

1-1-1993

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Recommended Citation

Stephen L. Winter, *Confident, But Still Not Positive*, 25 Conn. L. Rev. 893 (1993).

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CONFIDENT, BUT STILL NOT POSITIVE

Steven L. Winter*

I. PRESUMPTUOUS POSITIVISM

IN a provocative but ultimately vexing essay, Frederick Schauer sets out "to pierce some of the linguistic confusion that surrounds the many uses of the word 'positivism.'"¹ In so doing, he hopes to clarify exactly what positivism does and does not entail with respect to contemporary debates in American constitutional law. Schauer does not conceal the fact that there is a prescriptive dimension to his ostensibly explanatory effort. Clearly, he decries the degree to which positivism has fallen into disrepute among contemporary American legal theorists. In fact, he wants nothing less than to resurrect legal positivism and redeem it in the eyes of progressive legal scholars.

His strategy has two parts. First, he attempts to de-demonize positivism by showing that contemporary attitudes toward positivism are premised on a series of analytic errors. Thus, he argues that the political valence of positivism is context-dependent and that progressives are mistaken in associating legal positivism with political conservatism. Second, he seeks to demonstrate the normative and political advantages of a positivist theory of law in an era of a conservative judiciary.

Schauer challenges the conventional wisdom that equates positivism with morally obtuse (or undesirable) judicial formalism, inveighing against those contemporary legal scholars—and here he singles out Robert Cover as the "leading" offender—who identify positivism with "the very act of amoral law-obedience."² As Schauer explains the traditional jurisprudential dispute between positivists and adherents of natural law, there is nothing in the positivist position that presupposes or requires a morally sterile approach to judicial decisionmaking.³ To

* Professor, University of Miami School of Law. I am grateful to Bruce Ackerman, George Lakoff, Mike Fischl, Jeremy Paul, and Lynn Winter for helpful comments and suggestions.

1. Frederick Schauer, *Constitutional Positivism*, 25 CONN. L. REV. 797, 828 (1993).

2. See *id.* at 806 & n.18, 822 & n.58 (citing works by Robert Cover, Anita Allen, Kate Bartlett, Jamie Boyle, and George Kannar).

3. *Id.* at 810. He concedes, however, that the converse *is* true: a morally sterile approach to

the contrary, he explains that any actual legal system may as a contingent matter contain overtly moral conceptions. Obvious examples in American constitutional law are provisions such as the Due Process and Equal Protection Clauses.⁴

Thus, Schauer suggests that what passes for positivism in constitutional law is really a different position altogether. In reaction to the *Lochner* era, much mainstream scholarship has attempted sharply to delimit the permissible bases for judicial decisions.⁵ Properly understood, he argues, this is not really positivism but an insistence that judges adhere to a narrowly constrained "role morality."⁶ And that position, he points out, is entirely consistent with a commitment to natural law. It merely supposes that, for moral reasons, society has made a prudential decision to constrain judicial decisionmaking rather than risk an even worse alternative.

Schauer also suggests that legal positivism has much to offer progressive constitutional scholars now that the Court is home to political conservatives like Justices Scalia and Thomas.⁷ In the traditional jurisprudential dispute, natural law theory claims that morality is a constitutive precondition of legality and, thus, a necessary component of all (proper) acts of law identification and law application. Schauer suggests that this idea might (mis)lead one to view the actual practices of constitutional law as having successfully met some antecedent test of morality. Positivism, in contrast, views law as a social fact distinct from morality. Because it does not require any normative commitment to the constitutional enterprise, positivism allows the distance necessary for an external (moral) critique. Thus, Schauer suggests that it is legal positivism, and not a natural law outlook, that should be most congenial to those who desire progressive social and legal change.

As a kind of bonus, Schauer offers the intriguing possibility that legal positivism might enable progressives to have their cake and eat it too, now that the "Brennan era" has finally given way. This argument

adjudication does presuppose legal positivism. *Id.* This concession will become important later. *See infra* text accompanying notes 46-50.

4. *Id.* at 802-03. Here, as on other points, Schauer is drawing on Jules L. Coleman, *Negative and Positive Positivism*, 11 J. LEGAL STUD. 139, 141-43, 148-49 (1982).

5. Schauer, *supra* note 1, at 818-19.

6. *Id.* at 825.

7. The advent of the Clinton Administration may mitigate this aspect of Schauer's case for positivism. There is reason to expect that President Clinton will have anywhere from one to four appointments over the next few years and, thus, the potential to alter the ideological balance of the Court to a meaningful degree. Such a change in the practical significance of Schauer's argument would not, of course, affect in any way its conceptual value.

cleverly combines his previous two points. First, he argues that the positivist distinction between legality and morality allows progressives to draw a principled distinction between, on one hand, judges whose decisions they believe morally correct and, on the other, those whose decisions they find morally undesirable. Then, invoking the idea of a constraining role morality, he suggests that progressives could argue with complete intellectual integrity that a different, much more restrictive set of rules should apply to decisionmaking by the latter group of judges. But this, he points out, is only possible if one accepts another version of positivism—much assailed by Ronald Dworkin—that he calls the “limited domain thesis.”⁸ For any position that seeks to limit the scope of judicial authority, he explains, presupposes that there is some limited set of authoritative, purely “legal” materials to which the judge can be restricted.

Although Schauer manages to make positivism sound quite attractive, his attempted resuscitation remains highly implausible—and for a very basic reason. For all its analytical rigor, Schauer’s argument never once addresses either the actual views of sophisticated antipositivists like Cover or the very powerful challenges that they raise. Indeed, much of what Schauer offers as “clarification” turns out to be jurisprudential common ground with those whose “linguistic confusion” he presumes to correct. As a consequence, many of their supposed “mistakes” turn out to be nothing more than his misreadings of their objections to the avowed entailments of *his* position.

Schauer’s case is telling because it is so typical of mainstream analytic jurisprudence.⁹ The application of rigor, clarity, and precision to untie linguistic and conceptual tangles is, no doubt, a worthy endeavor.¹⁰ From his opening sentence, Schauer makes effective rhetorical use of this professional posture.¹¹ But his high-minded stance is no substitute for a sustained engagement with the most significant anti-

8. Schauer, *supra* note 1, at 823-25.

9. Perhaps the most familiar example of this phenomenon is Dworkin’s brief encounter with Critical Legal Studies, which he dispatches with a series of tendentious and unsubstantiated distinctions. See RONALD DWORKIN, *LAW’S EMPIRE* 271-75 (1986).

10. Clearly, Schauer expects us to see it as such. In his conclusion, he shrewdly invites the reader to assess the value of his enterprise as “a function of the extent to which clarity is seen as a facilitator of truth.” Schauer, *supra* note 1, at 828. Apparently, one either concedes its worth or admits to being an intellectual Philistine.

11. To this end, he affects the tone of the serious and committed expert decrying yet another missed opportunity to educate the great unwashed. Having thus established his rhetorical authority, Schauer abruptly shifts his attention to a rather different set of targets whom he nevertheless casts in the same fallen light.

positivist critiques, and *that* confrontation never takes place. In the final analysis, Schauer remains safely ensconced in the prison of his own analytic framework. There, he appears blithely unaware of the modes of thought that have already rendered it obsolete.¹²

II. LOGICIAN, HEAL THYSELF

Early in his essay, Schauer braves the conventional wisdom that condemns positivism as "irrelevant and pernicious"¹³ to contend that positivism should be the theory of choice for political progressives. He writes: "Contrary to the accepted wisdom . . . constitutional positivism may be the posture towards constitutionalism most conducive to distance and therefore to external critique . . . [and] most appealing to those least inclined to sympathy with the existing constitutional order."¹⁴ In a footnote, he identifies the prevailing wisdom with the work of Lon Fuller and, more recently, with that of Robert Cover.

In addition to Fuller's work, the leading modern articulation of the view that legal positivism promotes amorality (and therefore potentially immorality) is found in the work of the late Robert Cover. Unlike Fuller, however, who makes a causal claim (that I think mistaken) about the relationship between adopting legal positivism and obedience to immoral laws, Cover uses "positivism" as the *label* for the very act of amoral law-obedience.¹⁵

For those familiar with Cover's work, however, this characterization and Schauer's ensuing clarifications are extremely puzzling. Both of the passages that Schauer cites as evidence of Cover's view actually contain Cover's discussion of the legal theory of the Garrisonian abolitionist, Wendell Phillips. As one might expect, many abolitionists urged antislavery judges to use natural law to emancipate the slaves who

12. To be clear, Schauer is hardly alone here. Rather, his plight is but one example of the endemic effects of prefiguration. The term "prefiguration" comes from PAUL RICOEUR, 1 *TIME AND NARRATIVE* 53-57 (K. McLaughlin & D. Pellauer trans., 1984), and signifies the process by "which the very act of perception already entails a transfiguration and assimilation of the idea or event in terms of an existing conceptual framework." Steven L. Winter, *For What It's Worth*, 26 *LAW & SOC'Y REV.* 789, 799 (1992).

