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HOW LAW AFFECTS BEHAVIOR

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HOW LAW AFFECTS BEHAVIOR¹

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A centerpiece of Schauer's thought-provoking book is his argument that coercion is, in practice, the only significant way in which law can affect behavior. He argues that, contrary to what many theorists have assumed, "puzzled people" – people who obey the law simply because it has the status of law – are rare.² The law therefore must turn to coercion if it is to affect behavior. I will show, however, that there is an important alternative – that the law can alter morally relevant factors, thus generating moral reasons, such as reasons of fairness and preventing harm to others. This method of affecting behavior does not depend on people following the law simply because of its status as law – on their taking the law to provide "content-independent reasons." Rather, people are motivated to act in order, for example, to avoid unfairness. Although they are not obeying the law merely because it is the law, the law makes a difference to their behavior because the law has generated the moral reasons that motivate them.

Schauer argues that a widespread confusion has led philosophers and empirical theorists to greatly overestimate the prevalence of people who obey the law simply because it has the status of law. The alleged confusion is to assume that, if people act consistently with law for

¹ Much of the material in the first half of this essay is reprinted from Greenberg, "How to Explain Things with Force," *Harvard Law Review* 129: 1932 (2016). That essay elaborates the arguments at greater length and also develops many other points not discussed here. I am grateful to the Harvard Law Review for permission to reprint the relevant material. The second half of this essay replies to Schauer (2016), his response to my original essay.

² Schauer uses several formulations interchangeably: *to obey the law just because it is the law*; *to obey the law qua law*; and simply *to obey the law* (pp. 48–57). (Page numbers standing alone refer to Schauer 2015.) Schauer also uses *puzzled* person, someone who has *internalized* the law, and someone who takes the law to provide *content-independent reasons* to describe someone who obeys the law *qua* law (pp. 42, 45–52, 62–67, 73–74). H.L.A. Hart introduced the term "puzzled man" to describe someone who wants to know what the law is in order to know what he should do, as opposed to Justice Holmes's "bad man." Hart 1994: 40.

reasons other than self-interested ones (such as the threat of sanctions), then they are obeying the law because it is the law.

Schauer points out that it does not follow from the fact that conduct consistent with the law is not motivated by self-interest or personal preferences that the conduct constitutes obedience to law *qua* law. People may conform to the law — that is, act consistently with it — not only because of their personal preferences or tastes, but also for moral, altruistic, or cooperative reasons. For example, moral reasons often prevent people from acting on self-interested desires to steal, assault others, and engage in insider trading (pp. 48–50). “[W]e know that when people perceive a form of behavior to have substantial moral (or religious) or ‘prosocial’ implications, they will often relegate their own personal interest to secondary importance behind what they believe is the right thing to do” (p. 58). When people act consistently with the law because of morality, just as when they act for self-interested reasons, they are merely conforming to the law, not obeying the law *qua* law (pp. 48–51, 58–60).

In Schauer’s view, the assumption of a “false dichotomy between law-governed and self-interest-governed actions is ubiquitous” (p. 51). Because it is obvious that people often act in a way that is inconsistent with their self-interest, and such behavior will often be consistent with the law, the false dichotomy leads to the mistaken conclusion that there are many puzzled people. Schauer argues that once he exposes the false dichotomy, it is clear that there is little or no evidence for the existence of a significant number of people who obey the law because it is the law (pp. 61, 63).³

³ Schauer cites rates of noncompliance of more than fifty percent for various legal requirements that do not track people’s preferences and are not enforced (pp. 65–67). These studies and statistics are, however, consistent with the existence of substantial numbers of puzzled people. Perhaps for this reason, Schauer summarizes his discussion of the studies by saying that the evidence shows that puzzled people are much less common than theorists and others believe, rather than low in absolute terms (p. 67; Schauer 2016: 6-7). But he often writes as if he intends to show that puzzled people are rare (e.g., pp. 48, 52, 56).

