

## INTERVIEW

# Everything we do is tentative. An interview with Prof. Frederick Schauer\*

Bo Zhao

Frederick Schauer is David and Mary Harrison Distinguished Professor of Law at the University of Virginia, and was previously Frank Stanton Professor of the First Amendment at the John F. Kennedy School of Government, Harvard University, and Professor of Law at the University of Michigan. As a leading expert on the First Amendment, constitutional law, and legal philosophy, Schauer is the author of *The Law of Obscenity* (BNA, 1976), *Free Speech: A Philosophical Enquiry* (Cambridge, 1982), *Playing By the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Clarendon/Oxford, 1991), *Profiles, Probabilities, and Stereotypes* (Belknap/Harvard, 2003), and *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* (Harvard, 2009). And he is also the author of more than two hundred published articles on constitutional law and theory, freedom of speech and press, legal reasoning, and the philosophy of law.<sup>1</sup>

The interview was done at a restaurant in Tilburg shortly after Schauer's arrival in Amsterdam, where he was speaking at a conference on the methodology of comparative law organized by Prof. Maurice Adams. Against the chilling cold weather, the interview, over a glass of beer, was warm and interesting on both sides. It was conducted in a casual way, more like a dialogue, though with some disagreement and debate. The interview covered a variety of topics ranging from Schauer's new book, *Thinking Like a Lawyer*, to his understanding of legal positivism, to the priority of rules in legal decision making, to generality in reason-giving, to legal principles, and to his general impression of legal philosophy and legal philosophers in the future and much more. The reproduced interview does not follow a chronological sequence of the interview. Instead it has been reconstructed thematically to give the reader a fuller picture of the discussion that took place. The interview started with some more general questions, such as how Schauer came to philosophy of law, and his possible contributions in the field.

\* The author would like to thank Prof. Pauline Westerman and Dr. Jeanne Mifsud Bonnici for their comments and suggestions, and Prof. Hans Lindahl and Dr. Mila Versteeg for their attentive and detailed help with the arrangement of the interview. More important, particular appreciation goes to Prof. Schauer for his time, kindness and enthusiasm in making the interview a pleasant journey.

1 Mary Wood, Constitutional Law Expert Frederick Schauer to Join Law School Faculty, at: <[www.law.virginia.edu/html/news/2008\\_spr/schauer.htm](http://www.law.virginia.edu/html/news/2008_spr/schauer.htm)>.

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## Engaging in legal philosophy

Zhao: As a distinguished legal philosopher with a world reputation, I wonder what has brought you into legal philosophy?

Schauer: I have no training in philosophy. So I started doing philosophical work in the context of free speech. I had been writing about freedom of speech and became interested in the theoretical side of freedom of speech and freedom of expression. And that led me to do more philosophical reading about rights, as well as about the philosophical side of speech and language. Then I went from there to using some of that philosophical knowledge and reading to writing about language in legal interpretation and constitutional interpretation, and from there to general legal philosophy. So I started with law, and gradually I did more work in philosophy rather than starting in philosophy.

Zhao: Then what do you think are the best things for you to do as a legal philosopher?

Schauer: There are a few things, and one, which is not so new, is writing about rules and analyzing what rules are, what rules can do, and how they do it...

Zhao: Then we can plunge into the nature of legal things that you are interested in...

Schauer: For me, rule-based reasoning is just part of what legal actors are doing and how they are doing it. So, as in my most recent book, I am interested in legal reasoning generally, and rule-based legal reasoning, as an important topic of legal philosophy. And in some of my more recent work, I am attempting to change the understanding of what legal positivism is.<sup>2</sup>

Zhao: And the worst things?

Schauer: I think, at some point, philosophical inquiry can become too abstract and too removed from real problems or real world problems. This is not to say that philosophy should be immediately applicable or practical, but we should bear in mind the importance of using philosophical tools and philosophical analysis to help us understand actual institutions and problems. Perhaps related this and perhaps not, it is unfortunate that in the U.S. serious legal philosophy is taken less seriously than that it is here. It is now not a required course in American law faculties. It is less important and more marginal in the U.S. than that it is in much the rest of the world.