13. Schauer, *supra* note 1, at 798.

14. *Id.* at 806-07 (footnote omitted).

15. *Id.* at 806 n.18 (citing ROBERT M. COVER, *JUSTICE ACCUSED* 150-54 (1975) [hereinafter COVER, *JUSTICE ACCUSED*], and Robert M. Cover, *The Supreme Court 1982 Term—Foreword: Nomos and Narrative*, 97 *HARV. L. REV.* 4 (1983) [hereinafter Cover, *Nomos and Narrative*] (citations omitted)).

came before them. Phillips, in contrast, was a strict legal positivist who maintained that existing American law required support of slavery and, therefore, that antislavery judges had no choice but to resign.¹⁶ Thus, as Cover explains on the very first page of *Justice Accused*, his discussion of Phillips's jurisprudential position substantiates H.L.A. Hart's point that positivism has no inherent moral or political valence by showing that positivism was espoused by complicit judges and abolitionists alike.¹⁷

So far, Cover's position appears exactly the same as Schauer's. Both side with Hart against Fuller on the issue of the political import of positivism.¹⁸ But what Schauer does not seem to appreciate is that, although hardly a legal positivist, Cover does not adhere to any version of natural law either. To the contrary, Cover is a jural pluralist who warns that the desire to hold "the mirror of critical objectivity to meaning" is what leads to the "imperial mode of world maintenance."¹⁹ Indeed, like Schauer, Cover explicitly recognizes that positiv-

16. See COVER, *JUSTICE ACCUSED*, *supra* note 15, at 150-58; Cover, *Nomos and Narrative*, *supra* note 15, at 36-37.

17. Cover writes:

Some attempts have been made to associate legal positivism . . . with the [Nazi] atrocities. H.L.A. Hart has vigorously and convincingly argued that positivism has no necessary relationship to such amoral and immoral judicial conduct. Indeed, he has demonstrated how the English positivists, and most especially Bentham, urged the analytical distinction between law as it is and law as it ought to be and stressed the human origins of law in order to be able to effectively measure the law against an external standard for reform purposes. . . . While I argue within that a thoroughgoing legal positivism was one of the many factors that determined the complicity of the antislavery judge . . . , I shall also argue that the same jurisprudential perspective contributed to the most radical of the opposition

COVER, *JUSTICE ACCUSED*, *supra* note 15, at 1 n.* (citing H.L.A. Hart, *The Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958)).

18. It is not clear whether Schauer recognizes this point of congruence. He acknowledges that there is material difference between Fuller and Cover. But the way in which he states that difference suggests that he thinks Cover's position more extreme than Fuller's—that where Fuller claims there is a causal relationship between positivism and amorality/immorality, Cover allegedly holds that the relationship between positivism and amorality is one of identity. See Schauer, *supra* note 1, at 806 n.18; *supra* text accompanying note 15.

19. See Cover, *Nomos and Narrative*, *supra* note 15, at 16 ("The sober imperial mode of world maintenance holds the mirror of critical objectivity to meaning, imposes the discipline of institutional justice upon norms, and places the constraint of peace on the void at which strong bonds cease."). Cover is a "positivist" in the limited sense that he understands law as the product of human beings and human institutions, rather than of some transcendent set of fundamental moral principles. But Cover is not a *legal* positivist because he maintains that law is an ongoing cultural production of human communities, rather than an artifact of formal lawmaking. See *id.* at 11 ("the creation of legal meaning—"jurisgenesis"—takes place always through an essentially cultural medium"); Robert M. Cover, *Violence and the Word*, 95 YALE LJ 1601, 1602 n.2

ism can play an important emancipatory role in demystifying and delegitimizing statist law. As Cover observes, "Legal positivism may be seen, in one sense, as a massive effort that has gone on in a self-conscious way . . . to strip the word 'law' of these [moral, political, and philosophical] resonances."²⁰

There is nothing in Cover's presentation of the jurisprudential debates over slavery that is inconsistent with Schauer's account of the traditional dispute between positivism and adherents of natural law. As Cover explains, most abolitionists argued that natural law should be given effect as incorporated in positive law or as a guide to its construction.²¹ Thus, even those abolitionists who, unlike Phillips, urged judges to subvert slavery remained at least nominally positivist.²² As Cover presents the conflict between those abolitionists who advocated recourse to natural law and the judges who enforced slavery, it was a conflict between a morally infused positivism and a narrowly conceived—and these are Cover's exact words—"role fidelity."²³

At this point, it should be apparent that virtually all of what Schauer offers as "clarification" is actually intellectual common ground between him and Cover. So, exactly what is Schauer's beef? Simply this, that Cover refers to amoral judicial decisionmaking as "positivist." Schauer complains that "the label is inappropriate, largely because nothing about legal positivism entails any attitude whatsoever about obedience to law."²⁴ But there is a small problem here. To the extent Schauer claims that Cover *equates* legal positivism with amoral law-obedience, he is simply wrong. To the extent Schauer means to say that amoral law-obedience cannot accurately be referred to as "positivist," he contradicts his own view.

In *Justice Accused*, Cover does present the abolitionist Phillips as

(1986) ("[T]he thrust of *Nomos* [i]s that the creation of legal meaning is an essentially cultural activity which takes place (or *best* takes place) among smallish groups."). As such, Cover is a pluralist (and anarchist) who champions the multiplicity of "law" that is inevitably generated by "the too fertile forces of jurisgenesis." Cover, *Nomos and Narrative*, *supra* note 15, at 16.

20. Robert M. Cover, *The Folktales of Justice: Tales of Jurisdiction*, 14 CAP. U. L. REV. 179, 180 (1985) (footnote omitted). Cover goes on to explain, however, that the ineradicable social dimensions of meaning "doom the positivist enterprise to failure, or, at best, to only imperfect success." *Id.*

21. See, e.g., COVER, *JUSTICE ACCUSED*, *supra* note 15, at 34-35.

22. See *id.* at 156-57.

23. *Id.* at 192-93 ("The antislavery bar sought doctrinal growth, minimally. The utopians sought constitutional upheaval. . . . The judicial responses to these demands, insofar as they went beyond refusal, appealed to one or more of four justifications for role fidelity.").

24. Schauer, *supra* note 1, at 806 n.18.

contending that judges are constrained to obey the requirements of positive law. As Phillips wrote, "Their only 'paramount obligation,' as judges, is to do what they agreed to do when they were made judges, or quit the bench."²⁵ But, as Cover explains, even Phillips maintained that the judge's obligation to follow positive law stemmed not from positivist legal theory, but from "external moral criteria."²⁶ Similarly, in *Nomos and Narrative*, Cover uses the term "positivist" to describe a judge who narrowly followed the prescriptions of positive law. But, contrary to Schauer's characterization, Cover does not apply the "positivist" label to the act of amoral law-obedience. All Cover actually says is that "Roger Taney's positivist interpretation [in *Dred Scott*] . . . assumed a principle justifying obedience to the Constitution."²⁷ In other words, what Cover says is perfectly consistent with the view that Taney, like Phillips, assumed an external principle requiring judicial conformity to positive law.²⁸

Indeed, a careful reading of Cover's statement discloses that what he describes as "positivist" is only Taney's *interpretation* of the Constitution. This is a statement that Schauer cannot possibly take issue with because his entire argument—both here and elsewhere—hinges on the claim that positivist interpretation is, indeed, possible. For Schauer, positivism is nothing other than a largely mechanical formalism shorn of any considerations of morality, policy, or purpose (except to the extent incorporated in the positive law itself). Thus, what he offers here as "presumptive positivism" is merely a specialized, constitutional variant of what he has elsewhere described as a "presumptive formalism" in which "there would be a presumption in favor of the result generated by the literal and largely acontextual interpretation of the most locally applicable rule."²⁹ In his most extensive and sophisticated treat-

25. COVER, *JUSTICE ACCUSED*, *supra* note 15, at 153 (quoting WENDELL PHILLIPS, REVIEW OF LYSANDER SPOONER'S UNCONSTITUTIONALITY OF SLAVERY 15 (James M. McPherson & William Loren Katz advisory eds., Arno Press 1969) (1847)).

26. COVER, *JUSTICE ACCUSED*, *supra* note 15, at 153. As Cover explains, this moral duty was derived from notions of social compact and natural law. *Id.* at 28.

27. Cover, *Nomos and Narrative*, *supra* note 15, at 37 (discussing *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857)).

28. In the actual passage, Taney emphasized the requirements both of role morality and of an unspecified duty. See *Scott*, 60 U.S. (19 How.) at 405 ("It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws. . . . The duty of the court is, to interpret the instrument they have framed, with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted.").

29. Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 546-47 (1988) (suggesting that "pre-

ment, *Playing by the Rules*,³⁰ Schauer explicitly equates positivism and rule formalism. He observes that "a positivist system is in many respects the systemic analogue of a rule"³¹ and explains that rule-based decisionmaking "exists insofar as instantiations resist efforts to penetrate them in the service of their justifications."³²

We are now in a posture to see clearly (1) what Schauer so dislikes about Cover's position and (2) why none of Schauer's arguments in fact respond to that position.

Schauer's dispute with Cover has nothing to do with the conceptual questions of whether legal positivism logically entails either obedience to law or amoral decisionmaking. Schauer and Cover appear to agree on these analytic points, as we have seen. Rather, what so irks Schauer is that Cover condemns as "positivist" the kind of arid formalism that treats rules (and other decisional criteria) as severable from their justifications and effects.³³ For Cover, a legal prescription can never have a "literal" or "acontextual" meaning because it cannot, "even when embodied in a legal text, escape its origin and its end in experience."³⁴

Cover thus mounts a twofold attack on the conceptual and psychological viability of positivist interpretation. First, he argues that there

sumptive formalism" be used to allocate decisionmaking authority between lower and appellate courts such that the lower courts be restricted to the formal requirements of the rule and the reviewing courts be permitted to consider the application of the rule in light of its purpose). At this stage it is enough to observe that Schauer does not espouse a naive conception of "literal" or "acontextual" meaning. (We might note, with appropriate irony, that he does not intend these terms literally.) As I demonstrate in the next section, however, Schauer's relatively more sophisticated notion of "literal" and "acontextual" meaning does not survive analysis. See *infra* text accompanying notes 73-111.

30. FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* (1991).

31. *Id.* at 199.

32. *Id.* at 76. As Schauer explains,

A rule exists (for some agent or in some decision-making environment) insofar as an instantiation of a justification is treated (by that agent or by the decision-makers in that decision-making environment) as entrenched, having the power to provide a reason for decision even when that instantiation does not serve its generating justification.

Id. One of the sophisticated aspects of Schauer's discussion is his treatment of rules as entrenched generalizations. This allows his theory to comprehend both those cases in which the rule is not identical to its canonical form and those in which the justification is itself treated as the "rule," acting as an entrenched generalization with respect to higher order justifications. *Id.* at 62-76, 207-15.

33. See Cover, *Nomos and Narrative*, *supra* note 15, at 5 ("Every prescription is insistent in its demand to be located in discourse—to be supplied with history and destiny, beginning and end, explanation and purpose.").

34. *Id.*

can be no "limited domain" of law because every legal prescription is necessarily situated in and inextricable from its larger, meaning-conferring *nomos*.³⁵ Second, he argues that, because every legal prescription is a call to human action, positivist interpretation is a radical impossibility. "If there existed two legal orders with identical legal precepts and identical, predictable patterns of public force, they would nonetheless differ essentially in meaning if, in one of the orders, the precepts were universally venerated while in the other they were regarded by many as fundamentally unjust."³⁶ As an example, Cover points out that both abolitionists like Phillips and judges like Taney agreed on the dictates of positive law. Nevertheless, Cover explains that

The two groups . . . could only be said to agree on the meaning of the document abstracted from any need or desire to act upon it. But by its own terms the text is a ground for action. And no two people can be said to agree on what the text requires if they disagree on the circumstances in which it will warrant their actions.³⁷

Interpretation always entails a degree of ethical commitment because, as Paul Ricoeur observes, "what is interpreted in a text is the proposing of a world that I might inhabit and into which I might project my ownmost powers."³⁸

Obviously, Cover does not deny that one can self-consciously engage in positivist interpretation of the sort employed by Taney. Rather, Cover's profound point is that positivist interpretation fails on its own terms. No interpretation is amoral or acontextual because every interpretation occurs in a moral, political, and institutional context.³⁹ And

35. Compare *id.* at 4 ("The rules and principles of justice, the formal institutions of the law, and the conventions of social order are . . . but a small part of the normative universe No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning.") with SCHAUER, *supra* note 30, at 199 ("positivism is about normative systems smaller than and distinguishable from the entire normative universe").

36. Cover, *Nomos and Narrative*, *supra* note 15, at 7.

37. *Id.* at 37 n.104. For further, more general discussion of the ways in which the performative can have a radical effect on meaning, see Winter, *supra* note 12, at 795-97, 802-03, 806-07.

38. RICOEUR, *supra* note 12, at 81; cf. Cover, *Nomos and Narrative*, *supra* note 15, at 6 ("The varied and complex materials of [a great legal civilization] . . . present not only bodies of rules or doctrine to be understood, but also worlds to be inhabited. To inhabit a *nomos* is to know how to live in it.") (footnote omitted). For a discussion of how the process of interpretation necessarily involves identification and at least provisional commitment to the world created by the text, see Steven L. Winter, *The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225, 2272-79 & n.164 (1989).

39. As Cover writes,

no interpretation is severable from its justifications because every interpretation implicates the commitments of the interpreter and of those subject to her interpretation, all of whom must decide whether to follow, ignore, or enforce the law's command.⁴⁰ Accordingly, Cover castigates judicial self-abnegation in the face of positive law as an act steeped in artifice and denial, what he calls the "hermeneutic of jurisdiction."⁴¹ For Cover, the appeal to role fidelity is the defensive maneuver of judges attempting to conceal their failure of commitment behind "a static and simplistic model of law."⁴²

But that simplistic model is precisely what Schauer is arguing for in his presumptive positivism. Relying on the limited domain thesis,

[I]t is precisely this embedding of an understanding of political text in institutional modes of action that distinguishes *legal* interpretation from the interpretation of literature, from political philosophy, and from constitutional criticism. Legal interpretation is either played out on the field of pain and death or it is something less (or more) than law.

Cover, *supra* note 19, at 1606-07. Cf. Sanford Levinson, *Law as Literature*, in *INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER* 155, 163 (Sanford Levinson & Steven Mailloux eds., 1988) ("[T]he principal social reality of law is its coercive force vis-à-vis those who prefer to behave other than as the law 'requires.' . . . [T]he massive disruption in lives that can be triggered by a legal case is not a conversation.").

40. "'Law' is never just a mental or spiritual act. A legal world is built only to the extent that there are commitments that place bodies on the line. . . . [T]he interpretive commitments of officials are realized, indeed, in the flesh." Cover, *supra* note 19, at 1605. Cover gives the powerful example of the way in which the civil disobedience of the civil rights movement changed the meaning of "the law."

By provoking the response of the state's courts, the act of civil disobedience changes the meaning of the law articulated by officialdom. For the courts, too, may or may not speak in blood.

. . . The community that disobeys the criminal law upon the authority of its own constitutional interpretation . . . forces the judge to choose between affirming his interpretation of the official law through violence against the protesters and permitting the polynomia of legal meaning to extend to the domain of social practice and control. The judge's commitment is tested as he is asked what he intends to be the meaning of his law

Cover, *Nomos and Narrative*, *supra* note 15, at 47-48.

41. Cover, *Nomos and Narrative*, *supra* note 15, at 53-60. As Cover explains:

In the face of challenge, the judge—armed with no inherently superior interpretive insight, no necessarily better law—must separate the exercise of violence from his own person. The only way in which the employment of force is not revealed as a naked juripathic act is through the judge's elaboration of the institutional privilege of force—that is, jurisdiction. . . . The most basic of the texts of jurisdiction are the apologies for the state itself and for its violence—the ideology of social contract or the rationalizations of the welfare state.

Id. at 54 (footnote omitted). Cover's phrase "hermeneutic of jurisdiction" is a clever play on Paul Ricoeur's "hermeneutics of suspicion." See PAUL RICOEUR, *FREUD AND PHILOSOPHY: AN ESSAY ON INTERPRETATION* 32-36 (Denis Savage trans., 1970).

42. COVER, *JUSTICE ACCUSED*, *supra* note 15, at 6.

Schauer contends that it is possible and even desirable to have a regime of positivist interpretation in which the interpreter does not consider the justifications or effects of the relevant legal rules.

To the positivist there can be systems whose norms are identified by reference to some identifier that can distinguish *legal* norms from other norms, such as those of politics, morality, economics, or etiquette. This identifier . . . picks out legal norms from the universe of norms If a norm is so selected, it is a valid legal norm, notwithstanding its moral repugnance, economic inconsistency, or political folly.⁴³

The entire thrust of Schauer's "constitutional positivism" is that society could insist that the current Justices adhere to a narrow role morality and faithfully follow the dictates of positive law without regard to its justifications or effects. And, as he candidly concedes, this view presupposes the limited domain thesis: "If . . . there is no such limited domain or identifiable subset, then the role morality conception can never get off the ground."⁴⁴

With the dispute thus cast in bas-relief, it is easy to see how little of Schauer's argument is responsive (or even relevant) to Cover's anti-positivist critique. In place of a theoretical defense of the limited domain thesis, Schauer offers a relentlessly analytical examination of the traditional dispute between legal positivism and natural law. Thus, he declares that "the central positivist claim about the separation of law and morality is . . . simply a claim that the existence of law is conceptually distinct from its moral worth."⁴⁵ He then undertakes to criticize those who deride positivism for failing to comprehend the logical limits of this very narrow claim.