Schauer argues that, in order to determine whether law makes a difference to how people act, we must set aside all law-independent reasons — reasons that would exist even if there were no law. He takes for granted that moral reasons are independent of the law, so that to the extent that people act for moral reasons, the law is not making a difference (see, for instance, pp. 50–52).⁴ (Like Schauer, I use the term *moral* broadly to encompass, for example, preventing harm, helping people, and improving welfare as well as values such as fairness, democracy, and freedom.) He therefore emphasizes that, in order to investigate the empirical question of whether law without sanctions influences behavior, we must ask how often people follow the law merely because of its existence, setting aside all moral reasons (and, indeed, prudential or self-interested reasons):

The question is thus refined: If we distinguish the reasons provided by law from the reasons provided by morality, policy, prudence, and everything else, and if we distinguish the reasons provided by law from the various forms of enforcement that law typically employs to assure actual decision according to those reasons, then to what extent do these sanction-independent legal reasons actually influence decisions? (p. 54)

A preliminary point is that Schauer's characterizations of the puzzled person are often misleading, suggesting that the puzzled person must have a kind of fetish for the law, obeying merely because of "its very status as law" (pp. 52, 61). For example, he says that the question of whether people obey the law *qua* law can be recast as the question of whether lawbreaking *qua* lawbreaking "violate[s] a social norm in the same way that [talking] with your mouth full, not cleaning up after your dog, wearing a white suit in winter, or speaking to the Queen before she speaks to you does" (pp. 151–52). Such comparisons obscure the possibility of obeying the law *qua* law because one believes that one has a moral obligation to do so.⁵

⁴ "The distinction between legal and all other reasons is thus a construct designed to isolate the question whether law figures in the decisions and actions of law's subjects" (p. 54).

⁵ On this point, see Greenberg 2016: 1962–64.

Similarly, Schauer repeatedly characterizes the puzzled person as someone who thinks that she ought to act in a particular way on the basis of the full array of law-independent reasons, including moral reasons, yet, on discovering that the law requires a different course of action that she believes wrong, proceeds to take that action without regard to the possibility of coercion (pp. 51–52). “Will people do what they believe is wrong . . . just because of the law and without regard to the threat of sanctions?” (p. 62).⁶ But if a person believes that what the law requires is an important moral consideration — indeed, believes that she has something like a defeasible moral obligation to obey the law — then the person’s behavior is less peculiar than Schauer makes it sound. It is not that the law trumps her on-balance moral judgments, but that her on-balance moral judgments depend in an important way on the law. It is not that she does what she believes is wrong, but that the law affects what she believes she ought to do, all things considered.

Moreover, there are a wide variety of plausible motivations for adopting a policy of obeying the law other than, on the one hand, believing that one has a moral obligation to do so and, on the other, law fetishism, that is, taking the mere fact of something’s being law to be a reason. A natural example is that a person might decide that, rather than making case-by-case decisions about whether to obey the law — taking into account in each instance how to best help others, act fairly, advance her own interests, and so on — she would do better in the long run to adopt a general policy of obeying the law. Such a person does not believe that she has a moral obligation to obey the law, just that following such a policy is a good strategy for acting on her moral and

⁶ The passage from which this quotation is taken reads:

The question now is whether people, when they have reached this all-things-except-the-law-considered judgment, will, sanctions aside, subjugate *that* judgment to the prescriptions of the law. Will people do what they believe is wrong . . . just because of the law and without regard to the threat of sanctions?

Hart’s puzzled person is thus someone who follows the law just because it is the law even when what the law requires seems not only not in her best interest but also contrary to her best judgment. There is a reason that philosophers grappling with the issue are fond of imagining “Stop” signs in the middle of the desert, and that is because the example creates a situation in which the likelihood of apprehension and punishment is close to zero and in which acting in accordance with the law *appears otherwise pointless*. (pp. 62–63) (final emphasis added) (citations omitted)

other reasons, given limitations of time and information and her own cognitive and motivational limitations.⁷ When she obeys the law, there is an important sense in which she may be motivated by moral reasons that are independent of the law, such as helping others, yet the law has undeniably affected her behavior.

More importantly, Schauer neglects an interesting and significant way in which the law can affect behavior — by changing moral obligations, powers, permissions, and so on.⁸ (I have coined the term *moral profile* for the panoply of obligations, powers, permissions, and the like;⁹ for convenience, however, I will sometimes write simply of obligations.) As I will elaborate, legal systems have a variety of tools for changing the moral profile.¹⁰ The general idea is that legal institutions can take actions that change the relevant circumstances. Given various background moral principles, these changes in circumstances generate changes in the moral profile.

