PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE by Frederick Schauer. (Oxford: Clarendon Press, 1991). pp. xvii + 254.

Since the publication of H.L.A. Hart's *The Concept of Law*, the notion of a rule has become one of the central focuses in contemporary legal theory. In classical jurisprudence, law is viewed as either commands issued by a sovereign, orders backed by threats, or directives derived from a certain natural order. Contemporary jurisprudence in a sense starts with Hart's definition of law as an affair of rules. For Hart, law is the union of primary and secondary rules.[1] Says Hart,

> Our justification for assigning to the union of primary and secondary rules this central place is not that they will there do the work of a dictionary, but that they have great explanatory power.[2]

Following Hart's example, many jurists and legal philosophers are increasingly employing the notion of rules to explain jurisprudential concepts and issues, such as: legal validity, the normativity of law, legal obligation, legitimate authority, legal reasoning and judicial decision making. Ironically, the notion of a rule itself, though it has been wielded in almost every substantial work in analytical jurisprudence in the past thirty years, to a large extent remains unexamined.

Playing by the Rules A Philosophical Examination of Rule-Based Decision-Making in Law and in Life[3] is the first book which offers a comprehensive philosophical analysis of rules in a wide range of rule-governed contexts. It is written by Frederick Schauer, Frank Stanton Professor of the First Amendment at Harvard University, and published in the prestigious Clarendon Law Series. The book has ten chapters, can be divided into three parts. In the first part, chapters 1 - 4, Schauer demonstrates great analytical skill when discussing the meaning, the structure and the nature of rules. The nature of rules is here identified as entrenched generalization. The second part, chapters 5 - 7, discusses the nature of rules in the context of rule-based decision-making. Schauer, through contrasting two types of decision-making and examining rules as reasons for action, argues that rules as entrenched generalizations are necessarily suboptimal. By evaluating various reasons for having rules, Schauer articulates his theory of rules as devices for the allocation of power. In the last part, chapters 8 - 10, Schauer explores in depth the relationship among rules, rule-based decision-making and law. By locating the place of rules in a legal system, Schauer proposes his theory of presumptive positivism. In what follows I shall

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1 "The main theme of this book" says Hart "is that so many of the distinctive operations of the law, and so many of the ideas which constitute the legal thought, require for their elucidation reference to one or both of these types of rule, that their union may be justly regarded as the 'essence' of law, though they may not always be found together wherever the word 'law' is correctly used." H.L.A.Hart, *The Concept of Law*, (Oxford: Clarendon Press, 1961) at 151.

2 *Ibid.* According to Hart, the concept of a rule does not only characterize the paradigm cases of law but it also provides a new perspective to understand the relationship of law with justice and morality. *Ibid.* at 152-80.

3 F. Schauer, *Playing by the Rules A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Oxford: Clarendon Press, 1991).

first discuss the content of each part, and then give a brief assessment of Schauer's theory of law.

I. THE NATURE OF A RULE

Rules can be divided into two categories: descriptive and prescriptive. Descriptive rules reflect the regularity or uniformity of the world and human action, whereas "prescriptive rules are employed not to reflect the world but to apply pressure to it."[4] Any prescriptive rule exerts some pressure on the rule-follower. Rules of thumb are distinguished from mandatory rules according to their different degrees of pressure. The former only give general guides to action while the latter provide reasons and generate pressure for action when accepted. The focus of the book is on mandatory rules within philosophical and jurisprudential scope.