The problem is that, on his own account, this argument confuses what is analytically secondary (the separation of law and morals) with what is logically primary and fundamental (the limited domain thesis). As Schauer elsewhere explains, "[T]he heart of positivism lies not in something special about the law/morality distinction, but in the concept of *systemic isolation*."⁴⁶ In other words, the theoretical core of positivism (and what is common to competing versions⁴⁷) is the idea

43. SCHAUER, *supra* note 30, at 199 (discussing the role of Hart's "rule of recognition" or what Dworkin calls "pedigree").

44. Schauer, *supra* note 1, at 824.

45. *Id.* at 800-01.

46. SCHAUER, *supra* note 30, at 199.

47. *Id.* at 197-99; see also Coleman, *supra* note 4, at 140-42 (discussing "the separability

that the "legal" is conceptually distinguishable from the larger universe of the "nonlegal"—of which, Schauer points out, morality "is but an example."⁴⁸ Thus, both Schauer's constitutional positivism and the traditional positivist claim about the separation of law and morals presuppose the truth of the limited domain thesis. But it is precisely this claim that is put in question by the most sophisticated antipositivist critiques. And it is precisely on this point that Schauer most strikingly fails to engage.

Rather, in an almost imperceptible sleight of hand, Schauer responds by exploiting the fact that positivism and amoral law-obedience are not *mutually* entailed. He explains that legal positivism does not entail amoral decisionmaking, but then acknowledges that amoral decisionmaking does entail legal positivism.⁴⁹ He explains that legal positivism does not require a narrow conception of judicial role morality, but then concedes that a narrow role morality does depend on the limited domain thesis.⁵⁰ He identifies the limited domain thesis as the necessary precondition for—indeed, "the heart" of—legal positivism, but then fails even to acknowledge that this precondition is precisely what most contemporary antipositivists deny. In short, Schauer admits that the amoral judicial decisionmaking so many decry as "positivist" is not possible without the positivism that he fails in fact to defend.

Instead, Schauer supports his position by accusing his opponents of logical confusion. "[T]he truth of the limited domain thesis, although a necessary condition for this role morality conception of the judicial role, is not a sufficient condition. . . . My sense is that many of the existing attacks on positivism in most of its forms are based on a misperception of this last point."⁵¹ But, as we have just seen, this alleged misperception does not characterize Cover's position at all.⁵² Rather, it is only Schauer's *misstatement* of his opponent's position that commits the logical error of *equating* positivism with the limited domain thesis. "[T]he existing attacks on positivism" simply have nothing to do with

thesis").

48. SCHAUER, *supra* note 30, at 198.

49. Schauer, *supra* note 1, at 810 ("although legal positivism does not entail a morally sterile approach to adjudication . . . starting *from* a morally sterile approach does presuppose legal positivism").

50. *Id.* at 825 ("The truth of the limited domain thesis . . . is a necessary condition for the operation of a conception of judicial behavior pursuant to which judges make decisions not on the basis of all or most of what is within their moral field of vision, but rather on the basis of the more limited field circumscribed as 'the law.'").

51. *Id.*

52. See *supra* text accompanying notes 24-28.

Schauer's concern over the criterial adequacy of the different usages of the term "positivist." Rather, those attacks *are* about the conceptual implausibility of what Schauer concedes is the logical prerequisite for the very version of positivism that he advocates, i.e., the limited domain thesis. From the antipositivist's perspective, the problem is with the ethics of a judicial stance that amounts to little more than an exercise in psychological denial hiding behind a mask of positivist law.

One way to understand Schauer's misinterpretation is to see it as the product of a traditional analytic framework that relentlessly defines categories and concepts in terms of necessary and sufficient conditions.⁵³ This focus on questions of analytical "clarity" and "precision" deflects attention—both Schauer's and ours—from the powerful contemporary attacks on positivism's central tenet. While Schauer rigorously examines whether his opponents have faithfully met the necessary and sufficient conditions for the use of the term "positivist," he seems somehow to miss the fact that the brunt of their very forceful assault has fallen on the most essential premise of his position.

53. This view is so ingrained that there may not seem to be any other alternative. Cf. GEORGE LAKOFF, *WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND* xvii (1987) ("The objectivist view rests on a theory of categories that goes back to the ancient Greeks and that even today is taken for granted as being not merely true, but obviously and unquestionably true."). But the point of Wittgenstein's famous example "Shew the children a game" is precisely that categories cannot be described in terms of necessary and sufficient conditions.

Consider for example the proceedings that we call "games". I mean board-games, card-games, ball-games, Olympic games, and so on. What is common to them all?—Don't say: "There *must* be something common, or they would not be called 'games' "—but *look and see* whether there is anything common to all.—For if you look at them you will not see something that is common to *all*, but similarities, relationships, and a whole series of them at that.

LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 31e (G.E.M. Anscombe trans., 3d ed. 1953). Wittgenstein characterized these similarities and relationships as "family resemblances." *Id.* at 32e. Schauer gives short shrift to this point. See SCHAUER, *supra* note 30, at 40, 42 n.5, 59-60. But, as we will see below, it is fatal to the plausibility of any formalist approach to law and language. See *infra* text accompanying notes 92-96.

On the basis of extensive empirical evidence, Lakoff has demonstrated that the similarities and relationships captured by Wittgenstein's notion of "family resemblances" can be further specified. Most human categorization takes the form of "radial categories" organized around a central model with conventionalized extensions that cannot be generated by rule. LAKOFF, *supra*, at 79-114. If one were to work out the details of Schauer's account of "positivism," see *supra* text accompanying notes 46-50, one would find that it nicely exemplifies this phenomenon—possessing a core ("the heart") and a series of peripheral variants. For a more detailed discussion of the theory of radial categories, its relationship to H.L.A. Hart's notion of "core" and "periphery," and its significance to law, see Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105 (1989).

III. DISTINCTIVE, BUT NOT DISTINCT

A. *Assault on the Citadel*

It is instructive to consider what Schauer *does* say in support of the limited domain thesis. He explains "the limited domain notion of law as treating text, precedent, and perhaps other authoritative materials as relatively distinct from other sources."⁵⁴ As evidence that there are such "distinct sources," he invites us to "consider the collection overlap among all the institutions called 'law libraries,' and the lack of collection overlap between the set of law libraries and the set of libraries of other sorts."⁵⁵ But, by the next page, this bit of proof has already been demoted to a "seeming reality" and further qualified by the admission that "the kind of stuff found in books published by the West Publishing Company" is only "somewhat different" from the broader range of society's norms, and then only in "the overlapping, but not mutually exclusive sense."⁵⁶

These passages are remarkable because they illustrate how weak and implausible the limited domain thesis is, even on its own terms. Put the claims of the limited domain thesis up against any of the actual antipositivist critiques and one can see how fantastic they really are. The law library does not stand alone on a darkling plain. It is surrounded by all the varied instruments and institutions of culture. Instead of "systemic isolation," one finds that the so-called limited domain of law is thoroughly enveloped and suffused by the larger normative culture. Like the law library, it remains true that the overt paraphernalia of the law stand out amid the larger field of cultural constructions. It is easy to distinguish between a statute and a poem, and these two "literary" forms have very different weight as authority in a court of law. Yet despite the fact that no one would confuse Euripides' *Medea* with the Second Restatement of Contracts, both employ *precisely* the same arguments and assumptions with respect to such ostensibly "modern" doctrines as performance as consideration,

54. Schauer, *supra* note 1, at 824-25 (footnote omitted). In a footnote, he goes on to specify some of these "authoritative materials" as the original intent of the framers, *The Federalist* papers, statements in legal treatises and law journals, and the practices of certain political bodies. *Id.* at 824 n.62. Even at this point, it should be clear how heavily tainted with "nonlegal" material some of these sources are: does anyone seriously think that *The Federalist* papers or the practices of political bodies like the Senate Judiciary Committee are not themselves the situs of the debates that, in Schauer's words, characterize "the full set of the society's political morality"? *Id.* at 825 n.62.

55. *Id.* at 825 n.62.

56. *Id.* at 826.

quantum meruit, detrimental reliance, and rescission for impossibility of performance.⁵⁷ Indeed, whether considered in operation or content, the law is anything but "distinct."

