COMMENT: LEGAL THEORY AND THE ROLE OF RULES

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I. INTRODUCTION

Before I consider Frederick Schauer's *Rules and the Rule of Law*[1] in detail, let me emphasize the ways in which I agree with him. I have sympathy with Schauer's theoretical agenda and agree with most of his theses. I believe that it is both important and true to say that rules can bind and that they often do, in law and in life; that not all decisionmaking, and not even all legal decisionmaking, is rule-based, but much of it is; and that this rule-basedness cannot be dismissed, simply and in a sweeping way, as unjustified. I further agree with Schauer that an important function of rules is to limit powers and to enforce conceptions of a desirable division of responsibility and acceptable answers to *who* should decide an issue, not only *how* an issue should be decided. Finally, I think that it is important to stress that we are discussing not only the moral responsibilities of judges making individual decisions, but also those of the people deciding about desirable decisionmaking environments. At times, these responsibilities may pull in different directions, justifying a requirement of obedience to rules even when the requirement seems unjustified.

Schauer's enterprise is a complex one: He wishes to discuss the role, actual and desirable, of rules in the law, and the relationship between this question and the nature of law, as it is reflected in general theories about the law.[2] His argument, in a nutshell, is that the essence of law neither requires nor pre-

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1. Schauer, *Rules and the Rule of Law*, 14 HARV. J.L. & PUB. POL'Y 645 (1991).

2. The particular structure of the argument may be unique to Schauer's Symposium contribution, although it is hinted at in other parts of Schauer's lengthy and detailed examination of the role of rules in law and life. *See* F. SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISIONMAKING IN LAW AND IN LIFE (forthcoming 1991). *See also* Schauer, *Rules, the Rule of Law, and the Constitution*, 6 CONST. COMMENTARY 69 (1989); Schauer, *Is The Common Law Law?* (Book Review), 77 CALIF. L. REV. 455 (1989); Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987); Schauer, *Formalism*, 97 YALE L.J. 509 (1988) [hereinafter *Formalism*].

cludes that rules will be central to law.[3] Consequently, Schauer concludes that general theories about law leave open the descriptive and normative questions about the role of rules in law.[4] After reaching that conclusion, Schauer describes and evaluates the role that rules play and should play in the American legal system.[5] Schauer argues that, in fact, legal decisionmakers in the American system take rules into consideration, but deviate from them if there are strong reasons for doing so.[6] In other words, rules constrain, but their power is not always conclusive. Despite Schauer's belief that this is a contingent empirical statement about the American legal system, one not dictated by any theory about the nature of law, he labels his descriptive thesis "presumptive positivism."[7] Furthermore, he apparently also advocates the desirability of the same presumptive approach to rules. Positivism, we should recall, is one type of a general theory of law, much criticized by contemporary jurisprudence. Thus, there is a tension between the first part of Schauer's argument—that legal theory in general, and positivism in particular, does not decide the issue of rules in the law—and the second part—that the role of rules in the American legal system is best captured by presumptive positivism, and presumptive positivism is also the desirable attitude to rules.

This Article explores this tension. First, I examine what general theories of law (as distinct both from general theories of action or morals and from other types of investigations concerning law and specific legal systems), positivism included, tell us about the actual and the desirable role of rules in the law.[8] I conclude that the contribution of such general theories to

3. *See* Schauer, *supra* note 1, at 651-63.

4. *See id.* at 663.

5. *See id.* at 665-79.

6. *See id.* at 674-77.

7. *See id.* at 677. In *Formalism*, *supra* note 2, at 546-48, Schauer labels the position *presumptive formalism*; later, he changes the label to *presumptive positivism*, in order to avoid the more pejorative term. *See id.* at 548. In *Rules and the Rule of Law*, Schauer's justification for the label is more substantial; ruleness and positivism share important features, including being the targets of similar criticisms.

8. The sense in which I use the phrase "a general theory of law" is somewhat different from Schauer's, but I believe it is sufficiently similar to avoid any difficulty. A general theory of law seeks to identify features that are central to law in all societies, and that distinguish law from such similar phenomena as religion and morality. The identifying features need not be necessary and sufficient conditions of law. Rather, we seek an ideal type of law, which can then be used in comparative analyses of different cultures and societies.

Schauer's questions is indirect and limited: The classical descriptive theories of law all hold that law is largely a matter of general rules.[9] Furthermore, they usually do not offer any detailed account of how judges actually carry out adjudication, or how judges relate to the legal rules of their particular system. In addition, these theories do not propose any normative theory of adjudication (that is, a theory of how judges should decide cases), because their conception of legal theory is not normative.[10] In this sense, general theories of law indeed leave open Schauer's questions.[11] There is no special message, however, that positivism, as opposed to other theories of law, provides on this point.

In Part III, I make a few comments about the descriptive and the normative role of rules in law. Basically, I agree with Schauer that "presumptive ruleness" (a term I prefer to presumptive positivism) is an illuminating way to describe what happens with rules and implies a good general recommendation for dealing with rules. Unfortunately, I believe that presumptive ruleness does not have much practical "bite," either as description or as a recommendation. This is a failure shared by presumptive ruleness and accounts of adjudication in general theories of law: Most of the descriptive and normative

9. By classical descriptive theories of law I mean natural law theories, positivism, and realism. Natural law theories portray law as a system of general prescriptive rules that may be at least partly man-made, but must conform to some non-human "natural law" norms. Positivism describes law as a system of general prescriptive norms identified by some human institution (the sovereign or the judges). Realism sees law as a set of descriptive generalizations or predictions of how judges will decide cases; the statutory rules are the bases for predictions, but not law itself. If these three theories are on a continuum, Dworkin falls somewhere between natural law (human rules made by state organs must be interpreted by political morality or integrity) and positivism (law is man-made, but must be identified by an appeal to a wider social and political community). *See* Mackie, *The Third Theory of Law*, in RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE 161 (M. Cohen ed. 1984).

10. Dworkin's theory is a notable exception on both grounds: It is built around a culture-dependent theory of adjudication, which claims to be both descriptive and normative. *See* R. DWORKIN, LAW'S EMPIRE 45-113 (1986) [hereinafter LAW'S EMPIRE]; R. DWORKIN, TAKING RIGHTS SERIOUSLY 81-149 (1977) [hereinafter TAKING RIGHTS SERIOUSLY]. Not surprisingly, I believe that Dworkin's enterprise, for the most part, is not a theory of law. For a similar position, see Burton, *Ronald Dworkin and Legal Positivism*, 73 IOWA L. REV. 109 (1987). On the distinction between theories of law and theories of adjudication, see *infra* note 25 and accompanying text.

11. General theories of law leave open the question of the role of rules in legal decisionmaking—one formulation of Schauer's first question, the one central to his concerns. They do not, I believe, leave open the question whether law must be a matter of rules, as opposed to particularistic decisionmaking. For Schauer's argument to follow, this question need not be left open.

work remains to be done, even if we agree on presumptive ruleness.

In Part IV, I consider Schauer's choice of "presumptive positivism" as the label for his descriptive and normative theses. I address the question whether there is a strong connection between positivism and "ruleness" that makes them both targets for similar criticisms of their contribution to undesirable decisionmaking in law.

My conclusion is that we should discuss the role of rules in law on its own merits, without trying to implicate general legal theory in the discussion. Nevertheless, similarities exist in the ways that scholars use theories of law (for example, natural law theories, positivism, and realism) and formal attributes of decisionmaking (for example, rules versus principles, following rules versus creative judge-made legislation, and the usage of a rhetoric of "rights") in contemporary legal thought. Often, criticisms of both these theories and attributes are misplaced, distorting discussions of the theories and attributes and disguising the political or ideological concerns presumably motivating the critics.

Let me be clear that I do not imply that developing general legal theory is more important or more profound than developing and articulating detailed descriptive and normative theories about adjudication and the role of rules. If a choice must be made, I think that the opposite is the case. What is important is to understand the nature of the two enterprises, and not to expect that general theories about the nature of law will solve all of our legal and social problems.[12]

II. Legal Theory I

To understand the role that rules may play in a field or area, we need a theory of rules and their possible roles, and a theory of the field in question. Real understanding is likely to lie in the intersection between these two theories. This is because rules

12. The persistent tendency to deny this weak claim is itself an interesting phenomenon deserving more study. So, too, is the tendency to tie criticisms and descriptions of legal phenomena to general theories of law, thereby often distorting the theories by creating artificial joinders between them and the phenomena. Naturally, I shall not undertake such an analysis here. Within this general climate, however, Schauer's connection between the two is more understandable. It is this climate, rather than Schauer's thesis, that led me to make the point here. For Schauer's position, this argument is clearly of secondary importance.

are not unique to any particular field, but their role and importance may vary with the context in which the rules are used.[13]

Schematically, a general theory of the role of rules will have a conceptual-analytical part (What are rules?), a descriptive part (How do rules affect behavior?), and an evaluative part (Are the ways that rules affect behavior, in principle, good or bad? Can we identify circumstances in which they will tend to be good or bad? What follows for the identification of circumstances in which we ought to have (or not to have) rules? What should be our attitude toward rules?). These parts of the theory are interdependent, in the sense that both the descriptive and the normative part use the answers provided in the conceptual-analytical part, and the normative part evaluates the effects of rules identified by the descriptive part.[14] A general theory of law will have the same three parts.[15]

A general theory of law is relevant to a theory about the role of rules in law to the extent that its statements are relevant, as premises, in arguments about the role of rules in law. Schauer is right to suggest that general legal theory may be relevant in at least two senses: It will be relevant if it *defines* (or describes) law, wholly or partly, in terms of rules (at least in the sense that it will identify law as a system that uses rules), or if it *denies* that law can be, or ever is, a matter of rules. Common sense tells us that the second position is false. There is less superficial agreement on the first one: Legal theorists do give rules different importance in their characterizations of law. I shall suggest, however, that no legal theorist has ever argued that the legal

13. It might be that we shall need more than one "theory" of rules and of law, because there may be sufficient differences between types of rules so that more than one type is relevant to law, but other types are completely foreign to it. I do not mean to suggest that there is only one important sense of "rule."

14. The interrelationship among these parts of the theory is even more complex. The descriptive part, for example, will also require conceptual-analytical work belonging to a theory of action and to psychology, not only concerning the "meaning" of rules. Conceptual-analytical choices involve decisions concerning both description and evaluation (in the theoretical sense). The process is thus not a linear one of conceptual choices followed by description and evaluation, but a complex interrelated process. Nevertheless, we can divide the process into these categories fruitfully, although the process must be unpacked when the choices made in each stage are justified.

15. "Legal theory" and "a general theory of law" may mean many things. I need not enter the debate and explain my choices of terms (or senses) because my discussion is triggered by Schauer's references to positivism—a paradigmatic instance of a theory within general jurisprudence. Similarly, I need not take a stand on whether descriptive legal theory must be evaluative, because the object it describes (law) is immanently evaluative. Even those who make this argument must accept the difference between seeking the nature of law and determining what the law should be.

system is nothing but rules, and that no one has argued that we can have a legal system without legal rules.

Those who appear to challenge the idea that law *can* involve rules, or that it ever does (as distinguished from those who argue that there is more rhetoric of rule-following than is possible, reflective of reality, or desirable), typically do not invoke any of the special characteristics of law. They deny that legal rules make any difference because of either the psychological inability or the general incoherence of the idea of humans following rules.[16] If they are right, a description of humans and human societies that includes rules and rule-following is part of a huge exercise in false consciousness. The radicalness of the challenge is clarified when we recall that "rules" include not only legal rules, but all rules, including rules of games, mathematics, logic, language, and prudence. Such radical skepticism is not unknown in human thought, but it has never affected our life or our day-to-day descriptions of our life.[17] In any event, this has nothing to do with legal theory. All legal theories, like all legal systems and all language and many other human activities, presuppose that humans can identify what rules require, and that they can follow them.[18] As Schauer notes, it is harder to decide whether law must be exclusively a matter of rules.[19] If legal theory defines law as consisting only of rules, then the definition of law preempts the question whether and where we should have legal rules (as opposed to other ways of having "law").

