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Understanding the Force of Law

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FREDERICK SCHAUER, THE FORCE OF LAW (HARVARD UNIVERSITY PRESS 2015)
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I. OVERVIEW

The Force of Law raises a fundamental question: what is the nature of the force underlying legal authority? Frederick Schauer does an excellent job describing the history of two models of the nature of that force: coercion (i.e., sanction based) and sanction-independent. Having identified these two distinct models, he then tries to make the case that the law is primarily about coercion and that the role of sanction-independent force has been overstated. His efforts to make this case rest upon an examination of the social science evidence in which he reaches different conclusions than those of many social scientists. There is a large body of social science evidence showing that social norms, moral values, and judgments about legitimacy all influence law-related behavior and, relying upon it, social scientists generally suggest that while sanctions matter sanction-independent forces are central to and often dominate the factors shaping people's law-related behaviors. Schauer argues that this considerable evidence is irrelevant to his analysis. He does so by creating a definition of sanction-independent motivation that he defines as "obey[ing] law because it is the law."[1] He says that this category excludes the social science literature identifying the factors shaping compliance, and in particular he suggests that moral values and legitimacy do not meet his definition of sanction-independent factors. Then having defined out of the conceptual universe of his model, the considerable existing evidence against his perspective, Schauer concludes that coercion is the central force underlying law.

Ironically, Schauer himself seems unable to accept this radical argument because in his conclusion he proposes an integrated model in which social norms take on an important role. Unfortunately, he gives no compelling reason for choosing social norms, rather than moral values or legitimacy for this favored status and the social science literature that he dismisses suggests that social norms are a poor choice as the core sanction-independent value for an integrated model of the force of law. In the natural world, and outside of

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    1.   FREDERICK SCHAUER, THE FORCE OF LAW 55 (2015).

Schauer's very limited conceptual framework, the social science evidence shows that moral values and judgments about legitimacy are the two central factors shaping people's everyday law-related behavior.

II. THE FORCE OF LAW

Schauer's monograph addresses three important issues related to the nature of the force through which law is able to shape society. As Schauer frames that question, the nature of the force that is of concern comes from the ability of law to influence the behavior of individuals. He notes that "our principal interest in law and legal systems lies in their capacity to shape and influence what people do."[2] Within that definitional framework he addresses three concerns. The first is the history of relevant legal scholarship on why people obey laws. The second is the conclusion best reached when reviewing the findings of empirical social science research that bear on this question. And the third is identifying the problems and possibilities of building a legal system based upon coercion in conjunction with social norms.

The first argument is very reasonable: force is central to law. Hence we should engage in institutional design efforts to determine when and how to best use coercion to motivate compliance. The second argument is less well reasoned; Schauer argues that the role of sanction-independent motivations is overstated. His argument is based upon a tortured reading of the social science literature to reach conclusions contrary to those accepted by social scientists. Finally, Schauer's own argument is undercut in the final chapter when non-sanction based motivations in the form of social norms emerge as central to the author's integrated vision of the force of law.

The conclusion that we need ultimately to focus on balancing coercion and sanction-independent forces seems reasonable and is difficult to dispute, but the author's focus on social norms as being central to this balancing is not supported conceptually and runs contrary to the results of the social science literature reviewed earlier in the book. That literature suggests that legitimacy is a more important non-sanction based norm and a more natural focus for discussions of consensual forces shaping legal behavior.

III. HISTORICAL PERSPECTIVES

Schauer's historical discussion outlines how two distinct models explaining the nature of the force of law on society have evolved over time within legal scholarship. The first, which he attributes to Jeremy Bentham and John Austin, suggests that the primary element of the law that shapes people's behavior is command-coercion, linked to the ability of legal authorities to effectively sanction those who break rules. As he explains, this tradition has expanded over time and today includes a diverse set of potential types of sanctions and rewards. But the core premise of this model is that people act upon self-interest and consequently the legal system must influence their sense of what they might gain or lose from rule adherence or rule breaking.

A contrasting model is one that views law-related behavior as being more responsive to consensual factors, factors that Schauer calls sanction-independent. There are three

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2. *Id.* at 45.

sanction-independent consensual factors that are typically discussed in the legal literature: social norms, moral values, and feelings of obligation and responsibility to obey legal authorities (legitimacy). Schauer argues that the key question for law is the importance of each of these two categories of factors—coercive and sanction-independent—in determining whether people obey the law. As he says in his volume, he wants to test the claim that "ordinary citizens follow the law because it is the law, not due to punishment[.]"[3] In stating the problem in this way, he sets up the idea of "following the law just because it is the law"[4] as the key manifestation of consensual or sanction-independent motivation.