Robert Cover's radical assault on the autonomy and authority of positive law comes from within and without; its challenge is performative as well as constative. In the heart of the law library, on the very shelf marked "Harvard Law Review," sits his meditation on *nomos* and narrative, biblical exegesis and radical utopian constitutionalism, the jurisgenerative "hermeneutic of principle" and the jurispactic "hermeneutic of jurisdiction."⁵⁸ As Paul Kahn observes, "The essay represents an extreme assault on ordinary legal sensibilities and an immediate challenge to [the] confident reliance on the language and habits of the legal community."⁵⁹

Its radical message lies at the point where its form and content converge. When Cover says that "[n]o set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning,"⁶⁰ his profound point is that what passes itself off as a limited domain of law is merely the epicenter of the much larger—indeed, seismic—cultural process of law-creation. As Paul Kahn explains, "A common text is not itself a constraint on the construction of meaning; it is an invitation to the jurisgenerative forces of the community."⁶¹ Because all meaning is meaning in a context, legal meaning can never be successfully extracted from its cultural context,⁶² severed from its social

57. Steven L. Winter, *Foreword: On Building Houses*, 69 TEX. L. REV. 1595, 1616-18 (1991). [F]rom this we can surmise that the supposedly separate rationality of the law is continuous with—and largely indistinguishable from—the perfectly ordinary reason of everyday life. . . .

. . . [This] should not surprise, however, since the same embodied, socially-situated humans do the ratiocination in each and every case. And from this we can draw a further conclusion: that law is a deeply human product which is inextricably bound up with and unavoidably contingent upon wider cultural forms.

Id. at 1618-19.

58. Cover, *Nomos and Narrative*, *supra* note 15, at 4-6, 11-13, 19-25, 35-40, 40-56.

59. PAUL W. KAHN, *LEGITIMACY AND HISTORY: SELF-GOVERNMENT IN AMERICAN CONSTITUTIONAL THEORY* 196-97 (1992).

60. Cover, *Nomos and Narrative*, *supra* note 15, at 4.

61. KAHN, *supra* note 59, at 198. Cover provides a concrete example. "All Americans share a national text in the first or thirteenth or fourteenth amendment, but we do not share an authoritative narrative regarding its significance." Cover, *Nomos and Narrative*, *supra* note 15, at 17. The narrative of the religion clauses, for example, can begin with the Exodus from Egypt, the travails of Sir Thomas More, the landing of the Puritans, "or it can be a specific answer to a specific question raised about the national compromises struck between 1787 and 1789." *Id.* at 17 n.47.

62. Cover gives the example of the biblical law of primogeniture, which is set against a series of biblical narratives (Cain and Abel, Ishmael and Isaac, Esau and Jacob, Joseph and his broth-

significance,⁶³ or reduced to the mere artifacts of positive law.⁶⁴

The conclusion emanating from this state of affairs is simple and very disturbing: there is a radical dichotomy between the social organization of law as power and the organization of law as meaning. . . . The uncontrolled character of meaning exercises a destabilizing influence upon power. Precepts must "have meaning," but they necessarily borrow it from materials created by social activity that is not subject to the strictures of provenance that characterize what we call formal lawmaking.⁶⁵

The fallacy of the limited domain thesis is that it mistakes the salience and social distinctiveness of legal materials for conceptual autonomy and interpretive insularity. A lawyer always will approach an issue with the material designated "legal" firmly fixed in the foreground of her attention. Nevertheless, she can read, understand, and employ that material only against a much broader cultural background. At the first level, then, the fallacy of the limited domain thesis inheres in the fact that all legal prescription takes place against a cultural backdrop of formally unrestrained interpretation.

ers) in which the normal order of succession is overturned. The positive prescription is one in which the eldest son inherits the mantle of leadership, but the meaning of the law is qualified by a background understanding in which the succession of the younger child is seen as a mark of divine providence. Cover, *Nomos and Narrative*, *supra* note 15, at 19-22. As Cover observes, "This does not mean that the formal precept was not obeyed. Indeed, the narratives in question would lose most if not all of their force were it not for the fact that the rule was followed routinely in ordinary life." *Id.* at 21-22.

63. Cf. Cover, *supra* note 20, at 180 n.7:

The positivist assures us that evil "law" is "law" nonetheless, that the character of something as "law" cannot depend upon its moral qualities. Yet, the mythologies that we share *do* give that which is law legitimating force not by virtue of a sound analytic argument but by virtue of brute facts of culture, language and history. The result of the two vectors of positivism and cultural legitimation may be the unwanted greater legi[tu]lation of evil law.

64. See Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CAL. L. REV. 1441 (1990):

[L]aw is the unmistakable product of human interactions as they are institutionalized first in social practice and then as cultural and legal norms. . . . Consider the double irony of the right to travel. The right is considered "fundamental," "firmly established and repeatedly recognized" despite the fact that it appears nowhere in the Constitution and despite the inability of the Court even to agree on which provision in the Constitution provides a textual anchor for the right. And, yet, it makes perfect sense. . . . Indeed, what could be more fundamentally American than the right to travel?

Id. at 1512-13 (quoting *United States v. Guest*, 383 U.S. 745, 757 (1966)).

65. Cover, *Nomos and Narrative*, *supra* note 15, at 18.

But the fallacy runs much deeper. It is not just that the law library is situated in and illuminated by the broader field of culture. There is also the small matter of all that "stuff" found in those books published by West. Cover's observation that the law must borrow its meaning from materials created by social activity suggests that the law is thoroughly constructed out of and, therefore, permeated by the larger culture. Indeed, close examination reveals that culture is ineradicably *interior* to the language in which the law is written.

As I have argued previously, neither positivism nor the conventional questions regarding the appropriate judicial role survive the recognition that even the simplest legal commands can only be expressed in the normatively loaded language of the culture.⁶⁶ Consider, once again, H.L.A. Hart's proverbial rule prohibiting vehicles in the park.⁶⁷ If the rule has a "literal" and "acontextual" meaning—that is, if we can comprehend the coverage of the rule even without reflection—it is only because our background conception of a "park" informs our apprehension of the rule and renders it intelligible.⁶⁸ We understand that a park is for recreation, relaxation, and other leisure activities inconsistent with the hazards of traffic.⁶⁹ But these reflex assumptions about the appropriate uses of a park are themselves contingent normative developments that only emerged in the first few decades of this century. In fact, these assumptions are very much at odds with the original design and intended use of America's earliest (and most famous) urban parks as institutions of republican self-governance.⁷⁰

66. Winter, *supra* note 53, at 1172-80; Winter, *supra* note 57, at 1601-02, 1619-23; Steven L. Winter, *An Upside/Down View of the Countermajoritarian Difficulty*, 69 TEX. L. REV. 1881 (1991) [hereinafter Winter, *Upside/Down View*].

67. H.L.A. HART, *THE CONCEPT OF LAW* 121-32 (1961); Hart, *supra* note 17, at 607-08.

68. See Winter, *Upside/Down View*, *supra* note 66, at 1885-89; cf. STANLEY FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* 320-21 (1989) ("This simply means . . . that the context is so established, so deeply assumed, that it is invisible to the observer . . .").

69. In this case, the information conveyed by the conventional conceptions "park" and "vehicle" coincide in a manner that renders the rule relatively clear and unproblematic.

The "purpose" of the statute will therefore be evident from its language terms. It will be evident . . . because "vehicle" is not just a word, but a part of a cognitive process that evokes an experiential, embodied model. As a structure of thought, that model will identify an experiential gestalt: an object, its purposes, the manner of its use, and its concomitant hazards. The same will be true of the word "park": not any area of grass and trees, but one put aside for certain kinds of uses by embodied humans.

Winter, *supra* note 53, at 1178-79.

70. Winter, *Upside/Down View*, *supra* note 66, at 1895-1901. Consequently, many sights familiar in contemporary parks—such as statuary, baseball fields, and bicycling—were initially excluded from America's urban parks because they were considered inconsistent with the fundamen-

Now, Schauer does not deny that what he refers to as "literal" meaning "incorporates substantive moral, social, and political presuppositions that could be and may yet be otherwise."⁷¹ This should be a fatal admission because, conceptually, the limited domain thesis should not survive the interpenetration of the "is" and the "ought." Indeed, in the current essay, Schauer concedes that his constitutional positivism is not possible without the fact-value distinction.⁷² But he believes he has saved the point by showing in earlier work that it is nevertheless possible to have the kind of positivist interpretation consonant with a narrow role morality.⁷³ This would be true as long as the normative dimension of the "literal" meaning of a rule-term is sufficiently fixed to operate in a uniform and consistent manner, without the need for conscious deliberation by the decisionmaker. As we shall see in the next section, however, this assumption depends upon a view of language that is demonstrably incorrect.

B. *Legal and Linguistic Formalism*

To support his positivist view of law, Schauer must defend a formalist view of language—i.e., one that functions relatively automatically without recourse to purpose or context. Thus, his argument for the "systemic isolation" of law in fact leads him to argue for "the semantic autonomy of language."⁷⁴ Schauer seems to believe that this semantic autonomy is easily established; he merely points to "the ability of symbols—words, phrases, sentences, paragraphs—to carry meaning independent of the communicative goals on particular occasions of the users of those symbols."⁷⁵ He then shores up this highly reified view of language by contrasting it with the easily defeated position that meaning is purely contextual, a product of subjective purpose and,

tal character and purpose of the park.

