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RULES AND REASONING: ESSAYS IN HONOUR OF FRED SCHAUER

Edited by Linda Meyer

Hart Publishing, Oxford 1999
vi, 201 pp
ISBN 1901362981

Fred Schauer is unusual amongst US legal philosophers in his favourable interest in rules, formalism and legal positivism. His *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and Life* (1991) is a superb book which is both illuminating and persuasive with respect to the nature and benefits of a legal system that takes rules seriously.

This book of essays, written in Professor Schauer's honour and mostly delivered originally in his presence at a conference in 1997, variously expound, criticise or simply take off from Schauer's voluminous published work on legal reasoning. Some of the chapters subject his work to detailed and scholarly critique, while others seek to develop his views and pursue the topics that he has brought into the forefront of US legal philosophy. As the book contains nothing by way of response from Professor Schauer himself, this review will include some unauthorised surmises as to how he might have responded and some asides as to how he might develop his position.

As an enthusiast for a prescriptive form of legal positivism I am sometimes disappointed that Schauer is not as bold as he might be in his advocacy of 'normative' legal positivism, even in the presumptive version that he espouses, as a vision of a desirable mode of governance in which legislatures make laws which are clear, specific and operable and which citizens as well as judges can comprehend and follow without undue controversy as to their meaning and force. However, it is no doubt a strength of Schauer's position that he presents his theory as primarily a sound description and explanation of legal reasoning in the systems with which he is familiar.

The first two essays in the book take up this theme of the balance of description and prescription in Schauer's corpus. Thus, Brian Bix, in the opening piece entitled 'On Description and Legal Reasoning', notes Schauer's 'modest' objective of analysing the basic structure of rule-based decision making and merely noting that its benefits may sometimes outweigh its costs. He goes on to question the possibility of 'purely' descriptive theory of a sort in which, it is to be assumed, Schauer is thought to be

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involved. However, Bix spends most of his time in a critique of Philip Bobbitt for moving without justification from description to prescription in his constitutional theory, a critique which Schauer would surely endorse. Bix's main argument is that descriptive theory cannot distinguish between departures from standard legal practice which are mistakes and those which are actually changes in the practice. This argument seems to confuse evaluation and description, for all that descriptive theory need seek to do is to say what is and what is not regarded as a mistake, without taking any position on the accuracy of such views. This would not be a problem for Schauer since, while his analysis does include the evaluative concept of 'mistake', he is not committed to endorsing or condemning any of the judgments about these mistakes from an internal point of view. All that is required for his theory is that it be possible for people involved in rule application to reach some sort of agreement as to what is and is not a mistake in the application of a rule.

One alternative to pure descriptive theory, offered by Bix, is Ronald Dworkin's interpretivism but this is too far towards the evaluative pole to characterise Schauer's approach and, whatever its attractions as a theory of adjudication, lacks plausibility as a sociological method. Another alternative considered by Bix is conceptual analysis of 'essences'. This seems less an alternative to description than a reversion to pre-modern forms of philosophising. However, Bix uses this form of essentialism to critique Schauer's interest in 'thin' forms of legal positivism which do not assume the favourable internal attitude on the part of law's officials, something which Bix takes to be essential to law. Since such an essence is contentious this seems a weak position from which to make such a challenge. More pertinent would be an examination of the evaluative rationales which might favour a thicker form of legal positivism as a prescriptive model of law, but Schauer is careful to avoid going far down this avenue. Bix's principal concerns may not, therefore, be entirely pertinent to Schaeur's work.

Dennis Patterson's essay, 'Explaining "Law"', is insightful in its characterisation of Schauer's method as 'hermeneutic' in that it is primarily an insider's view of what law is and how it works, but he points to the ways in which Schauer's approach merges into functionalist analyses of the purpose of law (eg in resolving disputes) which tend to be presented as conceptual truths. In Schauer's words, quoted by Patterson:

> [G]ood institutional design requires norms that compel decisionmakers to defer to the judgments of others with which they disagree. Some call this positivism. Others call it formalism. We call it law.[1]

1 Alexander and Schauer, 'On Extrajudicial Constitutional Interpretation' (1997) 110 *Harvard Law Review* 1359, 1387.

He does not, however, press home the point that Schauer's method may be more prescriptive than he lets on. For instance, it seems a political rather than a conceptual point that officials need not always defer to the US Supreme Court's interpretations of the Constitution.[2]

The central thesis of Schauer's 'presumptive positivism' is that having a legal system requires a commitment to following authoritative rules even when we do not agree with their content or think they do not serve their purpose, a commitment which can be set aside only for special and unusual circumstances. Half of the book's ten essays deal directly with this theme. Schauer's sometime collaborator, Larry Alexander, in 'Can Law Survive the Asymmetry of Authority?' reiterates his point that there is 'an always-possible gap between what we have reason to do, all things considered … and what we have reason to have our rules … require us not to do',[3] a phenomenon which he calls the 'asymmetry of authority' because it highlights the contention that it is irrational or even immoral for subjects not to follow their own view of what is right and wrong overall, but also rational and moral for authorities to impose rules on these same subjects. It follows that it is both rational to disobey and to obey rules, an unhappy dilemma. Alexander is not happy with this conclusion but feels that neither he nor Schauer can provide adequate reasons for the unreflective conformity to law that seems to be required by its social function. Yet, there are, in fact, many reasons which can be given for conforming to laws with which one disagrees. However, it is argued that it is always possible to subsume these reasons in the 'all things considered' judgment which may come down against conformity on any particular occasion. Schauer's reply might reasonably be that if these reasons are individually or jointly of very considerable weight then this logical possibility will not result in significant actual non-conformity so that there will still be sufficient conformity to law to serve its social functions. Moreover, where civil disobedience is indicated the dissenting subject can, consistent with her disobedience, accept that it is right for the state to punish such non-conformity as part of the price to be paid for the benefits of government through law.