The general theme of the historical review is that recent discussions of the law have paid inadequate attention to the role of force (i.e., coercion) as a core factor motivating people to comply with the law. According to Schauer's discussion in this volume this is particularly true of H.L.A. Hart. If we distinguish between a coercive view of the role of law in shaping human behavior and a consensual one linked to norms and values, Schauer believes that current examinations of the law underweight the importance of coercion, broadly defined to include the use of the threat and use of sanctions or the promise and delivery of incentives, relative to the role coercion actually occupies in motivating people to obey the law. He argues that the role of sanction-independent obedience is "substantially exaggerated" and the role of sanctions "more important than [is] currently accepted."[5]

Schauer's precise argument is hard to pin down. At some points he argues that his goal is to restore a proper balance following discussions by Hart,[6] which he feels overstates the role of sanction-independent factors. He wants to do so by showing that force and coercion is more important than consensual factors. At other points he suggests that he wants to demonstrate that coercion is an essential feature of law and that law could not work without it, i.e., to support "the assumption that without force, the law is often impotent."[7] He also says that he is interested in whether force is as "important as the ordinary person believes"[8] or whether it is "nearly as common as theorists suggest."[9] Given these various framings of his concerns, it is often hard to discern how Schauer is using the evidence he cites to reach a conclusion. Each of these framings poses a different conceptual and empirical question.

The framing of the question is important in terms of the conclusions reached by the book. Schauer says, "[e]ven if we put aside the possibility that coercion defines law or is a necessary component of law, it is counterintuitive to refuse to acknowledge that it is not ubiquitous in law."[10] This is a point that most people would find easy to accept. Coercion is inherent in law. On the other hand, most people would probably also agree with Hart that law is not simply identified with compulsion. People also internalize law. Hence, the focus of the third section of the book on refining the role of coercion in designing legal

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3. *Id.* at x.
4. *Id.* at 6.
5. *Id.* at 7.
6. H.L.A. HART, THE CONCEPT OF LAW (2d ed. 1997).
7. SCHAUER, *supra* note 1, at 22.
8. *Id.* at 23, 43. (Although "[i]t has long seemed self-evident—at least to ordinary people—that coercion, sanctions, threats, punishment and brute force lie at the heart of the idea of law." And it is an "empirical fact that law as we experience it is overwhelmingly coercive.")
9. *Id.* at 6.
10. *Id.* at 159.

institutions is likely to make sense to most legal scholars and it is there that Schauer helpfully expounds on a set of issues defining and addressing the role of coercion in law. However, people might less readily agree that "[e]xamining the close relationship between law and coercion helps us to understand what law is good at and where it is intrinsically deficient,"[11] since the law may not be intrinsically deficient in those situations in which other forces besides coercion are shaping rule-following behavior. This final statement hints at the less convincing elements of the book.

IV. SOCIAL SCIENCE PERSPECTIVES

It is in the second section of the book that Schauer's analysis runs into difficulties. Schauer argues that the appropriate balance between coercive and consensual influences can best be determined by reviewing the findings of empirical social science research that bear on this question. Schauer makes clear that he views the answer to this issue as involving empiricism and that his arguments can be tested (they are "falsifiable"[12]) and "[t]he question is thus revealed as an empirical one."[13] Although he is a philosopher and might make his argument on normative grounds, he states very clearly that this is not his intention. Rather, he is making an assessment of the state of the social science literature on compliance.[14]

This reach across disciplines reflects an important attraction of legal scholarship, which is its interdisciplinary nature. At the same time, this feature of Schauer's analysis can open the way for controversy when people write outside of their own fields in ways that do not take account of the common understandings of the disciplines into which they are delving. *The Force of Law* is an exposition by a philosopher of the reasons that people obey laws that examines the social science literature on this key issue in legal scholarship. However, although Schauer wants to use empirical data to test his arguments, the way he frames and tests those arguments conflicts in key ways with social science practices and reaches conclusions different from those of social scientists. From a social science perspective, Schauer's effort to evaluate social science and use it in his argument is troubling in several ways.

