

PRESUMPTIVE POSITIVISM AND TRIVIAL CASES

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INTRODUCTION

Many aspects of Professor Frederick Schauer's approach to rules and their place in the law seem quite right, or at least quite promising. Like a typical commentator, however, I shall not accentuate the positive; instead, I shall concentrate on a few aspects of Schauer's work that can be questioned or that need further exploration. At least, I can begin by setting out what I see as our points of sympathy, and mention preliminarily my points of questioning in that context.

My first point of sympathy is with the basic orientation to non-ideal theory. This orientation leads Schauer to see rules neither as conceptually essential to law nor as devices to ensure certainty, but rather as devices to allocate power in such a way as to minimize the expected errors from wrong decisions. In other words, according to Schauer, the explanation/justification for rule-based decisionmaking, where it occurs, is that the relevant system-structuring authority evaluates the risk of errors resulting from relatively more rule-like decisions to be less than the risk of errors from relatively less rule-like decisions.¹ I think the risk-of-error approach might be deepened, and might well lead us to think that Schauer's proposed "presumptive positivism" is oversimplified.

Second, I agree with Schauer that ruleness should be understood on a continuum. Thus, absolute ruleness is merely a heuristic device at the far end of the theoretical continuum. It is not found in real-life uses of rules. This means that the traditional conception of rules, in which nothing without this absolute quality deserves the name of rule, must be rejected, or at least qualified to name a theoretical endpoint rather than an actual property. Hence, it is incorrect to postulate "logical" distinctions between rules and standards or between rules and principles, and Schauer rightly rejects these distinctions. I am

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1. See Schauer, *Rules and the Rule of Law*, 14 HARV. J.L. & PUB. POL'Y 645, 679-94 (1991).

left wondering, however, whether some of Schauer's reasoning about "presumptive positivism" covertly depends upon the distinctions that he has rejected.

Third, I sympathize with Schauer's general idea that rules must be socially understood. Schauer understands rules as socially based in at least the sense that some shared operative practice must ultimately underlie hierarchies of rules to make rules understood as applicable in particular practical circumstances. The ultimate social basis of rules can readily be understood, as it is by Schauer, in terms of Hart's concept of a rule of recognition.² What remains to be asked is to what extent the sociological understanding that underlies the applicability of rules also directly operates to support or undermine the operation of the rules in practice.

Finally, I sympathize with Schauer's blurring of the categories of explanation and justification as well as with his deep concern with what he calls phenomenology—the operation of rules in practice and the self-understandings of decisionmakers (rulemakers and rule-appliers) about their operation in practice. These are earmarks of pragmatism. I believe that Schauer is a pragmatic legal theorist, and I only hope he is not a pragmatist *malgré lui*.

Schauer proposes "presumptive positivism" to explain/justify the practical observation that legal decisionmakers, consistent with their own role conception, sometimes follow rules (and/or believe themselves to be following rules) even though the result is "wrong," and sometimes set aside rules (and/or believe themselves to be setting aside rules) to arrive at the "right" result. The question immediately arises whether "presumptive positivism" is rightly called positivism, because all "presumptive positivism" retains of the traditional positivist commitments is an attenuated version of the distinction between law and non-law.³ I leave this

2. See H.L.A. HART, *THE CONCEPT OF LAW* 93 (1961). Hart hesitated to refer to the rule of recognition as a rule because, unlike other rules, its existence was a matter of sociological fact, and it would no longer exist if legal actors ceased to follow it and ceased to have a shared public understanding of it. Although I do not pursue the point in this paper, Schauer should be clear that he does not conceive this ultimate basis of rule applicability as being itself a rule. Thus, he may wish to drop Hart's terminology.

3. As I note below, if we accept "presumptive positivism," we will not be entitled to say with certainty that judges are following rules in cases where the judges' own norms agree with the rules, and we will not say that cases that most flout ruleness are the clearest examples of improper judicial behavior. These features of "presumptive posi-

question for positivists to debate among themselves in order to focus on other aspects of “presumptive positivism” as Schauer has presented it: the role of social norms, the relationship between “presumptive positivism’s” applicability and the apparent triviality of the case, the idea that judges can “peek” at the non-law domain without fully engaging it, and Schauer’s optimism about the stability and operability of rules.