Despite the difference between descriptive and prescriptive rules, there is an important common ground to them. They both "speak to types not to particulars."[5] There are no rules for particulars. Rules are generalizations. Generalization is a contingent process with its necessary selection and suppression. When a group of particulars are generalized as a kind, certain common characteristics of those particulars must be selected and the remaining attributes belonging to each particular have to be suppressed. For example, a rule states "No dogs allowed." All the different properties and attributes of various particular dogs (for example, nice dogs, black dogs, the Queens' corgis, police-dogs) are suppressed and the common element "dogness" among various dogs is selected. Generalization constitutes the meaning of a rule. "Any rule can be reformulated to take the form of a hypothetical factual predicate followed by a consequent."[6] That is, any rule can be structured as a formula of "if (a factual predicate)..., then (a consequent)...." For example, the rule "No dogs allowed" can be formulated as following: *if* a dog is in a restaurant, *then* it has to be taken away. The point here is that "any rule uses its generalizing factual predicate to make it applicable to all of something."[7]

Now the question is, why does a factual predicate imply its consequent? To ask this question is to look for a justification of the rule. The justification of a rule, according to Schauer, lies in a *probabilistic causal* relationship between a factual predicate of a rule and the likely occurrence of some particular events. For example, the rule "No dogs allowed" is premised on the belief that dogness probabilistically causes annoying behaviour. Obviously, neither will every dog necessarily cause annoying behaviour, nor will annoying behaviour always be caused by dogs. Rules thus viewed are potentially either under or over inclusive. In brief, the under- and over- inclusiveness of a rule comes from a gap between the *universal* statement of a rule and the *probabilistic* justification of the rule.

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4 F. Schauer, *supra* note 3 at 2.
5 *Ibid.* at 18.
6 *Ibid.* at 23.
7 *Ibid.* at 24.

Two different models of generalization are distinguished by Schauer the conversational model and the entrenchment model. Under the former, rules are adaptable to the needs of the moment and the generalization of a rule without qualification is to be avoided. By contrast, rules under the latter, regarded a reasons for action, are transposed into a universal formula all P_s are Q_s resisting any malleability. Schauer says,[8]

> Under the entrenchment model, however, the pre-existing generalization would be treated as just that entrenched. The generalization would by its terms control the decision even *in those cases in which that generalization failed to serve its underlying justification.* [emphasis in original].

The worst thing is that, according to Schauer, the entrenchment of rules is not taken as an accidental attribute but as an essential property of rules. When the sources of entrenchment are identified, their deep roots are found in the semantic autonomy of language and the rule-formulation. The entrenchment of a rule has its origin in the *semantical* meanings of its words used in rules and the *syntactical* structure of rule-formulation. The meaning of a word is bound by its *universal* context among speakers and the formula of a rule has its logic implication. By his analysis in the first part, Schauer induces the central theme of the book rules, seen as entrenched generalizations with their necessary under- and over- inclusiveness, may thus, when followed, produce in particular instances decisions that are suboptimal or even plainly erroneous in relation to the background justification for the rule.

II. RULE-BASED DECISION-MAKING

Schauer first distinguishes rule-based from particularistic decision-making. Particularistic decision-making aims to optimize in the particular case, treating existing generalization only as temporary and as a largely transparent approximation of the array of better results which are the goal of a decision-maker to try to reach. By contrast, rule-based decision-making, embodied as entrenched generalization, provides a reason for the decision even in the case of under- and over- inclusiveness.

Is it possible to build a bridge between the two kinds of decision-making? This question is related to a long standing issue in contemporary moral philosophy the issue of the reconciliation of rule-utilitarianism and act-utilitarianism. David Lyons, in his defence of rule-utilitarianism, thinks that rules can be of unlimited specificity and still be rules. When rules are maximally specified, rule-based decision-making can be extensionally equivalent to the particularistic decision-making. Schauer criticizes Lyons' view, for rules, as entrenched generalizations, have very limited specificity and malleability. The limited malleability is a necessary condition for the very existence of a rule and rule-based decision-making.[9]

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8 *Ibid.* at 49.

9. *Ibid.* at 84.

> For any given two-level (justification and instantiation) relationship, rule-based decision-making exists only in so far as the instantiation resists continuous modification in the service of its generating justification.