Zhao: Having taught for so many years, are you satisfied with this position of philosophy of law in the American legal education?

Schauer: I am not satisfied with the situation of philosophy of law in the U.S. It is not only that it is not a compulsory subject. More importantly, treated as not important. That's very unfortunate. It is one of the reasons that when I operate in the legal philosophy side of my academic life, I tend to do as much, if not more, internationally or outside the U.S., as in the U.S.

Zhao: As a successful legal philosopher, you've published on a variety of topics, like free speech, rules, legal reasoning, authority, generality, et cetera. What

2 Schauer explained this later.

would you like to be remembered later on as important contributions to the fields?

Schauer: There are a few things. One is the analysis of rules, and the arguments for taking rules seriously, and thinking that rules are frequently but not necessarily good things. With respect to freedom of expression, my work on freedom of expression is less enthusiastic and less celebratory than is common in the U.S. I would like to be remembered as someone who made it legitimate to be skeptical of the celebratory tradition. I think in constitutional law I'd like to be remembered as someone who recognizes the importance of constitutional text, what's actually written down. And at some point in the future, in legal theory, I would like to be remembered as someone who helped to re-configure legal positivism.

Zhao: A more personal question: what are your favorite articles?

Schauer: I think the ones that I like the best, partly, some of ones I wrote in 1980s, or earlier 1990s, 'On Precedent' and 'Slippery Slopes', and 'Giving Reasons', and 'Formalism', all articles dealing with the characteristic devices of legal reasoning and legal argument. More recently, my favorite recent article in legal philosophy is one that hasn't been published yet. It is the one I just wrote for the John Austin Conference in London, and it is called 'Positivism before Hart'. Probably it is my favorite among the articles I have written in legal philosophy because it is my most direct and clearest engagement in legal philosophy with the positivist tradition, both recent and not-so-recent.

### Understanding legal positivism

Zhao: You mentioned re-configuring legal positivism, why?

Schauer: As I said earlier, I would like to help to change the understanding of what legal positivism is. I think there is a form of legal positivism that dates back to Bentham and Austin. They connect legal positivism with actual legal decision making and legal reasoning. I think that connection has been lost recently and that is unfortunate. So I want to try to reclaim Bentham, reclaim Austin, and reclaim a traditional form of legal positivism that has a prescriptive dimension and that attempts also to describe the role of a limited domain of rule-of-recognition-recognized legal materials in legal decision making.

Zhao: Do you think the recent development of legal positivism has been shaped by the attack from Dworkin and his proponents?

Schauer: I think Dworkin has the right understanding of legal positivism, but I think he is wrong to think it is wrong. The understanding of legal positivism that he wants to attack, one that sees legal decision making as based largely on a pedigreed set of distinctively legal materials, is the much more useful understanding of legal positivism. By contrast, the understandings of legal positivism that people have developed in response to Dworkin are increasingly removed from legal decision making and removed from historically legal positivism traditions. The

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debates between negative-and-positive positivism,<sup>3</sup> or inclusive-and-exclusive positivism, have diverged from a tradition that is two hundred years old. And the tradition is important for understanding the actual nature of legal decision making.

Zhao: Why?

Schauer: The tradition, with its major roots in Bentham and Austin, but crystallized in Hart's notion of a rule of recognition, sees law as based not on all available social norms, but as based on a limited set of norms identified by the rule of recognition.

Zhao: I didn't see your re-claiming recently your theory of 'presumptive positivism'.<sup>4</sup>

Schauer: I don't think I've changed my view. As a descriptive matter, presumptive rule-based decision making best characterizes most modern legal systems. Whether we want to call rule-based decision making 'positivism' is something that needs more argument. And as I said earlier, that's what I am working on now in legal theory, trying to explain the connection between legal positivism and rule-based decision making. I think that is Bentham's idea. Possibly also Austin's, but certainly Bentham's. I think that developing this idea as lying at the core of legal positivism needs more argument than I gave twenty years ago, and that is why I don't use the term positivism in the recent book, *Thinking Like a Lawyer*. But I haven't changed my mind about the basic idea.

Zhao: Then probably we will see another book or a heavy article on the topic soon?