I.

Schauer proposes that “positivistically-recognized rules exercise presumptive but not conclusive force.”⁴ According to this hypothesis, we would expect to see

many cases in which the recognized rule generated a result consistent with that generated by the full norm set; some cases in which the recognized rule indicated a result that was set aside in the service of some conflicting social norm; and some cases in which the recognized rule indicated a result that conflicted with a larger social norm, but not by so much or so egregiously that it was worth setting aside the result indicated by the [recognized] norm.⁵

Thus, what will tend to verify this hypothesis is the existence of (that is, our identification of) “the set of slightly but not extremely wrong answers (from the perspective of the set of social norms).”⁶

Let me try to unpack this hypothesis. First, there are some difficulties associated with Schauer’s use of “social norms.” Schauer probably does not mean that when a judge is deciding whether to follow a rule, she understands herself to be consulting a set of “social norms” different from her own set of norms.⁷ If Schauer does not mean that judges consult “social norms” directly when deciding whether to follow rules, the hypothesis can be restated to refer to conflicts between rules and the judge’s own norms.

Thus restated, the hypothesis supposes that there will be

ivism” seem at odds with traditional positivism, as (arguably) does Schauer’s attenuation of the fact-value distinction by blurring the categories of explanation and justification.

4. Schauer, *supra* note 1, at 674.

5. *Id.* at 676 (emphasis in original).

6. *Id.*

7. If Schauer does mean this, there is certainly a problem in determining how a judge is to identify and apply something that is recognizably a social norm that is not her own norm.

cases in which the judge's own views agree with the result apparently directed by a rule, and these cases will be decided in accordance with the rule. These are Schauer's "many cases in which the recognized rule generate[s] a result consistent with that generated by the full norm set"; I shall call them Type I cases. In Type I cases, there is no way for us to observe in practice whether the rule or the judge's views are the reason for the decision. Consequently, even if the legal world appears to be quite rule-governed, we cannot assume that rules operate in the sense that Schauer defines so long as the judges' views correspond substantially with the norms behind the rules.

Schauer's hypothesis, as restated, also supposes that there will be cases in which the judge disagrees with the result apparently directed by a rule, and that some of these cases will be decided in accordance with the rule anyway, while some will be decided to get the result that the judge thinks is right, apparently in derogation of the rule. Those cases in which the judge decides according to the rule solely because of its constraint, against her understanding of what is right, are Schauer's "set of slightly but not extremely wrong answers"; I shall call them Type II cases. Cases in which the judge decides against the rule and according to what she thinks is right are Schauer's "cases in which the recognized rule indicated a result that was set aside in the service of some conflicting social norm"; I shall call them Type III cases.

How do we observe cases in which the judge apparently went against a rule, that is, Type III cases? Perhaps Schauer would suggest that we have only to consult our own intuitions of rule-ness, not our social norms. If so, I am less sure than Schauer that our intuitions of rule-ness are disconnected from our general norm system.

At any rate, to observe cases in which the judge disagreed with the result of following a rule and followed it anyway, that is, Type II cases, we need some proxy for understanding when this has happened. Schauer does not limit this subset to cases in which the judge has *stated*, "I don't like the result of this rule, but feel constrained to follow it." Thus, Schauer substitutes "social norms" for the norms of the judge. That is, if the observer thinks social norms would have disagreed with the rule-like outcome, the observer can assume that the judge disagreed with it.

In Schauer's analysis as I have restated it, "social norms" are a proxy for the judge's own views. Using this proxy assumes that judges share the same social norms that prevail in society at large (or perhaps Schauer would say in the legal system as a whole). Note that once this is understood, as I pointed out above, we cannot say that judges are following rules in the great majority of cases, in which their own norms agree with the rules. Parenthetically, it is hard to understand a theory with this implication as "positivist"; rather, it seems to turn positivism on its head.

