-observance. … Behaviour conforming to the established order is achieved by a sanction provided in the order itself" (Kelsen 1945, 15). According to this meaning, sanctions are regarded as a reason for engaging in desired behavior (Kelsen 1960, 35). A coercive act considered as a sanction, acting against detrimental human behaviour, is the opposite of the lawful behaviour that is considered to have been commanded or to be legal, with the result that the behaviour mandated avoids the sanction (Kelsen 1960, 35). He stresses that, "[In] this sense, the law is a coercive order" (Kelsen 1960, 19). Moreover, "that the law is a coercive order does not mean that it enforces the legal behaviour. The behaviour is not enforced by the coercive act because the coercive act is to be executed against an illegal behaviour. This is the reason why a coercive act is considered as a sanction" (Kelsen 1960, 35). What Kelsen means is that it is the essence of a legal rule that the sanction prescribed be executed by the organ established by the legal order in situations in which an individual does not behave lawfully and violates the legal rule (Kelsen 1960, 23).

Furthermore, he makes an important clarification in stressing that when we speak of enforcement we do not refer to the coercive measure which the organ must execute, but to the subject's fear that the measure will be taken in the event of non-compliance; hence, this form of coercion should be termed psychic compulsion, which is coercive if it furnishes a reason for the behaviour desired by the legal order (Kelsen 1960, 23).

Kelsen clarifies in the first edition of the *Reine Rechtslehre* that what makes human behaviour illegal is not an immanent quality, nor is it related to a meta-legal norm, a moral value or a value transcending positive law. What makes behaviour unlawful is its classification under the reconstructed legal norm (Kelsen 1934) (*Rechtssatz*) as the condition of a specific consequence and the provision that the legal system will react to the behaviour with a coercive act. Kelsen argues that if coercion is an essential element of law, which is not accepted by Schauer, then the norms comprising a legal order must be norms stipulating coercive acts, i.e. sanctions (Kelsen 1945, 45). Thus, Kelsen's assertion that coercion is an essential element of law does not refer to the behaviour of the individuals who are subject to the legal order, but to the legal order itself and the fact that the legal order provides for sanctions, and in addition that it is this fact that distinguishes it from other social orders; on this view, the law thus constitutes the rule according to which mankind actually behaves (Kelsen 1945, 25–26).

Furthermore, a rule is a legal rule not because its efficacy is backed by another rule providing for a sanction. The problem of coercion—Kelsen explains (Kelsen 1945, 29)—is not to secure the efficacy of rules, but the content of rules. Coercion consists in the fact that specific acts of coercion, referred to as sanctions, are provided for by the rules of the legal order and "[The] element of coercion is relevant only as part of the contents of the legal norm…" (Kelsen 1945, 30). He specifies that "[This] doctrine does not refer to the actual motives of the behaviour of the individuals subjected to the legal order, but to its content" (Kelsen 1945, 25). In particular, "[A] rule is a legal rule not because its efficacy is secured by another rule providing for a sanction; a rule is a legal rule because it provides for a sanction" (Kelsen 1945, 29). He adds that the assumption that a certain form of human behaviour entails a legal sanction because it is a delict (i.e. an illegal act) is not correct; on the contrary, "[It] is a delict because it entails a sanction" (Kelsen 1945, 51). In fact, the delict is the condition for the sanction (Kelsen 1945, 53). As regards the delict-sanction relationship, Kelsen clarifies that a legal definition of delict must be based on the legal norm. The delict is the behaviour of the person against whom the sanction that is a consequence of the behaviour is directed, which provides the legal definition of delict (Kelsen 1945, 54). Furthermore, Kelsen rigorously asserts that the concept of sanction as the monopoly of force of the community may be summarised as follows: "The use of force of man against man is either a delict or a sanction" (Kelsen 1960, 42). And by providing for a sanction the legislator seeks to prevent behaviour that is considered to be detrimental to society. A coercive act is imposed on the person responsible for an evil act such as deprivation of life, health, freedom or property, which if necessary will be imposed even against his will by the deployment of physical force (Kelsen 1960, 33). Briefly, the coercive act

(*Zwangsakt*) is a measure of the legal order, a reaction by the law, a consequence of the law, and an essential function of the state. The law is "a coercive apparatus whose value depends, rather, on ends that transcend the law qua means", as Kelsen writes in the first edition of *Reine Rechtslehre* (Kelsen 1934, 31). And he specifies that "the *coercive apparatus* is identical with the *legal order*" (Kelsen 1926, 14) and "this coercive nature consists in nothing other than the *objective validity of norms*" (Kelsen 1926, 14).

The concept of delict is also related to the concept of legal duty. According to Kelsen (Kelsen 1926, 58–59), "[The] concept of legal duty is … a counterpart to the concept of legal norm". This means that a person is legally obliged to act in the manner opposite to the condition for a sanction, and people are under a duty to comply with the legal norm. "That the law is a coercive order—he writes—means that the legal norms prescribe coercive acts which may be attributed to the legal community" and these coercive acts can be executed against the will of the individual and, if he resists, by physical force (Kelsen 1926, 34), force being a distinguishing element of a coercive order. Law attaches certain conditions to the use of force, authorising the employment of force under certain circumstances (Kelsen 1926, 21). A monopoly of force over the legal community means that the legal order determines the conditions under which physical force may be employed by the individual so authorised by the legal community (Kelsen 1960, 36). And according to Kelsen, the individual applying the coercive measure with the authority of the legal order acts as a representative of the order, i.e. as an organ of the community, and only this organ can employ force. In this sense the law makes use of a monopoly of force over the community and in so doing pacifies the community (Kelsen 1960, 21). However, Kelsen clarifies that all legal orders are backed up by sanctions and the "decisive difference is not between social orders that are based on sanctions and those that are not. Every social order is based on sanctions by the reaction of the community to the conduct of its members" (Kelsen 1945, 16). And all orders prescribe coercive acts as sanctions (Kelsen 1948, 378). Moreover, if coercive orders are different from those that have no coercive character and are based on voluntary obedience, this is possible only in the sense that the former provide for measures of coercion as sanctions whereas the others do not (Kelsen 1948, 19). In addition, conduct that is legally forbidden by the law is the condition for a coercive act as a sanction (Kelsen 1948, 21). Thus, the normative meaning of the legal order is nothing other than the stipulation that particular evils ought to be inflicted and executed under certain conditions, with the result that coercive acts and sanctions are threats that an evil *will be* inflicted under certain conditions (Kelsen 1960, 44). This is because the law is an order which imposes duties on each member of the community, thereby specifying his or her position within the community by means of a specific technique, involving the provision for an act of coercion, namely a sanction directed against the member who does not fulfil his duty. If this distinction is not drawn it is not possible to differentiate between the legal order and other social orders (Kelsen 1945, 28).

As a representative of a strict normativity and legal positivism, Kelsen could only assert that coercion is an integral part of positive law and the theory that describes coercion as an essential characteristic of law is a positivist theory concerned with positive law. Moreover, since positive law is a coercive order because it prescribes coercive acts, it must establish appropriate organs for executing those acts of coercion (Kelsen 1945, 392–393) since sanctions are provided by the legal order in order to achieve specific human behaviour. It is on account of the normative meaning of coercive acts, that is the objective meaning of these acts, that such acts have the character of law in the sense that they are law-stipulating, norm-creating and norm-executing acts (Kelsen 1960, 44). Essentially, Kelsen is saying that the law is a coercive order because it is comprised of norms that regulate coercion, in the sense that it specifies how sanctions are to be applied. For Kelsen "[The] law is a *normative* order which seeks to bring about particular human behaviour by providing that, in the event of unlawful conduct to the contrary—the *delict*—a coercive act should be imposed as a consequence of the delict as a so-called sanction. In this sense, the law is a normative coercive order. Its specific existence is its *validity*" (Kelsen 1965, 465).

Kelsen thus gives a very strong sense of the coercive order, while Schauer in his recent book limits himself to arguing in favour of coercion, rather than the coercive order. Schauer even distinguishes between coercion on the one hand and sanctions and compulsion on the other. Indeed, as was mentioned in a recent review of *The Force of Law* (Miotto 2015), for Schauer law is coercive when its sanctions motivate people to act in a certain way that they would not otherwise have done had it not been required by the law (Schauer 2015, 129). For Schauer in fact, law is compulsory when it is able to make people change their behaviour in order to conform to the law. And just as for Kelsen, for Schauer too, a sanction is what "law imposes in the event of noncompliance with legal mandates" (Schauer 2015, 129), except that for Schauer sanctions can be coercive or non-coercive (Schauer 2015, 129).

However, Kelsen goes much further in also asking why it is necessary to obey the law, a legally and philosophically strong question which goes beyond the mere coercive nature of the legal order but which Schauer does not by contrast pose in such a direct fashion, or at any rate in the same terms and with the same radical nature. Kelsen provides the answer—which is once again the same (Kelsen 1957a)—stating that the binding force of the law, the idea that it ought to be obeyed by the people whose behaviour it regulates, is its validity. He thus poses a fundamental question over why people ought to obey the law, i.e. why the norms—i.e. prescriptions and commands—of positive law ought to be obeyed. In a normative sense the question is why norms have an objective binding meaning for people that have to comply with the dictates of a certain legal system (Kelsen 1957a, 257). Kelsen answers that positive law must not be obeyed because it conforms to the principles of morals constituting the ideal of justice on the grounds that the validity of law is not rooted in justice; moreover, were positive law to derive its validity from natural law, then positive law would have no validity in itself (Kelsen 1957a, 258–259). The reason why positive law has immanent validity is, according to Kelsen, because positive law must be supposed to be a supreme and sovereign order (Kelsen 1957a, 261).

This order is based on a hierarchical structure (*Stufenbau*) based on the constitution. And he explains that "[To] the question why we ought to obey its provisions a science of positive law can only answer: the norm that we ought to obey the provisions of the historically first constitution must be presupposed as a hypothesis if the coercive order established on its basis and actually obeyed and applied by those whose behaviour it regulates is to be considered as a valid order binding upon these individuals; if the relations among these individuals are to be interpreted as legal duties, legal rights, and legal responsibilities, and not as a mere power of relations; and if it shall be possible to distinguish between what is legally right and legally wrong and especially between legitimate and illegitimate use of force. This is the basic norm of a positive legal order, the ultimate reason for its validity, seen from the point of view of a science of positive law" (Kelsen 1957a, 262).

3.3 Norberto Bobbio

In the book *A Theory of Legal Order* the Italian jurist Norberto Bobbio (1909–2004) described one of the fundamental elements of the foundations of law, the juridical order. This is an important work in understanding the scientific way of conceptualising law in the new era of the jurisprudence of values. In this book Bobbio attempts to solve those problems that the theory of the norm had not solved or had not answered satisfactorily. And Bobbio himself declared that his work could be considered as a continuation of Kelsen's work, including in particular his *General Theory of Law and State*.

For Bobbio too, as for Kelsen, a normative system is a structured body of norms (Bobbio 1993).[3] According to a command-based conception, he argues that norms, including legal norms, are imperatives or commands (Bobbio 1993, chapter: III) which must be construed as prescriptive propositions expressing a precise content with a specific meaning (Guastini 2004). Thus, for Bobbio legal orders are normative systems comprised of various types of norms, including rules of conduct and rules on sanctions which have the function of maintaining the system (Bobbio 1970, 192). Consequently, for Bobbio too—as for Kelsen—the law is an organisation of force, with the difference that according to the traditional theory of common law represented by Austin and Bentham, respect for legal norms is guaranteed by force, while for Bobbio force is the content of legal norms and the law is the system that regulates the use of force, although the law is not comprised solely of rules imposing sanctions. This means that the legal order is legal insofar as it represents an organised body of norms, and any system having as its purpose the

[3]Bobbio (1993). This book contains two courses: Teoria dell'ordinamento giuridico and Teoria dell'ordinamento giuridico (Turin 1960).

organisation of force is a legal system. For Bobbio therefore, although the legal system is made up of norms regulating the production of other norms and norms providing for sanctions, and since all norms belonging to that system are in any case legal, including norms relating to conduct, the pre-eminent characteristic feature of a legal system is the presence of norms providing for sanctions (Bobbio 1970, 119; 1993, 197 et seq.) and thus the term "law […] indicates a type of normative system and not a type of norm" (Bobbio 1965, 169).

Bobbio analysed the relationship between law and force in various writings (Bobbio 1960, 61–67), including an important article translated into English (Bobbio 1965). Bobbio's main argument is that force should rather be considered as the content of legal rules and not as a means for the realisation of law, as Kelsen asserted in 1925 (Kelsen 1925), whereby the "law is not a body of rules guaranteed by force but a body of rules about force" (Bobbio 1965, 322) [the same theory was also endorsed by Ross (1958) and Olivecrona (1959)]. Thus, law should not be considered in terms of coercion, although coercion should be considered as an element essential to law.

According to Bobbio three objections may be brought against the traditional theory which defines law in terms of coercion, (1) that rules are generally observed spontaneously and hence the sanction is not necessary. However, irrespective of whether we consider coercion as an instrument or a means, or whether we consider it as the content of legal rules, spontaneous obedience can only be a valid argument if it is general and constant; yet in fact it is neither general nor constant (Bobbio 1965, 332); (2) that every legal system contains rules not backed up by sanctions because sanctions are not necessary. But rules not backed up by sanctions are not legal rules, which thus excludes from the system a large number of the secondary rules which are the characteristic rules of a legal system, i.e. rules regulating the exercise of force, even though these are proper legal rules; (3) that the infinite regress of sanctions is impossible. Unsanctioned rules exist not only in every system but also and necessarily at its pinnacle (Bobbio 1965, 333).

For Bobbio, the three arguments, the purpose of which is to remove coercion as an essential feature of the law and to define law independently of the concept of coercion, summarise the three modes of coercion: the necessity, existence and possibility of coercion (Bobbio 1965, 325). However, once coercion has been eliminated as a necessary element of the law, a question arises as to how to identify the criterion that enables a distinction to be drawn between legal rules on the one hand and moral rules and customary rules on the other. However, both the psychological theories which assert the position that rules are spontaneously accepted by individuals and do not therefore need to be backed up by coercion and the teleological rules which argue that the natural ends of law are justice, the common good or peace, which can be achieved without the use of force and coercion, do not provide a satisfactory answer because "[If] the element of coercion is left out, rules of law and rules of custom are difficult to distinguish in respect to their ends. Briefly, when not disguised as coercion theories, psychological and teleological theories cannot distinguish between legal rules and moral rules, and between legal rules and the rules of custom respectively" (Bobbio 1965, 326). Moreover, they

cannot be distinguished between on the basis of their content because, as Bobbio explains, "[S]ocial life is not the content of legal rules, but only the context in which legal rules operate; […] what seems to distinguish them is the 'how', and not the 'what'" (Bobbio 1965, 327).

For Bobbio above all, Kelsen tried to solve the problem of the relationship between law and coercion by attempting to distinguish the content of legal rules (and therefore to define legal rules) not in terms of form or ends, but exclusively in terms of their object. Thus, "if law is the body of rules which regulate coercion, or the exercise of force, this means that coercion or force is the specific object of legal rules, … and law is the rule of force" (Bobbio 1965, 328). This means that the law should no longer have the aim of regulating all human behaviour or social life, but exclusively of regulating behaviour in order to obtain certain results by means of force (Bobbio 1965, 330).

According to Bobbio, coercive power designates four forms of application of force: (1) the power to compel those who do not do what they should do; (2) the power to restrain those who do what they should not do; (3) the power to substitute (forced action); and (4) the power to punish those who have done what they should not have done. Classifying human acts as "actions or omissions, force is directed with regard to actions either in order to bring about or replace them, and with regard to omissions either to prevent or punish them" (Bobbio 1965, 330). Consequently, according to Bobbio, law has four functions in relation to coercive power, namely the *when*, the *who*, the *how*, and the *how much*: that is, it must (1) fix the conditions governing the exercise of coercive power; (2) determine who can exercise coercive power; (3) determine the procedure and the persons who can exercise coercive power; and (4) specify how much force can be exercised (Bobbio 1965, 330–331). In this way, since coercion is not the means for realising the law but its object, the relationship between law and coercion has three aspects: (a) coercion as an essential instrumental element; (b) coercion as a non-essential element; and (c) coercion as an essential material element Bobbio (1965, 331). Thus, force is not at the service of law; rather, law is at the service of force. Accordingly, "force and law condition each other reciprocally" (Bobbio 1965, 334).

Bobbio points out and stresses that the rules comprising the legal system are not sanctions but rules that regulate sanctions (Bobbio 1965, 334). This means that when we speak of force as the object of regulation it is clear that this refers not to individual rules but the system as a whole, and hence that when we speak about law, we distinguish between a legal system and a system that is not legal, and not between a legal rule and a rule that is not legal. After establishing a legal system in its entirety rather than single rule, Bobbio continues, "[I]n order to establish whether or not a single rule is a legal rule, it is enough to demonstrate that it belongs to the system through the so-called criterion of validity", that is, the individual rules must belong to the system in order to be legal (Bobbio 1965, 335–336). It is only by differentiating between the system and individual rules and by defining the law as an aggregation of rules (and as long as we do not attempt to define individual legal rules) that we can understand how the theory of law as a rule of force is a theory not of individual legal rules but of the legal system as a whole.

Force means coercion, and the concept of coercion is strongly tied up with the idea of force. For Bobbio, as well as for Kelsen, the legal system is a coercive order in the sense that it incorporates rules governing the exercise of force and is characterised by these (Bobbio 1965, 337). According to Bobbio, there are essentially two prerequisites for the exercise of force: (1) the power to compel or to prevent an action; and (2) the power to repair the effects of an action or of its omission after the violation has occurred, that is, the power of the legal system to impose and enforce sanctions if a legal rule from the system has been violated. Bobbio identifies two types of sanction, depending upon the behaviour's relationship with the end pursued by the person: "(a) those that make it possible for compliance with a rule to be an appropriate means and transgression to be an inappropriate means of achieving the desired goal; (b) those that make it possible for compliance with the rule to be an appropriate means and transgression to be an inappropriate means of avoiding the undesired goal" (Bobbio 1965, 337–338). Dealing as they do with the relations between means and ends, these two kinds of sanctions can be expressed through different technical rules. Bobbio specifies that if you want x, you must do y, where x is the end desired and y is an action regulated by the rule (deprivation of a good, privative sanction), or that if you do not want x, you must do y, where x is the end which is not wanted and y is the action regulated by the rule (infliction of a punishment/punitive sanction). In the former instance we speak of an invalid action (the action has no legal effects) if it does not conform to the legal system and the legal system's sanction of nullity (judgment of invalidity). In the latter case we speak of an unlawful action (legal negative consequences) if it does not conform to the legal rules which the legal system backs up with punishment. For the transgressor, punishment represents the harm which can be imposed on him by the force of the legal system; the privative sanction on the other hand represents the loss of the benefits of the legal system. Thus, for Bobbio "in the case of punishment, the sanction for the transgressor consists in having to submit himself to a force which diverts him or takes him away from his pre-established goal; in the case of nullification, the sanction… consists in not being able to avail himself of the force which should have helped him in achieving his established goal. Unlawfulness and invalidity are two kinds of valves which open and close… and therefore regulate the flux of force which is at the disposal of a dominant power to make effective the rules pertaining to the system as a whole" (Bobbio 1965, 340).

However, in order to understand fully Bobbio's reasoning concerning the relationship between law and force it is necessary to understand which ideas underlie his thinking in this regard. In his famous course on the *Theory of the Legal System* [*Teoria dell'ordinamento giuridico*] from 1960 (Bobbio 1960), Bobbio asserted that original power is derived from the established political forces that created the legal system and that, if the legal system depends upon the original power,[4] then

[4]Kelsen too provides a similar justification for power when asserting that "… and yet law only becomes law, it only becomes *positive* law at any rate due to the fact that it is imposed or posited by the 'state' power, by the power that only becomes the state by virtue of the law" (1921, 242).

law must consequently be derived from force. To obey the original power thus means to subject oneself to the subject holding coercive power with the aim of ensuring compliance with norms (legal rules), including by recourse to force. Force is thus the necessary means used by power, and the law is in turn based on coercive power. As the law is a body of effective rules, the legal system is inconceivable without the exercise of force, without a power that sustains and justifies it. Force is thus necessary in order to realise power and the legal system can only be effective if it is based on force. The legal status of a norm is not based on its content or form but on the fact that the norm is part of the legal order, and the order becomes legal when rules governing the use of force are formed. Whereas for Kelsen force is subject to legal regulation and the law is not a body of norms imposed by force but a body of norms regulating the exercise of force (a particular order or organisation or power, law is an organisation of force) (Kelsen 1945, 21; 1960, 221), for Bobbio the rules governing the exercise of force within a legal system do not have the purpose of implementing force but serve the purpose of organising sanctions, and thus of rendering behavioural norms and the system itself more effective. Thus, the law is not a means for organising force, but for organising society by force.

3.4 Frederick Schauer: Coercion as Force of Law

If Kelsen and Bobbio provided a strong explanation for the function of coercion and sanctions, this was possible thanks to their normativist conception of the legal order as a system of norms and, above all for Kelsen, as a formal system of law. In fact, according to their doctrine, law is law thanks to the specific nature of norms and not because norms prescribe models or ends to be pursued. The law is the legal system tout court, which is in turn based on a hierarchical system of norms kept together by a basic norm, which guarantees its unity in the sense that the validity of individual norms, and hence of the legal order as a whole, is guaranteed by one single norm (the *Grundnorm* for Kelsen[5]) which confers unity and consequentiality on the variety of individual norms. On this view, the law is a self-referential system that follows an internal logic. It is within this normativist conception of the legal order that the function of coercion and sanctions is construed in a strictly legal role such that they constitute essential elements of the legal norm itself, with the result that both coercion and sanctions must be understood in a strictly normativist and legal sense, are efficient and effective and form part of the legal apparatus of a state. On this view, legal norms are generally binding rules of conduct posited by the state authority, which are intended to regulate social relations. Legal norms determine the rights and duties of the parties to legal relations and compliance with legal norms is guaranteed by state coercion. Coercion is considered to be instrumental in determining a state's legitimacy and authority, that is the law's ability to prevent certain

[5]Definition of the Grundnorm: The Grundnorm is a self-justifying norm as it affirms itself.

behaviour by criminalising it (a man is coerced when either force is used against him or his behaviour is being determined by the threat of force) and to prove state's power to operate in structuring society.

There is no doubt that coercion has a political and social significance in that it helps to explain both the state's authority as well as its proper limits by exerting psychological pressure on subjects to act or not to act in some particular way by means of (psychologically potent) threats which alter the costs and benefits of acting, where the coercer—be it state or a single agent—communicates a conditional proposal involving a threat accompanied by some demand regarding the coercee's future actions (Anderson 2010, 3, 4).