V. SOCIAL SCIENCE AND WHY PEOPLE OBEY THE LAW

First, at the risk of seeming self-centered, I will begin by discussing my own work. My justification is not personal self-preoccupation but the fact that Schauer himself devotes considerable attention to critiquing that work, in particular to commenting on my book *Why People Obey the Law*.[15] To understand my book and the social science literature it reflects, it is important to explain how this social science research is conducted. A random sample of a population (in this case, the population of Chicago studied in the late

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11. *Id.* at 167.
12. SCHAUER, *supra* note 1, at 15.
13. *Id.* at 47.
14. LAURENCE CLAUS, LAW'S EVOLUTION AND HUMAN UNDERSTANDING 2-3 (2012). Another similar effort by a philosopher to examine empirical research findings to understand why people obey laws.
15. TOM R. TYLER, WHY PEOPLE OBEY THE LAW 3 (2006). This study was conducted in the late 1980's and first reported in 1990. *See* SCHAUER, *supra* note 1, at 57-61, 63-64, 67, 73, 97.

1980s) is sampled and interviewed about their law-related attitudes and values, as well as their degree of compliance with the law. Compliance with the law is reflected by choosing a set of everyday laws that people frequently have the opportunity to comply or not comply with. This study focused upon behaviors such as driving a car while intoxicated; speeding; taking inexpensive items from stores; parking illegally; and littering illegally. The attitudes and values measured included social norms (Would others disapprove?); moral values (Is the behavior morally wrong?); risk (How likely is it that you would be caught and punished if you broke a particular law?); and legitimacy (Do you feel that you ought to obey the law?).

The study finds that several factors shape whether people report complying with laws. The most important is whether they believe the behavior in question is moral (beta = 0.33) and whether they feel an obligation to obey the law (beta = 0.11). Other factors have a smaller, non-significant influence (social norms, beta = 0.08; sanction risk, beta = 0.02). These factors are correlated with one another, so there are overlapping reasons to obey everyday laws, i.e., behavior that is immoral is typically expected to elicit both disapproval and risk of punishment. The influences shown by the regression equation numbers (i.e., beta weights) above are the distinct strength of the influence of each factor, controlling for (i.e., removing) the joint influence of other factors.

The findings of the Chicago study are not unusual.[16] A 2014 study by Tyler and Jackson analyzes a national sample of Americans conducted in 2012 and finds nearly identical results.[17] The primary factor shaping compliance with everyday laws is the perceived morality of the behavior (beta = 0.18) with a separate influence of perceived obligation to obey the law (beta = 0.10).[18] Norms (beta = 0.06) and perceived risk of sanctioning (beta = 0.00) have smaller and non-significant independent effects.

While social norms, personal morality and legitimacy are all, at least on a conceptual level, sanction-independent factors shaping compliance, legitimacy is particularly important because it is, as Schauer notes, content-independent. If people think they ought to obey law, they obey it irrespective of what it says they should or should not do. Norms and moral values support the law when they agree with it, but their origin is outside the law. The history of law and the political authority from which it arises has often been a history of conflict with moral values, typically those that develop from religious authority. Hence, people's religious beliefs can oppose fighting in wars, getting children vaccinated and allowing abortions. The same is true of social norms which arise within particular communities. A community can oppose equal opportunities for minorities and even support extra-legal behaviors such as violence against them. Legitimacy is the sanction-independent factor which is the most directly under the control of legal authorities and hence, which most reliably supports compliance with the law.

Because of the centrality of legitimacy to law, many social science studies simply examine legitimacy and its relationship to compliance without considering the other

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16. TYLER, *supra* note 15, at 59, 125.

17. *See generally id.*; T.R. Tyler & J. Jackson, *Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation and Engagement*, 20 PSYCHOL. PUB. POL'Y & L. 78-95 (2014) (explaining that in this analysis of the data from 2014 Tyler and Jackson study, the definition is narrowed to consider only obligation).

18. *See id.* (operationalizing legitimacy as involving both obligation and trust and confidence in authorities).

factors mentioned (norms, morality). That literature provides strong support for the argument that legitimacy shapes law since those people who view the law as legitimate are more likely to follow the law in their everyday lives. This includes the widespread variety of laws that shape people's behavior: traffic laws, laws against stealing, regulations against buying illegal items, laws against drug use, laws against robbery, murder and assault, and so forth.[19] This is also true of criminals involved in felony level behaviors.[20] Higher legitimacy also leads to lower rates of reoffending when people leave prison or after they complete alternative non-traditional treatment programs.[21]

Similar empirical literatures exist in related areas.[22] Legitimacy shapes public acceptance of the role of the police and the courts as the authorities responsible for maintaining order. This involves empowering the police and courts to manage legal problems and accepting their discretionary decisions about how to enforce the law. When people have disputes or conflicts with others they can either turn to the legal system for redress, or they can engage in private vengeance. People are more likely to accept the role of the police and the courts in conflict management and rule enforcement (recognizing that they have a legitimate monopoly on the use of sanctions) if they believe the police, the courts, and the law are legitimate. A second concern is with behavior directed against state institutions or authorities such as riots and rebellions. Legitimacy lessens people's willingness to engage in such undermining behaviors.