But maybe we should not assume that judges' norms largely correspond to "social norms." Are there circumstances where this might not be the case? A "liberal" judge (perhaps appointed in the '60s) might decide a case in accordance with "conservative" rules only because she felt constrained by the rules, whereas, on the basis of the prevailing "conservative" social norms, we observers would believe that she had decided according to her own norms as well as the rules. Thus, we would mistake Type II for Type I. We might also mistake Type I for Type III if the "liberal" judge felt herself to be following a "liberal" rule, but "conservative" social norms cause the observers to find that the "liberal" result was not mandated by the rule after all. It is because I imagine that these kinds of observational differences of opinion will occur that I imagine our intuitions of ruleness are not so separate from our accepted norms as Schauer seems to believe.

The crucial question for Schauer, however, is whether Type I and Type III cases are likely to be systematically mistaken for Type II cases. If so, the hypothesis of "presumptive positivism" becomes shaky. If we cannot be sure we are observing Type II cases, then we cannot be sure we are observing any cases of constraint. We may be observing the pure legal realist world in which every decision accords with the judge's own norms.

We are perhaps unlikely to mistake Type III for Type II,⁸ but I think Type I can be easily mistaken for Type II. We can mistake Type I for Type II if, for example, the rules and the judges' views are both "liberal," but our "social norms," which

8. To mistake Type III for Type II, we would have to think the judge followed a rule even though she disagreed with the result, while the judge felt herself to be deciding in accordance with her own views and against the rule. To make this mistake, we must be incorrect both about the rule-likeness of the decision and about the judge's views.

were formerly "liberal" (we may suppose that's how the rules got made and the judges got appointed), are now "conservative." In that case we would perceive decisions against our social norms but constrained by rules (Type II), while the judges themselves would perceive decisions in accordance with rules that agree with their own norms (Type I). The phenomenological question here, on which the viability of "presumptive positivism" depends, is whether the norms expressed by the rules and the norms of the judiciary might lag behind the otherwise prevailing "social norms." The legal system might well be conservative in this sense.

If, by referring to "social norms," Schauer only means to invoke the general norms internal to the legal system, including the norms espoused by judges, then his hypothesis would not be threatened by the time-lag problem I have just suggested. If that is what he means by "social norms," however, Schauer can no longer suggest that they inhabit a non-law domain. Preservation of this non-law domain is a central commitment of his theory, and the reason why he believes his theory to be a species of positivism, so I imagine he would want to reject this rather Dworkinesque suggestion.

II.

A second issue raised by "presumptive positivism" relates to the basic understanding that non-ideal evaluation of risk of error underlies ruleness in general, and "presumptive positivism" in particular. What does Schauer mean by his description of Type II cases as "the set of slightly but not extremely wrong answers"?⁹ A traditional kind of response suggests itself. Perhaps an answer is slightly but not extremely wrong if it goes against a rule in some sense, but does not directly contradict the rule. If Schauer is consistent in supposing that ruleness is a continuum and that no real-life rules are as absolute as the theoretical endpoint of the continuum, a decision will be more clearly in accordance with or against a rule, the closer the rule is to the theoretical endpoint of the continuum. Thus, some decisions that we can see as in derogation of a rule nevertheless will not appear extremely wrong, if the rule is somewhere in the middle of the continuum. In other words, we could con-

9. Schauer, *supra* note 1, at 676.

clude that, in a case involving a rule in the middle of the continuum, it was wrong, but not extremely wrong, for the judge to have mistaken where this particular rule fell on the ruleness continuum (that is, for her to have perceived the rule as less rule-like than we do).