71. SCHAUER, *supra* note 30, at 58.

72. See Schauer, *supra* note 1, at 826-27. ("[W]ithout the fact/value distinction there can be no distinction between what the law is and what the law ought to be. . . . [W]ithout scientific positivism there can be no legal positivism, and without legal positivism there can be no role morality . . .").

73. SCHAUER, *supra* note 30, at 42-59. See *infra* text accompanying notes 74-84.

74. *Id.* at 55.

75. *Id.* Here, Schauer's conclusion is presented by means of a highly conventional set of *object* metaphors, locating the meaning *in* the words that independently *carry* the meaning. For a discussion of this metaphor-system and its centrality to our conceptual system, see Steven L. Winter, *Bull Durham and the Uses of Theory*, 42 STAN. L. REV. 639, 659-61 (1990); Steven L. Winter, *Death Is the Mother of Metaphor*, 105 HARV. L. REV. 745, 753-57 (1992) (book review).

therefore, indeterminate.⁷⁶ To refute this position, he simply observes that it is possible to read and understand an Australian newspaper of 1836 but not a contemporary's article on legal positivism written in Chinese.⁷⁷ Believing that he has thus secured meaning from the indeterminacies introduced by pragmatics (i.e., context of use) and subjective purpose, he then defines what remains as "literal" and "acontextual."

The identification of acontextual meaning involves not the denial of the necessity of context, but the recognition that a large number of contextual understandings will be assumed by all speakers of a language. These aspects of context might be thought of as a *universal context* . . . precisely because, however much these widely shared components . . . may be temporally or culturally contingent, they are largely invariant across English speakers at a given time. . . .

. . . [T]he ability of one English speaker to talk to another about whom she knows nothing is the best proof of the fact that at a particular time *some* meaning exists that can be discerned through access only to those skills and understandings that are definitional of linguistic competence.⁷⁸

Schauer's argument fails, however, because it is premised on a grossly mistaken view of language—one that, like his model of law, is unrealistically static and simplistic. Consider exactly what would have to be true in order for Schauer's claim to be correct. First, it would have to be true that the only factors introducing ambiguity into language were pragmatics and subjective purpose, so that what remained after their elimination was coherent, uniform, and (relatively) stable. Otherwise, the supposed invariance would prove ephemeral. Second, it would have to be true that whatever factors concededly cause mobility of meaning over time (and across cultures) do not operate in the realm of synchronic meaning (i.e., "at a given time"). In short, it would have to be true that all destabilizing factors were *extrinsic* "to those skills and understandings that are definitional of linguistic competence."⁷⁹ Examination of ordinary language, however, demonstrates that factors

76. See SCHAUER, *supra* note 30, at 59.

77. *Id.* at 55-56. Schauer does not commit himself to any particular account of how this is possible; he relies merely on the fact that it is. As we shall see shortly, however, the nature of the account does matter—and quite significantly.

78. *Id.* at 57-58.

79. *Id.* at 58.

like purpose, context, and experience are *intrinsic* to one's basic linguistic competence. Consequently, the stability of meaning necessary for Schauer's positivism is impossible.

To supply the necessary stability of meaning, Schauer relies on a concept he calls the "model of entrenchment."⁸⁰ He explains: "Instead of being continuously malleable in the service of changing circumstances, generalizations become *entrenched*, and the entrenchment of past generalizations impedes the possibility of an infinitely sensitive and adaptable language."⁸¹ Schauer describes entrenchment as "in large part a psychological phenomenon" and illustrates the point with a "shop-worn but still serviceable example."⁸² He contrasts "the numerous words in the Inuit language for different types of snow" with the fact that English has only a single generalization that "gather[s] up different types of snow and suppress[es] differences among them."⁸³ From this he draws two conclusions: first, that English "will ordinarily make it more difficult, albeit not impossible, to think and talk about the heterogeneity of snow than . . . [if] the generalization 'snow' [had] not been so entrenched in our language," and, second, that the suppressed particulars "are likely in practice to be far less accessible . . . [and] less subject to recall on demand."⁸⁴

It is important to recognize that Schauer's claim here is an empirical and not a conceptual one. In principle, therefore, it can be tested against the empirical data of ordinary language use. Although there is truth to Schauer's observation that "entrenched generalizations mould our imagination and apprehension,"⁸⁵ categories do not operate in the reified, totalizing way necessary for Schauer's positivism.

Indeed, on this point, the example of "snow" is particularly ill-chosen.⁸⁶ Every child knows that snow comes in at least two forms: the

80. *Id.* at 42-52. Both his view of language and his idea of rule formalism explicitly depend on this concept.

81. *Id.* at 42.

82. *Id.*

83. *Id.*

84. *Id.* at 42-43.

85. *Id.* at 43. This, after all, is the import of the phenomenon of prefiguration. See *supra* text accompanying note 12. The ingenious Kay-Kempton experiment has provided empirical confirmation of this point. See LAKOFF, *supra* note 53, at 330-33; Winter, *supra* note 53, at 1140-42.

86. George Lakoff describes repeated invocations of the 22-words-for-snow example as "[p]ossibly the most boring thing a linguistics professor has to suffer at the hands of eager undergraduates. . . ." LAKOFF, *supra* note 53, at 308; see also GEOFFREY K. PULLUM, THE GREAT ESKIMO VOCABULARY HOAX 166 (1991) ("The prevalence of the great Eskimo snow hoax is testimony to falling standards in academia, but also to a wider tendency . . . toward fundamentally

light powdery stuff that is easy to shovel and the wet sticky stuff that is great for snowballs.⁸⁷ Nothing about our language precludes either the perception or the memory of those particulars. Moreover, it is simply untrue that we have only a single word for snow. As George Lakoff notes:

English-speaking skiers have . . . at least a dozen words for snow (e.g., *powder*) in their vocabularies, and yet their conceptual systems are largely the same as mine. Anyone with an expert knowledge of some domain of experience is bound to have a large vocabulary about things in that domain—sailors, carpenters, seamstresses, even linguists. When an entire culture is expert in a domain (as Eskimos must be in functioning with snow), they have a suitably large vocabulary.⁸⁸

Thus, Schauer is doubly wrong in his conclusions. Not all words represent entrenched generalizations; a particular linguistic category may or may not be an entrenched part of the conceptual system.⁸⁹ Moreover, generalizations do not operate in the relatively static and reified way that he seems to suppose.

Although "snow" is not a particularly good example of an entrenched generalization, it is an opportune example nevertheless because it nicely demonstrates several of the fallacies of Schauer's view of language. The fact that localized domains of experience can ground

anti-intellectual 'gee-whiz' modes of discourse and increasing ignorance of scientific thought.").

87. I apologize for any implicit gender or geographic bias, but the reality of such bias is intrinsic to the substantive point that meaning is contingent on experience and, therefore, can vary even within a single linguistic community.

88. LAKOFF, *supra* note 53, at 308; see also PULLUM, *supra* note 86, at 170:

[T]he list is . . . not remarkably different in size from the list in English (which, remember, boasts not just *snow*, *slush*, and *sleet* and their derivatives, but also count nouns like *avalanche* and *blizzard*, technical terms like *hardpack* and *powder*, expressive meteorological descriptive phrases like *flurry* and *dusting*, compounds with idiosyncratic meanings like *snow cornice*, and so on; many of the [Central Alaskan Yupik] terms . . . are much more like these terms than like simple mass nouns for new and unusual varieties of snow).

89. LAKOFF, *supra* note 53, at 308 ("There are no great conceptual consequences of having a lot of words for snow."); see also PULLUM, *supra* note 86, at 165-66:

[E]ven if there were a large number of roots for different snow types in some Arctic language, . . . it would be a most mundane and unremarkable fact. . . . [P]rinters have many different names for different fonts Would anyone think of writing about printers the same kind of slop we find written about Eskimos[?] . . . Imagine reading: "It is quite obvious that in the culture of printers . . . fonts are of great enough importance to split up the conceptual sphere that corresponds to one word and one thought among non-printers into several distinct classes. . . ." Utterly boring, even if true.

different categories or vocabularies means that there is no "universal context" even for "English speakers at a given time." (A nineteenth-century British or Australian reader, for example, probably would have been quite puzzled upon encountering the distinctly American colloquialism "kangaroo court."⁹⁰) Moreover, the "snow" example illustrates the way in which meaning is grounded in cultural experience and responsive to cultural purposes and needs. Skiers and Inuits alike (and, one might add, ordinary automobile drivers) need a finely differentiated language for snow in order to perform their respective activities successfully.⁹¹ Thus, contrary to Schauer's supposition, the "snow" example aptly demonstrates the degree to which language is in fact sensitive and adaptable to quite varied experiences and purposes.

