POSITIVISM, I PRESUME? . . . COMMENTS ON SCHAUER'S "RULES AND THE RULE OF LAW"

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Professor Schauer's jurisprudential writings, including his contribution to this Symposium, *Rules and the Rule of Law*,[1] range widely over some of the most important problems of practical philosophy, philosophy of language, and philosophy of law. His always rewarding discussions raise a large number of issues worth debating at great length. I will address only two or three quite general issues, leaving to this Symposium as a whole to demonstrate the breadth of Professor Schauer's jurisprudential work.

I am grateful for Schauer's discussion of the nature of rules and their role in practical deliberation and decisionmaking. I found especially helpful his careful delineation of several models of decisionmaking. I will focus my attention on his use of this theoretical machinery to define and defend "presumptive positivism," his general account of the nature of American legal practice. I believe his argument to be basically correct, yet I have reservations about the terms in which he pursues the project.

My discussion falls into four parts. In the first two parts, I introduce and refine some of the conceptual machinery that Schauer employs to define and defend presumptive positivism. In the third, I criticize Schauer's defense of presumptive positivism. I suggest that his account is incomplete and that, as a result, his argument for presumptive positivism is inconclusive. I also argue that, his protestations to the contrary, his preferred model of decisionmaking, "presumptive rule-based decisionmaking," is indistinguishable from what he calls "rule-sensitive particularism."

In the fourth part, I take up Schauer's discussion of the institutionalization of presumptive positivism. Schauer usefully

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1. Schauer, *Rules and the Rule of Law*, 14 HARV. J.L. & PUB. POL'Y 645 (1991) [hereinafter *Rules and the Rule of Law*]. *See also* Schauer, *Formalism*, 97 YALE L.J. 509 (1988) [hereinafter *Formalism*]; Schauer, *The Jurisprudence of Reasons*, 85 MICH. L. REV. 847 (1989) [hereinafter *The Jurisprudence of Reasons*].

brings to our attention the importance for theoretical purposes of the institutional environment of legal reasoning and decisionmaking. His proposal for institutionalization of presumptive rule-based decisionmaking is intriguing. The proposal is ambiguous, however, in an important respect, and both ways of construing the proposal face difficulties. I conclude that, while presumptive positivism is on the right track, characterizing it in terms of *presumptive* rule-based decisionmaking may be a mistake.

I. Practical Reasoning, Rules, and Law

A. *Jurisprudence as Practical Philosophy*

Schauer's recent work rests on an important assumption about the province of jurisprudence, although he does not articulate or defend the assumption. Expressed in my terms, the assumption is that jurisprudence is a part of practical philosophy.[2] Because society designs law to operate within the practical reasoning of officials and citizens alike, jurisprudence, the general philosophical study of law, is concerned not only with a descriptive account of the institutions of law, but also with the forms of practical reasoning characteristic of law. With the ultimate aim of clarifying the nature of legal reasoning and decisionmaking, Schauer's article, and his book on which the article builds,[3] raise and address many important general questions of practical philosophy, especially those concerning the nature of rules, and the role of rules in practical deliberation. In this Part, I will discuss some of the results of this important investigation, but first I want to briefly defend Schauer's basic assumption.

Law (or a legal system) *exists* only insofar as a social group of some size *practices* it, that is, insofar as it takes shape in, and guides and directs, the behavior of members of that social group. It does so by addressing directives to these members, directives that the group takes as reasons to act in certain ways. Law, not only typically but essentially, purports to direct action by addressing reasons to those falling within its jurisdiction.

2. Practical philosophy, as I understand it, embraces both conceptual and normative inquiries.

3. F. Schauer, Playing By the Rules (forthcoming 1991). (Page references in this Article to this source are to the 1990 manuscript version of the book.)

Law depends for its efficacy on the understanding and practical reasoning of those whom it addresses.

We can distinguish two ways in which our practical deliberation about what *to do* can be influenced or structured. First, something can influence practical deliberation *externally* by so shaping the *environment within which* action can be taken that only some alternatives appear feasible or reasonable. Second, something can structure deliberation *internally* by providing directives about what *should* or *must* or *ought to* be done. Whereas external devices put obstacles in the way of rational agents choosing certain alternatives, internal devices provide rational agents with *reasons why* they should choose certain actions from the range of available actions.

Law uses both of these devices; sometimes one is more prominent, sometimes the other. But internal guidance is (and, I would maintain, must be) the primary device. That is, it is characteristic of, perhaps essential to, law to provide (or at least purport to provide) us with *reasons why* we should act in certain ways. Thus, a society through its law attempts to structure social interaction by addressing "internally" the practical reasoning of its citizens.

It follows that the activity characteristic of law is essentially deliberative activity. While the long tradition from Aquinas to Kant correctly stresses that law concerns itself with "external" behavior and interactions among members of a society, it must be acknowledged that these interactions are influenced through the practical reasoning of these members. The *activity* characteristic of legal practice (understood to include the activity of lawyers and lay citizens alike) involves practical argument, practical reasoning aimed at determining what one has good reason to do.

Thus, if jurisprudence seeks to provide a general account of the nature of law and legal practice, at its core must be an account of the nature of practical reasoning within the domain of law. To forestall misunderstanding, I should hasten to add that this is *not* to say that we should shape our theory of law to fit our theory of appellate judging. That is likely to yield a far too narrow view of the practice of legal reasoning. In one way or another, the law plays a role in the practical reasoning of *everyone* in society, and in reasonably well-functioning societies, law works as an *internal* guide to (nearly) everyone in society, and

not just to appellate judges. It *is* to say that a general jurisprudential theory would be radically incomplete and seriously misleading, if it failed to give some account of the place of law in the practical reasoning of officials, lawyers, and lay citizens alike. This is what I meant when I say that jurisprudence is a part of practical philosophy.

B. *Rules and Practical Reasoning*

On the strength of this assumption, Schauer grounds his jurisprudential inquiry on an analysis of rules and their role in practical reasoning. I begin with a sketch of his views on this subject and then turn to three models of decisionmaking defined in terms of this analysis.[4]

According to Schauer, rules are general prescriptive propositions that are designed to achieve certain ends if generally followed. These ends provide the purposes or aims in terms of which the rule is justified. Schauer distinguishes two ways in which the general prescriptive proposition may be related to its background justifying aims.

