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A Portrait of the Lawyer as a Philosopher: On *Frederick Schauer**

§ 1

Pick and Choose

WU has a reputation for being picky when it comes to awarding honorary doctorate degrees. Over its history it has done so only 15 times; roughly one per decade. Among those honored were towering figures on the national level. People like *Hertha Firnberg*, the former minister who, like few others, shaped the modern Austrian University. People like *Karl Korinek*, the former President of the Austrian Constitutional Court who, like few others, shaped the court's case law and Austria's constitution alongside it. And, of course, WU has honored academic giants in economics such as *Joseph Stiglitz* or *James Heckman*.

In honoring *Frederick Schauer*, WU has decided to honor an academic giant in law: someone who, like few others, has formed our understanding of freedom of speech, its purpose, its extensions, its structure; someone who, like few others, has formed our understanding of rules, their inner workings and their application; someone who, like few others, has formed our understanding of the concept of law, its idiosyncrasies, and the force that rests in it.

Against that backdrop it certainly is of minor importance that in honoring *Frederick Schauer*, WU decided to honor one of my personal intellectual heroes. If I'm honest: I think WU couldn't care less. Still: to give a laudation in honor of *Frederick Schauer* is an honor in itself. But, at the same time, it is a humbling experience: Looking at *Fred's* various achievements – and a laudation is a wonderful excuse to thoroughly stalk him on- and offline – is nothing short of a deeply depressing enterprise. The sheer numbers are staggering: Tens of thousands of downloads on the Social Science Research Network;¹

* This text was initially drafted as a laudation in honor of *Frederick Schauer* on the occasion of the award of an

a solid five digit result list on Google Scholar,² more than two hundred articles and review essays in the most prestigious journals and the most important edited volumes of the trade, 14 books with leading publishing houses:³ *Frederick Schauer* is the dream of any Dean of Research.

And that, even if these numbers do not include either the many translations of his work or the various books and special issues explicitly dedicated to his ideas. But of course: these figures will only get you so far and will not do justice to *Fred's* success. After all, I told myself: "I have come here to praise *Fred*, not to bury him in numbers". And praising *Fred*, for sure, is easy enough, given his tremendous achievements and his distinguished career.

§ 2

Early Years

Born on January 15, 1946 some of the first words *Fred* heard may have been *Harry Truman's* state of the union address, delivered a couple of days later. In his speech *Truman* depicts the US as "a land of great opportunities for those people of the world who sought to become part of it. [A land of great opportunities that now had become] a land of great responsibilities to all the people of all the world." The grandchild of Austrians who had emigrated to the US in 1902 made good use of the opportunities thus offered (his grandparents had their apartment

honorary doctorate degree at WU (Vienna University of Economics and Business) on 17 Oct 2019. It comes with my congratulations to *Fred* on this extraordinary achievement and with my congratulations to WU on this highly commendable decision.

¹ <https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=119225>.

² <https://scholar.google.com/scholar?hl=de&as_sdt=0%2C5&q=frederick+schauer&btnG=>>.

³ For a complete list of *Fred's* publications see <https://www.law.virginia.edu/sites/default/files/schauer_cv.pdf>.

on Wallensteinplatz which, technically, makes him a grandchild, not of the 2nd district, where WU is located, but of the 20th district, but it's close enough, I guess, to claim that there have been early ties to this campus and the institution located on it).

At the same time *Fred* seemed eager to take on part of the responsibilities *Truman* mentioned. A graduate of Dartmouth, he earned his JD from Harvard in 1972. He joined the faculty of West Virginia University College of Law in 1974; a year later his first article "Obscenity and the Conflict of Laws"⁴ was published. To deal with "obscenity" in such a prominent manner may indeed strike us as odd in a European Perspective. Still, I can vouch for it, whether and to which extent the display of lewd conduct is protected by the First Amendment is one of the major structural free speech problems in the US. And the time *Fred* dedicated to the topic (he also published his first book on it)⁵ was well-spent. As to this day it is my firm belief that his approach is the only one to bring sense to the Supreme Court's "*Miller-Standard*".⁶ For those who don't know what that is: be happy for it.