I can best explain how law can change the moral profile by developing an example.¹¹ The example illustrates several tools that legal institutions have for creating moral obligations to participate in specific schemes for the public good, such as an obligation to pay taxes. Without a legal system, people may have general moral obligations to help others. But there will often be no moral obligation to give any particular amount of money to any particular scheme or otherwise to participate in any one scheme. For one thing, especially when it comes to problems of any complexity, many different solutions are likely to be beneficial. Suppose that

⁷ Rebecca Stone offers a subtle analysis of different motivations for internalizing the law and argues that such motivational differences can be relevant to the law's control of behavior. See Stone (2015).

⁸ When Schauer and I write about how “law” can affect behavior the relevant question is how a legal system can affect behavior, not merely how the content of legal norms by itself can affect behavior. I elaborate on the importance of this point in note 20 below.

⁹ See Greenberg 2011: 56–57.

¹⁰ One might wonder why it would be desirable to change the moral profile. As I elaborate elsewhere, without law, there is much room for improvement in the moral situation. Law can provide a crucial service by changing the moral profile for the better. See Greenberg 2016: 1973–1974.

¹¹ I develop similar points at greater length in Greenberg 2014: 1310–19.

the community faces a problem for which some solutions are better than others, and it matters to people which solution is chosen. Different people support different solutions, and no one solution has any kind of consensus behind it. Moreover, the nature of the problem is such that participating in a particular solution will do little or no good unless many people, perhaps a majority, participate. In this situation, it is plausible that I do not have a duty to contribute to any particular solution. Nothing determines which possible scheme is the one that people should participate in. In addition, there is no mechanism for people to participate in one common scheme.

Now suppose that the legal system specifies a particular scheme and sets up a mechanism for implementing that scheme. In addition, the legislature prescribes penalties for not participating. The solution that is chosen, let us suppose, is not the best possible one, but having this scheme in place would be much better than the current situation. Consider now the effect on my reasons. The actions of the legal system may well succeed in making it the case that, quite apart from the self-interested reasons that I have for avoiding the penalties, I have powerful moral reasons for participating in the particular scheme that the legal system specifies. There is now a strong likelihood that a majority of people will participate in the scheme. As a result, participating in this scheme will make a difference, and participating in other schemes is unlikely to do so. My general moral reasons to help others are therefore channeled into moral reasons to help with this particular scheme. Moreover, the fact that others are likely to participate may make it unfair for me not to participate. Thus, the reasons that I have for solving the particular problem, the general moral reason to help, and reasons of fairness all come together to support my participation in the scheme. My awareness of the altered moral

reasons may motivate me — and many others — to participate in the scheme.¹² Schauer emphasizes that there is good empirical evidence that people often act for moral, cooperative, or altruistic reasons (pp. 48–51 & n.21, 58–59 & nn.8, 10, 61–62 & nn.21–22), so he should have no quarrel with the motivating force of the reasons in the example.

In my example, the law channels the preexisting duty to help others into a more specific obligation to participate in a specific arrangement. Morality frequently offers general and vague principles, leaving a great deal on which morality has nothing to say. (Moreover, even when morality is determinate — that is, there is in principle a correct moral answer to the relevant question — there is often much *uncertainty* about what morality requires.¹³) Just as law channels the obligation to help others into a specific obligation to participate in a particular arrangement, so it can channel moral principles about, for example, promising, property rights, avoiding harm to others, and procedural justice into much more specific schemes of contract, property, tort, procedure, and so on.

In the community scheme example, the law makes a practical difference. It does so by changing the morally relevant circumstances, thereby generating moral reasons, which, as Schauer accepts, motivate many people. Schauer is right that, in order to understand what

¹² I have elsewhere taken the view that moral obligations generated by the law in the kind of way developed in the text constitute *legal* obligations. See Greenberg 2007; 2014. For present purposes, it makes no difference whether the moral reasons or obligations generated by the law constitute legal reasons or obligations. Whatever position we take on that issue, the law has made a difference to people's motivations by changing the moral reasons that apply to them.

¹³ Given the problem of uncertainty, law can make a practical difference by *informing* us of the existing moral reasons, as opposed to changing them. In many situations, people are unsure of which solution is supported by the existing reasons. For example, people may be unsure which kinds of landscaping are best for conserving water. By codifying permissible kinds of landscaping, the law may not be changing the existing reasons — the landscaping that is specified to be permissible may already have been supported by the relevant reasons. But the law may affect behavior by eliminating uncertainty. Of course, in many real cases, the law may simultaneously change reasons and inform people of already existing reasons, and it may be a difficult question to what extent the law is doing each. In the text, I focus for the most part on generating moral reasons.