16. *See infra* note 18.

17. If we truly adopt a profound radicalism of this sort, and do not use it merely to demonstrate the ultimate presuppositions of our thought and conduct, we must stop teaching doctrine, because it does not affect behavior. We must cease to advocate changes in the law, because the content of legal rules does not make any difference. If we are truly serious, we will also not write articles explaining law, because we do not have any linguistic tools to make the writing and the reading a coherent exercise. . . . Obviously, the radical critics whom we read and discuss do not take their theoretical skepticism to this extreme.

18. One could assert that one version of the realist claim—that legal materials are so indeterminate that it is impossible to identify what they require—is a general statement about law, rather than a statement about the incoherence of rule-following in general. Schauer answers this assertion by saying that the indeterminacy is contingent on the nature of the legal materials in the American legal system, and therefore not a part of a general theory of law. *See* Schauer, *supra* note 1, at 659-60. This is true, but two additional caveats should be added. First, the realists have never claimed that, even in the American legal materials, it was always impossible to identify what rules required. Second, the argument may be made in a general, non-system-dependent way, by invoking characterizations of language and constraints on attempts to govern conduct by rules. These two, though, are not unique to law.

19. *See* Schauer, *supra* note 1, at 651-57.

Some theorists do define law in terms of rules.[20] Even theories that do not offer definitions of law feature prominently legal rules or norms. In fact, all descriptive theories of law presuppose, as a central feature of law, the existence of legal norms that preexist actual litigation.[21] So, in one formulation of Schauer's first question, legal theory does dictate an answer, and the answer is not the one that he gives. This is not fatal, because Schauer's question is not whether we can conceive of law without legal norms,[22] but whether there may be contexts of decisionmaking that will be particularistic and that will be called "legal." No legal theorist, no matter how important the idea of rules is to his conception of law, will deny this.[23]

The equivocation in Schauer's first question—must law be a matter of rules?—stems from two sources. First is the oftenmade move between a theory of *law* (that is, the appropriate characterization of the social institution of law) and a theory of *adjudication* (that is, legal decisionmaking by officials in that realm). We may collapse the two descriptive theories together only if we define law as everything that courts or other legal decisionmakers invoke to *justify* their decisions (or, in a less popular move, everything that in fact *explains* judicial decisions). Some theorists, notably Dworkin, make just this move.[24] Others find it more fruitful to say that law is independent of adjudication, and often preexists decisions by legal officials,

20. Hart insisted that law is a unity of primary and secondary rules, rather than a system of primary commands alone. *See* H.L.A. HART, THE CONCEPT OF LAW 77-96 (1961). Fuller characterized law as the enterprise of governing human conduct by rules. *See* L. FULLER, THE MORALITY OF LAW 35 (1964). Finnis defined law as "rules made, in accordance with regulative legal rules . . . ." J. FINNIS, NATURAL LAW AND NATURAL RIGHTS 276 (1980). At least two of these definitions come from critics of positivism. As Schauer himself notes, Fuller's theory posits rules as the defining feature of law more insistently than many positivists. *See* Schauer, *supra* note 1, at 656.

21. The critics may claim that rules are invoked as rationalizations, and that the restraining effects of rules on conduct are illusory to a large extent. They do not, however, challenge the statement that we have the equipment, linguistically and psychologically, to identify what rules of conduct require, and to follow them. Furthermore, many critics do think it useful to teach doctrine, because doctrine constrains, even if the constraint is merely instrumental. *See, e.g.*, Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518 (1986).

22. Schauer himself answers this question in the negative. *See* Schauer, *supra* note 1, at 689.

23. Thus, Schauer need not work so hard to make Fuller consistent with his position. For Fuller, the essence of law is that it is general and known in advance. Fuller, however, fully recognizes that there are limits to adjudication, and that courts will often decide cases in ways that are not "adjudication" in a strong sense. He therefore clearly joins Schauer in saying that legal decisionmakers often make non-rule-based decisions. *See* Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

24. *See* LAW'S EMPIRE, *supra* note 10, at 90-113, 176-224.

and that it is illuminating and interesting to observe when courts use the law and when they invoke other types of authority.[25] For these theorists, a characterization of law in terms of general norms does not commit them to a particular stand on the nature of decisionmaking in law. It may well be that many decisions within the law and in its shadow are not made on the basis of rules (laws) alone.

Even Dworkinians, however, may still, by Schauer's account, allow for particularistic decisionmaking. The second source of the equivocation is that rules, according to Schauer, vary in terms of generality and vagueness. This allows decisionmaking that will be both rule-based, because it will be done in the context of a rule, and particularistic, because the rule requires that many detailed circumstances be taken into account.[26] Good examples might be judging "in the best interest of the child" or "in the public interest." According to Fuller, these standards meet the requirements of the "inner morality of law," and therefore are good examples of "submitting human behavior to rules."[27] They do, however, allow a particularistic mode of decisionmaking, thus supporting Schauer's claim that legal decisionmaking is not exhausted by rule-based decisions. In other words, indeterminacy and its implications are much less central to Fuller's concerns than they are to Schauer's.[28] Their conceptions of rules and rule-based decisions similarly differ.

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25. For the distinction, and for an argument against collapsing the theory of law into a theory of adjudication, see Raz, *The Problem About the Nature of Law*, 21 U.W. ONTARIO L. REV. 203 (1983). The desire to distinguish between a theory of law and a theory of adjudication is common to those, like Raz, who identify law by the "sources thesis," and those who are willing to include in law the moral judgments incorporated into legal norms (for example, norms referring to morality). Both groups identify legal norms themselves by reference to some pedigree. Raz adds to the pedigree a further constraint: The identification of the law must not be a matter of moral argument. *See id.* at 213-14. Natural law theories, as we saw, define law in terms of rules. The real challenge may have come from realists, who, at certain moments, have suggested that law consists of decisions rather than general rules. To the extent that they claim this, Hart's critique is fatal. *See* H.L.A. HART, *supra* note 20, at 136. I doubt, however, that any of the realists would consistently defend such a position. It should be noted that one can define law in terms of its institutional structure, including that of having courts and other specialized institutions, without collapsing it into the decisions of such institutions. *See, e.g.*, M. WEBER, LAW IN ECONOMY AND SOCIETY (E. Shils & M. Rheinstein trans. 1954) (2d ed. 1925).

26. *See* Schauer, *supra* note 1, at 650-51 (noting that rules may have categories of different "sizes").

27. *See* L. FULLER, *supra* note 20, at 63-65, 200-24.

28. *See* Kress, *Legal Indeterminacy*, 77 CALIF. L. REV. 283 (1989) (arguing that indeterminacy does not affect the general grounds for the legitimacy of law's claims of obedience).

All general legal theories characterize law in part as a set of general norms. It is not surprising that they do. First, our common-sense experience with legal systems includes a body of rules identified as legal. This is, in fact, a primary subject of legal education. This prevalence of legal rules, though, is not accidental. Dispute resolution and authoritative decisionmaking in particular cases is but one (albeit indispensable) function of law. Even if we allow a *cadi* to decide disputes as he sees fit, this does not imply that his decisions are not governed by rules.[29] Usually, his decisions are made against a background of social rules governing the conduct of members of society. Disputes arise only when this regulatory activity of rules breaks down. The *cadi*, in turn, will often base his decisions on an interpretation of the background rules. Furthermore, by the time we observe the *cadi*'s adjudication as a practice, he has probably adopted the great maxim of justice that "equal cases should be treated alike." Chances are that the *cadi*'s decisions create new social rules, which help people predict his future decisions so that they may avoid going to him for resolution of the next similar dispute. An important task of the law is to identify in advance what people should do. This allows all to maximize their welfare. The law could not achieve this function without general rules of conduct.

The social institution of law has never existed without rules of conduct in the background. It is a defining feature of law that some, but not all, of these rules of conduct are made into "law." In this sense, law must be a matter of rules. This does not preclude the possibility that legal institutions (for example, courts) will not always be required to decide only according to rules. As Schauer notes, there are many contexts in which legal power-holders are given broad discretion.[30] But this discretion is "parasitic" on the fact that the officials are a part of an institutional system in which some, in fact many, contexts are governed by a combination of rules of jurisdiction and substantive rules of conduct, with stronger senses of "ruleness."

29. *See* Schauer, *supra* note 1, at 653.

30. For the purpose of argument, it does not matter if discretion is granted with, for example, an accompanying directive to promote the public interest, or if discretion is granted without any substantive guidance except a jurisdictional test. In both cases, we do not have much "ruleness" in Schauer's terms. In both cases, though, we have some "ruleness" in the sense that the sources of jurisdiction are rules, and that decisions must be justified by some general principle.

Therefore, in some sense, law must be a matter of rules. But if rules may require particularistic decisionmaking, if the nature of the decisionmaking process in a particular culture depends on the approach to rules that that particular culture practices, and if both the type of rules used and the approach to rules are contingent, can a *general* theory of law tell us more about how law is a matter of rules? It is here, I believe, that general theories of law, including positivism, cease to be relevant to Schauer's concerns. The particular account of adjudication, the decision who should decide what and the decision how general rules should be, is not a matter of general jurisprudence. Consequently, general theories just leave all these questions open.

The point might become clearer if we recall what general theories of law seek to do. Theories of law seek to give an adequate account of the phenomenon of law. Debates about the adequacy of the account are internal to the enterprise of seeking to provide such an account. The enterprise presupposes that the concept of law is a useful cross-cultural and cross-temporal concept, so that there is a distinction between the attributes of law and the attributes of particular legal systems at certain times and places. General theories of law seek to elucidate those features of law that are universal. This universality does *not* stem from stipulative definitions. Rather, it reflects basic similarities in human nature and in forms of social organizations. The presupposition is twofold: first, that human societies have similar problems, and are likely to generate similar ways of solving them; and second, that it is useful to designate a part of the way that human societies deal with their problems "law," thus distinguishing this part from other ways of solving problems. Therefore, a general theory of law is both a general social theory and a theory about individuating social phenomena and labelling them.

If this enterprise is coherent, statements about features that can be shown to be contingent or non-universal should not be included in general theories of law. Because answers to such questions as how broad rules should be, or how extensive the reasons for which a decisionmaker is permitted to deviate from a rule should be, depend necessarily on non-universal factors, they cannot form a part of a general theory of law.[31]

31. None of this suggests that a conception of law cannot be specific to a culture, or that this particular conception cannot be derived from processes of "social interpreta-

When we look at theories of law, we find that, in fact, most agree on what the universal features of law are. All theorists agree that some social institutions reflect law, that law is designed to guide behavior (it is normative, not descriptive),[32] and that law *claims* legitimate authority (it is normative in a stronger sense of claiming moral authority). Many agree that legal systems reflect the values of "legality." These values include the existence of general norms, which are promulgated and made available, and the resolution of disputes, according to these same norms, by an independent judiciary.[33]

There is some debate concerning constraints on the content of law, however. Sometimes, this debate is general and theoretical, as when natural law theorists claim that an atrocious human directive, even if issued by a person with legal authority, should not be regarded as law. Sometimes, the debate is system-dependent, as when the United States Constitution incorporates values that permit moral considerations to be directly relevant to determinations of constitutional validity.

