Michigan Law Review

Volume 90 | Issue 6

1992

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PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND LIFE. By *Frederick Schauer.* New York: Oxford University Press. 1991. Pp. xvii, 254. $39.95.

What exactly do rules do? The conventional answer, which Professor Frederick Schauer[1] challenges in *Playing by the Rules,* is: Not very much. Rules do so little because, while people adopt them to accomplish something (the "purpose" of the rules), the rules are always either over- or underinclusive with respect to their purposes. A rule is overinclusive when it directs someone to do something that does not promote, and might even inhibit, that rule's purposes. Applying an overinclusive rule is inefficient, imposing the costs of complying with the rule yet failing to advance the rule's purposes.[2] If a transit authority excludes all drug users, including those who use methadone, from jobs on the subway to promote safety, and it turns out that the methadone users pose no more risk than anyone else, the transit authority is raising its own costs of operation without getting anything in return.[3] A rule is underinclusive when it fails to direct someone to do something that *does* promote its purposes. Underinclusive rules are, *qua* rules,[4] presumptively unfair, because nothing distinguishes the underlying case to which the rule is applied from the one to which it is not applied. In the previous example, if people with diabetes happen to pose a greater risk to safety than methadone users, then excluding the latter from jobs available to the former, in the name of safety, is unfair.

One's natural reaction, when confronted with a case in which a

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1. Frank Stanton Professor of the First Amendment, John F. Kennedy School of Government, Harvard University.

2. The conventional account of rules takes into account the possibility that applying the rule in these circumstances might be efficient if the cost of deciding whether or not to apply the rule exceeds the cost of applying it. This is what Schauer describes as "rules as rules of thumb," and he properly notes that it does not get at the fundamental ruleness of rules.

3. The example is drawn from New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979). The analysis gets more complicated, but does not otherwise change, if the authority claims that its purpose is to promote safety in a cost-justified way.

4. The qualification is necessary because underinclusive rules rarely *bar* a decisionmaker from advancing the rule's purpose with respect to someone or something not covered by the rule; they merely do not require the decisionmaker to do so.

rule is over- or underinclusive with respect to its purposes, is to ignore the rule and invoke the purposes directly. Then, however, the rule does no work at all. It is, as David Lyons has argued in connection with rule-utilitarianism, extensionally equivalent to its purposes.[5] That is, the rule consists entirely in the invocation of its purposes in particular cases. At most, the rule is a shorthand guide, a summary of judgments about what is most likely to advance those purposes. But, given a rational argument that applying the rule would not advance its purposes, it will not do for a decisionmaker to say: "Well, the rule says it applies, and I'm going to apply it without further consideration." Rather, the decisionmaker ought to consider the merits of the rational argument: if persuaded that applying the rule would not advance its purposes, she ought not apply it.

Schauer argues, against this conventional view, that rules really do something. The mistaken conventional view, Schauer argues, fails to distinguish between those who articulate rules and those who apply them. Schauer concedes the accuracy of the conventional view only if the very person who has articulated the rule — and who therefore knows its precise purposes and has full confidence in her own ability to determine how to advance them — will apply it. But rules are most often directed from one person to another. And, Schauer argues, if the rule-articulator, whom I will call Susan, believes that the rule-applier, whom I will call Sylvester, will less accurately promote the rule's purposes if Sylvester attempts to analyze and apply the rule's purposes directly than if he simply invokes the rule, the rule will do some work. As Schauer puts it: "If we do not trust a decision-maker to determine x, then we can hardly trust that decision-maker to determine that this is a case in which the reasons for disabling that decisionmaker from determining x either do not apply or are outweighed" (p. 98).

Rules promote accurate outcomes by preempting Sylvester's inquiry into whether applying the rule would actually advance the rule's purposes. The inefficiency of overinclusiveness and the unfairness of underinclusiveness are offset, under this scenario, because Sylvester will never fail to apply the rule where doing so would in fact — although Sylvester believes otherwise — advance the rule's purposes.