Schauer mentions approvingly in a footnote the possibility that law can be causally efficacious by “indicating to the uninformed or the unsure what their law-independent responsibilities are” (p. 193 n.8). But his argument that “how important law without coercion really is . . . turns out to depend largely on the extent to which people” obey the law because it is the law seems to neglect the point (pp. 47–48).

difference the law makes, we need to set aside law-independent reasons — that is, ones that would exist even if it were not for the law (except to the extent that they motivate people to adopt a policy of obeying the law). In practice, however, he neglects the possibility that moral reasons can be generated by the law, proceeding as if all moral reasons exist independently of the law. If we are to understand how the law can affect behavior, we must not neglect its ability to do so by changing moral reasons. Just as, in trying to isolate what difference the law makes, we should not set aside prudential reasons that the law generates, such as those created by sanctions, we should not set aside moral reasons that the law generates.¹⁴

I developed the above points in an earlier essay (Greenberg 2016), and Schauer has responded (Schauer 2016).¹⁵ His principal response is that we are talking past each other. While I show

¹⁴ It is important to distinguish the way that the legal system influences behavior discussed in the text — by changing the moral profile — from the very different possibility that the legal system can lead people to believe that behavior is immoral simply by making it illegal. (Schauer briefly considers the latter possibility and concludes that the issue is complex and the evidence inconclusive (pp. 71–73).) In the latter case, the mechanism involves prohibiting an activity, thereby causing people to come to believe, typically over a long period of time, that it is immoral. No change in moral reasons, or the moral profile more generally, need be involved; rather, recognition of what the law requires directly affects beliefs about morality. (The mechanism is therefore more closely related to law’s performing an epistemic function — informing people of what morality requires — than to generating moral reasons. Schauer doesn’t connect his discussion of this mechanism to his brief note on the possibility that law is causally efficacious because it performs an epistemic function. *See supra* note 13.) By contrast, the mechanism discussed in the text involves the legal system’s changing moral obligations, powers, and so on. When people recognize the new moral situation, their behavior may be affected.

Perhaps the closest that Schauer comes to contemplating the possibility discussed in the text is in a brief discussion of the law’s “settlement function” in a chapter on the different ways in which the law uses coercion to achieve obedience. He points out that law often has a function of “settling deep moral and political disagreements for purposes of action” (p. 106). Rather than “changing people’s moral or policy views,” law can simply dictate a practical resolution (p. 104). In this context, he mentions the possibility that law can achieve such a practical resolution without coercion in the special circumstances “when widespread agreement on the need for settlement is combined with little of consequence turning on the substance of the settlement,” for example with respect to the question of which side of the road people should drive on (p. 104). But he argues that when such special circumstances are not present — in particular, when people care about which solution is selected — coercion will be needed to enforce the settlement (pp. 105–06): “It is precisely because of deep underlying disagreement that settlement is often necessary, but at the same time, underlying disagreement is what makes effectuating the settlement without coercion virtually impossible” (p. 105). Schauer does not seem to recognize that law can do more than dictate a settlement where there is disagreement — it can change the relevant reasons to make a particular solution the one that all or most people have reason to follow, thus potentially eliminating disagreement. As elaborated in the text, the capacity for law to change moral reasons is far more general than the special circumstances in which little of consequence turns on the solution chosen.

¹⁵ In this essay, I address Schauer’s responses that concern law’s capacity to affect behavior. Schauer (2016, part II) also responds to my arguments concerning the methodology of philosophy of law. My original essay suggests that philosophers can study phenomena with theoretically interesting natures, regardless of whether those phenomena correspond to our ordinary concepts. Schauer’s principal response is that “the subset of [things picked out by the ordinary use of ‘law’] that jurists tend to study might still be almost as heterogeneous as the full set of instances picked out by the word ‘law’ We ought not too quickly to assume that the category even legal theorists designate as ‘law’ has any more of an interesting nature or essence than the category encompassed by the word ‘game’” (Schauer

that law can create normative reasons, his point is that, as an empirical matter, these normative reasons do not in fact motivate people to act. “*The Force of Law* is substantially concerned with this empirical issue [of the law-produced motivations that people actually have].” (p. 6).

