



Unconventional Wisdom

LIKE MOST LAW PROFESSORS WITHOUT PHDS IN A NON-LAW discipline, Fred Schauer's first scholarly efforts were based on his practice experience. And because some of his experience as a litigator in Boston involved the defense of obscenity prosecutions in state and federal courts—"I was a smut lawyer," he says—he started off writing articles and then a treatise (*The Law of Obscenity* (BNA, 1976)) about obscenity law. Believing strongly that scholarship needs to be distinguished from advocacy, however, the treatise and articles often took positions different from those he advanced as an advocate. Indeed, his willingness to defend the constitutionality, even if not the wisdom, of obscenity restrictions set him apart not only from those who defended sexually explicit publications in court, but also from the conventional academic wisdom.

He may have started as a "smut" lawyer, but today Schauer is one of the most influential scholars in the legal academy. The author of six books, co-au-

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thor or co-editor of several more and the author of more than 200 articles, Schauer has written on an astounding number of subjects in the fields of constitutional law, legal theory, and philosophy. His work is characterized by analytic clarity, intellectual range, and skepticism about received wisdoms. As evidenced by the many honors he has received and the volumes of essays devoted to examining his work, Fred Schauer has shaped the terms of the debate in several fields.

Following his work on pornography and obscenity, Schauer broadened his scholarship to questions of First Amendment law in general. There, he continued to challenge the accepted views about the strength and scope of the First Amendment. In his writings about libel, incitement, privacy, and the speech of students, teachers, and government employees, for example, he took pains to recognize that freedom of speech, for all of its importance, exists in a world in which other and competing values are also important. “American protection of freedom of speech and freedom of the press is much greater than anywhere else in the world, and that includes all of the other open democratic countries,” he observes. “That does not necessarily mean that the rest of the world is right and the United States wrong,” he adds, “but it does suggest that it is a mistake to assume that free speech does not compete with other legitimate concerns, and a mistake to fail to recognize that we protect speech not because it is harmless, but despite the harm it may cause.”

If speech is protected despite its capacity to cause harms, there must be a deeper reason for protection, and the search for these reasons led Schauer to turn his free speech interests to the more philosophical and theoretical. His 1982 book—*Free Speech: A Philosophical Enquiry* (Cambridge University Press)—focused on these reasons, again in ways that challenged many of the standard platitudes about the value of self-expression and the ability of truth to prevail in the so-called marketplace of ideas. The book has achieved a central place in the free speech literature, and is often credited with shifting the nature of free speech scholarship from pure advocacy to a deeper and more balanced attempt to recognize and accommodate competing interests. Most recently, Schauer has been

as interested in the speech that the First Amendment does *not* touch as in the speech that it protects. He has explored this theme in several articles (“The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience,” 117 *Harvard Law Review* 1765 (2004); “Facts and the First Amendment” (The Melville Nimmer Lecture), 57 *UCLA Law Review* 897 (2010)), and he argues that it is important to recognize that the First Amendment deals with only a small sliver of our communicative and our linguistic life, and only a thin slice of the universe of communications policy.

Schauer continues to write about issues of freedom of speech and press, but his scholarly interests and efforts have broadened to general issues of constitutional law. His wide-ranging work focuses on issues of constitutional interpretation; comparative constitutional law; and the theories of constitutionalism, judicial review, and judicial interpretive authority. In one important strain in this work, Schauer has provided a defense of so-called judicial supremacy. His nuanced arguments in this vein have made him a leading voice against those who champion a major role for the President, Congress, and citizens generally in interpreting the Constitution.

Schauer’s work has frequently stressed the role of constitutional text, which he believes can have constraining power independent of question of original intent or original meaning (“An Essay on Constitutional Language,” 29 *UCLA Law Review* 797 (1982)). And he is particularly interested in the importance (or the lack thereof) of constitutional constraints in the decision-making processes of officials other than judges. In a series of articles with Larry Alexander, he has urged greater deference by legislative and executive officials to Supreme Court interpretations of the Constitution (“On Extrajudicial Constitutional Interpretation,” 110 *Harvard Law Review* 1359 (1997); “Defending Judicial Supremacy,” 17 *Constitutional Commentary* 455 (2000)).