This reading of Schauer's definition of "not extremely wrong" allies him to some extent with traditional positivism. In this view, "extreme wrongness" corresponds with direct flouting of a clear rule. Nevertheless, I do not think this is the right way to read Schauer. First, I must report that in much of his discussion of "presumptive positivism" I had the sense that his commitment to the notion of a continuum has not been fully applied; the discussion reverts to the notion of "two different forms of decisionmaking"¹⁰ more strongly than mere heuristic simplification. Moreover, this positivist reading does not take directly into account Schauer's qualifier: "not extremely wrong answers (*from the perspective of the set of social norms*)."¹¹

A less traditional reading suggests itself. Perhaps Schauer means that an answer will be slightly but not extremely wrong if it is morally wrong, but not morally outrageous. Perhaps an answer will be not extremely wrong if its consequences seem small, that is, if it wrongly (even outrageously) deprives people of only a small amount of liberty or economic security.

If this is what Schauer means, and I think it is, then "presumptive positivism" is radically different from traditional positivism. "Presumptive positivism" applies not in what are traditionally called "easy" cases, that is, cases in which a rule appears plainly applicable and the result appears dictated by the rule. Rather, "presumptive positivism" applies in trivial cases. By a trivial case, I mean one that appears to the judge as if nothing of much importance is at stake. The case could be morally trivial because nothing of much moral importance to the judge is at stake. For example, the judge may not care which form of comparative negligence is adopted. The case could be consequentially trivial if, whichever way it comes out, no one will lose a lot of money, be incarcerated for a long time,

10. *Id.* at 648.

11. *Id.* at 676 (emphasis added). Of course, Schauer could mean that one of our "social norms" is that judges should follow rules. Judges who are not extreme legal realists might have their perceptions of wrongness affected by how strongly they believe that a result is mandated by a rule. This implies that positivism works to the extent judges believe in it. (I owe this point to Professor Scott Altman.)

or have her life strongly affected in some other way.¹²

In other words, Schauer has thoroughly rejected the traditional positivist notion of "easy cases" as being those that fall within the core of a rule, and has substituted a conception of trivial cases in some moral or other consequentialist sense. For Schauer, a rule could appear to dictate a result because the rule lay very near the rule-like end of the continuum. Yet such a case could become a Type III case because for the judge and, as Schauer assumes, likewise from the perspective of social norms, the rule-like result was "extremely wrong."

Schauer admits that "easy cases" in the traditional sense can, at least some of the time, be made the subject of the work of legal argument so as to arrive at a non-rule-like result. Such a result, in retrospect, after the work of legal argument is done, can appear to be the right legal answer. It also appears, although I am not quite sure, that Schauer would agree with Professor Duncan Kennedy that one cannot tell in advance, before doing the work, when an apparently rule-like result will yield to the work of legal argument.¹³ (If he does not agree with Kennedy that a non-rule-like result will seem plausible in retrospect only some of the time, then he agrees with the realists that the non-rule-like result can be made to appear plausible all of the time.)

One can see why Schauer rests his theory not on predictability of outcome, as does the traditional ideal of the Rule of Law, but on power allocation. Predictability cannot be a theoretical cornerstone if Schauer is committed either to the realist position on when Type III can be made to look plausible (always), or to Kennedy's position (only sometimes, but we can't tell in advance when). In other words, if I am right that Schauer at least agrees with Kennedy about the unpredictability of when what looks like an "easy case" in the traditional sense will come out differently after working on it, then we cannot know in advance when rules will operate, although in practice it seems as

12. This would be true only so long as the judge did not find the particular result to be morally outrageous enough to make it "extremely wrong," even though only small consequences were at stake.

13. See Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518, 544-45 (1986) (describing how the judge's preliminary view of a case may seem to dictate a clear answer, yet how sometimes legal work can change this preliminary view).

if they are operating. We can only know in retrospect that a rule has been applied.

It remains to be seen whether this picture can correspond normatively or phenomenologically with the notion of the Rule of Law that "we" accept. Schauer explains and defends rules as allocating power away from judges and other decisionmakers when the governing authority that structures the decisionmaking environment weighs the risk of error from rules to be less than the risk of error from non-rule-like decisions. Putting Schauer's position on traditional "easy cases"¹⁴ together with his position on trivial cases in the sense I have described,¹⁵ we arrive at the result that the chosen power allocation can be trusted to work not in all cases that appear to be within the core of a rule, but rather in only those cases that appear trivial to the decisionmakers. I shall call this the hypothesis of "presumptive positivism in trivial cases."