Thus for Schauer, these two types of decision-making are extensionally divergent. However, the divergence is not based on the distinction between first-order and second-order reasons in practical reasoning. Schauer cites Joseph Raz as one who interprets rules as exclusionary reasons, as second-order reasons "excluding first-order reasons by providing reasons to refrain from acting for those first order-reasons.[10] Joseph Raz takes exclusionary reasons as enjoying some immunity from being overridden, claiming that an exclusionary reason always prevails in cases of conflict with a first-order reason within its scope. According to Schauer, Raz's account of rules, though compatible with his conclusion, remains incomplete, or Raz's account only gives us an idea of what a rule might do and how a rule functions in our decision-making; it however does not tell us why a rule provides an exclusionary reason for action even when the justification lying behind the rules is inapplicable.

To understand the nature of rule-based decision-making, Schauer claims that a further distinction between two types of justification must be drawn. A substantive justification "establishes the background rationale or goals behind the rules." A rule-generating justification "provides the rationale for specifying the substantive justification in the form of a rule."[11] Rules are backed by both kinds of justification. While particularistic decision-making is concerned more with substantive justification, rule-based decision-making is premised on the preference for rule-generating justification. Between them there is rule-sensitive particularism, in which the decision-makers have to take account of both substantive and rule-generating justification on each occasion.

With this spectrum of decision-making, Schauer now asks, if rule-based decision-making is necessarily suboptimal, then what are the reasons for having rules? Several standard arguments for rules are examined, arguments from fairness, reliance, efficiency, and risk-aversion. Each of the arguments has its pros and cons. By evaluating their pros and cons, Schauer argues that we actually make a comparison between the errors entailed by rule-based decision-making and the errors entailed by particularistic decision-making.[12]

> The two types of error are interrelated, for the attempt to decrease the incidence of under- and over-inclusion will likely increase the probability of decision-maker mistakes, and conversely an attempt to decrease decision-maker mistakes by limiting discretion will entail building into the process a higher likelihood of errors of under- and over- inclusion.

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10. *Ibid.* at 89. Raz says, "A second-order reason is any reason to act for a reason or to refrain from acting for a reason. An exclusionary reason is a [second-reason] to refrain from acting for some second-order reason." J. Raz, *Practical Reasons and Norms* (London: Hutchinson, 1975) at 39. For Raz's view on exclusionary reasons and rules, also see J. Raz, ed. *Practical Reasoning* (Oxford: Oxford University Press, 1978) at 128-143.

11. F. Schauer, *supra* note 3 at 94.

12. *Ibid.* at 152.

Thus, the best each of the standard arguments can do is to ask a tradeoff between two types of error or between two kinds of justification. Since each of the two decision-making models is respectively compatible with legal decision-making, these arguments do not show why we should prefer one to the other.

However, while each of the standard arguments do not work individually, together they reveal a formal quality of rule-based decision-making. This formal quality constitutes the argument from stability. The stability promoted by rules refers only to a formal sense, a sense that[13]

> ...rule-based decision-making narrows the range of potential decisions, and in doing so makes changes from the *status quo*, both for better or worse, more difficult than would be the case were decision-makers freer to depart from the categories and prescriptions of yesterday.

But rule-based decision-making cannot be considered as a preferred model only for a formal quality rules serve the goals of stability for the sake of stability. A substantive idea is needed here. The substantive idea is to view rules as essentially *jurisdictional*, as devices for determining who should be considering what. "Rules therefore operate as tools for the allocation of power."[14] Rules allocate powers among rule-makers, rule-enforcers and rule-followers in a given time, within a single as well as a multi-member institution. Says Schauer,[15]

> The allocation of power here is temporal, distributing decision-making jurisdiction among the past, the present and the future... rule-based decision-making decreases the degree of difference that a change in personnel would make, and thus entrenches the long-term institution *qua* institution as against the power of particular members of that institution at any one time. [p. 160] ... by allocating power to some agents and away from others, rules can also allocate power horizontally, determining who, in a given slice of time, is to determine what.

Viewing rules as devices for the allocation of power is one of Schauer's original contributions to legal philosophy. Schauer departs from the traditional way of seeing decision-making as an enterprise of independent moral agents. Rules serve to allocate power away from individuals of a community, and to the community as an institution. Rules thus understood serve purposes of co-ordination, co-operation and collective good in a community.