One reason for this view, he says, is that there is little evidence that people or policy-makers can distinguish second-order constitutional constraints from first-order policy preferences. In his recently published

Sibley Lecture at the University of Georgia (“When and How (If at All) Does Law Constrain Official Action,?” 44 *Georgia Law Review* 769 (2010)) he has marshaled examples and empirical support for the proposition that constitutional law in particular and law in general has little effect on the decisions of public officials, thus supporting the view that the courts must have a substantial role in the enforcement of legal and constitutional constraints on policies and political preferences.

While Schauer argues that courts can and should constrain public officials, in his view, less is more. He has argued that the courts can perform their task of constitutional interpretation most effectively if they do not take on too much. He started to develop this argument when he was invited to write the prestigious *Foreword* to the *Harvard Law Review*'s annual Supreme Court issue. In the *Foreword*, Schauer drew heavily on public opinion research to show that the Supreme Court's agenda diverges considerably from the public's agenda of concerns and policy-makers' agenda of activities (“Foreword: The Court's Agenda – and the Nation's,” 120 *Harvard Law Review* 4 (2006)), a strategy he believes helps the Court retain a degree of legitimacy and respect. By generally deciding either low controversy or low salience issues, he argues, and avoiding issues that are both high controversy and high salience (such as health care, bailouts of banks and auto companies, and the wars in Iraq and Afghanistan), the Supreme Court can and does avoid the kind of crises that existed in the 1930s when its actions prompted Roosevelt's court-packing plan.

Schauer's interest in the role of courts parallels his interests in the nature of legal argument and legal reasoning. In his 1991 book *Playing By the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Oxford University Press) and a series of articles (“Slippery Slopes,” 99 *Harvard Law Review* 361 (1985); “Precedent,” 39 *Stanford Law Review* 571 (1987), “Formalism,” 97 *Yale Law Journal* 509 (1988); “Is the Common Law Law,?” 77 *California Law Review* 455 (1989); “Exceptions,” 58 *University of Chicago Law Review* 871 (1991); “Giving Reasons,” 47 *Stanford Law Review* 633 (1995)), he has explored the various characteristic forms of legal argument, with a particular focus

on (and sympathy with) the role of rules in constraining decision-makers. And thus in a recent book, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* (Harvard University Press, 2009), he has tried to explain that legal reasoning—“thinking like a lawyer”—is distinctive in its comparative willingness to reach the wrong result in particular cases in the service of the values of generality in decision, constraint by precedent, and limitation of discretion by written rules. He sees the distinctive forms of legal argument and legal decision as embodying the special values of the Rule of Law, values that appropriately diverge from the values that motivate much of executive, legislative, administrative, and individual decision-making.

As with his work on freedom of speech, much of Schauer’s work on legal reasoning is informed by the methods of modern analytical philosophy, with some emphasis on the philosophy of language. More recently, he has used his philosophical interests to write about the enduring questions of jurisprudence and legal philosophy. Although much of jurisprudence focuses on ideal actors engaged in ideal decision-making, Schauer’s interests are in the role of law with respect to non-ideal decision-makers making decisions under non-ideal conditions. This concern with the non-ideal, and with the relationship between law and the messy motivations and skills of real decision-makers, explains not only his long-standing interest in rules and in the occasional but often-ignored virtues of formalistic decision-making (see “A Critical Guide to Vehicles in the Park,” 83 *New York University Law Review* 1109 (2008)), but also his more recent focus on the role of force and coercion in law and legal institutions (“Was Austin Right After All? On the Role of Sanctions in a Theory of Law,” 23 *Ratio Juris* 1 (2010)). That focus is likely to culminate in a book that will attempt to reorient much of modern jurisprudence away from a concern with abstract conceptual analysis under ideal conditions and towards a jurisprudence more focused on the non-ideal aspects of our legal lives.