One of the great contributions of modern positivists has been the insistence that legal systems include not only primary duty-imposing rules of conduct (for example, "do not kill, steal, rape"), but also power-conferring rules.[34] These rules enable individuals to make enforceable contracts or create legal personalities; the rules also allow individuals to make and change laws, and to create and define the institutions that enforce and apply them, and that perform the other tasks required for a smooth working of the legal system and the social system that it seeks to facilitate. In view of the importance of

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tion," such as those described by Dworkin. It only says that this particular conception is an instantiation of the social institution of law that exists, in one form or another, in many societies.

32. In this sense, even the realists acknowledge that law is normative. It may be just the prediction of what the courts will do, but the "bad man" will use this prediction to guide his conduct.

33. Occasionally, there may be instances of "acoustic separation," in which, at least for a period, issues are decided according to rules that are different from those presumably guiding the conduct before adjudication. Occasionally, such acoustic separation may be justified. *See* Dan-Cohen, *Decisional Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984). These are exceptions, however, that strengthen the rule that, to be both effective and just, rules of decision (the rules for the conduct of dispute decisionmakers) should be the rules by which the litigants could have planned their behavior.

34. *See, e.g.*, H.L.A. HART, *supra* note 20; J. RAZ, THE CONCEPT OF A LEGAL SYSTEM (2d ed. 1980); J. RAZ, PRACTICAL REASON AND NORMS (1979) [hereinafter PRACTICAL REASON AND NORMS]; J. RAZ, THE AUTHORITY OF LAW (1979) [hereinafter THE AUTHORITY OF LAW]; H. KELSEN, GENERAL THEORY OF LAW AND STATE (A. Wedberg trans. 1949).

power-conferring norms to understanding legal orders, general theories of law should include them in their accounts.

Legal theory acknowledges the fact that legal systems provide the framework for the use of political force within a society. Legal theory specifies the types of norms that should be used, and the tasks that should be performed. It is not committed to particular political choices about structures or about the content of particular rules. It is not committed to any position on who should have what powers. General theories of law presuppose that differences in the content of particular rules, even differences in legal cultures and structures (for example, a constitutional democracy, as in the United States, versus a principle of parliamentary sovereignty, as in the United Kingdom) do not, and should not, affect the characterization of these cultures as having law.

There are a few further generalizations that can be made about legal systems. Hart suggested that all legal systems must have a "minimal content of natural law," because a society that does not seek to regulate private use of violence and some right to possession does not give human beings their basic needs.[35] Therefore, we should expect that all legal systems will have norms against intentional killing. If we identify basic and universal human problems and persistent causes for disputes, we should expect societies to regulate these in their laws. It is essential to the idea of law that there will be some regulation of private use of violence, and that the state will tend to monopolize the legitimate use of violence. In addition, we can expect all legal systems to seek a balance between giving discretion to accomplish some task, and limiting that discretion to minimize abuse. This expectation presupposes, again, that we can effectively control, at least to some extent, both the broadness of the discretion conferred and the effectiveness of structuring it and supervising it.

A general theory of law becomes enriched when these generalizations are articulated and detailed. These statements about what actually happens in society, however, are directly relevant to such a theory only if they refute, or cast doubt on, the truth or the utility of the account given by it. Beyond this, should we incorporate a more detailed account of adjudication, of the

35. *See* H.L.A. HART, *supra* note 20, at 189-95.

ways that legal decisionmakers deal with rules, into legal theory, and into the defining characteristics of law? Some of the more detailed accounts are culture- and system-dependent. Many of them, however, can easily be presented as illustrations of universal features. The question is, therefore, double: First, how general and how skeletal should general jurisprudence be? Second, when does a skeletal description become so incomplete as to be misleading?

No one can deny that an account of legal systems will not be complete without reference to legal institutions, and that courts are a paradigmatic legal institution, performing a vital legal function. Furthermore, no one can deny that a legal system cannot work without intricate decisionmaking by various officials. The real question is whether a theory of law must include a detailed descriptive theory of adjudication, or whether it can choose, instead, to provide a sketch of courts and their functions as a part of its framework. Often, general legal theorists have done just that. They have discussed the nature of law and its defining characteristics, while making only a few scattered observations about adjudication. By implication, they have asserted that a theory of law could be adequate with a skeletal account of adjudication.

This is the initial challenge posed by Dworkin, who said, in effect, that the skeletal description of adjudication given by Hart's version of legal positivism was wrong, and that this affected positivism's theory of law itself. According to the skeletal description, judges begin the decisionmaking process by consulting preexisting, pedigreed legal materials. Often, these materials do not determine an answer; in these cases, judges have discretion and must decide on the basis of extra-legal material. Positivists, said Dworkin, characterize law as consisting exclusively of those pedigreed legal materials. Dworkin argued that, to the contrary, judges invoke other materials, notably principles. These materials, Dworkin concluded, should also be seen as law, and consequently, the characterization of law in legal theory should be modified, on the basis of a more accurate account of adjudication.[36]

36. *See* Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967), *reprinted in* TAKING RIGHTS SERIOUSLY, *supra* note 10, at 14. Dworkin still argues that the positivists' conception of law distorts our picture of adjudication in *Law's Empire*, but there is some controversy about the way his present challenge fits in with his initial stand. *See* Raz, *Legal Principles and the Limits of Law*, in RONALD DWORKIN AND CONTEMPORARY JURISPRU-

Dworkin's attack has been extremely influential. Legal theorists endorsing the skeletal description usually ignored the nature of the extra-legal materials judges invoke to justify their decisions. Positivists, as a whole, did not provide detailed accounts of what actually happened in adjudication. Obviously, they did not deal with the question of what judges should do in such cases as a part of articulating their theory of law. Only the need to respond to such criticisms made many positivists clarify their descriptive and normative theories of adjudication. Most of them would still argue today, however, that the skeletal description of adjudication is accurate, and that it suffices for the purposes of a general theory of the nature of law.[37]

To some extent, the skeletal account of adjudication is legal theory-dependent. It justifies a decision by invoking law and, only when law is not sufficient, invoking extra-legal materials. The skeletal account presupposes that legal justificatory materials can be identified, and that they are different and differentiated from non-legal materials. This presupposition, at least in the sense required for an account of adjudication, is an extremely weak one. To see this, we have to distinguish between the phenomena of law and legal systems, and labelling. There is no dispute that legal phenomena include easily identified materials such as statutes, decisions of the Supreme Court, and the United States Constitution. These are the materials identified by pedigree. Some will call them, misleadingly, "positivistic law." Dworkin would call them "pre-interpretive law."[38] Furthermore, there is no dispute that the process of justifying judicial decisions starts, and often ends, with these materials.[39] Pedigreed law is therefore important. It is entitled to a name.

DENCE, *supra* note 9, at 73, 81-86; Dworkin, *A Reply by Ronald Dworkin*, in RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE, *supra* note 9, at 247, 260-63.

37. In other words, Dworkin persuaded many that much could be gained from examining adjudication and legal reasoning more closely. He did not convince many, however, that his "imperialistic" conception of law, under which judges merely "discover" preexisting legal directives, is more illuminating than the acknowledgement of the limits of law and judicial discretion emphasized by the skeletal description. Furthermore, Dworkin created a misleading target by "forcing" positivism, as a general theory of law, into a debate about normative theories of adjudication that it never aspired to address. *See, e.g.*, Soper, *Legal Theory and the Obligation of the Judge: The Hart-Dworkin Dispute*, in RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE, *supra* note 9, at 1, 8-9; *see also* J. FINNIS, *supra* note 20, at 21.

38. *See* LAW'S EMPIRE, *supra* note 10, at 65-66, 90-91.

39. I do not mean to suggest that there must be distinguishable stages of the decision, so that one moves to consult other sources only when the first stage proves inadequate. There will often be such a sequence, however.

Let us call it, so as not to preempt the issue by using the term "law" itself, "first-stage law."

The skeletal description of adjudication need only say that a defining feature of law and legal systems is that judges and decisionmakers "start" to justify their decisions by reference to first-stage law. If this is proven false, all legal theorists should reconsider their positions. If it is true, albeit concededly incomplete, the debate changes to whether the richer account of what really happens should change the account given by legal theory. And, I shall repeat, the problem will not be a problem only for the positivist. It will be a problem for any person offering a general account of the nature of law, without including in this account a detailed account of adjudication.

Again, I know of no theorist or critic who argues that the weak skeletal description is *false*.[40] The serious challenge here is to say that it is *incomplete*, in such important and central ways that the description is misleading. For us to have a better sense of what law is, we must incorporate a richer account of adjudication into the account of the phenomenon of law. To do this requires two steps. First, we must identify general, universal features of adjudication that are not reflected in the skeletal description. This should not be too difficult. Second, we must show that it is important to incorporate these features into our analysis of the concept of law itself.

I am willing to assume that the examples that scholars use from particular legal systems to show that rules may be over- and under-inclusive, and that this problem may create a tension between the requirement of the rule and the requirements of "justice" or the "balance of reasons," reflect universal features of decisionmaking in law. I will further assume that decisionmakers the world over use the same techniques to mitigate those tensions. They invoke principles that "override" the rules; they find another rule that is applicable; or they create fictions to avoid an undesirable resolution of a particular dispute. On the other hand, in all legal systems we may find exam-

40. Even if it is true that judges always reach their decisions first (determined by their ideologies, diets, background, or an internalized sense of the law itself), and then seek to justify them, and even if all these attempts at justification are mere rationalizations, the skeletal description is still true. Without any commitment on the question whether the processes of discovery and justification are always, or often, separate and distinct, the skeletal description says that first-stage law is the starting point at the stage of justification. Clearly, natural law theorists endorse this same position.

ples in which judges, when faced with such tensions, prefer the rule. Occasionally, they explicitly discuss the tension, expressly noting that they thought the result to be less than optimal, and providing policy reasons for their choice. At other times, they clothe their opinions in the rhetoric of "legal necessity" or "formalism." They deny (or ignore) the tension between the requirement of the rule and of justice, and deny the availability of other bases for decision.

In other words, I agree that any detailed study of adjudication, in any legal system, will reveal these and other phenomena. Thus, I think that Dworkin is right that adjudication, in all systems, is more than a combination of a mechanical application of specific and determinate rules and "strong" discretion. This, however, is not what the skeletal account said adjudication is. Legal positivism, or the skeletal account, has no problem with acknowledging that judges make decisions like the one in *Riggs v. Palmer*.[41]

So the controversy is not about the obvious reality of legal decisionmaking. It addresses several related questions. First, what is the best description of what the judges are doing in such decisions as *Riggs v. Palmer*? If judges inevitably do such things, can we incorporate these truths into our theory of *law*? Should they affect our concept of law itself? If the answers to these questions are yes, how should they be incorporated? And will such incorporation show how law is (or is not) a matter of "rules"? In other words, is a general descriptive theory of adjudication possible? If it is possible, is it an important part of theories about law, so that the two are linked in a way that suggests that "law" is necessarily linked only to some kinds of legal decisionmaking? If so, is this the kind of decisionmaking that concerns Schauer in his article?

For my present purposes, I do not need to debate whether all, or even most, justificatory materials used by judges should

41. 115 N.Y. 506, 22 N.E. 188 (1889). The beneficiary of his grandfather's will murdered him to prevent a change in the will. The victim's daughters challenged the will in court. There was no provision in the relevant statute that could base an invalidation of the will. The majority of the court nonetheless invalidation the will, invoking the principle that no one should be allowed to benefit from his own wrong. Dworkin uses the case to show that judges use principles, at times, to defeat pedigreed rules. He argues that the case "refutes" positivism, which would have required application of the pedigreed rule. But positivists could argue that the principle was pedigreed as well, or that this was an example of a case in which courts had inherent authority to deviate from rules. *See infra* note 49 and pp. 759-60.

be called "law." Even the realists did not claim that looking exclusively at adjudication gives one an adequate account of what the law is. They were the first to realize that legal rules function in many important ways prior to adjudication, so that the (first-stage) legal materials were an important part of their picture of law,[42] even if law was conceived as the *prediction* of what courts would actually do.[43] On the other hand, Dworkin's account of law and adjudication, which underemphasizes the distinctness of first-stage law, portrays the judges, ultimately, as appliers or interpreters of preexisting law. One of the benefits of the skeletal description is that it describes judges as having mixed powers of application, creation, and revision of (first-stage) law. These are the reasons, among many others, for preferring an analysis of law that separates first-stage law from post-adjudication law. One way of stressing this separateness is by calling only first-stage law "law."

