

# POSNER'S FOLLY: THE END OF LEGAL PRAGMATISM AND COERCION'S CLARITY

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## ABSTRACT

*Highly influential legal scholar and judge Richard Posner, newly retired from the bench, believes that law is irrelevant to most of his judicial decisions as well as to most constitutional decisions of the U.S. Supreme Court. His recent high-profile repudiation of the rule of law, made in statements for the general public, was consistent with what he and others have been saying to legal audiences for decades. Legal pragmatism has reached its end in abandoning all the restraints of law. Posner-endorsed "epistemological democracy" obscures a discretion that is much worse than the rule of law promoted by epistemological authoritarianism. I argue that a focus on conceptual essentialism and on the recognition of coercive intent as essential to the concept of law, both currently unpopular among legal theorists and many jurists, can clarify legal understandings and serve as starting points for the restoration of the rule of law. A much more precise, scientific approach to legal concepts is required in order to best ensure the rational and moral legitimacy of law and to combat eroding public confidence in political and legal institutions, especially in an increasingly diverse society. The rational regulation by some (lawmakers) of the real-world actions of others (ordinary citizens) requires that core or central instances of concepts have essential elements rather than be "democratic." Although legal pragmatism has failed just as liberal theory generally has failed, the pragmatic value of different conceptual approaches is, in fact, the best measure of their worth. Without essentialism in concept formation and an emphasis on coercion, the abilities to understand and communicate effectively about the practical legal world are impaired. Non-essentialism grants too much unwarranted discretion to judges and other legal authorities, and thus undermines the rule of law. Non-essentialist or anti-essentialist conceptual approaches allow legal concepts to take on characteristics appropriate to religious and literary concepts, which leads to vague and self-contradictory legal concepts that incoherently and deceptively absorb disparate elements that are best kept independent in order to maximize law's rationality and moral legitimacy. When made essentialist, the concept of political positive law shrinks, clarifies, and reveals its true features, including the physically-coercive nature of all laws and the valuable method of tracing the content of law by following its coercive intents and effects.*

## KEYWORDS

*Legal Philosophy, Legal Theory, Jurisprudence, Concepts, Essentialism, Coercion*

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## CONTENTS

INTRODUCTION .....	367
I. THE PROBLEM OF LEGAL NON-ESSENTIALISM .....	372
A. The Expansion of Government Power.....	372
B. Diversity and the Need for Limits.....	372
II. POSNER’S VIEW AND THE DESIRABLE SHIFT TO SCIENTIFIC-STYLE CONCEPTS .....	375
A. Posner the Non-Scientific Juridical Scientist.....	375
B. Posner the Nihilist.....	378
III THE DUTY OF ESSENTIALISM.....	380
IV. LAW AS THE HUMANITY THAT MUST USE SCIENTIFIC CONCEPTS .....	384
A. Law as the Most Scientific Humanity.....	384
B. Refining the General into the Regulatory .....	386
C. Tracing Law via Coercion.....	387
V. LEGAL PHILOSOPHY AND THE CLARIFYING ROLES OF ESSENTIALISM AND COERCION .....	389
A. Law, Knowledge, and Coercion.....	389
B. Post-Modern Epistemological Democracy versus Law .....	393
C. Descriptive versus Prescriptive Values of Non-Essentialist Understandings .....	395
D. Posner and the Essential as the Pragmatic .....	396
CONCLUSION .....	399

## INTRODUCTION

The candor in retirement of Richard Posner, the ex-libertarian former judge, displays an admirable lack of limits. In an interview published on September 11, 2017, he explained for a general audience just how small a role the law played in his decisions while he served on the U.S. Court of Appeals for the Seventh Circuit:

“I pay very little attention to legal rules, statutes, constitutional provisions,” Judge Posner said. “A case is just a dispute. The first thing you do is ask yourself—forget about the law—what is a sensible resolution of this dispute?” The next thing, he said, was to see if a recent Supreme Court precedent or some other legal obstacle stood in the way of ruling in favor of that sensible resolution. “And the answer is that’s actually rarely the case,” he said. “When you have a Supreme Court case or something similar, they’re often extremely easy to get around.”<sup>1</sup>

Posner is both one of the most influential legal scholars as well as one of the most influential judges of the past few decades, and is by some measures the most-cited legal scholar of the 20<sup>th</sup> Century.<sup>2</sup> That such statements from such a prominent jurist could be made without attracting much controversy says a great deal about the ascendancy, in our time, of the rule of men over the rule of law. It did prompt the authors of one U.S. Supreme Court filing to complain, “Upon leaving the bench, Judge Posner even more clearly revealed his personal contempt for any constraint on his exercise of federal judicial power.”<sup>3</sup> In truth, Posner said no more than he and other legal pragmatists, legal realists, critical theorists, disgruntled originalists and textualists, and others have been saying for decades. It was simply unusual to hear it so baldly from a prominent judge in a prominent forum for the non-legal public. Judges typically prefer to profess reverence for the Constitution and law’s constraints, particularly in front of laymen.

Posner’s statement described the logical end of legal pragmatism as commonly understood and practiced in America: *An end to the rule of law itself and the substitution of the discretion of political and legal authorities so far as politically and socially tolerable*. And in truth, there are always good reasons to erode the rule of law. Legal rules and precedents often get in the way not only of what particular authorities believe are sensible resolutions of disputes, but of what almost anyone would consider sensible resolutions of some disputes, and even Aristotle acknowledged that the rule of just men could be superior to the rule of just laws because of the inability of rules to properly fit every set of facts—or could be superior if just men were not so rare.<sup>4</sup>

<sup>1</sup> Adam Liptak, *An Exit Interview With Richard Posner, Judicial Provocateur*, N.Y. TIMES, (Sept. 11, 2017), <https://www.nytimes.com/2017/09/11/us/politics/judge-richard-posner-retirement.html>.

<sup>2</sup> Fred R. Shapiro, *The Most-Cited Legal Scholars*, 29 J. LEGAL STUD. 409, 424 (2000).

<sup>3</sup> Brief of Public Advocate of the United States et al. as Amici Curiae Supporting Petitioners at 26, *Kenosha Unified Sch. Dist. No. 1 Bd. of Educ. et al. v. Whitaker*, 138 S. Ct. 1260 (2018) (No. 17-301) 2017 WL 4404962 (U.S.).

<sup>4</sup> Cf. ARISTOTLE, POLITICS, GUTENBERG, bk. III, ch. XV (1912), <http://www.gutenberg.org/files/6762/6762-h/6762-h.htm#link2HCH0031> (“Now the first thing which presents

Many are content to ignore the erosion of the rule of law when they trust political and legal authorities, but when those authorities change, as they have been with more-than-typical drama recently, those previously content suddenly rediscover the value of strong, clearly rule-oriented, and honored laws that restrain authorities' discretion—but they rediscover this too late. Perhaps the willingness to tolerate suboptimal results in particular cases in order to preserve the strength and stability of rules is the chief hallmark of distinctively legal reasoning,<sup>5</sup> and the erosion of the rule of law reflects the erosion of exactly this sort of reasoning—perhaps along with reasoning as a whole. Thus is lost the appreciation of one of the pragmatic values of tolerating suboptimal results: Such powerful respect for rules may have the unfortunate effect of such results, but also tends to prevent even worse consequences flowing from the abuses by political and legal authorities of their own discretion.

I share the increasingly common if not clichéd view that we have reached yet another new low in the crisis of confidence in American institutions—perhaps it is not overwrought to say in the institutions of Western Civilization generally—and that our politics, law, and education are suffering as a result, and that this suffering is very likely to worsen. Unfortunately, the institutions themselves have done much to lose citizens' confidence. The denunciations of the federal judiciary by prominent politicians, however destabilizing, seem justified. Judges and their defenders advocate the need for an independent judiciary, but judging from Posner's statements, the judiciary has declared itself independent of the law.

Much has been written decrying the decline of the rule of law and what to do about it, and I will not bore the reader by rehashing those previously-made arguments here. Others have long offered broader critiques of legal pragmatism.<sup>6</sup> Instead, from a corner of legal theory, I will sketch an approach to broadly reconceptualizing law beginning with its *essentially physically-coercive nature*. From a naturalistic and fundamentally Aristotelian point of view that reasons first from the characteristic effects of experienced realities upon the typical conscious human mind, the essential elements of the concept of law—those elements needed to distinguish political positive law from other phenomena—can be discerned to necessarily include a *socially-recognizable coercive intent* on the part of a lawmaker toward her legal subjects, i.e. those bound in duty to obey her laws. That

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itself to our consideration is this, whether it is best to be governed by a good man, or by good laws? Those who prefer a kingly government think that laws can only speak a general language, but cannot adapt themselves to particular circumstances; for which reason it is absurd in any science to follow written rule. . . .”).

<sup>5</sup> Cf. FREDERICK SCHAUER, THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING 7 (2009), “[E]very one of the dominant characteristics of legal reasoning and legal argument can be seen as a route toward reaching a decision *other than* the best all-things-considered decision for the matter at hand.”

<sup>6</sup> See, e.g., Smith, *The Pursuit of Pragmatism*, 100 YALE L. J. 409 (1990); RONALD M. DWORKIN, LAW'S EMPIRE (1986); BRIAN Z. TAMANAHA, LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW (2006); Richard H. Weisberg, *It's a Positivist, It's a Pragmatist, It's a Codifier! Reflections on Nietzsche and Stendhal*, 18 CARDOZO L. REV. 85 (1996); Sotirios A. Barber, *Stanley Fish and the Future of Pragmatism in Legal Theory*, 58 U. CHI. L. REV. 1033 (1991); and John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 31 HARV. J. L. & PUB. POL'Y 917 (2008).

coercive intent ultimately must be backed by physical coercion or the threat of it,<sup>7</sup> and *every law must have this coercive intent behind it to be a political positive law at all*. Even statutes containing, say, only definitions of terms or other superficially non-coercive elements must relate in some way to the legally-sanctioned coercion of subjects in order to be part of law.

Socially-recognizable coercive intent is not the only essential element of the concept of law—authority, social legitimacy, and a rule-like nature are among the others—but in my view, this intent is certainly essential even though almost all contemporary legal theorists take the opposite view. Seeing laws and legal systems consistently as the coercive structures that they are—rather than conceptualizing them in deceptive ways such as by emphasizing their empowering, rights-conferring, expressive, voluntary planning, “soft,” or moral aspects—can help to limit law and the discretion of legal authorities to their proper spheres. Legal pragmatism and other approaches have not.

I recently offered a long argument in favor of a return to a form of the Jeremy Bentham-John Austin coercive command theory of law.<sup>8</sup> Instead of repeating that argument, here I focus on refracting Posner’s views and legal pragmatism’s repudiation of the rule of law through the lenses of *conceptual essentialism* and law’s essentially coercive nature in the hope of outlining a path back to law and confidence therein. The argument in favor of conceptual essentialism and law’s coercion is certainly not the most important part of the effort to restore the rule of law and confidence in political and legal institutions, yet is overlooked and can play a valuable role in understanding and rectifying our current predicament, and indeed in understanding law in all times and places.

In sum: I contend that to best justify law and any legal system as a legitimate enterprise, as both rationally and morally acceptable when engaged in coercing citizens, legal concepts must be essentialist—thus rendering law an exercise in essentialism.<sup>9</sup> Conceptual non-essentialism of the sort famously described by Wittgenstein, whom Posner mentions regularly in his scholarly work, allows legal concepts to take on the vague, equivocal, and contradictory characteristics appropriate to religious and literary concepts. Wittgenstein himself said, “I am not a religious man but I cannot help seeing every problem from a religious point of view,”<sup>10</sup> and Posner wrote, “I think the literary analysis of [judicial] opinions is highly promising”—and these are exactly the problems.<sup>11</sup> Unsurprisingly, influential anti-

<sup>7</sup> From now on, I will use “physical coercion” and “physical force” to include the threat of physical force unless indicated otherwise.

<sup>8</sup> See generally Joseph D’Agostino, *Law’s Necessary Violence*, 22 TEX. L. REV. & POL. 121 (Fall 2017).

<sup>9</sup> I refer here to political positive law, that is, rules and commands laid down by socially-legitimated authorities given responsibility for the ultimate earthly ordering of a human society.

<sup>10</sup> RUSH RHEES, DISCUSSIONS OF WITTGENSTEIN 94 (1970). By the end of his life, Wittgenstein had abandoned the view, often attributed to him, of considering religious language meaningless. (“The early Wittgenstein still regards religion as non-scientific, meaningless and nonsensical, whereas the later Wittgenstein only maintains the first idea.” Joost Hengstmengel, ‘Philosophy to the Glory of God’: Wittgenstein on God, Religion and Theology’ (2010), <https://hengstmengel.wordpress.com/2010/02/22/philosophy-to-the-glory-of-god-wittgenstein-on-god-religion-and-theology/>).