And for Schauer too, what makes law distinctive is that, unlike other social, political, and cultural institutions, it not only tells us what to do but threatens us with unpleasant sanctions. More specifically, Schauer considers in greater depth the relationship between the role of the body imposing the rule and the person subject to the rule, specifying that a person with power to impose rules intervenes in harmful events, exerting control over people that breach rules. "And because rules are generalisations,… the rational intervener imposes rules even where he recognises that those rules will in effect mistakenly apply on some occasions and mistakenly fail to apply on others. […] the body imposing the rule will impose rules whenever it perceives that the harm prevented by the imposition of rules in the area in which their application is certain exceeds the harm caused by imposing rules in the area in which their application is uncertain. In imposing rules, therefore, the rational imposer considers how he or she should maximise her control over multiple miscreants, or,… over multiple potentially misbehaving (to the detriment of third parties) agents" (Schauer 2005, 88).

The question that Schauer asks in order to explain and to the very end to justify coercion and sanctions is a very simple question, that is 'Do people obey the law and if they do obey law do they obey the law, or are they doing something else which merely makes them appear as if they are obeying the law?' The law is peculiar as it is different from other normative systems of ethics and right-doing. And also for Schauer, as for Kelsen and Bobbio, this is the reason that makes law distinctive and unlike other social and political and cultural institutions because it not only tells us what to do but threatens us with unpleasant sanctions. Furthermore he asks, would we even obey it as a normative system without these sanctions and coercive means? Schauer indicates a sharp distinction between behaviour which is compliant with commands, and behaviour which is merely consistent with them. This might appear deeply problematic for those who believe and act on a law-as-law basis because it suggests that it is possible that the law merely tracks people's actions, which they would do otherwise do anyway. In that sense law loses its social status as a system different to other moral and normative systems. And for Schauer, if we are after all interested in law largely because of what it can do to us, of how it can make a difference, and if the commands merely track the law, then there is little point in being interested in the law at all. And for Schauer it seems also uncontroversial that most of the people will not commit unlawful acts just because it is the right thing to do.

And still it remains the question of why people actually comply with the law. In his description Schauer indicates that when sanctions are non-existent, soft, or administered without much alacrity, people defer to their better judgement, and that the task is to determine whether they comply with the law. And it is here where Schauer provides and introduces the necessity of coercion and sanction for the law to be effective because 'legal systems have long relied on coercion and we can understand why. A principal reason for having the law is that people's judgments are often mistaken and it should come to little surprise that many people overestimate their own decision-making possibilities'.

And this is why law with coercion is a fundamental system for effective social regulation in a complex world of beliefs, needs, wants and desires and the inevitable consequences that occur because of them.

For Schauer the law is often saying us to go against our best judgements, and when that happens, the law needs to be something more than a voluntary system that is alongside our natural tendencies to act in a certain way. That is why once we understand that people's self-interested decisions may not be in the collective interest, and once we understand that people's non self-interested judgements may often be mistaken, we can understand the need for law and law's authority, that is the need for force, coercion and sanctions.[6] As Leslie Green explains in his interesting comment on Schauer's book, "Schauer insists that coercion is central to a theoretical understanding of law and it is a mistake to 'denigrate' it, think it 'irrelevant', 'relegate it to the sidelines'" (Schauer 2015, 14).

For Schauer coercion is central to law, it merges with social power, that is, it is capable to influence people's action and interests, and its nature has been largely underestimated, and is convinced that many laws would not be complied with without a coercive support, motivating incentives included. It compels people to do what the law wants. Schauer provides us with a broader description of coercion and sanctions which is less closely aligned with a formal and normativist schema of the law. Schauer analyses coercion and sanctions, arguing that they are necessary in order for the legal system to operate, starting from an empirical observation and thus not from the legal order as a theoretical and legal philosophical construct. He concludes that coercion is widespread, or in his words "ubiquitous", in our legal systems, by which he means to say that the law applies coercion over a very broad range of cases, varying from rules governing how to drive a car through the provision of positive incentives, such as rewards and subsidies granted in a wide variety of cases, to contractual clauses and many more. In doing so, however, the law takes on nuances, such as with regard to cases involving state subsidies, which may leave the reader perplexed as to whether they may really be considered as coercion.

[6]In his interesting comment of Schauer's *The Force of Law*, Leslie Green affirms that "The force of law is not one thing but three: the imposition of *duties*, the use of *coercion*, and the exercise of *power*" (2015, 3) that is, that "Our law needs a back-up plan that comes into effect when we fail to conform to the demands of duty" (2015, 6) and that "The coercion thesis take the view that law guides by coercive proposals, normally by threats" (2015, 19).

It is true that the definition of coercion provided by Schauer is at times blurred and is not rigorous. For example, he draws a distinction between coercion on the one hand and sanctions and compulsion on the other (Schauer 2015, 129), asserting that law is coercive when its sanctions motivate people to act in a way they would not have acted had it not been required by the law, while law is compulsory where it succeeds in forcing people to change their behaviour to conform to the law. It has been rightly stressed in a recent review of this book (Miotto) that a sanction is that which the law imposes in the event of non-compliance with the dictates of the law, and it follows from this that sanctions may be coercive or non-coercive. In this sense continental legal philosophy provides us with clearer and conceptually less ambiguous conceptions. However, the discussion would end up being lengthy and pointless, departing from the underlying argumentation proposed by Schauer which clearly seeks to go to the heart of the problem and which essentially appears to be correct with regard to the stated purpose, that is in seeking to demonstrate that coercion and sanctions are necessary within a legal order to ensure its proper functioning, also in the face of potential exceptions. In fact, Schauer does not always distinguish clearly between cases involving coercion and cases involving non-coercive acts. However, that lack of distinction does not undermine the core essential argument which Schauer presents throughout the book without much ambiguity, namely that coercion and sanctions are a constant fact throughout all legal systems, and hence this does not appear to us to represent a lack of clarity or theoretical limit. If nothing else, Schauer already indicates in the title *The Force of Law* that, in order to be strong and to function properly, the law needs elements that are capable of rendering it such, and certainly both coercion and sanctions fulfil this purpose, even though they do not represent its sole internal rationale.

4 Conclusion

Schauer is certainly not a fully-fledged normativist—in fact he is a typical representative of analytical jurisprudence—but he does endorse a certain view of normativism,[7] accepting that coercion is an element of the legal order and of law, i.e. a means of backing law. In this sense Schauer has a normative concept of coercion. However, leaving aside the role of coercion in the law, Schauer's book gives rise to various interesting reflections on law in general. In order to understand the need to use force within the law, it is useful to refer to Schauer's analyses of the psychological attitudes of individuals and the extent to which these impinge upon their behaviour with regard to the legal demands made by a society. It would in fact be interesting to know whether the process of internalisation is a process of

[7]Schauer (2013). On this occasion, Schauer asserted that coercion, i.e. the ability of law to make people do things they do not want to do, re-emerges as perhaps the most important characteristic and defining feature of law.

rationalisation, a conscious rationalisation (and if so to what extent) and whether there is any general awareness of internalisation, long with the extent to which it is possible to demonstrate that human behaviour is independent from the law. In addition, noting that people who are motivated morally nonetheless act according to the law, it would be appropriate to consider whether this is a simple coincidence, and thus to establish a more precise relationship (in quantitative as well as qualitative terms) between the sociological, political and psychological components of legal force, and also to ask whether the use of legitimate force performs a compromise function within the general behaviour of individuals. It would also be appropriate to clarify the relationship between morality and self-interest and whether self-interest is immoral (by definition, and to what extent), along with the relationship between self-interest and interests rooted in the law, including whether they are diametrically opposed to each other or whether they can actually overlap in real life, except as regards motivation. In addition, it is also important to consider the extent to which it can be asserted that self-interest is always opposed to moral sensibility and to ask whether the aim of law is to solve practical problems or to change the moral opinions of people. If the law is supposed to perform a regulatory function and if this implies that there is a model of society that we seek to obtain by exerting moral pressure—and this is a very important moral and sociological point—it will be necessary to determine the role of individual attitudes in relation to a coercive and sanctions-based model of society. In fact, it is not possible to factor out people's moral agreement with the law and to ask whether this agreement is spontaneous because the individual approves its morality or is dependent on the fear of the consequences in the event of non-compliance with the law, along with the extent to which people comply with the law irrespective of its content, because of its content or because of its existence. "What we need to develop—rightly says Green (Green 2015, 30, 32)—is an account of the 'very idea of obeying the law *qua* law'…. Before we can count how many ways the law has to coerce us, however, we need to know what counts as coercion".

The conclusions reached by Schauer, Kelsen and Bobbio concerning the need for coercion and sanctions within the legal order are largely the same, namely that in order to function properly a legal order must be coercive and based on sanctions. It is the starting points used for their reasoning that differ. Schauer starts from an empirical analysis of the behaviour and inclinations of human beings in order to assert the need for sanctions and coercion within the law. As representatives of a classical and traditional form of legal positivism, Kelsen and Bobbio start from the assumption of the unity and coherence of the legal order, while Schauer gives greater consideration to the psychological and social aspect of human behaviour[8]—and perhaps placing too much importance on the psychological aspect of human behaviour—vis-à-vis the law, reaching the conclusion that in order to be observed the law needs to be backed up by the force of coercion and sanctions.

[8]Here it might be possible to endorse the view of Ludwig Wittgenstein when he asserts that we don't follow specific rules but mere social conventions.

And on the other hand, Kelsen and Bobbio draw a distinction between legal systems and all other systems, including moral, political and religious systems. This is the typical distinction drawn by legal positivism with all other schemata for interpretation, thereby distancing the law from all other systems. The law is law insofar as it is law and any further criteria for interpreting the human sphere belong to other disciplines. The only valid question in this regard relates to what really makes law distinctive compared to other systems. Moreover, a comparison between Schauer, Kelsen and Bobbio should take as much account as possible of the vast problem concerning the separation between law and morals as analysed and debated within continental philosophy. In this regard it would be useful to consider the extent to which Schauer considers moral obligation to be influenced by law, commands, sanctions, and coercion, and it is also legitimate to ask whether he considers there to be any intrinsic morality and whether this is the result of a process of internalisation. It would also be interesting to understand whether, for Schauer, it is possible to internalise the law without reference to coercion and sanctions and how it is possible to establish the origin of moral obligation irrespective of the law, as well as to establish whether the law prevails over morality, or vice versa, and if so for what reason. We could perhaps say in this regard, according to a utopian model, that the ideal habits and behaviour of individuals should result from morals plus the law. But can law and coercion be moral? Must an account of coercion rely intrinsically on normative presuppositions (meaning that it is intrinsically moralised) or is such a theory to be developed out of purely positive premises (meaning that it is non-moralised)? It has not been proven that a moralised account of coercion is required because "an account that eschews such moral judgments is liable, it may be supposed, to misclassify cases and, in particular, to find coercion where it should not" (Anderson 2010, 16). Moreover, "given that morality and other forms of normativity play a role in helping us to organise our societies and lives into various cooperative arrangements, there are… many ways in which normativity or morality can come into understanding of how one agent can exercise power over another" (Anderson 2010, 17). Yet this begs the question as to "why coercion requires special justification, why coercion is thought to be an act of special moral significance" (Anderson 2010, 26).

However, states do not need to control all different forms of pressure, including coercion and sanctions, in order to secure peace, nor in all likelihood does their authority depend on having done so. "A state that wishes to claim legitimate authority will need to protect individuals from the coercion of others as well as to avoid unjust coercion of its own" (Anderson 2010, 29). It is thus possible to explain how important it is that the state has the right to use coercion because society needs to be able to prevent and inhibit disruptive and anti-social behaviour in order to guarantee stability and safety. "While most people will be likely to respond to either moral or prudential considerations that favour peaceful coexistence, there is a continuous temptation for some people to victimise others. When individuals or groups disregard law,… society will need to be able to halt and discourage such behaviour effectively…. It is thus crucial for a state's functioning and authority that it exercise such powers,…" (Anderson 2010, 30). As Dennis Lloyd has argued, the

force of law is and seems always to have been linked with rules which are capable of being enforced by coercion (Lloyd 1970, 35). According to Kelsen, it is the *Grundnorm* that establishes the legitimacy of the laws of the state, while on a more modern and sociological view the legal order should be a system for satisfying legitimate expectations with the aim of realising an ideal of justice and a social equilibrium. In *The Force of Law*, Schauer seems to say that collective values and goals are more important and should be respected and realised more than individual ones. However, this presupposes a shared global ethic. Does Schauer agree?

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Forceful Law

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> *In equating law with coercion—the threat of punishment or some other "evil"—Austin was simply wrong. Law does much else beside control, threaten, punish, and sanction, and law does not always need coercion to do what it can do. But the fact that coercion is not all of law, nor definitional of law, is not to say that it is none of law or an unimportant part of law. Relegating the coercive aspect of law to the sidelines of theoretical interest is perverse.*
>
> —Schauer (2015, 167)

Abstract Frederick Schauer thinks that force and coercion are not given their due in contemporary philosophy of law. I agree with him that force and coercion play a big role in our legal systems. Nevertheless I think that (1) coercion and force are in an important sense secondary or supplementary to the law's claimed authority, that (2) even if there is a significant amount of coercion and force, there is also a significant amount of coordination and consensus; giving coercion and force their due should not blind us to these other things.

1. In one important respect Anglo-American legal theory has not had much influence on political philosophy. Many if not most contemporary Anglo-American political philosophers seem to think that coercion and force are central to state power. John Rawls, for instance, claims that "political power is always coercive power backed up by the government's use of sanctions, for government alone has the authority to use force in upholding its laws." (Rawls 1996 [1993], 136). This understanding of the state as inherently or importantly coercive is shared by left-liberal and libertarian thinkers alike. Elsewhere I have argued that this view is mistaken and that it represents a failure to understand the kind of form of political organization represented by the modern state, in particular its claimed authority or sovereignty. Some of the arguments I have deployed appeal to the familiar considerations about law invoked by H.L.A. Hart and Joseph Raz, and I have expressed surprise that the lessons taught by these important legal scholars have not been sufficiently appreciated by political theorists (Morris 2012).

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In a number of essays and now in his excellent new book, *The Force of Law*, Frederick Schauer challenges the picture defended by Hart, Raz, and their followers. As a fan of Hart and Raz I picked up the book expecting to disagree all the way to the end and was surprised to see with how much I agreed. Schauer is certainly right to think that coercion and force are important to the phenomena we wish to understand—important to the law, to our modern legal systems, and to a number of associated practices and attitudes. He is right to think that legal theory has or ought to have many dimensions other than the conceptual, and as he rightly affirms, "law is commonly and valuably coercive." (Schauer 2015, x). I also agree that "we should try to explain why the (coercive) face of law that seems so important to ordinary citizens, to officials, and to nonjurisprudential commentators has become and is so important." (Schauer 2015, x). Nevertheless, I think that (1) coercion and force are in an important sense secondary or supplementary to the law's claimed authority, that (2) even if there is a significant amount of coercion and force, there is also a significant amount of coordination and consensus, and that giving coercion and force their due should not blind us to these other things. I certain want to resist attributing to coercion the centrality that some nineteenth century legal theorists and many contemporary political philosophers have attributed to it. I am not certain, however, to what extent I am disagreeing with Schauer here.

Elsewhere,

> I have argued that influential conceptions of state power as essentially coercive are mistaken. They are mistaken in thinking that states and force are conceptually connected, but much more importantly, they err in attributing too much importance or significance to coercive power. It is not that just states can entirely eliminate the threat of sanctions. It is that coercion and force do not play as central a role as is widely thought, and this fact should affect the role the state's coerciveness ought to play in our accounts of legitimate or just states. (Morris 2012, 48)

Now my principal claim above, that "coercion and force do not play as central a role as is widely thought", is awkwardly imprecise. I think that some legal theorists and most contemporary political philosophers overemphasize coercion and force, and that this is an important objection to much of contemporary *normative* political theory. The alleged centrality of coercion and force looms large in the story that Rawls and other contemporary political philosophers tell, even though the just societies they envisage should need less coercion and force than our decent states have needed, and much less than that deployed by evil trannies.

Schauer is right in thinking that there is a lot of coercion and force and that this fact is important. "The presence of unavoidable coercive power is what is typically behind the very phrase 'the force of law' and behind the ordinary citizen's believe that coercion is central to the very idea of law." (Schauer 2015, 165). I need to try to make clearer my remaining possible disagreements with Schauer, even if I am not sure how significant they are. I think coercion and force are not as central to law as most contemporary political philosophers seem to think; they may not be as central as Schauer seems to think. It is not easy, however, to adjudicate a debate between a party that says there is much less of something than widely believed and another who says there still is a lot. It's not just that the dispute here is broadly empirical; it

is also not very easy to measure the quantity of stuff that is in dispute! In addition, the concepts at issue—coercion and force, as well as violence—are hard to characterize precisely. Let me say a few words about this at the outset, as I want to use these terms somewhat differently than Schauer does.

'Coercion' is notoriously hard to define, as Schauer notes (Schauer 2015, 127–129). Most natural language terms are hard to define, at least if one expects necessary and sufficient conditions. But 'coercion' suffers from special problems of its own. I don't think we always need good characterizations or definitions, at least for the ends of essays like this one, but I do want to distinguish coercion and force at the outset. I should like to think of *coercion* as a particular way of getting people to act in certain ways: we coerce people when we get them to act in certain ways by (credibly) threatening non-compliers with bad consequences. Compliance is nevertheless assured by the subject's agency. By contrast, *force* as I wish to think of it —"physical force"?—largely bypasses the subject's agency; for instance, someone is tied up and carried off to prison. 'Force' is often used more broadly in everyday life, but I think it is useful to distinguish it from coercion as I have. For one, force thus understood may in some societies be much more common than others (compare, for instance, Saddam Hussein's Iraq to Canada). Lastly, I wish to contrast both coercion and force to *violence*. Weberian definitions of the state often use all these terms interchangeably in a way that is confusing. Where handcuffs and prison cells may not hurt, breaking legs (and souls) does. Violence involves damage to the subjects. Although it is not central to the questions taking up in Schauer's book, it is important in these contexts to think about the state's specific power to use violence permissibly.[1]

2. I now want to try to determine more precisely where there may be some disagreement with Schauer. I agree that we must take note of the considerable amount of coercion and force deployed by the legal systems of our societies. But I wish to say that most of this coercion and force is, in a sense, secondary or supplementary. I am not sure that Schauer will disagree. To explain my claim I'll use an idealized example and contrast it to our worlds. The example won't be science-fiction, but a few aspects of it will stretch our imaginations.

Consider a society with people and government and law. (1) The **society** is small, much like the small to mid-size communities that humans have lived in for most of their time on earth. These communities, when very small, have been quite egalitarian, with power dispersed and decision-making decentralized (The smallest such communities were anarchist and lacked government and a legal system in Hart's sense). Larger communities, still much smaller than our states, are less egalitarian, with varying degrees of centralization of power. As classical political philosophers appreciated, the size of a political community matters considerably.

[1]I not only want to introduce distinctions that Schauer does not think need to be deployed; I also want to resist broadening the notion of force to include multiple other kinds of "incentives" (pp. 98–99) or broadening coercion to include incapacitation or door locks and the like (Schauer 2015, 124–126).

(2) The **people** in this small society are heavily idealized. Let us suppose that (a) they are generally reasonable and well-informed about matters relevant to social order (e.g., they may be quite ignorant about other things, say, physics or history). (b) They are rational and capable of constraining themselves; in addition, they are capable of acting on preemptive reasons for action, excluding certain considerations from the balance of reasons.[2] In addition, (c) there is considerable consensus about important structural or political matters.

(3) The **government** of our small society is importantly different from most governments we know, though the contrast I am drawing may be controversial. (a) The government generally does what it is supposed to do and little else; it is effectively limited, at least in practice. (b) Government agencies are quite efficient and competent. In addition, (c) law requires people to do (i) what is independently right[3] or (ii) what is required by reasonable and fair cooperative or coordinative schemes, and nothing else. These conditions are obvious idealizations (I note that c as formulated may exclude some forms of just redistribution; the formulation is meant to exclude unjust redistribution).

Our small society is not utopian in a certain respect. We shall find in it some coercion, force, and violence. People may not be perfectly rational and reasonable, and there may of course be external threats that require coercion, force, or violence. In addition, it's possible that coercion, force, or violence sometimes are necessary to signal the importance of certain norms.[4] Nevertheless we should expect that most disputes and conflicts in our small society will be resolved peacefully.

What's noteworthy about this small society is first that there is comparatively very little coercion, force, or violence on the part of its government or for the most part its members. I grant that this is an artifact largely due to the idealized members of the society (esp. parts 2 a and b). But I think that small societies, especially face-to-face communities, have properties that make cooperation and concord much easier to secure than large societies.[5] Contemporary political philosophers, on my view, do not spend enough time reflecting on the effects of size; some of the problems facing the United States, Russia, and China do not confront Norway or

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[2]Readers will recognize a reference to Raz's understanding of practical rationality. See Raz (1999 [1975]) and (1986, Chaps. 2–4). In his terms I am assuming that people are able to act against the balance of reasons and so doing is often rational. There are other revisionist accounts of rationality that are similar in important respects. See, for instance, Gauthier (1994, 1996) and McClennen (1990).

[3]Independently right, either by standards of natural law or convention.

[4]"Coercion may accordingly operate indirectly to encourage legal compliance by reinforcing the seriousness of the prescription itself." (Schauer 2015, 103).

[5]In real small societies in the past, even those with little centralization of authority or power, there was considerable coercion and force. They were not, anymore than our societies, populated by reasonable, well-informed people capable and willing to comply with preemptive directives.

I might also note that in these communities the distinctions we draw between morality, manners, and law seem absent. So it may not always have been true that "law, unlike morality and etiquette possess the resources to compel compliance in ways that other normative systems do not." (Schauer 2015, 1).

Switzerland, much less Singapore or Andorra. Culture also is very important, but I am ignoring that and am merely assuming considerable consensus without specifying its sources (2c).

The second think to notice is that what little coercion, force, and violence there is in this small society is *secondary* or *supplementary* in certain ways. Appreciating this is quite important for understanding our legal systems and political forms of organization. For various reasons, people may not always act in the way they think they should act (e.g., temptation, weakness of the will, corruption, greed, jealousy). Coercion, specifically the threat of sanctions, is a supplementary incentive, available when people are not entirely reasonable or able and willing to constrain themselves, or when they are misinformed (I am assuming that the laws are just and people have reasons to just; coercion is of course available to get people to do what they would otherwise have reason not to do). They may also be unable to respond as they should to preemptive directives requiring that they exclude certain considerations from the balance of reasons.[6] In addition, coercion and force often provide assurance that others will comply. Some norms are reciprocal; it makes sense to accept them and conform to them only if others do so as well. When one is not certain of the compliance of others, coercion and force offers assurance. In these familiar ways, coercion and force are supplementary.