Before assessing Schauer's argument, I must enter a disclaimer. Schauer has written a serious work in the philosophy of law and language, which can most fully be evaluated by specialists in those fields. Although I am not such a specialist,[6] I can bring to Schauer's work the perspective of a law professor interested in jurisprudence, and particularly in the implications of jurisprudence for constitutional law. Although the limitations of my perspective deserve mention, I also

5. DAVID LYONS, THE FORMS AND LIMITS OF UTILITARIANISM (1965).

6. I should also note that I regard myself as one of Schauer's friends, and so may be more tempered in my judgments, more charitable in my presumptions, than I might otherwise be.

believe that Schauer's work is likely to be assimilated into mainstream U.S. law precisely by people like me, rather than by specialists in the philosophy of law and language. My quibbles, criticisms, and mistakes, therefore, can suggest what the "social" meaning of Schauer's work might be over the next few years. Further, as befits a writer in the analytic tradition, Schauer takes great care to be as precise as he can in his formulations. As a result, it would take an extended analysis and argument to unpack what he has to say about many collateral points. Fortunately for me, those collateral points do not adhere conceptually to Schauer's central argument about the practice of rule-following, and I believe it appropriate to leave discussion of most of the collateral points to others.[7]

Schauer's basic argument turns on distinguishing between Susan, the rule-articulator, and Sylvester, the rule-applier. Two related problems arise from that distinction. Schauer argues that rules do something when Susan, and not Sylvester, can better discern when applying the rule will advance the rule's purposes.[8] In Schauer's core image, a judge articulates a rule to be applied by a police officer on the beat. Some police officers might be better than some judges at determining whether the purposes of the constitutional rules limiting police investigatory techniques would be promoted by refraining from using one such technique in the circumstances at hand. But, Schauer suggests, the typical officer is more likely than the typical judge to make errors of over- and underinclusiveness. The typical officer will mistakenly believe in a high probability of discovering a crime in progress, while the typical judge, knowing that the probability is relatively low, can state a rule directing the officer to refrain from investigating unless conditions *A, B,* and *C* obtain — conditions that together raise the probability to a socially acceptable level. As Schauer says, we take a "worst case" or second-best perspective (pp. 152-53), disabling the best police officers from exercising their judgment directly so that less competent officers will, by following the rule, make the right decision more often. In the aggregate, we get a better fit between actions and purposes by directing every police officer to follow the rule, although in particular cases the best police officer would serve us better by exercising independent judgment.

Suppose, however, that Sylvester is actually better than Susan at figuring out how the rule's purposes will be advanced. The very abstractness of the issues presented to appellate courts, for example,

7. For example, much of chapter 2 clarifies the distinction between descriptive and prescriptive rules, and similarly clarifies the notion of rules as probabilistic descriptive generalizations. These clarifications are important in some contexts but they are not, I think, central to Schauer's main argument. Except when engaged in a particular kind of philosophical argument, of a different sort than Schauer's, few people think that legal rules are, in their normative dimension, descriptive.

8. *See, e.g.* pp. 149-50.

might lead judges to overlook relevant information that police officers have at their fingertips — information that because of their lack of specialized education, officers are less likely to articulate in terms that judges find persuasive.[9] Here, two possibilities emerge. First, Susan may recognize that Sylvester is better than she. She could then adopt a rule for herself that she will always defer to Sylvester's decisions. That, however, raises a difficult question. Under what circumstances does it make sense for a person to make a rule that purports to bind herself in the future? It makes sense, I think, if Susan (a) is unsure that she will be able to invoke the rule's purposes directly in the future (perhaps because she knows that her judgmental capacities will degenerate), and (b) is sure that in the future she would recognize that her then-contemporary judgments about what would advance the rule's purposes were less accurate than the judgments to which the rule directs her (that is, that she would recognize that her judgmental capacities had degenerated). I am skeptical about the psychological realism of this picture.[10]