Consider first *rules of thumb*. If we regard a rule as a rule of thumb, we simply regard following the rule as a good way of achieving its background aims. We regard those background aims *alone*, and not the rule itself, as providing reasons for action. Under this view of the rule, the fact that a case falls under the rule would not itself be a reason for following the rule, but only a reason for *believing* that doing so would achieve the background aims. We can say that the rule is *transparent* to its background justification. We might still hold that rules of thumb are binding; they are binding insofar as the ends that they help us achieve are binding, and following the rule (that is, performing the action indicated in the rule) is the best way available for achieving those ends. The purposes behind rules of thumb alone supply reasons for action, so there is no reason to comply with the rule in those cases in which one correctly judges that complying with it will not advance those purposes. It does not follow, however, that one should never look to the rule for guidance, or should ignore the rule and in every case look to the background purposes for guidance. Rules of thumb genuinely

4. I will follow Schauer here for the most part, although I will suggest one or two refinements that I believe he would be willing to accept. My description of rules of thumb follows Regan, *Authority and Value*, 62 S. CAL. L. REV. 995, 1003-13 (1989).

guide action, but only provisionally, and when they conflict with or fail to advance their background aims, an agent has no reason to comply with them.

Contrast rules of thumb with "proper rules."[5] Proper rules are *entrenched* prescriptive generalizations. They apply, or are binding, even when following them would not further the purposes of the rule.[6] Such rules are *opaque* to their background justifications. Schauer explains this defining feature of proper rules in terms of Raz's notion of "exclusionary reasons."[7] Exclusionary reasons are different from first-order reasons (that is, ordinary reasons to act). Exclusionary reasons are not reasons for action, but rather reasons for *not acting* on certain *other* (first-order) reasons. First-order reasons may differ in weight or importance such that, when they conflict, the more important outweigh the less weighty. The relation between first-order and exclusionary reasons, however, is different. Exclusionary reasons do not *outweigh* first-order reasons; rather, they prevail over them by precluding an agent's acting on those reasons. Proper rules, on Schauer's account, provide both first-order reasons for following the rule and second-order, exclusionary reasons not to act on certain, otherwise relevant reasons. To say that proper rules are opaque to their background justifications, then, is to say that they provide reasons for not acting on reasons drawn directly from those background justifications. This explains why proper rules demand that one act as the rule prescribes, even when the purposes of the rule are not thereby served.

Two further features of exclusionary reasons will help us articulate Schauer's notion of proper rules and his alternative decisionmaking models. First, exclusionary reasons themselves stand in need of justification. It is always appropriate to demand justification for treating a prescriptive generalization as a proper rule, rather than a rule of thumb. Second, exclusionary

5. Because the idea of proper rules depends on the idea of "exclusionary reasons," those who reject the idea of exclusionary reasons regard this not, as Schauer does, as an alternative *kind* of rule, but as an alternative (and mistaken) *account* of rules.

6. Of course, following the rule would have to further the purposes of the rule in most cases, or the rule could not be regarded as justified (by reference to those purposes, at least).

7. *See* J. RAZ, PRACTICAL REASON AND NORMS 15-84 (1975); J. RAZ, THE AUTHORITY OF LAW 3-162 (1979) [hereinafter THE AUTHORITY OF LAW]; J. RAZ, THE MORALITY OF FREEDOM 23-69 (1986); Raz, *Facing Up: A Reply*, 62 S. CAL. L. REV. 1153, 1154-79 (1989).

reasons have *scope*: They may exclude some reasons, but not others. The scope of exclusionary reasons is determined by their grounds, that is, by the arguments for treating a rule as a proper rule (with exclusionary or preemptive force), rather than a rule of thumb. I will call the values that, on this view, justify treating rules as proper rules "rule-dictating values."[8]

The background justifications of a proper rule will, presumably, always fall within the scope of its exclusionary reasons. But what shall we say about other values or principles? The values that justify a rule may conflict in some cases with other reasonable values, and it may be important to know whether or not reasons drawn from these competing values fall within the scope of the rule's exclusionary reasons. Suppose they do not. Then, the *rule* can conflict with these competing values in some cases. In these cases, the decisionmaker will have to resolve the conflict between the rule and these competing values like all other conflicts among first-order reasons, *viz*, by determining which has greater weight in the circumstances.

Sometimes, however, the rule's opacity will extend not only to its background justification, but also to potentially conflicting considerations. This would be the case when the rules are thought to be justified because following them is thought best overall, considering both the purposes thereby served and the costs of doing so (measured in terms of defeat to competing values). That is, sometimes proper rules represent a more or less comprehensive balancing of conflicting reasons, and preclude agents from acting on their own assessment of the competing relevant first-order reasons. Putting these two points together, we can see that it is possible for some rules to be opaque both to their background purposes narrowly construed and to *certain* potentially conflicting values, while at the same time *not* being opaque to *other* potentially conflicting considerations. This, of course, is never true of rules of thumb.

Thus far, we have identified two dimensions of a proper rule's opacity: opacity to background considerations and opacity to conflicting considerations. Often, Schauer has just these two dimensions of opacity in mind when he describes the role

8. These include, among many others, considerations of predictability, certainty, reliance, and a certain kind of fairness across cases. *See* F. SCHAUER, *supra* note 3, at 230-77. I prefer "rule-dictating values" to the more common "rule of law values" that Schauer uses, because many of these values are often important outside as well as within the formal, institutional context of law.

of proper rules in rule-based decisionmaking. Schauer also identifies a third possible dimension of opacity, however. As we have seen, it is always appropriate to ask *why* we should treat a prescriptive generalization as a proper rule with a certain range of opacity. In Schauer's view, the opacity of proper rules, and the scope of that opacity, is a function of the nature, strength, and importance of rule-dictating values for the rules in question. Moreover, these rule-dictating values can sometimes justify treating the rule as opaque *to themselves*. Thus, the rule may be "self-opaque"—opaque to the rule-dictating values that justify treating it as a proper rule.