One further refinement is needed. The degree of perceived "wrongness" resulting from rule-following or the degree of perceived triviality of a case will vary on a continuum. "Presumptive positivism" will be strongest when the case is most trivial and weakest when the case is most significant, morally or otherwise. Thus, when rules allocate power away from judges because of the governing authority's evaluation of the risk of error, the power allocation will work best when the case is perceived to be extremely trivial, less well when the case is perceived to be in the middle of the triviality continuum, and least well when the case is viewed as morally or otherwise salient.

If "presumptive positivism in trivial cases" is a good hypothesis, we might observe in practice that it is impossible to make stable rules that can be followed about things that are very important to judges, morally or otherwise, such as the death penalty or the taking of private property. By contrast, we might observe that judges always follow rules, even if they do not agree with them, when the subject is something like the speed limit. It appears phenomenologically plausible that what we can observe in our legal system is indeed "presumptive positivism in trivial cases." This is not trivial for the functioning of the system as a whole, because it is important for the system to

14. "Easy cases" can become Type III cases if the judge dislikes the result.

15. Trivial cases are likely to be Type II cases if the judge dislikes the result.

have rules of the road of various kinds, and these are the kinds of cases that appear trivial when taken individually.

Although "presumptive positivism in trivial cases" thus has a nontrivial result, it poses a problem for Schauer's underlying theory about power allocation, risk of error, and the Rule of Law. Is not the risk of error more important in cases that are *not* trivial? Those who institute systems of rules to implement the social norms *they* accept and have authority to impose presumably care about those norms most in nontrivial cases. If power allocation by rules only works well in trivial cases, then it does not work well to minimize risk of error from the point of view of the authority creating the decisionmaking environment. It may work to some extent in the middle of the triviality continuum, but its force decreases as importance increases. Rules about things that are morally important to decisionmakers, such as the death penalty, will often be remade in particular cases. Perhaps unfortunately for Schauer's thesis about power allocation, the concern about risk of error might also motivate judges and other particular decisionmakers. Judges might work harder in derogation of apparently rule-like results when, according to their own lights, those apparent results threaten nontrivial error.

III.

Schauer is aware, of course, that in order for a judge to determine when it would be "slightly but not extremely wrong,"¹⁶ from the perspective of the full domain of norms, to follow a rule, the judge must have some way of making a judgment in advance, without examining the full domain, about how wrong following the rule would be. Schauer posits the mechanism of "peeking."¹⁷ If "peeking" is not possible, every case will be tested by the full domain of norms, even if it is done tacitly, and the notion of "presumptive positivism" collapses.

What does Schauer mean by "peeking"? He says:

I tentatively offer the idea of a casual look, a glimpse, a peek, a preliminary check, pursuant to which a decisionmaker follows the recognized rule unless some other factor overtly intrudes on her decisionmaking process. . . . If I am correct, if presumptions do serve as psychological simplifiers . . . , then

16. Schauer, *supra* note 1, at 676.

17. *See id.* at 677.

presumptive positivism does not fail, even though it requires the decisionmaker to examine in some way the larger range of potentially overriding factors.¹⁸

Consider the notion of a psychological simplifier. Schauer argues that the judge would try to save herself the work of moral evaluation by using rules, so long as she can satisfy herself that the result will not be too awful. For a judge in this psychological mode of trying to save work, Schauer proposes that the result can only appear too awful if something about the situation sticks out like a sore thumb and cries out for further investigation. A judge is psychologically predisposed to assume a standard set of circumstances—stereotypical circumstances—unless something about the case leaps out to warn her that things are otherwise.