The decision we make on this question will affect our characterization of law, and the limits of general theories of law. Whatever this decision is, though, a detailed account of the ways in which particular legal systems and particular judges solve the immanent tensions between rules and justice in particular cases should not belong in a *general* theory of law.[44] A general descriptive theory of adjudication will distinguish between following rules (deciding settled disputes according to first-stage law) and other kinds of judicial activity. It will also say that while the nature of law dictates that there will be a lot of judicial behavior of the first type, judges will also act in other ways. The account may be more or less detailed and rich. Some of the more detailed elements might be universal to most legal systems, but the significant parts will not be in the nature of general, conceptual claims about legal decisionmaking. They will be an important contribution to a comparative analysis of

42. This acknowledgement is an argument for stressing the importance of first-stage law and maintaining its separate identity.

43. This must be the case because prediction in the abstract is very different from prediction of the decision in a particular case, where knowing the identity of the judge and other particular circumstances enhances any prediction. For a person to guide her behavior by a prediction of what judges in general will do, the contribution of legal doctrine to the decision must be substantial.

44. For additional reasons not to incorporate a richer descriptive theory of adjudication into general theories of law, see *infra* note 46 and accompanying text. It may be that the non-system-dependent generalizations we can generate are not that illuminating.

cultures, stressing the differences between legal cultures against the common background provided by general theory.

The conclusion is that legal theory, as an enterprise, need not have more than the skeletal description of adjudication. Positivism is a type of legal theory in this sense. As such, it is not committed to any particular description of adjudication (including a description of what judges think they ought to do, which I think is a main factor in what they will ultimately do), or to any recommendation for what judges should do. Positivism, like any other genuine general theory of law,[45] is consistent with all true descriptions of adjudication. I am not yet prepared to argue that there is *no* general feature of adjudication that should be incorporated into general legal theory, but I have yet to see a persuasive argument for this view.[46]

Positivism, and legal theories defining law in terms of rules of conduct, are similarly agnostic, to a large extent, about the formal attributes of these norms. Despite the general claim that positivists like "rules,"[47] they have no position on the preference for rules (as opposed to standards or contexts of simply conferring discretion).[48] In addition, although all theories of law regard judges as bound by law (leaving open the question

45. This is why I believe that part of Dworkin's work is not an example of general legal theory: Claiming that law should be defined by reference to adjudication, or that law is an interpretive concept, is a general claim about law. If interpretation is an attempt to discover the best available political justification of law, however, and if legal theory is just the most general part of the legal system, then legal theory must be immanently culture-dependent and contingent.

46. This may support those who think that the general theory of law is uninteresting and unimportant, and that people should instead develop detailed descriptions of adjudication and normative theories about how to use judicial powers. I said above that *if* a choice must be made between the two enterprises, this may be true. *See supra* note 25 and accompanying text. I do not think that this is the case, though. A detailed descriptive theory of adjudication will help us understand and predict what judges do. A detailed normative theory of adjudication will give judges and those who evaluate their decisions a frame of reference, but no clear answers for most hard cases. General theories of law do neither. Their possible justifications and functions are beyond the scope of this paper. I will just say that, in addition to a general wish to "know the truth" about an important social institution, it is quite possible that the adequacy of theories about law depends on the context in which they are offered. There might be differences in approach if the purpose is to provide the social scientist with tools to distinguish law from religion, morals, and politics; or the legal reformer with an understanding of the limits of law as a tool for regulation of human conduct; or the citizen with a criterion of identifying the "right" answer to questions of obedience to authority under the name of law.

47. By "rules," I refer to the sense of specific directives, not as norms in the generic sense used by Schauer. *See* Schauer, *supra* note 1, at 647-51. Rules in these accounts are thus often presented in opposition to "principles" or to "policies."

48. In fact, Dworkin accuses positivism of a willingness to live with too much discretion. *See supra* note 36. I argued above that all legal theories that subscribe to the skele-

whether they are bound by other things, as well), the theories as such say nothing about the legal question of the content of these rules, including the question whether judges should always be required by the law to follow preexisting law. Most modern positivist theorists accept the phenomenon of judges deciding against the law,[49] and many of them stress the problems of vagueness and open-texturedness, which create opportunities for judges to (indeed, make them) supplement preexisting law.[50]

If this is the nature of general jurisprudence, its contribution to the question of how rules in fact function, and the extent of their desirability in the law, must be limited. We shall do better to discuss our normative and descriptive problems directly and on their merits, without hoping to gain "answers" from theories of law. Therefore, I agree with Schauer that the essence of law neither dictates nor precludes "ruleness." This conclusion offers enough initial support to my argument that the label "presumptive positivism" is unfortunate. I shall return to this question later, after discussing the role of rules in law, to see whether adopting a given theory of law (positivism) has the same effects as adopting rules, and whether the similarities are sufficiently important to justify the label, after all.

III. The Role of Rules

Now that we have addressed theories of law and positivism, let us discuss the very genuine problems raised by Schauer. They are, as he says, both descriptive and normative.[51] The two are related at least in the sense that much of the debate about the description is based on an intuition that most participants accept the law, as a whole, as legitimate.[52]

Schauer is obviously right that, before discussing rules and

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tal account of adjudication share this weakness. *See supra* note 46 and accompanying text.

49. Kelsen discusses the power of judges to decide against the law in terms of a fiction of gaps in the law introduced and accepted by legislators to avoid unjust results. *See* H. Kelsen, *supra* note 34, at 146-49. *See also* The Authority of Law, *supra* note 34, at 189-92 (discussing overruling of precedents).

50. *See, e.g.*, H.L.A. Hart, *supra* note 20, at 121-50.

51. *See* Schauer, *supra* note 1, at 647, 665-91.

52. Most legal scholars see the practice of adjudication, in its complexity, as legitimate. They may differ on how best to describe it (the positivists may prefer the account under which judges at times have discretion, Dworkin may prefer an account stressing a search for principles or integrity), but they do not *describe* adjudication in order to discredit it. An exception may be some of the critical accounts, which seem to want to

their role, actual or desirable, we must first be clear about what rules are. Unfortunately, his analysis of rules limits his enterprise in ways not required by his assumptions, so I shall start with a few comments on it. I shall then amplify some of the points he makes under the descriptive and normative claims. I believe that there is not much that we can say, in a general way, about the descriptive claim. It is thus not surprising that legal theories have found it difficult to incorporate more detailed accounts of adjudication. It is interesting to see why this is so, by pointing out some of the many difficulties encountered by any attempt at describing adjudication. On the other hand, legal rules do have unique and important features, not shared by all rules of practical reasoning, that may provide some insights into their actual and desirable roles in law. On the morality of rules, I feel that Schauer surrendered to an unfortunate fashion in American legal academia, namely, by quarrelling mostly with those who think that there is more "ruleness" than is justified.[53] He makes very good arguments for the position that rules are at times justified.[54] I am deeply convinced of that, so, for me, whether rules may be good is a non-issue. The more important problem is to see which rules are good, and how it is possible to implement them. I therefore would like to see more work done on the functions that only rules can perform, and on contexts in which rules may be justified, assuming (rather than arguing for) a general justification of rules (or of authority).

A. *The Nature and Function of Rules*

I agree with Schauer's (unstated) decision not to take a stand on such questions as whether we must conceive of rules as special kinds of reasons for action (as suggested by Joseph Raz[55]), or whether we should see them as providing "only" additional first-order reasons for action.[56] The differences are genuine

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expose the process as a deceitful manipulation. *See, e.g.*, Kairys, *Introduction*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 1 (D. Kairys ed. 1982).

53. *See* Schauer, *supra* note 1, at 679-91.

54. *See id.*

55. Raz argues that mandatory rules generated by authorities are "protected reasons for action," that is, a combination of first-order reasons for action and exclusionary second-order reasons for not relying on considerations excluded by the rule. *See* PRACTICAL REASONS AND NORMS, *supra* note 34, at 15-48; THE AUTHORITY OF LAW, *supra* note 34, at 19-25. For a critique of Raz's argument, see Moore, *Authority, Law, and Razian Reasons*, 62 S. CAL. L. REV. 827 (1989).

56. Schauer does not address the question in his discussion of rules, *see* Schauer,

and important, but it is more important for our present purposes to get at the points at issue. I therefore believe that we should try to give rules the least preemptive and theory-dependent analysis that we can, assuming that the problems can be stated within the different conceptions, and that their main features are clear. Accordingly, I shall follow Schauer's analysis in the main, making only those clarifications I deem necessary for the argument.

Rules, Schauer tells us, are generalizations. Prescriptive rules, the subject of his analysis, have two dimensions: the size of the categories, and their opaqueness—the degree to which a rule requires that considerations external to its command be ignored.[57] The main decisional problem with rules is their inevitable under- or over-inclusiveness. This vice will tend to be more pronounced if the size of the categories is large. The decisional problem is that rules, to be effective, must be entrenched to some degree (or will be entrenched, even if they do not have to be, for a variety of reasons), but this entrenchment may lead to suboptimal decisions. The larger the categories and the stronger the entrenchment, the more "ruleness" we have.

Schauer does not tell us much more about rules (at least in this Symposium). He moves directly to distinguishing between modes of decisionmaking according to their relationship to rules.[58] There is a spectrum, which has as its extreme points rule-based decisionmaking and particularistic decisionmaking, with at least one important intermediate position of rule-sensitive particularism.[59]

Schauer's analysis captures important features of rules, but we should recall that there is something contingent in his usage, especially against the background of the literature with which he argues. According to Schauer, we have "more" rule-

supra note 1, at 647-51, or in his discussion of presumptive ruleness, *see id.* at 674-77. His characterization of rules, *see id.* at 649, is explicitly agnostic on this question.

57. By making some opaqueness a defining feature of rules, Schauer moves beyond seeing rules as providing additional and independent first-order reasons for action, because he defines opaqueness as the requirement that other reasons be excluded. Because Schauer's opaqueness is a matter of degree, and not only of scope, however, the analysis does not yield the conception of rules as protected reasons for action.

58. *See* Schauer, *supra* note 1, at 648.

59. The spectrum is known in discussions of utilitarianism. Act-utilitarianism is particularistic, whereas rule-utilitarianism is rule-based. Those who argue that rule-utilitarianism can be justified in act-utilitarian terms, without collapsing into act-utilitarianism, are believers in the intermediate position.

ness when the categories are broader.[60] Broader categories, however, usually resemble "standards" rather than rules. Even if we take broadness only in the sense of range of applicability, it is not clear that size is directly relevant. Large categories will tend to be over-inclusive and less determinative, but small categories may be under-inclusive and more determinative or constraining. Either raises the ruleness problem. So perhaps we should only use the strength of entrenchment as an indication for ruleness.

