

## **Comment on Frederick Schauer's "Was Austin Right After All? On the Role of Sanctions in a Theory of Law"**

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### **Introduction**

Professor Schauer's paper is two things simultaneously. It is a critique of HLA Hart's critique of John Austin's sanctions-inclusive theory of law and it is also more broadly an account of why coercive aspects of law should be central, or at least important, to any general theory of the nature of law. In the brief presentation of core claims in the paper and then in my own reflections on those claims, I would like to keep that broader account front row and centre and avoid as much as possible turning our discussion into what Hart said 50 years ago – a movie we have seen many times now.

That said, I should begin with a preliminary point that nods in the Hartian direction of the ever-present potential for linguistic distinctions to point us in relevant directions for analysis. That point is that Professor Schauer by and large treats the Austinian term of "sanctions" as interchangeable with the term "coercion." For purposes of this comment, I only want to flag the issue of whether this fungibility comes at a price if it turns out that "coercion" is, in relation to "sanctions" a richer notion in at least one if not both of two senses: firstly, being more ecumenical in terms of phenomena relevant to law's operation including phenomena that may not be best thought of as internal to the legal system in question; and secondly, as an aspect of this ecumenical dimension, coercion seems more apt to capture more diffuse forms of compulsion to conform to law than the term sanctions may be apt to convey. Part of what I am suggesting is that the notion of coercion in law may direct our

attention to salient features of law and its operation in society that the notion of sanctions may obscure due to what I suggest is a propensity to associate that notion (of sanctions) with organized mechanisms that are ‘official’ by the lights of the legal order or system in question. Related to this is that the term sanctions may have a certain semantic pull towards discussing law in terms of official and indeed state law, and subtly stack the deck against understanding and theorizing about law through more legal-pluralist lens.

By the way, I am aware that I have been speaking in somewhat fused (although hopefully not *confused*) terms of both “law” and “law’s operation” as I feel that this is part of the project of theorizing about the general nature of law and, more importantly, I see it as implicitly part of Professor Schauer’s orientation to the question of what it is to ‘do’ jurisprudence -- or, more pluralistically put, what it is permissible to include as a version of doing jurisprudence.

### **Schauer’s Neo-Austinian Argument**

What, then, are the key claims in Professor Schauer’s paper? Because many of you have either read the paper or attended the Or’Emet lecture yesterday, and because Professor Schauer is here to fill in any gaps that are too gappy in my summary, I will be exceedingly spare in my summary and attempt to distill what I see as the essence of the argument. In so doing, I will freely resort to paraphrase, indeed interpretive paraphrase, and to quoting from Professor Schauer’s own paraphrases in yesterday’s lecture. I have organized the summary into seven full-paragraph points.

Firstly and at the most general level, Professor Schauer wishes to persuade us that “compulsion against choice” is “frequently and importantly” central to law as we experience it and/or as we should understand it. (I will return to this “and/or”, because he covers two bases in his paper, that of legal theory about law’s nature as a

descriptive enterprise and legal theory about law's nature as moral theory.)

Secondly, in respect of this general goal, he uses as one reference point the rejection by HLA Hart of John Austin's notion of sanctions as a required component of "law properly so-called", sanctions being a corollary of a more general Austinian theory of law as the command of superiors to inferiors and, more particularly, state law being the command of the sovereign to subjects. Hart's argument is, more or less, that, for there to be law, there both must be, and need only be, a union of primary rules and secondary rules of recognition generative of felt obligations to act in accordance with those rules within the common practice of fairly broadly defined "officials" of the putative legal system. Even if law also may include sanctions as part of its structure, and for example regularly includes such sanctions in fields of law like the criminal law, it is not a necessary feature of law – including in the sense that criminal law would still be criminal law even if a system of prosecution and punishment were not in place.