Schauer fails to see that my points undermine his empirical claim that, absent coercion, the law is not able to make a difference to behavior. As he emphasizes, that argument depends crucially on Schauer’s claim that, in order to evaluate what difference law makes, we have to set aside law-conforming behavior that is motivated by moral reasons. But many of these moral reasons are in fact generated by the law. If law generates moral reasons and moral reasons affect behavior, then it is a mistake to set aside all behavior motivated by moral reasons when we try to gauge law’s ability to affect behavior.

First, as I have pointed out, Schauer’s characterizations of obeying the law qua law often seem to suggest, misleadingly, that it is a bizarre kind of law fetishism; he leaves out a range of plausible reasons why people might adopt a policy of obeying the law qua law.¹⁶ By

2016, 13). But nothing in my proposal depends on the idea that the phenomena legal philosophers tend to study or designate as ‘law’ share a theoretically interesting nature. We can identify and study a phenomenon unified by an explanatory powerful property or properties, regardless of whether that phenomenon corresponds to ordinary usage (even that of legal theorists) (Greenberg 2016, 1955-56). I offered several potential examples of such properties (Greenberg 2016, 1956). Some of the organizations or institutions that possess these properties will fall under the term ‘law’ as used by legal philosophers, and others may not. Thus, the most important difference between Schauer and me on this topic may be that Schauer advocates continuing to investigate the phenomena picked out by ordinary usage, while I propose seeking to identify and study phenomena unified by explanatory powerful properties. I lack space to pursue these issues here, so will confine myself in the text to the topic of how law can affect behavior.

¹⁶ See Greenberg 2016: 1962-1964. As I pointed out in my original essay, his discussion might even give the inaccurate impression that he thinks that someone who complies with the law because she believes she has a general moral obligation to obey the law does not count as obeying the law because it is the law. 1962.

In response, Schauer writes that I “several times describe[] the idea of a general obligation to obey the law as a ‘fetish.’” Schauer 2016: 8. This gets matters backwards. The point I make is that *Schauer’s characterization of what it is to obey the law qua law* misleadingly makes it look as if such obedience to the law must be the result of a fetish: “Schauer’s characterization of the puzzled person are often misleading, suggesting as they do that the puzzled person must have a kind of fetish for the law, obeying merely because of ‘it’s very status as law’.” 1962. Against this characterization, I argued that “there are a wide variety of possible motivations for adopting a policy of obeying the law other than, on the one hand, believing that one has a general moral obligation to do so and, on the other, law fetishism.” Greenberg 2016: 1963. And, far from suggesting that the idea of an obligation to obey the law is a fetish, I pointed out that Schauer presentation “obscure[s] the possibility of obeying the law qua law because one believes that one has a moral obligation to do so.” 1963.

characterizing what it is to obey the law in this misleading way, Schauer unfairly makes it seem plausible at the start that obeying the law is unlikely to be common.

Second, Schauer emphasizes at several points that moral reasons motivate people's behavior (50, 58-59, 61-62). (In fact, one of his central arguments is that people regularly act for moral reasons, and that theorists, observing that people are not acting for self-interested reasons, wrongly infer that the law has influenced their behavior.) As he documents, there is a large body of empirical evidence that legal institutions are effective in motivating people.¹⁷ I argue – and Schauer appears to concede – that many of our moral reasons are in fact the result of the actions of legal institutions. (Schauer 2016: 2-7). If the law is effective at creating moral reasons, and people in fact are commonly motivated by moral reasons, then it seems that law has an important way of motivating behavior that is an alternative to both coercion and obedience to the law because it is the law.

Now Schauer could try to respond that people are motivated by moral reasons only when those moral reasons are completely independent of the law – that somehow reasons of fairness and the like only motivate people when legal institutions played no role in generating those reasons. In the first place, however, it is highly implausible that people are able to discern which moral reasons are independent of the law. Legal institutions are so thoroughly part of the background of our lives that it is easy to fail to notice their impact on the normative landscape. Moreover, it would be utterly ad hoc to suggest that people care about moral reasons – but only when they are independent of the law. So far as I am aware, none of the empirical evidence that

¹⁷ See Schauer 2015, 195 n. 21, 197 n. 8, 199 nn. 21-22. There is a large literature. In addition to the sources Schauer cites, see, for example, Fehr and Schmidt 1999; Fehr and Schmidt 2006; Fehr, Goette, and Zehnder 2009; Ederer and Stremitzer 2013/2016; Mischkowski, Stone, and Stremitzer 2016 and sources cited in the foregoing papers.