It is Schauer's view, I think, that *proper rules* (or at least, proper "rule-based decisionmaking") are typically opaque in all three dimensions: (1) opaque to their background justifications, (2) opaque to other potentially conflicting values or norms within the scope of their exclusionary reasons,[9] and (3) opaque *to the rule-dictating values* on which their status as rules proper rests. This is important, because if rules are not opaque to these rule-dictating values, then an agent could be tempted to balance rule-dictating values against the excluded reasons, and conclude in some cases that she should not comply with the rule. Such a balancing of reasons would take into account not only the background purposes and other possibly conflicting considerations, but also the relevant and applicable rule-dictating values and decide on the basis of what is now *all* things considered.

C. *Three Models of Decisionmaking*

With these distinctions and concepts in hand, we can briefly sketch Schauer's three primary legal decisionmaking models. *Simple particularism*, or "all-things-considered decisionmaking," regards practical reasoning under law to be a matter of considering and balancing all the practically relevant reasons and values and making a decision based on one's assessment of their

9. Are *proper* rules opaque to *all* values and principles that might conflict with them? That might be more than Schauer wishes to claim. It does seem true of pure rule-based decisionmaking, as Schauer describes it, that the rules that figure in practical reasoning *purport* to represent a comprehensive balancing of *all* competing reasons. It may be consistent with this approach, however, to permit judges, faced with conflicts between clear rules and weighty considerations that the rulemakers simply did not envision, to take these competing values into account and balance them against the value of following the rule. On this view, they could do this only if the rulemakers failed through inadvertence to consider the potential conflict.

relative weight. Simple particularism has no tolerance for proper rules and, according to Schauer's unsympathetic description, seems to fail to recognize the importance of rule-dictating values. Rules of law, like any rules, are treated as rules of thumb.

In contrast, *rule-based decisionmaking* takes rule-dictating values to have great importance. In consequence, it regards legal reasoning to be a matter of reasoning with proper rules opaque *in all three dimensions* just mentioned, including opacity to the very rule-dictating values on which the demand to treat the rules as proper rules rests.

Schauer also identifies a model that stands mid-way between these two ends of a spectrum. He calls it *rule-sensitive particularism.* This third model recognizes the importance in many cases of following rules, even when their background purposes are not best served thereby, but it also holds that, in some cases, competing values can outweigh these rule-dictating values. The difference between rule-based decisionmaking and rule-sensitive particularism, then, is that the latter is willing in some cases to take into account, and weigh against each other, purposes behind standing rules, conflicting considerations, *and* relevant rule-dictating values. By contrast, rule-based decisionmaking treats rules as opaque to all these competing considerations, precluding action on those reasons by anyone bound by the rules in question.

II. Practical Reasoning and Law's Domain: Defining Positivism

The conceptual machinery introduced in the previous section not only enables us to define certain models of decisionmaking, but also allows us to reformulate certain general issues of jurisprudence and thereby to shed new light on them. I will focus in this Part on one such issue, sometimes referred to as the issue of "the limits of law." I will use Schauer's machinery, clarifying and extending it in certain respects. I do this both because the results of the exercise may be of intrinsic interest and because they will help me highlight the distinctive features, and some weaknesses, of Schauer's proposed jurisprudential theory, presumptive positivism.

A. *Practical Reasoning: Domains and Structure*

Within practical philosophy, we can identify two central questions: the *domain* question and the *structure* question. The paradigm *domain* question is: What count as good or relevant reasons for action? The paradigm *structure* question is: How does one properly reason from these considerations to decisions and actions? To illustrate the difference between these two questions, consider the traditional problem of the role of self-interested considerations in moral deliberation. Assume that the thought, *my doing A will increase my prospects of happiness*, is a paradigm self-interested consideration. Suppose now that we believe, as some moral theorists do, that self-interested considerations ought not to play a role in moral deliberation. One way to give theoretical expression to this view is to deny that such self-interested considerations *are reasons* that could justify decision or action. We might say that the domain of relevant practical reasons does not include such reasons.[10] They are not valid or sound reasons. Of course, people might *take* them to be sound reasons, and if so, these invalid reasons might still figure in successful explanations of their actions.

Once a theory of good or right defines the domain of practical reasoning, our preferred theory might set beyond proper consideration some considerations that might otherwise strike us as good reasons, or are counted as good reasons by other theories. Suppose now that our theory of practical reasoning holds that rational deliberation and decisionmaking always involve balancing all relevant considerations within the domain. Such "all-things-considered" practical reasoning would still not regard *all alleged* reasons as appropriate material for practical deliberation, because it would not consider self-interested reasons of the above sort. That is, "all-things-considered" practical reasoning (simple particularism) always operates within a domain of valid or sound reasons. It presupposes that the domain has already been determined by some substantive theory of value or right. The notion of all-things-considered practical reasoning is well-defined only *relative to* some such pre-determined domain.

Return again to my example of the place of self-interested

10. Similarly, a hedonist utilitarian would regard, for example, *because God commanded it* as outside the domain of practical reasons, unless it could be linked instrumentally to promoting someone's pleasure or reducing someone's pain.

considerations in moral deliberation. We might take a quite different view of this relationship. In contrast with the above approach, we might hold that self-interested considerations *are* valid or sound reasons, but hold that in certain circumstances or contexts agents *ought not to act on them*. We could give theoretical shape to this alternative view by altering our view of the structure or *modus operandi* of practical deliberation. We might say that practical deliberation is structured in such a way that, in some cases (for example, where moral values or principles are relevant, or where certain kinds of moral concerns like rights or justice are relevant), certain ordinarily relevant and weighty reasons must not serve as grounds for decision or action. For example, we might think that, once one has promised to meet a student for lunch to discuss her term paper, the fact that discussing her paper over lunch is or is not a pleasant way to spend two hours in mid-day should not be among the reasons one considers in deciding to keep one's promise. The promise should be enough, we might say.

If we take this view, practical reasoning would not always involve "all-things-considered" balancing. Sometimes, one might be required to act against one's assessment of all the relevant reasons. This would be true if some of the reasons against so acting are, on this account of the matter, effectively excluded from the proper grounds of one's action. To the extent practical decisionmaking has this structure, it has something akin to the structure of rule-based decisionmaking.[11]

B. *Law and Practical Reasoning: The Limited-Domain Thesis*

Now consider legal reasoning. It is often thought that introducing law into a framework of practical reasoning (defining a domain and a structure of reasoning) *alters* it in some material way. There are three ways in which it might do so: (1) It might simply *add* considerations that were not available before—creating new situations, introducing new values, adding new kinds of reasons; (2) while adding some considerations, it might also *partition* the domain of practical reasoning, that is, delimit a proper legal sub-domain; and (3) law might create a new domain of *sui generis* legal reasons that, despite a superficial resem-

11. At least the boundaries between moral and practical reasoning seem to be defined by criteria that function like proper rules.

blance, is radically incommensurable with the reasons of the familiar moral or practical domain.