Thirdly, Hart then becomes Professor Schauer's partial reference point not only because of the iconic status in the last half-century of Hart's refutation of Austin on this point, but also because Hart's (and, more generally, Hartians') approach to doing jurisprudence is put squarely on the table. In a nutshell, Hart purports to be engaging in an exercise of explanation as empirical description or distillation. Hart characterized his own approach as that of "descriptive sociology." As Schauer puts it while quoting Hart, a theory of law must "fit the facts" of the phenomena being theorized, and Austin simply did not see beyond a kind of criminal-law, punishment-for-deviation paradigm to notice how much of the rest of law as we know it does not fit that paradigm. In terms of Hart's perceived facts, law is full of facilitative rules and guidance rules that are tasked with coordinating social interaction in what other theorists would term collective action dilemmas. And corresponding to this dimension of law is an assumed subject of the law, the "puzzled

person” who adopts the point of view that he or she wishes to abide by the law (understanding the social-interaction benefits of this) but needs clarity and guidance in related measure in order to know what to do in light of what others also will do if they too know the law.<sup>1</sup>

Fourthly, whether Hart adequately separated out the psychology of participants internal to the articulation of law (the famous “officials” of the system), on the one hand, and, on the other hand, of ordinary citizens who are addressees or subjects of the law becomes implicitly part of Schauer’s counter-critique. For Schauer’s argument is that, on its own terms as an exercise in fitting theorized description to the phenomenon being described, Hart is arguably as blinkered as was Austin. Schauer argues that it may turn out to be – and implicitly his argumentation suggests that we already know that it is – the case that puzzled persons are minority actors within most legal systems as we know them and that most people interact with the legal system in terms of knowing they risk suffering harm if they disobey the law and wanting to know the law at least as much to avoid harm as to be good citizens looking to law to guide social interaction. Thus, the general import of Schauer’s argument is that, if Hart’s method suggested he believed the task of jurisprudence is to “attempt to explain at a highly theoretical level what actual functioning legal systems or orders are like” (lecture), then Hart’s account is open to the charge he misdescribed the dominant experience of law.

Fifthly, Schauer goes on to say that there may well be a sound argument that, in order to exist as law, law does not necessarily need to include sanctions (whether as part of its general system or, more crudely, as specific annexes to every norm). But then the attention must shift to the question of the value of such a theory, when it

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<sup>1</sup> Note that Schauer notes the considerable number of senses in which Hart was right in his discussion of Austin and also in his general observations about the nature of law, including how law’s primordial function as a coordinator of conduct was incorrectly ignored by Austin. I shall not rehearse the points of agreement between Schauer and Hart.

either directly or indirectly does not concern itself with “important and frequent” features of much if not most law as we know it.

Sixthly, once the inquiry opens itself up to the question of the value of the theory in light of the phenomenon described, then, argues Schauer, we are pushed to ask deeper questions about the very enterprise of jurisprudence. “It may be that jurisprudence turns out to be a branch of moral philosophy” that concerns itself with what Schauer refers to as “an appropriately [versus factually] motivated subject of law.” At more than half a dozen points throughout his essay, Schauer speaks of the point or task of jurisprudence; we could equally use terms like the function or purpose of jurisprudence. This is a familiar turn in some respects to the extent that theorists have long (since Hart, at least) pointed out that one cannot ‘do’ jurisprudence without at least implicit background accounts of why one is doing what one is doing. In other words, it is not self-defining for jurisprudence that general jurisprudence should be in the mode of “descriptive sociology” to use Hart’s phrase or that a theory of the nature and existence of law need to be about “fitting the facts.” Perhaps most famously, Dworkin’s background premise about what it is to theorize about the nature of law is that the theory must in some measure involve an equilibrium of some sort between “fit” with a practice or phenomenon and “justification” of that practice or phenomenon. There is thus always a stipulative dimension to theorizing about a concept or a phenomenon related to the concept, which I believe post-Hartians like Raz themselves recognize as when Raz writes in the context of a theory of the nature of rights:

A successful philosophical definition of rights illuminates a tradition of political and moral discourse in which different theories offer incompatible views as to what rights there are and why. The definition may advance the case of one such theory but if successful it explains and illuminates all.