Schauer’s focus on the non-ideal has led him to an increased interest in the empirical and institutional side of legal scholarship. Institutions matter, he argues, in much the same way that rules matter, because they

structure the decisions and incentives of inevitably imperfect human beings. This is reflected in the persistence of even the psychologically naïve formal rules of evidence (“On the Supposed Jury-Dependence of Evidence Law,” 155 *University of Pennsylvania Law Review* 165 (2006); “In Defense of Rule-Based Evidence Law—and Epistemology Too,” 5 *Episteme* 295 (2008)). For Schauer, the law of evidence is a microcosm of the role of law more generally: structuring real-world decision-making institutions so as to achieve the optimal balance between empowering wise decision-makers to make wise decisions and preventing unwise, misguided, or genuinely evil decision-makers from making disastrous ones. Schauer recognizes that neither of these goals can be taken as exclusive, and that achieving the balance between the two in light of what we know about human behavior and human decision-making capacities remains the perennial dilemma of law. In thinking this way, Schauer often draws in a non-technical way on the decision theory he was introduced to when studying for an M.B.A. prior to law school, and his interest in decision theory and probabilistic reasoning, *Profiles, Probabilities, and Stereotypes* (Harvard University Press, 2003), has produced a particular interest in the mistakes that people make and how legal institutions might be structured to recognize the persistent phenomenon of human error.

In his current and planned future work, Schauer is interested in focusing more on the empirical and comparative dimensions of the topics of his greatest interest. He is planning a series of experiments on legal reasoning, trying to determine whether those who self-select for law school or those with legal training think and decide differently from others. And he is also interested in further empirical exploration of the effect of law in general and constitutional law in particular on the decisions of officials and ordinary people. But he has not abandoned his longstanding philosophical interests and focus, and is also trying to develop a new conception of legal positivism that will better connect traditional jurisprudential debates about legal positivism with historically and currently important concerns about the legal interpretation and the role of judges. 🍃

EXCERPTS

Is It Important To Be Important?: Evaluating The Supreme Court's Case-Selection Process

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AS THE SUPREME COURT'S CASELOAD SHRINKS, FROM ABOUT 150 cases per year in the 1980s and early 1990s to about seventy now, concern has grown over whether the Court is leaving too many important cases undecided. But the extent to which the concern is justified depends in part on what we mean by "important," and in part on whether it is important that the Supreme Court decide important cases. That the Court has traditionally taken on important cases and issues is a commonplace, but whether the commonplace is true depends on how we phrase the question. Whether what much of what the Supreme Court does is important is very different from whether much of what is important is done by the Supreme Court, and without knowing which we are asking, we cannot intelligently evaluate the Court's case selection process.

The difference between how much of what the Court does is important and how much of what is important the Court does emerges upon even a casual glance at the daily newspapers. Although the Court has addressed important issues of gun control, campaign finance, capital punishment, punitive damages, presidential power, detention of enemy combatants, sexual orientation, and religion in the public sphere, among others, it has decided no cases determining the authority of a president to commit troops to combat outside of the United States. Nor has it directly decided cases involving health care policy, federal bailouts of banks and automobile manufacturers, climate change, and the optimal rate of immigration. And nothing the Court has decided for years is even in the neighborhood of

addressing questions involving mortgage defaults, executive compensation, interest rates, Israel and Palestine, and the creation of new jobs.

The latter list is not randomly chosen. Rather, it is a list of the issues that dominate public and political discourse, a list surprisingly removed from what the Supreme Court is actually doing. Three years ago I noticed this gap between what the public cares about and what the Supreme Court does, and updating the data does not change the picture. When asked in non-prompted fashion to name the most important issues facing the country, Americans overwhelmingly name the economy, health care, wars in Iraq and Afghanistan, jobs, immigration, and education, as they have for the past eight years. Indeed, the list resembles those for much of the past three decades. Crime occasionally breaks into the top ten, but the most recent lists capture not only the long-standing importance of basic foreign policy and economic issues, but also the persistent non-appearance in the top ten (and usually even in the top twenty) of abortion, sexual orientation, race, gender, and the other issues that represent the salient part of the Court's docket.

When importance is measured by what the public and their elected representatives think is important, therefore, and by what the government actually works on, the Supreme Court's docket seems surprisingly peripheral. That is not to say that what the Court does is not important, but it is to say that its actual business is less important to the public and to the public's representatives than lawyers and law professors tend to believe. And it is hardly clear there is anything wrong with this. By dealing either with low-controversy issues or with high-controversy low-salience issues, and thus by generally avoiding high-controversy high-salience issues, the Court may retain public confidence and empirical legitimacy necessary to secure at least grudging acquiescence in its most controversial decisions.