<sup>11</sup> RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION 269 (1988).

foundationalist legal scholar and literary theorist Stanley Fish<sup>12</sup> wrote some time ago, “Posner puts the cap on his anti-essentialist, anti-foundational, anti-rational (in the strong sense), anti-metaphysical, and deeply pragmatist view of the law, and it is perhaps superfluous for me to say that I agree with him on almost every point.”<sup>13</sup>

Instead, I believe that *legal concepts should be patterned after scientific ones* rather than religious or literary ones, not because religious and literary concepts are not highly valuable within their spheres, but because they are detrimental within the strictly legal sphere even though all of these spheres inevitably—and productively—interact with one another. Legal concepts need a worldly, everyday epistemological foundation to be something more than intellectual games with coercive effects, and the foundationalism I favor is the empirically-based, realist one that begins with sensory observation and experience. Epistemological anti-foundationalism that refers all inferences to other inferences, and nothing else, is too arbitrary for real-world exercises of *social practical reason* such as law. However, I do not insist on metaphysical foundationalism here—a foundationalism based upon social convention will do for my argument in this article. In other words, the agreed-upon bedrock upon which to base our inferences need not be considered to be the absolute metaphysically true one, but only one treated as such, i.e. accepted as socially objective and universal for the purposes of legal reasoning. Thus, my argument is compatible both with foundationalism and some forms of anti-foundationalism.<sup>14</sup>

Legal concepts must refer to socially-objective realities, understandable in the same general way by all concerned, as well as objective physical realities in order to justify their involvement in any rational scheme of regulating the behavior of a society’s members. Different subjective perspectives must be harmonized when one person, or a small group of persons, commands others to conform to certain concepts, rules, and commands—whenever a legal authority or legal subject can have a substantially different understanding of a legal concept, rule, or command even while remaining reasonable and diligent, the law has failed to be its best rational self. If disagreement were substantial and widespread enough, the content of the law would not exist as a truly social phenomenon at all, but only as a collection of subjective and contradictory personal understandings. The alternative to essentialism means that different legal subjects and even different legal authorities, while remaining reasonable, too easily can have fundamentally different understandings of laws and legal obligations, and this tends to defeat the

<sup>12</sup> For Fish’s literary theory of interpretation, see generally STANLEY FISH, *IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES* (1982). On defending his own version of anti-foundationalism, see, e.g., *id.* at 368–70. He has said elsewhere, “[T]he thesis of anti-foundationalism is not that there are no foundations, but that whatever is taken to be foundational has to be established in the course of argument and debate and does not exist to the side of argument and debate.” (Stanley Fish, *Dennis Martinez and the Uses of Theory*, 96 *YALE L.J.* 1773–1800, 1796 (1989)).

<sup>13</sup> Stanley Fish, *Almost Pragmatism: Richard Posner’s Jurisprudence*, 57 *U. CHI. L. REV.* 1447, 1456 (1990) (referring to statements in Posner’s book *THE PROBLEMS OF JURISPRUDENCE* (1990)).

<sup>14</sup> For an introduction to foundationalism and bibliography of modern topical works, see ALI HASAN & RICHARD FUMERTON, *FOUNDATIONALIST THEORIES OF EPISTEMIC JUSTIFICATION*, *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (2016), <https://plato.stanford.edu/archives/win2016/entries/justep-foundational/>.

concept of law as a rational and presumably morally legitimate way of regulating subjects' behavior.

Maximizing the pragmatic value of law thus mandates essentialism, and if Posner's opposition of essentialism and pragmatic value includes conceptual approaches, as it appears to do, it is counter-productive. In explaining legal pragmatism, Posner writes, "I mean, to begin with, an approach that is practical and instrumental rather than essentialist—interested in what works and what is useful rather than in what 'really' is."<sup>15</sup> I believe that legal concepts can and should be based upon the really useful.

Although metaphysical and conceptual essentialism may both be unfashionable in many quarters, at least the latter is imperative for law, which depends upon the artificial classification of phenomena in ways that must be objectively recognizable to the subjective perceptions of a public. Although large numbers of legal concepts, such as those associated with "law," "crime," "negligence," "liability," and "due process" are not formed directly from our shared sensory experience of the natural world, a universally-intelligible social understanding of these concepts still must be constructed.<sup>16</sup> Further, this understanding must be clear enough to justify using those legal concepts in the *application of coercion* against ordinary legal subjects—that is, against citizens who must obey the law but who had no hand in the formulation of those concepts.<sup>17</sup>

In other words, conceptual essentialism is necessary to "doing law" properly, and makes it harder for legal authorities to "forget about the law" while treating the legal rulings of higher authorities as things "to get around."

After essentialism is established as the proper path to maximizing law's rationality and moral legitimacy, tracing the legal system's essential coercive intent and effect reveals more of law's content than any other method. This emphasis on law's coercion of citizens may also encourage a more libertarian, or at least more precise and restrained, use of law in the future than otherwise may be the case, and greater precision and restraint should contribute to the regrowth of confidence in political and legal institutions. I believe that Posner's prodigious writings, so valuable in some areas, have hurt far more than helped here.

In Part I, I outline the problems caused by non-essentialist thinking in legal concepts. In Part II, I discuss Posner's views and the desirability of employing scientific-style concepts in law. Part III briefly explains that essentialism is required in social practical reasoning and that non-essentialist concepts can and should be made into essentialist ones. I also give a summary of the steps of my argument. Part IV advocates for understanding law as the humanity that should use scientific concepts. In Part V, I very briefly and partially situate my argument in the contemporary flow of legal philosophy with a continued eye toward Posner's thought and the clarifying value of essentialism and coercive intent.

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<sup>15</sup> RICHARD A. POSNER, *OVERCOMING LAW* 4 (1995).

<sup>16</sup> By "universally intelligible," I mean that those who are meant to obey laws are able to understand the laws that they are meant to obey. I do not mean to include young children or the mentally disabled, nor do I mean to say that society's members must actually understand the law, only that they could if they tried at least insofar as it applied to their own behavior.

<sup>17</sup> By "legal subject," I mean anyone upon whom the law places a binding requirement to act in a certain way. I consider a requirement to "not act" in a certain way to be a kind of requirement to "act."

## I. THE PROBLEM OF LEGAL NON-ESSENTIALISM

### A. *THE EXPANSION OF GOVERNMENT POWER*

Legal concepts such as substantive due process, equal protection, privacy, freedom of speech, establishment of religion, free exercise, the right to bear arms, the personhood of corporations, and negligence have justified the expansion of the power of the courts, and sometimes of other branches of government, in dramatic ways.<sup>18</sup> It is difficult to say how much non-essentialist thinking has facilitated this expansion since judges, regulators, and legislators typically do not indicate their conceptual approaches—and though I expect few consciously consider the question of essentialism versus non-essentialism, they may employ non-essentialism without saying or without realizing so.<sup>19</sup>

So, in examining the work of most judges and other legal authorities, the problem posed by non-essentialism is twofold. First, there is the effect, perhaps mostly psychological, of the popularity of non-essentialism in legal scholarship and elsewhere, and this may be one of the factors rendering religious- and literary-style conceptual imprecision more and more acceptable in law either explicitly or implicitly. The imperialistic expansion and long-burgeoning Gnostic vagueness of so many legal concepts over time may draw some of their energy and justification from this source, even though legislators and judges rarely delve openly into the philosophy of concepts, or of anything else, in the way Posner so intelligently does in many areas—yet the unconsidered philosophies behind their work determine the outcomes of that work to a great extent, especially in difficult cases. Second, in the future, judges and others may come to adopt explicitly the non-essentialism already adopted by many theorists within and without the legal academy. Regardless, judges and other legal authorities have a notorious habit of imprecise use of concepts, and a conscious adoption of stricter approaches to conceptual definitions would yield considerable benefits to puzzled subjects, as well as puzzled legal authorities and legal practitioners, who try to make sense of and obey the law.

### B. *DIVERSITY AND THE NEED FOR LIMITS*

This is all the more important in our time of increasing diversity and disagreement, as shared norms splinter and the unity of a Christian-ish, Anglo cultural and legal tradition gives way to a clashing collection of differing traditions and newly-minted doctrines. The law and legal authorities *can no longer rely so strongly on socially hegemonic ideas and attitudes to underlie and shape ill-defined concepts*

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<sup>18</sup> See, e.g., MICHAEL S. GREVE, *THE UPSIDE-DOWN CONSTITUTION* (2012); RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION* (2004); and AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION* (2012).

<sup>19</sup> Cf., e.g., this from an Australian scholar: “A person, purpose or activity falls within the meaning of the term if, and only if, it possesses all of the ‘essential features’ or essential characteristics’ that define that term. I shall argue that the semantic model that judges actually use frequently differs from this simple proposition. In particular, they often employ definitions that do not consist of ‘essential features.’” Simon Evans, *The Meaning of Constitutional Terms: Essential Features, Family Resemblance and Theory-Based Approaches*, 29 U.N.S.W.L.J. 207, 207–08 (2006).



and their application, not to mention rely on them to buttress confidence in their authority, but rather must make themselves unmistakable to a much greater variety of not-easily-compatible perspectives. “Due process,” “privacy,” and “freedom of speech” mean more differing things to more different groups of Americans today than they did 50, 30, 20, or even ten years ago, and methods of approaching legal questions continue to diversify—how long before what remains of the *traditional Anglo-American legal tradition must give way* to other elements on many major points? All this argues for greater need of clarity and essentialism in law, which cannot legitimately straddle questions of what to require of its subjects but rather must give those subjects pragmatically precise instructions—and, further, when unenforceable traditional norms and manners decline in political culture or society generally, they must be replaced by coercive norms to maintain order. Those new coercive norms should be clearly formulated.

And so, as these coercive norms expand and social diversity grows, delimitation is needed all the more, though it is typically desirable in law in all times and places. Perhaps one day, comments such as those of Posner and the following from Ronald Dworkin’s *Law’s Empire* will ring false instead of too true: “We are subjects of law’s empire, liegemen to its methods and ideals, bound in spirit while we debate what we must therefore do. What sense does this make? How can the law command when the law books are silent or unclear or ambiguous?”<sup>20</sup> *Silent or unclear or ambiguous*—how can ordinary citizens obey, or respect, a system that requires them to conform to the silent and unclear and ambiguous, especially when they no longer conform or wish to conform to residual WASP norms?

It is not that law is impossible with Wittgenstein-style non-essentialist concepts, but that such understandings needlessly render law less comprehensible and less stable. Although some law will always be vague, ambiguous, or even self-contradictory, subjects must as a general rule be able to understand the law and the concepts it uses so that they can obey it<sup>21</sup>—in particular, they must be able to recognize the coercive intent of legal authorities and what that intent signals concerning the behavior demanded of them<sup>22</sup>—or else law loses its legitimacy as an exercise in reason and justice.

Beyond this, lawmakers and other legal authorities should strive to make laws and legal concepts *not just minimally clear, but as clear as reasonably possible*—part of the evaluation of a lawmaker, as good or poor at her function, is her capacity for the *right level of precision*. The more unclear the law is, the more its legitimacy

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<sup>20</sup> DWORKIN, *supra* note 6, at VII (1988).

<sup>21</sup> “It is a presupposition of thought itself that some kind of objective ‘rightness’ exists.” HILARY PUTNAM, REASON, TRUTH, AND HISTORY 124 (1981). (Whether this is true in an absolute metaphysical sense, it must be true in some sense in order to fix the meaning of law well enough for subjects to obey it, and further true enough to declare coercive legal rules and commands morally “right”—or at least not morally wrong—if law is to be legitimate in a way that the rules of organized crime syndicates cannot be.)

<sup>22</sup> This formulation emphasizes the internal points of view of, first, the legal subject and, second, the lawmaker while recognizing that external signs form the only communications between internal points of view. Like an approach outlined by Dan Priel, this “could thus maintain the concern with the ‘internal point of view’ by examining the role law plays in people’s lives and the way these issues touch on questions of legitimacy but adopt an ‘external’ methodology for answering this question.” Dan Priel, *Jurisprudence Between Science and the Humanities*, 4 WASH. U. JUR. REV. 269, 322 (2012).

rightly erodes. Law is a matter of practical reason, not theoretical reason, and should conform to the requirements for guides to reliable decision-making about courses of action—ultimately, law is meant to tell both legal authorities and legal subjects *what to do* rather than *what to think*. Not only is law an exercise in practical reason, but it is an exercise in social practical reason—the reasoning must be understood not only by those doing the reasoning, but by a number of distant others. The imprecision unavoidable and sometime fruitful in the realm of pure theory, or even in the realm of religious and moral thought meant to guide behavior, must be resolved into precision when commanding others to “do” or “do not.”

Many theorists, conspicuously since the publication of Wittgenstein’s *Philosophical Investigations*,<sup>23</sup> have variously denied that concepts have, should have, should always have, or even *can* have essentially-defined content, and this certainly has included legal theorists regarding legal concepts.<sup>24</sup> They assert that many or all concepts, either as ordinarily used or as in any way useable, do not have any essential elements to their understandings but are rather collections of disparate elements with no commonality or set of commonalities.<sup>25</sup> The most famous example used by Wittgenstein is “game,” which he claimed had no feature common to all the different core or central—and not just marginal—uses of the concept.<sup>26</sup> Instead, he claimed, strands of similarity ran through different core instances of games as through a rope but that no one strand, no one property, ran through all of them. This is like a family, he said, whose members often share certain traits such as eye color or temperament, but no one trait must be shared by all family members for those members to still make up a family or even to appear to be a family.<sup>27</sup> Anti-essentialist or non-essentialist concepts are often called family resemblances, cluster concepts, prototypes, or generics, and each term has an associated theory that approaches the question somewhat differently, although I will tend to treat them together.<sup>28</sup>

<sup>23</sup> LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (G.E.M. Anscombe trans., 1967).