There are, however, some ways in which "snow" is not representative of the flexible capacity of linguistic categories; these differences further sabotage the plausibility of Schauer's legal and linguistic formalisms. At the heart of Schauer's notion of entrenched generalizations is the recognition that linguistic categories are not purely homogenous groupings of like entities and events. Nothing much follows from this in the traditional view, however, because categories are assumed to be a matter of common properties specifiable as necessary and sufficient conditions. On that view, the particulars supposedly suppressed by a linguistic category—Schauer's "entrenched generalization"—are merely the incidental or contingent features of the phenomenon at hand.

In fact, however, most human categories are not structured in the simple and static way supposed by the traditional view.⁹² Human categorization is, rather, a complex and dynamic *process*. Most categories are configured as radial structures, which manifest in patterns of more-or-less membership consisting of central and noncentral cases. Typically, a radial category is organized in terms of a core model with con-

90. This phrase, which originated in America in the 1850s, does not even appear in the first edition of the *Oxford English Dictionary*. Compare I THE OXFORD ENGLISH DICTIONARY 652 (1971) (definition 4.b.) with VIII THE OXFORD ENGLISH DICTIONARY 348 (2d ed. 1989) (definition 4.b.).

91. Thus, even descriptive categories that do not seem to make any reference to purpose or function turn out to be structured in terms of use-value. This is an important point that Schauer does not understand. Rather, he draws a mistaken distinction between linguistic categories such as "vehicle," where function (i.e., mobility) is part of the meaning, and those that are more purely descriptive: "there are numerous general terms whose correct application requires no reference to function or to success in performing it." SCHAUER, *supra* note 30, at 74 n.31.

92. See *supra* note 53 and accompanying text.

ventionalized extensions.⁹³ This more complex structure reflects the dynamic nature of the categorization process which, in turn, is the reason for its power and success as an adaptive mechanism. The ability to distinguish among category members is a crucial part of one's ordinary linguistic competence that makes it easier to function in and adapt successfully to the flux and complexity of the real world.

Consider the following example:

Suppose you say to me, "We're having a discussion group over tonight, and I need four more chairs. Can you bring them?" I say "Sure," and show up with a hardback chair, a rocking chair, a beanbag chair, and a hassock. Leaving them in your living room, I report to you in the kitchen, "I brought the four chairs you wanted." In this situation, my statement is true, since the four objects I've brought will serve the purpose of chairs for an informal discussion group. Had you instead asked me to bring four chairs for a formal dinner party and I show up with the same four objects and make the same statement, you will not be appropriately grateful and will find the statement somewhat misleading or false, since the hassock, the beanbag chair, and the rocker are not practical as "chairs" at a formal dinner.⁹⁴

In the case of "chair," the central model is organized in terms of function relative to human body structure. Competent English-speakers naturally and unreflectively evaluate particular instances (like a hassock) in terms of its relative fit both with their particular culture's idealized model of a chair and with the particular purpose at hand. "This shows that our categories (e.g., *chair*) are not rigidly fixed in terms of inherent properties of the objects themselves. What counts as an instance of a category depends on our purpose in using the category."⁹⁵

93. See LAKOFF, *supra* note 53, at 79-114 (discussed in Winter, *supra* note 53, at 1148-59). Even categories that do have clear boundaries—and, therefore, can be specified in terms of necessary and sufficient conditions—frequently have additional internal structure such that some members are more representative than others. Extensive experimental work by Eleanor Rosch demonstrates that people consistently identify robins and sparrows as best examples of the category "bird" and owls, ducks, and penguins as less central members of the category. *Id.* at 44-45. Moreover, these "prototype effects" play a role in reasoning: "New information about a representative category member is more likely to be generalized to nonrepresentative members than the reverse. For example, it was shown that subjects believed that a disease was more likely to spread from robins to ducks on an island, than from ducks to robins." *Id.* at 42.

94. GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* 164 (1980).

95. *Id.*

Schauer, of course, would contend that this example says nothing about categorization and the possibility of "literal" and "acontextual" meaning, but only shows how pragmatics and subjective purpose modify meaning (and introduce ambiguity). We can test this, however, with a few simple hypotheticals. Suppose all you know is that a friend called and left the following message, "Come at eight; bring a chair." You are not sure whether a dinner party or discussion group is in the offing. You decide to play it safe and bring a dining room chair because it would be appropriate in either case. This, then, would seem to be the best candidate for the positivist's "literal" and "acontextual" meaning of the word "chair." But suppose that, having received the same message, you arrive home to discover your spouse engaged in an impromptu card game. All the dining room chairs are occupied, so you grab the only available chair and head to your friend's home. The host opens the door and, seeing you with rocking chair in hand, says (with obvious annoyance), "Why did you bring *that*?!" "But," you respond defensively, "you said bring a 'chair.'"

In one sense, both the dining room chair and rocking chair are literally "chairs." But they are not equally "chairs," which is to say that the category has an internal structure that varies with purpose and use. Things are not simply "chairs" or "not-chairs," but prototypical chairs, "more-or-less" chairs (depending on context and purpose), or not "chairs" at all.⁹⁶ Worse yet, the dining room chair and rocking chair hypotheticals demonstrate that there is a divergence between the "acontextual" and "literal" cases as Schauer uses these terms. Usually, only the prototypical category member (the dining room chair) will be appropriate "acontextually." But many different category members (like rocking chairs or beanbag chairs) will be within a word's "literal" purview—depending on context and purpose, of course.

Schauer's legal theory fails because evaluation of context and purpose is a necessary part of ordinary linguistic competence. Although there is "literal" meaning (at least within a particular linguistic community or sub-community), it is not of the stable, "acontextual" sort that Schauer requires. And, although there is something like "acontextual" meaning (the prototypical category members), it is not coextensive with—indeed, it is only a subset of—the "literal" meaning of a word. Rather, the "literal" meaning of a word-category is subject to

96. Even so, borderline cases—like a hassock—may be treated as "peripheral" or "related" instances of the category that are included or excluded depending on the circumstances.

expansion or adjustment "relative to our purposes and other contextual factors."⁹⁷ Schauer's legal positivism is impossible because his linguistic formalism is wrong (not to mention unworkable); context and purpose are routinely built-in, constitutive dimensions of linguistic categorization.

Even when function is not a constitutive part of a word's meaning, contemplation of context and purpose nevertheless may be necessary to ascertain its "literal" meaning. Schauer gives the example of "a rule prohibiting 'live animals on the bus.'"⁹⁸ Obviously, a dog on a leash or lion in a cage is within the "literal" terms of the rule even if the respective restraints palliate the need for the rule's application in light of its purpose. But suppose a passenger boards the bus carefully carrying a specimen case containing slides for a microscope. Upon inquiry, the driver ascertains that the slides contain live paramecia. Should she exclude them from the bus? If your answer is "no," consider that paramecia "can move voluntarily, actively acquire food and digest it internally, and have sensory . . . systems that allow them to respond rapidly to stimuli."⁹⁹ If your answer is still "no," consider whether the rule includes the case of a live goldfish in a sealed plastic bag given that the dictionary also defines "animal" as "a mammal, as opposed to a fish, bird, etc."¹⁰⁰ And, if your answer in either of the previous cases is "yes," consider whether you can defend the decision to allow on the bus any *humans*—who, after all, are literally "live animals" too.

Although Schauer does not commit himself to any particular theory of language, what he is in fact defending is a reductive view of meaning as reference that functions after purpose and context have been shorn away. As the "snow," "chair," and "animal" examples demonstrate, however, this view does not work even for the simplest linguistic categories.¹⁰¹ Purpose, context, and cultural experience are

97. See LAKOFF & JOHNSON, *supra* note 94, at 164.

98. Schauer, *supra* note 29, at 533 n.70.

99. This is the first definition for the word "animal" given in THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 82 (2d ed. unabridged 1987) (further noting that "some classification schemes also include protozoa . . . that have motility and animal-like nutritional modes").

For the moment, the text leaves open the possibility that someone might answer the question affirmatively, excluding the paramecium-carrying passenger. But, there is little to say in that case. On my view, such a person is well-suited for a job with the phone company, a health insurance carrier, or some other large, insensitive bureaucracy. On Schauer's view, of course, that person is eminently qualified to be an Associate Justice of the Supreme Court.

100. *Id.* (definition 3).

101. It is not accidental that most of the examples chosen by analytic jurists like Schauer to establish the "relatively" unproblematic nature of meaning have a simple "cat on the mat"

integral to meaning. When linguistic categories are part of legal rules that themselves have purposes and contexts, Schauer's legal and linguistic formalisms become even more unworkable.

Imagine how Schauer's positivist judge would go about applying the penal offense of "house trespass" in the European, Moslem, and commercial sections of Khartoum.¹⁰² She cannot do so by reference to some "largely invariant universal context." There are no *houses* in the commercial section. And, in the European and Moslem sections, the cultural conceptions concerning what constitutes a violation of the intimate private space of the household are very different. For the Europeans, they are limited to the house proper; for the Moslems, they include the gardens as well. On Schauer's account, the decisions of the positivist judge would turn on her understanding—which is to say her *culture's* understanding—of the "literal" and "acontextual" meaning of the term "house." She would then apply her parochial cultural understanding to the cases arising in the other culture's section. The commercial establishments presumably would go unprotected.