Coercion and force are supplementary or secondary in another way. Coercion and force *follow* wrongful disobedience; they are a *response* to the wrong. "It is because a rule is regarded as obligatory that a measure of coercion may be attached to it: it is not obligatory because there is coercion."[7] Coercion and force here are a response to a wrong, and their justification presupposes this prior and independent wrong. People are fined or imprisoned *because* they acted wrongly.

In our small idealized society, then, coercion and force play a role, albeit small, as a supplement to other factors that sustain social order. Our societies are different in ways that I shall detail. But while here coercion and force play a larger role, it remains secondary and supplementary in the senses I have described. As I say elsewhere, "One does not understand law and, more generally, states if one does not see coercion and force as supplementary to authority. Coercion and force are needed when the state's claimed authority is unappreciated, defective, or absent."[8]

Our societies are different. (1*) They are large, with much power centralized—they are modern states.[9] Size alone creates complexity and social order becomes harder to maintain by decentralized means. There will be less consensus and consequently more disagreement and conflict. Large societies require more law; ours require a great deal, though it is controversial how much it really needs. As we

[6]I make reference to a Razian account of practical rationality and authority. I think it is possible to deploy my idealized example with or without the assumption of a revisionist conception of practical rationality. Agents without the capacity to constrain themselves and to act counter-preferentially may be harder to control.

[7]Arthur Goodhart, quoted by Schauer (2015, 31).

[8]Morris (2012, 40), also quoted by Schauer (2015, 97).

[9]See Morris (1998, Chap. 2) for an analysis of the state.

shall see, Schauer thinks that the force of law in our societies makes possible many benefits. Recall the characterization of government in our small society:

> (3a) The government generally does what it is supposed to do and little else; it is effectively limited, at least in practice. (b) Government agencies are quite efficient and competent. In addition, (c) law requires people to do (i) what is independently right or (ii) what is required by reasonable and fair cooperative or coordinative schemes, and nothing else.

For various reasons we should expect conditions a-c to obtain much less in a large society. Here government will need to do more and in some ways to be more active. Even if it remains limited, it may be expected to be more clumsy and inefficient. But presumably the governments of large societies, subject to multiple pressures from powerful groups, will not generally do what they are supposed to do and little else. Law will not be limited to (i) what is independently right or (ii) what is required by reasonable and fair cooperative or coordinative schemes, and nothing else. So (3*) government will act in ways which will involve more coercion, force, and possibly violence.

Schauer argues that "legal coercion's contingent ubiquity testifies to the fact that in many domains there are valuable goals that cannot be achieved by cooperation alone… If we ignore this fact, we will have ignored something very important about why law exists and what functions it serves." (Schauer 2015, 165). Schauer thinks that much of contemporary jurisprudence takes our attention away from the "force of law" and hinders our understanding of some of the important benefits of law: "focusing on the coercive side of law helps us to understand why and when we might need law, and why and when law can do things that other political institutions and other forms of social organization cannot." (Schauer 2015, 168, last page). I agree and wish to mention the opportunities offered by our large societies and global order. In parts of our world there are considerable benefits available to members of large societies. If large societies are open in various ways—opportunities open to most if not all—there will be considerable benefits available to people that are not to be had in small societies. So here law and associated coercion and force make available benefits not otherwise available.[10] This is important as these benefits are not to be found in small societies, so it may be argued that coercion and force are needed to make them available and that consequently here we misunderstand coercion and force if we think them to be unimportant and needed only to address negative externalities.

However, there is another side of the force of law to consider. Let us note that many of the things that government and law do in our large societies comprise valuable "things that other political institutions and other forms of social organization

[10] *The Wealth of Nations* is the first of many works to explain the benefits of size. Larger "markets" make possible cooperation with more people. I put 'markets' in double quotation marks to forestall common misunderstandings of markets as narrowly commercial or "economic" realms; they are better appreciated as domains of cooperation. The notion of "open access orders" developed in (North et al. 2010) is very illuminating here. Open access orders greatly enlarge our opportunity sets.

cannot" do as well as things that are *not* "valuable goals that cannot be achieved by cooperation alone". Some things law achieves are not desirable or not just. The extent of this is often contentious, but most people surveying all of the states that populate the globe will rightly think that many do many things that are wasteful, inefficient, unjust, and sometimes horrific. States capable, for instance, of redistributing resources will not always redistribute in just ways. In addition, as we well know, the modern state and its legal apparatus make possible evil on a scale that proved to be breathtaking in the last century. More contentious would be the claim that our decent liberal constitutional states allow for undesirable or wrongful activities "that cannot be achieved by cooperation alone". So an assessment of the relative benefits and costs of state power will be needed, however difficult it may be to do.

Let me mention that we should not only expect size to lead to an increase in the force and coercion deployed by government, it may also lead to an increase in the potential *violence* in society. One reason for distinguishing violence from coercion and force, as I have suggested we do, is that violence is special in a number of ways. Broken limbs are harder to repair than the damage of coercion and force, and lost lives cannot be recovered by the deceased. More to the point, the use of violence often triggers violent responses, and the consequent cycle of violent responses can easily spiral out of control. For this reason the control of violence specifically is always an important task of rulers or, in our times, states. States do this in many ways, but one that is important in the context of this discussion is the creation of a variety of means of "non-violent conflict resolution" (e.g., judicial systems, elections).

In my example of a small society I also offered an idealized description of its members (condition 2):

> (a) they are generally reasonable and well-informed about matters relevant to social order… (b) They are rational of constraining themselves; they are capable of acting on preemptive reasons for action… In addition, (c) there is considerable consensus about important structural or political matters.

A small society populated by individuals like this, where the laws are just, will not need to deploy much coercion or force—coercive *threats* may be plenty, but they will rarely need to be carried out. Were our large societies populated by such people, there would also be less coercion and force. And while I am not assuming that size alone will make people less reasonable or capable of constraining themselves (conditions 2a, b), most people in our large societies are not so reasonable or law abiding.[11]

I should also note Schauer's instructive emphasis on particular features of our societies, namely the size of our administrative state:

[11]Condition 2b is controversial insofar as the conception of practical rationality is revisionist and antithetical to orthodox balance-of-reason conceptions. Dominant conceptions of rational choice are balance-of-reasons accounts.

> The significance of law's coerciveness is highlighted by the omnipresence of law in the modern regulatory state… [T]he modern administrative state is an environment of pervasive regulation, with a mass of detailed regulations being enforced by the treat of criminal fines, civil liability, loss of privileges, and a panoply of other sanctions. Moreover, much of the contemporary regulatory environment, although often effective in implementing worthwhile environmental, health, safety, consumer protection, financial stability, and other policy goals, rarely inspires voluntary compliance. (Schauer 2015, 43–44)

Our states are significantly different and busier than were those known to Bentham, Austin, and even Hart. Hobbes may have defended absolute government, but the size and activity of our states was unimaginable to him. The ways in which these changes have contributed to non-compliance remain to be determined.

So we should not be surprised to see that our states deploy a lot of coercion and force. Here "the state's claimed authority (will often be) unappreciated, defective, or absent", as I have said, and coercion and force needed. This coercion and force will be largely secondary and supplemental in the ways I have described. It is important to appreciate that law can have authority in this society even if its authority is often partial or otherwise incomplete or defective. Equally important there will be considerable amounts of coordination and cooperation that will not depend on the law. The "constitution" of a state will be maintained largely by the coordinated actions of large numbers of peoples, especially politically important individuals (e.g., legal officials, the military, various elites). Constitutions here are understood to be the conventions that create and maintain the political and legal system(s) of a society (see Hardin 1999, Chap. 3). They include Hart's rule of recognition and other constitutive conventions. Social orders generally—large and complex ones in particular—cannot be coercion and force all the way down (or up).

Schauer is right to think that we should not neglect the coercion and force associated with law, "focusing on the coercive side of law helps us to understand why and when we might need law, and why and when law can do things that other political institutions and other forms of social organization cannot." (Schauer 2015, 168, last page) Our idealized small society makes clear the ways in which coercion and force are secondary and supplementary, but it also suggests that the benefits made possible by "open-access societies" because of their size, require coercion and force. These benefits are not insignificant. Most of the wealth of our prosperous societies depend on extremely large markets, that is, domains in which cooperation is possible and facilitated. And expanding the range of cooperative relations, it may be argued, has significantly pacified most parts of the world. (Recent decades have of course give reason to be sceptical of this point, though it would take us too far afield to say much more about this here. See Pinker 2011).

3. I end my remarks with some comments about Schauer's interesting thoughts about nonstate law. It is "a mistake to make too much of the connections between legal systems and nation-states." (Schauer 2015, 162). He argues 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 and that may, sometimes but not

> necessarily, claim jurisdiction over only a limited number of activities. Sometimes.. these are private associations. Sometimes they are religious organizations… corporations… cross-border organizations *of* nation-states… (Schauer 2015, 161)

He notes that "Typically, the legal systems of nation-states purport to regulate all of the activities of their citizens. And typically, the rule systems of nonstate organizations do not." (Schauer 2015, 162). States of course claim, in addition to their extraordinary authority (i.e., sovereignty), the *exclusive* right to rule within their realm (Morris 1998, Chaps. 2, 7). There are complication questions raised here and cannot all be discussed here. Schauer rightly notes that

> Once we acknowledge the possibility of even legitimate coercive force outside of the realm of the municipal nation-state, and now that we have already acknowledged that institutions other than nation-states or their subdivisions can be organized with primary and secondary rules and the internalization of an ultimate rule of recognition, the search for the differentiating characteristics of law becomes more elusive. (Schauer 2015, 163–164)

I agree that coercion and force are ubiquitous in our world, though I am not sure the degree to which this will differentiate law from other institutions and practices:

> Coercion may, precisely because of its ubiquity, constitute a significant part of what differentiates law from other public institutions, from other decision-making environments, and even from other authority-based human enterprises. (Schauer 2015, 159)

Early small anarchist communities deployed a certain amount of coercion (Taylor 1982). More importantly, the law's claimed authority and the fact that this authority is acknowledged in part or in whole by a significant number of subjects may mean that it too will differentiate law from other institutions and practices.

I think, then, that coercion and force remain, in some important ways, secondary and supplementary to authority. In addition, even if there is a significant amount of coercion and force, there is also a significant amount of coordination and consensus, and that giving coercion and force their due should not blind us to these other things. Schauer is right in thinking that "The presence of unavoidable coercive power is what is typically behind the very phrase 'the force of law' and behind the ordinary citizen's belief that coercion is central to the very idea of law." (Schauer 2015, 165). He is right to emphasize this and to urge that legal theorists appreciate this fact. But the law's—and the state's—claim to authority also are central and, in important way, primary.

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The Force of Law: Law and Coercion, Validity and Effectiveness, and Synergy

Jorge Emilio Nunez

Abstract This paper considers the two claims Schauer introduces in *The Force of Law*. Firstly, the paper seeks to establish that coercion is (a) *generally* part of the law; and (b) *occasionally* may not be. Secondly, I intend to demonstrate that despite the fact that the relationship between rules and facts within a normative system could be necessary, sufficient or desirable, in all cases is a synergetic one: they work better when they work together. Hence, the last section of this paper shows that coercion has philosophical interest in explaining the nature of law and that the question whether it is a necessary or sufficient element can be set aside.

1 Law and Coercion

It is arguably a dogmatic view in post-Hartian legal philosophy that coercion is not a central element when defining and describing the nature and characteristics of law. To the surprise of many, *The Force of Law* reopens the question long ago considered to be settled. In his latest book Schauer has two claims that are interlinked: (a) a challenge to the current way in which we study jurisprudence; and (b) that law is commonly and valuably coercive (Schauer 2015, x).

Schauer claims that legal philosophy or legal theory currently limits its inquiry to essential features, elements, or components of the concept of law and its nature (Schauer 2015, 4) and disagrees with this approach. In tune with this, as legal philosophers—i.e. at least the Anglo-American tradition—follow H.L.A. Hart's

For a very early version of this paper see "нормативные системы как право в синергии: ДЕЙСТВИТЕЛЬНОСТЬ И ДЕЙСТВЕННОСТЬ" (in English, "Normative Systems as Law in Synergy: Validity and Effectiveness"), Philosophy of Law and State Responsibility, St. Petersburg State University, 2012.

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The Concept of Law, they make a postulate that law cannot be identified with force —i.e. coercion is not a necessary condition for law to *be*, to exist.

Schauer agrees that "noncoercive law both can and does exist." (Schauer 2015, 3) That is not the issue he intends to unravel in *The Force of Law*. However, because we currently understand in legal philosophy that coercion is not a necessary condition for law to *be*—i.e. exist, and legal philosophy seems to be interested only in those features in law that are considered essential, "coercion loses its philosophical or theoretical interest in explaining the nature of law." (Schauer 2015, 3)

Indeed, there is a vast literature on the nature and the constituent elements of law. Within this literature, and in particular the literature following Hart's *The Concept of Law*, coercion is not central. To be more precise, coercion is only briefly noted as a potential, additional and apparently optional element in this literature, rather than being subject to detailed analysis—or at times, any analysis at all.

This paper therefore considers the two claims Schauer introduces. Overall, it recommends that coercion should be generally considered when defining and describing the nature and characteristics of law; but may occasionally be omitted. The first part of this paper seeks to establish that coercion is (a) *generally* part of the concept of law and its nature; and (b) *occasionally* may not be. Thereafter, I focus the attention on legal philosophy as a whole and what we should consider as relevant when defining and characterising the law as it is and its nature. Consequently, the last section of this paper will show that coercion has philosophical or theoretical interest in explaining the nature of law since the question whether it is a necessary or a sufficient element is irrelevant.

2 Coercion Is *Generally* or *by Default* Part of the Law

In this section, I will focus on coercion as an element that is *generally* present when referring to the concept of law and the nature of law. I will argue that coercion is *generally* part of the law—i.e. part of the law *by default*—by evaluating erroneous interpretations. In order to assess these misunderstandings, I will centre the attention on coercion as: (a) a sanction—i.e. what I call a 'thick' or broad account of coercion or coercion *by default*; and (b) a sensu stricto view—i.e. what I call a 'thin' account of coercion.

There are many theories in legal philosophy, legal theory, or jurisprudence that have included coercion when defining and describing the nature and characteristics of law—i.e. Bentham, Austin, Kelsen, to name a few. They all maintain—at least broadly—that law will need some form of coercion to be, and that seems intuitively plausible too. An obvious example is Criminal law. Although Hart does not include the notion directly, he conceded that legal rules impose behaviours and therefore individuals are not free to do what they want (Hart 1997, 87).

More substantively, to *generally* include coercion in the analysis of what law is can be a corollary of all rules having a sanction—or at least, all legal rules having a sanction. That is, if we hold that all rules have a sanction, and that that coercion is

one of the many forms a sanction may adopt, then coercion may again be an object of analysis. The problem starts with a widespread misunderstanding of the meaning of the term "sanction."

On the one hand, since Hart the dogmatic view in legal theory is that "sanction" means privation, that is, a negative consequence. On the other hand, sanction may be seen as rewards—i.e. Schauer refers to carrots and sticks. Sanctions, however, may be more broadly defined as any kind of consequence that follows an act within the law whether that consequence is positive or negative.[1]

Hart—and thereafter his followers (for example very recently Green 2015, 9)—starts from a presupposition based on an oversimplification when he says that for Kelsen "[l]aw is the primary norm which stipulated the sanction." (Hart 1997, 20–25, 35; Kelsen 1949, 61) Therein, Hart somehow assumes that Kelsen identifies sanction with threat; rules therefore for this distorted account have the form of "[…] the antecedent or 'if clause' of conditional orders backed by threats or rules imposing duties." (Hart 1997, 37) The quotation is—to say the least—incomplete.

Kelsen tells us that law, like any other normative system, is an order integrated by rules (Kelsen 1949, 1). In order to distinguish these rules from any other normative system Kelsen tells us that they are hypothetical statements (Kelsen 1949, 38). These hypothetical statements stipulate as a consequence a coercive act, i.e. a sanction (Kelsen 1949, 45). That is to say, for a Kelsenian account, sanction is the consequence that *ought to* follow a given antecedent. Schauer, although enlightening, does not escape the post-Hartian slippery slope since he too defines coercion interchangeably with sanction, the latter associated mainly with negative consequences (Schauer 2015, 5). But sanctions do not only imply per se negative consequences. In fact, they may also include positive ones; even if we agree that sanctions in the form of negative consequences have a more visible role in a social orders such as law (Kelsen 1949, 17).

There is coercion—or more specifically, coercive sanction—when the consequence happens independently of the subject's will (Kelsen 1949, 18)—i.e. I prefer to use "independently" rather than "against" since the subject may be willing to align his volition with the consequence. So coercion means—thick account—that somehow the choice of an antecedent conduct is limited to the subject. That is, he either (a) follows the antecedent and therefore the consequence ought to follow—e.g. he murders and ought to be sentenced to a penalty; he signs a contract and ought to have consequently rights and obligations; or (b) he does not follow the antecedent and the consequence does not follow—e.g. he does not murder hence he ought not to be sent to prison; he does not sign the contract and ought not to have consequent rights and obligations.

For a 'thin' or narrow account, however, coercion may be identified with the potential use of force in particular cases. But, force does not need to be present in order to have coercion since it is a factual question whether power is actually used

[1]Note that I use the term "positive consequence" and not reward since reward may be an example of "positive consequence" but not the only one.

(Green 2015, 8; Kelsen 1949, 29 in fine and 30 supra). So, to use the classical examples of rules of contract or wills in order to show that because they do not prescribe coercive sanctions they are not included in Kelsen's view when defining and describing the nature and characteristics of law (Green 2015, 9) is misleading because of its incompleteness. It is correct to say that if we do not comply with the rules of contract, *force* will not be used—i.e. thin account of coercion. However, to state that not complying with the formation rules of contract will not have legal consequences is something different. That is because, even in cases like the ones sub-examine, the subject has his conduct coerced—i.e. his conduct is not completely free, autonomous—since if he does not comply with the rules of contract, there will be no contract at all and therefore, no consequent rights and obligations—i.e. thick account of coercion. To that extent, coercion is *generally* or *by default* part of the law.

3 Coercion May *Occasionally* not Be Part of the Law: Coercion Sensu Stricto

There are several means in which human behaviour may be motivated and coercion is but one of them. Indeed, there are situations in which our conduct may be somehow limited with regards what we ought to do or not to do—antecedent—in order for something else to happen—consequence. It is in these situations in which our behaviour is coerced. More specifically, coercion may refer to the use of force but it does not need to. Indeed, I will argue that there are other means to motivate subjects and I will reject the use of coercion in some cases. I intend to show that *occasionally* law may do without coercion.

4 Motivation

In what is specific to the social, legal, political and moral spheres, an individual or subject offers four different levels of analysis: (a) in their individuality (I); (b) in their relationship with their peers (you and I); (c) in their relationships as part of a community or society (us, from an internal aspect); (d) as a member of a community or society that has relations with other communities or societies (us, from an external aspect). A conflict of interest between subjects can only happen when more than one agent is involved. That is because, any community or population consists of subjects who are different in many senses—pluralism, as Rawls says[2]—is a

[2]Referred to Rawls's idea of pluralism as a "permanent feature of a democratic society." See Rawls (2003), in partic. 84.

permanent feature that cannot be ignored. Therefore, as in the case of civil societies in Rawls' *Theory of Justice*, I assume that subjects in their relations recognise some "rules of conduct" and act upon them (Rawls 1999, 4). But, as in any circumstances in which we have agents of different kinds, there will also be identity and conflict of interests (Rawls 1999, 4).[3] As a result, some criteria are needed for regulating their intersubjective interference.

Social orders such as religion, morality, and law are there in order to let subjects or individuals and social aggregations (Nozick 1974, Part I, Chap. 2) have their conducts interfered with in a frame of concord with others. As Kelsen says "to make them refrain from certain acts which, for some reason, are deemed detrimental to society, and to make them perform others which, for some reason, are considered useful to society." (Kelsen 1949, 15) Therein, law as any other social order, may motivate subjects to act or refrain from acting directly or indirectly.

Law, as any social order, "may attach certain advantages to its observance and certain disadvantages to its non-observance." (Kelsen 1949, 15) Indeed, even though he grants that the former "plays a far more important role" (Kelsen 1949, 17) in social reality, sanctions do not only imply negative consequences but may also include positive ones. In tune with this, Schauer attempts to include both advantages and disadvantages in his account when maintaining that "there can be rewards as well as punishments, and law's coercive […] power often includes its ability to create positive as well as negatives incentives." (Schauer 2015, 7) Unfortunately, Schauer falls victim to oversimplification too since he defines advantages or positive consequences in terms of rewards only (Schauer 2015, Chap. 8). Kelsen goes further and makes clear that social orders may even do without advantages or disadvantages and still "require conduct that appeals directly to the individuals." (Kelsen 1949, 15) Therefore, legal rules may be—according to a Kelsenian view—about duties but also may confer powers—i.e. all three fundamental deontic concepts, such as obligation, prohibition, and permission are included (Navarro and Rodriguez 2014, 18).

In brief, normative orders are there for subjects to be able to interfere with each other within social aggregations in order to live in concord since otherwise conflicts of interest may happen. These social orders—law being one of them—are the set of rules that help in achieving that intersubjective interference within a frame of tolerance. And they may do so by motivating subjects directly or indirectly. Furthermore, whether this motivation is direct or direct, it may be in the form of negative but also positive consequences.

[3]In what matters here Rawls says that "[t]here is an identity of interests since social cooperation makes possible a better life for all than any would have if each were to live solely by his own efforts. There is conflict of interests since persons are not indifferent as to how the greater benefits produced by their collaboration are distributed, for in order to pursue their ends they each prefer a larger to a lesser share […]".

5 Coercion and Force

Evidently, coercion is an example of a direct means to motivate behaviour—i.e. you ought to act or not to act in such a form in order for this or that consequence to happen. But coercion does not imply per se the use of force. This is another Hartian misinterpretation of the Kelsenian account that is still present amongst us. Kelsen clearly states that "[t]his does not mean that in carrying out the sanction physical force must be applied." (Kelsen 1949, 18) In tune with this, Schauer's account of the inclusion of force as a way to see coercion is rather rushed. He maintains that "law's brute force […] is the principal identifying feature of legality has in the past been conventional wisdom […]. But precisely the opposite—that force is not the characteristic or identifying feature of law—is now conventional wisdom […]." (Schauer 2015, 10) This is not true; or at least, it is not an accurate description of a Kelsenian account.

