The Generality of Law

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THE GENERALITY OF LAW

Frederick Schauer

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1. INTRODUCTION

It is part of the ritual of the American law school. A new crop of incoming students arrives, and the dean is called upon to give the welcoming speech. This welcoming speech includes the familiar paeans to justice and to the role of lawyers in protecting the rights of the downtrodden; it recalls famous events and epic figures in the glorious history of law and lawyers; and it reminds the new law students that, unlike the carefree experience of their undergraduate years, law school will be very hard work. But then the dean shifts course, and foreshadows what the students will actually be learning during their three years

* Frank Stanton Professor of the First Amendment, John F. Kennedy School of Government, Harvard University. This Article is the written version of the Donley Memorial Lectures, presented at the West Virginia University College of Law on November 15-16, 2000. A version of this lecture and article appears as Chapter 10 of Frederick Schauer, Profiles, Probabilities, and Stereotypes (Harvard University Press, 2003). I am grateful to the College of Law not only for giving me the privilege of joining the illustrious group of scholars who have delivered previous Donley Lectures, and not only for the stimulation provided by the questioners on the occasion of delivering the Lectures, but most of all for having introduced me, as a beginning Assistant Professor a quarter of a century ago, to the joys of a life of teaching, scholarship, and intellectual collegiality.
in law school. Law school is not about learning a battery of legal rules, the dean cautions, thereby attempting to alleviate the expected anxieties of first year students who, come November, become increasingly anxious about that fact, in all of their courses combined, and for all of their ability to make articulate assertions about policy, they have yet to learn a single legal rule. Nor is law school about learning where to stand in the courtroom or about how to write a will or a complaint, the dean continues, hoping to inoculate the school and its administration from the complaints of students who worry that law school is insufficiently practical. Rather, the dean pompously concludes, law school is at its core about learning how to think like a lawyer, and about mastering the skill that is commonly referred to as legal reasoning. By learning to think like lawyers, the dean assures the students, they will not only be better lawyers, but will also be better at a host of other occupations that attract those who have had the benefit of a legal education.

In holding out the promise that the students will learn how to think like lawyers, the dean reinforces the view that legal reasoning is a concrete and learnable skill, sort of like long division, French, or statistics. And like the master of any of these skills, the dean pronounces, the master of legal reasoning, the person who knows how to think like a lawyer, has something that distinguishes those who possess the skill from everyone else, the everyone else usually identified by that wonderful catchall term, "non-lawyer."

In the hands of the skillful practitioner of the ancient art of decanal oratory, the opening day's speech serves its intended goal. Students commence their studies with a sense of purpose and mission, confident that at the end of it all they will have a discrete, important, and, above all, marketable skill. But just what is that skill? What can lawyers do that other sorts of folks cannot? My goal here is to tackle at least one facet of that question, and in the process to attempt to locate in the distinction between the general and the particular the point of view that may provide a partial explanation of how, if at all, the kind of thinking that goes on in the legal system differs from the kind of thinking that pervades ordinary life.

II. THE APPARENT PARTICULARITY OF LAW

There are many ways in which one could approach the topic of thinking like a lawyer, but one that appeals to me, and one that seems especially timely at this point in the history of American legal thought, is along the dimension of generality and particularity, for it is along this dimension that many of the debates about the nature of legal reasoning can be situated. So let us start with a conception of decision-making, and not just legal decision-making, that puts at one end of a continuum the maximally particular. Every conceivable feature of an event, or of a decision-making opportunity, is relevant to the decision, and no

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In deference to the sensibilities of my current colleagues in a school of public policy, I will not refer to the standard policy claims that dominate law school classrooms as "arguments."
feature should be excluded from consideration. If a police officer stops a driver for unsafe driving, a particularistic police officer making a particularistic decision whether to summon the driver to appear in court would take into account the condition of the roads, the amount of traffic, the weather, the time of day, the type and condition of the car, the experience and previous driving record of the driver, the explanation offered by the driver, and perhaps even the ability of the driver to pay the fine. At its extreme, particularism is about taking everything into account.

By contrast, a more general decision-making style would not focus so closely on particular drivers driving particular cars under particular circumstances, but would rather have made the decision in advance about an entire category—all drivers driving all cars under all conditions on a moderately large stretch of the highway. Whatever real differences might exist among actual drivers, actual cars, actual conditions, and actual locations would be suppressed in the service of making decisions based on large categories rather than on exceedingly narrow and situation-specific facts.