The other possibility introduces a third character, Loretta the legislator. Loretta knows that Sylvester is better than Susan, and therefore structures Susan's jurisdiction to keep her from making rules binding on Sylvester. At this point, though, a problem of infinite regress looms. We want to make sure that Loretta allocates jurisdiction correctly, allowing Susan to make rules where she is better than Sylvester, and denying her jurisdiction where Sylvester is better. But, of course, the allocation of jurisdiction occurs according to some rule, too.[11] As a result, we now have to worry about the problem that arises when Susan is better than Loretta at figuring out when invoking Susan's jurisdiction will promote the purposes of the rules.

The problem of jurisdiction may not be serious in light of Schauer's limited purposes. At the outset of the book, he describes his analysis as deliberately "unrealistic" (p. vii). I take that to mean that the analysis tries to define a set of conditions that would make "playing by the rules" a coherent practice. Schauer's conditions for coherence are these: (a) Susan is better than Sylvester with respect to questions over which she has jurisdiction; (b) Loretta is better than Susan with respect to questions of allocating jurisdiction; (c) and so on *ad infinitum*. Nothing in this argument *requires* that those condi-

9. I merely note that a certain degree of elitism seems essential to Schauer's argument, beyond even the hierarchy of rule-articulator and rule-applier that it obviously requires.

10. Schauer discusses this intertemporal problem in connection with the issue of precedent (pp. 182-87), and in connection with institutions that persist over time with changing personnel (pp. 172-74). The discussion of precedent, posing the problem as it arises for Susan at time 2, does not, I think, fully address the problem that faces Susan at time 1. The discussion of institutions, while astute, of course does not deal with the psychology of rule-formulation by individuals.

11. Schauer uses the term *jurisdiction-apportioning* to describe rules. *See, e.g.*, p. 98.

tions ever obtain, and indeed Schauer often inserts qualifications strongly suggesting that, in his view, the domain in which "playing by the rules" is a coherent practice is quite limited.[12] Further, nothing in the argument requires that anybody ever be able to tell whether or not the conditions obtain, which is why the infinite regress is not a problem for the argument.

Still, I am bound to wonder about the practical significance of Schauer's argument.[13] Once again I find it useful to put the question in terms of jurisdiction. Jurisdictional rules typically allocate decisions to institutions — courts, police departments, prosecutors' offices, legislatures — rather than to individuals. And, while I am confident that some individuals are better than others at determining whether applying a rule will advance or impede the rule's purposes, I seriously doubt whether we can make any systematic judgments about institutions. I for one am not confident that judges, taken as a group, are better than police officers or, perhaps more important, police chiefs — again, taken as a group — at striking the proper balance between my right to be protected against depredations by marauding individuals and my right to be protected against depredations by marauding police officers.

My lack of confidence occurs because each job requires its holder to have a number of talents: the ability to make sound judgments after reflection ("applying the law"), the ability to make sound decisions quickly ("preserving order"), the ability to discern the reality of events beneath the words people use to describe them ("finding facts"), and many others. Some people are better than others along all these dimensions, but we have no reason to believe that the processes by which people are selected for different jobs ensure that only those better along all dimensions occupy the superior positions. Some judges are better than some police chiefs, but some police chiefs are better than some judges.

Further, the situations in which people are called on to make decisions are so various that we have no reason to believe that the talents we measure as a basis for deciding who ought to occupy different jobs really do very well to identify those who will make the best decisions about the cases they are asked to decide. Police chiefs probably are better than judges in setting guidelines about high-speed car chases; judges probably are better than police chiefs in setting guidelines about using battering rams to get into "drug houses." And, unfortunately, I doubt that we really know whether most rules deal with situations

12. *See, e.g.*, p. 179 ("the aspirations of the common law tend away from ruleness").