III. RULES, RULE-BASED DECISION-MAKING AND LAW

With the accounts of rule-based decision-making at hand, Schauer tries to interpret the place of rules within the legal system. First, the relationship between rules and law in general. Can we make sense of the idea of a legal system without rules? To answer this question, we have to distinguish jurisdictional rules (rules establishing a decision-making

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13 *Ibid.* at 157.
14 *Ibid.* at 159.
15 *Ibid.* at 161.

environment, or empowering rules) from regulatory rules (rules purposing to control or guide decisions within their scope). Schauer says,[16]

> It is hard to conceive of a legal system without jurisdictional rules, since otherwise nothing would establish the system in the first place.

If the jurisdictional rules could be viewed as "constants" of a legal system, then substantive regulative rules might be regarded as "variables" of a legal system. The former constitute necessary and sufficient conditions for establishing a legal system, while the latter vary from one legal system to another and thus create a differentiation of one legal system from another. This again shows that rules serve primarily as vehicles for the allocation of power.

Next, Schauer considers the relationship between rules and common law. According to Schauer, the common law is not a legal system without rules. Common law rules, being based on the stock of accumulated previous judicial opinions are ossified generalizations without canonical formulas. They are not merely descriptive generalizations, but they are also prescriptive. Take some landmark cases in common law, *MacPherson* v. *Buick Motor Co.*,[17] *Hennigsen* v. *Bloomfield Motors*,[18] for example. These are not cases in which relevant rules cannot be found, nor are the rules involved too vague. The difficulty for making decisions on these cases lies in the course of applying relevant rules. "The common law's characteristic lack of canonicity greatly facilitates changing the rules as they are applied."[19] Schauer thinks that common law is best understood as a method, a method of seeking case-specific optimization rather than rule-based stability. He says,[20]

> Given their lack of codes, common-law systems normally find their rules in cases and in professional discourse, and will entrench those rules by understandings that tend to give those rules presumptive albeit not conclusive force.

What then about the cases in common law settled on the grounds of the principle of precedent? Schauer does not worry too much about the problem of precedent. According to him, if we look at what makes a case a precedent one for some other, and if we carefully examine what makes a precedent constrain the next case, then we will find that there is a generalization behind the principle of precedent. A case can be settled by the principle of precedent only if it shares either the rationale, justification, description or reasoning with the precedent case. According to Schauer, it "turns out that an argument from precedent is quite similar to the argument from rule."[21]

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16. *Ibid.* at 169.
17. 271 N.Y. Rep. 382, 111 N.E. 1050, (1916). A case ruled that manufacturers not in 'privity' with the purchaser could be liable to consumers despite the lack of privity.
18. 32 NJ 358, 161 A 3D 69, (1960). A case ruled that even if absent fraud, a consumer's waiver of an otherwise applicable warranty [does not relieve manufacturer of liability] when it was 'unconscionable' and where the nature of industry allowed no real opportunity for the consumer to bargain for different terms.
19. F. Schauer, *supra* note 3 at 177.
20. *Ibid.* at 181.
21. *Ibid.* at 185.

So far rules are discussed in isolation from their rule system. When rules are considered in a legal system of rules, the relationship among rules within a rule system can be described in terms of the dimension of locality. The degree of locality is dependent on the extent of generality of a rule. A rule covering smaller numbers of events is called the more local rule. The normative conflict between rules can be understood in terms of their degree of locality. The case of *Riggs* v. *Palmer*[22] can be utilized by Ronald Dworkin as a powerful weapon against legal positivism, according to Schauer, because the decision in *Riggs* shows that the more distant rule is given a priority over the more local. The conflict here is between a more local rule (the *Statute of Wills*) and a less local rule (one prohibiting people from profiting by their own wrong). However, Schauer claims, "*some* degree of local priority is necessary to preserve in those systems a modicum of rule-based decision-making."[23] The significance of the *Riggs* case shows that a rule with any degree of locality has but only presumptive priority, not absolute.