<sup>24</sup> See, e.g., Torben Spaak, *Schauer’s Anti-Essentialism*, 29 *RATIO JURIS* 182–214 (2016); James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 *U. PA. L. REV.* 685 (1985); David Alan Sklansky, *Too Much Information: How Not to Think About Privacy and the Fourth Amendment*, 102 *CAL. L. REV.* 1069 (2014); Stuart P. Green, *The Concept of White Collar Crime in Law and Legal Theory*, 8 *BUFF. CRIM. L. REV.* 1, 29 (2004); Andrew Koppelman, *The Troublesome Religious Roots of Religious Neutrality*, 84 *NOTRE DAME L. REV.* 865, 880–81 (2009); Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 *CAL. L. REV.* 753, 763–64 (1984); Jeremy Waldron, *The Right to Private Property* 49–50 (1988); and Daniel J. Solove, *Conceptualizing Privacy*, 90 *CAL. L. REV.* 1087 (2002).

<sup>25</sup> See H.L.A. Hart, the great exponent of legal positivism, who “was likely not averse to basic Wittgensteinian ideas.” Frederick Schauer, *(Re)Taking Hart*, 119 *HARV. L. REV.* 852, 861 (2006). Not all agree that Hart had no such aversion.

<sup>26</sup> WITTGENSTEIN, *supra* note 23, at 3ff.

<sup>27</sup> *Id.* at 32ff.

<sup>28</sup> The classic treatment of family resemblance theory is WITTGENSTEIN, *supra* note 23. For a sample of arguments in favor of newer theories of concept-formation and semantic meaning, see on cluster concepts, JOHN R. SEARLE, *SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE* (1970); on prototype theories, Eleanor Rosch, *Principles of Categorization*, in *COGNITION AND CATEGORIZATION* 27–48 (Eleanor Rosch & Barbara B. Lloyds eds., 1978); and on generics, Mark Johnston & Sarah-Jane Leslie, *Concepts, Analysis, Generics and the Canberra Plan*, 26 *PHILOS. PERSPECT.* 113–71 (2012).

I believe that the infection of legal theory and law itself with this sort of non-essentialist thinking has caused a great deal of confusion and contributed to the current failure of contemporary theorists to recognize even as much as the necessary features to define law, such as its inherent coercion.<sup>29</sup> A focus on law's characteristic effects upon real-world subjects—who generally are first concerned with what legal authorities can do to them, and second concerned with what they can get legal authorities to do to others—can help to rescue legal theory from the charge of having modest relevance to anything outside of itself.<sup>30</sup> This neglect of law's coercive nature has contributed to the gradually totalitarian expansion of both legal concepts and the legal system, and government generally, into more and more territory, often with the justification that law empowers subjects—which it never does except at the expense of others. If Posner is right, today law typically authorizes legal authorities to do whatever they think is sensible after forgetting about the law entirely.

## II. POSNER'S VIEW AND THE DESIRABLE SHIFT TO SCIENTIFIC-STYLE CONCEPTS

### A. POSNER THE NON-SCIENTIFIC JURIDICAL SCIENTIST

Law and legal concepts should become more scientific, by which I mean first, that all legal concepts should have non-contradictory cores defined by essential properties, and second, that real-world effects—particularly coercive ones—should be the foundational raw material of legal concepts rather than justice, rights, duties, fault, or the like considered abstractly in the way that jurists love so much. This latter requirement may be only a matter of emphasis, but a change in emphasis has often produced real legal change affecting real subjects. There are bounds to a scientific approach to legal concepts: Law is a humanity, not a science—with all the inevitable limits to precision that human things demand—and unlike science, religion, philosophy, and literature, law must employ force in order to fulfill its function, and even to be distinguishable as law at all rather than exhortation, guideline, rhetoric, or something else such as a mere source for voluntary rules of personal conduct.

In a book aptly titled *Overcoming Law*, Posner rightly says, and this can be said of the prophet, philosopher, and scholar as well, that “[t]he scientist is the inquirer who [is] disdainful of enlisting the power of the state to enforce agreement with his views.”<sup>31</sup> *This cannot be the attitude toward the actions of others of the legal authority, who whenever acting as a legal authority, never engages in acts of*

<sup>29</sup> *But cf., e.g.*, (“For all its appeal—apparent simplicity, stability and roots in classical philosophy—the ‘essential features’ element of the standard model is unworkable.”) Evans, *supra* note 19, at 208.

<sup>30</sup> *See, e.g.*, “Many law students have complained that there seems to be little or no connection between legal philosophy and other subjects in the curriculum. Similarly, many legal scholars complain that they find little illumination for their particular studies from such theorizing.” William Twining, *General Jurisprudence*, 15 U. MIAMI INT’L & COMP. L. REV. 1, 23–4 (2007).

<sup>31</sup> POSNER, *supra* note 15, at 450.

*pure abstract inquiry or persuasion, but rather seeks to make practical judgments relevant to the enforcement of behavioral conformity to the law's specifications.*

Just as the scientist and the philosopher always should seek to use definitions as definite as realistically possible in contrast to the prophet and the poet, so too should the legal authority, and here I agree with Posner's hope when he says that he wishes "to nudge the judicial game a little closer to the science game."<sup>32</sup> Yet I am put on my guard when he says that "[t]he idea that law stands or falls by its proximity to mathematics is the fallacy shared by Langdellians and many critics."<sup>33</sup> In using legal concepts and issuing legal rules—which are themselves legal concepts containing somewhat specific imperatives to obey, derived from an idea of authority, rather than descriptions and predictions alone—legal authorities should seek to distill broad concepts into easily-obeyable ones. As the humanity that should use scientific-style concepts, law for the ordinary subject should be an area of exact inquiry just as much as science should be, though again insofar as reasonably possible—for example, legal authorities often need substantial discretion in many circumstances just as scientists do. Legal inquiry can be only so exact.

"In areas of exact inquiry, Orwell's stated goal of writing prose as clear as a windowpane seems, if properly understood, an attainable ideal. . . ." says Posner. "Newton will survive as long as Homer, but the essential Newton—the Newton that will survive—is not the language in which he described his theories and findings but the theories and findings themselves, while the essential Homer cannot be detached from the language in which he wrote or chanted."<sup>34</sup> Although mathematical precision is unachievable in much of science as well as in most of law, judges and others write too much like Homer and not enough like Newton. Broad and vague moral concepts, social goals, and rhetorical language cannot be, and should not be, prevented from influencing the formulation and enforcement of law—they cannot any more than social attitudes toward, say, dogs and other animals can, or should, be prevented from influencing scientists' attitudes toward animals. I suspect the choice of rats for so much scientific experimentation is not a purely scientific one. But when they impair the precision needed, these influences necessarily become negative in both spheres, the legal and the scientific.

Unfortunately, judges do not rigidly distinguish between the simple application of the law and the making of it, including when they *de facto* make law by interpreting it discretionarily, and "[m]ost judges blend the two inquiries, the legalist and the legislative, rather than addressing them in sequence"<sup>35</sup>—and thus the judges themselves may not know when they are being influenced by imprecise extra-legal concepts and attitudes, much less be clearly and explicitly translating those concepts and attitudes into clear-cut legal ones. The sad fact is, says Posner, "Judges are not a moral vanguard, and the highfalutin words they use tend to be labels for convictions based on hunch and emotion. Rhetorical inflation, like sheer loquacity and impenetrable jargon, is one of the occupational hazards of adjudication, as of law generally."<sup>36</sup> Here is all the more reason to use essentialism and a tight focus on law's coercive effects in order to deflate the rhetorical bubble, at least a bit.

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<sup>32</sup> *Id.* at 8.

<sup>33</sup> *Id.* at 3–4.

<sup>34</sup> POSNER, *supra* note 11, at 273.

<sup>35</sup> RICHARD A. POSNER, *HOW JUDGES THINK* 84 (2010).

<sup>36</sup> RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 67 (2003).

Many of the unfortunate realities that Posner describes are, I think, indisputably well-established, such as the Supreme Court's frequently political nature in what is supposed to be a republic characterized by the separation of powers. The political branches headed by the elected representatives of the people may be no more political in their decision-making than the Court when it interprets the Constitution, suggests Posner. "I shall argue that, viewed realistically," he says, "the Supreme Court, at least most of the time, when it is deciding constitutional cases is a political organ."<sup>37</sup> This flows partly from the nature of the Constitution itself. "[C]onstitutional provisions tend to be both old and vague. . .," Posner notes. "The older and vaguer the provision at issue, the harder it is for judges to decide the case by a process reasonably described as interpretation rather than legislation."<sup>38</sup> Another part of the problem is the Court's need to maintain some sort of vague uniformity of governance as this one small group of jurists has gone from overseeing a small federal government, set over four million people, to reviewing vast federal and state apparatuses micro-regulating over 300 million residents. In such circumstances, perhaps no court with nine—or 90—members could possibly fulfill its standardizing role while remaining a court, but must transform into a legislature as Posner suggests it has done—and a legislature that can give only general guidance to inferior authorities, who must be left free to adapt that guidance to a wide range of situations. "[L]et me . . . note the extraordinary growth in the ratio of lower court to Supreme Court decisions," he writes. "That ratio has reached a point at which it is no longer feasible for the Court to control the lower courts by means of narrow, case-by-case determinations—the patient, incremental method of the common law. Instead, it must perforce act legislatively."<sup>39</sup> Here is one of the ways the Anglo common law is dying.

In fact, Posner candidly calls the Supreme Court a "lawless judicial institution,"<sup>40</sup> but repudiates the implicit condemnation such a description implies. "I use 'lawless' in a nonjudgmental though unavoidably provocative sense," he says. "I mean the word simply to denote an absence of tight constraints, an ocean of discretion. . . . From a practical standpoint, constitutional adjudication by the Supreme Court is also the exercise of discretion—and that is about all it is."<sup>41</sup> Not only are the Supreme Court's constitutional decisions mostly exercises in lawless discretion, they are exercises in arbitrary lawless discretion—and it would be good if the Court's members admitted as much, at least within the privacy of their own minds, says Posner. "If the Justices acknowledged to themselves the essentially personal, subjective, and indeed arbitrary character of most of their constitutional decisions, then—deprived of 'the law made me do it' rationalization for the assertion of power—they probably would be less aggressive upsetters of political and policy appercarts than they are," he says. "That, in my opinion, would be all to the good."<sup>42</sup>

But although the Court is lawless, its decisions are lawlike, Posner says. "[E]ven if legislative in a sense," they are "so much more constrained, disciplined, impersonal, reasoned, nonpartisan—as to be 'lawlike'" when compared to "the

<sup>37</sup> Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31, 34 (2005).

<sup>38</sup> *Id.* at 40.

<sup>39</sup> *Id.* at 35.

<sup>40</sup> *Id.* at 41.

<sup>41</sup> *Id.* at 41.

<sup>42</sup> *Id.* at 56.

characteristic product of the official legislatures.”<sup>43</sup> And so, in fact, perhaps the Court’s arbitrary lawless discretion “is really rather narrowly penned” after discretionary decisions are made.<sup>44</sup>

This sets up an interesting conundrum for those who see the courts, and particularly the Supreme Court, as systematically overstepping their proper bounds in unjust, anti-legal ways and undermining public confidence in our institutions in doing so, but also often taking very vague constitutional and statutory provisions and refining them into something closer, although rarely as close as might be, to the clear and specific regulations that the coercive rule of law ideally mandates. Not that specific regulations must be carved in stone—in fact, rationality requires they be subject to revision when circumstances warrant.<sup>45</sup> Is it too revolutionary to join those who suggest that legislatures should legislate better, including by revising statutes when needed, rather than allow courts and administrative agencies to engage in such revision as a routine matter while claiming to merely interpret? Yet essentialism should always be used by all lawmakers, whether legislative, administrative, or nominally judicial.

### B. POSNER THE NIHILIST

Posner’s rhetorical candor fails in the acknowledgement of his nihilism. Like so many other moderns and postmoderns, he must dress nihilism in the language of liberalism, pragmatism, diversity, and the like, but ultimately believes that nothing is good nor evil but thinking makes it so. He says that pragmatism’s “core is merely a disposition to base action on facts and consequences rather than on conceptualisms, generalities, pieties, and slogans.”<sup>46</sup> If he means that abstractions should not be allowed to obscure the results of applying them to real-world situations, and that those results should weigh heavily in the balance, then all is well. Yet how can anyone determine what facts are relevant and the value to attach to any consequences without prior conceptualisms and generalities? Representative of Posner’s nihilism is the below passage expounding pragmatic philosopher Richard Rorty’s views, which Posner endorses. Speaking of a variety of moral, political, legal, scientific, and aesthetic beliefs such as those concerning the defects of National Socialism, Posner writes:

These are all things that most of us believe, and we would like to think that we believe them because they correspond to the way things are.... Rorty disagrees. He thinks we believe a thing because the belief fits our other beliefs. Two hundred years ago Negro slavery, though already controversial, nestled comfortably in a system of beliefs.... We have other beliefs about these things today, with which slavery doesn’t fit, and it has become anathema. Not because slavery “really” is wrong; there is no really about the matter if “really” is taken to point to something more “objective” than public opinion.... [T]he liberal state is neutral

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<sup>43</sup> *Id.* at 75.