In any event, the problem arises only where there is discrepancy between the result that the rule requires and the result required by some other estimate of the best thing to do. If we have freedom to determine the answer to the question of what the rule requires in a way that will avoid the conflict, the problem of ruleness does not arise. Large categories may tend to over-include, but they may also provide more opportunities for "internal" interpretations that avoid the conflict altogether. Size on its own, then, does not add much to the likelihood of a problem of ruleness.[61]

Second, there is something curious and misleading about the way in which Schauer moves from the definition of rules to modes of decisionmaking. Schauer directs us not only to the entrenchment of rules, but to seeing them as the opposite of particularistic decisionmaking (that is, decisionmaking based on the background justification(s) of the rules). In some cases, this is all there is to it: We require some age limit for eligibility because we assume that this is the age at which people typically may have the qualification, and we prefer a mechanical, one-dimensional, objective rule to a case-by-case examination of (the possibly complex criteria of) eligibility. The same applies, within morality, when we debate having rules within the framework of the same moral theory, say, utilitarianism. There, too, the rule stands opposed to the act-utilitarianistic evaluation of the case.

60. *See* Schauer, *supra* note 1, at 651.

61. I do not think this is an important point in Schauer's overall argument, so I do not intend to pursue it here in detail. It is obviously true that a rule applicable to all is more likely to be over-inclusive than a rule applicable to some. If the rule imposes a duty, the scope of the duty is broader under such a rule, thus leading to more "ruleness." Similarly, if the rule describes the behavior to be prohibited in sweeping terms, it is more likely to be over-inclusive than a finer description. Again, more conduct is prohibited, and we may have "more ruleness," that is, more behavior is regulated by the rule.

Some of our decisional problems with rules, however, are not that they are over- or under-inclusive within the *same* justificatory framework. We object to the rules because they create a requirement that conflicts with another justificatory framework, one that we deem superior to that of the rule. The rule in this case is not only entrenched vis-à-vis the particularistic, all-things-considered judgment, taking into consideration its own background justifications; it is also entrenched vis-à-vis the normative requirement of all other justificatory frameworks. These requirements, in their turn, may be formulated in the form of rules or of all-things-considered judgments. So the entrenchment of rules is not necessarily a matter of ruleness versus non-ruleness. It is a matter of identifying, at the outset, the kinds of reasons that are dispositive, and their weight or status.[62]

Schauer at times seems to think that, whereas some entrenchment is definitive of rules, its strength may be a matter of degree:[63] "Ruleness" will be more manifest when entrenchment is stronger.[64] Presumably, we can have a spectrum of degrees of entrenchment (keeping to the first-order level of reasons): from the most entrenched (that is, we must follow the rule always, whatever the consequences) to the least entrenched (that is, the rule provides a weak first-order reason for following it). This account, in addition to taking a controversial stand on the nature of rules, creates a problem for Schauer's formulation of his own problem. It is not clear when a decision should be termed "rule-based," because in principle, everything on this spectrum is rule-based. Clearly, this would be a confusing usage. I conclude that it is better to speak not of de-

62. Thus, we can have a rule-utilitarian position that justifies certain limitations of the government's power to limit freedom of speech because the rule is supposed to serve better the act-utilitarian calculus of maximizing welfare. The problem of ruleness, according to Schauer, arises when, in a particular case, it seems that the rule requires a deviation from the act-utilitarian calculus. We may object to the conclusion (and to the rule itself), though, because we think that decisions about free speech cannot be adequately made if only consequentialist considerations are taken into account.

63. I say "at times" because, when discussing Fuller's theory of law and its consistency with his claim that law does not have to be a matter of rules, Schauer argues that "rules of thumb" are also rules. *See* Schauer, *supra* note 1, at 656. Also, when discussing Kennedy's objection that judges always have to see whether this case is not the one justifying deviation as fatal to rules, Schauer responds by the retail-wholesale distinction, as if ruleness were one-dimensional and an all-or-nothing phenomenon. *See id.* at 660-61.

64. *See, e.g., id.* at 650 (identifying the point of strongest "ruleness" as that at which the rule *precludes* all evaluation of possible reasons for not following the rule).

grees of ruleness but of the proper attitude to rules, and then moving on the spectrum suggested by Schauer.

Equipped with these clarifications, we may move to the notion of presumptive ruleness.

B. *Presumptive Ruleness*

Schauer discusses two types of presumptions.[65] First, the existence of the rule creates a presumption in favor of following the rule: The decisionmaker has a duty to follow the rule unless there is a strong reason for not doing so. Second, when there is a rule, one has the liberty, in most cases, not to scrutinize factors irrelevant to the rule's applicability. One is entitled to merely "peek" at, or even ignore, those factors.

Schauer needs the second implication of presumptive ruleness in order to overcome what he presents as a powerful argument: If a rule merely creates a presumption in its favor, decisionmakers always have a duty to decide whether in this case the presumption should be rebutted, and to do that, they must examine all of the other reasons deemed relevant. According to this argument, all cases are hard cases because the rules act not as entrenched guides for action, but as rules of thumb.

A duty to examine all relevant reasons (where "relevant" is determined by the decisionmaker's ultimate justificatory system, not by the rule itself or even its background justifications) in all cases does not make all cases hard. It does make all cases time-consuming, in ways that are extremely wasteful.[66] To see that, we need to distinguish between recipes for identifying the right decisions and recipes for a decisionmaking procedure. The two are distinct, although they may be interrelated.

"Presumptive ruleness" in the first sense is a description of the right answer to a question governed by a rule. Usually, one should follow the rule. If one wishes to deviate, one must provide (or at least there must be) a justification of a certain strength. It is not enough that, on some balance of reasons, the decision is suboptimal in this case. One can only justify devia-

65. *See id.* at 674-75.

66. If the duty to examine all background justifications creates long delays in decisionmaking, this is a serious cost to the adequacy of the decisionmaking. That cost should count against it, especially if it turns out that in most cases, the examination does not yield a deviation from the rule. This is, in fact, one of the justifications for adopting rules in the first place.

tion with a strong reason for not following the rule.[67] If such a strong reason exists, one should not follow the rule. At this stage, I do not want to argue about the morality of this approach to ruleness. I wish only to stress that it is not a definition of what a rule is, but rather a description of a normative approach to rules.[68]

Identification of the right answer does not depend on the depth of the examination the decisionmaker made, on the comprehensiveness of her analysis of various reasons, or on the answer's validity. A decisionmaker may have had a hunch that proved right and that she did justify persuasively (she may have given a formalistic or essentialistic opinion, consciously or unconsciously hiding the true grounds for her decision), or she may have listed the relevant reasons with great care, in a long opinion, only to be wrong.

The second sense of presumptiveness, that of "peeking," concerns what a decisionmaker should do *before* she decides. Here, it is not clear whether, according to Schauer, the rule creates another presumption, that is, that only the factors enumerated in the rule itself are relevant; whether the practice of following rules justifies disregard of such factors (unless something attracts our attention to the possibility that such factors may be relevant); or whether there is a fully-entrenched rule that non-rule factors should not be considered unless something or someone "shouts."

Does the attitude of "substantive" presumptive ruleness, though, necessarily require that all other factors will always be

67. Or, to adopt the language of exclusionary reasons, you can only look to those "background justifications" or other factors that were not excluded by the exclusionary reason, or the examination of which is required by another reason of a similar status and weight.

68. On the spectrum of strength of entrenchment, Schauer chooses to be close to the lower part. The reason to overcome the presumption must be strong, but it should not be stronger than the first-order reasons for following the rule combined with the value of the rule and the reasons that made the rulemaker embody them in a rule. This is probably an important difference between his account and an exclusionary reasons account: Even if the scope of the reasons excluded is not large, it is reasonable to expect that some reasons that may provide the strong reason for not following the rule might be excluded. This, to me, though, is an advantage of not making a commitment to the exclusionary reasons analysis of rules (as distinguished from normative arguments that there are cases in which the reasons provided by rules should be seen as exclusionary). Although this is not dictated by the analysis, it does suggest that the normative question of the desirable attitude to the rule follows inexorably from the general analysis of rules. I prefer, tentatively, to keep the analysis of rules more open, and to pursue the question if and when the adoption of exclusionary reasons of certain scopes is justified as a normative question.

examined? To some extent, it does. If this is the adopted attitude, any decision to follow the rule should be read as including a statement that the decisionmaker thought that the rule should be followed. Decisionmakers should be made aware of this fact. The important question, however, is what kind of investigations or examinations decisionmakers must make to reach this judgment. The *normative* answer may be that life experience suggests that the costs of a comprehensive search and analysis, in the absence of something suggesting that such a search is called for, are greater than their contribution to the right decision.[69]

In many contexts, including in many cases of legal decisionmaking, the need to reach a decision quickly is part of our notion of justice. A long delayed decision puts burdens on the litigants, which burdens are desirable to avoid. So the balance of reasons cannot always be for a comprehensive deliberation seeking to make extra certain that the decision that seems right initially is indeed the right one. Once the risk of error is minimized, it is mandatory to accept the finality of deliberation and to reach a decision, even though a deeper examination would have occasionally revealed a better decision.[70]

This feature is not unique to law, but it is often present in law and adjudication. It is thus a suitable point with which to move to the question of whether the nature of law can shed some light on the desiderata of legal decisionmaking.

C. *The Uniqueness of Law*

As Schauer keeps reminding us, most of the decisionmaking problems that he raises are not unique to law. Moral theorists often debate the relative merits of the application of rules of law and case-by-case particularism.[71] Moral theorists also raise the problem of ultimate versus intermediate principles. There are also debates both within a moral theory and between different moral theories; in the latter, one of the important differ-

69. I believe that Schauer is right that there is a psychological tendency not to examine what seem to be "external" factors in the absence of a sense of conflict. If one's sense of conflict is usually adequate, this tendency may support the normative approach. The tendency may be dangerous if decisionmakers tend to suppress the awareness that some decisions are bad.

70. For a discussion of the rationality of putting some end to deliberations, see H. FRANKFURT, *Identification and Wholeheartedness*, in THE IMPORTANCE OF WHAT WE CARE ABOUT 159 (1988).

71. *See, e.g.*, Moore, *Three Concepts of Rules*, 14 HARV. J.L. & PUB. POL'Y 771 (1991).

ences may be precisely the relevance of some factors of practical importance.[72] Is there anything that is unique to law that might affect the descriptive and normative claims about the role of rules (or entrenched norms)?

This is where legal theory can help us, after all—in two ways. First, the very enterprise of legal theory is to distinguish between law on the one hand and other facets of human life, especially morality or politics, on the other. So legal theory as an enterprise assumes that law has a certain autonomy. The features that may account for this autonomy may be relevant to the role and the justification of adopting rules in the law. Second, the features that theories of law identify as relevant, and the general things that theories of law tell us about law and its relationships to other parts of social life, may help us see reasons for rules that may not exist to the same degree in other decisionmaking contexts.

All agree that a distinctive feature of law is its institutional character: It confers powers on organs to make law, change laws, enforce them, and apply them; it also confers many powers to act (for example, to issue licenses or supervise activities) that do not amount to lawmaking or to law enforcement. Often, when we want to confer powers, we also want to minimize their abuse. One of the ways to do that is by limiting power; hence, policemen cannot detain people beyond a very short time without judicial approval. As Schauer insists, limiting powers may be done in a combination of two ways: limiting the jurisdiction of an organization, or structuring the types of decisions an organization may make within its powers. At least in some circumstances, we want these structures to be specific, concrete, and clear—and extremely entrenched. We do not want police officers or Central Intelligence Agency (CIA) agents deciding according to their own judgment whose telephones to tap.

This means two things: We do not want them to decide what the background justification of the rule actually adopted requires in each particular case, because we are afraid that they may be overzealous; we are also afraid that their ideologies are such that they do not see the balance between civil rights and

72. One of the criticisms of both act- and rule-utilitarianism, for example, is that they do not take into account distributive considerations. A utilitarian recommendation may thus be criticized for not considering some excluded reasons that are morally relevant, and that utilitarianism as a whole is entrenched against.

law and order in the same way as the rulemakers. We suspect the police officer and the CIA agent of making *bona fide* mistakes within the background justifications, and of wanting to decide the issue by considerations external to those justifications.

