

# Book Review

## *Playing By the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* by Frederick Schauer

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Schauer, Frederick. (1991). *Playing By the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life*. Oxford: Oxford University Press. Pp. xviii, 254. ISBN 0-19-825661-2. Cloth CDN \$76.50.

Frederick Schauer presents an analytically elegant discussion of various ways in which decision-making utilizes rules both within and outside of the legal system. His goal is to provide a comprehensive philosophical analysis of what rules are and how they function in decision-making contexts as diverse as morality, religion, law and etiquette. A central theme of the book is "the importance of seeing rules as crude probabilistic generalizations that may thus when followed produce in particular instances decisions that are suboptimal or even plainly erroneous" (p. xv). Nevertheless, Schauer describes the virtues of rule-based decision-making over particularistic methods of decision-making that either ignore rules or treat them as guidelines that may be overridden, virtues such as protecting against decision-maker error and providing mechanisms for allocation of power. Ultimately Schauer favors a prominent role for rules in law, a position which contrasts with those articulated in much of the recent jurisprudential literature. He defends a view he calls "presumptive positivism," in which rules are most effective in

determining not the outcome of particular cases, but what sort of cases are on the agenda at all.

Schauer begins by differentiating descriptive and prescriptive rules. The former usually describe empirical regularities, while the latter are normally used to control or change behavior of agents capable of being responsive to such guidance. Schauer focuses on prescriptive rules which are not mere optional instructions but are mandatory in the sense that when accepted they furnish reasons for action "simply by virtue of their existence *qua* rules" (p. 5). Contrary to the traditional positivist assumption that law is merely a system of rules, Schauer begins by treating rules as governing only a subset of legal decision-making and as having explanatory power far beyond the law.

Yet overly zealous focus on the common philosophical distinction between descriptive and prescriptive rules can be misleading, according to Schauer, for it can obscure a major similarity, namely that both types of rule involve generalizations which are probabilistic and may be more or less universal. But as generalizations, rules may be over- or under-inclusive, leading to instances where the generalization fails. A generalization is over-inclusive if it is true for some or most cases, but not necessarily all. Claims that smoking causes cancer, or that driving over 55 m.p.h. is hazardous, provide examples of

over-inclusiveness. Generalizations such as “no one under age 21 shall consume alcoholic beverages” are under-inclusive to the extent that some people over 21 are unable to use alcohol responsibly (pp. 31-32). Over- and under-inclusive rules are not defective, according to Schauer, but raise the question whether to maintain or revise them when counter instances arise. On Schauer’s view, generalizations are not always treated as continuously malleable, but often become entrenched so that they control decisions even in the face of a “recalcitrant experience” (p. 45) conflicting with the underlying justification of the generalization.

Indeed, it is crucial to Schauer’s understanding of a rule that it is possible for there to be a divergence between rule and justification, when generalizations have meanings different from the results of direct application of the justification behind the rule (p. 61). In other words, contrary to Fuller’s argument against Hart that terms cannot have core meanings independently of particular purposes (p. 59), Schauer defends the view that meanings and goals can diverge, and meaning creates the entrenchment of the rule for guiding. Fuller believed that when an instance, such as a statue of a vehicle, fell within the letter of the rule “No vehicles in the park” but not within its purpose, e.g. peace and quiet in the park, literal interpretation should yield to purpose. In contrast, Schauer’s view of rule-based decision-making takes the generalization ‘vehicle’ to be entrenched, thus providing a reason for excluding vehicles in war memorials, even when the goals of the rule are not served (p. 74). While it may be clear that a statue of a vehicle is within the entrenched meaning of the term, what about roller blades and baby carriages? Fuller’s reliance on the purpose of the statue generates clear answers: to promote peace and quiet, exclude roller blades and allow baby carriages in the park. We might well wonder whether entrenched meanings will always be as uncontroversial.<sup>1</sup>

Schauer is well aware that rejecting continuous revisability of generalizations in light of purposes leads to counter-intuitive results. Yet he insists it is a central feature of rules, and even a necessary and sufficient condition of rule-based decision-making, that rules are not completely defeasible indicators which can be modified at any moment (p. 84), as is the case in particularistic decision-making. It is the entrenchment of rules that gives them their force as rules.

This portrait of rule-based decision-making is normatively unattractive because it allows results that are suboptimal or wrong in the sense that they oppose the background justification of rules. On this account rule-based decision-making is, Schauer acknowledges, “intrinsically and logically conservative (in the non-political sense of the word)” (p. 102). So what can be said to commend it? Why follow rules or take them seriously?