Sanctions are coercive measures in the sense that consequences happen *independently*—not necessarily against—subject's will. So far, a thick, broad account of coercion or coercion *by default* as per the previous sections in this paper. More specifically, for a thin account of coercion or coercion *sensu stricto*, some coercive sanctions may *if and only if necessary* be applied by the employment of physical force (Kelsen 1949, 19). Indeed, the use of force is the exclusive prerogative of law as a social order. Thus, the use of force is exclusive to law but does not define it. In other words, force is instrumental to law as a form of coercion. But that does not mean: (a) that coercion is defined as force; (b) that force is the only form of coercion law has. It only means that force as a form of coercion is exclusive to law. And that is an accurate reading of what Kelsen proposes too (Kelsen 1949, 18, 21).

Law may be defined as a set of rules or norms. These rules are statements characterised as being hypothetical—i.e. in the hypothetical case a certain antecedent happens ought to be the respective consequence. And that consequence may be either positive or negative. In the case of law as a social order, whether the consequence is positive or negative, in all cases it is independent from subject's will. Coercion sensu stricto may be used in the event "resistance is encountered in applying the sanction." (Kelsen 1949, 18) In that sense—and that sense only—coercion is an element that has to be considered in the quest to define what the law is. Kelsen himself made it clear: "[i]f 'coercion' in the sense here defined is an essential element of law, the norms which form a legal order must be norms stipulating a coercive act, i.e. a sanction. In particular, the general norms must be norms in which a certain sanction is made upon certain conditions […]." (Kelsen 1949, 45) But that does not mean that actual force—i.e. thin account of coercion—will be used. Therein, law may *occasionally* do without coercion sensu stricto.

6 It Is a Matter of Synergy; not of Counting

Schauer challenges a prevalent mode of jurisprudential inquiry (Schauer 2015, x). I am in agreement with Schauer that "noncoercive law both can and does exist." (Schauer 2015, 3) According to him, legal philosophers understand that coercion is not a necessary condition for law to exist, and because legal philosophy seems to be interested only in those features in law that are considered essential, "coercion loses its philosophical or theoretical interest in explaining the nature of law." (Schauer 2015, 3) He disagrees: legal philosophy or legal theory should not limit its inquiries to essential features, elements, or components (Schauer 2015, 4). I am sympathetic with this view. In order to demonstrate that regardless of being necessary or sufficient, jurisprudential inquiry should study these features, I will argue that, when we consider the mainproperties of a legal order (i.e. broadly, validity and effectiveness), discussions of whether each property is necessary, sufficient, or even desirable are irrelevant and can be set aside. That is because, should we want to have a complete picture of what law is and its nature, we cannot overlook certain features solely on the basis that we understand they are not essential.[4] As a direct consequence, because coercion has to do to an extent with both the validity and the effectiveness of the law, coercion has philosophical interest in order to define its object and in examining its nature.

Alchourrón and Bulygin clearly state that in legal science there are empirical as well as logical issues (Alchourrón and Bulygin 1971, 53). Two key concepts that characterise law from the empirical and logical standpoints are effectiveness and validity, respectively. I maintain that in any case, the relationship that exists between validity and effectiveness within a normative system is based on synergy. In the present section of the paper I intend to conceptualise or clarify the notions of these two fundamental terms in legal theory—i.e. validity and effectiveness—showing how they work together in a synergetic form. Although it may be understood that one belongs to the logical side of law and the other one, to the factual or empirical one, both can *be*—i.e. exist—independently in their spheres. But it is only when they are part of a synergetic relationship that they have full actual functionality.

Synergy implies a particular relationship amongst the components or members of the given whole; the individual members or objects can work better when working together. In other words, the individual components of the whole can exist on their own, autonomously and independently; however, working together in a synergetic manner improves their performance. And that is exactly the situation as between validity and effectiveness: they may exist independently since their existence has to do with different realms, that is to say the logical and the factual ones.

[4]I use the terms "essential" and "necessary" interchangeably here. Following Alexy "[e]ssential or necessary properties of law are those properties without which law would not be law." (Alexy 2008).

Hence, whether their relationship is that of necessity, sufficiency, or desirability for law to be is irrelevant since, in any case, in theory they can be studied as separate parts.

7 Validity or Logical Existence

As any term, "validity" is potentially vague. And that has to do with the "open texture" of law (Hart 1997, 124). Bulygin is clear in that there is no consensus among scholars about the exact meaning of this rather elusive word (Bulygin 1990). Any legal order is constituted by valid "sentences" or norms. Kelsen begins with this matter arguing that the validity "of a norm is to express first of all simply the specific existence of the norm." (Kelsen 1992, 12) In principle, by defining *existence* we would eliminate every hesitation about what *validity* means. Nevertheless, it is true, as Bulygin maintains, that "Kelsen says repeatedly that validity is the specific existence of norms. But […] the term 'existence' is in his use at least as ambiguous as 'validity'." (Bulygin 1990) Bulygin finds four different conceptions of existence (Bulygin 1990): (a) factual existence; (b) membership; (c) existence as validity; (d) formal existence. So, it seems that validity has different meanings; that Kelsen defined validity in terms of existence; and that existence itself has several other meanings too. If determining the meaning of validity was complex, now the enterprise becomes cumbersome.

Leaving aside the previous interpretations for now since they seem to only add more hermeneutic questions rather than answers, I will start again from a more basic and humble beginning. A norm is valid when it exists. But, its existence depends on a simple aspect: its creation. Indeed, in order for anything to *be*—i.e. to exist—it has first to be created. It is this creation that will guarantee its birth, its virtuality, its existence in the legal field—more broadly, in any field. And we are no longer dealing with factual or empirical questions. We are in the presence of the logical boundaries of law.

The "validity" of a rule or norm implies that the requirements for its production, its creation, have been fulfilled: formal (competent body and procedure), and material (compatibility with the content of higher norms) determined in other norms of the order that regulate the normative production. That is why in legal theory, validity of a norm or rule usually refers to that norm or rule as belonging to a legal system from its two angles: as formal validity and as material validity.

So, if a rule or norm is created following a given procedure and by a competent authority, with its basic yet fundamental content congruent to a superior norm that is valid, with these criteria all aspects of validity are included. Whether these norms or rules must include coercion in order to be considered legally valid is a separate, additional issue. Here I follow Kelsen, Hart, Cossio and others in that there are norms in every legal system that do not imply binding force and are still valid—e.g. secondary norms, secondary rules, perinorms, etc.—as it has been shown in previous sections of this paper. So, for validity understood as the logical existence of

the law, coercion may be—but does not need to—be present. To be more precise, a valid norm will imply *by default* coercion in the sense our behaviour is somehow limited—i.e. thick or broad account of coercion or coercion *by default*—but that does not mean that the same norm must refer to the use of force—i.e. thin or narrow account of coercion or coercion sensu stricto.

A valid norm or rule is that one that *is*—i.e. exists—in a legal order. In other words, a norm or rule is valid if and only if it has been created following the procedure, by the authority, and in tune with the content determined by a norm or rule that is superior, regardless of including coercion—or at least, coercion sensu stricto. At the same time, we may ascertain that by creating a new valid norm or rule part of what used to be independent, autonomous human conduct is now somehow limited by the boundaries determined by this new valid norm or rule—i.e. thick account of coercion or coercion *by default*.

8 Effectiveness or Factual Existence

According to Kelsen the effectiveness of law means that the norms are actually applied and obeyed (Kelsen 1949, 39). That is to say, effectiveness results a factual, empirical question or a question of facts. The facts that concern the legal world are those of human beings with regards their behaviour or conduct. Thus, a norm or legal order will be effective provided it is complied with by the community to which it is directed to, and provided its members behave according to what is established and do not do what is prohibited.

Many legal philosophers have agreed with this notion. Aftalión, García Olano and Vilanova point out: "the word effectiveness signifies the same as what is meant in the purity of legal philosophy by saying that norms are in force: the effective existence of a conduct in compliance with that addressed by the norms." (Aftalión et al. 1984, 184) Nino and many others identify effectiveness with force (Nino 1984, 139–140). Cossio emphasises that "effectiveness or facticity is the fact that the effective conduct agrees with its representation given by the norms; thus, the norms are effective norms." (Cossio 1964, 474)

From the above considerations and in brief, a legal norm will be effective or *in force* as long as it is followed by the population to which it is addressed to—at least in a representative number or percentage, a sufficient number of members of that population.[5] Obviously, there will be conduct that deviates from the content stipulated by the norm. But, the rule, norm, legal order will also be effective or in force if the competent authority actually applies the corresponding coercive sanction when the antecedent happens—i.e. a thick account of coercion is present whilst a

[5]I am not going to discuss here what expressions such as "representative number or percentage" or "sufficient number" mean since they are out of the scope of this paper. For simplicity I follow Philip Pettit—i.e. less than everyone, but likely to be nearly everyone (Pettit 1990).

thin account of coercion may be, depending upon compliance or non-compliance of the subject and actual use of force.

Coercion—thin account—seems to have a more central role on the factual side of the law. That is to say, if the members of the population do not comply with the norm in a sufficient number or the consequences that ought to follow the antecedent in any valid norm do not happen in a representative number or percentage, that rule or norm is ineffective. So if the coercive side of the norm or rule does not manifest when the antecedent happens, therein the valid norm or rule loses its *force* since it is not effective. For example, if someone kills someone else, and the law says "whoever kills ought to be sent to prison," the killer ought to be sent to prison for that norm or rule to be effective—i.e. the coercive element of the rule or norm has to manifest. If the killer did not go to prison, and therein the coercive element of that norm or rule did not manifest, we would be in the presence of a non-effective norm. Similarly, in the case of a contract in which the parties ought to sign in order for the document to be binding. For example, if we have a valid norm or rule stating that "for a purchase to be satisfied the seller and buyer ought to sign." Let us consider the case in which someone sells his house for a price but when reviewing the actual document that was meant to "transfer the property" to the buyer, one of the signatures is missing—either, that of the seller or that of the buyer. This norm or rule is in principle coercive in the sense the conducts of both the buyer and the seller are limited since they ought to sign the contract for the purchase to *legally* happen—i.e. to *be*, to exist. Now, if any of these two parties did not sign the contract, there would not be a contract at all. However, if the parties behaved as if there was a purchase even though the contract had not been signed, therein that norm or rule would be non-effective. That is because in addition to the norm or rule being coercive in the sense it limits the behaviour of contractual parties by including requirements, the parties ought to comply with these requirements in order for that norm or rule to be actually effective.

9 Validity and Effectiveness: Synergy

It is time now to evaluate how these two concepts, validity and effectiveness, may work together and whether they have a relationship of necessity or sufficiency. But before evaluating that relationship, we must make clear what we do not talk about when we refer to them. Law may be seen from a static and dynamic point of view. In both cases, these views refer to the validity of the law. The static point of view refers to law as it is, a system of valid norms with certain features—e.g. unity, hierarchy, coherence. The dynamic point of view refers to the creation and application of the law—i.e. law in "motion." Although there are facts involved in the creation and application of law, effectiveness has nothing to do with the dynamic side. Both static and dynamic points of view are related to validity only. We are in the presence here of a different kind of facts, those of the competent authorities that create and apply law. Whether the law is followed or not—effectiveness—refers to

a different angle that is purely factual. From the previous sub-sections we have learnt that a norm or rule may not be coercive but may still be valid. But for a norm or rule to be effective, it seems that coercion plays a more central role.

Having made clear what I will not dwell with, it is time to centre the attention on the kind of relationship validity and effectiveness may have. Bulygin mentions three different ways in which facts and norms may have a particular relationship: (a) in the case of issuing a norm; (b) in the case of derogating a norm; and (c) "[a]nother necessary condition for the validity […] of a norm is according to Kelsen the efficacy of the legal order to which this norm belongs […]." (Bulygin 1990) According to Kelsen there is a very important relationship between validity and effectiveness. That is because a norm will be valid only if the system it belongs to is as a whole effective. It is a dogmatic view in legal philosophy that effectiveness is the condition of its validity (Kelsen 1949, 42). So if effectiveness is the condition of the validity of a norm or rule, and if for a norm to be effective means that somehow our behaviour is coerced, therein it seems plausible to maintain that the validity of these norms or rules may ultimately depend on their coercive character.

It is at this point I include synergy to relate validity and effectiveness. I maintain that these two concepts that characterise law can work independently or jointly. Similarly, they can be studied in their individuality or together. However, it is only when a valid norm is effective that it becomes actually meaningful. I will be more precise. The traditional scholarly interpretation understands that, on the one hand, for the case of the specific analysis of a legal norm or a group of them, the question is not transcendent. That is to say, the non-effectiveness of a given norm or a group of them within the community does not affect its validity at all, or that of the rest of the legal order or system. Those norms or rules may lose *force*, effectiveness, but they will still be part of the legal order in question. On the other hand, it has become dogma in legal theory that the situation seems to be different if we analyse the same scenario from a different standpoint, that is the whole—i.e. reviewing the influence of the lack of force or effectiveness of the validly created complete legal order. In this case, the community does not comply with, follow, respect or obey the whole —or at least, most parts—of the legal system and the coercive sanctions that must be applied consequently, are not. That system is ineffective, it is not in force; hence, it is not valid either—i.e. the effectiveness of the system as a condition for its validity.

To be more specific, in the latter two situations may occur: (a) the legal system is re-established by the application of coercive sanctions regaining enough compliance within the population; or (b) the legal system does not obtain enough acceptance or compliance, and therefore it is modified, reformed or substituted by a new legal system that will have the same "proofs" or "checks" of force—in the sense of effectiveness—to succeed in remaining valid in time and space. Let remind us that effectiveness "is a condition of validity; a condition, not the reason of validity." (Kelsen 1949, 42) I maintain that although validity and effectiveness do have a certain relationship, they do not condition themselves reciprocally, at least not in all possible ways.

Let me be more precise. Whether the relationship between validity and effectiveness is necessary or sufficient, and whether this mere question is relevant will have to do with our position in legal philosophy. We may share the view that to investigate the *necessary* features of something is to investigate its *nature*. Some go to the extreme—i.e. essentialists—and maintain that a theory has to do with necessary truths only (Raz 2009, 24). But even if we accepted this extreme view, that would not be the end of our debate. We would have to push things further and expect to differentiate amongst necessary conditions as logical, factual, and even natural necessity. I agree with Hart here in that the question whether this necessity is logical, factual or causal can safely be left as an innocent pastime for philosophers (Hart 2001, 79). *Mutatis mutandis*, the same applies to the question of whether the relationship between validity and effectiveness is necessary or not.

Even though the complete legal order may lose effectiveness, and it may no longer be followed, it is still perfectly and fully valid for the purpose of legal theory and its study. The fact that it is not followed or effective does not alter its logical and formal existence. In an extreme case scenario, the legal system may be modified or changed for a new one by means of evolution or revolution. Nevertheless, until that happens, the legal system remains fully valid. It is when a valid legal system interacts in synergy with effectiveness that it achieves both a real and logical dimension. However, that does not mean that one is condition for the other to exist, at least in theory.

A rule or norm—in large, a legal system—is valid, it exists, when it has been created following the procedure, by the authority, and in tune with the content determined by a superior norm or rule (logical existence); a rule or norm—a legal system—is effective when it is followed by its addresses or in the event of non-compliance, coercive consequences follow—i.e. thin account of coercion (factual existence); a norm—a legal system—is both valid and effective when these two characteristics work together in synergy.

10 Conclusion

The force of law is, unquestionably, one of the elements legal philosophy will continue to discuss in the years to come. Whether a necessary or sufficient element, it is plainly that, an element of law and, therefore, it should be included in any analysis about the nature of law. Schauer's *The Force of Law* is a valuable addition to this study. Not necessarily because of his argument against legal philosophy and its arguably assumed essentialism, but mainly because he puts at the centre of the discussion coercion, an element most of the time included in legal theory textbooks and articles in a very brief—almost apologetic—fashion.

For simplicity, I suggest to view coercion from two different standpoints: (a) a thin or narrow account of coercion; and (b) a thick or broad account of coercion or coercion by default. Following a Kelsenian approach, the rules that constitute law are hypothetical statements relating antecedent with consequent. Specifically, in

what matters this paper, the consequent is a sanction that may—but does not need to—incorporate the use of force. So a sanction is coercive as long as the consequence is no longer dependant on the subject's will—i.e. thick account of coercion. And we are in the presence of coercion sensu stricto when the use of force may be required—i.e. thin account of coercion. That, however, does not mean it has to be used as we will see in the next section.

The last section of this paper showed that coercion has philosophical interest in explaining the nature of law since it has to do with one of its main realms, that of the effectiveness of a particular norm or rule and that of the effectiveness of the legal order as a whole. The question whether the effectiveness of the whole legal order is a necessary or sufficient element with regards its validity is irrelevant. That is because legal philosophy has to do with defining and describing the nature and characteristics of law, and therein whether the elements we study are necessary, sufficient, or desirable is an innocent pastime for philosophers. Consequently, as an element that has to do with the effectiveness of the law, coercion may have central or peripheral importance, but in any case has to do with law as it is. As any element that somehow has to do with the law as it is and its nature, coercion should be part of legal philosophy inquiry.

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Does Law Without Force Exist?

Michael Potacs

Abstract Virtually all norms of a legal system are more or less closely connected to the enforcement of law. The reasons for this coercive character of law is to be found in the state's monopoly of legitimate coercion, conflicting interests of the members of society and the unpredictability of the behavior of human beings. The coercive character of law ensures the effectiveness of law and therefore legal security. As legal security is a fundamental value of any legal order and society, the effectivity of law based on the enforcement of law is a reasonable argument to obey the law "just because it is the law". Therefore the force of law might not be the only or even the main reason to follow the law, but it is a necessary condition to obey it. As law has no empirical existence without obedience, it does not exist without force.

1 Family Resemblance?

In his impressive book "The Force of Law" Frederick Schauer comes to the conclusion that coercion is "typical but not conceptually essential" (Schauer 2015, 43) for law. Schauer concedes that "coercion is a pervasive characteristic of legal systems, and that it is also an important if not logically essential component of law as we know it "(Schauer 2015, 128). But for him this does not "entail the conclusion that a threat of coercion is an essential component of every individual prescription that we should designate as law or recognize as a component of the legal system" (Schauer 2015, 128). "Like many other aspects of law as we experience it" Schauer believes that "coercion is neither necessary nor sufficient for law" (Schauer 2015, 165).

For a better understanding of his argument Schauer refers to the idea of "family resemblance" of Ludwig Wittgenstein, demonstrated by the example of the word "games" (Schauer 2015, 38). All the things we call "games" have no necessary or

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essential properties but they have manifold affinities which characterize them typically. For Schauer it is similar to the relation between law and coercion which is a typical, whilenot a necessary feature of the phenomenon of the law.

I greatly admire Schauer's book for its important insights. Nevertheless, against the backdrop of the example of Wittgenstein's "family resemblance" I will try to propose a different position: It might be true that all the things we call "games" have no necessary or essential properties but many particular games like for example "chess" certainly have. Would we call a game without the (for the logic of chess essential) piece of the "king" really chess? I think we have to acknowledge that certain features are essential for at least some phenomena united under a single term. My fundamental assumption is that coercion is a necessary feature of the phenomenon of social orders, which we normally call "law".

I therefore agree with Hans Kelsen who understands the law as a "coercive order" (Kelsen 2009, 33). That does not mean that every legal provision is necessarily a coercive act. But with Kelsen I would venture to say that every legal norm is *necessarily linked* to coercion and in this sense coercion is an essential element of law and legal orders are coercive orders. This does not mean that coercion is the *only* characteristic of law but it is a *necessary* one. Hence in contrast to Frederick Schauer I would submit that coercion may *not* be *sufficient but necessary* for law. I will try to explore this in more detail in my following considerations. Before doing that, however, some remarks on the term "law" should be made.

2 Reality

Of course a definition of "law" depends largely on the specific epistemological interest. When the main interest lies only in the interpretation of a normative order referred to as "law" we could include also merely theoretical conceptions of a normative order into the definition of law. And there is no doubt that we may develop a "non–coercive" concept of a normative system in theory. The problem is, however, that we do not really encounter such a system as a functioning normative order in reality, especially not in more or less complex societies. As far as we demand to make statements about law in reality it is not useful to include pure theoretical conceptions into the definition of "law". Rather the discussion about the "force of law" should be held about law as an existing phenomenon in social reality. Therefore in our context "law" should be understood as "norms" of an established, that means "by and large effective" (Kelsen 2009, 212), normative order.

Also this feature is not sufficient for the definition of law, as legal orders have to serve also other purposes (like establishing a systematical organization[1]). In this

[1]Therefore it is correct when Shapiro (2011, 176), states, "that, when the law does use force, it is always organized".

sense, legal orders might also compete with other normative orders like the "law" of the mafia or the Catholic Church (See Schauer 2015, 143). But for a discussion about the "force of law" it is sufficient to say, that "law" means a "by and large" effective system of norms. My basic thesis now is that all norms of such an "existing" legal order in the end serve the goal of enforcing the system by coercion as a whole if necessary. Therefore every norm of a legal order is *necessarily linked* to coercion. To make this position more understandable it may prove useful to discuss the objections against coercion as an essential element of law.

3 Objections

One objection to the coercive character of law was raised by H.L.A. Hart. In his view the description of law as a coercive order is not adequate since law is often rather *constitutive* and *empowering* than coercive. Law, as Hart puts it, confers also "powers on private individuals to make wills, contracts or marriages, and law gives power to officials, e.g. to a judge to try cases, to a minister to make rules, or to a country council to make by-laws". Statutes often bind "the legislators themselves" (Hart 2012, 26). Such laws do not impose duties (Hart 2012, 27), Hart assumes, and therefore cannot be described as coercive (see also Schauer 2015, 2). Adding to Hart's statements Frederick Schauer summarizes: "We must concede that law´s ability to create power to make wills and trusts and contracts, just like its ability to create the power to enact legislation and issue judicial decrees, is not completely captured by a coercion based account of law" (Schauer 2015, 30). But is this objection really convincing? I doubt it, because all these empowering rules of law may be seen as sources for legal acts which can be executed with coercion.