This is where the "limited-domain" feature of law comes into the picture. According to Schauer, some versions of positivism emphasize the limited domain of law.[73] No doubt, the wish to distinguish between law and morality and politics motivated all positivist theories of law.[74] As my discussion of legal theory hints above, I wish to argue that some sense of limited domain is the essence of law, and that this essence is reflected in all integrated theories about the law: Natural law theories of law require some connection between law and morality, but they do not collapse the two. They advance theories of human law, and say something substantive about human law, which is different from saying that legal decisionmakers should merely decide legal cases as if they were moral dilemmas. The distinction between law and morality and politics does not suggest separation or absence of many areas of overlap. Most law is made through a political process. Laws are obviously affected by morality both in their making and in their application. Nevertheless, law is distinct from these background justificatory schemes, and this distinctness is an important ingredient of the law's capacity to perform its social functions. In a world in which opinions differ about morality and the status of moral norms, it is of the utmost importance to have normative guidance that cannot be collapsed to those controversial beliefs. Such guidance promotes clarity. It also derives its legitimacy from an agreement about the ways in which these norms were made, rather than from an agreement about their content.

Thus, in addition to the reasons we may have for rules in general (and I believe that there are many, including fear of mistakes in judgment and wishes to gain the rule-of-law virtues of predictability and clarity), and for limited domains in partic-

73. *See* Schauer, *supra* note 1, at 666 n.41.

74. The difference between limited-domain theories (for example, the Razian theory, which identifies laws exclusively by sources and confines laws to legal materials preexisting adjudication) and more "dynamic" theories (those that are willing to label "law," at least in a loose sense, as the product of legal officials) is not the greater willingness of the latter to give up on the distinction between law and morality and politics.

ular, we have a reason for keeping the law from collapsing totally into politics or morality. A prime way of doing this is to limit the types of justificatory materials legal decisionmakers are entitled to invoke.[75] In addition, as Schauer reminds us, if we want to maintain hierarchy in legal systems (as I think we do), we must prevent every decisionmaker from seeing everything as open to her discretion or best judgment.[76] We need a way of entrenching some results from the discretion of some decisionmakers.

I wish to make clear that this position does not commit me to many of the views that people usually associate with it. Nor, as Schauer reminds us, does it commit me to positivism.[77] All I am saying is that judges, as judges, do not reason, and should not reason, as politicians or as moral preachers (or teachers). Judges are unique in at least two ways: They are bound by materials that may be irrelevant to the politician or the moralist (laws); and they are organs in a system that has systemic concerns of a special nature transcending the decision of the instant case. These systemic concerns include both institutional factors of the proper relationships among various authorities, and the general need to have norms of conduct that may be used to plan, to interact, and to avoid and resolve disputes without the invocation of the law-enforcing institutions of the legal system.[78]

There is a third important sense in which judges are unique. The law is a comprehensive system that claims supreme power to regulate all conduct by its subjects. In other words, the law claims general authority. Stated yet another way, the law claims a general legitimate authority to issue rules of conduct that will be binding—rules of conduct that will require the desirable at-

75. I believe that Dworkin's position that judges should (and do) rely only on principles, not on policies, is an attempt to grasp the same truth. *See* LAW'S EMPIRE, *supra* note 10, at 221-24; TAKING RIGHTS SERIOUSLY, *supra* note 10, at 22-28, 90-100. It is an attempt to make judges (and the law) unique by limiting the materials that may be invoked to decide issues within the law (as distinguished from politics, which decides issues outside the law, occasionally creating law in this way).

76. *See* Schauer, *supra* note 1, at 684.

77. *See id.* at 685-91.

78. The mere fact of systemic constraints may not be unique to law and legal decisionmakers. Political decisionmakers obviously also are a part in a system, and even moral decisionmakers may have systemic constraints if they are not one-time decisionmakers. The nature of the systemic constraints of legal decisionmakers, however, is different. For a partial list of such constraints, see Soper, *supra* note 37, at 1-7. *See also* Newman, *Between Legal Realism and Neutral Principles*, 72 CALIF. L. REV. 200 (1984).

titude toward rules. The morality (or the justification, or the legitimacy) of law is thus very different from that of rules in general. The question whether, and when, it is justified to adopt or follow rules is very different from the question whether, and when, it is justified to adopt an attitude of accepting the authority of law. It is likely that it will be much easier to justify the adoption of some rule, and thus by implication to affirm that some rules may be justified, than it will be to justify the adoption of an attitude of respect for law, simply because there is much less control, in advance, on what this attitude may require. I shall assume below that Schauer is not interested in this particular problem.[79]

D. *The Descriptive Claim*

I agree with Schauer that presumptive ruleness, in both the substantive and the procedural senses, is a good metaphor for the approach of judges to law. It is also a better description of what judges do than either radical "rule-skepticism" or stringent rule-following.[80] Schauer's discussion is illuminating and rich. I would simply like to use the framework that he created to make a few observations about describing such a complex phenomenon as adjudication.

The first problem is that what we seek to describe is not a straightforward empirical phenomenon. We want to know how judges in fact decide cases, and what they examine before they do so. In particular, we want to know how rules affect their decisions. Can we formulate a testable hypothesis to refute (or confirm) either description? Will such a hypothesis rely only on

79. This assumption is based on the fact that Schauer does not connect the standard reasons for having an obligation to obey the law as relevant to his discussion of the desirability or possible justification for rules. I shall return to this question below, when I discuss the criticism that positivism encourages too much obedience to law.

80. I guess that I have a consensus-personality. I cannot think of any serious observer of any legal scene, including the American, who has consistently advanced either of these claims. When we look at "candidates" in context, and we recall what they were fighting when they insisted on their apparent "rule-skepticism," we can see that they did not mean to embrace this. Take Justice Holmes's "bad man theory," that law was what courts did in fact. (Other realist claims, which fought "essentialism," did not offer a "particularistic" conception of law, but wanted to identify "real law," as distinguished from "paper law.") If this is a serious theoretical claim, it does mean that law is not rules but rather is particular decisions (as opposed to the realist view, also expressed by Holmes, that law is the prediction of what courts will do, which may in turn depend on some theory of the extent to which courts follow rules). Holmes, however, clearly did not intend this to be his claim. He just wanted to stress, in a dramatic fashion, that law should not be confused with morals.

"external" facts, such as the text of decisions, or must it rely on other factors as well? Can we know, to a sufficient extent, that other evidence?

It should be clear that the published opinions are an extremely partial body of data to describe what judges in fact do.[81] Moreover, they are systemically misleading,[82] for a variety of reasons. First, judges write opinions in order to *justify* their decisions. Because many judges believe, or at least write opinions as if they believe, that they are bound by what they can identify as the law, we are unlikely to find explicit declarations that a decision is a deviation from what the law requires. Typical judicial decisions, including those that we give as illustrations of preferring "background justifications" to law, still maintain that they are "true" declarations of what the law requires.[83] More seriously, a decision is often a conscious attempt at rhetoric—at explanation, justification, and persuasion. It may have nothing to do with the psychological processes that were involved in the judge's decisionmaking.[84]

Nevertheless, the data that we seek to explain and describe are mainly published opinions of high courts. I would venture that this partial "diet" explains why cases decided on the "merits of the case," as opposed to the "rule," are under-

81. Only a very small number of judicial decisions generate reasoned opinions, and only a small percentage of the opinions are published.

82. At least for those parts of "what judges do" that are distinct from writing their opinions.

83. This feature of adjudication lends some credence to Dworkin's insistence that these judges work "within the law" rather than invoke extra-legal considerations when the "law" has run out. We can, however, accommodate this rhetoric to the skeletal description very easily: First-stage law has indeed run out. The law permits judges to make decisions in such cases, and gives them limited direction as to where to seek answers. In this sense, they are still working "within the law." Some of these other sources may still be "legal" (in some institutionally-linked way), but some are not. There may be some institutional justification in the attempt to show that the "best" decision reached by the court is "law." To the extent that this rhetoric suggests that the answer was pre-determined by legal materials, I believe that both the rhetoric and Dworkin's analysis are misleading rather than illuminating, contributing to the tendency not to see that the judges are making political decisions. *See* Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1087-93 (1975), *reprinted in* TAKING RIGHTS SERIOUSLY, *supra* note 10, at 81, 110-15. *See also* Dworkin, *A Reply by Ronald Dworkin*, in RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE, *supra* note 9, at 247, 272.

84. I do think, however, that we often make conscious attempts to reconstruct the argument, identifying what convinced the judge that one decision should be preferred to others. I do not think that we should always regard those as mere rationalizations. Professor Stanley Fish is wrong here because he overlooks the fact that the practice of judges (unlike that of athletes) involves the public justification of decisions. *See* Fish, *Dennis Martinez and the Uses of Theory*, 96 YALE L.J. 1773 (1987).

represented in the data that we observe.[85] Clearly, our data base is biased in favor of hard cases. Easy cases are unlikely to reach the courts. As mentioned above, judges always say that they decide according to law. So how do we identify the decisions that call for a special explanation, that support or refute a descriptive hypothesis?

I tend to think that we cannot make more than weak generalizations about how judges decide cases using only our common sense. We shall also have a different generalization in different times, for different subjects, for different judges. It is not at all clear that we can generalize for adjudication as a whole. All we may do is *to exclude some sweeping generalizations*, such as "judges never follow rules" versus "judges always follow rules," or "judges always ignore what the rules do not specify" versus "judges always peek at (or fully examine) the circumstances of the case." This is what Schauer's presumptive ruleness does.

The idea of presumption captures the reality of much of adjudication. Judges have an initial tendency to look only to the rule and to what the rule deems relevant. Only if there is something disturbing in the situation or in the result, will judges conduct more elaborate inquiries. When critics accuse a judge of formalism, it may be because the judge has ignored an important aspect of the situation. But more often than not, the judge followed the rule because she did not find the result disturbing, despite efforts by counsel to urge her to see it that way.

If a judge believes that the application of the rule to the case is not straightforward or acceptable, many things may happen. The judge may nevertheless refuse to examine any information or to deviate from the rule. She may justify this by the need to follow the rule. If many judges do that, this might pose some difficulty for Schauer's presumptive ruleness. Judicial behavior would be closer to radical rule-following. More often, I would guess, judges in such situations do more than merely follow the

85. This may sound surprising, because we often assume that it takes a brave judge to deviate from a rule, and brave judges are more often than not on a high court. It takes a good judge, however, to know exactly what the law is, and to be aware of the problems of deviation from rules. I have encountered numerous decisions in Israel's lower courts in which cases were decided in disregard of the law. Sometimes, there was no one involved in the case who argued the law. Sometimes, the judge believed that resolving the dispute was more important, and if the resolution was "just," that was the end of the matter.

rules, especially if the result creates extreme hardship. They seldom deviate from the rule, and when they do, they find some respectable legal justification for that deviation.[86] *Riggs v. Palmer*[87] is a case of this sort. More often, however, the judge decides to follow the rule. This is fine for presumptive positivism. The judge may explicitly discuss the conflict and explain why she preferred to follow the rule, by citing such reasons as considerations of institutional competence, or the need for certainty. She may occasionally invite the legislator or administrator to change the rule, or she may suppress the problem and provide a short, neutral-looking, formal justification.[88]

If we are interested in saying more and knowing more about when to expect the one or the other, and how to bring about a tendency to do one or the other, this goes beyond confirming presumptive ruleness as a descriptive thesis. In this sense, presumptive ruleness, like the skeletal description of adjudication in general legal theory, is just a framework within which these richer discussions must take place.