Against the view that rules promote fairness and consistency, Schauer points out that neither are sufficient arguments for rule-based decision-making, since the latter can suppress differences of particular situations relevant at the moment. Moreover, predictability, reliability, and certainty, while important, do not alone provide adequate justification for rule-based decision-making on his view, because these can also be accounted for by theories which take rules seriously but allow them to be revisable. And efficiency can be achieved with rule-based decision-making, but only with the tradeoff cost of a greater likelihood of wrong results.

Nevertheless, there are two major defenses of rule-based decision-making. Any decision-making procedure will produce errors, and one is risk averse to the extent one focuses on minimizing such errors. In contexts where one is more concerned with the possibility of decision-maker error than with error arising from the rule itself, then rule-based decision-making can be defended by an argument from risk

aversion. Following the rules may allow some counter instances, but it optimizes protection against significant decision-maker errors arising from bias, ignorance, incompetence, or confusion.

Rule-based decision-making also promotes stability. While this makes change from the *status quo* more difficult, in some contexts it can also be a significant virtue. A decision-maker not constrained by rules has the power or authority to take everything into account (p. 159), whereas a rule-constrained decision-maker loses some of that authority. Rules thus guard against allowing change too easily or too frequently, and guard against overemphasizing new temporal perspectives. Because rules entrench the *status quo* and place weight on the past, they operate as devices for allocating power among individuals and institutions as decision-makers. Schauer believes this allocation of decision-making authority is one of the chief and largely unnoticed virtues of rule-based decision-making.

The implication of Schauer's views for legal decision-making may now seem obvious. He says,

...to the extent that legal systems embrace rule-based decision-making, they embrace as well those values of intertemporal consistency...stability for stability's sake, unwillingness to trust decision-makers to depart too drastically from the past, and a conservatism committed to the view that changes from the past are more likely to be for the worse than for the better (p. 174).

But, as Schauer emphasizes, "nothing inherent in the idea of a legal system mandates that it serve those values" (p. 174).

Common law best captures the value of rule-based decision-making when it emphasizes the principle of precedent, though determination of which precedent is controlling is still usually underdetermined. And rule-based decision-making does not alone resolve all difficulties arising from conflicts between rules. Furthermore, the realist challenge that legal decision-makers are largely unconstrained by factors

beyond their own preferences is strengthened if rules are sufficiently indeterminate. Recognizing these concerns, Schauer is not defending the over-simplified model of judges as mere applicers of rules. Nevertheless, he argues that legal decision-making and interpretation leave more of a role for the formal use of constraining rules than is usually acknowledged.

Positivism can be understood as a descriptive claim that legal rules are distinct from moral norms. Schauer believes our legal system gives priority and status in most cases to results generated by a limited and pedigreeable set of rules, and is in this sense a system of "presumptive positivism," where rules control most legal decisions. It is Schauer's view that "presumptive positivism may be the most accurate picture of the place of rules within many modern legal systems" (p. 206).

Many readers will remain unpersuaded that Schauer has responded adequately to the realist challenge concerning the indeterminacy of rules, to Dworkin's arguments that American legal practice empowers judges to treat rules as subject to override or revision in many cases, and to Fuller's defense of the priority of purposes of laws. They may not be inclined to preserve the *status quo* and may not be preoccupied with the threat of judicial error.

Some may, however, fear that judges are granted too much power and may believe these alternative views exacerbate that by empowering judges to rely on their own preferences (realism) or their own judgments about when an outcome is too outrageous to accept (Dworkin) or their own determination of purposes (Fuller) or original intentions, especially in cases of conflict. If so, then they will welcome Schauer's spirited and original defense of Hart's view that rules do have core meanings and of a positivist-type theory of law that has often been summarily dismissed.

Schauer's position is that rule-based decision-making can be recommended in contexts far beyond the law to the extent

one agrees “that none of us, ordinary or not, have the mental capacity incessantly to consider all of the things that an ‘all things considered’ decision-making model

requires of us” (p. 229). Rather than being paralyzed by uncertainty or stumbling into errors, one can then simplify one’s life by following the rules.

### Notes

- <sup>1</sup> Jonathan Adler has suggested another point favoring Schauer’s interpretation, however. Even if there are vehicles that do not violate the rationale, the rule itself generates expectations, so that persons have a right to complain about violations of the rule even though there is no violation of the original justification.

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