Philip Bobbitt ('What it Means to Follow a Rule of Law'), on the same issue, concentrates on the dichotomy between discretion and rigidity in having and using rules, observing, from his experience as a visitor to the UK, the 'discretion in the American system salvages justice; in the British system it smacks of corruption'.[4] His reaction to the 'tragedy' of Alexander's 'gap' comes down (rather swiftly but unsurprisingly) on the side of his American compatriots as having a more

2 See ibid 1359.

3 Larry Alexander, 'Can Law Survive the Asymmetry of Authority?' in Linda Meyer (ed), *Rules and Reasoning: Essays in Honour of Fred Schauer* (1999) 42.

4 Philip Bobbitt,'What it Means to Follow a Rule of Law' in Meyer, ibid 56.

enlightened (because less empiricist) approach to the reality of the choices that we have in our liberty to use rules as we choose. His point is that Schauer's tie between empirical generalisations and prescriptive rules which are based upon them ('no dogs in the restaurant' because 'dogs are dirty' etc) disguises the fact that we always have a choice whether or not to follow a rule. That does not seem to be so, for Schauer's theory gives us reasons for following rules as well as an account of what it is to follow a rule. Here we might call upon Bix's observation (see above) that Bobbitt tends to pass too readily from analysis to prescription and reflect that what may be at work in this essay is Bobbitt's felt priority for the American way, favouring judicial 'conscience' over allegedly unreflective rule following.

Marianne Constable's 'Laying Aside the Law: the Silences of Presumptive Positivism' makes the very interesting point that Schauer does not relate his account of rules to the concept of justice. Constable declines to remedy this defect by equating rule following with formal as distinct from substantive justice and presses the point that Schauer, in neglecting law's essential relatedness to justice and right action, fails to account for the fact that law gives us reasons to act. In her view 'invocations of justice reveal the distinctiveness of law',[5] a fact, she argues, that Schauer fails to notice. However, while some reference to justice may be important if we are to distinguish legal rules from other social rules, her suggestion that judges must look behind the rules to assess the justice of their substance simply ignores one of Schauer's central points about the social functions of rules, namely their role in coordinating conduct in situations in which people, including judges, disagree as to what is just and unjust in a material sense. This may explain why the judicial function is quite properly not directed at substantive justice.

A prime feature of Jeremy Elkins' analysis, in 'Frederick Schauer on the Force of Rules', is the way in which it unearths the political justifications for what he calls 'rule positivism'.[6] In a long and impressive essay which casts doubt on Schauer's distinction between rule-based decision making and a particularistic account of decision making which nevertheless takes rules into account, and on the distinction between the meaning and the purpose of a rule, Elkins draws attention to Schauer's essentially evaluative point that rules serve the benign function of allocating jurisdiction, something which Elkins considers can be satisfied through rule-sensitive particularism.

This is a genuine challenge to Schauer to develop the prescriptive side of his thesis. In so doing he would understandably want to question Elkin's extended use of judicial 'interpretation' as routinely involving morally motivated reinterpretations of

5 Marianne Constable, 'Laying Aside the Law: the Silences of Presumptive Positivism' in Meyer, ibid 62.

6 Jeremy Elkins, 'Frederick Schauer on the Force of Rules' in Meyer, ibid 79.

existing law and the too-ready acceptance of intentionalism as an appropriate source of interpretative authority.[7] However, in any such development, Elkins' central point that the force of rules depends on democratic and constitutional factors not any analysis of rules per se must surely stand. Within this exercise Schauer could usefully draw upon the final essay in this the main part of the book 'Rules and the Possibility of Social Cooperation' by Jason Johnston which sets out the rationale for rules presented in terms of their value in promoting social cooperation, a persuasive thesis that has the effect of strengthening the prescriptive side of Schauer's theory.

To adapt the terminology of the introduction to the book, the applications part of this books of essays 'takes off' from rather than 'takes on' Schauer's philosophy. Michael Doerf holds that Schauer's analysis of rule making applies less to courts than to legislatures. Claire Finkelstein begins by saying that Schauer treats all exceptions to rules as instances of the background justification for a rule leading to the limitation of the rule out of respect for its purpose. That is probably incorrect as an observation on Shauer's work. However, her contribution is basically a discrete thesis about the need to retain a distinction between exceptions which are actually part of a rule, when fully expressed, and those exceptions which introduce an extraneous or external factor which is deemed to outweigh the rule. In a brilliant analysis of key concepts in criminal law, Finkelstein goes much of the way to establish a basis for distinguishing excuses from defences, a topic which, as she notes, is greatly undertheorised. Although her analysis does not entirely remove the sense of arbitrariness from such distinctions, she does have an impressive attempt at sustaining them. I expect that Fred Schauer would applaud what can be seen as an effort to put more system into the individuation of rules, although there is something of an anti-positivist line to her approach. Finally Leo Katz rather neatly seeks to turn Schauer's philosophy on its head by suggesting that formalism systematically subverts the purpose of having a rule. The argument does however seem to depend heavily on citizens being, like many lawyers, committed to a bad faith manipulation of rules to achieve their own purposes. It might be important that Schauer concede that presumptive positivism could not work without an accompanying ethic of positivism whereby people commit themselves to following rules in good faith according to their (hopefully) plain meaning.

This is a fine collection of essays that very properly focuses careful attention on the important work of Fred Schauer. It will serve a further purpose if it prompts Schauer himself to extend his labours for the rehabilitation of prescriptive legal positivism in the heartland of American legal realism.

7 See ibid 102.

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