If these outcomes seem improbable or unacceptable, it is because we understand and expect the judge to consider (consciously, if necessary) the underlying justifications and normative dimensions of the rule. Schauer defends against this truism by insisting that everyone else is confused. Observations of this sort, he claims, "conflate the questions of what a rule requires with what, all things considered, a decision-maker ought to decide."¹⁰³ But that distinction appears plausible only because he espouses a theory of meaning that falsely assures him that "what a rule requires" can be determined is some relatively straightfor-

quality to them. These examples are almost always chosen from "basic level" categories, which is the domain of language that most nearly approximates a direct correspondence with objects in the world. See Winter, *supra* note 53, at 1141 n.118 ("'Basic level' categories are organized in terms of direct physical experience relative to observable attributes, human motor movements, and similarity in shape.") (discussing Eleanor Rosch, *Principles of Categorization*, in COGNITION AND CATEGORIZATION 27, 31 (Eleanor Rosch & Barbara B. Lloyd eds., 1978)); LAKOFF, *supra* note 53, at 296-97 ("[M]any of the example sentences in the philosophical literature[] have a decidedly Dick-and-Jane quality about them. . . . The best examples of knowledge are things that we know about basic-level objects, actions, and relations in the physical domain—what might be called our cat-on-the-mat knowledge. . . ."). Thus, by staying with these examples, I have responded to Schauer on his own best turf. Even there, I have loaded the dice in his favor by not considering the problems introduced by metaphor and polysemy. For example, suppose the rule was "no pets on the school bus." Does the rule encompass a pet rock or the teacher's pet? If not, why not?

102. This example, drawn from an oral report by William Twining of actual cases in the Sudan in the 1960s, is discussed in Winter, *supra* note 57, at 1619-23.

103. SCHAUER, *supra* note 30, at 215.

ward, unproblematic, "literal" and "acontextual" way. On that static and simplistic view, the only "hard cases" are those in which there is a divergence between the "requirements" of a rule and its underlying justification (or "of the full array of justifications . . . existing in the entire decisional environment"¹⁰⁴).

The fundamental problem of Schauer's positivism is that it depends upon a highly reified view of language. But language cannot be understood apart from the cognitive processes of the actual humans who speak it. The flux of the world and the more-or-less character of linguistic categories means that humans understand and evaluate words in terms of contexts and purpose. That is an essential part of ordinary linguistic competence; it is what humans do unreflectively all the time in order to make sense of the world. Accordingly, Schauer's positivism is absurd because a competent human decisionmaker will need to advert to context and purpose to ascertain when a "vehicle" is a "vehicle," an "animal" an "animal," and a "house" a "house"; a competent human decisionmaker must advert to context and purpose just "to determine what a rule *means*."¹⁰⁵ Contrary to Schauer's assumptions, it is neither psychologically nor linguistically feasible to think that judges can do otherwise. If it were, we would just install a computer.

We have seen how, even in the case of apparently simple language, the judge may be required to call on complex cultural understandings in order to parse a rule. But all of the examples we have considered assume the simplified case of synchronic meaning, which is a conceptual fiction to begin with. Humans and human legal systems exist in time. The social meaning of the terms in a legal rule or precedent change,¹⁰⁶ and they do so in a matter of decades. How does Schauer's positivist judge interpret the rule that "citizens may sue in federal court" when the meaning of the term "citizen" has changed since the rule's adoption?¹⁰⁷ How does Schauer's positivist judge apply the First

104. *Id.* at 209.

105. *Id.* at 211-12.

106. See LON L. FULLER, *ANATOMY OF THE LAW* 59 (1968) ("All this adds up to the conclusion that an important part of the statute in question is not made by the legislator, but grows and develops as an implication of complex practices and attitudes which may themselves be in a state of development and change."); KARL N. LLEWELLYN, *THE CASE LAW SYSTEM IN AMERICA* 83 (Paul Gewirtz ed. & Michael Ansaldi trans., 1989) ("All words (that is, linguistic symbols) and all rules composed of words continuously change meaning as new conditions emerge.").

107. Cf. *Scott v. Sandford*, 60 U.S. (19 How.) 393, 426 (1857) ("No one, we presume, supposes that any change in public opinion or feeling . . . in the civilized nations of Europe or in this country, should induce the court to give to the words of the Constitution a more liberal construction . . . than they were intended to bear when the instrument was framed and adopted. . . . It is

Amendment to a rule prohibiting public speaking in parks when the central purpose and function of the park has changed?¹⁰⁸

True to form, Schauer treats these as easy cases. "Once we recognize that language has meaning independent of what its initial users (or inscribers) intended to say, we can see that there is nothing necessary about the recourse to original intent."¹⁰⁹ The positivist solution would be to apply the rule as it now reads (i.e., as it now *means*) unless there is some metarule pointing to the meaning of the rule as adopted.¹¹⁰ But in these and other real cases, judges cannot avoid calling upon their cultural knowledge with all its intrinsic normative dimensions and built-in potential for subcultural variation. Even if those normative considerations never figure in the judges' conscious deliberations, those assumptions will nevertheless come into play as they inform the attempts of different judges to apprehend and apply the current meaning of the relevant legal rules. In these and other real cases, there is nothing in the "literal" and "acontextual" meaning that can provide the mechanical consistency and stability that Schauer's positivism requires.¹¹¹

In the end, there is no escaping the cultural and normative penetration of the ostensibly limited domain of law. There can be no sys-

not only the same in words, but the same in meaning . . .").

108. See Winter, *Upside/Down View*, *supra* note 66, at 1895-1901 (discussing the changes of social meaning that undermined the holding of *Davis v. Massachusetts*, 167 U.S. 43 (1897), and led to the decision in *Hague v. C.I.O.*, 307 U.S. 496 (1939)).

109. SCHAUER, *supra* note 30, at 219.

110. See *id.* at 219 n.20 ("The answer can be determined only by reference to the values that inform the internalization of the rule. Although any internalization takes place *now*, the internalization of now could (but need not) incorporate the meaning of some time in the past."). Even on Schauer's account, however, the judge must make a normative determination about the purpose and content of the rule at hand *before* she can ascertain what the rule says.

111. Schauer maintains that, once properly identified, every rule has a core of meaning that is unproblematic. SCHAUER, *supra* note 30, at 211. This, too, is the import of his earlier statement "that at a particular time *some* meaning exists" that is available to all competent speakers of a language. See *supra* text accompanying note 78. The trouble with this position is threefold. First, like H.L.A. Hart, Schauer has absolutely no way to describe or distinguish the core from the periphery. Moreover, while the phenomenon of prototype effects accounts for the common meaning upon which Schauer relies, it also undermines his attempt to yoke together the "literal" and the "acontextual" meanings of a word. See *supra* text accompanying notes 95-97. Finally, different subcultural experiences and the resulting different understandings will effect the content of the "core" and "periphery."

For my parallel criticism of Hart as lacking both a viable account of the core and a reliable way of differentiating the penumbra, see Winter, *supra* note 53, at 1176-78. Using the cognitive linguistics adverted to here, I provide a revisionist account of Hart's position that makes sense of his linguistic assertions (and answers Fuller's critique), but that undermines his version of positivism. *Id.* at 1178-80.

temic isolation because there is no semantic autonomy to the only language in which the law can be expressed. The very processes of categorization and understanding already implicate the legal decisionmaker in the process of making classifications and distinctions relative to the practical commitments and normative assumptions of her culture. Moreover, the fact that categorization and understanding are a dynamic process—and not a static, reified property of linguistic symbols—means that the decisionmaker cannot avoid active, cognitive participation in the decisionmaking and law-application process. This is why positivism is neither plausible as a theory of description nor necessary as a basis for an external moral critique of the law. The capacity for moral judgment is, as Cover suggests, already internal to the process of law's becoming. "To live in a legal world requires that one know not only the precepts, but also their connections to possible and plausible states of affairs. It requires that one integrate not only the 'is' and the 'ought,' but the 'is,' the 'ought,' and the 'what might be.'"¹¹²

Cover contends that positivism is little more than a comforting formula for judicial disclaimers of hermeneutic accountability. Schauer concedes that it can function that way at times.¹¹³ He maintains nevertheless that positivism works well most of the time. But positivism does so by pretending that it's all simple. And law, like life, just doesn't come that way. Positivism is, thus, a prescription for overconfidence. And we already know how that story comes out.

112. Cover, *Nomos and Narrative*, *supra* note 15, at 10.

113. SCHAUER, *supra* note 30, at 232 ("Insofar as rules are the frequently undesirable justifications for the denial by agents of ultimate responsibility for what they do, they are at best a mixed blessing.").