Schauer: Yes, perhaps a new vision of positivism, or the old vision re-captured.

### Thinking like a lawyer

Zhao: Talking about your new book, *Thinking Like a Lawyer*,<sup>5</sup> what would you like to say to readers in the Netherlands, taking this as a sort of promotion?

Schauer: First, that legal reasoning as a topic is philosophically important, and it is important to have the right understanding of legal reasoning. But it turns out, for example, and by contrast, that Joseph Raz thinks that there is something called legal reasoning, but he thinks it is not part of the philosophy of law. I disagree.

Zhao: His article 'Reasoning with Rules'...

Schauer: Yes; there and in his response to Postema and in a few other places. Raz said this is what law is and that's what legal reasoning is, and the two are different. And for him the task of jurisprudence is to explain the nature of law as such, leaving aside what is for him the different question of how judges and

3 J. Coleman, "Negative and Positive Positivism", *Journal of Legal Studies* (1982), 139-164.

4 The theory advocates that the priority of decision making should be based on pedigreeable sets of rules, unless particularly exigent reasons can be supplied for not applying it. F. Schauer, *Playing by the Rules*, (Oxford: Oxford University Press, 2002), Section 8.6.

5 F. Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* (Cambridge: Harvard University Press, 2009).

others make decisions, and what role law as such plays in those decisions. But I disagree. I think legal reasoning is an important topic of philosophical interest about law. It needs to be studied philosophically. And thus it is part of the 'philosophy of law' properly so called.

Zhao: The book is said to be 'a primer' to new law students.

Schauer: I mean, partly, that I want students to be able to understand, outside of specific substantive areas, all of these forms of legal reasoning, and I want them to understand the formality of law, because they come to law thinking law is always producing the right answer. So the book is partly to introduce this idea to students and partly to reinforce or develop my own particular academic themes. There is, I think, a consistency in the book and in its connection with my past publications.

Zhao: And...

Schauer: I think the big idea is understanding the central formality of law. Some of the things I've written about in the past separately: rules, precedents, and authority, especially. All of these devices of decision making can be understood as really part of the same topic, and part of the same 'formal nature of law', in the sense of formal as anti-instrumental, or as anti-pragmatic. Law frequently produces the wrong answer, where wrong is measured in terms of the best all-things-considered decision for the case at hand. Why this is so, and why it is sometimes desirable, is the running theme of the book.

## Dworkin and legal principles

Zhao: The 'right answer thesis' is just what Dworkin claimed by using the concept of legal principle. You were strongly against the use of the concept before, especially in your article 'Prescriptions in Three Dimensions' and also in your book *Playing by the Rules*. But you also show interest in the concept: you supervised a post-doc project conducted by...

Schauer: Humberto Avila!<sup>6</sup>

Zhao: ...and you indeed used the concept in later publications.

Schauer: I think 'principle' is not a distinct logical form. I resist the use of the term, just because it is so confusing. And I fear that Dworkin has made it more confusing.

Zhao: In which way?

Schauer: I think he confuses the dimension of weight with the dimension of generality. And he wants to say that principles are more general and not necessarily absolute, and the two don't necessarily go together.

Zhao: Principle could be very specific and also very general. I have no problem with that.

Schauer: I sometimes use the word 'principle' to refer to rules that are more general; when I use 'principles', I mean more general rules.

6 The project led to publication of a book afterwards. H. Avila, *Theory of Legal Principles* (Dordrecht: Springer, 2007).

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Zhao: So, more general rules could be principles...

Schauer: I think there is no reason that we can't use the word 'principle' to mark one end of the 'spectrum' of the degree of specificity of rules, and thus 'principles' could be thought of like 'standards' in the distinction between rules and standards.

Zhao: Years ago, I read Atiyah's inaugural lecture, 'From Principles to Pragmatism', describing a legal tendency from applying rigid principles (rules) to realizing particular justice. But Julius Stone,<sup>7</sup> in his response called 'From Principles to Principles', argued that this should be understood as a development from the domination of hard principles to more flexible principles to achieve particular justice. This pair of articles really lead me to think about what legal principles are. Are they soft or are they hard, or both? More interesting is that this also happens to rules, if one looks from your perspective... they are both hard and soft in application. There probably exists I think, a sort of double characters of rules and principles as normative prescriptions, both soft and hard at the same time?