Many legal theorists, while disagreeing fundamentally about other jurisprudential issues, agree that the domain of legal considerations is not co-extensive with the domain of all sound practical reasons (or even with the domain of all moral considerations). Some theorists might have in mind something like (3) above, but I find the idea of such *sui generis* reasons entirely mysterious. It is far more likely that they accept some version of (2), which Schauer calls the limited-domain thesis. Expressed in the terminology introduced above, they hold that the introduction of law into the general domain of practical reasoning results in a partition of that domain, creating a special sub-domain of legally relevant considerations.

Even if the limited-domain thesis captures the practical effect of introducing law into the framework of practical reasoning, we still must explain the *relationship* between the legal sub-domain and the larger domain of practical reasoning of which it is a part. One approach would be to regard legal reasoning *to strictly exclude* acting on practical considerations falling outside the legal domain, just as above we thought that the promise strictly excluded considerations of self-interest. This approach would treat practical considerations within the legal domain as always prevailing over potentially conflicting considerations from outside the legal domain.

A somewhat weaker approach might treat the "exclusion" as entirely *relative to* certain practical questions, but not to final or conclusive practical justification of decisions or actions. On the "relative exclusion" approach, determining what one ought to do "under law" would proceed without reference to considerations outside the legal sub-domain. We might not think, however, that determining what law requires settles *conclusively* what one *morally* ought to do, or (if this is different) what one without qualification ought to do. Law itself might only settle the practical question with respect to *legal* considerations, and then only on the assumption that legal considerations have some rational weight or importance. Thus, on some versions of the limited-domain thesis, settling what one *legally* ought to do would not always settle (though it will typically be relevant to) what one *morally* ought to do.

No matter how we understand the definition of the law's

practical domain, we should note that delimiting the legal domain does not determine what the *structure* of practical reasoning *within* that domain will be. Partitioning the practical domain into legal and non-legal sub-domains does not determine by itself which of Schauer's three decision models properly captures practical reasoning within the law. It is therefore still possible, assuming a limited-domain thesis, that the simple particularist account best models practical reasoning within the legal sub-domain. Of course, in that case, the determination of when "*all* things *are* considered" for legal purposes is made *relative to* the legal domain (it would require only that all *legal* things be considered).

The limited-domain thesis allows us to give shape to the notion of responsible judicial reasoning. It also allows us to distinguish responsible judicial decisionmaking from both (1) legally *correct* judicial reasoning and decisions, and (2) *morally* responsible and morally correct reasoning and decisionmaking. The limited-domain thesis promotes judgments of responsible judicial reasoning because it defines the domain of factors judges may (or must) consider. Because, however, it says nothing about the structure of practical reasoning within that domain, it does not offer an account of correct judicial reasoning. Moreover, because the limited-domain thesis treats the legal domain as only a partition of the larger domain of practical reasoning, it does not settle what responsible (let alone correct) *moral* reasoning is, even for the judge. It does settle what the judge *qua judge* should take into account, but it does not settle what the judge *qua moral agent* should consider or how the judge *qua moral agent* should weigh the relevant considerations.[12]

Our discussion thus far allows us to frame three important jurisprudential questions: (1) Is some version of the limited-domain thesis true? (2) If so, how is the partition defined? Is this a conceptual matter, a matter of sociological fact (that can be described "from the outside"), a matter of interpretation of the practice ("from the inside"), or a matter of political-moral theory? (3) What is the practical status of this limit; how does it operate in practical reasoning?[13] This third question is interest-

12. At least this is true for those versions of the limited-domain thesis that are *relatively* exclusionary in the sense I introduced above.

13. Note that we can ask these questions about law or legal systems in general, or about a particular system or family of legal systems. That is, the scope of the questions can be global or, in varying degrees, local.

ing because it reflects the fact that the question of the place of rules, or rule-based decisionmaking, can be decomposed into two further questions: (a) To what extent do the *boundaries* of the legal domain have a proper rule-like character? and (b) to what extent is decisionmaking *within* the legal domain proper rule-governed?

Different jurisprudential theories give different answers to these questions. I will not pursue these matters any further except to note a contemporary positivist view of the place of limit-defining criteria in practical reasoning, because it provides a foil for discussion of Schauer's presumptive positivism.

Positivist legal theory holds a strong version of the limited-domain thesis. As Schauer has observed,[14] positivism partitions the legal domain from the rest of the domain of practical reasoning in a distinctively rule-like fashion. Positivists believe that, although the criteria that define membership in the domain of valid legal considerations rest on background justifying principles and values, the criteria themselves must be opaque to their background justifications. Positivists treat these criteria like proper rules. Moreover, the properties that define membership in the legal domain by these criteria of validity must be non-evaluative matters of social fact. In particular, these properties must be facts about how the rules were *made*.[15] That is, legal validity is a matter of "pedigree."[16]

This version of the limited-domain thesis is consonant with, though it does not strictly entail, the view that the rule-based model of decisionmaking dominates the practical reasoning within the domain of law. *Strong positivism*, however, represented in recent literature by Hart and Raz, unites these theses into one general jurisprudential theory.[17] Law, on this view, is exclusively a matter of pure rule-based decisionmaking from pedigreed rules.

III. Two Problems of Presumptive Positivism

Now we can introduce Schauer's unique entry into the jurisprudential sweepstakes. Presumptive positivism attempts to

14. *See* F. Schauer, *supra* note 3, at 329-33.

15. This is one way of expressing what Raz calls the "sources thesis"; *see* The Authority of Law, *supra* note 7, at 37-52.

16. *See* R. Dworkin, Taking Rights Seriously 14-45 (1977).

17. *See* The Authority of Law, *supra* note 7, at 163-232; H.L.A. Hart, Essays on Bentham 127-61, 243-68 (1982). "Strong positivism" is my term, not Schauer's.

mark out a position between strong positivism and its most vocal critics, coming from the legal realist or Dworkinian camps. Schauer seems to provide substantial scope to positivist and formalist accounts of practical reasoning within American law, while still allowing room in legal reasoning for the influence of moral and practical considerations to which legal rules are typically thought to be opaque.