Beyond compliance, the police benefit from cooperation with the community. One form of cooperation involves helping the police to solve crimes or apprehend criminals. Providing tips about the location of crimes and criminals is a key issue, as is the willingness to aid with prosecutions by participating in lineups and trials. Such cooperation is more likely to occur when the law and the police are legitimate. A second type of cooperation is working with the police to co-police neighborhoods. This could involve attending community meetings or joining a group such as neighborhood watch. In contrast to the

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19. *See generally* J. Fagan & A.R. Piquero, *Rational Choice and Development Influences on Recidivism Among Adolescent Felony Offenders*, 4 J. EMPIRICAL LEGAL STUD. 715-748 (2007); D.C. Gottsfredson et al., *How Drug Treatment Courts Work*, 44 J. RES. CRIME DELINQ. 3-35 (2007); J. Jackson et al., *Why Do People Comply with the Law? Legitimacy and the Influence of Legal Institutions*, 52 BRIT. J. CRIMINOLOGY 1051-71 (2012); R.J. Kane, *Compromised Police Legitimacy as a Predictor of Violent Crime in Structurally Disadvantages*, 43 CRIMINOLOGY 469-98 (2005); C.G. Lee et al., *A Community Court Grows in Brooklyn: A Comprehensive Evaluation of the Red Hook Community Justice Center Final Report* (2014); M.D. Reisig et al., *Compliance with the Law in Slovenia: The Role of Procedural Justice and Police Legitimacy*, 20 EUR. J. CRIM. POL'Y RES. 259-76 (2013); J. Sunshine & T.R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC'Y REV. 513-48 (2003); T.R. Tyler et al., *Street Stops and Police Legitimacy*, 11 J. EMPIRICAL LEGAL STUD. 751-85 (2014); Tyler & Jackson, *supra* note 16, at 78-95; T.R. Tyler et al., *Reintegrative Shaming, Procedural Justice, and Recidivism: The Engagement of Offenders' Psychological Mechanisms in the Canberra RISE Drinking-and-Driving Experiment*, 41 LAW & SOC'Y REV. 553-86 (2007).

20. *See generally* Fagan & Piquero, *supra* note 19, at 715-48; Kane, *supra* note 19, at 469-98; A.V. Papachristos et al., *Attention Felons: Evaluating Project Safe Neighborhoods in Chicago*, 4 J. EMPIRICAL LEGAL STUD. 223-250 (2007); A.V. Papachristos et al., *Why Do Criminals Obey the Law?* 102 J. CRIM L. CRIMINOLOGY 397-440 (2012).

21. *See generally* Fagan & Piquero, *supra* note 19, at 715-48; D.C. Gottsfredson et al., *How Drug Treatment Courts Work*, 44 J. RES. CRIME DELINQ. 3-35 (2007); J. Jackson et al., *supra* note 19, at 1051-71; Kane, *supra* note 19, at 469-98; C.G. Lee et al., *supra* note 19; M.D. Reisig et al., *supra* note 18, at 259-76; J. Sunshine & T.R. Tyler, *supra* note 18, at 513-48; T.R. Tyler et al., *supra* note 19, at 751-85; T.R. Tyler & J. Jackson, *supra* note 17, at 78-95; T.R. Tyler et al., *supra* note 19, at 553-86; S.J. Listwan et al., *The Pains of Imprisonment Revisited: The Impact of Strain on Inmate Recidivism,* 30 JUST. Q. 144-68 (2013).

22. T.R. Tyler et al., *The Impact of Psychology on American Policing: Procedural Justice, Legitimacy, and Effective Law Enforcement*, PSYCHOL. SCI. PUB. INT. (forthcoming).

first category of behavior, these actions are more proactive and organized. Again, if people believe the police are legitimate, they are more likely to join cooperative efforts in their community.

In addition to the general influence of legitimacy on rule adherence an additional concern is how people respond when they have personal interactions with the police and courts. People can either comply with police and court decisions and directives or they can resist and avoid them. And hostility and active resistance can also occur, leading to the use of force and sanctions. Studies indicate that people accept decisions more willingly and with less anger and defiance when they view the police and courts as legitimate.