<sup>44</sup> *Id.*

<sup>45</sup> *Cf.* The common law “treats all generalizations as contingent and perfectible.” FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 178 (1993).

<sup>46</sup> POSNER, *supra* note 36, at 3.

about substantive values. It insists only on the procedural values, such as the protection of privacy and of freedom of belief and speech and of occupation, that are necessary to secure diversity of belief, expression, and ways of life. These values and their institutional safeguards constitute “epistemological democracy”.... All this seems to me basically sound. It is the generalization to the sphere of politics of the “fallibilist” vein in the philosophy of science.<sup>47</sup>

This way of thinking has nothing convincing to say to potentially change the minds of those who do not share the beliefs relevant to slavery and National Socialism that Posner says that “we” do, or any way to object if public opinion changes to favor those things once again, as it well might.

Nor can the distinction between substantive and procedural values withstand scrutiny. Does the protection of privacy require a legal right to abortion? Some say yes, others no, and the question cannot be resolved without substantive values about the rights of women and of unborn children, and of what legal “privacy” covers substantively—how is it obvious that paying an abortionist to terminate a pregnancy is a private matter that must be almost entirely free from government control, whereas one’s private correspondence can be discovered through legal compulsion by an opposing party in litigation before any wrongdoing has been found? Or that adults’ sexual matters are private, but the hiring, pay, and promotion decisions of private businesses are subject to reams of public regulation? Do the procedural values necessary to secure diversity of “ways of life” protect those who wish to return to the plantation system complete with “Negro slavery,” or descendants of Aztecs who wish to resurrect the ceremonies of human sacrifice suppressed by the conquering Spanish Catholics? Does freedom of speech or expression protect those who delight in posting to the internet the photos, names, and addresses of private citizens together with unproven accusations that they are cop-killers? If such speech should be illegal because it can lead to harm, should we also outlaw speech critical of Christianity, Islam, or Judaism, as some countries do in order to forestall hate crimes? No procedural values can resolve these questions, only substantive values that privilege—or so much as acknowledge—some rights and ways of life rather than others.

“Epistemological democracy” seems to be a term for “affirming nothing so long as social disagreement exists.” Since law involves the coercive regulation of some by others, such a stance by any legal authority is just a hypocritical pose. In all real political states, some or perhaps nearly all subjects do not agree with the entirety of the law’s requirements or conform to them. Regardless of their personal beliefs about truth or what they may say, lawmakers and the legal authorities who enforce the law must act as if they know what the law is and are justified in inflicting upon subjects the law’s consequences, including financial penalties, disbarment from occupations, incarceration, and occasionally death. Lawmakers, including judges when behaving as *de facto* lawmakers, must act as if they know what the law should be, and what it should prescribe in order to punish those who act illegally—and saying to a defendant convicted of a crime and sentenced to a decade in prison that “I am unsure that this is the right thing, but I am doing it to you anyway” is unlikely to amount to much consolation.

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<sup>47</sup> POSNER, *supra* note 15, at 448–50.

“Epistemological democracy” may contribute to the ongoing slow-motion exposure, in the view of many, of the façade of our political and legal systems as corrupt frauds, and we may see the public bankruptcy of what Posner, to borrow his description of façade as an expansive concept, might label “[a]n intricate complex of interrelated laws, judge-made and statutory, [that] protects this interest that has no name, the interest I am calling ‘the face we present to the world.’”<sup>48</sup> In my analogy, the intricate complex protects the reputation of the legal system in crucial part because citizens have confidence that the complex of laws is *truly of laws rather than of something else, such as the largely lawless discretion of the men and women in power.*

### III THE DUTY OF ESSENTIALISM

Whatever else they may do, epistemological democracy and related thinking require concepts that are anti-essentialist or non-essentialist *when it comes to the regulation of behavior by law.* The supposedly procedural values of liberalism paper over substantive disagreements that need not be resolved when those values remain abstract, but must be resolved when the law is coercively enforced in the real world. Assuming we accept non-essentialist concepts as valid, the concept of privacy at the procedural level, as Posner appears to mean it, can include the irreconcilable elements of “private persons can legally keep private correspondence private from others, including those who sue them” and its negation. It can include “decisions about abortion are private” and also its absence. But not when coercive legal decisions about discovering private correspondence or punishing abortion must be made, and whenever an appropriate case arises, the question of whether the law should extend respect for diversity of ways of life to include racial discrimination or slavery must be answered.

Legal coercion should be defined broadly to include the awarding of benefits that are legally obtainable only by meeting certain conditions, so long as coercion is used to keep those benefits away from those who do not meet the conditions, as well as coercion applied to government officials—who, rather than or in addition to ordinary legal subjects, are the subjects of some laws. Ultimately, the coercion in question must be physical, for financial and other such penalties cannot be *legally enforced* except by *physical force.* Demands for the payment of a fine that go no further than sending the fined subject unpleasant letters hold little terror, nor are they distinguishable from non-legal social pressure generated by political and legal authorities—who often exhort and lecture citizens about their duties in non-coercive, non-legally-formal ways. I have written a much longer argument in favor of this understanding elsewhere.<sup>49</sup>

Posner cites Wittgenstein in many of his writings, and Wittgenstein is famous for his formulation of non-essentialist family resemblance concept theory. Posner rejects essentialism as alien to pragmatism,<sup>50</sup> though he never quite endorses Wittgenstein-style conceptual non-essentialism as far I have found. Yet many of

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<sup>48</sup> *Id.* at 531.

<sup>49</sup> See D’Agostino, *supra* note 8, at 145–70.

<sup>50</sup> (“Emphasis on consequences makes pragmatism anti-essentialist”). POSNER, *supra* note 36, at 6.



his approaches and assertions implicitly require conceptual non-essentialism, as do most forms of legal pragmatism, since they require judges to reinterpret legal concepts, in ways contradictory to previous interpretations, in order to produce the desired results on a case-by-case basis while claiming not to legislate, but rather claiming to use the same law and same legal concepts each time. If the judges are not changing the law each time that they use or interpret principles in ways that contradict prior uses, then the legal concepts must already contain within themselves contradictory elements from which judges choose in accordance with their wishes in any given case.

Instead, judges should work with essentialist concepts and when they change the law, *they should state explicitly that they are doing so* and how they are doing so, in an open and above-board way. This approach not only better informs subjects of what legal changes have taken place and what to expect from legal authorities in the future, but may promote stability and predictability in law by discouraging judges from making changes in the law—changes which are no longer disguised. And if judges make more pragmatically poor rulings in order to adhere to precedent and avoid legal changes, they can put greater onus for legal change onto legislatures where it belongs. Even more, what endlessly second-guessing judges, in their folly, consider pragmatically poor rulings may turn out not so, or at least to be consistent with the intentions of the officially political branches of government.

Instead of arguing for the complete abandonment of modern non-essentialist approaches in the formulation of legal concepts, elsewhere I have argued in favor of the superiority of an *essentialist understanding of supposedly non-essentialist family resemblance concepts, cluster concepts, and other such concept forms, at least when engaged in social practical reasoning with legal concepts*.<sup>51</sup> This includes lawmakers' decisions about what laws to promulgate in affecting the actions of those subject to those laws—their legal subjects—and the decision-making of those subjects concerning whether and how to obey the law. Purely theoretical concepts entirely unrelated to behavioral regulation by legal authorities are not my concern.<sup>52</sup> An essentialist understanding of non-essentialist concept forms allows them to be used to shape law without unnecessarily impairing the law's rationality and legitimacy, and thus I do not argue that a return to the exclusive use of older and more straightforward notions of legal concepts is required. Family resemblance and related theories are good ways to understand many legal concepts when such theories are reconfigured as essentialist.<sup>53</sup>

<sup>51</sup> See generally Joseph D'Agostino, *Against Imperialism in Legal Concepts*, 17 U.N.H. L. Rev. 67 (2018).

<sup>52</sup> Similar distinctions now have a long history and continue to be made by contemporary legal theorists, such as this one in Poland: "It seems to be quite obvious that in practical deliberation, we cannot generally avoid concept analysis [but] [f]rom the vast set of concepts, we can simply cut off ones that do not bear any practical, observable effects." Adam Michał Dyrda, *Pragmatism, Holism, and the Concept of Law*, 8 ERASMUS L. REV. 2, 9 (2015).

<sup>53</sup> Do not fear that I claim to offer something fundamentally new. I offer only a new argument in favor of old ways and am not "a legal philosopher [who] proposes to offer a new classification scheme; he assures that great things will follow (the achievement of conceptual clarity is almost always involved); then after much arduous reading and repeated encounters with ethereal abstractions, nothing happens." Pierre Schlag, *How To Do Things with Hohfeld*, 78 LAW & CONTEMP. PROBS. 185-86 (2015).

Those who consider family resemblance and similar theories to be *essentially non-essentialist* can view my argument as one in favor of normatively excluding such theories entirely from understanding legal concepts.

This approach combats the expansionist tendencies of contemporary legal theorists, whose abandonment of coercion as an essential element of every political positive law has helped to enable them to fit more and more phenomena under the umbrella of law as conceptual alchemy transforms non-legal phenomena into legal ones—and some legal phenomena have become anti-legal exercises of unfettered discretion. Non-essentialist legal concepts by nature are systemically vaguer than essentialist legal concepts and invade the provinces of other categories of concepts where such vagueness is a valuable asset—in law, it is a liability. In my view, at least when substantial enough to be used by some to regulate the actions of others who are meant to understand the rules and commands used to regulate them well enough to obey, any non-essentialist concept is unproductively equivocal or in insufficient conformity to experienced reality. Conformity to our experience of worldly reality is a crucial test of a practical concept's usefulness, and when it comes to legal practical reasoning, non-essentialist concepts perform more poorly on this test than do essentialist ones.<sup>54</sup>

If we believe that legal authorities have a duty to use law and legal concepts as clearly as reasonably possible when regulating subjects' actions, then we should believe that they have a *duty to employ conceptual essentialism*.<sup>55</sup> Of course, even essentialism employed as effectively as possible would not mean that difficult legal questions could always be resolved with clear right answers—clarity can, at best, be approached only parabolically.<sup>56</sup> Posner's endorsement of epistemological democracy grants judges an abusive franchise, allowing them enormous discretionary power while leaving citizens in the dark concerning what those judges will do with that power.

My argument against non-essentialism, whether explicit like that of Wittgenstein or implicit like that of Posner and many other legal pragmatists, can be divided into the following four steps:

1. Any real-world system of political positive law seeks to coerce its subjects using rationally-comprehensible rules and commands. I believe that my argument fits with any reasonable definition of "political," but I mean it to refer to the structures, concepts, and authorities ultimately responsible for the socially-legitimated governance of temporal human societies. The *ends* of political positive law, i.e. law promulgated by legal authorities designated as such by a polity, necessarily involve the regulation of subjects' actions through the *means* of coercive rules and

<sup>54</sup> *Contra* "...I shall argue that departures from the standard model [of essentialism] are often inevitable and appropriate [in judicial reasoning]." Evans, *supra* note 19, at 208.

<sup>55</sup> "What is law? Pontius Pilate had little time for a similar question about truth, and it is unlikely that busy attorneys will find much time for philosophical disquisitions concerning the nature of law." Hans Oberdiek, *The Nature of Law by Alan Watson*, 130 U. PA. REV. 229, 229 (1981). Yet the unexamined professional life unfolds within an irrational framework. "[T]hose who ignore such questions do so to their own detriment, for one's conception of law will certainly affect one's understanding of what one is doing, whether it is worth doing, and what one is becoming in the process." *Id.* at 229.

<sup>56</sup> *Contra* Ronald Dworkin, *Is There Really No Right Answer in Hard Cases?*, in *A MATTER OF PRINCIPLE*, 119 (1985).

commands meant to affect subjects' practical decision-making. The regulatory end remains necessary even if understood to be a means to a further end, such as justice or social stability. Even if some political positive law is thought—erroneously in my view—to be non-coercive, every political legal system systematically employs coercion.<sup>57</sup> Note that the objectively-manifested *coercive intent* of legal authorities, not coercion simpliciter, is an essential element of any political positive law, although there are other essential elements as well such as social legitimacy and authority. The remainder of my argument applies to legal concepts employed, directly or indirectly, in the coercive regulation of behavior. I believe this includes all truly legal concepts.

2. To justify political positive law as a *rational enterprise*, lawmakers and other legal authorities must strive to make their coercive demands of subjects as clear and comprehensible as reasonably possible so that those subjects may use their own rational minds to understand and obey the law, and so that legal authorities not involved in the making of any particular law can understand that law well. This applies just as much when subjects turn to legal practitioners and others they trust to explain the law to them; those who do the explaining must be able to understand the law's requirements first. "Reasonably possible" leaves room for vagueness and ambiguity in law when the advantages of such vagueness and ambiguity outweigh the disadvantages, such as when granting necessary discretion to judges and regulators, and *essentialism can circumscribe more clearly the bounds of vagueness and ambiguity* than can non-essentialism. Of course, perfection is not achievable here any more than in other areas of human life, but the failure to commit to this principle of rationality as a goal *renders law unfit to be classed as an exercise of reason*, even though law is *never solely* an exercise of reason in any case—legal authorities cannot rely solely on the rational force of argument in order to persuade subjects to obey. The requirements concerning clarity may apply to non-coercive advice just as much as to coercive rules, but I do not focus on this possibility here.