This argument parallels a characteristic pragmatic view of reasoning.¹⁹ In this pragmatic view, reasoners have paradigmatic views or background assumptions about certain situations, and they do not examine these background assumptions unless something forces them to. Schauer suggests that rules are like our unquestioned background assumptions; we follow them unquestioningly until something obtrudes itself upon us that makes us examine them. According to this argument, however, perhaps “peeking” is the wrong metaphor for Schauer. “Peeking” implies that something, however little, is actively being done by the judge, whereas Schauer supposes that the judge is passive, and the sore thumb simply obtrudes itself and forces her to do some moral work.

Now put this picture of “peeking” together with the notion of the triviality continuum. In any case that the judge considers nontrivial, nothing more than juxtaposing the apparent result of the rule with the judge’s own norms would be required to trigger further scrutiny. For instance, the very fact that the case involves the death penalty may preclude the psychological shortcut for the judge. On the other hand, judges will not look deeply into cases that are apparently trivial, such as cases involving only a small fine, unless a sore thumb catches the judge’s attention and makes her think that something “extremely wrong” may lurk beneath the surface. In this pragmatic reconstruction of the “peeking” theory, judges stick to rules

18. *Id.*

19. See, e.g., G. HARMAN, *CHANGE IN VIEW: PRINCIPLES OF REASONING* (1986).

the way reasoners stick to preconceptions or stereotypes—until they are dislodged by circumstances that overcome mental inertia and force the judge or the reasoner to do some work. For the judge, the work will involve rearranging the legal “field.”²⁰ For the reasoner, the work will involve rearranging the background beliefs.

IV.

The various positions of legal theory on whether or not rules operate to constrain decisionmakers can be arrayed on a continuum of discourse-optimism. Discourse-optimism is the faith that words, rules, can constrain someone from acting in the way that she would otherwise prefer and otherwise has power to act. The extreme discourse-optimists are the formalists, who assume that rules can always be efficacious in this sense, and the extreme discourse-pessimists are the legal realists, who assume that rules can never be efficacious in this sense. Schauer tries to stake out a position somewhere in the middle of this continuum. As a pragmatist, I think this approach, in principle, must be correct. Schauer tries to split the difference between the materialist-idealist dichotomy, or the theory-practice dichotomy. We should think that words have some power to affect the way things go in the world, but we should recognize that other things have power, too. Words will not always win and will not always lose. The interesting problems, which we cannot get to from one of the positions at either end of the continuum, are in saying when and how words can win.

Although Schauer is not an extreme discourse-optimist, he is more of a discourse-optimist than most. He writes with apparent faith that rules can work straightforwardly a lot of the time. Because Schauer thinks that both extreme legal realism and Herculean coherence should be rejected because they are false phenomenologically,²¹ the only position that Schauer thinks will threaten “presumptive positivism” is the “convergence hypothesis.”²²

According to the “convergence hypothesis,” there is a prevailing outlook among decisionmakers about the appropriate

20. See Kennedy, *supra* note 13, at 538.

21. By this Schauer means that extreme legal realism and Herculean coherence do not square with our observations of the legal system.

22. See Schauer, *supra* note 1, at 665 n.38.

degree of ruleness, a specific preferred point (call it point x) on the continuum of ruleness. When the governing authority tries to structure a decisionmaking environment to be more rule-like than point x , judges will undermine the rules until the degree of ruleness reaches point x ; when the governing authority tries to structure a decisionmaking environment to be less rule-like than point x , judges will create subrules within the general directives given them until the degree of ruleness reaches point x . As Schauer concedes, if the "convergence hypothesis" is true, it would undermine his theory, for "the tendencies toward convergence will substantially undercut the ability of a rulemaker to use varying degrees of ruleness as variable constraint."²³ Convergence will prevent authorities from using rules for risk-of-error purposes, that is, from using rules "only when there is a reason to believe that the particular decisions of a particular class of decisionmakers ought to be constrained."²⁴