Schauer: That is why I think there is no logical distinction between principles and rules. What we are really talking about is how crisply are they written and how seriously are they taken. And I am not sure that the distinction between rules and principles helps us with that, except as a convenient marker to say rules are ones written crisply in precise language, and principles are ones written loosely in general language; that's the basic distinction to me.

### Generality, spectrum and continuum

Zhao: In your article, 'Giving Reasons',<sup>8</sup> also your new book, you said that by giving reasons, the subject is brought to a higher level, which is more general. To me, however, I have difficulty in understanding this point. Take your conversational example: why is the reason 'it is raining' more general than the action of bringing one's umbrella? Why it is not a directly intuitive reaction, but a more general, normative thing involved?

Schauer: I don't think it's normative. My claim is about the logic of rules, and not about the degree of generality of the language. So it is a claim about the fact that any reason logically includes the particular case, but others as well. So it is the claim about the logic of norms, and not the claim about the specificity of language; there is nothing more general about rain and about umbrella. But in terms of normative logic, or logic of norms, carrying an umbrella 'today', is necessarily included in carrying an umbrella whenever you think it is going to rain.

Zhao: But I have a different understanding. For you, it's the resort to normative logic, but for me, it's never something that complex: just intuitive. Because it is raining, or it is going to rain, I will bring my umbrella, or my raincoat. I bring my

7 P. S. Atiyah, "From Principles to Pragmatism: changes in the function of the judicial process and the law", *Iowa Law Review* (1980); J. Stone, "From Principles to Principles", *Law Quarterly Review* (1981): 224.

8 F. Schauer, "Giving Reasons", *Stanford Law Review* (1995): 633-659.

umbrella today, probably because my raincoat needs repair. So... see my point? Just from intuition or consciousness, nothing normative.

Schauer: I see. But I think at some point, all of these can be translated into something more general and that, if I would ask you the question: yes, it's raining, but why it leads you to bring your umbrella or your raincoat? You would still answer that when it is raining, I need something to protect me from the rain, and that's more general. So I think, implicitly, it is not a matter of language to treat them, but the reason behind it is more general, not necessarily the reason that you give.

Zhao: I observe in your publications that you like to use terms like 'continuum' and 'spectrum' as an analytical tool to describe subjects. We see a very similar use in Fuller's analysis of morality of duty and morality of aspiration. Have you thought about their drawbacks?

Schauer: Yes. I mean, at some point, it is important to identify differences, even if there is a continuum between them, and at some points I think that people are wrong to think that just because there is a continuum, there are no differences between the ends. There is always a risk of saying if there is a continuum, people will assume there are no differences. But that is false. We could say these are the factors that when they exist to the greatest extent, we are at one end of a continuum, and to the least extent, we are at the other end. And there might be a number of factors that tell us where we are in-between. But, yes, we have to have some way of identifying the criteria or factors that tell us where we are.

Zhao: But it might lead people to stop inquiring into a complex problem, when you say there is a continuum.

Schauer: Not everything in the world can be explained in terms of bimodal logic. There are things that are variable and it is not necessarily arbitrary to recognize and use variable concepts. So it is important to distinguish that which is variable from that which is arbitrary. It is perfectly rational to recognize more or less. It is rational and reasonable, even if not logically precise.

Zhao: Ok, following this, we can apply what you've said above to the continuum from rules to standards you proposed before. You said in discussing the legendary no-vehicle-in-the-park case that no-vehicle-in-the-park is a typical, concrete rule on the one side, but 'peace and quiet' as the rule's further justification, is a typical standard on the other side, right?

Schauer: Yes, I said that.

Zhao: Then, here we have one rule and one standard, but there is no continuum between them, although you could extend this to a higher level of justification, then to something broader like 'enjoy the park'.

Schauer: Except that we can change things somewhat. Even if no-vehicles-in-the-park is at one end of the spectrum, at the other end we can say nothing noisy in the park, or nothing disruptive in the park. And so we can be more precise on the other side, from no vehicles to no trucks or no motorcycles in the park. We are talking about a continuum.