Empowering rules of law entitle to set different legal acts that contain different obligations which can be enforced. Therefore, Hans Kelsen refers to these empowering provisions as "*dependent* norms, establishing only one of the conditions under which coercive acts stipulated by other norms are to be ordered and executed" (Kelsen 2009, 51, my emphasis): Constitutional norms authorize the legislator to create certain other norms and those other norms enable individuals to conclude binding contracts and the judges and authorities to impose binding legal decisions as well as measures of their execution. The whole legal order therefore forms a system to establish obligations which can be executed with compulsion.

Therefore, it is an essential feature of a legal order that each legal norm is necessarily linked to coercion. It has to be admitted that this connection differs between particular legal acts. Some statutes *directly* prescribe execution by force. Other statutes stipulate coercive sanctions in case of *infringement* of a legal provision. And yet other statutes merely *empower* to create obligations that can be executed by force or authorize to perform coercive acts. But still all these phenomena are necessarily linked to coercion.

It has to be admitted that the necessary link between law and coercion for some legal provisions is to be found only in their conditionality of the validity of a coercive act within the framework of a particular legal order; which leads to another objection against coercion as an essential element of law: This objection is based on the consideration that the legal consequence of a violation of a law can be *nullity*. And, of course, the question has to be raised whether or not nullity may be seen as a coercive sanction. John Austin regarded the legally imposed nullity of a transaction as a sanction (Austin 1862, 141). And even Hart admitted that no "one could deny that there are, in some cases, […] associations between nullity and such psychological factors as disappointment of the hope that a transaction will be valid" (Hart 2012, 33).[2]

But none the less for Hart "the extension of the idea of a sanction to include nullity is a source (and a sign) of confusion" (Hart 2012, 34), because "in many cases, nullity may not be an 'evil' to the person who was failed to satisfy some conditions required for legal validity" (Hart 2012, 34). For instance a "party who finds that the contract on which he is sued is not binding on him, …, might not recognize here a 'threatening evil' or 'sanction'" (Hart 2012, 34). Hart points out that in cases of nullity the rules "merely withhold legal recognition from them" (Hart 2012, 34), which is quite different to the situation where a certain obligation is enforced by coercion. But even if we concede that nullity is not a coercive sanction: does this call the thesis of the coercive character of law into question?

I tend to answer "no" if we take the legal consequences of nullity into account: Nullity means that the act in question is not a valid part of a particular legal order. Therefore, it does not participate in the binding force of that particular legal order and its content cannot be executed within the legal framework by its coercive instruments. Against that background nullity cannot be a persuasive argument against the coercive character of the norms which are a *valid* part of this legal order. The position endorsed here argues that all *valid* norms of a legal order are necessarily linked with coercion. It is not inconsistent with this position if void acts do not have this specific character. Nullity describes a phenomenon where certain acts are not part of a legal order. As Scott Shapiro put it: "nullities are merely the absence of benefits" (Shapiro 2011, 64) of a particular legal order. Therefore, the question of the consequences of nullity does not conflict with the assumption that valid norms of this legal system do have a necessary link with coercion.

Another objection against coercion as a necessary element of law is based on the fact that in many legal orders also *erroneous court decisions* are valid until they are reversed by a higher court. "It is obvious", Hart argues, that "in the interest of public order that a court's decision should have legal authority until a superior court certifies its invalidity" (Hart 2012, 30). To him this may seem to be an objection against the coercive character of all legal provisions, because judges who disobey

[2]In so far it is correct when Shapiro (2011, 63) points out "that sanctions and nullity have the same basic function: they both are *negative incentives*" (emphasizes in original).

the law are often subject to no sanctions at all. Frederick Schauer is correct by stating: "The judge who ignores a governing statute might be reversed by a higher court, but when the highest court ignores a governing statute, the judges in the majority are typically subject to no sanctions" (Schauer 2015, 86).

This is due to the fact that legal orders to some extent (in the interest of finality and certainty) accept even erroneous legal acts as a valid part of the legal system. In the terminology of the Pure Theory of Law of the Viennese school of legal theory (founded by Hans Kelsen) this is called the "Calculation of Fault" ("Fehlerkalkül"[3]) of a legal order. But the existence of non–sanctioned mistakes in a legal order does not question its coercive nature. The courts decisions (erroneous or not) have a binding force and are therefore a condition of a coercive act.

Some scholars might find an objection to the coercive nature of law in legal provisions that provide *financial benefits* (like social aid). Of course such norms in the first place support people and therefore seem to be without any coercive character at first glance. But a closer observation shows that even such norms with benefitting character are linked with coercion. The law grants the benefits just under certain conditions and forbids its abuse by force. Also the existence of *customary law* cannot falsify the necessary link between law and coercion: Customary law is applied by the courts and other state authorities and their decisions can be executed with coercive force.

Finally, another objection to the coercive essence of law might be based on the fact that some acts of legal authorities have obviously *no legal consequences* at all. As an example Kelsen mentions modern legal orders which sometimes contain norms that provide rewards such as titles or decorations for certain meritorious acts (Kelsen 2009, 34). Another example Kelsen points to is a constitutionally established statute which says that the nation's congratulations may be conveyed to the head of the state on the occasion of an anniversary of his accession to power. This may be done to invest the congratulations with special solemnity. A last example for those acts without legal consequences are legal provisions where infringements are not sanctioned at all, like speed limits in legal acts which are mere recommendations.

At least some of these examples could be seen as few exceptions which do not really affect the coercive character of law. I prefer another view which is also suggested by Kelsen: Acts of legal authorities which cannot be executed by coercive means have no binding force and therefore cannot be seen as norms of that legal order even when the procedure of their release is provided in statutes. We could call these acts *declarations* or (as mentioned) *recommendations* but not legal norms. Therefore, if we understand law as normative acts ("norms"), the existence of non-binding acts of legal authorities is completely compatible with the view of the coercive nature of law.

[3]The theory of the "Fehlerkalkül" was developed by Merkl (1923, 293), a disciple of Hans Kelsen.

4 Reasons

All in all, the inseparable connection between law and coercion may hardly be denied. That raises the question, why law is coercive by its nature. We can find one answer to this question in the writings of H.L.A. Hart who argues in a simple but reasonable way that mankind has a "limited altruism". In the words of Hart people "are not devils dominated by a wish to exterminate each other". And for him it is a false view "that men are predominantly selfish and have no disinterest in the survival and welfare of their fellows" (Hart 2012, 196). But he truly emphasizes on the other hand that "if men are not devils neither are they angels; and the fact that they are a mean between these two extremes is something which makes a system of mutual forbearance both necessary and possible" (Hart 2012, 196).

The reason for the coercive character of law therefore is to be found on the one hand in the *unpredictability* of the behavior of human beings. On the other hand it is the result of *conflicting interests* of the members of societies. History has shown that even the early Christian communities, which were based on love and peace, over time developed different interests and needed rules and decisions to solve their problems. After a certain stage of development experience shows that societies need coercion to make their established rules effective. Objections can hardly be raised against Frederick Schauer, when he says: "Three or perhaps even thirty people can sustain their mutually beneficial agreement without coercion, but to expect that three hundred or three thousand can do the same thing, …, is fantasy" (Schauer 2015, 85).

The coercive character of law ensures the effectiveness of law and therefore *legal security* which is a fundamental value of any legal order and society. Or to quote Scott Shapiro: "It is indeed likely that life would be poor, brutish, and short without legal systems maintaining order through threats of coercion" (Shapiro 2011, 175). The organization of the enforcement of law can of course differ from legal order to legal order. Especially constitutional legal orders try to avoid arbitrariness in the exercise of coercive enforcement. This is manifested in the state's monopoly of legitimate force in order to ensure that legal rules and court decisions are obeyed. In legal orders like international law, on the other hand, the coercive enforcement of law is more individualized. Within the framework of international law it can be in the hand of a state how and to what extent it reacts with sanctions to an infringement of law. But also in those legal orders the possibility of coercive sanctions serves the effectiveness of law and can be seen as an expression of legal security. As finality and legal certainty are fundamental values underlying any legal order, the force of law can be seen as essential (and not only "typical") to the concept of law.

5 Rationality

But is the coercive force of law the only or even just the main reason why people follow the law? This leads me to the last point of my disquisition: Why do people follow the law? To answer this question it seems to be useful to distinguish the

terms to "*follow*" and to "*obey*" the law: (see Schauer 2015, 6). To "follow" the law is the wider term and we can follow the law because of many reasons. As Frederick Schauer mentions, "law independent" reasons to follow the law exist (Schauer 2015, 41). We follow the law because it is in conformity with our preferences, desires, values or tastes. Most people would not kill other people or eat the flesh of dead people (cannibalism) even if these activities were not prohibited by law. Many people follow the rules of law because they correspond with their moral standards. Also the internalization of an established legal order must not be underestimated.

We follow the law to a large extent just because other members of society do so as well. In fact, to follow the law is often based on a mix of complex reasons of preference, morality and unconscious attitudes. But we have to see that this is particularly true in certain fields of law like criminal law and to a large extent in private law. Of course also in those fields of law coercive force is an indispensable component of law because there are always some people who have other preferences, moral standards or simply have not internalized the legal provisions.

But in other fields of law like in tax law or in public traffic law (speed limits) much more often we do not only "follow" but also "obey" the law. Compared to "following" the law, to "obey" the law is the narrower term. Of course we can say the obedience of law is a way of following the law. But we obey the law even if it is not in conformity with our desires, values and tastes. When we "obey" the law we do things even if we do not want to do them. For the obedience of law, coercion is a crucial point for at least two reasons: Firstly, we obey the law because of the fear of coercion. But secondly, coercion can also be a reason to follow the law even when in certain circumstances good chances exist, not to be caught or punished (like in cases of tax evasion or infringements of speed limits). In those cases many people follow the law because they believe in the legal order as a guarantor of legal certainty and security.

The decision to obey the law is often a *rational choice* based on the fundamental value of security the law provides. The decision based on rational reasons may well be the decision of Hart's "puzzled man" (Hart 2012, 40) who obeys the law "just because it is the law" (Schauer 2015, 42).

But the crucial prerequisite of such a decision is the coercive enforcement of law, because it ensures the effectiveness of law. And only a decision to obey an *effective* legal order is a decision for security provided by law and therefore a rational choice. To obey a legal order which is not effective seems not to be a rational choice. Or to put it in the words of H.L.A. Hart: "Yet, except in very small closely-knit societies, submission to the system of restraints would be folly if there were no organizations for the coercion of those who would then try to obtain the advantages of the system without submitting to its obligations". This does not rule out, that in "exceptional circumstances" (Dworkin 1998, 110) it might be more rational to disobey even coercive and effective law than to comply with it. Insofar Ronald Dworkin correctly emphasizes that the "question how far law is commanding and when it may or should be set aside, must match the general

justification it offers for law's coercive mandate" (Dworkin 1998, 110). But beside these "exceptional circumstances" the force of law renders a decision for the obedience of law rational, because the coercive force of law in Hart's words is the "guarantee that those who would voluntarily obey shall not be sacrificed to those who would not" (Hart 2012, 198).

6 Conclusion

This brings me to the end of my remarks which I want to conclude by the following statement: The coercive force of law may not always be the only or even the main reason to *follow* the law, but it is a *necessary condition* to *obey* it. The existence of law presupposes by and large an effective legal order. As law has no empirical existence without obedience, it does not exist without force.

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Schauer on the Differentiation of Law

Lars Vinx

Abstract This chapter supports Frederick Schauer's contention, put forward in the last chapter of *The Force of Law*, that coercion is one of the differentiating characteristics of law. However, the chapter takes issue with the way in which this contention is defended by Schauer, and it argues that a fully successful case for the differentiating character of coercion ought to focus on the monopolistic character of legal coercion.

1 Introduction

In the last chapter of *The Force of Law*, Frederick Schauer argues that "any satisfactory account of the phenomenon of law" must explain the differentiation of law. The law, in Schauer's words, "is plainly different from many things, and from many social institutions". Therefore, Schauer concludes, "explaining the source and nature of those differences is an important task of legal theory" (Schauer 2015, 154–155).

The core message of the chapter is that a satisfactory explanation of the differentiation of law must attend to law's coerciveness. That law, in all or almost all of its known empirical instantiations, is coercive is one among several factors that differentiates law from other social institutions. Theories of the nature of law in the Hartian tradition, which emphasize that law is not essentially coercive, Schauer also suggests, fail to offer a satisfactory account of the differentiation of law. They miss a key aspect of the actual phenomenon of law in turning their attention away from law's coerciveness (see Schauer 2015, 159).

This chapter will support the view that coercion differentiates law. However, I will suggest an improvement on the argument that Schauer offers for it. Let me begin by giving an outline of a general worry about how the case for coercion as a differentiating characteristic is presented in *The Force of Law*. There are two

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different strands of critical argument, in *The Force of Law*, against what might be called the post-Hartian essentialism[1] in legal theory: One strand accepts that the post-Hartian essentialists are right to claim, on the level of discussion of the nature of law, that there could be a non-coercive legal system (see Shapiro 2011, 69–73; Raz 1999, 157–161), and only argues that, as an empirical matter of fact, coercion is "contingently ubiquitous" (Schauer 2015, 165) since, given certain facts of human psychology, coercion is frequently practically necessary to induce compliance with law. As an empirical matter of fact, puzzled persons, i.e. those who do what the law tells them to do for the reason that the law tells them to do it, are few and far between (see Schauer 2015, 43–74), and there is no "norm of law" that secures compliance in cases where individuals disagree with the wisdom of a legal demand (see Schauer 2015, 151–153). Hence, jurisprudence, if it is to achieve an adequate understanding of how law actually works, would do well to acknowledge that coercion is a central feature of law and to concern itself more with empirical questions relating to the conditions of the effectiveness of legal force than seems the norm in the current legal-theoretical mainstream.

The other strand of critical argument against post-Hartian essentialism in Schauer's book appears to work towards a philosophically more ambitious claim, namely towards the suggestion that coerciveness (or its absence) should be recognized as one of the criteria by which we determine whether a system of rules is to be regarded as legal. To be sure, Schauer emphasizes that his thesis is not that coercion is either a necessary or a sufficient condition of legality. He explicitly rejects the claim that coercion is essential to law and admits that there might be law that is not coercive (see Schauer 2015, 37–41). Coercion, in Schauer's terminology does not demarcate law but, together with a number of other factors, merely differentiates it (see Schauer 2015, 157). However, the claim that coercion differentiates law clearly seems to go beyond the mere empirical observation that, as a matter of fact, all or almost all actual legal systems are coercive.

Imagine there was a system of rules that did not exhibit one or several of the characteristics other than coercion that, in Schauer's view, differentiate law (see Schauer 2015, 154–159): sociological differentiation, differentiation of method, or differentiation of source. If these are differentiating features of law we ought to be less inclined, *ceteris paribus*, to accept the system as having legal quality, though the case for such acceptance might still hold good, all things considered. We would not say, for instance, that while it is characteristic of law, as an empirical matter of fact, to exhibit methodological differentiation, the absence of such differentiation does not weigh against a system's claim to be recognized as law. Rather, we would say that the lack of methodological differentiation weakens the case for regarding the system in question as a legal system, whereas its presence strengthens that

[1]The designation is supposed to emphasize that it is not all that clear, as Schauer points, out, whether Hart would have considered himself to be offering a theory of the nature of law. See Schauer (2015, 3, 40).

claim. If coercion differentiates law, then the absence of coercion must likewise weaken a system's claim to be regarded as law while its presence must strengthen that claim.

Now, if the claim that coercion differentiates boiled down to the observation—central to Schauer's first strand of argument—that it is characteristic, as an empirical matter of fact, for law to be coercive, just as it is empirically characteristic for birds to be capable of flight, then post-Hartian essentialists should have no problem accepting the claim. The authors in question could simply concede the contingent ubiquity of legal coercion, admit that the observation of coercion's contingent ubiquity raises interesting and important questions of legal sociology, psychology, and institutional design, while continuing to insist that coerciveness is not an essential characteristic of law and thus need not figure in a philosophical theory of the nature of law (see Green 2015).

So to give bite to his criticism of post-Hartian essentialism, and to turn the claim that coercion differentiates law into a philosophically interesting and provocative claim, Schauer must make good on the second of the two strands of argument distinguished above. He must show that coerciveness is indeed one of the features that contribute to making some practice or system an instance of legality. To do that, however, it is not sufficient merely to observe that all or almost all observable legal systems in the actual world appear to rely on organized coercion, or to point to the popular prejudice, associated with the man on the Clapham omnibus, that coerciveness is a distinguishing characteristic of law. What is needed, rather, is an interesting and illuminating explanation for why a practice or system that is not coercive has a weaker claim, other things being equal, to be recognized as legal than one that is.

My claim will be that Schauer does not offer a completely satisfactory explanation of the claim that coerciveness differentiates law. However, I will also try to develop, if only in very rough outline, what strikes me as a natural way to improve on the explanation offered in *The Force of Law*. In what follows, I will first present my worries about Schauer's case, through a close reading of the last chapter of *The Force of Law*, and then turn to my constructive proposal in the last section of the chapter.

2 The Gunman

Schauer's argument for the claim that law's coerciveness differentiates law from other social institutions takes its start from an attack on Hart's famous claim that law is not the gunman situation writ large (see Hart 1994, 82–85). The thesis that law is not the gunman situation writ large, but operates, rather, on the basis of an internalization of legal norms on the part of at least some officials and citizens, appears to support a denial of the claim that coerciveness is one of the factors that differentiate law. Hart's theory of law at least suggests that it is essential to law to make a claim to practical authority (see Raz 1996, 210–237), and that the actual

recognition of this claim on the part of subjects of the law does not essentially depend on the threat of the use of coercive force against lawbreakers. Law's coerciveness, therefore, ought not to figure in an account of the differentiation of law.

Schauer proceeds to attack this line argument by asking the reader to imagine a protection racket of the sort run by the Mafia. Such a scheme of extortion could be so highly organized, hierarchized, and rule-based that it would be misleading to assimilate it to the simple gunman-scenario. The organized and rule-based nature of the protection racket, rather, raises the question of why such a scheme should not be recognized as a kind of law (see Schauer 2015, 159–161). In earlier passages of *The Force of Law*, Schauer makes a similar suggestion, in claiming that there could be (and that in fact there are) legal systems which, even at the official level, do not function on the basis of an internalization of legal norms but rely on nothing more than the threat of brute force (see Schauer 2015, 41, 82–84).

Even if we grant that claim, however, it is unclear why the example of the protection racket would suffice to show that coerciveness differentiates law. Let us concede that a sufficiently systematic protection racket is to be regarded as a legal system. It does not follow that the racket is legal in virtue of being coercive. The reason why one might be inclined to recognize the protection racket as law, Schauer himself suggests, is its systemic character, i.e. the fact that it could take the form of a stable, rule-based structure, and not the fact that it is coercive. That we might be willing to recognize the protection racket as law merely shows that the fact that a system of rules is extortionate or oppressive does not necessarily impugn its claim to be law, if it otherwise exhibits characteristics of legality. An account of the phenomenon of law that explains the differentiation of law by recourse to law's coerciveness, however, will have to show that some institution or practice is to be recognized as law for the reason that it is coercive.

Schauer will perhaps reply that this criticism misses the point of the example of the protection racket. The point of the example of the protection racket is one about the motivations that people have for complying with the law. No one would obey a protection racket if it was not for the credible threat of coercion on the part of the criminals who run it. Perhaps something similar is true, at least in some instances, of institutions that more clearly number among the paradigm cases of legality. This, in turn, might be taken to show that we ought to reject the view that the law necessarily claims practical authority. And a rejection of the authority thesis seems to fit in well with Schauer's empirical claim that law would not be able to make much of a difference to how people behave—and, hence, would be unable to serve any useful purpose—if it was not pervasively coercive. There are not nearly as many puzzled persons, persons willing to act in this or that way solely because that is required by the law, Schauer convincingly argues, as Hart and his followers seem to have assumed (see Schauer 2015, 57–74).

Schauer's Hartian opponents, I think, are still in a position to deny that this response suffices to establish that coerciveness differentiates law. Let us assume that it is true, as a matter of fact, that few people would ever obey the law, in the

technical sense of the term,[2] if law was not coercive, and that there are or that there could be legal systems that do not even claim practical authority but instead rely on brute force alone. It still does not follow that coerciveness differentiates law, since these assumptions do not rule out, as far as I can see, that there might conceivably be non-coercive legal systems, and that law is therefore to be differentiated by features other than its contingently ubiquitous coerciveness, for instance by, to use Schauer's own analysis, differentiation of source, sociological differentiation, or differentiation of method (see Schauer 2015, 154–159).

To be sure, Schauer's empirical insights into the centrality of coercion in the functioning of actual legal systems give rise to a number of highly important empirical questions and questions of institutional design: Why is coercion typically needed to motivate obedience to the law? What form of coercion is the most efficient in motivating obedience? How can bearers of public authority be made subject to coercion that will make them obey the law? Inquiries into the nature of law, admittedly, are unlikely to help answer such questions. And for that reason it would indeed be problematic if jurisprudential inquiry was solely focused on delineating the essence of legality.

However, or so post-Hartian essentialists might go on to argue, there is no reason whatsoever to think that adoption of an essentialist concept of law, and one that does not hold coercion to be differentiating, must stop us from asking the empirical questions just outlined. It might even be argued that we will be able to investigate these questions empirically only on the basis of an understanding of the nature of law that does not take law to be essentially coercive. We can only ask the empirical question why almost all birds fly (or why some birds do not) on the basis of an understanding of the nature of birds that does not take the capability to fly to be an essential feature of a bird. The claim that coercion is not essential to legality, then, is not merely perfectly compatible with the contingent ubiquity of legal coercion. The recognition of its truth might well be a condition for the kinds of empirical inquiry into law's coerciveness that Schauer is rightly interested in, in that it permits us to clearly demarcate the field if empirical inquiry (see Green 2015).

3 Stateless Law

At any rate, the discussion of the status of the protection racket takes a new turn on p. 160 of *The Force of Law*. Here, Schauer observes that there is an obvious counter to the claim that the extortion racket ought to be recognized as law; one that is available in the work of the legal philosopher—John Austin—whose views Schauer aims to rehabilitate. The extortion racket, an Austinian might argue, "does not exist

[2]In which obedience involves doing what the law tells us to do for the reason that the law tells us to do so. See Schauer (2015, 48–52).

within the municipal state". Hence, it cannot be law, because law "is, by definition, a creature of the municipal state" (Schauer 2015, 160).