It is one thing to recognize the strategic value of avoiding most publicly important issues, but quite another to see much value in the Court's avoidance of *legally* important issues, one measure of which would be the extent to which the issue appears in lower court litigation. If that is the measure, however, then there is evidence that the Supreme Court

is little more inclined to take on legally important issues than publicly important ones.

It is impossible here to offer full empirical analysis and support for this claim, but consider as an example litigation under the First Amendment's speech and press clauses, a great deal of which is represented by free speech issues arising in public employment and the public schools. Indeed, issues involving student and teacher speech, employee speech, organizational membership, and related topics vastly overwhelm the quantity of lower court First Amendment issues dealing with obscenity, indecency, incitement, press freedoms, and the numerous other topics that dominate the casebooks. Yet although schools and public employee cases far surpass other categories of First Amendment litigation in the lower courts, the Supreme Court takes surprisingly few such cases. In forty years it has taken only four involving speech in the public schools, three dealing with speech in colleges and universities, and twelve on the free speech rights of various public employees.

That the Supreme Court takes few cases in a number of high-litigation areas would be of less moment if the cases it did take were representative, and the decisions it issued useful in terms of providing guidance. But in fact neither of these occur. In *Morse v. Frederick*, for example, the “Bong Hits 4 Jesus” case, the Court, in deciding only its fourth student speech case ever and the first in more than a decade, took and decided a case that was highly unrepresentative of the student speech cases that bedevil the lower courts. And having taken the case, even the majority issued an opinion that was so narrow, so case-specific, and so idiosyncratically about alleged encouragement of drug use as to provide virtually no guidance to the courts that have to deal with the issue.

Morse is hardly unusual. On a large number of issues of regulatory law, constitutional law, criminal procedure, and others, the Court's cases have been similarly unrepresentative and its decisions similarly unhelpful. And thus if frequency of litigation in the lower courts combined with unanswered questions about the state of the law is some indication of legal importance, then the Court's record of taking legally important cases is

little stronger than its record of taking socially important cases, but with far less justification.

The Court's weak record of deciding legally important cases is likely a function of its inability systematically to gain needed information about legal importance. When appellate courts make decisions, they determine the outcome of the dispute between the parties and set forth a rule that governs large numbers of other acts and events. In order to perform the latter task adequately, however, courts need a sense of the array of events that some putative rule or standard or policy or test will control. The problem, however, is that courts find themselves suffering from a structural inability to obtain just that kind of information.

First, courts are of course not well situated to go out and actually research the field of potential application of some rule. Occasionally one of the parties might do this in a brief, but it is rare, and even at the Supreme Court level amicus briefs seldom serve this function. Second, everything we know about the availability heuristic and related phenomena tells us that a court trying to make a rule in the mental thrall of the particular case before it will likely assume, often inaccurately, that the case before it is representative of the larger field. Finally, and most importantly, the selection effect—the process by which cases with certain characteristics get to appellate courts and other cases with different characteristics do not—provides further distortion of information. Whenever the Supreme Court—or any court—sets forth a rule, standard, principle, or test, it creates the possibility of three different forms of behavior on the part of those the rule addresses. One is compliance, another is violation, and the third is “dropping out,” ceasing to engage in the behavior the rule seeks to regulate. So when the Court decided *Miranda v. Arizona*, it created a world in which some police officers complied by giving the required warnings, others violated by conducting custodial interrogations with giving warnings, and some stopped conducting custodial interrogations.

The selection problem arises because the courts will never see the dropout cases, and rarely see the compliance cases. By seeing only the violations, courts find themselves subject to severe information distortion.

