The Nature of Law: Essential vs. Important

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Frederick Schauer, *On the Nature of the Nature of Law*, **Archiv für Rechts- und Sozialphilosophie (ARSP)**, Vol. 98, pp. 457-467 (2012), available at SSRN.

At the heart of analytical legal philosophy are theories about the nature of law. In recent decades, there has been a growing convergence around the conclusion that theories about the nature of law (like those of H.L.A. Hart and Joseph Raz) are conceptual analyses, determining the "essential" or "necessary" characteristics of the concept of law. (The debates about the proper way to understand theories about the nature of law are summarized in Brian Bix, *Joseph Raz and Conceptual Analysis*, **APA Newsletter on Philosophy of Law**, Vol. 6(2), Spring 2007, available at SSRN.) Against this background, Frederick Schauer, in a number of important recent articles, including *On the Nature of the Nature of Law*, has argued that legal theorists should focus more on "the typical truths" of law, even if this is different from the list of its "essential characteristics."

To explain: the "essential" or "necessary" characteristics of law are those characteristics that make it "law," the characteristics without which it would not be "law." These characteristics will be present (by definition) in all legal systems, present, past, future, or hypothetical. Claims of which characteristics are "essential" or "necessary" are claims about our concepts, not (or at least not primarily) falsifiable claims about the world independent of those concepts. (The role of "necessity" in philosophy generally and in legal philosophy in particular is a large topic that would take us too far afield. I discuss the topic in *Raz on Necessity*, 22 **Law and Philosophy** 537 (2003), also available at SSRN.)

A helpful example Schauer uses in this article (and elsewhere) is that while flying is often associated with birds, there are entities that are birds but cannot fly. "Birds [can] fly" is a general truth that is, at the same time, not universally true of the category "bird." Regarding law or legal systems, one could say that all or almost all legal systems (past or current) have courts, employ specialized practitioners (lawyers), and use coercion. Yet, these may not be *necessary* truths about law, in the sense that one could perhaps imagine institutional systems that did not have these characteristics but were nonetheless appropriately labeled as "*legal* systems." (There has been an active debate among theorists over whether coercion is a necessary characteristic of law, but most modern theorists seem to have concluded that it is not.)

Schauer argues that there are properties that may be essential to law but may not be important to understanding the nature of law—the phrase being "understanding the nature of law" here being used in a general sense of understanding something's nature, rather than in a technical philosophical sense; under a technical philosophical sense, understanding the nature of something might *simply equate* to understanding its necessary characteristics. Similarly, there may be characteristics (like courts and coercion) important to understanding the nature of law that are not essential to the concept of "law," but just general truths about legal systems. "Even if we wish to understand not just the law of this or that legal system, but law generally, features that exist in all or almost all actual legal systems can tell us much about law's goals, methods, and limitations." (P. 461.) Schauer's approach would allow us to side-step the controversies of "essentialism" while still grounding claims about how best to understand the differences between (for example) law and morality (e.g., one tends to involve coercion and the use of courts to resolve disputes while the other does not).

Towards the end of the article, Schauer suggests that law might be best understood as a “family resemblance” concept or a “cluster concept,” an idea that has been raised before (e.g., by Rolf Sartorius, cited by Schauer at P. 465, n. 39). Under this proposed approach, “both the word ‘law’ and *our* concept of law consist of a series of intertwined properties, no one of which is necessary for the correct understanding and application of the concept or the word, and no one set of which is sufficient for their correct application and understanding.” (P. 465, footnotes omitted.) Schauer thus at least suggests doubts about the value of conceptual analysis for discussing the nature of law. At the least, Schauer reasonably concludes, if there are characteristics that unite all the quite disparate experiences that we identify as “law,” they will be “at such a level of abstraction as to be of little value in understanding the nature of law.” (P. 466.)

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