3. Separately, in order to justify political positive law as *morally legitimate*, lawmakers and other legal authorities must strive to make their coercive demands of subjects as clear and comprehensible as reasonably possible. Anything else would be unjust and unfair, and indeed law is often unjust when it is unclear and subjects are subsequently penalized for non-compliance with its unclear demands. I take these heavily moral assertions for granted rather than argue for them. I recognize that those whose moral system requires no justification for the coercion of some by others, or whose moral system requires no goal of clarity in coercive requirements, or who have no moral system at all may find this part of my argument unconvincing.

4. When promulgating legal rules and commands meant to be intelligible to a range of subjects who must then reason practically based upon those rules

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<sup>57</sup> Hart himself writes that some positive law must be coercive due to a form of natural requirements. ("... [W]e do need to distinguish the place that sanctions must have within a municipal system, if it is to serve the minimum purposes of beings constituted as men are. We can say, given the setting of natural facts and aims, which make sanctions both possible and necessary in a municipal system, that this is a *natural necessity*...") H.L.A. HART, *The Concept of Law* (3d ed. 2012), at 199. He says that "the minimum forms of protection for person, property, and promises which are similarly indispensable features of municipal law" are natural necessities as well. *Id.* at 199. But he views the system of international law differently and, mistakenly in my opinion, denies that "every legal system *must* provide for sanctions." *Id.*

and commands, the use of scientific-style essentialist understandings of concepts is systematically clearer and more precise than the use of non-essentialist understandings of concepts. The use of non-essentialist approaches does not offer any outweighing advantages. And further, from the perspective of practical reason, all non-essentialist concepts can transform into clearer and more consistent essentialist ones. This remains true even when the elements of essentialist concepts are fixed not by objective, pre-existing social or other realities, but by chosen social conventions—as long as those conventions do not contradict social or other realities. The purpose of concepts is to classify human experience, not necessarily in any absolute sense, but sufficiently well to *distinguish phenomena from one another*, such as law from non-law and legal requirements from the legally unrequired. I believe that the fundamentals of the first three major steps of my argument are more or less common sense, or close enough to it, and thus that this step is the one of major contention.

#### IV. LAW AS THE HUMANITY THAT MUST USE SCIENTIFIC CONCEPTS

##### A. LAW AS THE MOST SCIENTIFIC HUMANITY

Law is the one humanity that, to be its best self, must exclusively use a scientific approach when formulating its own distinct concepts, and so law must translate the religious, moral, and literary concepts that it uses as source materials into scientific-style concepts for itself. Religious and moral rules and commands as well as the concepts on which they depend—and I believe that morality is a subspecies of religion—can at times be their best and perhaps only selves when non-essentialist and self-contradictory from a worldly perspective; whether they are self-contradictory in an ultimate analysis is another question. I say this not about mysteries of faith such as the Trinity and its associated doctrines, although it may be true of them, but about rules and commands that believers are meant to obey. Some religious rules and commands are straightforward but others, such as the difficult “So whatever you wish that men would do to you, do so to them,”<sup>58</sup> the apparently impossible “You, therefore, must be perfect, as your heavenly Father is perfect,”<sup>59</sup> and the obscure “[B]e wise as serpents and innocent as doves,”<sup>60</sup> have natures that would make them hard for any legal system to enforce in a rational and just manner if left at their high levels of generality—fortunately, they are not meant to be enforced by secular authorities using their methods.

When a typical believer seeks to follow them with consistency in her actions, she must translate them into clearer and more concrete concepts from which she can derive clear rules to follow. For example, she may decide that “cunning yet innocent” includes the evasion of questions in certain circumstances, which she must further define, but never includes outright lying even though “cunning yet

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<sup>58</sup> Matt. 7:12, National Council of the Churches of Christ, REVISED STANDARD VERSION CATHOLIC EDITION (RSVCE), BIBLEGATEWAY.COM, <https://www.biblegateway.com/versions/Revised-Standard-Version-Catholic-Edition-RSVCE-Bible/> (last visited Feb 2, 2018).

<sup>59</sup> Matt. 5:48, *Id.*

<sup>60</sup> Matt. 10:16, *Id.*

innocent” by itself is not specific enough to require any such distinction. After she makes the distinction, the believer can then formulate a rule against lying, and Wittgenstein himself said that religious believers show their beliefs by “regulating” their actions rather than in some more amorphous way.<sup>61</sup>

Many legal authorities enjoy issuing their own religious-style pronouncements, with the U.S. Supreme Court being particularly fond of them. A classic example of a regulatorily near-useless revelation is this from the Court:

Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.... These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.<sup>62</sup>

This airy edict thinly disguised as constitutional law does little to indicate what actions the Supreme Court would allow the government to regulate and what actions it would not. Certainly, marriage, many family relationships, child rearing, and education are heavily regulated by a bewildering array of federal and state statutes, common law, and administrative rules, while acts of procreation and contraception are less so. “Personal dignity and autonomy” are very much in the eye of the beholder. The last sentence has no legally relevant meaning at all—somehow it buttresses a right to abortion but not, say, to a right to polygamy, to a single-sex work environment, or to sell one’s own internal organs.

These, as well as somewhat more recognizably *legal* concepts such as “negligence,” “equal protection,” the “right to privacy,” “due process,” and the “personhood of corporations,” must be translated into rules and commands that subjects can rationally understand and obey if law is to aspire to rationality and justice. The imperative for such translation is greater in law than in religion and morality, for many religious and moral concepts can vary substantially from thinker to thinker and still be themselves—they can be more purely individual mental kinds—and, further, religious and moral concepts are not necessarily used by some to regulate the actions of others. Legal concepts are necessarily social and must be substantially shared by a variety of subjects, and are used to coerce.

It is not that the law should dispense with the use of concepts of high generality any more than it should dispense with religious concepts as sources—“do unto others as you would have them do unto you” clearly plays a prominent role in the thinking underlying a wide range of law, as do “dignity and autonomy.” Instead, before law is made, they should be translated into specific legal concepts that indicate more clearly to subjects what they must and must not do, and which can serve as more precise and stable sources for rules and commands than either openly or *de facto* non-essentialist procedures.

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<sup>61</sup> A religious belief of a believer “will show, not by reasoning or by appeal to ordinary ground for belief but rather by regulating for it in all his life.” L. WITTGENSTEIN, LECTURES & CONVERSATIONS ON AESTHETICS, PSYCHOLOGY AND RELIGIOUS BELIEF 53–4 (Cyril Barrett ed., 1967).

<sup>62</sup> *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992).

For instance, giving to courts the power to penalize subjects for uncontroled “negligence” would give them a quasi-religious power to interpret, often unpredictably, the concept in different ways at different times that then would lead to different outcomes for subjects however diligently those subjects attempted to be law-abiding. Unlike God, courts neither merit this power nor can be relied upon to exercise it properly. This is why legislators, judges, and regulators translate negligence, constitutional rights, and other general concepts into more specific ones, if not explicitly then at least implicitly when they produce concrete rules and commands. Insofar as this process does not produce precise essentialist concepts, it is faulty.

Again, sometimes legal concept formulation must leave room for considerable discretion for legal authorities, but that discretion should be delineated as precisely as reasonably possible. Essentialism can contribute to this. And again, it is not that essentialism alone can cure law of harmful vagueness, rationally-irresolvable ambiguity, and arbitrary discretion—far from it—but essentialism is a necessary step along the right path. Like many essentialist concepts, all non-essentialist concepts should be, at most, sources for law rather than used as legal concepts, that is to say, used to regulate subjects’ actions by means of the legal system.

### B. REFINING THE GENERAL INTO THE REGULATORY

“Negligence,” as a general American legal concept, includes violations of behavior expected of the reasonable man of ordinary prudence, and also includes higher standards such as “utmost care” that demand more than ordinary prudence, as in the case of common carriers. At times, those different standards dictate different results in a given tort lawsuit because the two standards are partially contradictory and at times irreconcilable, even though the general concept of negligence encompasses them both. Allowing judges and jurors to use the negligence concept containing the contradictory standards, without including in the concept specifications of the circumstances in which each standard should be used, gives them a *non-essentialist concept* that renders the application of the law unpredictable for some litigants and potential litigants. They cannot know when a court will choose which standard. The non-essentialist concept allows courts to choose out of it what the court wants, when the court wants, while leaving the contradictory elements behind. This is irrational and unjust. The same goes for such vague doctrines as “dignity and autonomy,” the “right to privacy,” and whatever can be deduced for law from “the right to define one’s own concept of existence” as well as more mundane examples such as “disorderly conduct.”

These must be refined into regulatory concepts and rules that come closer to the ideal of informing subjects of exactly what behavior will expose them to legal liability, or allow them to obtain legally-specified benefits, and what will not. The concepts should contain properties that both do not contradict one another and are also specific enough to cover as many future contingencies as possible. Due to the vagaries of facts, thought, and language, this ideal is often unreachable, but it *should be an ideal at which the law aims*. Marginal cases especially will present evergreen challenges, but by having cores to them, legal concepts can more clearly signal which cases are marginal and which are central. “Negligence,” the “right to privacy,” and so on are often refined into essentialist concepts for certain purposes—but often are not, and often are altered unexpectedly without the salutary candor and precision that more rigorous conceptual thinking would provide.

More examples of translations: moral principles such as “avoid harm to others” have been translated into tort law in various ways, but have not been used to create a general duty to rescue strangers in distress even when the cost to the potential rescuer is negligible. The conjectured constitutional “right to privacy” has been refined to cover the commercial purchase of contraceptives but not items inside discarded residential garbage.<sup>63</sup> And so on.

In other words, *Posner's epistemological democracy should become epistemological authoritarianism*. Keeping legal concepts “democratic” empowers the discretion of legal authorities at the expense of legal stability and predictability for legal subjects and citizens. Although legal authorities’ discretion can be employed to benefit legal subjects and advance justice when following clearer legal rules would not, authoritarianism produces better results overall for the same reasons that the rule of law is superior to the rule of men—allowing the powerful to do as they think best comes at too great a cost, even though law sometimes prevents the powerful from doing the best thing. In law, epistemological democracy is most often democracy restricted to rulers, and epistemological authoritarianism is freeing for the ruled.

Many legal authorities’ discretion is too great—Posner seems to think it close to legally unconstrained, though perhaps constrained by what society will accept—and non-essentialist concepts always leave it greater in sub-optimal ways when compared to the advantages of essentialism. More generally, contemporary non-essentialism helps to justify pre-existing tendencies toward slipshod thinking, certainly a long-standing feature of human life.

### C. TRACING LAW VIA COERCION

Beyond the conscious use of essentialism *per se*, using it to clarify the high-level concept of law, such as the recognition of coercive intent as an essential element, is a precondition for clarifying many downstream legal concepts.<sup>64</sup> This may be most important when a judicial opinion or statute overturns or simply ignores previous law than with an opinion or statute that falls within long-established and hopefully long-understood precedents.<sup>65</sup> A substantial change in the law highlights

<sup>63</sup> (“[T]he issue here is whether the Fourth Amendment prohibits the warrantless search and seizure of garbage left for collection outside the curtilage of a home. We conclude, in accordance with the vast majority of lower courts that have addressed the issue, that it does not.” (quoting *California v. Greenwood*, 486 U.S. 35, 37 (1988))). The Supreme Court of Canada came to the same conclusion. (“[T]he police did not breach P’s right to be free from unreasonable search and seizure. When P’s conduct is assessed objectively, he abandoned his privacy interest when he placed his garbage for collection at the rear of his property where it was accessible to any passing member of the public” (quoting *R. v. Patrick*, 17 SCC 579, 580 (2009))).

<sup>64</sup> *Contra* “[Essentialism] cannot provide answers to many of the questions of categorization that arise in constitutional law. Judges should, therefore, abandon the search for ‘essential features.’” Evans, *supra* note 19, at 208.

<sup>65</sup> Failure to recognize this duty is part and parcel with a failure to recognize the significance of the rule of law, both in principle and in the eyes of those ruled. *Cf.* “Rejection of a strong commitment to the normative importance of received doctrine would probably generate serious legitimacy concerns among the general public. A more free-wheeling approach to legal practice, in which lawyers placed heavy and explicit weight on

the benefits of an emphasis on legal concepts' effects upon ordinary legal subjects, and a paramount focus on any shift in direction of the stream of law's coercive force—rather than on its rights-conferring effects or its advancement of justice or “dignity and autonomy”—could lead to a more judicious and restrained attitude in forming new concepts and rules.<sup>66</sup>

For example, in shifting a certain class of cases from the ordinary prudence standard to the utmost care standard of negligence, the direct real-world effect is not to increase the safety of those newly due utmost care. That may or may not occur. The direct effect, or at least directly-intended effect, is to make liable, or at least potentially liable, a new group of potential defendants to an increased risk of lawsuits, and the associated expenses and other disadvantages, and an increased risk of paying judgments, which may also have a higher average cost. The direct effect is the coercive force of the law applied more strictly against a certain group of subjects. When this is recognized, the coerced subjects' interests come into sharper relief, and the more distantly-intended effects can be more easily seen to be subject to greater uncertainty. Perhaps the more risk-adverse members of the industry in question will get out of the business, thus rendering the industry's customers, whom the legal authorities had intended to make safer, in reality less safe.