Another threatening possibility that I think Schauer should take into account is what I can call the "divergence hypothesis." The "divergence hypothesis" is favored by those who are less optimistic about discourse than Schauer is—those who find that discourse is always internally conflicted and unstable. According to the "divergence hypothesis," when rules are imposed, decisionmakers will gradually become aware of and dissatisfied with the inadequacies and errors caused by rules. Decisionmakers will find exceptions and will begin to refer directly to the underlying norms that supposedly generate the rules. In other words, when rules are imposed, they will gradually degenerate into what some critical writers call standards. On the other hand, when discretionary standards are imposed, decisionmakers will gradually become aware of and dissatisfied with the seemingly open-ended arbitrariness caused by such standards. Decisionmakers will find areas of decision suitable for carving out subrules and eventually may find that the subrules exclusively define the standard. In other words, when standards are imposed, they will gradually degenerate into rules.²⁵

According to this view, there is no place where we can feel at

23. *Id.*

24. *Id.*

25. For a nice exposition of this view, see Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985). I believe that the "rules versus standards" terminology is a less useful way to describe the domain of various kinds of directives than is Schauer's ruleness

home on the continuum of ruleness, no stopping place that will be stable. The various parts of the system will vacillate from relative ruleness to relative non-ruleness, but not in any way that is rational with respect to goals of the system. Nor will this vacillation be rational with respect to underlying grounds concerning the virtues of relative ruleness in context, such as evaluation of the risk of error. There will be no convergence, no point x on the ruleness continuum that decisionmakers find satisfactory.

This skepticism is not equivalent to the outright discourse-pessimism of classical legal realism. In the "divergence hypothesis," we *can* do things with words, sometimes; but our dissatisfaction with the shortcomings of all our ways of dealing with words causes any given decisionmaking environment to be inherently unstable. I think this hypothesis is phenomenologically plausible. I think we can observe many instances in which non-rule-like environments have become rule-like, such as judges creating lists of rules to determine what counts as "due process,"²⁶ and many instances in which rules have become less rule-like, such as judges measuring antitrust violations under the "rule of reason."²⁷ Takings doctrine is a suggestive example, because it can be read as evolving from rules involving physical invasion and exclusion, to the non-rule-like *Penn Central* balancing test,²⁸ and back again to rules involving physical invasion and exclusion.²⁹ Schauer's own example, in which he sees Section 16(b) of the Securities Exchange Act of 1934 evolving toward non-ruleness, and Rule 10b-5 evolving toward ruleness,³⁰ can just as easily illustrate this "divergence hypothesis" as the "convergence hypothesis" for which he suggests the example. There is no reason to suppose that the evolution

continuum. See Radin & Michelman, *Pragmatist and Poststructuralist Critical Legal Practice*, 139 U. PA. L. REV. 1019, 1053-54 (1991).

26. See, e.g., *Mathews v. Eldridge*, 424 U.S. 319 (1976) (hearing not required before cutoff of Social Security benefits); *Goss v. Lopez*, 419 U.S. 565 (1975) (hearing required before suspensions from school).

27. See, e.g., *Standard Oil Co. v. United States*, 221 U.S. 1 (1911) (violations of Section One of Sherman Act will be judged by rule of reason, to be read into the Act).

28. See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (Court declared takings decisions to be "essentially ad hoc" and propounded multi-factor balancing test).

29. See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (physical invasions of property are takings regardless of how insignificant).

30. See Schauer, *supra* note 1, at 665 n.38.

in both directions along the ruleness continuum must stop at point x .

Perhaps the “divergence hypothesis” is not fatal to “presumptive positivism,” but it does seem to add another qualification. If we accept the “divergence hypothesis,” and add it to the hypothesis of “presumptive positivism in trivial cases,” then, in any given decisionmaking environment where the governing authority has chosen rules, Schauer’s “presumptive positivism” might still usefully describe the situation, but only for trivial cases and only for awhile. Finally, the “divergence hypothesis” might be strongest in domains that are perceived as very important, morally or otherwise, because our dissatisfaction with all points on the ruleness continuum might be strongest in such domains. So rules both work better in trivial cases and last longer in trivial domains.

