Coercion and the Conceptual Force of Law

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Date : February 16, 2016

Frederick Schauer, *The Force of Law* (**Cambridge: Harvard University Press**, 2015).

Some of the most difficult problems in legal and political philosophy concern the state's use of coercive enforcement mechanisms. The problem of justifying state authority, for example, is an important moral problem precisely because the state characteristically employs enforcement mechanisms that coercively restrict the freedom of law subjects – coercion being presumptively problematic. Without such mechanisms, authority does no more than "tell people what to do" – a practice that seems presumptuous and rude but not one that would give rise to any serious moral problem that warrants a great deal of philosophical attention.

In *The Force of Law*, Frederick Schauer discusses a variety of problems that arise in legal theory because of the law's characteristic use of coercive enforcement mechanisms. The book's treatment of the role of coercion in law spans the entire spectrum of these philosophical problems, encompassing issues that are conceptual, normative, and empirically descriptive in character. It is an unrelentingly fascinating discussion that demonstrates Schauer's impressive mastery of a literature on coercion that crosses many discipline lines. The book succeeds in bringing the problems associated with coercion back to the forefront of debates about the nature of law; it is, for this and many other reasons, a must-read.

One of these problems is conceptual — the issue being whether it is a conceptually necessary feature of law that it employs coercive enforcement mechanisms. As Schauer observes, the authorization of coercive enforcement mechanisms is both central and ubiquitous to law, as we have experienced it in the world of our empirical experience: "The law tells us what to do, and it tells us that if we do not obey, then bad things will happen to us" (P. 5).

It is certainly true that not every law can be characterized as being intended to coerce certain behaviors. Schauer points out that many laws regulate behavior through means that are not accurately characterized as coercive. As he puts it, "[t]he law does not appear to care whether I make a will or not, and it certainly does not coerce me into making or not making one." (P. 2) Rules that are constitutive of law and certain practices such as those giving rise to the law of contracts are not properly characterized as "coercive," on this argument. There is, as Schauer observes, "distortion inherent in attempting to shoehorn all of law into the ideas of force or compulsion." (P. 2) Law may sometimes utilize the favored mechanism of the gunman (i.e. coercion), but law is not just a gunman *writ* large.

Here it is worth keeping in mind what I take to be Schauer's larger concern in writing the book and most valuable contribution of the book to the literature. Schauer has been convinced (incorrectly, I will suggest) by arguments for the view that coercion is not a conceptually necessary feature of law, and his point is to reach beyond narrow disputes about coercion in conceptual jurisprudence to the wider jurisprudential community. His concern is to make readers aware of the point—and this is surely correct—that even if the link between coercion and law is not conceptually necessary, the phenomenon of coercion deserves greater attention among philosophers and legal theorists is on other areas, such as sociology and psychology.

Having said this, however, I think it important not to surrender too quickly to Hart's view that coercion is not conceptually related to law. Notice that there are other ways than the view Schauer criticizes above to hold the position that coercion is a conceptually necessary feature of law. Although theorists like Jeremy Bentham and John Austin might have embraced this stronger view that every possible legal norm is coercive in character, H.L.A. Hart saw that there was a weaker—and far more plausible—view of the conceptual relationship between law and coercion. As Hart

observes in *Essays in Jurisprudence and Philosophy* (P. 78):

> It is surely not arguable (without some desperate extension of the word 'sanction' or artificial narrowing of the word 'law') that every law in a municipal legal system must have a sanction, yet it is at least plausible to argue that a legal system must, to be a legal system, provide sanctions for certain of its rules. So too, a rule of law may be said to exist though enforced or obeyed in only a minority of cases, but this could not be said of a legal system as a whole.

According to this weaker claim, then, it is a conceptually necessary feature of legal systems that (1) coercive enforcement mechanisms (2) are *authorized* (3) for violations (4) of *some* mandatory legal norms that (5) regulate the acts of citizens. [For a defense of this weaker claim, see Kenneth Himma, "The Authorization of Coercive Enforcement Mechanisms as a Conceptually Necessary Feature of Law," forthcoming in Jurisprudence; available at SSRN.

Schauer considers this more plausible possibility but rejects it on the strength of the well-known "society-of-angels" argument. The idea is that a society of angels would need a system of social norms to solve certain disputes and coordination problems but would not need coercive enforcement mechanisms to enforce these norms. This system is, on this line of reasoning, a system of *law*.

It is not clear, however, why anyone should think that a system of norms governing a society of angels should be thought of as being a system of *law*. As Joseph Raz observes, it is *our* legal practices that construct the content of *our* legal concepts. But our legal practices are essentially organized around an attempt to keep the peace when potentially dangerous conflicts arise between self-interested beings for scarce goods needed to satisfy desires or needs. That is why coercion is omnipresent in the real world of legal systems: self-interested individuals who are *otherwise* likely to resort to violent self-help to settle conflicts are most effectively deterred from violence by the threat of violence. It is difficult to see what there is in our legal practice that would support the idea that there could be law in circumstances very different from ours among beings with very different psychological characteristics than ours, as there would be in a society of angels.

But, as Schauer ultimately realizes, the conceptual dispute is not necessarily the most important dispute. Even if coercion is not an essential property of law, it is still a feature of many legal systems that warrant philosophical attention. Conceptual disputes are largely terminological in character; the claim that law as such is not coercive does not entail that the law's use of coercion does not merit serious philosophical evaluation. As Schauer rightly insists, "it may still often be more valuable to focus on the typical rather than the necessary features or properties of some category or social phenomenon." (P. 4)

Of course, Schauer does not limit himself to either conceptual or empirical issues; Schauer wants to highlight the whole range of issues that arise in connection with law and coercion. The book has many contributions to make, in terms of both its breadth and depth; however, it should always be kept in mind that one of his chief points is to expand and recast the conversation away from the narrow conceptual one.

Schauer's *The Force of Law* is, by far, the most important recent comprehensive discussion on the role of coercion in law. It is consistently insightful and enlightening. But Schauer's earlier work on the topic, which gestures in the other direction, is every bit as thoughtful and important; it should not be ignored or forgotten.

Cite as: Kenneth Himma, *Coercion and the Conceptual Force of Law*, JOTWELL (February 16, 2016) (reviewing Frederick Schauer, *The Force of Law* (**Cambridge: Harvard University Press**, 2015)), https://juris.jotwell.com/coercion-and-the-conceptual-force-of-law/.