The previous discussions of canonical rules, common law rules, precedent, and local priority lead us to see an essential feature of legal decision-making: the presumptive feature of rule-based decision-making. Now Schauer is ready to propose his theory of law presumptive positivism.[24]

> Presumptive positivism is a way of describing the interplay between a pedigreed subset of rules and the full (non-pedigreeable) normative universe, such that the former is treated by certain decision-makers as presumptively controlling in this not-necessarily-epistemic sense of presumptive. As a result, these decision-makers override a rule within the pedigreed subset not when they believe that the rule has produced an erroneous or suboptimal result in this case, no matter how well grounded that belief, but instead when, and only when, the reasons for overriding are perceived by the decision-maker to be particularly strong.

It is *positivistic* in the sense that what Schauer provides is not a moral evaluation of the content of rules but a descriptive claim about the status of pedigreed rules within the full normative universe. It is *presumptive* in the sense that the pedigreed rules serve primarily as substantively skewed accommodations to epistemic uncertainty and they can be overridden by stronger reasons from the full normative universe.

IV. SOME COMMENTS ON SCHAUER'S THEORY

Schauer's theory of law can be divided into two levels: his theory of rules as devices for the allocation of power is concerned with the jurisdictional environment; his presumptive positivism deals with judicial decision-making.

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22 115 N.Y Rep. 506, 22 N.E. 188 (1889). A grandson, named as beneficiary by his grandfather, attempted to collect his legacy by murdering his grandfather. When the case was presented in the court, the grandson relied on the *Statute of Wills* (one named in a will shall inherit in accordance with its term) while the challengers relied more successfully on a more remote rule, one prohibiting people from profiting by their own wrong. For Dworkin's discussions on the case, see R. Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1985) at 39; *Law's Empire* (Cambridge, Mass.: Harvard University Press, 1986) at 15-20.

23 F. Schauer, *supra* note 3 at 191.

24 *Ibid.* at 204.

The theoretical significance of Schauer's theory of rules as devices lies in his intention to direct our theoretical attention away from the role rules play in judicial decisions to the role rules play in determining the jurisdictional environment. Much of the debate in contemporary legal theory is on the interpretation of judicial decisions with respect to hard cases as well as the application of legal rules to such cases. Dworkin once said that judicial decision-making is *the* issue of jurisprudence.[25] Schauer, by viewing rules as devices for the allocation of power, suggests, in the last chapter of his book "Epilogue: The Silent Virtues," that rules are most effective not in determining the results in the cases on some decision-maker's agenda, but in determining at the outset what is on the agenda at all.[26] It is far more important to see what role the rules and our attitudes towards them play in determining what is a hard case than to look up the mere decision on a hard case. This is an insightful point. Any judicial decision is made in a given jurisdictional environment. Without an adequate understanding of the role rules play in a jurisdictional environment, it will be difficult for us to have a full understanding of legal rules as reasons for judicial decision-making.

But legal rules are not all jurisdictional rules. Most of the legal rules are regulatory rules, and their primary function is to control or to guide a certain part of judicial decision-making namely, the application of rules to factual situations. As Schauer recognizes it, an understanding of the jurisdictional environment is equivalent neither to an understanding of regulatory rules, nor to an understanding of judicial decision-making. Accordingly, Schauer proposes his presumptive positivism to deal with the issues on the level of judicial decision-making. The parties to the contemporary debate on the issues of judicial decision can be, roughly speaking, divided into two camps. On the one hand, positivists maintain that legal rules are validated by the rule of recognition (institutional facts, or social sources), and legal decisions are made by law-enforcers in accordance with what those pedigreed rules require, no matter how much these rules are morally, socially or politically undesirable. On the other hand, anti-positivists (especially Dworkin) claim that in some cases (for example, *Riggs* v. *Palmer*)[27] a rule is overridden because decisions made in accordance with it (though it is pedigreed) are just morally or politically undesirable. In some other case (for example, *Hennigsen* v. *Bloomfield Motors*),[28] judicial decisions are made simply in terms of non-pedigreed norms as well. By those so-called hard cases, anti-positivists attempt to show that judicial decisions are always a function not only of rules validated by the rule of recognition, but of non-pedigreed or non-legal norms as well. Consequently, moral, political, social or economic considerations are inevitably loaded into judicial decision-making. Given these two conflicting views, Schauer's presumptive positivism aims to articulate "a more holistic decision model."[29] Schauer claims that his model can show that "both observations are