Given all of this supportive social science evidence, how is it that Schauer comes away from his review of this literature by suggesting that his examination supports the conclusion that "the empirical fact [is] that law as we experience it is overwhelmingly coercive"?[23] The justification for this conclusion lies in Schauer's definitions. He argues that the relevant problem is distinguishing "doing something because of the law and doing something because of law-independent reasons that happen to be consistent with the law."[24] In other words, morality and other social motives lead people to do many things that are consistent with the law, but he does not regard them as thereby doing something because of the law. This argument has two stages, the first about morality and the second about legitimacy.

VI. MORALITY AND OBEDIENCE TO THE LAW

In the case of morality, Schauer discounts social science findings because they reflect multiple simultaneous influences upon compliance. The social science literature on compliance, as illustrated by the studies I have just reviewed, generally finds that there are a set of overlapping non-sanction based factors that shape compliance in real world settings. Those include the influence of social norms, the impact of moral values, and a role for the legitimacy of the law. There is also the role of sanction threat. Each of these factors makes a distinct contribution of varying strength to the understanding of compliance. In general, as I have noted, moral values and legitimacy have the strongest empirical relationship to compliance in natural settings involving everyday people and everyday laws. But these influences occur together and typically support each other.

Schauer discounts research of this type because he says that when people obey a law within a setting where there are attitudes about morality/legitimacy, norms, or even sanction risks, this is not evidence that those factors matter in shaping obedience because people might obey the law anyway, if any particular factor were absent. Hence, it is not shown that a particular factor causes compliance. For example, he critiques *Why People Obey the Law* for failing to show that "most people follow the law just because it is the law" since it does not isolate the effects of law as he defines it from those of risks, norms, morality and legitimacy.[25]

This argument by Schauer, if taken to its extreme, suggests that only experimental research which manipulates one factor while controlling for all others can contribute to

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23. SCHAUER, *supra* note 1, at 43.
24. *Id.* at 49.
25. *Id.* at 61.

our understanding of compliance. On a less extreme level, he argues that we should at least look for situations in which non-experimental studies can consider compliance in a setting in which other factors do not matter. The key point is that we need to distinguish doing something because it is law and doing something for law-independent reasons. To do that Schauer suggests we need a situation, for example, without any moral values associated with the behavior to see how frequently people follow the law. If people do not view using drugs or speeding as morally wrong, we should test compliance in those settings. It is certainly possible to test Schauer's argument empirically. We can consider an example of what the role of sanctions and legitimacy in such cases is found to be.

A specific suggestion that Schauer makes is to look at laws that have no moral force. Using his argument, it is possible to divide the behaviors studied in the national survey discussed by Tyler and Jackson into two groups.[26] One group of behaviors is morally disapproved of (making false insurance claims: 97% morally wrong; stealing from stores: 97% morally wrong; buying stolen goods: 92% morally wrong) and another group of behaviors involves those that are less universally seen as morally wrong (speeding: 72% morally wrong; littering: 91% morally wrong). It would of course be ideal to have a behavior that no one thought was morally wrong but it is challenging to completely separate moral values from behaviors that the law regulates. As the percentages reported illustrate most illegal behavior is widely viewed as also morally wrong.

If we examine the role of sanctions in shaping behavior that is more widely viewed as not morally wrong we find that risk more strongly shapes behavior (the average correlation between risk and compliance is -0.16 versus -0.07 when we consider behaviors that people universally see as morally wrong). This indicates that when morality is not a factor, the risk of punishment has a larger role in whether people comply. However, the average role of legitimacy in shaping behavior is essentially the same in both cases (the average correlation between legitimacy and compliance without morality is 0.16 versus 0.14 with morality). So, in an admittedly imperfect natural approximation of a pure setting of the type Schauer is seeking, there is support for the argument that whether people think they risk sanctions has more to do with the decisions when they do not regard the behavior as immoral. However, it is hard to argue that sanction-independent factors do not matter since legitimacy matters equally in both cases. This finding reinforces the general finding of other social science studies that legitimacy has a distinct influence from coercive factors and those findings lead to a need to focus on Schauer's treatment of legitimacy.

VII. THE USE OF EXPERIMENTS IN LAW

Before discussing legitimacy it is important to acknowledge that calling for experiments (if that is what Schauer is in fact doing) is certainly a reasonable argument and more experimental evidence would be valuable.[27]

Experiments do exist but they are hard to do in real world settings.[28] No one disputes

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26. *See generally* T.R. Tyler & J. Jackson, *supra* note 17, at 78-95.