Presumptive ruleness thus says a bit more than the skeletal description about what actually happens in adjudication. It does rule out radical rule-following. (It also rules out complete rule-skepticism, but the skeletal description presupposed this.) The ability of presumptive ruleness to describe judicial decisionmaking, however, without filling in the details, is not extremely powerful.

The fact that all legal systems give judges, especially judges of last resort, powers of changing the law, strengthens presumptive ruleness as a descriptive thesis. Because of the justificatory rhetoric, it is often hard to identify when judges use these powers, rather than when they use their powers to follow the law or to "apply" it. This rhetoric obscures differences between decisions, which are often easier to state theoretically than to instantiate. Take *Riggs v. Palmer*, for example. Dworkin's assertions notwithstanding, positivists need not be embarrassed by it (or, in fact, by any other judicial decision). The real descriptive question is what happened in that case. Was this a

86. I do not want to speculate which of the two comes first: the decision or the argument supporting it.

87. 115 N.Y. 506, 22 N.E. 188 (1889).

88. Cover argues that antislavery judges who upheld slavery laws took the latter course, thus reducing their own cognitive and moral dissonance. *See* R. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 119 (1975).

regulated dispute, in which the law said the murderer should inherit, and the judges decided not to follow the rule and to look instead at background justifications? If this is the description, was this a legitimate decision by judges? The description does not answer the question. The legitimacy of judicial decisions, in any system, is not a matter of the analysis of specific decisions on their own. The ultimate court has, in such cases, discretion in the third sense mentioned by Dworkin—that of finality.[89] The system decides whether this is a legitimate use of power by its general response to the decision. Perhaps, however, this is the wrong description of *Riggs*. Was it a case in which the legal materials did include references to background principles that should have governed, so that the law permitted, or maybe required, denying the murderer the right to inherit? Either description is possible. Either description is consistent with presumptive ruleness. It is not clear why it is of any theoretical importance to decide which of these descriptions is a more accurate one.

The difficulty of assessing the descriptive theses, once we make them more specific, is that it is difficult to think of what could support or refute such theses. We do not know enough, and we do know that there are many differences in the ways decisionmakers make decisions and conceive of them. It may just be that making decisions within the legal system is not the type of human behavior that is sufficiently basic and structured to be described in such a general way.

In short, there is a lot that could be done and that should be done to understand how judges make decisions and how they choose to justify them.[90] It might be wise to accept that we should not aspire to general, sweeping descriptions, even within any particular culture or legal system at a certain time.

One interesting thing to consider, suggested by the two

89. *See* TAKING RIGHTS SERIOUSLY, *supra* note 10, at 35.

90. In many cases, opinions do not address some arguments or factors that seem obvious and relevant. Furthermore, in some of the cases, these factors and arguments were made known to the court, either in oral argument or in writing or both. Did the judges ignore these factors because they were excluded by the rule? Did they think that they were irrelevant? Were they simply overworked and not attentive enough, or was this an intricate way to be formalistic in order to disguise political ideologies or moral unease? These questions are all relevant to presumptive ruleness in both its senses. The answers are not likely to be general and sweeping. For an acknowledgement that not much has been done to understand the "real" factors affecting judicial decisionmaking, see Schwartz, *A Proposed Focus For Research on Judicial Behavior*, in FRONTIERS OF JUDICIAL RESEARCH 489 (J. Grossman & J. Tanenhaus eds. 1969).

senses of presumptiveness Schauer mentions, is the extent to which the existence of the rule strengthens tendencies to ignore, and to legitimate ignoring, those features of social situations that the rule deems irrelevant.[91] Such ignorance may lead to mistaken attitudes toward the rule, because it may lead the decisionmaker to ignore the fact that the circumstances of the case justified or even required deviation from the rule.[92] Thus, this is a good point at which to consider the morality of rules.

E. *The Morality of Rules*

The dilemma that Schauer faces is clear and well-known: What should a decisionmaker do when she is confronted by a rule dictating a result that goes against her best judgment? And what follows from that to the principles that should govern our decisional environment?[93] Presenting the question presupposes two things. First, it presupposes that we can identify, at least at times, what rules require us to do (and that we can identify the conclusion of an all-things-considered judgment, or at least that a decisionmaker can decide what she thinks is the best thing to do, all things considered, and hope that this is close enough to the "reality of things").[94] Second, it presupposes that we can decide whether or not to follow the rule. As I said above, these presuppositions are general in nature. They

91. That the answer to the question may not be simple is illustrated by the fact that we encounter opposing claims. Women often claim that their gender is taken into consideration, usually against them, even in contexts in which rules seek to exclude its relevance. On this account, rules do not effectively affect background sensitivity. They do not succeed in doing so even when we try to use rules precisely for this purpose. On the other hand, women also argue that commitments to equality and to merits effectively prevent decisionmakers from taking into account (as they should) the effects of past discrimination, so that small differences in merits should not disqualify women. In the latter cases, it should be noted, it is not always clear whether what is attacked is the role of the rule or its content.

92. And it does not matter, for this purpose, if we see this deviation as permitted by the system and its practices, or as a deviation from the system as a whole.

93. I shall not comment on the interesting epilogue, in which Schauer discusses the implications of his answer that it is at times justified to follow rules, and at times justified not to do so, to the techniques used by a person or organ wishing to induce obedience to rules.

94. The presupposition about the ability to identify what rules require is not trivial for our purposes. There are many cases in which judicial lawmaking is not revision of law or deviation from it because of injustice, but merely lawmaking in the interstices of law. *Lochner*-type decisions, under this account, do not raise questions of rule-following at all, because there could be a legitimate controversy about the requirement of the Constitution. *See* Lochner v. State of New York, 198 U.S. 45 (1905) (state law limiting hours of workers interfered with freedom of contract, thereby violating Fourteenth Amendment).

belong with all inquiries about rule-following, and are not limited to law, or even to practical reasoning. In answering these two questions, denials of radical skepticism are, therefore, also a matter of general philosophy. If law has a unique contribution to make, it will work to lessen skepticism in this particular context.[95]

Is it ever justified to go against one's better judgment, when making a decision, because of a rule? Is it justified for people in authority to require others—judges as well as citizens—to obey in this way, and to subject their behavior to rules? Finally, is there something unique about the law that makes the answer different from what it might be under general moral theory?

Schauer's presentation of the issue permits us to interpret the question in two ways. First, is it ever justified to give the rule, rather than the reasons that justified the rule's adoption, some independent weight in deciding? So far as I know, all scholars agree that this is appropriate, although they may come from different scholarly traditions.[96] Second, is it ever justified to follow a rule when the result dictated by the rule is unjust? Here, the answer is less clear. How do we determine "justness"? If we agree that we should not follow rules in those cases, does that mean that we must give up all the advantages of rules? Must we reach some threshold of injustice before we abandon the rule? Or are thresholds more appropriate when we talk of "suboptimal" decisions, and out of place when a rule-dictated result is "unjust"? Is the question one of the extent of the deviation between the rule-dictated result and the decisionmaker's best judgment? Or its severity? Or certainty? Or a combination of all three?

Before we reach these questions, we should recall that, although some of these dilemmas may stem from the under-inclusiveness or over-inclusiveness of a rule (as Schauer's ac-

95. Law may lessen skepticism because its texts are designed to be prescriptive communications, because it is relatively easy to identify first-stage law, because there are conventions about how to treat law, because the people who are authorized to interpret and enforce the law are socialized in specific and particular ways, and because there is authoritative finality to some institutional decisions. Most will accept that "the game of" law is more constrained, determinate, and specific than "the game of" moral evaluation or life itself. No one can argue that it is less so.

96. This conclusion can be justified by rule-utilitarians, and by most act-utilitarians—when they are willing to take into account, as indeed they must, some generic consequences of the fact that human behavior is not regulated by anything but rules of thumb. The conclusion may also be justified by most deontological approaches.

count suggests), others may stem from the fact that the rulemakers made a deliberate choice with which the individual decisionmaker does not agree. This helps us to see that the problem here is not ruleness versus particularistic reasoning, nor is it the rule versus its own background justification, but rather the tension (from any source) between the requirement of the rule and the decisionmaker's background assessment of the situation. Schauer thus seems to want to remain within the range of suboptimal results, and it is not clear that all, or even most, suboptimal results are unjust.[97] Schauer also does not raise, explicitly or implicitly, the types of problems that motivated Fuller to accuse positivism of encouraging excessive obedience to authority—for example, the willingness of German judges to participate in enforcing potentially immoral laws.[98] Nothing of much moral consequence seems to depend on the decision by judges to follow rules or ignore them.

Thus, here again we encounter the same frustration we had before. We have ruled out several extremist positions. We have concluded that it is justified at times to follow rules, even if the result departs from one's best judgment absent the rule. On the other hand, it is sometimes justified not to follow a rule. Indeed, common sense requires that one sometimes not follow a rule, even if one is apparently bound by the rules. If this is all that we can say, we do not know much about the correct approach to rules. We can offer little guidance to decisionmakers, those who create decisionmaking environments, and those who evaluate their performance.

Our inability to provide guidance results primarily from the lack of an elaborate, detailed normative theory of adjudication to tell us what the right approach to rules should be, and, more importantly, what the right moral answers are and how to identify them. More discouraging still, even elaborate normative theories of adjudication often provide such general guidance that they leave open hard questions.[99] The sad truth is that all

97. My intuition is that, even in *Riggs v. Palmer*, the issue was not whether it was "just" to give a legatee who had killed his testator the benefit of the legatee's inheritance (assuming that those who would have gained were not those whom the victim wanted to benefit, so that they did not have a claim to the inheritance). The issue was whether the legal system should sanction such a result. *See* Riggs v. Palmer, 115 N.Y. 506, 22 N.E. 188 (1889).

98. *See* L. FULLER, *supra* note 20, at 40-41 & n.2.

99. *See, e.g.*, Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 279 (1985).

general normative theories can help by identifying relevant considerations, but they cannot dictate particular decisions.

How, then, can we help decisionmakers? First, we need to make the *content* of the rules as adequate as possible. The first goal is to make the rules require the right decision most of the time. This may mean, among other things, attention to the different needs for specificity and flexibility in different contexts and at different times. Every lawyer knows that some areas are more suited for regulation by clear rules, others can only be regulated by open-ended norms, and still others have competing considerations. We must also be attentive to those contexts of decisionmaking that appear to be especially vulnerable to wrong "best judgments" by the decisionmaker. Schauer points out one purpose that requires rules: limiting some types of decisions and powers to some types of decisionmakers.[100] This is indeed a distinct function of rules. To achieve this function successfully, we need to know more about the risks of decisionmaking by particular types of decisionmakers, and about the needs of efficient decisionmaking in various fields.[101]

My belief is that the pendulum has swung too far: Schauer believes that he must persuade only those who think we have too much ruleness. These critics see rules as the enemy of justice, flexibility, and rich contextual decisionmaking. I think that, in the hands of responsible legislators, rules (drafted with common sense and wisdom, and enforced appropriately) are great contributors to justice. They may be our defense against discrimination, persecution, bigotry, and corruption. Rules are entrenched exclusions of some considerations. Their contribution depends on the justice and the wisdom of excluding these considerations much more than on their formal, neutral attributes.[102]

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100. *See* Schauer, *supra* note 1, at 686.

101. We may think, for example, that it is wrong to let a police officer decide who should be arrested. In some cases, such as when an arrest warrant is issued before the arrest, this can be done. Most arrests, however, must be made immediately and at the scene. The only way to resolve the dilemma is to give the police broad discretion to arrest, coupled with effective sanctions for clearly illegal arrests, and effective judicial review. The decisionmaker must be the police officer on the beat.