13. Schauer expresses the "hope" that his analysis can be "returned to its more realistic home . . . in such a way that the analysis may then help those who study decision-making in greater breadth." P. vii.

more like car chases or more like battering rams.[14]

The general point follows. Suppose that the distribution of skill in applying rules solely in light of their purposes is roughly the same within every potential rule-applying institution. Then, playing by the rules would not be a coherent practice: Susan might be better than Sylvester, but all the Susans taken together would not be better than all the Sylvesters taken together. Of course, to find out whether this was true would require an empirical inquiry of the sort that Schauer abjures.[15]

Schauer makes a secondary argument, one that almost inverts the first insofar as it requires that he deny that two groups like the Susans and the Sylvesters are different. The problem this argument addresses is: How does it come about that Sylvester actually is constrained by the rule Susan has laid down? Sylvester may follow the rule because he is subject to the exercise of social power; if Susan concludes that he failed to follow the rule, he will be fired. Then, however, Sylvester is not constrained *by the rule;* he is constrained by social power.[16] For *the rule* to constrain, it must have what Schauer calls *semantic autonomy* — "the ability of symbols . . . to carry meaning independent of the communicative goals on particular occasions of the users of those symbols" (p. 55).

Clearly, to complete the argument, Schauer must establish that semantic autonomy is not derived from social power.[17] At this point my amateur status disables me from offering more than a modest comment. Consider the possibility that the meaning of words is stabilized within communities that are constituted by the exercise of social power.[18] Within such communities, words have the relevant sort of semantic autonomy, and rules (appear to) constrain, but the true source of constraint is the social power that constitutes the community.[19] Schauer marches up to, and then away from, discussing this

14. I am fairly sure that class-based elitism affects the judgment prevalent among law professors that judges, taken as a whole, are better along most dimensions than police officers or police chiefs. *See also supra* note 9.

15. One might ask for a common-sense judgment about the distribution of skills. For what it's worth, my sense of things is that police chiefs have a slight advantage over judges with respect to the skills relevant to issues of law, order, and civil liberties. Of course, framing the inquiry in terms of common sense simply invites us to consider the social sources of common sense.

16. I believe that the argument against Schauer is strongest in its "social power" version, but similar arguments could be constructed by someone who offered some other nonlinguistic source of constraint.

17. Or, again, from some other nonlinguistic source.

18. For my argument to hold, these communities must be linguistic: social power must define the language that community members use. For a discussion of Schauer's response to one version of this claim, see *infra* note 20.

19. For an analysis that is, I believe, consistent with the lines of argument developed here, see Margaret Jane Radin, *Presumptive Positivism and Trivial Cases,* 14 HARV. J.L. & PUB. POLY. 823 (1991).

possibility.[20]

Schauer does show that the "social power" argument cannot be conducted on the level of individuals, but that, presumably, should go without saying. He may have been misled by a common rhetorical style, echoed in this review, of personalizing more general arguments (Susan and Sylvester, for example) rather than discussing — to be crude about it — the ruling class and the working class. Of course the question of social power, or nonlinguistic sources of semantic autonomy, arises only in connection with Susans and Sylvesters taken as aggregates.

In two footnotes, Schauer notices the problem, but recasts it in a way that leads him away from a full discussion. "[N]othing I say," he writes, "denies the possibility of linguistic sub-communities within the community of English-speakers."[21] But, he argues, "it is almost always the case that that technical language [of linguistic subcommunities] is parasitic on ordinary language" (p. 60 n.11). Finally, Schauer envisages an extension of the "technical sub-community" idea to "the possibility that every speech act environment is its own linguistic community" (p. 60) — that is, an extension to a completely individualistic form.

I do not understand why the only relevant subcommunities are those that use technical language. Perhaps Schauer believes that linguistic subcommunities cannot be constituted by social power because they must use ordinary language to get the process of becoming a *sub*-community going, and that social power can have no relevance to the already constituted ordinary-language community of which the subcommunities are already parts. Yet, the point about linguistic communities that use technical language, which Schauer obviously understands, is that their uses are initially parasitic upon ordinary language, but at some point split off.