Schauer does not explain very clearly exactly how a discussion of the Austinian claim that law must exist within the state is relevant to the question of whether coercion differentiates law from other social institutions. Given the context in which the Austinian reference to the state is introduced—the exploration of the suggestion that the Mafia's protection racket may be a legal system—the relevance of the point would appear to be the following: Most would find the claim that the protection racket is a legal system (and that paradigmatic instantiations of legality are nothing more than particularly elaborate protection rackets) highly counter-intuitive. The suggestion that law might be nothing more than the gunman situation writ large, in other words, would appear to make our concept of law over-inclusive. And an account of legality that focuses on the law's purported claim to practical authority, as opposed to its coerciveness, might seem to have the virtue of offering a solution to this problem. Racketeers, after all, do not even purport to make rules that we have reason to follow in the absence of a threat of coercion.

Schauer's response to this problem toys with two very different replies. The first reply, as already mentioned, is to say—"with Austin and, indeed, with our friend the man on the Clapham omnibus—that law is, by definition, a creature of the municipal nation state" (Schauer 2015, 164). This answer, however, appears unsatisfactory at first glance, for the reason that, as Schauer points out, "what is now called non-state law is perhaps best understood as law" (Schauer 2015, 161). The second reply, then, is to bite the bullet and acknowledge the existence of various forms of non-state law, including the 'law' of the Mafia. Let us now address Schauer's discussion of the second of these two replies, and then move to the first in the next section of the chapter.

Examples of non-state systems of rules that, in Schauer's view, might have a claim to be recognized as law include systems as different as the EU, UN, WTO, Canon Law, the rules of the National Hockey League, the rules of corporations or universities, and those of criminal organizations like the Mafia or Al-Qaeda. All these groups practice systems of rules that are systematic and internally complex enough to support the claim that we are faced with law. Non-state law, Schauer argues, "is not like chess without the queen", a "bastard variant on an accepted case". "Or if it is", he adds, "we need an explanation of why […] being part of the government and governance of the nation-state is part of the definition of law" (Schauer 2015, 162).

Schauer expresses skepticism that such an explanation is available. He admits that every state has a legal system, and that such systems have a special status in that they successfully claim control over a delimited geographical territory. They also tend to be comprehensive and to claim the final authority to regulate all behavior of norm-subjects. However, these two features do not suffice, in Schauer's view, to explain why all law must exist within the state. Non-state systems of rules could conceivably claim to be comprehensive, while some state-based legal systems (federal law in a federal system, for instance) are, according to Schauer, not comprehensive. Non-state legal systems such as that of the EU, in turn, may have a

geographically delimited sphere of validity. The conclusion to draw from all this, Schauer repeatedly suggests, is that we must accept that there are non-state legal systems, and that they are not to be regarded as defective instantiations of legality (see Schauer 2015, 161–163).

Let us grant this conclusion for the sake of argument. Perhaps this gets us out from under the requirement to explain why the Mafia's rules are not law. But it is difficult to see what the claim that there is non-state law is supposed to contribute to the general attempt to show that law's coerciveness differentiates it from other social institutions. If we grant the existence of non-state law, then some of it will be coercive, for example the extortion racket. However, it is still unclear whether the coerciveness, in this case, helps to explain why the system in question should be regarded as legal. As we have seen already, it is the internal complexity of the protection racket, and not its coerciveness, that intuitively seems to support the claim that it is comparable to law.

Some non-state law, on the other hand, will apparently be non-coercive. As Schauer himself points out, the 'law' of the National Hockey League or the American Bridge Contract Bridge League is, in an important respect, not coercive, since these organizations do not have the power to wield the raw force of physical coercion or to impose pecuniary loss that is not contingent upon breach of contractual obligation; sanctions that the state's organs are empowered to employ. What is more, subjection to the rules of the NHL and the Contract Bridge League, in contrast to subjection to the state's law, is not unavoidable (see Schauer 2015, 163–167). Nevertheless, Schauer's second reply tells us that the rules of these associations are law and that they are not to be regarded as defective instantiations of legality. If this is true, then it is hard to see why or how coerciveness would differentiate law from other social institutions.

To repeat: If coercion differentiates law, then the fact that a system of rules is coercive must at least give support to the claim that it is to be recognized as law, but this does not seem to be the case in the example of the extortion racket. On the other hand, a system's non-coerciveness must imply that the system in question is not to be regarded as a full-fledged case of a legal order. But Schauer appears to deny that non-coercive non-state law is an untypical or marginal instantiation of legality.

4 Coercion, Differentiation, and the State

Let us now turn to Schauer's first reply to the problem that a coercion-centered account of legality seems to have counter-intuitive consequences, in apparently forcing us to recognize the rules of the Mafia as law. Can the claim that law must exist within the municipal nation-state be made more defensible and less stipulative? Is it possible, in other words, to provide an interesting and illuminating "explanation of why […] being part of the government and governance of the nation-state" (Schauer 2015, 162) differentiates law? And does that explanation, whatever it may be, help to support the more general thesis that coercion differentiates law?

Schauer observes that systems of non-state law typically differ from the state's law in a number of important respects: First, systems of non-state law can usually exist only with "the acquiescence of one or more nation-states" (Schauer 2015, 163). Second, systems of non-state law typically do not have "an army or a police force" (Schauer 2015, 163). In other words, they do not typically have the capability and authority to exercise the "raw force" (Schauer 2015, 165) that characterizes state-coercion. Finally, subjection to rules of non-state law is often optional, whereas subjection to the laws of the state is non-optional. One can withdraw from the American Contract Bridge League, and thus get out from under having to conform to its rules, but such withdrawal is impossible where the laws of the state are concerned.

These differences might seem to lend some support to the view that law, or law in the core sense, must exist within, or be derived from, the legal order of a sovereign state or of a group of states. And Schauer eventually does appear to commit to the claim that the features just listed—authorization by the state, access to raw force, and non-optionality—do help to differentiate law. This commitment is evident in two passages of the text that I would like to highlight. The first of these concerns the relation of municipal law, coercion, and the state:

> We could say – with Austin and, indeed, with our friend the man on the Clapham omnibus – that law is, by definition, a creature of the municipal nation-state and that considering the Mafia and the American Contract Bridge League rule systems as law is a metaphorical and not a literal exercise. But if we do this, we find ourselves back to one of the traditional differentiating concepts of law: the institution that organizes what seems to be the plain fact of the nation-state's monopoly on the legitimate use of force. That it was Max Weber who understood the law in such terms is noteworthy because Weber was, after all, a sociologist. If we thus attribute a sociological dimension to Weber's understanding of law, we find ourselves with a differentiation between law and other normative institutions that captures a contingent reality and a popular understanding, even if it is not one that differentiates law in terms of necessary and sufficient conditions, or even provides a crisp demarcation between law and other institutions (Schauer 2015, 164).

The general drift of this quote is that Weber, Austin, and the man on the Clapham omnibus have a point when they take law to be "a creature of the municipal nation-state". The most characteristic feature of the state is that a state successfully claims a monopoly of the legitimate exercise of coercive force in a certain territory, whereas the state's law determines how this monopoly is exercised. The claim that law, or law in the core sense of the term, is the law that exists within or that derives from a municipal nation-state is thus, at bottom, a reference to a fact of coercion. It is the fact that the state's law has supreme coercive power that supports the view that the state's rules, as well as the rules authorized or tolerated by the state, are the key instantiation of legality. If we differentiate law by appeal to the state, we really differentiate it by appeal to overwhelming coercion.

This point, Schauer again cautions, should not be understood (or rather misunderstood) in essentialist terms. Rather, the claim is that coercion, of the sort exercised by the state, is to be regarded as one of several differentiating features of law.

> As noted above, law may be differentiated in terms of its methods, its procedures, its sources, and its social makeup. But it may also be differentiated because of its reliance on raw force and because being subject to that raw force may be in important ways for most people non-optional (Schauer 2015, 165).

The reason, or one of the reasons, why we hesitate to call the rules of the American Contract Bridge League law is that the American Contract Bridge League (or the NHL, or the Catholic Church, etc.) does not exercise "unavoidable coercive power" (Schauer 2015, 165). Unavoidable coercive power is neither a necessary nor a sufficient condition for law, but its absence speaks against recognizing a system of rules as a system of legal rules, while its presence supports that contention.

One problem with this line of argument seems to be that it rests on a rather narrow account of coercion, one that seems narrower than the notion of coercion developed elsewhere in *The Force of Law*. If the reference to coercion is to explain why one might justifiably hesitate to recognize the rules of the American Contract Bridge League as law—if, in other words, the American Contract Bridge League is to be regarded as a non-coercive institution—then our notion of coercion had better be limited to the raw force of physical violence, deprivations of liberty, or involuntary takings of property. After all, the American Contract Bridge League, or the Catholic Church, can sanction those who fail to abide by their rules, as they do have the power to exclude rule-violators and thus to deprive them of the goods that result from membership in good standing in these institutions.

Schauer plausibly argues, earlier on in *The Force of Law*, that nullity might, in some instances, be regarded as a sanction, and that there is thus no hard and fast distinction, in terms of coerciveness, between sanction-backed legal commands or prohibitions and constitutive legal rules that determine what one has to do to bring about a certain normative consequence in which one might be interested (see Schauer 2015, 43–47, 124–139). If this is a sound view, then it seems that institutions like the Contract Bridge League or the Catholic Church could be regarded as coercive. But in that case, the appeal to coercion will lose its differentiating force, as it will fail to explain why we hesitate to acknowledge the rules of the Bridge League as law. The use of a narrower conception of coercion in the present context, on the other hand, comes across as ad hoc and theoretically unmotivated.

Moreover, and more importantly, one might well ask whether Schauer's brief discussion of state-coercion offers sufficient argument for the claim that coercion differentiates law. Let us accept that attempts to differentiate law by reference to the sovereign nation-state are indeed implicit appeals to the state's coercive power. But as an argument for the claim that coercion differentiates, the Austinian attempt to differentiate law by reference to the state has a whiff of circularity: If the attraction of the view that proper law must exist within the state is that the state is essentially coercive, that its rules are necessarily backed and enforced by organized coercion, then, in the context of our general discussion of why coercion differentiates, the reference to the state appears to assume what is to be shown, i.e. that coercion is the (or a) differentiating characteristic of the law.

Put differently, instead of adopting the view that law must exist within the state for the reason that that view makes law come out to be coercive, we must explain

first, without reference to the state, why coerciveness ought to be regarded as a differentiating feature of law. If we have independent reasons for thinking that law must be coercive, it might still turn out, of course, that law must typically exist within the state, because the state might be the most effective and in many instances the only institution that can provide the kind of coerciveness that is needed for the existence of law. But Austin's brute, purely definitional reference to the state does not supply any argument for such a view.

In the quotation given above, Schauer offers two further considerations that are meant to fill this gap. The Austinian view, he observes, fits in with a "contingent reality"—with the contingent ubiquity of state-coercion captured by legal-sociological investigation. What is more, the view that coercion is a differentiating characteristic of law indeed conforms to "a popular understanding" of legality, it chimes with the intuitions of "our friend the man on the Clapham omnibus."

The first of these two considerations is unlikely to sway theorists in the Hartian tradition, for reasons already adumbrated above. A post-Hartian essentialist might well accept that there are very few puzzled people, that coercion is very often needed to motivate compliance with law wherever people are not already independently motivated to comply with the law, and that law, for this reason, is contingently coercive in all or almost all of its observable instantiations. S/he might accept as well that it is therefore important to engage in empirical legal-sociological or legal-psychological research into what kinds of sanctions are likely to be most efficient. But s/he might still deny that a theory of the nature of law or an investigation into the concept of law need be concerned with these questions of legal sociology or psychology.

It is true that, in using a concept of law that does not treat (perhaps merely possible) non-coercive legal systems as defective instantiations of legality, we rely on a concept of law that differs from the folk concept employed by the man on the Clapham omnibus. It is not immediately clear, however, why this should be a problem. For all we know, the use of a theoretically purified concept that allows for the possibility of non-coercive legal systems might turn out to lead to a superior understanding of legal phenomena. At the very least, such a concept does not, as we have already seen, in any way foreclose more thorough empirical research into why legal coercion is contingently ubiquitous or into how it might be made most effective with regard to achieving the law's aims.

5 Monopolistic Coercion

Having said all this, I sympathize with the view that coercion, and in particular the kind of coercion that is typically exercised by the state, differentiates law. I also think that Schauer is very much on the right track in bringing up the monopolistic character of state coercion. Let me try to close by making some very rough and tentative suggestions as to how one might successfully defend the view that the kind of coercion typically exercised by a state differentiates law.

Schauer aptly describes state-based law as "the institution that organizes what seems to be the plain fact of the nation-state's monopoly on the legitimate use of force" (Schauer 2015, 164). But his discussion somewhat neglects one important dimension of the state's or the state's law's claim to a monopoly of legitimate force. The point of the state's claim of a monopoly of force, as Hans Kelsen emphasized in some of his writings (see Kelsen 1945, 21–23, 1944, 3, 1952, 13–18; Vinx 2013) is not merely that the state will use force to make its rules obeyed. As importantly, the state, in claiming a monopoly of legitimate force, criminalizes all use of force that is not legally authorized. Where a monopoly of force has successfully been established, in other words, uses of force will be legally permissible only in the form of legal sanctions which are applied upon a judicial ascertainment of a breach of existing legal rules. All other uses of force are themselves delicts that the state will attempt to punish and suppress.

It is a very widely shared intuition about law, one that Schauer himself endorses (see Schauer 2015, 165), that law makes human conduct non-optional. Law presumes to have the last word on what courses of action are mandatory, prohibited, or permissible. The law takes its own word on these matters to be final, and it will refuse to entertain any challenge to its word that might be raised from the point of view of our own practical reasoning, be it prudential or moral.

Needless to say, this non-optionality of the law is closely bound up with the law's coerciveness, as the law typically uses coercion to enforce its mandates against the recalcitrant. However, there is a second, somewhat more oblique connection between coercion and the non-optionality that emerges once we focus on the monopolistic character of the coercion exercised by the state. Clearly, a system of rules could be law-like, in its internal complexity, and be coercive, without claiming a monopoly of force, i.e. without claiming that all uses of force other than attempts to implement its own sanctions are impermissible and punishable. The Mafia, for one, does not claim a monopoly of force, however systematic and complex its operations may turn out to be. It evidently has good reasons to avoid the costs that might result from raising and defending a force-monopoly.

So why do the legal systems that we traditionally regard as paradigmatic instantiations of legality tend to go further and to associate with the state's claim to a monopoly of force? Imagine a system of arbitration in which parties to some conflict can mutually agree to submit their conflict to an arbitrator who will give a verdict as to how the conflict is to be resolved. Clearly, such a system would be of very limited effectiveness if its rulings did not presume to be final, i.e. if parties to a conflict had a right to overturn the verdict simply because, for some reason or another, they thought it wrong. But of course, the presumption of finality alone, or even its prior recognition by the parties to a conflict, is not always going to suffice to make losing parties accept verdicts. The verdict, hence, must be backed up by a threat of coercion, in the simplest case in the form of social pressure or, perhaps, in the form of a conditional authorization to the winning party to enforce the verdict.

Even with a threat of coercion, however, the system of arbitration will be limited in its effectiveness if it did not also deprive participants of what Hobbes would have regarded as their general right (and the factual power) to engage in unilateral uses of

force to protect what they see as their legitimate interests. Imagine I have secured a verdict against you, and the verdict authorizes me to coerce you in case you do not abide by it. I am unlikely to do so, in the face of your refusal to abide, if you are permitted (as well as possessed of sufficient power) to engage in further unilateral uses of force against me. To put the point more generally, the system of arbitration is going to fail, in very many cases, to provide for a possibility of peaceful conflict-resolution if it is not compulsory, and for it to be fully compulsory, uses of force not authorized by the relevant arbitral institutions must have been outlawed and successfully suppressed. Otherwise, stronger parties will prefer to rely on their own power to get their way and the weak will suffer what they must, that is, they will choose not to use the system so as to avoid the retaliation of the powerful.

The only way to ensure that our system of arbitration is fully functioning, in other words, is for the system successfully to claim a monopoly on the legitimate use of force. Let us call the coercion exercised by a system that has successfully established a monopoly on the legitimate use of coercive force 'monopolistic coercion'. In a system of monopolistic coercion, subjects are compelled to have their conflicts arbitrated by the law, unless they can reach agreement by themselves or decide to let a matter rest. But they also know that they will not be subject to exercises of raw, aggressive force that are not legally authorized, and they can, as a result, shield themselves from becoming victims of such coercion by remaining on the good side of the law. Monopolistic coercion ends the state of nature and creates a state of legal peace (see Vinx 2007; Notermans 2015).

Monopolistic coercion is necessary not merely to make people who are, for whatever reason, disinclined to do so comply with some particular legal requirement. Monopolistic coercion, more importantly, is necessary, at least in the actual world, for people to be able to rationally accept the law's claim to finality. Even if there were many more people willing to adopt the stance of a puzzled person than it appears there are, and even if those people were to recognize the benefits of a comprehensive mechanism of conflict-resolution, they would have to know that the verdicts of the law will be enforced against the recalcitrant, and that they are shielded against retaliation, in order to have sufficient reason to rely on the law.

So here is the suggestion—and it is really no more than that—that I am gesturing at: It is a claim to monopolistic coercion, and not coerciveness as such, that, among other things, differentiates law from other internally complex, rule-based social institutions. There is a kernel of truth, then, in the Austinian view that law must exist within the state. Reliance on a state's coercive capacities is the most efficient means, and in many circumstances the only feasible means, for the law to establish its own claim to monopolistic coercion. But this does not entail that law must, by definition, exist within the state, since there clearly can be non state-based systems of rules that claim a monopoly of coercive force and have some success in establishing it. What is more, the claim is not that law is coercive because it must exist within the state. Rather, the view is that the law itself is differentiated by a claim to monopolistic coercion, and that the law's observable affinity to the state results from the fact that, in order to satisfy its own need for monopolistic coercion, the law will typically, though not inevitably, need to be backed up by the state.

Obviously, the thesis that law is differentiated by monopolistic coercion is open to the objection that it leads to a concept of law which is under-inclusive, too restrictive in what it counts as law. In reply, one could point out that it seems clear that the distinction between systems of monopolistic coercion and other coercive (or non-coercive) systems of rules is, at any rate, salient and important. There is a sound motivation to distinguish between systems of rules that do claim a monopoly of force, and do so successfully, and systems that do not, and to mark that distinction on a conceptual level. A system of monopolistic coercion alone can provide a basis for public order while systems that do not exercise monopolistic coercion cannot: their functioning, if not illegal, is, as Schauer himself has told us, typically parasitical upon systems that successfully enact a monopoly of force.

The view that law is differentiated by monopolistic coercion explains, what is more, why the extortion racket run by the Mafia is not a legal system, and it does so without attributing to the law a claim to authority. Hart was right to hold that law is not the gunman situation writ large, but our argument points to a reason for that view that Hart did not recognize. Gunmen, of the Mafia, do not normally have an interest in establishing and maintaining a monopoly of force. The Mafia does not care if I slash the tires of my neighbor's car or beat my children. It does not claim to comprehensively control the conditions of the legitimate use of force, as it is content to use coercion to extract its protection money. Hence, we were quite right to question the view that the coerciveness of the Mafia supports its claim to be law. In fact, its coerciveness is what makes a racket criminal, precisely because the coercion exercised by the Mafia is not and does not even aspire to be monopolistic.

Lawful systems of rules that might be regarded as non-state law, on the other hand, are typically either dependent on or even authorized by systems that wield monopolistic coercion. The rules of the American Contract Bridge League would not be able to function as they do if I had the freedom to use private force against the League's officials in case I feel aggrieved by how they apply the League's rules. The NHL is dependent on the fact that commercial contracts are enforceable at law. As Schauer points out, even if the NHL and the Bridge League are, in some sense, coercive, they do not wield raw force. And we now have a rationale for why it is the monopolistic control of raw force—and not of the kind of soft coercive force that might be exercised by the officials of the NHL or the Bridge League—that differentiates law. Raw force must be monopolized for law, for a system of genuinely non-optional rules, to exist. The forms of coercion exercised by the American Contract Bridge League do not even aim at a monopoly of force.

The UN, arguably, claim a monopoly of force in the international sphere, though apparently without full success. Current public international law might thus be seen to fit, though uncomfortably, with the claim that monopolistic coercion differentiates law. The EU—and the same might be said to hold for other more specialized international regimes—arguably derives its legal authority from the joint authorization given by a group of monopolistic coercers. It is also quite clearly dependent for its functioning on the background of public order provided by those monopolistic coercers. In short, a closer look at concrete examples of purported non-state

law might well show that the view that law is differentiated by monopolistic coercion is not as implausible as it might appear at first glance.

Does the view outlined here provide a reply to the claim that it is a mere contingent, empirical truth that law, in the actual world, makes claims to monopolistic coercion, and that this empirical truth does not concern inquiry into the nature of law? Would not the society of angels need a system of rules of co-ordination that was as final and as comprehensive as the systems of monopolistic coercion that we see in the actual world? And if the angels could run that system without coercion, because they are motivated to show unfailing deference to law, would this not show that (monopolistic) coercion should not be regarded as differentiating?

The best reply to this objection that I can think of is a restatement of what I take to be one of Schauer's fundamental messages in *The Force of Law*. When we seek to differentiate law, we are not primarily interested in counterfactual stories about angelic societies. What we are interested in is how to draw a distinction that divides the systems of social rules that do (or that at least could) exist in the actual world into legal and non-legal systems. And given the circumstances of justice, purported law will always be defective, in the actual world, if it is not backed up by monopolistic coercion. In the actual world, the absence of (a claim to) monopolistic coercion, or of a proper relation to such a claim, thus invariably puts into doubt a system's claim to be law. It follows that we cannot go wrong in treating monopolistic coercion as an identifying characteristic of legality for the actual world. A biologist would make a mistake if they held that a penguin is not a bird, or less of a bird, because it does not fly. But a legal scholar will never be mistaken in claiming that the lack of (a claim to) monopolistic coercion speaks against recognizing a system of social rules as an instance of legality.

One could reply that such considerations, even if sound, do not show that coercion differentiates law, but at best that the absence of a (claim to) monopolistic coercion is a reliable indicator of an absence or deficiency of legality in the actual world. And one might then add that this would not be so in a society of angels. I am tempted to reply that the matter, at this point, comes down to intuition. It would not strike me as awfully counter-intuitive to take the view that the angels do not have proper law, precisely because the system of rules by which they are governed does not have to be coercive. The angels, one might say, do not need what we call 'law', given that they can never experience conflict that requires coercive solutions. If we take law to be committed to the goal of realizing legal peace among beings that are not so favorably situated, we are justified in treating monopolistic coercion as a differentiating characteristic of legality. At least, this is the direction in which Schauer's reflections on the role of coercion for the differentiation of law seem to me to point.