§ 3

At the Café

Fred's time on the topic was well-spent also, and far more importantly, as this was his original academic encounter with the field he should shape so significantly. His magisterial – and nevertheless highly influential – work: "Free Speech: A Philosophical Enquiry"⁷ rests on the foundation thus laid. This, of course, also applies to *Fred's* other important contributions to the inner workings of Free Speech at that time.⁸ His work on the 'philosophical enquiry', however, seems particularly noteworthy from the Viennese perspective: after all, as he once told me, he wrote major parts of it sitting in Café Landtmann in Vienna's 1st district when he spent a year in Vienna in the early 1980ies (still not the 2nd district, but close enough, I guess). And it was this period that significantly contributed to knitting the close ties he should keep to Vienna until today.

⁴ *Schauer*, Obscenity and the Conflict of Laws, 77 West Virginia Law Review (1975), 377.

⁵ *Schauer*, The Law of Obscenity (1976).

⁶ *Miller v California*, 413 US 15 (1973).

⁷ *Schauer*, Free Speech: A Philosophical Enquiry (1982).

⁸ See eg *Schauer*, Language, Truth, and the First Amendment: An Essay in Memory of Harry Canter, 64 Virginia L Review (1978), 263; *Schauer*, "Private Speech" and the "Private Forum", Supreme Court Review (1979), 217; *Schauer*, Categories and the First Amendment: A Play in Three Acts, 34 Vanderbilt L Rev (1981), 265.

Unfortunately, even if he was to return on a regular basis, the spell Vienna cast on him proved not to be permanent. Having spent some time as a faculty member at Cambridge, he accepted another position in Virginia; this time at William and Mary; from there he moved on to University of Michigan Law School where he spent the next eleven years of his career.

This brief sketch does not, of course, do justice to an important period in his life and academic development. The 14 years thus summarized on the one hand bear witness to the emergence of *Fred Schauer* as the leading free speech scholar of his generation, but, on the other, they show us the emergence of *Fred Schauer* as one of the most original legal philosophers of his time, as the scholar who wrote contributions such as "Formalism",⁹ "The Jurisprudence of Reasons"¹⁰, and "Authority and Indeterminacy"¹¹.

§ 4

Harvard

Having sufficiently enjoyed the mild Michigan climate, *Fred* accepted the position of a "Frank Stanton Professor of the First Amendment" at Harvard University in 1990. He never cared too much for the designation, though; and comprehensibly so. As he was much more than a professor of the First Amendment at Harvard. Not only because he spent five years as Academic Dean and one year as the Acting Dean of the Kennedy School but also, and more importantly, because he was much more than a professor of *the First Amendment*. Needless to say he kept publishing extensively on free speech,¹² but, at the same time he focused more and more on questions of legal philosophy and methodology as contributions such as "Positivism as Pariah"¹³, "Do Cases

⁹ *Schauer*, Formalism, 97 Yale L J (1988), 509.

¹⁰ *Schauer*, The Jurisprudence of Reasons, 85 Mich L Rev (1987), 847.

¹¹ *Schauer*, Authority and Indeterminacy, in: Pennock/Chapman (eds), Authority Revisited. Nomos 29 (1987) 28.

¹² See eg *Schauer*, Uncoupling Free Speech, 92 Columbia Law Review (1992), 1321; *Schauer*, The Political Incidence of the Free Speech Principle, 64 University of Colorado L Rev (1993), 935; *Schauer*, The Speech of Law and the Law of Speech, 49 Arkansas Law Review (1997), 687; *Schauer*, The Cost of Communicative Tolerance, in: Cohen-Almagador (ed), Liberal Democracy and the Limits of Tolerance (2000) 28; *Schauer*, Free Speech and the Social Construction of Privacy, 68 Social Research (2001), 221; *Schauer*, The "Speech"-ing of Sexual Harassment, in: MacKinnon/Siegel (eds), Directions in Sexual Harassment Law (2004) 347; *Schauer*, Facts and the First Amendment, 57 UCLA Law Rev (2010), 897.