moral reasons motivate people suggests that the efficacy of those reasons lapses when legal institutions play a role in generating the moral reasons.¹⁸

In fact, Schauer's putative examples of instances in which he himself acts on moral reasons – and therefore the law has not made a difference to his behavior – are more plausibly cases in which the law has influenced his behavior by shaping the relevant moral reasons. Consider Schauer's claim that, when he abstains from shoplifting and insider trading, he acts consistently with the law, but not because of the law (p. 50). It is true, I assume, that even if shoplifting and insider trading were not prohibited, he would not engage in them. But it is too quick to conclude that the law has not shaped his behavior. The property rights that he is respecting — both in kind and in distribution — are the result of complex legal norms about how (and which) property rights can be acquired, transferred, and lost, not to mention legal regimes concerning securities, tax, and much else.

Finally, my argument undermines Schauer's critique of the empirical studies that purport to show the effectiveness of law in influencing behavior (in ways other than by threats of sanctions). Discussing the work of Tom Tyler, the leading empirical theorist in this area, Schauer points out that Tyler focuses on “the minor prohibitions of the criminal law, such as shoplifting, littering, making excessive noise, and the laws regulating driving and parking” (p. 60). Schauer dismisses the relevance of this work on the ground that “in almost all the cases in which Tyler finds that people claim they would follow the law for reasons other than fear of sanctions, the laws are ones the followers likely think are good laws” (p. 60); therefore, they may be acting on moral reasons. In these kinds of cases, however, as with insider trading, the relevant moral reasons have been brought about in part by law. People may generally agree that the minor

¹⁸ For citations to the empirical literature, see the previous footnote.

prohibitions of the criminal law are supported by moral reasons, but when people follow rules concerning how long and where one may park, how much noise one may make, how one may drive, and who has property rights in what (and therefore what counts as shoplifting), these precise rules have been shaped by legal institutions, so law has made a difference to those people's behavior. We can put the point in terms of Schauer's test of whether people would have acted in the same way "but for the law" (p. 49):¹⁹ do we really think that people who conform to the minor prohibitions of the criminal law because they think those prohibitions are good would act in exactly the same way — parking in the same places for the same lengths of time, following the same rules of the road, respecting the same property entitlements, and so on — if there were no legal system and they were merely consulting their prelegal moral intuitions?

A related point is that Schauer's framing of the question of law's ability to affect behavior without sanctions is mistaken. At a crucial point in his discussion of Tyler's work, Schauer dismisses Tyler's conclusion that the "perception of legitimacy" is an important factor in influencing behavior: because people think the laws are good, Tyler's work on the importance of a perception of legitimacy teaches us "little about the extent to which the fact of legality leads people to obey laws they think wrong and not merely costly, frustrating, or inconvenient" (p. 60). If our goal is to understand how and whether the law can affect behavior without sanctions, the crucial question is not whether the law can get people to obey legal requirements they think wrong. Indeed, to the extent that the law modifies behavior by altering the relevant moral considerations, it will never get people to do what they ex post — after taking the law

¹⁹ "Our interest in law is largely an interest in law insofar as it is causally consequential, and for that purpose the distinction between law that makes a difference to behavior and law that makes no difference is of central importance. If we are interested in obedience to law, we must focus on law's effect on people who, but for the law, would have done something other than what the law commands." (p. 49)

into account — believe is wrong. Rather, it affects behavior precisely by changing moral reasons, thereby changing what people believe is the right thing to do.

The problem with Schauer's empirical argument can be put another way. He scrutinizes the studies to determine whether there is evidence that people obey the law merely because it is the law. Arguing that the studies do not provide such evidence (because they do not exclude the possibility that people are acting on moral reasons), he concludes that, in order to affect behavior, the law must rely on coercion. He never considers the possibility that the law affects behavior in a third way, by altering the moral profile.

Why does Schauer not recognize that his neglect of the moral reasons that law creates undermines his empirical claims? He suggests that the way in which, according to me, the law can motivate people by creating normative reasons, is not importantly different from obedience to law because it is the law (Schauer 2016: 8-10). In response to my example of the way in which law can give people reasons to participate in a cooperative scheme, he objects that:

People participate in many cooperative schemes that exist apart from or outside the law. After an automobile accident, for example, a Good Samaritan may stand in the road to direct traffic away from the accident. Here the law is absent, but there is still a good reason to obey the instructions of the Samaritan.