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## Debating rule priority

Zhao: Regarding regulation, I observe that here in the Netherlands, as well as in a much broader legal context, the EU, more general directives containing goals and purposes are used as guidelines to member countries. But this is just against your argument that precise and concrete rules should prevail.

Schauer: Yes, but I think that although rules are frequently good things to have, this does not mean that they are always good things to have. When we should use rules and when we shouldn't depends on time, place, goal, and especially in the context of the EU, the politics of EU, the politics of leaving decisions to national authority, maybe, in consistence with a number of rules; that is, rules are devices for central control. So whether you want to use rules in the EU or not, depends on the political substantive view about how much central control there should be in the EU.

Zhao: Rules can allocate power and thus restrict arbitrary discretion in decision making.

Schauer: Right.

Zhao: Regarding the reality of goals and purposes as general standards in regulation in the European countries, do you think that rigid, specific rules could someday be replaced by general goals and purposes? Then goals are more dominating than rules?

Schauer: It is entirely a function of how much trust there will be in the people who make the decisions. And if there is at some point more trust in people who make decisions, there will be more willingness to give them discretion. And we give people discretion by using purposes and more general standards and general principles. And if we have less trust, we have more specific rules.

Zhao: To my knowledge, in the American legal-political background, can I say trust is minimal.

Schauer: At some level there is much distrust, but at another level, the U.S. is a society that, as in many common law systems, trusts judges in general, more than civil law systems do. So, yes, Americans tend to distrust official power, but there is more willingness to have judges make law than there is in civil law countries.

Zhao: But, in 'a law' or in 'the law' itself, a legal system, there could be different sections or departments which are more purpose-oriented, like in environmental law or administrative law, while, on the other hand, others are more rule-oriented.

Schauer: Yes, that's right. Again, there is no reason that any society must have the same thing for every kind of law. We might be more willing, and we should be more willing, to distrust discretion for criminal law, than for other forms of regulation.

Zhao: So it seems whenever the matter is more important, then we...

Schauer: It is not just that it is more important, because it is also the question of the consequences of mistakes. It is not that criminal law is more important, it is that we may be more concerned about notice and predictability for criminal law, than we are for other forms of behavior.



Zhao: Talking about predictability, I have some points to make here regarding the drawbacks you proposed against general standards. You are in favor of precise, concrete predictability brought by rules.

Schauer: Yes. That's true. It is an important value, albeit not the only value. And it is a value especially important in law.

Zhao: But there are two sorts of predictability. One is more precise, in the way that I know exactly what will be the consequence of my particular act. But there is also vague, general predictability, in a way that I know vaguely and generally the consequence of my conduct, like when facing a standard prescribing that driving above fifty kilometers per hour will be fined "reasonably". From the past precedents with fines ranging from forty-eight, forty-nine to fifty dollars, I can assume that the fine in my case could be at worst fifty. Vague predictability, but still with some precision.

Schauer: Right, but then, that is why precedent is a form of rule-based decision making. I can predict more if I assume what's happened in the past will happen again.

Zhao: But that is vague assumption, not to the point yet. If you agree with this, now I shall say that probably we can use purposes and goals to give better predications, of course, with the combination of rules.

Schauer: But only if we can predict purposes. It is empirical question of whether we can predict purposes, or whether we can predict what particular people will do with respect to those purposes. And it is an empirical question about when precise language will produce more predictability than not.

Zhao: In regulation by rules and purposes or goals, I think there is another possibility than merely either rules prevailing or purposes prevailing: on the one hand, to constrain the arbitrary defects of decision making with rules, and on the other hand, to go one step further, to achieve the best result in a particular case by adopting purposes. Is there a way in between to get both? I mean to get particular justice, when we can still constrain discretionary power?

Schauer: I think there may be a way in between, but there is no way to get both. There is definitely a trade-off. The more you want the benefits of rules, the more you are giving up the advantage of particular justice, and vice versa.

Zhao: I think it is possible. I offer a counter-example here to show a possibility to gain both. Probably you know that in Germany, they have the road rule prescribing no maximum speed limit on highways, at least two-third of the highways.