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25. "What, in general, is a good reason for decision by a court of law? This is *the* question of jurisprudence: it has been asked in an amazing number of forms, of which the classic 'What is law' is only the briefest." R. Dworkin, "Wassertrom: The Judicial Decision," 75 *Ethics* 1 at 47.

26. F. Schauer, *supra* note 3 at 231-233.

27. *Supra* note 22.

28. *Supra* note 18.

29. F. Schauer, *supra* note 3 at 203.

correct,"[30] and moreover, that his model is closer to the actual decision-making in legal reality than either a positivistic or an anti-positivistic account. Indeed, he believes, "Presumptive positivism may be the most accurate picture of the place of rules within many model legal systems."[31]

It seems to me that Schauer is a bit too enthusiastic about the soundness of his presumptive positivism. Much could be said about Schauer's two-level theory. On account of the limited space here, I shall in the following present only three brief comments.

The first comment is a minor one. Is the picture of the place of rules in law painted by Schauer the most accurate one given our legal reality? My answer is, "that depends" it depends on how we understand his notion of "presumptiveness." Legal rules indeed play only an assumptive, not an absolute role in judicial decision-making. When a rule seems to play an exclusive role in judicial decision-making, it is because the presumptive force of a legal rule is largely strengthened by a factual predicate fitting the substantive justification underlying the rule, rather than merely for the sake of the rule-generating justification for the rule. When a rule plays a role in a relatively weak sense of presumptiveness, it is always in those cases where there is a normative conflict with respect to the applications of two legal rules or, in some worse cases, between a legal rule and a non-legal norm. Schauer says that even if a decision-maker has a *well grounded* belief that applying a relevant rule to a particular case will produce an obvious error, it may be that the decision-maker still cannot override the rule legitimately. In a case like this, I cannot see how the accuracy of Schauer's picture helps to capture the judicial decision-making in modern society today.[32] The meaning of presumptiveness, it seems to me, in its deep sense, cannot be determined merely by the epistemological sense of uncertainty, as Schauer tries to define it. The issue of the presumptive force of rules cannot be fully understood unless we have some grasp of Schauer's holistic model of decision-making. This leads to my second comment.

To be qualified as a holistic model of judicial decision-making, the model must have a rationale for reconciling the concerns of positivism (decisions are to be made consistently in accordance with pedigreed rules) with the worries of anti-positivism (decisions are to be made necessarily in terms of unpedigreed or non-pedigreeable norms). In other words, the minimal requirement for a holistic model is that it must be able to specify under what conditions, when and how, a rule is overridden by an unpedigreed or a non-pedigreeable norm. By the word "specify", I mean that the model must provide in principle a set of criteria by which a comparison might be made between the strength of rules in a legal system and the strength of norms in a non-legal but normative universe. It is not enough, as Schauer does in his definition of presumptive positivism, just to describe the fact that sometimes a legal rule can be overridden by a particulary strong normative reason. The phrase "particularly strong" is very vague here, especially compared with Schauer's crystal clear analysis of the nature of rules and rule-based

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30 *Ibid.* at 204.

31 *Ibid.* at 206.