The question then is whether, sanctions apart, people would have a better or additional reason to follow the same instructions in the same circumstances from someone acting with the authority of law (Schauer 2016: 9).

But, if, as Schauer emphasizes, the goal is to determine how law can influence behavior, then this question is not the appropriate one. For it is a mistake to maintain that the actions of legal institutions have made a difference to behavior only if non-legal actors, by taking the same actions, could not have created the same reasons. The fact that a Good Samaritan could in principle have created reasons of the same sort that the law creates does not show that the law has not made a difference to behavior. If a firefighter rescues someone from a burning house, but

her status as a firefighter did not play a role in the rescue – e.g., she could have performed the same rescue without that status – it obviously does not follow that the firefighter did not make a difference. Similarly, if the law is able to change the relevant circumstances, thereby creating moral reasons to participate in a scheme, and these moral reasons motivate people to participate in the scheme, the law has made a difference to their behavior. The fact that the law's status is not what motivates people to act is irrelevant. (If it were true that, had the legal institutions not acted, some other actor would in fact have successfully created the same reasons, then there would be a serious argument that the law had not made a difference; but, in general, there is no basis for assuming that some other actor would have done so.)²⁰

We can drive home the point by considering the way in which the law makes a difference to behavior by threatening sanctions. If a Good Samaritan credibly threatened sanctions for bad behavior, the Good Samaritan could create prudential reasons for avoiding that behavior. Obviously, the fact that a Good Samaritan could in principle create such reasons does not show that the law does not make a difference to behavior when it threatens sanctions.

Schauer assumes throughout that, without coercion, law can only make a difference to behavior through obedience to law qua law.²¹ As a result, he misunderstands the account I

²⁰ If a Good Samaritan could as effectively make the scheme salient and ensure that many people would participate, she could create the same reasons. In practice, however, the law typically has many advantages over a Good Samaritan in generating moral reasons. Legal institutions are better than most individuals and institutions at, for example, setting up a mechanism to implement a particular scheme, publicizing that scheme, ensuring that many people will participate, harnessing reasons of democracy, and so on. Moreover, on my view, it is part of the point or aim of law to solve moral problems by altering the moral profile, so it is no accident that it is often legal institutions that take the necessary actions even if other institutions in principle could do so.

²¹ Schauer's failure to recognize that my alternative way of motivating people does not involve obedience to law qua law may derive in part from an ambiguity in the term 'law.' See Greenberg 2011: 40. In one common sense of the term, 'law' is roughly synonymous with *legal system* (including both legal institutions, such as the legislature, police, and prisons, and the content of the law). In a narrower sense, 'law' refers to *the content of the law*, i.e., to *the content of legal norms*. It is often easy to tell from context which sense is intended. For example, when we ask what the law is in California concerning carrying concealed weapons, it is plain that we use the term in the latter, narrower sense. Now consider the question central to Schauer's book of what tools the law has to ensure compliance with legal norms, and, more specifically, to what extent law must rely on coercion. If one took the question to be what tools *the content of the law* has to affect behavior, then arguably obedience to law qua law would be the only possibility. On this way of thinking, it doesn't count as the content of the law itself that affects behavior unless people obey the law simply

develop of how law can motivate people by changing the normative reasons that apply to them. Although I emphasized in my original essay that I offer an *alternative* to obedience to law qua law, Schauer interprets me as offering merely a minor variation on the theme of obedience to law qua law.²² Having pointed out that a Good Samaritan could create reasons to participate in a cooperative scheme, he suggests that, as I take the law to make a difference, I must be claiming that the fact “that the law has created the scheme should make a moral difference.” Schauer 2016: 9. But, he goes on to argue “if it does, it is because people are treating the law-ness of the directive as morally relevant, and it is here that the difference between Greenberg’s picture and the idea of a moral obligation to obey the law begins to evaporate.” Schauer 2016: 9. To put it another way, Schauer takes me to be offering a way in which the law can provide content-independent reasons – reasons to act simply because the law says so.²³

But it is precisely my point that the law can make a difference *without providing content-independent reasons*. As I explained, if the actions of legal institutions have the effect of making a particular cooperative scheme salient and ensuring that many people will participate in the scheme, those actions create reasons – of helping others, solving the particular problem, and fairness – for participating in the scheme. People who participate in the scheme in order to help others, solve the problem, and act fairly are *not* obeying the law because it is the law. The

because it is the law. But understanding the question of what tools the law has for affecting behavior in this narrow way would deprive the question of much of its interest. If a legal system has ways of modifying behavior other than the use of coercion, it doesn’t matter that those ways don’t count as ways in which *the content of the law* itself does the modifying. Indeed, even a legal system’s using coercion to affect behavior arguably would not count as a way in which the content of the law itself modifies behavior.