27. *See generally* K.A. APPIAH, EXPERIMENT IN ETHICS (2008).

28. *See* Lorraine Mazerolle, et al., *Shaping Citizen Perceptions of Police Legitimacy: A Randomized Field Trial of Procedural Justice*, 51 CRIMINOLOGY 33, 34-35, 40-44 (2012); Tom R. Tyler, *supra* note 19, at 553, 557-58.

the value of experiments, especially when field experiments are possible. It is often feasibility that prevents the use of experimental methods in field settings. Schauer does not himself provide experimental evidence to support his contention that coercive factors matter; that they are more important than consensual factors; or that they are more important than people think.[29] Hence, it is hard to accept his argument that coercion-based compliance is more important than people realize, while coercion-independent compliance is less important based upon existing experimental evidence.[30]

Also, it is important to note that, while experiments are valuable, their use potentially confuses two issues: whether something can cause something else in an artificial setting and whether something is important in natural environments. For this reason, many researchers work to supplement experiments with surveys. Similarly, social scientists conduct field experiments so that influences of different treatments can be measured in natural settings.[31] There is also reason to be skeptical of the vignette studies that Schauer cites in his notes. For example, the 2007 study by Schweitzer, Sylvester and Saks uses college student participants responding to hypothetical vignettes.[32]

VIII. LEGITIMACY AND OBEDIENCE TO THE LAW

It is the second aspect of Schauer's argument—the discussion of legitimacy—that is the most problematic from a social science perspective. Schauer establishes his argument in favor of coercion via semantics rather than by a review of empirical literature on legitimacy. As noted above, a large number of social science studies link perceived obligations to obey the law to compliance. Schauer states that people who comply with the law due to perceived obligations are not "doing something because it is the law."[33] His central idea requires that we identify and separate people who are simply "doing something

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29. There is such evidence and it would be possible to evaluate it and compare the findings to findings about the influence of sanction-independent factors.

30. It is interesting that while he calls for experiments, Schauer is critical of one of the most frequently cited experimental demonstrations that legitimacy of authority matters: the work of Milgram. SCHAUER, *supra* note 1, at 67-69. Thomas Blass, *The Milgram Paradigm After 35 Years: Some Things We Now Know About Obedience to Authority*, 29 J. APPLIED SOC. PSYCHOL. 955 (1999). Although Schauer dismisses this work, it supports the importance of legitimacy in that rates of compliance were much higher when the commands were given by an authority likely to be viewed as legitimate (a science authority figure, associated with a respected academic institution), and compliance was lower when a peer was giving the directives or the study was conducted in an office away from the university. *See id.* This classic work has inspired a large literature that has generally replicated the initial findings But it has also lead to a variety of views about the methodology of the Milgram study and varying interpretations of the findings, some of which accord with the comments of Schauer. It is nonetheless an excellent example of an experimental effort to test the impact of the legitimacy of authority on compliance that suggests legitimacy shapes compliance. An important post-Milgram study that moves beyond the experimental setting is the work of Kelman and Hamilton in 1989, which examines the role of legitimacy in compliance in the real-world setting of the My Lai massacre during the war in Vietnam. In a study of a national sample of the public it was found that most people believed that in the situation examined they would shoot civilians if so ordered (51%) and that others would do the same (67%). The authors emphasize that one important motivation for such actions is the belief that people have a responsibility to obey legitimate authorities, in combat and in other situations.

31. Donald P. Green & Dane R. Thorley, *Field Experimentation and the Study of Law and Policy*, 10 ANN. REV. L. SOC. SCI. 53 (2014).

32. N.J. Schweitzer, D.J. Sylvester, & M.J. Saks, *Rule Violations and the Rule of Law: A Factorial Survey of Public Attitudes*, 56 DEPAUL L. REV. 615, 628 (2007).

33. SCHAUER, *supra* note 1, at 49.

because it is the law" from other people.[34] To Schauer, this reflects the true essence of a reasonable test. Schauer suggests that such a pure test regarding non-coercive law is negated when people act out of obligation. Moreover, Schauer argues that the key issue concerns what people do in situations where moral values or feelings of obligation to obey the law are not present. This is the setting that reflects Schauer's idea that people obey the law "just because it is the law."[35] Using this restricted definition, Schauer concludes that the importance of non-coercive factors has been overstated.