32 For Schauer's own paraphrase, see his definition of presumptive positivism I quote in section III of this paper.

decision-making earlier in his book. This brings up the question of why Schauer does not, or whether he even can, go a further step to clarify the meaning of "particularly strong." The issue I raise here is not just that Schauer does not provide anything in principle as to how a decision-maker (i.e. a judge or a jury) is supposed to act when he or she faces a normative conflict with respect to the applications of two relevant rules. My real concern is whether a legal positivist by Schauer's definition (making descriptive claims about the validity of law)[33] can be allowed to jump into the full normative universe and to pick up a moral, political or social norm in order to make a legal decision. On the one hand, being a positivistic theory, to recognize that legal rules are only *legally* presumptive is already to acknowledge the limitations of legal positivism. On the other hand, to understand the meaning of "presumptiveness of a rule" requires a legal positivist to go beyond the limit of legality and to take a close look at the full normative universe.

This leads to my last comments on a potential conflict in Schauer's theory the normative implication of its positivistic claim. As I mentioned earlier, Schauer's theory of rules as devices for the allocation of power is considered one of his original contributions to contemporary legal theory. But this statement does not imply that Schauer is the first to articulate this view. For example, Schauer's conclusion is largely compatible with the claims made by the Critical Legal Study Movement.[34] The difference between Schauer's theory and the claims from CLS seems obvious. The former draws its conclusion from a conceptual analysis of rules and rule-based decision-making, while the latter may rely more on a political or moral critique of a particular legal system in a given social regime; the former's approach is content-independent, while the latter is socially and ideologically loaded. Despite their different approaches, one crucial element is common to both of them. That is, they are both talking about the *social function* of legal rules and law. And moreover they both regard allocating and distributing power as a justification for the existence of rules and as a *substantial value* of law. When a theory starts to discuss the social function of law, especially when a theory tries to search for the substantial value in having rules, this theory cannot be characterized as legal positivism. Although what the essential characteristics of legal positivism are always a debatable issue, with Schauer's own interpretation of legal positivism, we are sure that a positivist theory of law can only provide a conceptual description of law. When Schauer shifts his main theoretical attention from a description of legal concepts to an evaluation of the social functions of legal rules and to a normative evaluation of the substantial value of a system of legal rules, he perhaps cannot claim that his theory is presumptive *positivism*.

"One flaw cannot obscure the splendor of the jade," as a Chinese proverb says.

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33. See Schauer, "Positivism is about legal validity and not about ultimate action...", *supra* note 3 at 200.

34. See R. Unger, "The Critical Legal Study Movement," 96 *Harvard Law Review*, (1983) at 561. Also see K. Marx and F. Engels, *The German Ideology*, ed. G.J. Authur (London: Lawrence and Wishart, 1970) Chapter 1. Marx views law as serving as a tool for a social purpose. D. Kennedy, "Form and Substance in Private Law Adjudication," 89 *Harvard Law Review* at 1685. Quite similarly, when Kennedy contrasts rules with standards, he points out that the essence of rules is generality, which results in the problem of over- and under-inclusiveness. However, the conclusion Kennedy draws from his formal analysis of rules is different from Schauer's. While Schauer takes some sort of communitarian line to argue rules as devices for the allocation of power, Kennedy thinks that rules-based decision-making more likely finds its roots in individualism.

Schauer's book indeed contains many insightful ideas about the nature of rules and rule-based decision-making. This perhaps is also one of the most readable books in recent jurisprudential literature. It neither assumes any particular background knowledge for its readers, nor does it involve too much philosophical or jurisprudential jargon. Since the issues and problems are so important for a range of jurisprudential and philosophical areas, it should have a wide scope of readership. For academic lawyers, law professors and legal philosophers, it is a very good reference book. For students in law, social science and philosophy, it is an excellent introductory book for understanding the nature of rules in general and legal rules in particular. I strongly recommend it without reservation.[35]

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[35] I wish to thank Professor Roger A. Shiner for his encouragment and patience, and particularly for his very insightful comments on my earlier drafts. For an illuminating evaluation of Schauer's book, see R.A. Shiner, "Rules of Power and the Power of Rules." *Ratio Juris* 6 (3), 1993.