And because this phenomenon is exacerbated as litigation ascends the appellate ladder, the Supreme Court, even taking into account the information provided by amicus briefs, the research done by the Justices and their clerks, and the fact that the Justices read the newspapers, will be at an informational disadvantage in deciding which cases to decide and how broadly or narrowly to decide them. 🌿

From Chapter One of *Thinking Like a Lawyer: A New Introduction to Legal Reasoning*

(Harvard University Press, 2009)

LAW SCHOOLS CLAIM TO INSTRUCT THEIR STUDENTS IN HOW TO “think like a lawyer.” Studying law is not about learning a bunch of legal rules, they insist, for law has far more rules than can be taught in three years. Nor is legal education about being told where to stand in the courtroom or how to write a will, for these skills are better learned in practice than at a university. What really distinguishes lawyers from other sorts of folk, so it is said, is mastery of talents in argument and decision-making often collectively described as *legal reasoning*. So even though law schools teach some legal rules and practical professional skills, they maintain that their most important mission is to train students in the arts of legal argument, legal decision-making, and legal reasoning—in thinking like a lawyer.

But *is* there distinctively *legal* reasoning? *Is* there something that can be thought of as thinking like a lawyer? Of course some lawyers think and reason better than others, but the same can be said for physicians, accountants, politicians, soldiers, and social workers. So the claims of law schools to teach legal reasoning must be other than just teaching students how to think more effectively. And indeed they are. Law schools aspire to teach their students how to think *differently*—differently from ordinary people, and differently from members of other professions. The idea that legal reasoning is different from ordinary reasoning, even from good ordinary reasoning, has been the belief of most lawyers, judges, and law schools for a long time. The traditional belief in the distinctiveness of legal reasoning might be mistaken, but it comes with a sufficiently distinguished provenance that the possibility that there is *legal* reasoning ought not be easily dismissed.

That there might be something distinctive about legal reasoning does not flow inexorably from the existence of law as a discrete profession.

Electricians know things that carpenters do not, and carpenters know things that plumbers do not. But it would be odd to talk of thinking like a carpenter or a plumber. Indeed, maybe it is odd to talk of thinking like a lawyer. Yet law schools and most lawyers do not think it odd. What lawyers have other than technical skills and knowledge of the law is not so simple to pin down, however. Indeed, that difficulty may account for the numerous skeptical challenges over the years to law's claim to distinctiveness. Legal Realists insisted that lawyers and judges do not approach problems much differently from other public decision-makers. Political scientists often make similar claims about the Supreme Court, arguing that the attitudes and policy preferences of the justices play a larger role in the Court's decisions than the traditional methods of legal reasoning. Psychologists examining the reasoning processes of lawyers and judges focus less on modes of legal reasoning than on the shortcomings of rationality that bedevil all decision-makers, whether lawyers or not. Lawyers and judges may be lawyers and judges, so these challenges maintain, but they are also human beings with human talents and human failings. And the fact that lawyers and judges are human explains more about legal and judicial reasoning, it is said, than anything that may have been learned in law school or legal practice. Consequently, one way of approaching the alleged distinctiveness of legal reasoning is to consider how much of the reasoning of lawyers and judges is explained by their specialized training and roles, on the one hand, and just how much is explained simply by the fact that they are human, on the other.

This book is dedicated to exploring the various forms of reasoning that have traditionally been especially associated with the legal system, such as making decisions according to rules, treating certain sources as authoritative, respecting precedent even when it appears to dictate the wrong outcome, being sensitive to burdens of proof, and being attuned to questions of decision-making jurisdiction as well as result. But we should not set up unrealistic aspirations for legal reasoning's claim to distinctiveness. In the first place, law cannot plausibly be seen as a closed system like the game of chess. All the moves of a game of chess can be

found in the rules of chess, but not all of the moves in legal argument can be found in the rules of law. Not only does law depend on numerous non-legal skills, but it is also inevitably subject to the unforeseeable complexity of the human condition. We can at best imperfectly predict the future, just as we continue to be uncertain about what to do with that future once we get there. Law may well contain within its arsenal of argument and decision-making the resources it needs to adapt to a changing world, but the image of a totally closed system is an inaccurate picture of what law does and how it does it.