Schauer's argument is inconsistent with social science discussions of legitimacy and hard to accept. Legitimacy is a non-coercive reason to obey the law.[36] Unlike morality, legitimacy is directly related to the acceptance of legal authority. This argument that the situation in which people comply with laws "just because law is the law" is distinct from the feeling that laws ought to be obeyed because of general feelings of responsibility and obligation to obey appropriate authorities is inconsistent with other discussions regarding the meaning of legitimacy. Obeying the law because of feelings of responsibility and obligation is central to the way social scientists define the idea of internalized values. To argue that internalized values must be excluded to obtain a true measure of non-coercive law seems labored and makes Schauer's argument seem like it is based upon rhetoric rather than substance.

Further, Schauer suggests that there is some residual of pure "non-coercive" motivation that can be distilled after the influence of norms, moral values, and feelings regarding obligations to obey are removed, yielding a "pure" construct that can be compared to coercive factors.[37] This argument seems questionable both conceptually and empirically. Conceptually, we have to determine the goal of legal analysis. I argue that legal scholarship is concerned with why people follow laws. Legal scholarship recognizes that the law means very little if people do not obey it. Hence, we want to understand what levers exist that persuade people to follow the law. Three widely identified levers are the influence of social norms; the power of moral values; and the impact of perceived legitimacy. Of these identified levers, legitimacy is especially valuable as a lever because legal authorities can actually pull it. In other words, legitimacy is important because it best reflects the type of content-independent authority that Schauer praises in his discussion.

Imagine a world in which most people, in their everyday lives, encounter laws and obey them out of an internalized motivation to defer to laws and legal authority. Despite the fact that they are acting out of internalized motivation, we are unwilling to recognize those people as being influenced by consensual non-coercive motivations in relation to the law. It seems much more natural to view actions based upon the belief that authorities are legitimate and ought to be obeyed as the essence of obeying the law because it is the law. The question of what following the law because it is the law means is therefore central to our evaluation of Schauer's arguments. In contrast to Schauer in the normal settings in which people make law-related decisions, social scientists generally study the ability of

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34. *Id.* at 49.
35. *Id.* at 93.
36. *See* Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCHOL. 375 (2006).
37. SCHAUER, *supra* note 1, at 23, 46.

different factors to influence behavior in ways that are distinct from the influence of other factors. In normal settings, consensual factors (i.e., norms, moral values, and legitimacy) shape compliance in a way that is empirically distinct from coercion. The aforementioned consensual factors are often more important than coercion. If the goal is to determine what is "typical of law," and the issue concerns why ordinary people obey the law in their everyday lives, it is hard to explain away widespread findings that legitimacy matters.[38] Certainly, the influence of legitimacy cannot be explained away simply by defining it out of existence.

IX. THE CONTENT OF COERCION

What is especially puzzling about Schauer's effort to take on the social science literature is that doing so—and seeking to undermine a role for non-sanction based motivations—does not seem particularly important to his larger project. Social scientists and studies by behavioral economists do not dispute that coercion plays a role in law. Even Hart, as Schauer notes, acknowledges the importance of coercion in the law.[39] If we accept that coercive and sanction-independent motivations matter, as social scientists and behavioral economists seem to, then the key issues are those that Schauer tackles later in his analysis, including: when coercion might be more or less important; whether coercion is sufficient to sustain law; and how the coercive elements of law can best be structured (institutional design).

Determining which set of forces is more important as a general proposition does not seem central to Schauer's enterprise. Instead, Schauer discusses the circumstances under which coercion is more or less effective in shaping a person's compliance with law. Schauer's examination regarding when coercion is more or less important is consistent with social science empirical findings, which state that the strength of various elements shaping compliance depends upon the particular situation. It is not possible to make an overall statement about which factors are more or less important as a general proposition. Instead, it is necessary to define the situation or type of situation of concern and establish the role of different factors within that setting.

As an example, while coercion is often found to have little influence upon behavior, research suggests that coercion becomes more influential if sufficient resources are placed into the surveillance, apprehension, and punishment of law-breakers because there is more coercive influence to follow the law when the likelihood of detection after breaking a law is greater. Similarly, moral values have a stronger influence when people view the behavior in question as having relevance to strongly held moral beliefs. Further, legitimacy is more potent when legal authorities are strongly trusted or distrusted. The relative influence of different factors depends upon their potency, and thus, surveys of natural settings are important because they tap into the strength of each factor within a particular setting.