Schauer's argument for presumptive positivism is subtle. I will not trace it out in detail. At the heart of it, however, is a distinction between two species of *rule-based* decisionmaking. According to *pure* rule-based decisionmaking, rules should be treated as *absolutely* opaque to considerations within the scope of their exclusionary reasons, including the rule-dictating values on which their status as proper rules rests. According to *presumptive* rule-based decisionmaking, while decisionmaking is opaque to all these considerations, it is only *presumptively* so. The proper rule-like character of the rules is regarded as having significant but not absolute weight within the legal domain. Sometimes, a rule's claim to practical attention—its claim to prevail against competing considerations—can be defeated.

Presumptive positivism is the thesis that legal reason (at least in American practice) is characterized by presumptive rule-based decisionmaking. This model, Schauer argues, *best explains* the practice of legal reasoning in American law, and, for a variety of reasons, is also normatively preferable to positivist, legal realist, or Dworkinian alternatives. In this Part, I raise two general problems with Schauer's preferred theory and his argument for it.

A. *Incompleteness Of Presumptive Positivism as a Theory of American Law*

It is not clear where to locate presumptive positivism in the picture I sketched in Part II. This uncertainty is due to Schauer's presentation of presumptive positivism as a middle way between positivism and its particularist (realist and Dworkinian) critics. The critics of positivism that Schauer considers, however, have had different targets. Some critics (for example, those with roots in legal realism) attack the limited-domain thesis, insisting that no distinction can be drawn between the set of legal norms and the set of *all* (true or valid) norms. Other critics defend a version of the limited-domain

thesis, but attack the positivist view that the limits of law are defined in a rule-like way, precluding recourse to the justifications behind legal practice. Still others attack the strong positivist view that legal reasoning is fundamentally (purely) rule-based.

For example, as I read *Law's Empire*[18] and *Taking Rights Seriously*,[19] Dworkin makes both of the latter criticisms. He insists that non-pedigreed principles play an essential role in legal reasoning, but he denies that just any (true or widely accepted) principle can properly play this role. Non-pedigreed principles properly figure in legal reasoning, on his view, only when they can be shown to have a place in the best interpretive theory of the law as a whole. Thus, Dworkin's theory provides a basis for a partition of the "full norm set" available to judges, and hence for a distinction between legal and purely moral arguments. At the same time, he insists that legal argument is dependent on its moral-political sources in two ways: (1) Judicial decision-making is not strictly rule-based, but rather is sensitive to background non-pedigreed principles "embedded in the legal practice"; and (2) while not all true principles are principles of law, the partition between legal principles and others can be drawn only by interpretive arguments that essentially rely on what look very much like principles of political morality (albeit not necessarily *true* political morality). Thus, on Dworkin's theory, the partition-defining criterion does not operate like a proper rule. Moreover, there is no reason to insist that Dworkin's "particularism" is pure or simple. On the contrary, given his recognition of the importance of "local priority," separation of powers, and other "rule of law values" in our legal system, I believe that his theory can plausibly be interpreted as committed to a version of rule-sensitive particularism.

I mention Dworkin here not to endorse his theory but to clarify Schauer's argument for presumptive positivism. Schauer's basic argument is that neither strong positivism nor its critics adequately account for the phenomena of American legal practice. Strong positivism either (1) denies that non-pedigreed principles have any proper role in legal reasoning and decision-making; or (2) denies that non-pedigreed principles are *law*, but nevertheless allows that they may be used by judges in the

18. R. DWORKIN, LAW'S EMPIRE (1986).
19. R. DWORKIN, *supra* note 16.

proper exercise of their discretion. Schauer argues that the first version flies in the face of all the cases in which non-pedigreed principles played a central role, even while regarding these cases as proper exercises of judicial decisionmaking authority.[20] The second version makes the effort to draw a sharp and rule-like distinction between the legal domain and the domain of practical reasons difficult to defend. "If decisionmakers may disregard the result generated by the legally recognized rule," he argues, "then there seems to be little point in the idea of a rule of recognition at all."[21]

On the other hand, Schauer argues that the *critics* of positivism, while correctly pointing out the role of non-pedigreed norms in proper judicial reasoning, mistakenly draw the particularist conclusion that proper judicial decisionmaking must be decision based on the judge's best assessment of all the relevant moral and practical considerations. He argues that particularism fails to explain the great importance to judges of the most *locally applicable rules*. In the view of judges, he insists, "the world of legal decisionmaking does not look like the world we would expect if legal results were entirely at the mercy of the non-limited set of social norms."[22]

Schauer's criticism of strong positivism is on target, but I think that his criticism of the critics of positivism is incomplete in two respects. First, it fails to distinguish between critics who reject the limited-domain thesis in any form and those, like Dworkin, who reject only the strong positivist version of it. As a result, *if* Schauer wishes to show that a Dworkinian version of the limited-domain thesis is mistaken, he still needs to make that argument.

Second, Schauer's own view of the limited-domain thesis is

20. Schauer discusses, for example, Riggs v. Palmer, 115 N.Y. 506, 22 N.E. 188 (1889), and Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1968).

21. F. SCHAUER, *supra* note 3, at 333. We can phrase Schauer's argument another way. The criteria that partition the sub-domain of law (the criteria of validity that enable us to distinguish *law* from that which is "*extra-legal*") either function like proper rules—opaque to background considerations and the like—or they do not. If they *do*, then from the point of view of law, officials are precluded from deciding cases on the basis of non-pedigreed considerations. From this, it follows that from the point of view of law, if judges appeal to such non-pedigreed considerations, they go beyond the bounds of responsible judicial decisionmaking. If they *do not* function like proper rules, then strong positivists must abandon their central thesis that law necessarily claims authority in the sense that its rules exclude from *legal* reasoning non-pedigreed ("extra-legal") considerations.