102. There is probably a similar phenomenon in the current debate about "rights-language." The debate is conducted as if language and the concepts we use are the real culprits of incorrect thought and legal practice. I am the last to think that concepts are unimportant, but I am generally suspicious when political agendas seem to concentrate exclusively on them. Language may contribute significantly to biases and stereotypical thinking, which may in turn lead to misconceptions of reality and to discrimination, and

This leads me to my final point: Is there, after all, some general argument against rules, built on an overall assessment of their effects, that should make us change our mind about their morality? Although rules may have some beneficial consequences (and some non-consequentialist benefits), can it be that their costs are so great that we should avoid them? And, returning to positivism, is there a similar argument about legal positivism, and should we therefore discard positivism as an inadequate legal theory?

IV. Legal Theory II: Obedience to Law

Even if we accept, with Schauer, that it is sometimes justified to follow rules, and that it is sometimes justified for judges to decide a case against their "best judgment" (all things considered) absent the rule, we must still face an important second-order argument against rules. I raise this problem because an analogous argument is often made against positivism. In fact Schauer mentions this as a reason for his choice of the label *presumptive positivism*. The argument is an important one. If the similarity between the argument against rules and that against positivism is significant and illuminating, this may indeed justify using the same label to draw attention to the similarity.

For rules, the argument goes something like this: Legal rules create relatively weak justifications for deviating in important ways from moral judgments (and moral rules may create reasons for deviating from all-things-considered moral judgments). The existence of rules, however, creates relatively strong tendencies to follow rules and to disregard factors of the situation that are excluded by the rules. Therefore, on the whole, rules tend to encourage more undesirable following of rules than desirable following of rules. Thus, rules should be, at most, rules of thumb. The decisionmaker should always be required to determine whether what is required by the law is also morally justifiable.

The analogous argument against positivism runs as follows: Positivism, as a theory of law, stresses the social aspect of law.

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it is important to show how it can do that. This relationship, however, is not due to some immanent quality of language, or the concepts generally, but to specific uses and usages. This criticism is less radical and may appear less profound; for this reason, it is less exciting. I believe, though, that it provides a better framework for dealing with the political problems that supposedly trouble these critics of the language.

Positivism is not committed to a particular position on the duty to obey the law,[103] but it nevertheless fosters a certain disregard for the moral implications of legal rules, thus encouraging blind obedience to rules, despite their injustice. On the whole, positivism as a legal theory leads to more unjustified obedience to unjust rules than desirable obedience to good rules (or desirable disobedience to bad rules). We should thus adopt a legal theory that will make it the business of judges to look beyond the law.

At this stage, I am not so interested in the validity of these arguments as I am in their similarity. Even if all the counterfactual empirical hypotheses in the two arguments are true (which I doubt), there is one major structural difference between them. One of the primary reasons for having rules is to improve decisionmaking. If this is their sole purpose,[104] then rules that fail in this respect are bad. Similarly, if rules systematically result in bad decisions, and if we cannot intelligently distinguish contexts in which rules will improve decisionmaking and contexts in which they will not, then rules should indeed go.

Legal theories, on the other hand, offer descriptive accounts of law. They should be evaluated according to the adequacy of their accounts. Let us assume, with Schauer, that positivism's account of what judges actually do is consistent with presumptive ruleness, and that this account provides a more accurate description than either rule-following or rule-skepticism. As-

103. The critics assume that positivism endorses an obligation to follow the law. This is why its emphasis on defining the law as "first-stage law" is supposed to lead to mechanical obedience to such law. Positivists, however, have held a variety of positions on the obligation to obey the law. Joseph Raz, for example, whose version of positivism is one of the most powerful and sophisticated, argues that there is no general obligation to obey the law *qua* law (although he concedes that there may be good moral reasons for obeying many laws, and that individuals subject to just legal systems may adopt an attitude of respect to law that does subject them to such an obligation). *See* THE AUTHORITY OF LAW, *supra* note 34, at 233-61. Raz's position clearly highlights the need to evaluate the law on moral grounds before reaching a conclusion that one should obey it.

104. I am not asserting the validity of this assumption because, for my argument, the hypothetical is sufficient. Rules may have inherent value as reflections of the decisions of the community. Similarly, I do not need to take a position on the view that rules are not human artifacts, of either instrumental or inherent value, but rather the way that moral norms come "packaged" in the natural order of things. My goal here is to elucidate Schauer's perspective, which focuses on the instrumental value of legal rules. The same perspective is shared by Raz, whose discussion of when it may be justified to adopt protected reasons for action concerns the circumstances that might suggest that these reasons will better identify the right thing to do.

sume further the counterfactual that endorsing a positivistic theory of law encourages obedience to atrocious laws.[105] Even with these assumptions, unlike in the first argument, it is not at all clear that the theory should be discarded. I hope that I shall not anger my pragmatist friends by hoping that they, too, see a problem here. I further hope that the superficial similarity between these criticisms of rules and of positivism will not mislead us into thinking of them as identical.

The similarity should help us with a more practical concern: Rules, as well as theories of law, should be advanced with an eye toward their impact.[106] They will not be used only by scholars and theorists. In fact, part of their adequacy is the way in which they reflect the way that ordinary people and practitioners see the law. Consequently, theories of law should be presented as one part of a practitioner's comprehensive equipment, complete with a lot of moral and professional responsi-

105. I think that it does not. First, most judges do not have articulated theories of law at all. They may connect their perception of their role and their perception of a duty to follow the letter of first-stage law, but this connection is not unique to positivistic conceptions of the law. It may be related, more generally, to tendencies to obey authorities. *Cf.* S. MILGRAM, OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW 1-12, *passim* (1974). A "positivistic" approach may indeed accompany a theory of adjudication under which all that judges should heed is the law. As Dworkin has pointed out, however, this association is built on a misunderstanding of positivism. *See* TAKING RIGHTS SERIOUSLY, *supra* note 10, at 31-39. In fact, positivism requires a theory of adjudication under which judges have discretion. Or, a "positivistic" approach must be interpreted to mean that once the laws are clear, judges have no powers to revise them, even if they are atrocious. This, too, is not dictated by positivism. And the moral dilemma of judges facing an atrocious law upheld by a majority of their society is clearly more complex than fighting with an inarticulate legal theory that is silent on the issue anyway. I have addressed some of these points in *Natural Law, Positivism, and the Limits of Jurisprudence: A Modern Round*, 91 YALE L.J. 1250 (1982); and *The Implications of Jurisprudential Theories for Judicial Election, Selection, and Accountability*, 61 S. CAL. L. REV. 1617 (1988).

106. In this sense, I am even willing to be a pragmatist myself. Rules and theories of law are not identical. Truth and usefulness are not identical. The impact of rules is simpler to gauge than that of theories, simply because rules seek to change behavior (although the behavior patterns that rules seek to change may be very complex—for example, have rules for integration of public schools achieved their goals?). The only relevant question is how much and in what way rules changed things. With theories, we are concerned with their theoretical fruitfulness and with their effects on diverse contexts. We are also interested in their adequacy, accuracy, and success in highlighting the important features of the phenomena they seek to describe. Finally, we are interested in the types of things that they legitimate and enable. The stronger the claim of the theory to "truth," the less significant these consequences will be in a decision to discard it. We shall have to fight these undesirable consequences by methods other than systemic lying. It is quite conceivable, for example, that we would want to promote gender equality in admissions and appointments in law schools even if we discover that women, on the whole, have better theoretical intuitions than men. Nevertheless, such a discovery might legitimize (or rationalize) unknown undercurrents of prejudice against men. Should that danger encourage us to suppress the truth?

bility education. In this regard, I feel great sympathy with the "radicals": It is not enough to understand the world. We should also strive to change it. As legal actors, even as legal academics, we participate in this attempt to change the world as well. Our understanding of the world, our conceptions of law and of rules and of the moral implications of being bound by a rule or by law, necessarily affect our behavior (even if they do not conclusively control it). Disseminating theories about law, and about the moral implications of having rules, is thus an enterprise charged with moral responsibility.

There are two dangers here. The first, often emphasized by critics, is that we refuse to accept the practical implications of theory, and that we divorce our discussion of theory from these implications. For example, if it is true that positivism contributes to undesirable obedience, then this should concern us, even if that theory does not require such an effect.[107] Positivists cannot simply say that the truth or the adequacy of their position is the end of the matter. Similarly, if deciding to add rules into practical reasoning creates more damage than gain, we should rethink the proper role of rules.

The second danger is no less harmful, however. It is the trap of collapsing everything to consequences, and it threatens our enterprise in two ways. On one hand, we have radical critiques that take aim at our picture of the world: They argue that the inadequacy of this picture is directly responsible for the wrongness of our choices. On the other hand, we have critiques that aim at our way of doing things (rules) and argue that they, in themselves, dictate that our choices are politically biased. Both critiques deny the autonomy of theory and understanding (or of formal attributes of means). Similarly, both ignore the fruitfulness of the distinction between understanding and explanation on the one hand and evaluation on the other, and the distinction between ways of doing things and what should be done.

What I have to say may be less integrated, and may sound

107. It is interesting to recall, however, that Fuller's critique of positivism for its alleged contribution to Nazi atrocities was flawed. His own conception of law, with the notion of an "inner morality," would not have changed anything. *See* L. FULLER, *supra* note 20, at 42. The laws that permitted Nazi atrocities, unfortunately, were not deficient in this formal sense. Unlike typical regimes, in which legislatures are constrained by some "barrier of shame," or the outcry of the public, so that the formal requirements of publicity discourage atrocities, these formal constraints failed with the Nazis.

less profound than these critiques. I nevertheless believe it is true. My optimism leads me to think that, ultimately, it is also useful because it is true. Put succinctly, rules are sometimes good and sometimes bad, and can be used to promote all kinds of political goals. Legal systems must have some core of rules, and this core will be pedigreed (first-stage law). Much of this core will also be clear and will not raise serious problems of application in most cases. Positivism, and all other theories of law, are consistent with these minimalistic characterizations of law. Rules in general, and laws in particular, raise the problem of possible conflict between the requirement of the rule and the "right thing to do, all things considered." We should resolve the conflict by giving due weight to the value of having rules, and the value of having an efficacious and on-the-whole just legal system. The resolution is not a matter of the rules themselves, but a matter of the way that the "system" deals with such conflicts. There are many ways of doing this, and a general description of such systems (or of law) should not be committed to any one of them. On the other hand, if the system in question does not provide adequate leeway for resolving such conflicts, this may affect its justness and its viability. Thus, it is reasonable to suppose that most systems, those that are accepted as just by the majority of their subjects, found something that is close to adequate in this respect.

The practical task, therefore, is not to construct a general theory of rules or of law, but an enterprise in which parts of these are presupposed, one that seeks to identify factors relevant to questions such as when (more strongly entrenched) rules are called for, or how we should best attain a balance of tendencies resulting in the most moral behavior by all agents.

My guess is that often we will discover that the problems that make decisionmaking undesirable at times have less to do with the things we talk about and, to some extent, control (that is, rules and theories of law), and more to do with other facets of human action. Again, I am in sympathy with some radical themes: The danger and the hope, in extreme cases, stem from the fact that human beings, including judges, are not exclusively or even primarily motivated by legal reasons for action. They may find ways to "improve" on these reasons, just as they may find ways to frustrate good legal reasons. At times, they will be aware of the fact that this is what they are doing; at

times, they will be doing this unaware. Of course, judges do have independent, strong motivating reasons to be seen as obeying legal reasons most of the time. This is why the effort to make legal reasons good, both substantively and formally, and to strengthen the tendency to obey them when we have succeeded in making them, on the whole, good, is generally desirable.