The importance of situational factors emphasizes the futility of trying to draw an overall conclusion about how important one factor is, alone or relative to others. The

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38. *Id.* at 94.
39. *Id.* at 27-34.

answer depends upon general social circumstances as well as the nature of particular situations. Bentham argued that, in earlier historical eras, law and legal authorities had little legitimacy so legitimacy could not serve as a strong force toward compliance. Sanction threats were therefore of necessity central to the effectiveness of law. In the modern era, the issue of legitimacy is contested, but studies suggest that individuals in our society generally feel substantially obligated to obey the law and legitimacy can be a basis for a consent based system of law. Still, behavior continues to be responsive to coercive factors. For example, in some settings, the likelihood of detection is higher than others, which explains why few people light up a joint in front of a police officer. Instead, people might elect to light up a joint in a private setting. Schauer recognizes this point by noting that history and culture both create a general framework that shapes the factors motivating compliance and situational factors create a more specific but similar framework at any given moment in time and in any society.

Further, the factors motivating compliance are not necessarily naturally occurring variations in history or culture. The factors can be consciously manipulated as part of an institutional design. The police officer in the prior example will be present or absent at least in part in response to how many resources society wants to put towards surveillance. The strength or limits of sanction-based strategies are resource based, which is why it is important not to conclude that force can or cannot be effective. The ability of force to be effective is linked to the ability of political authorities to deploy and sustain the deployment of sufficient surveillance, apprehension, and punishment capacity, which deter behavior. However, the costs of these efforts are a collective drain on society and may over time undermine it. But, in the short term, they can deter crimes.

The attractiveness of non-coercive motivations is that they are not resource-based. Legitimacy is an internalized reason to obey laws that is separate from the costs and benefits of rule adherence. Hence, legitimacy is especially important during times of crisis or transition when the state is least able to support its laws by deploying credible threats of punishment for illegal behavior. Yet, legitimacy also varies in strength, and societies cannot automatically assume that their populations view authorities or rules as legitimate. Institutional design also focuses on how to create and maintain legitimacy.[40]

X. SCHAUER'S CONCLUSIONS

In his concluding discussion Schauer takes an unexpected twist. He discusses social norms only minimally during his review of social science findings (a literature that finds at best a small role for such norms). Then in his last chapter, Schauer attempts to reconcile his findings by suggesting that social norms are a desirable focus for understanding non-sanction based compliance.

There are several problems with focusing on social norms as the non-sanction based motivation of greatest interest in institutional design. First, as noted, empirical studies suggest that norms play a minor role in influencing behavior. Schauer provides no reason for focusing on social norms rather than other factors that empirical studies have found to be stronger predictors of compliance. Why not focus on moral values or legitimacy?

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40. Tyler, *supra* note 36.

Unfortunately, this question is not addressed in Schauer's conclusion. According to Schauer, none of the aforementioned factors is sanction-independent, including social norms, and thus, each factor seems to be an equally appropriate candidate for his design focus.[41]

Second, unlike legitimacy, social norms are outside of the control of legal authorities. If you want to focus on a factor outside of political authority, why not focus on personal morality? Empirical studies suggest that personal morality has a stronger impact; however, it has the same disadvantage. Morality is personal; social norms are group-based. Is there some reason that one is better than the other? Schauer does not address this question.

It seems very reasonable to end his book, as Schauer does, with a discussion of institutional design. Schauer makes arguments about the most desirable design for law and legal institutions. However, Schauer's arguments lack force. Schauer does not provide a basis for viewing his approach as the preferred plausible model of institutional design. In particular and in relationship to his dismissal of social science evidence earlier in the book, for several reasons it seems that legitimacy emerges as the most desirable non-coercive value. Legitimacy is under the control of legal authorities and is reliably linked to compliance. Additionally, evidence suggests that legitimacy is usually at least as strongly related to compliance as are sanction risks. Yet legitimacy is not the non-sanction based motivation that Schauer endorses. Instead, Schauer focuses on social norms.

In summary Schauer's advocacy for social norms as a central focus in models of the force of law is not well supported by the evidence reviewed. For the reasons outlined morality and legitimacy seem like better choices. Further, his argument for coercion as the basis of legal authority seems undercut when non-sanction based motivations in the form of social norms emerge as a central theme in his overall vision of the force of law. Nonetheless, Schauer's conclusion that we need to focus on understanding the balance of coercion and sanction-independent forces seems reasonable and difficult to dispute.

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41. SCHAUER, *supra* note 1, at 72.