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Incomplete Responses

Frederick Schauer

I am more than fortunate that such a distinguished group of commentators representing multiple traditions and seven different countries have taken time out from their own work to comment on mine. Each of the commentators whose comments on *The Force of Law* (Schauer 2015) are found in this book has produced articles that are independently important, and each has offered multiple ideas, perspectives, and criticisms. It would take an entire book, and one I doubt I have the ability to write, to respond to each of these ideas, perspectives, and criticisms, and in that sense my responses here to each of these commentaries are plainly incomplete. I have chosen in this response to focus on only some of what each of the commentators has written, not because what I have ignored is less important, but because the topics I have selected are those that seem to me most conducive to further discussion and continuing jurisprudential progress.

1 Lars Vinx and the Methods of Jurisprudence

Lars Vinx has offered an original and thorough perspective on the issues raised in *The Force of Law*. His central substantive theme is offered partly by way of qualified agreement that coercion is centrally important to the phenomenon of law, but with the important modification that for Vinx it is not law's coercive power

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alone that differentiates law from other social phenomena, but that it is law's monopoly on legitimate coercion (or at least its *claim* to a monopoly on legitimate coercion[1]) that is chief among the characteristic identifying and differentiating features of law.

In adding monopolization and legitimacy to bare coercion, Vinx has usefully filled in important gaps in my account, although, as I will explain presently, I am more sympathetic with the monopolization addendum than with that of legitimacy. But before turning to such substantive questions, it will be valuable to focus on some more preliminary, and perhaps more fundamental, questions of jurisprudential methodology.

Although much of jurisprudential inquiry has focused on the question, "What is law?", it seems preferable, following H.L.A. Hart's introductory remarks in *The Concept of Law* (Hart 2012, 7–8), not only to attend to what kinds of genuine worries lurk behind the "What is law" question, but also to examine closely what it is, if anything, that makes law different from other public, coercive, or normative institutions or phenomena. This is the problem of differentiation, and Vinx and I are in total agreement about its importance. Hart was chiefly interested in differentiating law from morality and from certain dimensions of raw force—law is not "the gunman situation writ large", he insisted (Hart 2012, 7)—but the question of differentiation is more pervasive. We are interested in differentiating law not only from morality, as Hart stressed, but also from policy, and from various other institutions of the state; and we are (perhaps) interested in distinguishing law not only from the gunman, but also from a host of other prescriptive, coercive, and normative phenomena. Indeed, for all of the annoyances in John Austin's too-baroque definitions and typology, it was Austin who best understood the importance of distinguishing law "properly so-called" from various other normative domains, including the domain of morality and the domain of what would now be called social norms (Austin 1995, 18–37).

But how should we go about differentiating law in this sense? Here Vinx is not entirely clear, but the reason for that is almost certainly that I was even less so in *The Force of Law*. More specifically, we could distinguish an institution by identifying the necessary and sufficient conditions for its existence. This is the central approach of much of the modern philosophy of law, at least insofar as that enterprise seeks to locate the essential features of law, those properties without which it would not be law at all. The contemporary practitioners of this approach, perhaps most prominently Raz (1979, 104–105), Shapiro (2011, 13–22), and Dickson (2001, 17–25), often purport to be following the path first established by Hart, but whether Hart actually believed that law could be so characterized is, at the very least, open to doubt. It is true that in the later parts of *The Concept of Law* Hart seemed to be identifying the union of primary and secondary rules, coupled with the

[1]Joseph Raz famously insists that there is an important difference between what law claims and what law just is or what characteristics it actually has Raz (1979, 28–33) and Raz (1994, 199–200). An important commentary on the distinction is Gardner (2012).

internalization of an ultimate rule of recognition by the officials of the system, as the necessary (and perhaps sufficient) features of a legal system, but the earlier parts of the book, especially the first chapter, have a far more non-essentialist cast (Schauer 2013). There Hart embraced the possibility that law, like most other phenomena, has core and fringe (or penumbral) examplars, but believing this characterization to be sound is not necessarily inconsistent with an essentialist view about what makes the core examples the clear cases of law that the core and fringe understanding supposes that they are. But Hart also suggests, more tentatively, that the concept of law might be somewhat closer to a Wittgensteinian (1958, 66–71) family resemblance (Hart 2012, 15–17, 279), such that there are no properties that all of the examples of law, even the clear ones, share.[2]

In somewhat different language, Vinx appears to share this view, and in this he strikes me as plainly correct. More precisely, Vinx appears to suggest that there might be numerous properties or criteria that contribute to "law-ness" (my term and not his), and that the identity of some phenomenon as law or not is the product of a complex process involving assessing just how much of the various criteria are present, such that more of one of the criteria might compensate for less of another, and such that enough of one criterion might compensate for the complete absence of another criterion, a criterion that might in a different combination of properties be important or even dispositive.

In suggesting that law is a criterial concept[3] of this variety, Vinx has made a substantial methodological contribution to the philosophy of law. I would like to say that this is what I was thinking about all along, but it is more accurate to say that Vinx's approach, like much of the best of scholarship, says something that appears to be obvious once said, but which was not recognized or not understood until someone identified it.

There are places in Vinx's contribution in which he seems less than fully committed to the methodology I have just described, and for which I give him great credit. More particularly, Vinx is more skeptical than I am of the role of pure coercion as one of the criteria for law, and urges us to think that it is legitimate coercion, and the monopoly of coercion, that plays the role that I attribute to coercion alone. Now I agree with Vinx that there is a lot of coercion in the world, and that much of it, probably even most of it, exists outside of what we normally consider the legal system. And I agree with Vinx that much of this extra-legal coercion is illegitimate, under any of a various number of conceptions of legitimacy. But if we were to follow Vinx's argument to its logical conclusion, we might wish to conclude that coercion *simpliciter*, the legitimacy of coercion, and the

[2]A very closely related idea is that of a *cluster concept*, as developed in Black (1954, 28) and Searle (1969, 162–174). For application to law, see Tamanaha (2015, 359–361). See also Ehrenburg (2009, 193), positing that law may consist in a "particular combination[] of non-unique elements". Raz (2005) recognizes and rejects the possibility that law is a cluster concept, but does not offer any reasons for his conclusion.

[3]Dworkin (2011, 158–160) uses the term "criterial concept", but it is not clear whether he means it in the same way that I use it here to describe what Vinx suggests, albeit in different terms.

monopolization of coercion are three different criteria for law, and, again, more of one might counterbalance less of another. Thus, a system containing the union of primary and secondary rules,[4] and one closely connected with or part of the sovereign political state, and one using coercion to enforce its directives, might be considered to be a legal system even if the coercion of that system did not have anything close to a monopoly on the use of force, and even if the force it used was far from legitimate. And such systems are by no means as imaginary as, say, unicorns. Insofar as there exists a legal system in Somalia, for example, or in contemporary Afghanistan, that legal system might well satisfy the criteria I have just described.

This is not to say that Vinx is mistaken to wish that I had focused more on legitimacy and more on monopolization. The former is more complex, involving competing conceptions of legitimacy, and running the risk of blending into a morally front-loaded loaded conception of law that I and other so-called positivists wish to avoid. But even if we leave such debates aside, it is still possible to agree with Vinx that there is an important difference between coercion and the monopolization of coercion, and that thinking of the monopolization of coercion as an important criteria for law, even if not a necessary one, is a valuable addition to the project of attempting to locate the differentiating properties of law.

2 Pierluigi Chiassoni and the Mistaken Search for Essences

Jurisprudential methodology is also the focus of Pierluigi Chiassoni's contribution, and of course it pleases me that he appears to be largely sympathetic with my challenge to the essentialism that seems to dominate so much of post-Hartian jurisprudence in the analytic tradition. Chiassoni agrees that the claims to find an essentialist approach in Hart's own work are somewhere between exaggerated and false, and one of the many virtues of his contribution is in adding additional sources and analysis to a claim that I made far more briefly in *The Force of Law* and even elsewhere (Schauer 2013) than the carefully documented one that Chiassoni

[4]Hart (2012, 99). Vinx refers to my distinction between the gunman and the more structured "protection racket" (Schauer 2015, 159–161), and says that he does not understand how my example of the protection racket assists in explaining how coerciveness differentiates law. I agree that my example does not do this, but that is because doing so was not the purpose of the example. In talking about the gunman (Hart 2012, 7), Hart conflates two different properties of the gunman scenario—its raw coerciveness and the absence of secondary rules. My purpose in changing the gunman to the protection racket was thus to disentangle these two properties by positing a scenario in which raw coerciveness was present but the absence of secondary rules was not. If my example succeeds, it is not because it shows that law is coercive, but because it shows only that a coercive system involving primary and secondary rules is not quite as obviously non-law as is the simple and non-rule-structured case of the lone gunman.

develops here. Anyone arguing that the contemporary search for the essential features of law in all possible legal systems in all possible worlds is an enterprise derived from or pioneered by Hart will have to confront Chiassoni's extensive evidence to the contrary, and I very much doubt that they will be successful.

Once we understand that Hart himself was likely not engaged in an essentialist enterprise at all, then we can see that he ought not to be understood as being as hostile to a focus on coercion as both I and his supporters in this regard (Gardner 2012, 37–38; Green 2008, 1049; MacCormick 1973, 101)[5] take him to be. Implicit in Chiassoni's argument is the view that I may have slightly misunderstood Hart as offering a strongly anti-coercion picture of the nature of law, when in fact he was seeking largely only to supplement Austin's over-emphasis on coercion with a focus on other important features of law that are neither dependent on or much connected with law's use of force.

On reflection, I am inclined to think that Chiassoni is right. It is true that Hart did not refer to the "natural necessity" of legal coercion until the later pages of *The Concept of Law* (Hart 2012, 199–200, 216–220), and it is also true that Hart earlier (Hart 2012) refers to the union of primary and secondary rules as lying at the "centre" of a legal system and the key to understanding the nature of law, but the more sympathetic reading of Hart would see him as less hostile to the importance of coercion than I have pictured him to be. If one accepts the anti-essentialist characterization of Hart's approach, and if one accepts that Austin's single-minded focus on coercion had dominated English-language analytic jurisprudence for more than a century, then we can see how easy it is to underestimate, as Chiassoni has convinced me that I did, *The Concept of Law*'s basic compatibility with recognizing the importance of other features of law, even features, such as coercion, that were not Hart's primary focus in this book.

The most important virtue of Chiassoni's contribution, however, lies in the way in which he draws Jeremy Bentham into the conversation about essentialism and concepts more generally, thus suggesting that the problem with attempting to locate the essential features of the concept of law is not (only) that the concept of law may not have essential features, but also that there may be no concept of law at all, or at least no interesting concept of law at all.

As Chiassoni explains, Bentham distinguished natural from fictitious entities, with the former category including not only natural kinds such as gold and water, but also artifacts such as chairs and hats.[6] But for Bentham the category of the fictitious included vast numbers of things identified by abstract terms with little or no connection with objects appearing in the world, such as "fortitude", "justice", "duty", and "right". Such terms drew their meaning from the way in which they

[5]Thus Gardner describes Hart as having exposed a "sadly … familiar error", Green describes a system of norms relying soley on sanctions and incentives as "not a system of law" at all, and MacCormick portrays a coercion-centered account of law as "one of the perennial and persistent fallacies in legal philosophy".

[6]See Ogden (1932) and Stolzenberg (1999).

were used in context, and in this sense Bentham was an important precursor of views about language ("meaning is use", to oversimplify gtealy) that we now tend to associate with Wittgenstein (1958) and Austin (1975, 1979), and others of their generation.

The importance for our purposes of this perspective about language and about fictions is the possibility that law may itself be such a fictitious entity, serving simply as the covering term encompassing a wide range of phenomena with less in common than their presence under the same linguistic or even conceptual umbrella might suggest. Chiassoni maintains, inspired by Bentham, that laws, judges, legislatures, sheriffs, and tax-payers, for example, might be sufficiently diverse entities or phenomena that to infer that they share much of interest in common, to say nothing of sharing something essential to each, would be a fruitless search for the "essential properties of something that does not exist".

Consider, for example, dentists, rugby, and the European Union. Each of these is important in its own right, and each is interesting, but if we were to ask what is essential to all three together, we would likely either have nothing to say at all, or, somewhat more likely, likely wind up saying something both trivial and unilluminating, as in "all are designated by words in the English language", or "all are created by human beings", or "none have been to the moon". And that is because at any interesting level the three simply have nothing in common and no essential properties.[7]

So too, perhaps, with law. Criminals in bad movies refer to "the law" to mean the police, but police officers figure very little in contemporary accounts of the nature of law. Similarly, books and articles about "legal reasoning" talk about the reasoning and decisional processes of lawyers and judges, but ignore the decisions of the legislatures and administrative agencies who actually make most of our law. And even if we stick to the decisions of lawyers and judges, theorists following the lead of Kelsen (1967, 349) and Raz (1998, 7) would insist that even lawyers and judges do many things that are not part of the law, even as other theorists—Dworkin (1986, 2006), Posner (2008, 2013), and many of the Legal Realists (Schauer 2009, 124–147; 2011), for example—see law as a far more encompassing category including a great deal that Kelsen, Raz, and others would exclude.

The value of what both Bentham earlier and Chiassoni now have to offer, therefore, is in suggesting that before we go off on a search for law's essence, we need to think carefully about whether law has an essence at all. Perhaps it does not, and the problem with essentialist jurisprudence in the post-Hartian tradition may be not only that it locates the wrong essences, but also that it mistakenly believes that there are essences out there to be located.[8]

[7]See Lebel (1979, 779), suggesting the folly of conducting a symposium on psoriasis and the First Amendment, because "each of the terms refers to a matter of independent interest, but the link between the two [is not] intuitively apparent".

[8]This is the theme of many of the contributions in Baxi et al. (2015).

3 Thomas Bustamante and Law's Normativity

Lars Vinx and Pierluigi Chiassoni have offered comments that are largely focused on jurisprudential methodology,[9] but the remaining commentators on *The Force of Law* have directed their attention principally to my claim that coercion, even if not strictly essential to law, is nevertheless pervasive in it and is fundamental to its actual operation. In response to this claim, some of the commentators here have claimed I have gone too far, but at least one (Potacs, discussed below) insists that I have not gone far enough. And in the former category we find Thomas Bustamante, whose valuable and incisive challenge to what he sees as my inflation of the importance of law's coerciveness is coupled with an equally valuable challenge to what he understands as my deflation of the importance of law's non-coercive normativity.

Bustamante's tightly argued challenge to my challenge to the so-called problem of law's normativity contains much with which I agree. I agree, for example, that there is a difference between the statement of someone who accepts the law in a strong sense and one who simply presupposes the law for purposes of making a statement from it. Following Raz (1990, 171–172), we can call the latter the legal point of view, and recognize that the legal point of view includes what Raz, again, calls the detached normative statement.[10] I can say to my friend the vegetarian that "you shouldn't eat that" in pointing out that the soup she is about to consume is made with a chicken broth base even as I do not accept the tenets of vegetarianism and would consume the same soup with unqualified gusto. So too can I say to my other friend the devout Muslim that he should not eat a particular piece of candy because it has an alcohol-based filling, even as, again, I myself have no such objections to consuming alcohol. And thus were I to say that "it is illegal to have a commercial sign written only in English in the Province of Quebec", I would be making a statement very different from the statement I might be making in issuing a legal judgment as a Quebecois judge. The former is detached, but the latter might not be.

Having properly identified the nature of the legal point of view and of a detached normative statement, Bustamante then goes on to distinguish such statements from ones that are the product of acceptance in a much stronger sense. One can, he argues, accept a legal rule as a reason for action—an "all in" reason, we might label it—and not simply a *legal* reason for action, and that to do so is very different from accepting the rule contingent on being inside the legal system and accepting its commitments.[11] Thus to accept the law—to internalize the law in this strong sense—is very different from internalizing the rules of chess for the contingent purposes of playing chess, and thus very different from internalizing the rules of law for the contingent

[9] And so too Isabel Trujillo in her Introduction, which I address below.

[10] A valuable analysis of these and related ideas is Bix (1999). See also Shapiro (2006).

[11] On the distinction, see also Enoch (2011) and Bix (2012). Compare Rodriguez-Blanco (2013).

purpose of participating in a legal system. For Bustamante, there are non-contingent and non-domain-dependent reasons, and that genuine acceptance is about these kinds of non-contingent or non-hypothetical reasons.[12]

Bustamante's distinction and clarification is valuable, and he puts the distinction between conditional presupposition and genuine acceptance more clearly than Hart, Raz, or I have done, and for this we owe him our gratitude. But having drawn the distinction, Bustamante then says that the question of law's normativity is the question of acceptance in this stronger sense. I agree. But he then claims that I argue that the only reasons for accepting the law *qua* law in this stronger sense are prudential, and here there seems to be a genuine disagreement, both about the substance and about the nature of my argument.

In seeking to deflate the problem of normativity, I did not in *The Force of Law* seek to deflate the importance of the philosophical question of moral obligation to obey the law just because it is the law. Although there are arguments of various strengths and with (or without) various qualifications from Wolff (1970), Smith (1973), Gans (1992) and Green (1988), and, perhaps most prominently, Simmons (1979), that such a (prima facie) moral obligation to obey the law just because it is law does not exist, there are arguments of greater venerability from Socrates, Thomas Hobbes, John Locke, and John Rawls, among others, that there is indeed an obligation to obey the law just because it is the law (Green 2002; Greenawalt 1987; Smith 1996). My argument in *The Force of Law* is thus decidedly not that there is no problem of legal normativity at all, but that there may well be no problem of legal normativity that exists independently of the problem of the moral obligation to obey the law as it has been formulated and debated by all of the foregoing figures and many more. I believe that Socrates and his successors have offered a conceptually clear position, and that they have offered powerful arguments for why one *should* accept that moral obligation to obey the law just because it is law.[13] But in *The Force of Law* I remain agnostic on the question whether it is Socrates or Simmons who has the better of the argument. Still, I do not deny that there is at least a plausible argument for accepting the law in this strong sense, and that, following Bustamante and others [Postema (1982), for example], such an argument might be based on the moral and rationality-based obligations of coordination and cooperation within a society. What I do deny is that the problem of normativity, as it is articulated these days, presents a problem different from the problem as I have just identified it.

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[12]They are non-hypothetical in the sense that we can say, "*If* you are playing chess, then you must not move your castle diagonally". But there is nothing hypothetical about "You must behave rationally" or "You must not torture small children", and the question is whether law and legal reasons can be, should be, or is accepted in this latter and stronger sense.

[13]And I have also argued (Schauer 1991, 128–134, 2005) that there is reason for the state, from its perspective, to impose and enforce an obligation to obey the law even if there is in fact, from the perspective of the subject, no reason to accept an obligation to obey the law. See also Alexander and Sherwin (2001).

In offering my explanation for the importance of coercion in understanding the nature and operation of law as we experience it, I took pains to distinguish the question whether there is a moral obligation to obey the law qua law from the question whether the behavior of actual people indicates their belief in the existence of such an obligation. There are many references to empirical findings and social science literature in *The Force of Law*, and these are devoted principally to demonstrating that the existence of a felt obligation (and actual behavior following from it) to obey the law for non-prudential reasons is considerably less common than is typically supposed. This conclusion plainly varies with time, place, and other dimensions of context, and that is why the citizens of Helsinki stand obediently at "Don't Walk" signs even when there is no possibility of danger or sanction, and even though the citizens of New York, Naples, and Sao Paolo would think such behavior absurd.

Bustamante properly frames his discussion around the question of reasons for action, and thus around the question of a reason to accept the law in a strong sense. But he charges me with not understanding that there can be a reason to obey the law just because it is the law, and not understanding that people can have reasons for accepting the law. Here, however, our only disagreement is about whether we have a disagreement. Yes, I fully accept that people can have reasons for accepting the law *qua* law, but there are two meanings of "reason" in this context. One is that a reason is an ontologically strong phenomenon, such that people might have a reason to do something even if they believe and behave otherwise, and the other meaning understands the word "reason" to refer to why people actually do things. Reason in the former sense refers to what is, and reason in the latter sense refers to human motivations, and why people actually do things. After all, to ask someone "Why did you do that?" is hardly nonsensical. And thus there is no inconsistency between the two senses or the two meanings. It is just that they just refer to two different phenomena, and from this perspective the word "reason" is ambiguous. But in seeking to explain the ubiquity and natural necessity of legal coercion, I rely on reason in the second and not the first sense. There is much evidence, that is, that people are less commonly actually motivated to obey the law just because there is law than is widely believed, and reaching that conclusion is in no way inconsistent with accepting the claim that people ought to obey the law because it is the law even if they do not. But because there is much evidence that people are not actually so motivated, we can understand why coercion has emerged as such an important feature of the operation of law.

4 Situating Coercion—Christopher Morris's Amendments

Christopher Morris usefully puts my emphasis on coercion in law in proper perspective. He agrees that coercion is important, but then proceeds to argue that coercion's importance in and to the law cannot be fully appreciated unless we also appreciate the non-coercive ways in which coercion in law is framed and exists. His

amendments to my account are valuable, and there is little with which I disagree, but it may be important to explain these amendments, and to offer a minor objection to the way that Morris characterizes them.

Morris appears to agree that for most laws in most contexts coercion is a contingently necessary feature of their effectiveness. But he also argues that law claims to create obligations independent of coercion,[14] and that coercion is the method by which these obligations are enforced. There is little to disagree with here, although John Austin, were he still with us, might take issue. Austin (1995) sought to *define* legal obligation in terms of susceptibility to coercion, but this is now widely and properly understood to have been a mistake. Just as there are moral obligations whose existence is conceptually distinct from their enforcement, so too can there be legal obligations with the same status. There are differences between "You ought to be nice to your mother" and "You ought to pay your taxes", but if we accept the conceptual possibility and obligation-referring capacity of the former, existing as it does with no mechanism of enforcement, then we should accept the conceptual possibility and obligation-referring capacity of the latter as well, recognizing as we do so that the mechanisms of enforcement for the latter are greater than or different from the mechanisms of enforcement of the former. The point is only that for the latter—the legal obligation—we can still understand the obligation that the law creates as independent from the mechanisms that law uses to enforce it.

My only disagreement with Morris on this score is about his preference for characterizing the enforcement dimensions of this story as being something other than primary, and thus about characterizing the unenforced obligation as primary. It is certainly true that the obligation can exist without the enforcement, but it is also true that the obligation (probably) cannot exist without language, without human consciousness, and without many other things. So although the existence of the obligation is a necessary condition for behaving according to that obligation, it might turn out that so few people behaved in this way without coercion that the necessary condition without the contingent supplement of coercion turned out to be decidedly rare in the world we know. To the extent that that is the case, and that is what the empirical material in *The Force of Law* is aimed at demonstrating, then it is undoubtedly useful to point out the status of the obligation itself, apart from its coercive supplementation, as a necessary condition, but then going further to describe this admittedly necessary condition as "primary" may be at least slightly misleading.