¹³ *Schauer*, Positivism as a Pariah, in: Robert P. George (ed), The Autonomy of Law: Essays on Legal Positivism (1999) 31.

Make Bad Law?”¹⁴ and “A Critical Guide to Vehicles in the Park”¹⁵ demonstrate.

Nothing, however, should prove to be more significant for this period in *Fred's* life as his seminal monograph “Playing by the Rules”¹⁶ which decisively altered the established academic perception of the phenomenon. It also displays a most interesting trait of his character: *Fred* does not follow the crowd. In the 1990ies when everybody was talking about principles,¹⁷ he asked us to “take rules seriously”. A decade ago when the leading *Neo-Hartians* of their generation prominently made their definitional case against coercion as a property of the concept of law,¹⁸ *Fred* started to work on his great monograph “The Force of Law”¹⁹: the most convincing case made to my knowledge for not compulsively separating law from its capacity to coerce.

§ 5

A Genuine Superstar

The book was published with Harvard University Press at a time when *Fred* had already left Harvard for the “David and Mary Harrison Distinguished Professorship” at UVA Law. The announcement of him joining the faculty in Virginia was met with widespread enthusiasm. In a press statement his soon-to-be faculty colleague *Caleb Nelson* was quoted describing him as a “genuine superstar”.²⁰

As we all know: Professor *Nelson* did not exaggerate. *Guggenheim* fellowships, academy positions, distinguished visiting positions at leading institutions around the globe and honorary degrees hardly ever are the marks of mediocrity. But what's behind all this? After all: There are many decent people in legal academia. What makes *Fred Schauer* stand out?

Any intelligent (even if not exhaustive) answer to that must, in my opinion, rest on three interdependent elements: *Fred's* sincerity, his respect for the law and his humility:

¹⁴ *Schauer*, Do Cases Make Bad Law?, 73 U Chi L Rev (2006), 883.

¹⁵ *Schauer*, A Critical Guide to Vehicles in the Park, 83 NYU L Rev (2008), 1109.

¹⁶ *Schauer*, Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and Life (1991).

¹⁷ Following *Dworkin's* work: Taking Rights Seriously (1978) and Law's Empire (1986).

¹⁸ See, eg, *Raz*, Between Authority and Interpretation (2009); *Shapiro*, Legality (2011).

¹⁹ *Schauer*, The Force of Law (2015).

²⁰ Constitutional law expert *Frederick Schauer* to join University of Virginia Law Faculty, 28.04.2008 <<https://news.virginia.edu/content/constitutional-law-expert-frederick-schauer-join-university-virginia-law-faculty>>.

As to the first element: *Fred* is a scholar of nearly unparalleled rigor. He cannot but dive into his subject and he writes with the clarity and confidence of those happy few who actually know their stuff. I'd accept anyone's wager who claimed he could find a single piece in the whole body of *Fred's* work that is not at the same time accessible and instructive.

As to the second: *Fred* is one of the leading legal philosophers of our time. But he never gave up being a lawyer; and a lawyer's lawyer at that. As he once put it in an interview: “Thinking and reading about philosophy is very important, but [you] also have to know something about law, in much the same way that the best philosophy of physics these days is done by people who understand physics. The best philosophy of law can be done by people who actually understand law as it is.”²¹ *Fred* certainly is one of those people.