Finally and interestingly, then, Schauer goes on to merge the moral account of doing jurisprudence and the explanatory account when he discusses what kinds of moral or functional purposes would be forwarded if theorizing about law were indeed to be understood as about giving the best explanation of what actually functioning legal systems are like. The moral virtue of sociological positivism in this sense has often been understood as that of distancing oneself from the desirability of the content of law enough to give the distance that allows one to understand it – and, I would add, evaluate its desirability. If that line of explanatory theorizing then takes us to an understanding of the prevalence of sanctions within actually functioning systems, says Schauer, then this produces the benefit of engendering the recognition that law is often the antithesis of persuasion – that authority in the name of law is often imposed rather than accepted. A further purposive benefit is that it then “allows us to focus on the morality of coercion itself”, as contrasted to Hartian discourse on law that does not in any significant way ask us to think of law in terms of coercion.

### **Comment**

I would like to make three comments, two (if not all three) of which may help internationalize or transnationalize the discussion a bit.

### ***Relevant jurisprudential distinctions and their virtues in Public International theorizing***

There is still reason to separate out notions of validity/existence, effectiveness, and legitimacy (in relation to either of the preceding). This is still the dominant approach to thinking about public international law such that ineffectiveness and/or illegitimacy do not as such disqualify the putative law from the status of law, although strands of New Haven School thinking do build both fundamental policy morality and basic effectiveness into the very question of law’s existence. In this orientation, there is arguably at play – usually implicitly more than explicitly – a moral theory of a somewhat

prudential sort, namely that, by taking law seriously as that which is recognized by relevant actors as being law, we do one or all of three things: a) by separating out validity and legitimacy, we allow ourselves to see how power configurations, hegemonic discourses and so on are working themselves into law-making processes and, as such, we enable critical discourses – not about whether the law is even law but about whether the law must be changed and indeed whether in some cases it is so unworthy of being followed that social or state power may justifiably defy it; b) we focus the mind on effectiveness as a follow-on question and not as itself definitional to whether the law exists as law in the first place, which is why so very much of legal theory in PIL in the last 15 years has been around a variety of approaches to compliance without being pulled into a whole chicken-and-egg debate about whether that which is the subject of compliance discussion should even be complied with because, not already being subject to reasonably effective compliance mechanisms, it is not actually law, ; and c) we arguably elevate ‘rule of law’ culture by approaching law as something that should, ideally, be adhered to because of PIL’s implicit aspiration, to paraphrase Martti Koskenniemi, to function through modes of persuasion as a “gentle civilizer of nations” (civilization being used both ironically and metaphorically by Koskenniemi).

### ***Where and how to situate reciprocity?***

Again with an eye to international law and also fields in which actors self-define their field as a species of transnational law, where does reciprocity as a dynamic conducing towards law observance stand between the Austinian and Hartian perspectives? In particular, consider the notion of diffuse reciprocity and the related perceived self-interest of actors, including states in PIL, of being law-abiding members of the community because of both recognition of the instrumental utility of common rules and because of the need for a reputation that would generate willingness of other actors to treat or to contract with you. Is it about sanctions even if reciprocity-based pressure to conform is often not associated with either organized

mechanisms of sanctioning or easily identifiable acts of sanctioning coercion in direct response to perceived violations by other actors? Or is it more closely about the rules of the game for coordinating conduct?

### ***Law's operation and coercion within law***

So much of law is not about the posited norm but about the interpretive and decisional contexts in which a) the norm's concrete meanings are generated and b) interpreters and decision-makers' take into account addressees of their interpretations and decisions in terms of whether those addressees should, reasonably, be persuaded of the rectitude of the interpretation or decision. Because of both open-texturedness of most legal formulation and of good faith disagreement about best interpretations, it seems to me that in the sense of its operation – which operation is, I suggest, essential to its existence – law is almost always everywhere coercive to at least some degree. To the extent this is true, one could say that no legal system can exist without actors empowered and willing to act on interpretations that they know others do not share, and to that extent no legal system can be coercion-free. But, returning to my comments earlier on the distinction between coercion and sanctions, I am far from certain that this line of argument has much to do with an understanding of law as being primarily or dominantly concerned with sanctions.