22. *Rules and the Rule of Law*, *supra* note 1, at 671.

not clear. In this respect, not only is his *argument for* presumptive positivism incomplete, but so too is the theory itself. He points out that non-pedigreed, principle-like considerations may at times properly outweigh the presumption in favor of the most locally applicable rules in our legal practice. He is silent, however, about whether these non-pedigreed considerations must meet some other criteria of legal relevance in order to count as appropriate bases for legal decisions. As we have seen in Part II, questions about the *boundaries* of a domain or sub-domain are distinct from questions about the *structure* of practical reasoning within that domain or sub-domain. To be complete, presumptive positivism needs some thesis about whether (and how) the domain of law is partitioned from the rest of practically relevant norms and considerations.[23]

B. *The Essential Identity of Presumptive Rule-based Decisionmaking and Rule-sensitive Particularism*

At most, the above criticisms suggest that Schauer needs to elaborate his theory and argument for it. There is, however, a more serious incompleteness in the argument that may signal a deep difficulty for the theory. Schauer argues that presumptive positivism better accounts for the role that locally applicable rules typically play in our legal practice in general than particularist theories, especially when we consider the operation of law outside of appellate courts. This is plausible, I think, relative to the simple particularism of some realist (and neo-realist) theories. It is less plausible relative to a sophisticated rule-sensitive particularism that takes into account the value of local priority, separation of powers, and other rule of law values, in our system.

Schauer's argument assumes that there is an extensional difference between the presumptive rule-based model and the

23. I am reluctant to guess what Schauer's view might be. Indirect comments in his article and book seem to point in different directions. On the one hand, Schauer is critical of strong positivists like Raz who identify law with locally applicable rules, but allow judges discretion to set aside these rules by appeal to non-legal considerations. *See* F. SCHAUER, *supra* note 3, at 333. On the other hand, he seems to think that *Henningsen*, for example, was decided by appeal to a principle that has its roots *only* in moral theory (or perhaps acceptance in the society at large). This suggests a view much closer to a natural law approach, albeit, of course, one that finds room for presumptive exclusionary force of rules. The latter example is not decisive, however, because for these purposes he does not consider approaches, like Dworkin's, that root such principles in the practice without relying on positivist pedigree.

rule-sensitive model; that is, he assumes that, in many cases, judges following the presumptive model would make different decisions than if they followed a rule-sensitive particularist model. The arguments that Schauer uses to develop his theory, however, show only that there would be a difference between a *simple* particularist judge and a judge who would give independent weight to locally applicable rules.[24] *Both* presumptive rule-based deliberation and rule-sensitive particularism, though, give the rules independent weight. His arguments do not show that the two would yield different decisions, let alone that the presumptive model better explains the decisions actually made by American courts.

This extensional equivalence of the presumptive rule-based model and rule-sensitive particularism is not merely due to the examples Schauer has chosen. Schauer's argument that presumptive positivism is a distinctive theory of American legal practice depends on his ability to open logical space between pure rule-based decisionmaking, on the one hand, and rule-sensitive particularism, on the other. He has not yet done this. I do not think it can be done.

If we hold the same theory about the moral weight of relevant rule-dictating values when evaluating both models, there just is *no logical* difference between the presumptive rule-based model and the rule-sensitive model. In fact, the presumptive model collapses into rule-sensitive particularism. Presumptions, as Schauer understands them, are simply a function of the weight of reasons. It is "a way of describing a degree of strong but overridable priority within a normative universe in which conflicting norms might produce mutually exclusive results."[25] But the weight of the reasons provided by "presumptive rules" is a direct reflection of the weight of the reasons for treating the generalization as opaque relative to themselves and other reasons. It is just such weight, though, that the rule-sensitive deliberator would be expected to take into account. So there is no essential difference between the models on this score.

Furthermore, the notion of *presumptively* proper rules, or presumptive exclusions, is not coherent. If we attempt to treat the opacity of rules as presumptive, we do not merely weaken their

24. *See Rules and the Rule of Law*, *supra* note 1, at 665-79.
25. F. SCHAUER, *supra* note 3, at 351.

status as rules, we change them into something else. The presumptive model collapses the difference of *kind* between proper rules and rules of thumb into a difference of *degree*. In Raz's model of practical reasoning, the introduction of rules and their associated exclusionary reasons into a given domain creates a profound *structural* change in that area of practical reasoning. It is not the content or weight of reasons, but their structural relationships, that are changed. By contrast, presumptions merely *add* the *weight* of certain reasons to the weight of others. This changes the content or weight of conflicting reasons, but not their structural relationships. Thus, the original mode of reasoning essentially remains. The only way that I can make sense of Schauer's talk of *presumptive rules* is in terms of adding the weight of the rule-dictating values to the reasons in favor of complying with the rule, reasons that compete on the same level with other reasons. That implies, though, that there is no logical difference between presumptive rules and deliberation sensitive to rule-dictating values that nevertheless treats the rules as rules of thumb. Upon pain of incoherence, the presumptive model collapses into rule-sensitive particularism.

To this, Schauer might reply that there is a difference, because the general form of justification for presumptions differs fundamentally from the form of justification characteristic of rule-sensitive deliberation. According to Schauer, the presumptive rule formula (PRF) is:

> Given that result *a* is indicated by rule *R*, [rule subjects] shall reach result *a*, unless or until [they] have a reason of great strength for not reaching result *a*.[26]

He contrasts this with the rule-sensitive formula (RSF):

> Given that result *a* is indicated by rule *R*, [rule subjects] shall reach result *a* unless there are reasons for not following rule *R* in this case that outweigh the sum of the reasons underlying *R* and the reasons for setting forth those underlying reasons in the form of a rule.[27]

We must admit that, as they stand, these formulae are different. Once they are clarified, however, the apparent difference between them vanishes. Note first that the PRF needs to be revised slightly. Surely, it is not enough to defeat a rule that there is a reason of *great* strength against following it, *if* the reasons

26. *Rules and the Rule of Law*, *supra* note 1, at 676.
27. *Id.* at 676 n.66.

for following the rule are even stronger. The reason must be of significant weight, we can grant, but it also must outweigh the (rule-dictating value) reasons supporting the presumptive rule.[28] Clearly, the critical matter is the weight of the reasons for not reaching the rule-dictated result relative to the weight of the reasons for following the rule—not the absolute weight of the former. Once we factor this into the PRF, it seems that the RSF merely spells out more completely what is already implicit in the PRF. Each of these formulas can probably be improved upon, but I doubt that improvements of either will make a clear logical difference, let alone the enormous and enormously significant difference that Schauer finds between them.[29]

Schauer also claims that there is an important *psychological* (or "phenomenological") difference between the presumptive rule-based model and the rule-sensitive model—a difference in the way judges following the two different models would typically look at rules.[30] Again, I fail to see the difference. The difference seems to be that under the presumptive rule model, decisionmakers need to examine the set of excluded considerations only *casually*, whereas under the rule-sensitive model, decisionmakers need to *inspect* and balance out the reasons in every case. In the former model, only "a casual look, a glimpse, a peek, a preliminary check"[31] is necessary, Schauer maintains.