As to the third: *Fred* sure speaks and writes better than most. But he is a better listener than speaker and a better reader than writer still. Differing from quite a few prominent writers in his field, he doesn't do monologues – he engages in conversations. And he is humble enough, eager even, to give anyone his due. His ‘note on notes’ preceding the footnotes section of “The Force of Law” may be particularly telling here, with *Fred* emphatically rejecting the prevailing approach in legal philosophy to use footnotes sparingly, if at all. “Scholarship”, *Fred* writes, “is a collective enterprise, and scholarly works with few references tend to exaggerate the novelty of the author's contributions, ignore the extent to which the work builds on what has been done by others”.²² *Fred* certainly wouldn't do that.

§ 6

Schauer's Law

One may suppose against this backdrop that *Fred* is one of those academics who live for their work and for their work only. I can vouch for this to be an inaccurate assessment. *Fred* and his wife *Bonnie* are proud homeowners in Virginia. That by itself may not be something too remarkable in this context. After all: we all have to live somewhere. *Fred*, however, is not only a proud homeowner but also holds the position of groundskeeper-in-chief. I remember all too well when he had to leave a *Kelsen* conference in Chicago momentarily to have a tree removed that just fell on his house. He pursued this task, it is to be assumed, with the same rigor he employs in his

²¹ *Zhao*, Everything we do is Tentative: An Interview with Prof. Frederick Schauer, Rechtsphilosophie & Rechts-theorie (2010) 67 (78).

²² *Schauer*, The Force of Law xiii.

academic endeavors. And I'm certain house and tree benefited from his diligent care. Maybe the house even a little more than the tree which, due to *Fred's* thorough methodic approach, I'm pretty sure we'll find neatly chopped in an adjacent barn, assorted by relevant features including but not limited to size, shape and density.

Fred, like nearly all persons of high moral standing, is a dog-person and, thus, among the few individuals I met so far, truly interested in the pictures of the pug my wife and I own when I forced them on him. *Fred* also is the proud owner of a tiny sports car that looks like fun to drive if you know how to drive it. Being aware of this particular fact may also explain why many of his discussions of the phenomenon of rules start with speed limits and the question of whether expert drivers who know their stuff should be subjected to them in the same manner as novices (or people like me).²³

Fred not only drives, however, he is an enthusiastic hiker who is, I assume, particularly tempted to join events like the World Congress on Legal and Social Philosophy when they are held in places like Lucerne not only because of the conference topics but also because of the conference surroundings. Of course, he is not only a hiker but also a skier (that's when his Austrian genes come into play) and overall an admirable athlete who is versed in all kinds of sports. He gave up golfing, though, as he, as he once remarked, stopped seeing the point in spending so much of his time on a single activity.

While he may be an athlete, and in better shape than many persons half his age, he certainly is no ascetic. *Fred* is a true connoisseur when it comes to fine wine and good food (again: the Austrian descent, I suppose): In expert circles he is known as the author

of "Schauer's Law of Main Courses": according to which "there is no entrée which could not be further improved by adding bacon".

§ 7

Belonging Together

To make it short: Like any true philosopher, *Fred* knows how to live and how to live well. And he is happy to share his knowledge. This holds true in general, but it particularly applies to the law. *Fred* is a passionate and engaging lecturer. The various teaching awards he received in his career attest to that, just as the fact that quite an impressive selection of the leading legal minds in contemporary US academia were his students at one point. Of course, his influence extended far beyond the institutions that employed him: an indefatigable ambassador of legal philosophy, *Fred* has travelled extensively over the last decades, accepting visiting teaching positions and invitations to talks and lectures around the globe, which gave so many of us, me among them, the opportunity to be his students. Various of his countless journeys led him to WU, a university where *Fred* lectured on multiple occasions in the past; also, one may safely assume, because it is a place he felt drawn to, given his family history.

WU awarding an honorary doctorate to *Fredrick Schauer*, thus, brings together what belongs together. It is wonderful to witness that. And it is wonderful to witness that WU, an institution so picky when it comes to awarding honorary doctorate degrees, made such a great pick in picking *Fred*.

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²³ Just see *Schauer*, *Thinking like a Lawyer: A New Introduction to Legal Reasoning* (2009) 13-35.