Similarly, when the Supreme Court decided that citizens do not have a privacy interest in discarded garbage, it did not decide to directly empower the police to search garbage without a warrant, but rather took away the potential legal power of citizens to coerce police and prosecutors away from such searches by having any evidence thus obtained rendered useless, or by granting monetary compensation at the government's expense, or by some other method. A will does not empower a testator to inform others of the desired disposition of his property—this could be done by a legally-informal document—but rather, as a specifically *legal* document, a will directs the coercive power of the state against those who might take the testator's property against his wishes after his death.<sup>67</sup> These shifts in emphasis can lead judges and others to rule differently in close cases.

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non-doctrinal considerations, would offend our political culture's commitment to the distinction between the rule of law and the rule of persons.” David Millon, *Objectivity and Democracy*, 67 N.Y.L. SCH. L. REV. 1, 64 (1992). Insofar as law and legal concepts are unclear, the door is opened to the rule of men over the rule of law.

<sup>66</sup> Non-essentialism can join with other types of deconstruction to weaken, rather than strengthen, our understanding of and commitment to law. “[I]t has often been liberals and leftists who have championed the possibilities of Hohfeldian decomposition. . . . [O]nce we see that legal concepts can be unbundled into constituent jural relations that can be reallocated, the classic *cri de coeur* of the laissez-faire or free market champion against redistribution—‘but it's my property!’—loses much of its presumptive force.” Schlag, *supra* note 53, at 221. This is because, perhaps, “property” does not mean much of anything at all. “Indeed, the possibility of decomposition challenges the notion that there is some sort of already established natural or neutral baseline conception of what constitutes ‘property’ or indeed any jural composite.” *Id.* at 221. As Schlag recognized, the so-called political right has taken advantage of this approach as well. “Decomposition is politically indiscriminate: one can decompose in the service of the Right as well as the Left. As the United States has turned sharply right during the last three decades, decomposition has been vigorously exploited in various legislative and executive precincts.” *Id.*

<sup>67</sup> On wills and other “law-constituted” forms, see D’Agostino, *supra* note 8, at 194–203.



This approach also reveals what is directly at stake in an ongoing class of free speech and religious liberty cases. For example, when a baker refuses to bake a cake for a same-sex wedding in certain jurisdictions,<sup>68</sup> the first thought should not be that an anti-discrimination law would prevent discrimination or empower the couple to buy a cake at the store of their choice. Rather, where such a law is in effect, the law coerces the baker to do something against his conscience, or empowers the couple to use the force of the law to coerce the baker into doing something against his conscience. The direct operation of the law is to force someone—the baker—to do something, not to do anything for the couple—who also are not forced to do anything. Without the anti-discrimination law, the couple would have to obtain voluntary, rather than forced, service from a willing provider, bake a cake themselves, or go without an inessential service while suffering the inconvenience and potentially distressing feelings that may accompany these alternatives—yet it would not be the law that imposed these consequences, but rather the voluntary choice of the private baker.

Such anti-discrimination cases are about forcing private citizens to do things they do not wish to do by using the legal system—which may or may not be justified in these cases, but of course often is. Obscuring the operation of the law by focusing first or solely on preventing discrimination or the like is deceptive, although it can be useful *after first identifying the coercive effects of the law*. In any case, Posner's nihilistic procedural values of liberalism and epistemological democracy are of no use.

## V. LEGAL PHILOSOPHY AND THE CLARIFYING ROLES OF ESSENTIALISM AND COERCION

### A. LAW, KNOWLEDGE, AND COERCION

The relationship among law, knowledge, and coercion is highly relevant to conceptual essentialism since that relationship determines the need for essentialism, the value of which is contingent upon the ends and means in question.<sup>69</sup> Legal philosophers should have a consensus regarding the value of essentialism for legal concepts and coercion as essential to the concept of law. Unfortunately, like Posner, other legal theorists entertain non-essentialist conceptual understandings,<sup>70</sup> and some argue that while legal theorists should pay more attention to coercion in formulating their theories, they continue to reject coercion as essential to the concept

<sup>68</sup> See, e.g., *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018).

<sup>69</sup> Tracing the flow of coercion is a useful way to frame the metaphors that I believe we inevitably use to understand law. “[L]egal concepts are analyzed as if they were spatialized objects existing in two- or three-dimensional space. Hence it is that legal thinkers, even today, will speak un-self-consciously about legal concepts as ‘covering certain areas’ or as having certain ‘boundaries’ that must be established through ‘line-drawing’ exercises...” Schlag, *supra* note 53, at 194. Schlag is much more skeptical of the value of spatial metaphors than I.

<sup>70</sup> On essentialism, see, e.g., FREDERICK SCHAUER, *THE FORCE OF LAW* 35ff (2015).

of law.<sup>71</sup> I believe that the essential nature of law's coercion flows from a focus on law's effects on subjects, and the work of Brian Leiter, particularly his advocacy of a naturalistic jurisprudence,<sup>72</sup> has helped to orient me in my argument, which of course is rooted in older views of concepts and law from Plato and Aristotle to St. Augustine and St. Thomas to Jeremy Bentham and John Austin.<sup>73</sup>

Posner has long favored paying close attention to science in judicial decision-making, and I agree with those who say that legal philosophers would do well to examine more closely actual experience, including data from empirical disciplines such as sociology and psychology.<sup>74</sup> This is consonant with a focus on law's real-world effects. A rigid separation between philosophy and scientific disciplines<sup>75</sup> is counter-productive since the data of the latter must inform the former, including informing our discovery of what is essential to law and the understanding of legal concepts—discovery of essences is an empirical exercise rather than purely *a priori*.<sup>76</sup> Further, non-essential features of law and many other phenomena are

<sup>71</sup> See, Schauer, *id.* at 3 (“It thus appears that noncoercive law both can and does exist”). Schauer is among those prominent contemporary legal theorists who come closest to acknowledging coercion as an essential element of law. So is Kenneth Einar Himma, who writes, “I argue that the authorization of coercive enforcement mechanisms is a conceptually necessary feature of law.” Kenneth Einar Himma, *The Authorization of Coercive Enforcement Mechanisms as a Conceptually Necessary Feature of Law*, SSRN, 1 (2015), <http://ssrn.com/abstract=2660468> (last visited Sept. 26, 2016). Neither argues that coercive intent, or coercion in another form, is an essential element of every political positive law.

<sup>72</sup> BRIAN LEITER, *NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY* (2007).

<sup>73</sup> See, e.g., ARISTOTLE, *THE COMPLETE WORKS OF ARISTOTLE* (J. Barnes ed., 1984); AUGUSTINE, *AGAINST THE ACADEMICIANS AND THE TEACHER* (P. King trans., 1995); JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* (1996); and JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (W. Rumble ed., 1995).

<sup>74</sup> “[W]e ought not let the contingent and contested contemporary demarcations of the academic disciplines circumscribe the inquiry. . . . Some of what follows will be sociological, in the broadest sense, and more than some will draw on experimental psychological research.” SCHAUER, *supra* note 70, at 4. He says that “we should not too quickly accept that the domain of inquiry designated as ‘philosophical’ should be limited to the search for essential properties” and also relies upon “empirical and analytical conclusions from economics and political science.” *Id.* at 4.

<sup>75</sup> *Contra* “Legal philosophy has to be content with those few features which all legal systems necessarily possess.” JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 104–5 (2009). Instead, “we may usefully think of law as shaped by three relatively distinctive yet intersecting elements—ideas, interests, and institutions—and that each of these elements has formed the principal object of particular traditions in legal theory.” Nicola Lacey, *Jurisprudence, History, and the Institutional Quality of Law*, 101 VA. L. REV. 919, 926–7 (2015). If that is accepted, we can see that “[a] theoretical understanding of law—in the sense of an explanation of not only what it is but its social role and effects, and its development—requires an analysis informed by . . . a jurisprudence that opens itself to both historical and comparative analysis.” *Id.* at 927.

<sup>76</sup> “Aristotelian jurisprudence also challenges the split in legal studies between normative and empirical research. . . . Aristotle’s own legal thought powerfully combines a deep normative orientation toward human flourishing with an empirical study of over one hundred and fifty Greek constitutions and myriad Greek legislation.” ARISTOTLE AND MODERN LAW, XX (Richard O. Brooks & James Bernard Murphy eds., 2003).

crucial for understanding those phenomena and, at times, for the best understanding of their essential features.

I disagree with those who suggest that the concept of law and other legal concepts can be more fruitfully understood from a non-essentialist standpoint than from an essentialist one, and even with those who simply leave the door to non-essentialism open. One writes:

And thus a running subtext of this book is a challenge to a prevalent mode of jurisprudential inquiry. For most contemporary practitioners of jurisprudence, the principal or even exclusive task of their enterprise is to identify the essential properties of law, the properties without which it would not be law, and the properties that define law in all possible legal systems in all possible worlds. But that understanding of the jurisprudential enterprise rests on what is at least a highly contested and quite possibly a mistaken view of the nature of our concepts and categories, and of the nature of many of the phenomena—including law—to which those concepts and categories are connected.<sup>77</sup>

It is this “quite possibly mistaken view of the nature of our concepts”—essentialism<sup>78</sup>—that I wish to defend within legal theory *while retaining the useful elements of Wittgenstein-style family resemblance and similar theories* and while, also, relying upon the empirical data of the actual world rather than imaginable but unrealistic “possible worlds.”<sup>79</sup> And I certainly believe that one of the principal duties of jurisprudence or legal philosophy is “to identify the essential properties of law,” which is a project that Posner also rejects. He wrote, “Law itself is best approached in behaviorist terms. It cannot accurately or usefully be described as a set of concepts. . . . It is better . . . described as the activity of . . . judges, the scope of their license being limited only by the diffuse outer bounds of professional propriety and moral consensus.”<sup>80</sup> To that, I say that concepts describe and shape the behavior, and indeed we cannot identify what behavior counts as law-related without a clear concept of law.

Posner says of judges’ work that “[i]ts raw materials are the ugly realities of life, but the judicial game transmutes them into intellectual disputes over rights and duties, claims and proofs, presumptions and rebuttals, jurisdiction and competences.”<sup>81</sup> That transmutation must be into the practically comprehensible and empirically obeyable, not alchemically into a game of abstract mental gymnastics made all the more facile by non-essentialism.<sup>82</sup> I have concentrated on the necessity

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<sup>77</sup> SCHAUER, *supra* note 70, at x–xi.

<sup>78</sup> *See id.* at 37–8. (“Cognitive scientists who study concept formation have almost universally concluded that people do not use concepts in the way that the ‘essential feature’ view of concepts supposes. . . . [P]eople think of concepts and categories in terms of properties . . . that may not hold even for all the central cases of the category”).

<sup>79</sup> I could say that “I advocate a common sense jurisprudence toward law and its practical applications.” Jean R. Sternlight, *Symbiotic Legal Theory and Legal Practice: Advocating a Common Sense Jurisprudence of Law and Practical Applications*, 50 U. MIAMI L. REV. 707, 713 (1996).

<sup>80</sup> RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 456–57 (1990).

<sup>81</sup> POSNER, *supra* note 15 at 134.

<sup>82</sup> Essentialist thinking is necessary elsewhere as well. I expect that the same cognitive scientists whom Schauer references seek to use terms precisely, and without internal

of essentialism from a *pragmatic standpoint in legal philosophy*—by which I mean a focus on what works best in promoting the ends or goals of law.<sup>83</sup> My approach could be called functionalist.<sup>84</sup>

Family resemblances, cluster concepts, and the like can and should be reinterpreted with a firm anchor in some form of essentialism that employs necessary and sufficient properties, even if the question of inclusion of additional properties is objectively irresolvable.<sup>85</sup> Upon inspection when used practically, *such non-essentialist concepts either dissolve in equivocation and non-conformity to reality or can be made essentialist after all*. To see this, readers must accept the minimum of beliefs about concepts, terms, and their uses that can make a workable legal system and legal philosophy,<sup>86</sup> i.e. they must accept that we can understand subjectively and communicate objectively about concepts sufficiently well to support political positive law as an exercise in practical reason necessarily dependent upon some (lawmakers and other legal authorities) relaying to others (legal subjects) instructions meant to guide the latter’s behavior in human societies with the aid of rules or norms.<sup>87</sup> Theoretical systems that do not allow for the

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contradictions, in their work rather than think like ordinary people. “Moreover, people think of concepts and categories in terms of properties—like flying for birds and grapes for wine—that may not hold even for all of the central cases of the category. And although cognitive scientists debate about many things, this is not one of them, for it is widely recognized that a picture of concept formation that stresses necessary (and sufficient) conditions or properties is an inaccurate picture of how people actually think.” SCHAUER, *supra* note 70, at 37–8.

<sup>83</sup> Thus, my use of “pragmatism” does not encompass any anti-essentialist essence that it may be thought to have. See “I said earlier that once pragmatism becomes a program it turns into the essentialism it challenges; as an *account* of contingency and of agreements that are conversationally not ontologically based, it cannot without contradiction offer itself as a new and better basis for doing business.” Fish, *supra* note 13, at 1464.