²² In fact, he takes me to have offered merely a type of reason for obeying the law qua law, which he therefore thinks misses his point that however good the reasons for obeying the law qua law, those reasons do not in fact motivate people: “And thus one of the book’s pervasive claims, supported by various forms of empirical and experimental data, is that obedience to law *qua* law, whether for reasons of actual obligation to obey the law because it is law, or for the kinds of reasons that Greenberg illuminates, or simply because of irrational rule fetishism, is in reality less common than many people and many theorists believe” (Schauer 2016: 6-7).

²³ In my original essay, I avoided the term “content-independent” because it is used in different ways by different writers and is in need of theoretical precisification. On content independence, see Greenberg 2011: 43-47. Schauer’s response emphasizes that he takes content-independent reasons to be the only alternative to coercion, so I use the term here to emphasize that the alternative I develop does not involve content-independent reasons.

reasons that they act on are *not* content-independent: for example, it is the fact that by participating, they will help to solve a community problem and avoid acting unfairly, that motivates them to act, not the fact that they have been instructed to do so by an institution with legal authority. So it is not my suggestion that people “treat[] the law-ness of the directive as morally relevant.” Rather, without people giving any regard to the fact that the relevant institutions have legal authority, the law can create moral reasons by changing the relevant circumstances.²⁴

Conclusion

In sum, Schauer neglects an important way in which the law can motivate people. It shapes our moral reasons. Schauer’s response that he is concerned with empirical motivations, not normative reasons, misses the point. His empirical argument depends crucially on his assumptions that, when people act for moral reasons, the law has not made a difference to their behavior and that the use of coercion is the only alternative to getting people to obey the law simply because it is the law. Once we see that the law regularly molds our ordinary moral reasons, not by creating content independent reasons, but by changing the morally relevant circumstances, we see that much morally motivated behavior is in fact behavior that is importantly influenced by the law. Regardless of the empirical frequency of puzzled people, because people respond to moral reasons, law has an important alternative to the use of coercion.

²⁴ In my original essay, I pointed out that not only is generating moral reasons an alternative way to motivate people (as opposed to using threats of sanctions to generate prudential reasons), but the law can also use *coercion* to generate such moral reasons. Greenberg 2016: 1970. Schauer takes for granted throughout the book that coercion affects behavior only by generating prudential reasons for complying with the law. Given the topic of the book, it is especially noteworthy that coercion can be used to affect behavior by generating moral reasons.

REFERENCES

- Fehr, E., Goette, L. and Zehnder, C. 2009. "A Behavioral Account of the Labor Market: the Role of Fairness Concerns," *The Annual Review of Economics*, 2009.1:355-84.
- Fehr, E. and Schmidt, K.M., 1999. "A Theory of Fairness, Competition, and Cooperation," *Quarterly Journal of Economics*, 114 (3): 817-868.
2006. "The Economics of Fairness, Reciprocity and Altruism – Experimental Evidence and New Theories," in *Handbook of the Economics of Giving, Altruism and Reciprocity*, 1, 615-691.
- Greenberg, M. 2007. "The Prism of Rules." Available at <http://ssrn.com/abstract=1042121>.
2011. "The Standard Picture and Its Discontents," *Oxford Studies in the Philosophy of Law*, 1: 39.
2014. "The Moral Impact Theory of Law," *Yale Law Journal*, 123: 1288.
2016. *How to Explain Things with Force*, *Harvard Law Review*, 129: 1932.
- Hart, H.L.A. 1994. *The Concept of Law* (2d ed. 1994).
- Schauer, F. 2015. *The Force of Law* (Cambridge, MA: Harvard University Press).
2016. "How (and If) Law Matters" (Responding to Mark Greenberg, *How to Explain Things with Force*), *Harvard Law Review Forum*, 129: 350.
- Stone, R. 2015. "Legal Design for the 'Good Man'" (November 15, 2015) (unpublished manuscript) (on file with author).