Schauer: Right.

Zhao: In this case, I think it is possible to get merits both from concrete rules and general, vague standards. The maximum speed limit that appears in most countries is replaced in Germany by a standard of driving prudently and carefully. But they still have the concrete minimum speed limit rule. Is this an example of a combination of a rule and a standard, or a principle, which may achieve both virtues regarding road behavior?

Schauer: I see your point. It is a combination, but that just means that the minimum and the maximum are two different rules. One of them is more rule-based, and one of them is more standard-based. And there is still a trade-off for each one. I think any system can have some rules and some more general standards.

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But, for every particular form of conduct, there is still a trade-off between whether you want to treat it by rigid formal rules, or loose general standards.

Zhao: But just now you said that it is more standard-based. Do you mean that a rule is made from a general standard?

Schauer: No. The maximum one is a standard, the minimum is a rule, and maybe the trade-off, the balance, is different for the minimum than for the maximum...

Zhao: So...

Schauer: It is not the same rule. It is two different rules for two different forms of conduct. One form of conduct is driving too slowly, and another form of conduct is driving too fast.

Zhao: But anyway, that is still a combination of the two things.

Schauer: They happen to go together because they both are dealing with driving on the roads. But it is not a combination because it is still two different problems.

Zhao: Sure, two different problems, all reacting to road speed or driving behavior.

Schauer: But two different kinds of problem that Americans and Germans deal with in two different ways. And I don't see anything wrong with that.

Zhao: But I think, still all reacting to driving act.

Schauer: Ok. But I want to resist thinking it's the same thing. It is two different things and two different problems and two different forms of driving.

Zhao: But the result is interesting enough at least. I saw on the Internet that the fatality rate in Germany is much lower than that in the U.S., though...somewhat higher than the U.K. Here you see a general standard, even not talking about the combination of a rule and a standard, can achieve the result that is no worse than merely using a concrete rigid rule.

Schauer: But it will take empirical study to know what the other variables are, including how much driving, how much training, and much else.

Zhao: The above is about the first type of counter-arguments against rule-priority. Now let's discuss the 'developmental' argument. Nonet and Selznick described responsive law, or purposive law, as you may have known already.<sup>9</sup> When I read their book, I thought they were just describing legal development in the U.S. They proposed arguments against the use of rigid rules, but argued in favor of principles-or-purpose-oriented responsive law, in order to achieve particular justice. How would you react to their proposal?

Schauer: They are both empiricists and recognize that the way to answer a question is to look empirically at the world. One of the interesting phenomena we have seen is that in most common law countries, there is an increasing tendency to use very precise, specific rules, rather than allow judges to make decisions based on general, broader purposes. So I think they offer an interesting empirical hypothesis about the progress of legal development that may turn out to be empirically wrong, if we also look at what has happened with the increasing tendency of common law countries to use more precise rules. Yes, there is also a tendency in civil law countries to rely more on purposes and more on judges that would not

9 P. Selznick and P. Nonet, *Law and Society in Transition: Toward Responsive Law* (New Jersey: Transaction Publishers, 2001).

happen in the past. So there is some degree of convergence, but the convergence may be more in the rule direction than in the purpose direction.

Zhao: Interesting enough is that your preference of rigid rules reminds me of Duncan Kennedy's proposition, the close linkage, or analogy between the use of rule and individualism, and the use of standard and altruism... and also... similarly between rule and liberalism...standards and...

Schauer: That is another empirical hypothesis and it is probably false. Many people want to announce as necessarily true things that are in fact empirical. Kennedy's view that rules are individualist rather than communitarian strikes me as empirically false, but maybe logically false too. Rules make it harder to talk about your individual case. I think Kennedy gets it backward. Rules are much more likely to make claims of special privilege or individual claims harder. Standards make it easier for me to say my case is special, and I think Kennedy just gets it backward. When we have broader, general standards, they are not communitarian; they make it easier for every person to say: treat me differently!

### Legal philosophers and legal philosophy

Zhao: I know that you've been nominated recently as one of the most influential people in legal education by the *American Jurist Magazine*.