<sup>84</sup> “[F]unctionalism represents an assault upon all dogmas and devices that cannot be translated into terms of actual experience.” Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 822 (1935).

<sup>85</sup> “It is worth repeating that the most important versions of anti-essentialism are not merely about peripheral cases. . . . Rather, the question is whether even the core or standard or central cases can be understood in terms of necessary features.” SCHAUER, *supra* note 70, at 39.

<sup>86</sup> Thus I am not a legal realist if the following is essential to legal realism: “[W]e see that the basic realist gesture is a double, and perhaps contradictory, one: first dismiss the myth of objectivity as it is embodied in high sounding but empty legal concepts (the rule of law, the neutrality of due process) and then replace it with the myth of the ‘actual facts’ or ‘exact discourse’ or ‘actual experience’ or a ‘rational scientific account.’” Fish, *supra* note 13, at 1459. Legal realists “go from one essentialism, identified with natural law or conceptual logic, to another, identified with the strong empiricism of the social sciences.” *Id.* at 1459. I believe in both forms of essentialism, with the first (legal concepts) built upon the second (actual experience). *Contra* “Cohen and Frank are full of scorn for the theological thinking and for the operation of faith, but as [Roscoe] Pound sees, they are no less the captives of a faith, and of the illusion—if that is the word—that attends it.” *Id.* at 1459 (then explaining in the next paragraph that “illusion” was not the best word since it implies the existence of another, objective perspective). Yet Frank eventually became a Catholic Thomist.

<sup>87</sup> *Cf.* “Let us accept that what we are really studying is the nature of institutions of the type designated by the concept of law.” JOSEPH RAZ, *BETWEEN AUTHORITY AND*

project of law cannot be useful to legal philosophy, but rather rule legal philosophy out of existence.<sup>88</sup> I do not here assert that every legal norm must be laid down by a lawmaker or that legal norms alone constitute legal systems, only that some such relaying of instructions is a necessary and important part of any political legal system.<sup>89</sup> Whether non-essentialist concepts are useful in other philosophical contexts is not one of my primary concerns here.<sup>90</sup>

### B. POST-MODERN EPISTEMOLOGICAL DEMOCRACY VERSUS LAW

Therefore, even those who favor the highly dubious epistemologies of post-modernism must believe, if they believe in law, that valid and socially-objective conclusions<sup>91</sup> can be made within the system of law, even if those conclusions may have no ultimate metaphysical truth behind them, and that there must be ways for different reasoners to distinguish better reasoning from worse with reasonable consistency with one another.<sup>92</sup> If truth is not objective but rather depends upon

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INTERPRETATION: ON THE THEORY OF LAW AND PRACTICAL REASON 32 (2009). Any law necessarily involves or shapes in some way a claim on the decision-making process of those toward whom the law is directed, i.e. the concept of law involves an acceptance of some form of the practical difference thesis. *Cf., e.g.*, “[T]he most plausible construction of the Practical Difference Thesis asserts that every legal norm must be capable of making a practical difference in the deliberations of those persons who are addressed and hence obligated to conform to that norm.” Kenneth Einar Himma, *H.L.A. Hart and the Practical Difference Thesis*, 6 LEG. THEORY 1–43, 38 (2000).

<sup>88</sup> See “Indeed, if you take the anti-foundationalism of pragmatism seriously (as Posner in his empiricism finally cannot), you will see that there is absolutely nothing you can do with it.” Fish, *supra* note 13 at 1464. This renders pragmatism a useless, thoroughly un-pragmatic-in-a-higher-sense method. Fish disclaims the label of advocate for pragmatism. *Id.* at 1465.

<sup>89</sup> “Norms, we were told, are imperatives. They are laid down by an individual or groups of individuals with the intention of guiding human behaviour. This is the imperative theory of norms.” JOSEPH RAZ, PRACTICAL REASON AND NORMS 51 (1999). Raz rejects the imperative theory as a comprehensive description, but surely some legal norms must be imperative or at least have an imperative effect. Although I do believe in a form of the imperative theory of norms for all legal norms, I do not believe it is necessary for my argument here.

<sup>90</sup> Keep in mind that conceptual essentialism and metaphysical realism do not necessarily go together, and the results of the explicit adoption of one may not have the same results as adoption of the other. “[I]t might still be the case that adopting the metaphysical realist program would not substantially change the results courts reach.” Brian Bix, *Michael Moore’s Realist Approach to Law*, 140 U. PA. L. REV. 1293–1331, 1319 (1992). This may be because courts are implicitly realist even though not all philosophers are.

<sup>91</sup> For any workable legal system, this must include conclusions based upon imperfect knowledge. See, e.g., “Despite the limited evidence, judges rightly affirm propositions such as ‘the contract is valid,’ and deny their negation, in cases in which there is offer, acceptance, consideration, and no available defense.” Michael S. Moore, *The Plain Truth About Legal Truth*, 26 HARV. J.L. PUB. POL. 23, 34–5 (2003).

<sup>92</sup> Postmodernists believe in “no neutral, objective standpoint to which we can retire in order to determine the truth value of any assertion. We can, however, evaluate the truth of a proposition from within our own knowledge system; that is to say, there are generally accepted criteria within a particular discourse, reference group, or community for determining whether something is true.” Peter C. Schanck, *Understanding*

the perspective of each evaluator, those within the same legal system must be able to share perspectives similar enough for them to share the same laws, which means there must exist something objective in the sense of being accessible—and comprehensible—to all reasonable evaluators that allows them to draw the same conclusions, or at least conclusions similar enough to one another to be able to obey the law and be viewed by others as obeying the law, at least the great majority of the time.<sup>93</sup> Posner’s epistemological democracy rules out this necessary consensus beyond an extremely narrow and wholly inadequate set of procedural ideas that, as argued above, cannot answer fundamental questions that must, practically speaking, have answers.

Further, there are features and goals that may not be strictly essential to law, but are essential to maintaining respect for it and, thus, perhaps for maintaining the rule of law in the long run. Situating the question as a relation of the means necessary to achieve socially-desired ends, Fish wrote of Posner’s *The Problems of Jurisprudence*:

Law emerges because people desire predictability, stability, equal protection, the reign of justice, etc., and because they want to believe that it is possible to secure these things by instituting a set of impartial procedures. This incomplete list of the desires behind the emergence of law is more or less identical with the list of things Posner debunks in his book, beginning with objectivity.... Repeatedly he speaks of himself as “demystifying” these concepts in the service of “the struggle against metaphysical entities in law”.... But the result of success in this struggle, should Posner or anyone else achieve it, would not be a cleaned-up conceptual universe, but a universe deprived of the props that must be in place if the law is to be possessed of a persuasive rationale. In short, the law will only work—not in the realist or economic sense but in the sense answerable to the desires that impel its establishment—if the metaphysical entities Posner would remove are retained....<sup>94</sup>

I have gone beyond Fish in one sense and denied that law can exist at all without a socially-objective conceptual universe that includes these “metaphysical entities.” A collection of willful commands, untethered from socially-recognizable rules of at least substantial predictability that are administered with at least substantial impartiality, is not the rule of law, but the rule of men—and not only is formulating a legal rule

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*Postmodern Thought and Its Implications for Statutory Interpretation*, 65 S. CAL. L. REV. 2505, 2517 (1992). I argue that these criteria ideally should include essentialist concepts and thus essentialism should become generally accepted. Postmodernist epistemology “constitutes a set of assumptions, sometimes unrecognized, behind much current legal theory.” *Id.* at 2517.

<sup>93</sup> Some argue that those who take a purely pragmatic or relativist theoretical position cannot offer anything to those who must act, especially when they act to judge what others should do or what should be done to others. “Thus the idea that we cannot overcome our positioned perspective and make legitimate, impartial judgments is theoretical only: The practices of both judgment and justice are deeply rooted in the belief that we can.” Eric Blumenson, *Mapping the Limits of Skepticism in Law and Morals*, 74 TEX. L. REV. 523, 561 (1996).

<sup>94</sup> Fish, *supra* note 13, at 1462.

without using legal concepts impossible, but a legal rule *is* a legal concept.<sup>95</sup> If the distinction between the rule of law and the rule of men is one without a difference, then Aristotle has had us waste a great deal of our time—and legal philosophy must be indistinguishable from a philosophy of non-legal power relations pure and simple.

### C. DESCRIPTIVE VERSUS PRESCRIPTIVE VALUES OF NON-ESSENTIALIST UNDERSTANDINGS

I do not criticize those linguists who assert that non-essentialist theories may be valuable ways to describe how speakers use many terms and concepts in various contexts, and that is often what legal theorists such as Posner appear to be doing.<sup>96</sup> If such theories are restricted to semantics and the common usages of concepts, and to religious and artistic uses, they certainly have descriptive and perhaps prescriptive value, and can be more useful than essentialist concepts.<sup>97</sup>

Imprecision, vague association, and outright incoherence characterize, to greater or lesser degrees, much of our thinking and speech both in everyday life and in certain professional areas, especially those in which these qualities are often actively sought such as politics, propaganda (often euphemistically called journalism), and legal argument.<sup>98</sup> Some incoherence is often acceptable for everyday and even specialist purposes and, indeed, the stereotype of the annoying amateur logician who needlessly corrects the imprecise—but clear enough—speech of others exists for a reason. Yet at other times, this incoherence yields confusion and even hides dishonesty.

In addition, and contrary to the beliefs of some, there is considerable scientific evidence that the human mind naturally tends toward conceptual essentialism.<sup>99</sup>

<sup>95</sup> Here, we can usefully employ the term *a priori*. Even something as simple as “Do not exceed 55MPH” involves multiple prior legal concepts such as “a rule,” “meant to guide subjects’ behavior,” “a measurement of physical speed meant to be employed in determining the legal speed limit,” “enforceability,” and the “penalty” for the rule’s violation. It almost certainly involves other legal concepts such as the “exceptions to the rule,” explicit or implicit, including whatever the law classifies as “emergency vehicles” under a “duty to travel as quickly as reasonably possible” in “appropriate circumstances.”

<sup>96</sup> But Schauer never adopts non-essentialism and writes, “That our language and our concepts, especially those that do *not* describe natural kinds such as gold and water, are best characterized in terms of prototypes, central cases, generic properties, clusters, and family resemblances is contested terrain.” SCHAUER, *supra* note 70, at 39.

<sup>97</sup> Concerning empirical research into how people use concepts, *see, e.g.*, “The present study is an empirical confirmation of Wittgenstein’s (1953) argument that formal criteria are neither a logical nor psychological necessity; the categorial relationship in categories which do not appear to possess criterial attributes, such as those used in the present study, can be understood in terms of the principle of family resemblance.” Eleanor Rosch & Carolyn B. Mervis, *Family Resemblances: Studies in the Internal Structure of Categories*, 7 COGNIT. PSYCHOL. 573–605, 603 (1975).

<sup>98</sup> “More importantly, the nonessentialist view is consistent with a great deal of research in contemporary and not-so-contemporary cognitive science. People simply do not think and use concepts in terms of essences or necessary and sufficient conditions.” Frederick Schauer, *The Best Laid Plans*, 120 YALE L. J. 586–621, 617 (2010).

<sup>99</sup> *See, e.g.*, Woo-kyoung Ahn et al., *Why Essences Are Essential in the Psychology of Concepts*, 82 COGNITION 59–69 (2001). They discuss the theory of psychological essentialism. “Essentialist theories have recourse to the notion of naturalness of a causal

Structured cause and effect reasoning is a human habit as well as a required property for the interpretation of any intelligible world.<sup>100</sup> Thus, when I advocate for effects-based concepts, I most certainly do not mean to exclude causal inferences from the content of concepts, only to assert that the effects are the first—and essential—materials for such inferences.<sup>101</sup>

Regardless of the accuracy of the theory of psychological essentialism and setting aside the preferences of the human mind—rationality and not preference should be our ultimate guide—problems arise when non-essentialist family resemblances or other non-essentialist forms become considered acceptable, or even unavoidable, *when terms and concepts need to be used prescriptively for coercive social action*. I criticize the refusal to recognize that any family resemblance or similar concept must involve an essential core or else be a mishmash of more lucid categories and a sign of muddled thinking, even if that muddled thinking has no substantial cost or has advantages in many contexts.

Family resemblance can be employed valuably and positively not only in describing the thinking of real people in the real world, but also in non-linear explorations of reality such as much literature, other forms of art, and religion, in all of which incoherent thinking can be a stepping-stone to insight and thus a more profound understanding of reality. *Law does not qualify and cannot valuably be extended to include such categories*. Although even in philosophy the quest for precision can go beyond what is useful or possible, it is the duty of theorists, scholars, and jurists to clarify language and use concepts with the optimal levels of precision and limitation rather than accept the common sloppiness of thought and speech, or even the truth-revealing obscurity of art and religion, and it is the duty of legal scholars to clarify legal argument.<sup>102</sup> Such precision is an essential quality of truly philosophical discourse as opposed to other forms of communication.<sup>103</sup>

#### D. POSNER AND THE ESSENTIAL AS THE PRAGMATIC

Unlike the concept of epistemological democracy, Posner's general concept of pragmatism does not, initially, produce any incompatibility with an essentialist

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relation. It is precisely in distinguishing natural from non-natural relations or properties that the content of essentialist beliefs is crucial." *Id.* at 62.