Describing uncoerced obligation as primary becomes slightly less misleading if we focus on the foundations of the state or even the foundations of a legal system. As Hart (2012, 100–109) and many others (Axelrod 1984; Ellickson 1991; Levinson 2011; Weingast 1997) have argued, and as Morris usefully develops hete, the very foundation of a legal or political system may require some degree of uncoerced cooperation and commitment to the existence of the system in the first place. Without this more or less voluntary agreement, whether conscious or

[14]On what law claims, see note 1 above.

otherwise, the very system might not ever come into being. But whether the system can then survive and flourish without coercion is a different question, yet this is not to deny Morris's belief that the bottom turtle of any legal system is still coercion-independent. The cooperative agreement to establish a legal system may still be a matter of self-interest on the part of the cooperating founders, but it is a mistake to think of even that kind of self-interested cooperative agreement and coordination as coercive in any interesting sense. I have no disagreement with Morris on this score, and his views about non-compelled agreement at the beginnings of a legal order are best considered valuable supplementation rather than strong (or even weak) disagreement.

5 Jorge Nunez and the Actual Effectiveness of Law

In many respects, Jorge Nunez's impressive contribution is the natural complement to Morris's. Nunez rightly distinguishes legal existence (or legal validity) from legal effectiveness, and then goes on to explain why and how legal validity can exist without coercion or the threat of it. In this he agrees with Morris, as well as with Hart, and with me as well, and disagrees with almost no one except, most importantly, Austin. But although Morris is at pains to illustrate the importance of uncoerced law and legal obligation, Nunez believes that among the most important aspects of a legal *system* is its effectiveness, and that the effectiveness of an entire legal system turns out to be highly coercion-dependent. And although Morris and Nunez are focused on different aspect of the phenomenon of law, again I find much to admire and agree with in Nunez's contribution as well as in Morris's, and little with which I would want to take issue.

At the heart of Nunez's analysis is a series of perceptive observations about legal efficacy, and about the relationship between validity and efficacy. As to the former, Nunez draws an important distinction between the characteristics of an individual law and the characteristics of a legal system. This is right. Although a great deal of scholarship has focused on the conditions for the validity of a single law, of far greater significance is the question of identifying the existence conditions for an entire legal system, and Nunez is to be commended for focusing on the issue of what it is for a legal system to exist.

Moreover, Nunez's attention to the interaction—he calls it synergy—between efficacy and validity raises a very important. If we are concerned with the validity of a law, then we need to be concerned with the validity of the legal system of which the individual law is a part. But in determining whether a legal system is valid, we also need to be concerned with its efficacy. As Kelsen and then Hart argued, the question whether a legal system exists depends, ultimately, on some notion of efficacy. Hart, for example, put this in terms of the acceptance of the system by the relevant officials, but made it clear that acceptance of the ultimate rule of recognition—acceptance of the system itself—was an empirical matter, and thus intimately related to efficacy. Kelsen's theorized this in less factual terms, and

understood it more as a presupposition, or a Kantian transcendental understanding, or a hypothesis, but the connections between Kelsen's and Hart's views are close, and both are importantly related to effectiveness, even if for Kelsen it was the effectiveness of the presupposition for the theorist and for Hart the effectiveness of the ultimate rule of recognition within a society. But the basic idea for both was that legal validity ultimately rested on something non-legal, and the word "effectiveness" may to some extent capture this idea.

Conversely, legal norms will not be effective, and a legal system will not be effective, unless some relevant group—judges, other officials, the army, the public at large, or some combination thereof—accepts that it is legitimate, or valid in some larger sense. Hart preferred to reserve the term "valid" for the designation of the status of a law or rule within the legal system or rule system that determined the criteria for validity, but in a slightly looser sense a system itself is valid insofar as some relevant group accepts it. And thus insofar as efficacy depends on acceptance, there is a way in which efficacy is as dependent on validity as validity is dependent on efficacy. I am not quite sure that synergy is the exactly correct words to describe this mutual interdependence, but it is close enough, and in this respect Nunez's contribution, with which I have no quarrel at all, wisely puts an important issue on the jurisprudential agenda.

6 Not Far Enough—Michael Potacs and the Necessity of Coercion

Some number of commentators and critics—Christopher Morris here, and Green (2015) and Spaak (2015) elsewhere, for example—have argued that I may have gone too far in trying to put coercion back on the jurisprudential agenda. Yes, coercion and force are empirically and contingently important, they admit, but not-necessarily-coercive internalization and related phenomena are the features of law that are truly primary, or fundamental. And thus their claim is that I have gone too far, as Austin did earlier, in stressing the importance of coercion.

By contrast, Michael Potacs argues that I have not gone far enough. In *The Force of Law* I argue that it is a mistake to think that the enterprise of philosophy of law should be restricted to the search for the necessary conditions of law whenever and wherever it may exist, and that as a consequence we can agree with Hart and his successors about the non-necessity of coercion while still believing that it is a central feature of law and one fully deserving of philosophical as well as empirical attention.

In his short but acute analysis. Michael Potacs argues that at least some social phenomena do indeed have necessary or essential properties, that law is one of those phenomena, and that coercion is in fact one of law's essential properties. More specifically, Potacs endorses Kelsen's claim that law is a coercive order, and thus that every legal norm is linked, even if indirectly, to coercion. For Kelsen and

Potacs, as is true for many other commentators and theorists, coercion is indeed an essential or necessary property of law.

As the discussion of nullity in *The Force of Law* suggests, I am far from hostile to Potacs' claim. Many of the legal acts that Hart and his followers took to be non-coercive may well be more coercive than they suppose, and in that sense there may be more coercion in law than Hart's challenge to Austin imagines, even if there might be less than there is under Austin's picture. Nevertheless, my concessions in *The Force of Law* about the presence of non-coercive law were largely strategic. Coercion is of course important even if it is not essential, but in order to argue that coercion is important and pervasive even if not essential it was necessary to offer the strategic concession about coercion's non-essential character. That concession was necessary partly to support my methodological claim that non-essential properties are jurisprudentially important, a claim that has less bite if made in conjunction with an argument that coercion is in fact essential. And the concession also serves, I hope, to persuade even those who are persuaded by Hart and others of coercion's non-necessity that coercion nevertheless deserves jurisprudential and philosophical attention. And thus because my concession to Hart and other coercion-skeptics was more strategic tan definitive, I find myself less resistant to what Potacs argues than he might imagine.

It is also, however, worth saying something about an important issue embedded in the argument that Potacs offers. In responding to possible objections to his view that coercion is indeed necessary to law, he observes that some acts of or statements by legal authorities are not law at all, but, rather, are best understood as declarations or recommendations. Following Kelsen, and, more recently, Raz (1998), Potacs thus seeks to draw a distinction between law and what legal actors, especially judges, do, a distinction most prominently resisted by Dworkin (1977, 2006), who, although rarely willing to offer an actual definition of either law or "law", seems best understood as implicitly maintaining that law is simply to be equated to the decisional inputs and decisional processes of judges.

It is of course true that judges do things that are not law, and are not based on law. That judges engage in elementary exercises of logic, arithmetic, and grammar, for example, does not make all of these enterprises law. But if we take this too much further, and define out of our understanding of law a large number of activities that appear to resemble legal reasoning, legal argument, and legal decision-making, we may wind up explaining too little about legal systems as they actually operate. Raz, most prominently (Raz 1998), distinguishes law from legal reasoning, and treats the philosophy of law as engaged solely in the analysis of the former. But if the philosophy of law is unconcerned with legal reasoning, then the entire enterprise of legal philosophy has relegated itself to an excessively marginal position. Potacs, here and elsewhere, does not make this mistake, but his suggestion that there are many things that legal authorities do that are not law *strictu* sensu justifies the caution that legal philosophy ought not to doom itself to irrelevance by defining its enterprise too narrowly.

7 Christoph Bezemek and the Moral Force of Law

Christoph Bezemek's engaging commentary uses my focus on the "puzzled man", as Hart (2012, 40) puts it, to explore the moral and legal postures of the puzzled man, of Holmes's bad man (Holmes 1890), of my "moral person", and a collection of other characters. But at the core of this array of attitudes, as Bezemek properly identifies, is a variety of positions that people might take with reference to the law.

Bezemek is correct in understanding that the bad man is not necessarily bad in the ordinary understanding of "bad". The bad man is simply someone who cares about the law only insofar as the law has the capacity to do unpleasant things to him in the event of non-compliance. But someone with that attitude need not necessarily be bad. An American who sought to travel to Cuba individually in order to provide food for the poor might justifiably worry about the sanctions attached to the (at least for now) potential illegality of his behavior, but might also think that the American travel restriction was both stupid and morally troubling. Being normally self-interested, at least in his desire to avoid imprisonment or further travel restrictions, such a person might comply with the law for entirely prudential reasons, but if he determined that the law was so unlikely to be enforced against him under these circumstances that he was willing to violate it we would hardly use the word "bad" to describe the full array of his motivations.

Understanding the bad man in this way helps us to understand the puzzled man, as Hart describes him, in a different light. For Hart the puzzled man is someone who wants to know what the law is in order to obey it without regard to sanctions, and Hart uses the puzzled man construct as a contrast not only to Holmes's bad man, but also to what we might call Austin's frightened man. But Hart is not entirely clear about what the puzzled man is puzzled about, and attempting to answer this question may be of considerable assistance in trying to understand the nature and grounds, if any, of legal obligation, and of the moral obligation, if any, to obey the law.

One possibility is that the puzzled man is puzzled about what, all things considered, to do, and sees the law as providing him with assistance in engaging in such contemplation and deliberation. The puzzled man might be unfamiliar with the roads and the drivers in some country he is visiting for the first time, for example, and might, the law apart, be wondering how fast it is safe to drive on such unfamiliar roads. When informed that the legally-imposed speed limit is 90 kph, he then would have information about the roads and drivers that is superior to the information he had before, and he can then use the legal requirement as an indication of what, the law apart, he ought to do. The law is here serving an informational or indicative function, and Donald Regan's perceptive discussion of *indicator rules* (and indicative reasons) (Regan 1986, 20–21, 1989, 1003–1018, 1990) helps us to understand what it is to follow a rule because of the information that it provides—because of what it indicates about the state of the world using factors that the legal subject herself believes to be independently important.

For Regan, and for me, treating rules as indicators is importantly different from treating rules—or their existence—as independent reasons for action. If I have determined to a degree of considerable confidence on the same trip that it is safe to drive at 100 kph, then I will obey the 90 kph rule only if I fear the sanction upon disobedience or if I treat the rule as itself providing a reason for action just because of its existence. And since Hart wants us to disregard the former possibility, we can then focus on the latter—the possibility that someone takes the existence of a legal rule as a reason for action apart from its sanction-imposing function and apart from its indicative (or informational) capacity. The question then, for me, for Hart, and for Bezemek, is whether people should or do take legal rules as reasons for action in just this sense. Although in *The Force of Law* I try to avoid taking a position on this question as a normative matter, I understand it, as I have suggested above in discussing the views of Thomas Bustamante, as largely tracking the venerable debates about the existence—or not—of a prima facie moral obligation to obey the law just because it is the law. And thus we might imagine someone obeying the law for reasons of fairness, or of reciprocity, or of reasons of coordination or cooperation, or for some other reason. All of this is conceptually possible, and as an existence theorem there is no doubt that such people actually exist, and not only in Finland. The point of my example in *The Force of Law* of obedient Finns standing and waiting at the street corner, despite the absence of cars or police officers, was to make clear that there are people who are puzzled—or not even puzzled—in exactly this sense. Perhaps some of them are puzzled in Regan's indicative sense. That is, perhaps they are not inclined to obey the law solely because it is the law, but are disinclined to encounter danger at street corners. And so although it looks to them as if it is safe to cross, they recognize that they might be mistaken, and thus take the "Don't Walk" sign as an indication of the fact that it is unsafe to walk, even though they believe that it is.

But there are also obedient people in the stronger sense. For one or more of the reasons just noted, and possibly others, they want to obey the law not because it provides them information about the application of their first order reasons, but because it is the law. Period. And if such people with such inclinations do not know what the law is, they might turn out to be puzzled people in this strong sense that I understand Hart to be using.

It turns out, however, that such people are far more rare, perhaps even in Finland, than Hart and others have supposed. The point of all of the summaries of social science findings in *The Force of Law* is to illustrate that, as an empirical matter, people who want to obey the law just because it is the law are, in reality, few and far between. It is easy to overestimate their numbers because it is easy to mistake consistency with compliance, but if we isolate compliance in terms of the willingness to take the fact if law as supplying a new and different reason for action, enforcement aside, that variety of genuine compliance, or genuine internalization of the fact of law as a reason for action, is based on a picture that is, to adapt Hart's characterization of Austin, not true to the facts of legal life or of citizens' experience with the law. Rather, it appears that most people most of the time in most places are like Holmes's bad man, at least once we remove the pejorative characterization.

They want to do the right thing in the sense of some complex amalgam of self-interested, socially cooperative, and altruistic motivations, but this amalgam—this array of internalized reasons for action—rarely includes the law. And although Hart may not have fully recognized this, the law does, and that is why the law so importantly and so frequently uses coercive force in the broadest sense—external incentives of various sorts—to support its mandates.

8 Nicoletta Ladavac and the Norms of Law and Legal Theory

Nicoletta Ladavac's immensely scholarly commentary seeks with great success to connect the arguments in *The Force of Law* with the main lines of analysis in the continental normative tradition, and in particular the contributions of Kelsen (1945, 1967) and Bobbio (1965). In doing so she performs a valuable function that goes beyond the precise contours of her analysis. She recognizes that, unfortunately, continental legal theory and the legal theory of the Anglo-American jurisprudential culture often appear to operate in different orbits, drawing on different sources and at times understanding the enterprise of legal theory in different ways. This is to be lamented, because if the goal of legal theory is to offer explanations that go beyond explaining particular legal systems, then there is little reason to believe that the sources of scholarly enlightenment ought to be more geographically or temporally restricted than the phenomenon that those sources seek to illuminate.

More particularly, the problem of the paucity of trans-tradition scholarly engagement is unfortunately unidirectional. Although these days a considerable amount of continental and Latin American jurisprudential scholarship engages deeply with Hart, with Dworkin, and with other major figures in the Anglo-American tradition, the same rarely holds in reverse. Despite the fact that the major works of Kelsen, Bobbio, and other important continental scholars have been available in English for generations, contemporary Anglo-American legal theorists seem most often to be only superficially aware of Kelsen, and largely oblivious to Bobbio, to German and Austrian scholars other than Kelsen, and to those who come from France, Spain, Poland, Scandinavia, and Latin America, among others. To the extent that Ladavac's contribution to this volume seeks to bring not only Kelsen but also Bobbio (and others) into these conversations, it has independent and important value.

Turning more particularly to the substance of Ladavac's analysis, she draws a distinction between the continental normativist tradition as exemplified by Kelsen and Bobbio and a somewhat different perspective perhaps best exemplified by Dworkin. I refer in particular to Dworkin here because we might draw a distinction between theories that focus on independent norms systems, on the one hand, and, on the other, on those that focus on the actions of a certain set of legal actors, actors whose behavior might or might not be restricted to a particular normative domain. And if this is a useful (but certainly not the only) distinction, then Kelsen, Bobbio,

and (some) contemporary exclusive positivists might be understood as existing in the former category,[15] Dworkin, the Amercan Legal Realists and others in the latter, and Hart and some of his followers hovering somewhere in between.

For Ladavac, coercion is the analytical glue that holds legal norms together in the normative tradition, and indeed Kelsen and others explicitly make this claim. And this is not surprising. There exist multiple normative systems and multiple normative hierarchies, and if the legal normative system is not to be identified with what lawyers and judges actually do, then there must be something else that identifies and differentiates the legal normative domain. It is here that coercion performs a substantial analytical task that is unimportant for Dworkin and less for Hart. When Hart, for example, stresses the existence and importance of power-conferring (and thus non-coercive) laws, and makes it clear that they are still law, he might plausibly be understood as claiming that multiple normative systems might still be encompassed by the concept of law. In order to avoid this conclusion, the normativist uses coercion to join them together, and thus the sanction of nullity, even if it strained to think of this as coercive to the Hartian, performs a central function within the strong normativist tradition.

With this as background, it is useful to consider Ladavac's concern that my own conception of coercion is not "rigorous". And of course she is correct. But my conception of coercion is not rigorous precisely because I may be less of a normativist than Ladavac, generously, wishes me to be. My concern in *The Force of Law* and elsewhere is with the effectiveness and operation of the institutionally differentiated (in something resembling Luhmannesque (Baxter 2013; Luhmann 2008) sociological differentiation, but with more focus on institutions such as courts, lawyers, bar examinations, and legal publishers) system we refer to as law, and with what enables it to achieve whatever effectiveness it has. This is an unavoidably empirical enterprise, and thus coercion for me is an empirical phenomenon above all.

Because coercion is an empirical phenomenon and an empirical idea, it may not be possible to specify it as carefully as Ladavac would like and as carefully as the normativist tradition requires. My principal concern is with the legal subject who finds that the law compels her to do something that she would not do but for the existence of law. And from this perspective it turns out that the law has a considerable number of weapons in its arsenal. It has criminal punishment, civil liability, positive rewards, and the physical power of sheriffs and armies. And it has the direct personal orders (backed by threats) we refer to as injunctions. There are undoubtedly more as well. What connects all of these weapons—these devices of enforcement—is only that the pre-legal motivations of legal subjects are "adjusted", as Bentham (2010) might have put it, but the nature, source, and operation of these various adjustments are simply too diverse to be susceptible of a single definition, let alone a single definition of sufficient rigor to satisfy the normativist. And that is

[15]And thus it might be of some exegetical interest that the earliest work of Raz (1970), the most prominent of today's exclusive positivists, draws heavily on Kelsen.

why force and coercion may function for me only as the covering terms loosely encompassing all of these forms of motivation adjustment, but why, at least for my particular purposes, a more rigorous definition may not be necessary. To put it differently, *The Force of Law* as I conceive it is much less a book about force (or coercion) than it is a book about law, and for that purpose the kind of deep analysis and definition of the very idea of force, or the very idea of coercion, turns out to be far less important.

9 Isabel Trujillo and the Relation Between Force and the State

In her important Introduction to this volume, Isabel Trujillo delves into a topic that makes only a relatively brief appearance in *The Force of Law*—the question of non-state law. Under a very traditional Austinian conception of law, non-state law is simply an oxymoron. Law for Austin and most of his followers is intimately connected with the sovereign political state, such that non-state rule-based or coercive regulatory institutions are simply not law at all, no matter how much they may resemble law in their other properties.

Trujillo properly challenges that conception of law, and I agree. In the first place, large numbers of public regulatory institutions are not creatures of the unitary political state. Some of these are multi-state organizations of different varieties, including the United Nations, the European Union, and the World Trade Organization. And others are somewhat more particular agreements, such as the increasingly frequent bilateral or multi-lateral trade agreements. In addition, substantial portions of human activity are controlled by rule-based and coercive (albeit perhaps in different and often less direct ways) multi-national corporations such as Shell Oil, Apple, Microsoft, Volkswagen, MacDonalds, Credit Suisse, and Toyota, and by multi-national and transnational non-governmental organizations such as Oxfam, Doctors Without Borders, the International Olympic Committee, and the Red Cross. Moreover, even intra-national but non-governmental organizations can wield considerable controlling power over both individuals and corporations. Some of these organizations are themselves illegal, such as the Mafia, but others exist legally but largely independently of the law, such as the Football Association, the New York Stock Exchange, and the National Rifle Association.

We are then faced with a question about the relationship between such entities and a conception of law. We could stick with Austin and say that such organizations, however many law-like properties they may possess, are simply not law. They are not, as Austin would have put it, law properly so-called. But we could instead side with Trujillo and resist what she nicely calls the "domestic assumption"—the assumption that the most important or interesting law is state law. But at this point we might simply prefer, as she appears to suggest, to resist thinking that all of the features of the paradigmatic case of law (aw *tout court*, as she puts it) need be present

in everything that might nevertheless usefully be thought of as partly law, or law in some respects, or analogous to law. And thus insofar as institutions such as international law, Microsoft, British Petroleum, the Red Cross, and the Football Association contain within their organization primary and secondary rules, insofar as their members and especially their highest officials have internalized the primary rules and the rules of recognition that recognize the primary rules, and insofar as such organizations have recourse to at least some forms of coercion,[16] we might conclude that they have possess aspects of law, but that there are also other aspects of such institutions—perhaps including their lack of direct recourse to physical force and their disconnection with the sovereign political state—that at least distinguish them from the paradigm case.

In much the same vein, Trujillo asks us to take account in legal theory of so-called soft law, and also of the way in which cooperation, perhaps assisted indirectly by some means of enforcement,[17] might also be characteristic of a number of increasingly important dimensions of law. With this too I have no call to disagree, but with two cautions. First, it is important to distinguish cooperation as a potential vehicle for legal effectiveness from the actual ability of uncoerced cooperation to do so. Cooperation is often a good thing, and so often are the cooperative enterprises that are based on it. But whether such enterprises are actually effective is a different question, and one that is unavoidably empirical.

Second, however much we wish to broaden our understanding of law to include soft law, non-state law, and other institutions that fall under the legal pluralist umbrella, we should be careful not to broaden our understanding of law so much that we lose sight of the fact that law still exists as a differentiated institution on numerous sociological, methodological, and informational dimensions. There is a difference between international law and other forms of international cooperation, just as there is a difference between behavioral change produced by law from behavioral change produced by public opinion, public relations, education, and the operation of non-institutionalized social norms. All of these are important, and there are undoubtedly interactions among them. But however much they interact, they still exhibit important differences, and an enduring task of legal theory, even as we recognize the importance of the legal pluralist agenda, still remains an attempt to explain why the domain of law is at least in some respects different from many of the other domains of human existence. Legal pluralism properly invites us to broaden our understanding of law, but if we broaden it too much we will have lost sight of law's empirical and conceptual differentiation. If everything is law, then nothing is law.

[16]Such as the threat of expulsion. See Hathaway and Shapiro (2011).

[17]Trujillo wishes to distinguish coercion from other forms of enforcement, such as naming and shaming, but threatening with naming and shaming fits well within my broad understanding of coercion, and an institution that achieves compliance by threatening expulsion, or reputational harm, is still very different from one that achieves compliance by the purely voluntary actions of its constituents.

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