Now consider two potential linguistic subcommunities: Susan's and Sylvester's. Perhaps their language must be parasitic on ordinary language in the same way, but I do not understand why that must be so. If they are parasitic in different ways, as the subcommunities de-

20. Schauer addresses what he properly calls an implausible argument that "meaning is a function of how an item of language is used on a particular occasion by a particular speaker." P. 59. He says as well that it is another thing to argue that "the meaning of a word . . . is a function of how it is used by the community of speakers of a language." P. 59. A few pages later he discusses an important contemporary controversy among philosophers about how to understand Wittgenstein's discussion of rule-following. Pp. 65-68. The dispute as Schauer presents it concerns how *"an unformulated or unformulatable rule"* constrains; it does not concern "explaining the potential constraint of a formulated rule." P. 67. As so understood, the dispute is not one on which Schauer must take a position. P. 65 n.23. Perhaps because I have misunderstood the philosophers' debates about Wittgenstein (and because I find one side of the argument more persuasive than the other), I think that Schauer does not confront the "social power" argument head on.

21. P. 60 n.11; *see also* p. 58 n.8.

velop their understanding of their own terms, the distance from ordinary language increases, but, more important for the present argument, so does their distance from each other. Sylvester's *probable cause* may be parasitic on ordinary language in one way, within a linguistic subcommunity of police officers, while Susan's is parasitic on ordinary language in another way, within a different linguistic subcommunity.[22] If Sylvester nonetheless acts in a manner consistent with Susan's rule, Schauer has not eliminated — or, I am afraid, even addressed — the possibility that it is social power, rather than the rule's meaning, that constrains Sylvester. To capture my point in an oversimplified phrase: for "playing by the rules" to be a coherent practice, Sylvester must be different from Susan, but for rules to constrain because of their semantic autonomy, Sylvester must be part of the same linguistic community as Susan.

Nothing in the nature of society makes it *impossible* for both parts of that phrase to be true. Nor, however, does anything in the nature of language make it *necessary* that they both be true. In short, Schauer's analytic exercise makes sense of the practice of rule-following, but it does not, because I believe it cannot, establish that rules constrain because of their semantic autonomy. I confess, though, that I do not really understand why that is so important anyway.

Throughout the book Schauer illuminates a number of issues. For example, he explains why a legal system, considered as a set of rules, typically operates on the premises of "presumptive positivism" (pp. 202-06). Yet, as far as I can tell, little in Schauer's analysis of these collateral issues turns on his particular view of the ruleness of rules; nothing changes, as far as I can see, if we confine our attention to rules considered as mere "rules of thumb." Presumptive positivism for Schauer is "a way of describing a degree of strong but overridable priority," so that "decision-makers override a rule . . . not when they believe that the rule has produced an erroneous or suboptimal result in this case . . . but instead when, and only when, the reasons for overriding are perceived by the decision-maker to be particularly strong" (p. 204). But that also describes how an intelligent decisionmaker uses rules of thumb. Rules of thumb have presumptive force when decisionmakers believe that they *may* be overlooking information that a more intensive but more expensive search would reveal. They therefore lack sufficient confidence in their judgment that the result in the case at hand is erroneous to override the rule of thumb, which encapsulates a range of experience with apparently similar cases.

Schauer's collateral arguments are interesting, but obviously more important is his central point about the practice of rule-following. His analysis there is instructive, and may well be correct as a conceptual

22. For example, Susan the judge may believe that *probable* means "more likely than not," while Sylvester the police officer may believe that it means "reasonably likely."

analysis. As I have suggested, however, its practical implications are less clear to me. Perhaps the analysis suggests that a police chief trying to develop a rule about car chases should consider whether she is better than police officers at identifying and balancing the interests affected by car chases. Yet, as I have suggested, I am reasonably confident that any chief who put the issue of formulating such a rule on her agenda would already have resolved *that* question. And, of course, Schauer agrees that once a rule is in place, his analysis does not tell anyone what to do with it.