Schauer: I am not sure that recognition is accurate, but it's nice that someone said it.

Zhao: From your point of view, do legal philosophers have some influences outside the academia and what do you think is the role of legal philosophers in the American society?

Schauer: I think an academic pursuing an academic career is a way of increasing understanding, and I don't think that legal philosophers do, or should, in their legal philosophy work, try to have a short-term effect on actual decisions.

Zhao: But professors like Kennedy and others as well still wrote about Iraq war.

Schauer: That's fine, and there is nothing at all wrong with an academic writing about current topics, but that is not the same as the academic work influencing those topics. Bentham wrote about lots of current topics, and perhaps the best example of separation is Bertrand Russell, who wrote about current affairs all the time, but insisted that was a different agenda from his work on logic and language.

Zhao: But the fact is, they, as famous, influential people, still indirectly use their academic power to enhance their...

Schauer: Academic influence is slow, and should be slow. It should take place over time or over generations. If an academic tries to have an immediate short-term effect, it may dominate the search for truth and the search for knowledge. So I think academics should be someone detached.

Zhao: So you want the separation of academics and...

Schauer: The separation of academic inquiry and short-term advocacy. And this is a good separation.

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Zhao: Another 'big' question before ending the interview is what do you think about the future of legal philosophy and how legal philosophers shall confront it? Of course, not limited to the U.S.

Schauer: The future, I think, may not be entirely good. I think the future of legal philosophy includes, for instance, it becoming a more philosophical topic, more dominated by professional philosophers, more dominated and more controlled by people with formal professional training. That is part of the future, but I don't think that's a good thing. I think legal philosophy at its best is deep, abstract, theoretical inquiry and analytic inquiry into the nature of law and legal decision making, but that need not to be the province of professional philosophers. So when you think about people like Lon Fuller, or Brian Simpson, or Patrick Atiyah, or a number of others, these are people who have offered valuable theoretical insights in understanding the nature of law, but none of them are philosophers or work in an explicitly philosophical mode. Legal philosophy is not just for legal philosophers.

So let me add one more item to my list of my own favorite articles of mine. I did a book review about four years ago, in the *Harvard Law Review*, of Nicola Lacey's autobiography of H.L.A. Hart, *The Nightmare and the Noble Dream*. In my review essay I try to capture some of why I think it may not be a good thing that legal philosophy be taken over exclusively by philosophers. The review essays is called '(Re)Taking Hart'. I think there are a lot of things that philosophers can contribute, but it is important that the real philosophers are not taking philosophy of law as something that should be just for them.

Zhao: We shall see on the battle field how the two will fight against, or, with each other. I ask a more general question to end this interview. What would you like to say to young scholars who are interested in legal philosophy and want to do good research?

### **To young philosophers**

Schauer: Thinking and reading about philosophy is very important, but they also have to know something about law, in much the same way that the best philosophy of physics these days is done by people who understand physics. The best philosophy of law can be done by people who actually understand law as it is, and that might be partly sociological and partly empirical. You have to understand what you are philosophizing about. The subject is not just philosophy, it is also law. Like the philosophy of physics, you have to know the philosophy but also you have to know the physics.

Zhao: My own experience is that when you read philosophical issues, you are easily dragged into the muddy discussions of pure philosophical topics, very abstract things.

Schauer: And sometimes you are not saying anything about law.

Zhao: How do you handle this?

Schauer: If you genuinely understand law as law, you are not going to just see law as an example of philosophical problems; you will see law as something that pro-

duces its own problems. Philosophical tools can help to solve those but legal problems are not just examples of philosophical problems.

Zhao: From within law itself...

Schauer: In part, or from within both, not just from within philosophy.

Zhao: One more thing: how to become more productive, a very important, but also very practical question for young scholars.

Schauer: I think the best way to become more productive is to recognize that you are engaged in a conversation with other people, and if you write, you do not need to be absolutely, finally right. You are engaged in a back-and-forth conversation; you say what you want seriously and carefully, but then finish writing. And then people may respond, but the first word you write is not the last word.

Zhao: Nothing final and really big.

Schauer: In a genuine academic conversation, everything we do is tentative!