Not only is law not a closed system, but its methods of reasoning are not completely unique to law. Perhaps there is little overlap between Estonian and English, or between literary criticism and multivariate calculus, but the forms of legal reasoning are found outside the legal system. Judges often make decisions based on the dictates of written-down rules, but so do bureaucrats, bankers, and every one of us when we observe the speed limit written on a sign. The legal system is concerned with precedent, but this is again hardly unique to law, as is well known to the parents of more than one child when dealing with the argument by a younger child that he or she should be allowed to do something at a certain age just and only because an older sibling was allowed to do the same thing at that age. And although law is also characterized by authority-based reasoning, this too is hardly unknown outside of the legal system. Every parent who has ever in exasperation said “Because I said so!” to a stubborn child recognizes that appeals to authority rather than reason have their place throughout human existence.

Yet although the modes of legal reasoning are found outside the law, these forms of reasoning and decision-making may be particularly concentrated in the legal system. For however much these various forms of reasoning exist throughout our decision-making lives, it is important not to forget that they are odd in a special way: each of the dominant forms of legal reasoning can be seen as a route towards reaching a decision *other than* the best all-things-considered decision for the matter at hand. Often when we obey a speed limit we are driving at a speed that is not the same

as what we think is the best speed given the traffic, the driving conditions, and our own driving skills. Similarly, following precedent is interesting primarily when we would otherwise now make a different decision. The parent who gives the younger child the same privileges at the same age as an older child feels the pull of precedent only when the parent otherwise thinks there is a good reason for treating the two differently. And we say we are *obeying* or *following* an authority only if what we are doing because of what the authority has said is not the same as what we have done if left to our own devices to make the decision we thought best.

Once we understand that these admittedly common forms of reasoning are peculiar in dictating outcomes other than those the decision-maker would otherwise have chosen, we can understand as well that the substantial and disproportionate presence of these forms of reasoning in the legal system can support a plausible claim that there is such a thing as legal reasoning. If these counter-intuitive forms of reasoning are dominant in law but somewhat more exceptional elsewhere, then we might be able to conclude that there is such a thing as legal reasoning, that there is something we might label “thinking like a lawyer.”

Law’s seemingly counter-intuitive methods are a function of law’s inherent *generality*. Although legal disputes involve particular people with particular problems engaged in particular controversies, the law treats the particulars it confronts as members of larger categories. Rather than attempting to reach the best result for each individual controversy, law’s goal is to make sure that the outcome for *all* or at least most of the particulars in a given category is the right one. Often in law it is better to reach the wrong result in the particular controversy than to adopt a rule that would produce what would seem to be the correct result for this case but at the cost of producing the wrong result in many others.

This principle explains the traditional ritual of Socratic dialogue that takes place in the first year of law school. After eventually being coaxed into accurately reciting the facts of some reported case, the student is asked what she thinks should be the correct result. Typically the student responds by announcing what she believes to be a fair outcome as between

the particular parties. At this point the student is asked to give the rule or principle that would support this outcome, and then the pattern of Socratic inquiry begins. By a series of well-planned hypothetical examples, the professor challenges the student's initially offered rule, with the aim of demonstrating—at the expense of the chosen victim—that a rule that would generate a fair outcome in the present case might generate less satisfactory results in other cases.

Socratic inquiry is also the common form of judicial questioning in appellate argument. Because appellate opinions serve as precedents in subsequent cases, judges are as concerned with the effect of their immediate ruling on future cases as with reaching the best result in the present case. Appellate advocates thus frequently find themselves asked in oral argument how the rule or result they are advocating will play out in various hypothetical situations. As in the law school classroom, judges pose hypothetical scenarios to lawyers because the right result in the particular dispute before the court will wind up as the actual outcome only if it can be justified in a way that will not produce the wrong outcomes in too many future cases.

In seeking to demonstrate to the hapless student or struggling advocate how the best legal outcome may be something other than the best outcome for the immediate controversy, Socratic interrogation embodies law's pervasive willingness to reach a result differing from the one that is optimally fair in the particular case. Law is typically concerned with the full array of applications of some general rule and principle, and law often pursues that concern at the cost of being less worried than non-legal decision-makers might be with a possible error or injustice or unfairness in the particular case. Although it may seem unfair to take the existence of a clear rule or a clear precedent as commanding a result the judge herself thinks wrong, following even a rule or precedent perceived by the judge to be erroneous is what, under the traditional understanding, the law often expects its decision-makers to do. 🌿

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