This ignores the role of genuine rules of thumb in rule-sensitive particularist practical reasoning. Rule-sensitive decisionmaking need not be fanatically calculating. It requires only that decisionmakers be sensitive to those cases in which the relevant rule-dictating values are weak relative to conflicting considerations. There is nothing in the rule-sensitive approach, or its treatment of rules as rules of thumb, that requires decisionmakers to ignore the practical advantages of "a casual look, a glimpse, a peek, a preliminary check."

Sometimes, Schauer tries to mark this alleged psychological difference with the metaphor of *wholesale* exclusion, as opposed to *retail*—case-by-case—consideration.[32] Again, although this

28. *See* F. SCHAUER, *supra* note 3, at 351-52; *The Jurisprudence of Reasons*, *supra* note 1, at 862 n.43.

29. *See Rules and the Rule of Law*, *supra* note 1, at 676 n.66.

30. *See* F. SCHAUER, *supra* note 3, at 156-57.

31. *Rules and the Rule of Law*, *supra* note 1, at 677.

32. *See id.* at 660-61, 674 n.62.

contrast may mark a difference if we are comparing the pure rule-based and the simple particularist models, and even (stretching the description some) the pure rule-based with the rule-sensitive model. It does not, however, mark a distinction between presumptive rule-based and rule-sensitive models.

I conclude that, so far as I can see, there is no reliably predictable extensional difference between the presumptive rule-based and the rule-sensitive models of decisionmaking, because there are no deeper psychological or logical differences. Thus, if we accept Schauer's criticisms of strong positivism and the pure rule-based model, as I am inclined to do, we are left with a view of legal reasoning that will turn out to look a great deal like some version of rule-sensitive particularism.

IV. Institutionalizing Presumptive Positivism

A. *Schauer's Proposal*

Toward the end of his article, Schauer shifts his theoretical perspective. Having focused exclusively on the nature of different forms of legal decisionmaking and their relative merits as models of American legal practice—all viewed from the point of view of *the decisionmaker*—Schauer invites us to consider them again, but this time from the point of view of the *designer* of law-applying and law-enforcing institutions. This is primarily a normative and pragmatic point of view, dominated by the question: How should we set up our institutions to insure the best kind of decisionmaking according to law? This presupposes a view about which of the decisionmaking models is preferred, and asks how we might effectively install it in our practice.

Schauer proposes to institutionalize rule-based decisionmaking by making it known that we will punish rule-violations severely, but only if they yield *wrong* decisions or outcomes when judged, all things considered.[33] The aim is, through the use of threats of punishment, to encourage rule-following even when the decisionmaker is inclined to deviate from the rule in the belief that doing so is justified, all things considered. No sanctions would be applied to decisions that in fact turn out to be *right* when judged, all things considered. Only those that turn

33. *See id.* at 691-94. Schauer does not make clear whether he means "all legal things considered" or "*all* things considered." That is, it is not clear whether the outcome is to be judged from within the sub-domain of law or from the perspective of practical (moral) reasoning in general.

out to be *wrong* would be punished. Desire to avoid sanctions, it is supposed, would encourage decisionmakers in *close* cases to follow the rule even if, on their best judgment, doing so cannot be justified, all things considered. In this way, deviations from the rules are likely to be deterred, except where it is clear to the judge that deviation is justified, all things considered.

This proposal aims to construct law-applying institutions that *mimic* rule-based decisionmaking in certain respects. The aim is ambiguous, however, in one respect. Schauer's aim might be to design a decisionmaking environment that approximates the *results* of the presumptive model. Alternatively, his aim might be to encourage decisionmakers to deliberate as the presumptive model dictates. The former is concerned only with decisions or outcomes: The environment is designed to produce results that mimic what ideal officials would decide *were* they to adopt the presumptive model, but it does not expect officials to adopt the model. The latter, by contrast, attempts to have officials *adopt* and successfully *execute* the presumptive model. Schauer's argument, especially his reliance on the "asymmetry of authority,"[34] suggests that his concern is only to mimic results. Yet, in nearly the next breath, he says that "the task facing the rule imposer is to get the rule-applier or rule-follower to relinquish her best judgment."[35] *This* suggests that the aim is to transform the process. I will not try to resolve this ambiguity, because I think both versions face problems. I discuss them one-by-one.

B. *Mimicking Results*

I suspect that Schauer would be happy if we viewed his institutional design proposals as directed at mimicking *results* of presumptive rule-based decisionmaking. Under this version, he would not have to maintain the psychological feasibility of this form of decisionmaking, so long as it is possible to set up incentives to achieve the results that following such a model *would* produce, were it feasible. Sanctions would be intended to work in the normal deterrent way, providing a certain kind of reason for decision—possibly not decisive, but strong enough to put a surcharge on rule-violations that would force officials to think twice before deciding against an established rule. Offi-

34. *See id.* at 692-93.
35. *Id.* at 693.

cial decisionmaking would probably remain "particularist" of some sort.

This institutional design proposal, however, faces two problems. First, it is not clear how we can test whether the design is working. The aim, presumably, is to mimic the results of the presumptive model rather than one of the other models.[36] But if the presumptive model is extensionally equivalent to rule-sensitive particularism, we will not be able to distinguish an institutional device aimed at mimicking the former from a device aimed at mimicking the latter. Of course, we might notice that while sanctions make officials more sensitive to rules, they are not sensitive *in the way* rule-sensitive particularism requires. This, however, cannot help us discriminate between the two devices, because sanctions do not make officials sensitive to the rules *in the way* the presumptive model requires, *either*.