<sup>100</sup> Cf. "Psychological essentialism was initially proposed in reaction to the common assumption that concepts are equivalent to undifferentiated clusters of readily accessible properties." Ahn et al., *supra* note 99, at 90.

<sup>101</sup> And, in fact, the human mind may ultimately prefer to classify by cause rather than effect. "[P]revious studies show that when causes underlying the surface features are revealed, people group objects based on the common underlying cause rather than surface features." *Id.* at 63. My approach of using effects to infer coercive intent in order to identify law fits this model.

<sup>102</sup> "It thus appears that an important feature of human cognition and human communication is the use of probabilistically but not universally true characterizations as a vital part of our cognitive and communicative existence." SCHAUER, *supra* note 70, at 39. The imprecision of everyday language becomes unacceptable when indulged by philosophers, and thus I reject the influence of ordinary language philosophy if and when its claims lead philosophers to accept in their own work the counter-productive imprecision of the ordinary use of language.

<sup>103</sup> Cf. D'Agostino, *supra* note 8, at 211–21.



approach that does not require *metaphysical* essentialism. By pragmatism, he says, “I mean, to begin with, an approach that is practical and instrumental rather than essentialist—interested in what works and what is useful rather than in what ‘really’ is.”<sup>104</sup> Certainly, I see law as beginning with the practical and instrumental, and as an initial matter I agree with the pragmatist’s view that it is as “odd to suppose that a judge has an obligation to maintain a ‘fit’ between what he does and what his predecessors did as to suppose that a modern scientist has an obligation to maintain a fit between what he does and what Archimedes and Aristotle did.”<sup>105</sup> Instead, he says, “There are practical reasons of both an epistemological and political character why judges should usually follow precedent . . . but no question of *obligation* is involved. . . .”<sup>106</sup>

But I would add that a specific obligation to follow precedent does arise after the practical reasons are identified, precisely because there is a general obligation to serve those practical reasons, and I would add also that this specific obligation is subject to exceptions—and certainly the specific obligation does not arise from some purely *a priori* or Kantian-style notion of duty. The specific obligation to follow precedent is highly valuable in realizing law’s overarching goals, which require considerable stability and predictability. After all, Posner says that if formalism works best in the long run, then “[a] pragmatic philosopher might without inconsistency think that judges should be formalists rather than pragmatists. . . .”<sup>107</sup> Posner also repudiates overall utilitarianism and consequentialism, saying, “If a consequentialist is someone who believes that an act, such as a judicial decision, should be judged by whether it produces the best overall consequences, pragmatic adjudication is not consequentialist, at least not consistently so. . . . Judicial decisionmaking is likewise a truncated form of consequentialism.”<sup>108</sup> This truncation makes Posner’s views somewhat more compatible with the essentialist view expressed here—we need not consider the cosmic effects of the essentialist approach as a consistent consequentialist or utilitarian must seek to somehow do.

Posner’s work cannot give us the answer, nor even the tools for a good answer, for restoring or preserving the rule of law, perhaps because this does not seem to be one of his priorities.<sup>109</sup> And the most important reason for this lack may be *his approach to concepts and epistemology*. Writes Edward Cantu, “Posner’s vacillations between fact and value . . . appear to be practical manifestations of the *conceptual* contradiction created by Posner’s simultaneous embracing of greater empiricism and rejection of foundationalism.”<sup>110</sup>

It is not that conceptual approaches can never change, or that we should not always be open to revision in our thinking, but that some things are so unlikely to

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<sup>104</sup> POSNER, *supra* note 15, at 4.

<sup>105</sup> *Id.* at 11.

<sup>106</sup> *Id.* at 11.

<sup>107</sup> *Id.* at 12.

<sup>108</sup> POSNER, *supra* note 36, at 65.

<sup>109</sup> See, e.g., “As so often in *The Problems of Jurisprudence*, Posner then walks away, leaving his readers with an unresolved clash of arguments. Throughout the book, one constantly has the sense of strolling into Maxim’s and being handed a trout, a pan, and a place by the stove.” Eric Rakowski, *Posner’s Pragmatism (Review of The Problems of Jurisprudence)*, 104 HARV. L. REV. 1681, 1691 (1991). I deny that Posner provides a trout.

<sup>110</sup> Edward Cantu, *Posner’s Pragmatism and the Turn toward Fidelity*, 16 LEWIS & CLARK L. REV. 69, 107 n.171 (2012).

change that we need not concern ourselves with the possibility.<sup>111</sup> In biology, we can continue to include the concept of mammal as an essential part of the concept of dog even though we can imagine that dogs without mammary glands would remain easily recognizable and classifiable as dogs from a common-sense perspective and perhaps even from a strictly biological one—reworking our classifications based upon detached speculation about what is extremely unlikely to be, but which still could conceivably be, would render almost all of our categories uselessly vague or ambiguous. We can imagine that one day, human bodies could exist that do not require the consumption of protein to be healthy—should that mean we should conclude that protein is not essential to a healthy diet?<sup>112</sup> What about vitamin B12?<sup>113</sup> So the question of what is essential is a practical, even pragmatic one: What is always necessary to best serve our instant purpose, in the world as it actually is and is overwhelmingly likely to remain?

Posner sometimes seems to use this conceptually essentialist approach *because it is pragmatic*, but while denying that he does so: “[T]he question arises whether pragmatism has any common core, and, if not, what use the term is. To speak in nonpragmatic terms, pragmatism has three ‘essential’ elements. (To speak in pragmatic, nonessentialist terms, there is nothing practical to be gained from attaching the pragmatist label to any philosophy that does not have all three elements.)”<sup>114</sup> That is just the point to conceptual essentialism as it should be used in legal theory and law itself: Essential to a concept is what it should always include in order to optimize understanding and communication in pursuit of the relevant ends.

A way of restating the above: Modern law has a great number of imperialist tendencies and gradually has conquered more areas of life and regulates each one with greater and greater effect. Despite law’s many benefits—including some benefits of expanded regulation—its overcriminalization, overregulation, vagueness, and ambiguity<sup>115</sup> degrade both the quality of life and the confidence in legal institutions

<sup>111</sup> Cf. “Practical reason avoids the trap of ensconcing a conceptual scheme, or a theoretical, rule-governed picture of the world, into which new incidents must either fit or exist as anomalies. Its nature is to exist beyond grammars currently extant, moving on to better ones when it can picture them and holding fast to the best existing ones when it cannot.” James Penner, *The Rules of Law: Wittgenstein, Davidson, and Weinrib’s Formalism*, 46 U. TORONTO FAC. L. REV. 488, 506 (1988).

<sup>112</sup> “Protein malnutrition leads to the condition known as kwashiorkor. Lack of protein can cause growth failure, loss of muscle mass, decreased immunity, weakening of the heart and respiratory system, and death.” Protein, THE NUTRITION SOURCE, HARVARD SCHOOL OF PUBLIC HEALTH, <https://www.hsph.harvard.edu/nutritionsource/what-should-you-eat/protein/> (last visited Feb 14, 2018).

<sup>113</sup> “Symptoms of B12 deficiency include memory loss, disorientation, hallucinations, and tingling in the arms and legs. Some people diagnosed with dementia or Alzheimer’s disease are actually suffering from the more reversible vitamin B12 deficiency.” Vitamin B12 Deficiency: Causes and Symptoms, THE NUTRITION SOURCE, HARVARD SCHOOL OF PUBLIC HEALTH, <https://www.hsph.harvard.edu/nutritionsource/b-12-deficiency/> (last visited Feb 14, 2018).

<sup>114</sup> Richard A. Posner, *What Has Pragmatism to Offer Law?*, 63 CAL. L. REV. 1653, 1660 (1990).

<sup>115</sup> See, e.g., Todd Haugh, *Overcriminalization’s New Harm Paradigm*, 68 VAND. L. REV. 1191, 1223–24 (2015) (“Overcriminalization not only causes unnecessary criminal violations through increased and unjustified enforcement and adjudication, but it also

of those subjects who live under them.<sup>116</sup> Some such as Posner openly acknowledge the irrelevance of law in most judicial decision-making, at least at the appellate level where law is most often judicially shaped and precedents set.<sup>117</sup> Conscious or unconscious non-essentialist conceptual imperialism is one contributor to this phenomenon, and pragmatic conceptual clarity versus non-essentialism is the piece of the puzzle that I address.<sup>118</sup>

Statements such as this from Posner are common among dedicated legal pragmatists: “There is no algorithm for striking the right balance between rule-of-law and case-specific consequences, continuity and creativity, long-term and short-term, systemic and particular, rule and standard. In fact, there isn’t too much more to say to the would-be pragmatic judge than make the most reasonable decision you can, all things considered.”<sup>119</sup> Again, this is a license to rule without law and to look only to one’s own judgment concerning consequences—either that, or it is a statement of useless generality, for if understood broadly, who opposes making “the most reasonable decision you can, all things considered”?

A strict formalist’s answer would be, “Apply the law as written regardless of the perceived consequences. All things considered, that is what reasonable judges do.”

## CONCLUSION

American legal pragmatism has reached its *reductio* in Posner’s open and public repudiation of the rule of law. This state of affairs is not only irrational and unjust as a substantive matter, but contributes to the ongoing undermining of faith in American political and legal institutions.

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causes criminal behavior itself”); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 506-7 (2001) (“Anyone who reads criminal codes in search of a picture of what conduct leads to a prison term, or who reads sentencing rules in order to discover how severely different sorts of crimes are punished, will be seriously misled. The reason is that American criminal law, federal and state, is very broad; it covers far more conduct than any jurisdiction could possibly punish”); and RICHARD A. EPSTEIN, *HOW PROGRESSIVES REWROTE THE CONSTITUTION 2* (2006) (“The New Deal Court thus vindicated both expansive federal powers and limited protection of individual rights of liberty and property... That transformation represents the defining moment in modern American constitutional law: the Court’s shift toward the big government model that continues to dominate today”).

<sup>116</sup> For the erosion of confidence in major U.S. institutions, including the U.S. Supreme Court, see, e.g., Gallup, AMERICANS’ CONFIDENCE IN INSTITUTIONS STAYS LOW, GALLUP.COM (2016), <http://news.gallup.com/poll/192581/americans-confidence-institutions-stays-low.aspx> (last visited Jan 31, 2018) and Gallup, SUPREME COURT | GALLUP HISTORICAL TRENDS, <http://news.gallup.com/poll/4732/supreme-court.aspx> (last visited Jan. 31, 2018).

<sup>117</sup> Perhaps pragmatists and critical theorists have more in common than many suppose. On critical theory, see, e.g., COSTAS DOUZINAS & COLIN PERRIN, *CRITICAL LEGAL THEORY* (2011).

<sup>118</sup> This is far from just an American phenomenon. For an example, see a treatment of an unacknowledged move away from an essentialist understanding of “tax” in Australian law. Evans, *supra* note 19 at 223–7. For an openly non-essentialist understanding of “judicial power” in Australian law, see *id.* at 227–30.

<sup>119</sup> POSNER, *supra* note 36, at 64.

One aspect of the restoration of the rule of law should be a shift to the conscious, consistent, and precise use of conceptual essentialism and, then, a focus on coercive intent's role as an essential element of every law. By beginning with legal phenomena's effects upon the decision-making processes of typical legal subjects, jurists and theorists can better understand and direct law, and hopefully in a more careful and disciplined fashion. Unlike other approaches that focus on the political nature of the courts or the questionable constitutionality and broad powers of the administrative state, this philosophical critique attacks the problem from a very different angle and can complement those other efforts. Rather than seeing essentialism and pragmatic values in opposition, I have argued that pragmatic values require essentialism, and that legal pragmatism is unpragmatic.

The power of my argument depends on the value ascribed to the rule of law. Those who consider broad discretion granted to judges to be a virtue, not a vice—and especially if they wish the contours of that discretion to remain obscured—may favor conceptual non-essentialism over essentialism. Those who imagine the rule of just authorities to be a superior and lasting state of affairs may not favor the reinvigoration of law, which is often an obstacle to the implementation of their own best judgments.<sup>120</sup> This is not necessarily a dispute over the principle only, but additionally over the empirical value of the supremacy of law. But as society continues to diversify, the empirical need for clear and stable laws less prone to unexpected—and unrespected—reinterpretations is likely to grow.

Says Plato's Athenian in the *Laws*:

We insist that the highest office in the service of the gods must be allocated to the man who is best at obeying the established laws.... Such people are usually referred to as "rulers," and if I have called them "servants of the laws" [it is] because I believe that the success or failure of a state hinges on this point more than on anything else. Where the law is subject to some other authority and has none of its own, the collapse of the state, in my view, is not far off; but if law is master of the government and the government is its slave, then the situation is full of promise and men enjoy all the blessings that the gods shower on a state.<sup>121</sup>

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<sup>120</sup> Cf. "In a society governed by the wise and the good, legal reasoning is likely simply to get in the way. And in such a society, were such a society ever to exist, the Rule of Law would be at least superfluous, and quite possibly pernicious." SCHAUER, *supra* note 5, at 11.

<sup>121</sup> Plato, *Laws*, in PLATO: COMPLETE WORKS 1318–1616, 1402 (John M. Cooper & D. S. Hutchinson eds., Trevor J. Saunders trans., 1997).