Second, the proposal is open to a moral objection. The objection is not that it encourages individuals not to exercise judgment, but rather that it *corrupts* that judgment. Usually, we are concerned not only about the results of an official decision-procedure, but also about the process by which decisions are made. From this perspective, sanctions introduce extraneous and potentially distorting considerations into the decision process. We would not be happy with a decisionmaking process in which coin tosses or divination played an integral role, *even if* we could be assured on statistical grounds that we were getting at least as many correct decisions with these devices as by asking fallible decisionmakers to assess the merits of the cases that come before them. We should be no more sanguine about Schauer's institutionalization proposal. It introduces as integral components of the deliberation process considerations that are, strictly speaking, irrelevant. If the device produces the right decisions, it does not do so *in the right way*.

The problem is that sanctions are appropriate when we are

36. This is not entirely clear from the text of *Rules and the Rule of Law*. Schauer suggests that the aim of the proposal is to discourage free decisionmaking. *See id.* at 692. But he could have in mind either simple particularism, or rule-sensitive particularism, because both could be described as forms of "free decisionmaking." I suspect that he wishes to discourage both, and to encourage rule-based decisionmaking. That still leaves unclear, however, which of the two forms of rule-based decisionmaking—pure or presumptive—that he wishes to encourage or mimic. From the substance of Schauer's proposal and argument for it, I believe that we can reasonably infer that it is the presumptive model that he has in mind, although sometimes his language suggests otherwise.

concerned only with "external behavior," but they become far more troublesome—from an institutional design point of view—when our concern is with the character of the process of deliberation. It is not surprising, then, that in our current practice, we have only the most vestigial version of the sanction strategy. We talk about overturning a decision at the appellate level as a sanction levelled against the court below. The "sanction," however, is directly tied to the merits of the issues in question. Typically, higher courts overturn decisions on the ground that the arguments of the lower court on the issues in question are faulty. The primary and direct result is that the decision thereby supported is vacated. Reputation is, of course, tied to this, but this is only an indirect consequence. It is a consequence *because* we believe that officials and others first care about the decisions and the process by which they are made.

C. *Mimicking the Process*

Consider now the process-transforming version of Schauer's institutionalization proposal. Threatening sanctions for rule violations again creates problems. Sanctions merely *add* new reasons to the officials' domain of considerations that must be weighed and balanced. Introducing further reasons into their deliberations does not alter the *structure* of that deliberation in the way that the rule-based model prescribes. How, we might ask, could this transform the decisionmaking process?

In Schauer's behalf, we can reply to this objection. Suppose we conceived the function of the sanctions, not as deterrence devices, but as reinforcers carrying an "expressive" message. Sanctions, then, might be part of a package of educational devices, signalling the seriousness with which the rule-imposer takes the rules. Their primary function would be to communicate condemnation and through this to educate the sensibilities of decisionmakers. Secondarily, they could deter backsliding and thereby underwrite integrity in the decisionmaking process.

There is a certain plausibility in this argument, but it does not resolve two remaining worries about Schauer's proposal. First, if the institution designer's task is to get officials to adopt and successfully pursue a presumptive rule-based decision program, then it must be possible to characterize such a program in psychological terms such that officials can understand what

is expected of them, and such that we can test whether the proposed device has achieved this aim. Again, questions about the psychological feasibility of the presumptive model return. If there is no stable middle ground between pure rule-based decisionmaking and rule-sensitive particularism, then Schauer gives his institution designer an infeasible task. The device will either fall short, and encourage rule-sensitive judgments, or overshoot its target, and encourage officials to adopt and follow the pure rule-based program (or, worse yet, encourage them to adopt the latter and then condone their backsliding).

Second, if we grant Schauer the psychological feasibility of presumptive rule-based decisionmaking, we put in jeopardy his "asymmetry-of-authority thesis" and with it a major premise in his defense of the desirability of presumptive positivism. Schauer addresses the objection, made against deliberation governed by proper rules, that for a rational agent to treat rules as proper rules is either irrational or morally objectionable because it requires that the agent abandon her autonomy of judgment. He replies that we can grant that "abandoning one's judgment," as the pure rule-based model requires, is either irrational or immoral (or both), and yet insist on the rationality and even the morality of setting up an institution that brings about a similar result. This is the "asymmetry-of-authority" thesis.[37]

If the aim of "bring[ing] about a similar result," however, is to get officials to adopt and deliberate in the manner described by the rule-based model, then, at the very least, it encourages (on the given assumptions) irrationality and immorality. That alone is enough to throw the "asymmetry assumption" into doubt. For, *if* it is immoral or irrational for one to adopt the model, then it must be at least morally problematic for the institution designer to succeed in getting one to do so. It may even be morally problematic for the designer to encourage it (at least if there is reasonable likelihood of success). It sounds like the intentional corrupting of a moral agent, and, while these are not the same offenses against morality or rationality as the original objection contemplates, they are cognate offenses. Granted, on some moral theories, this might not be conclusive of the immorality of the designer's activities, but at

37. *See id.*

the very least, a significant moral cost has to be put on the designer's bill.

This may not be a deep worry for Schauer, because he does not believe that following the rule-based model (at least its presumptive version) is morally objectionable. Indeed, he argues that some rule of law (that is, rule-dictating) values directly support what we called "self-opacity." They are reasons not only for exclusion of a given rule's aims, but also for exclusion of the very value of pursuing those aims by *means of this rule*.[38] Yet, he should worry a bit at least. We might wonder whether threatening sanctions is the best device to accomplish the essentially educational job that Schauer assigns to them. Even if we accept that sanctions might have the desired psychological effects in some cases, the costs may be too high. As I noted earlier, fear of sanctions is strictly irrelevant to the merits of cases to be decided by officials. Sanctions may not be *intended* to function *as reasons*, but can we be assured that they will not typically do so? If not, does that not risk anew significant *corruption* of the decisionmaking process?

Thus, Schauer's proposal for the institutionalization of presumptive rule-based decisionmaking is open to important worries. These worries, in conjunction with the problems I noted in Part III, lead me to conclude that something like rule-sensitive particularism may provide a better account of legal reasoning. If rule-dictating values are given considerable weight, and greater weight as we move away from appellate courts, then such a model of decisionmaking under law could capture the phenomena Schauer has documented for us in his article and book. I am not yet convinced that presumptive positivism offers a coherent and viable alternative.

38. *See* F. SCHAUER, *supra* note 3, at 168-70.