This distinction between general and particular decision-making exists in numerous domains. The traditional debates between act- and rule-utilitarianism, for example, are debates that take the same form. The act-utilitarian, while still employing various heuristic presumptions and rules of thumb, maintains that the goal of each decision is to maximize utility. Accordingly, every fact is relevant if it contributes positively or negatively to the assessment of the utility of the outcome of the decision, and for the act-utilitarian the best thing to do on this occasion is the thing that will maximize utility. By contrast, the rule utilitarian acts and thinks differently. From the perspective of the addressee of a rule, the rule-utilitarian faithfully follows the rule whose faithful observance will maximize utility over a range of decisions or acts, and does not inquire whether it would be wise to deviate from the rule on this occa-

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2 I deliberately do not say "running a stop sign," or "exceeding the speed limit." A speed limit, for example, like any other rule, represents a departure from maximal particularity. Under a speed limit, even one that is presumptive rather than absolute, a driver traveling at a speed in excess of, say, fifty-five miles per hour is at least partially precluded from relying on facts that a more open-ended style of decision-making would take as relevant. See generally FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE (1991).

3 On thinking about rule and standards, and thus generality and particularity, from the perspective of whether decisions are or are not made in advance of the circumstances of application, see Louis Kaplow, Rules Versus Standards: An Economic Analysis, 42 DUKE L.J. 557 (1992). The other locus classicus in thinking about rules and standards is Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 HARV. L. REV. 1685 (1976).

4 Much of the debate took place in the 1950s and 1960s, and most of the landmarks are collected in CONTEMPORARY UTILITARIANISM (Michael D. Bayles ed., 1968) and MILL'S UTILITARIANISM: CRITICAL ESSAYS (David Lyons ed., 1997).

sion. And from the perspective of the creator of the rule, who in order to make the distinction between act- and rule-utilitarianism must be conceptually or actually distinct from the addressee of the rule, the rule-utilitarian makes the rule whose faithful observance by others will maximize its utility, rather than telling those others to just maximize utility as they see fit for each act or for each decision.

That the rule-utilitarian is unwilling to repose the power to make primary utility calculations to each decision-maker signals a connection with another area in which the distinction between general and particular decision-making is highly relevant. When in numerous domains we applaud the exercise of discretion and create the conditions for its exercise, we are in effect encouraging particularistic decision-making, for we are fostering an environment in which decision-makers are free to look at every dimension of the particular decision before them, and to make the decision that, in that context, appears at that time to be optimal. And when we are as institutional designers fearful of this kind of discretion, we substitute rules, or regimens, or protocols, each designed to constrain discretion, and each designed to set out what is to be done in advance of the particular occasion on which it must be decided what is to be done.

Although the rule of law is typically contrasted with the "rule of men [sic]," numerous features of modern and not so modern legal thought encourage the view that legal decision is ultimately, and at its best, particularistic. Although Aristotle had contrasted law with equity, and the suboptimal gener-

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7 On the distinction between rule-maker and rule-follower being essential for an intelligible version of rule-utilitarianism, see R.M. HARE, MORAL THINKING: ITS LEVELS, METHOD, AND POINT (1981); SCHAUER, supra note 2.


12 THE ETHICS OF ARISTOTLE: THE NICOMACHEAN ETHICS § 1137a-b (J.A.K. Thomson trans., 1977). For explication, see GEORGIOS ANAGNOSTOPOULOS, ARISTOTLE ON THE GOALS AND
ality of law with the optimizing potential of equity, the notion that equity was something done outside the legal system has not survived. Instead equity itself has been assimilated within the legal system. This assimilation has made equity more rule-bound, but the discretion, flexibility, and situation-specific judgment that characterizes equity is now understood to exist as part of the law and not outside of it.

But although the system of equity has become part of the legal system, the equitization of the law has in fact been far more pervasive, especially in the United States. If we understand equity less as a formal system and more in Aristotelian terms as the ability to reach the correct result in the particular case without reference to the constraining generality of rules, we see in the United States an increasing acceptance of the power of judges and other legal actors to use whatever devices are necessary to reach the right result in the particular case. Most obvious, of course, is the frequency with which express constitutional or statutory language necessitates the kind of open-ended inquiry that characterizes particularistic decision-making. In the context of the constitution we see provisions like "Commerce with foreign Nations, and among the several States," "necessary and proper," "unreasonable searches and seizures," "cruel and unusual punishments," "equal protection of the laws," and "due process of law.". When we turn from the constitution to statutes, similarly non-constraining language arises in the context of the Sherman Antitrust Act's prohibition on "[e]very contract, combination ... or conspiracy, in restraint of trade

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14 "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould [sic] each decree to the necessities of the particular case." Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944) (Douglas, J).


16 U.S. CONST. art. I, § 8, cl. 3.

17 *Id.* art. I, § 8, cl. 18.

18 *Id.* amend. IV.

19 *Id.* amend. VIII.

20 *Id.* amend. XIV, § 1.

21 *Id.* amends. V & XIV, § 1.
or commerce . . ."22 the Securities and Exchange Act's condemnation of "any device, scheme, or artifice to defraud,"23 the way in which the Americans with Disabilities Act does not require accommodations to the disabled when such an accommodation would "fundamentally alter the nature"24 of the enterprise, and the widespread acceptance, usually enshrined in statutes but sometimes only in judicial practice, of the "best interests of the child" standard for determining custody and related child welfare matters.25

It is a noteworthy feature of American law, however, that contextual and particularistic decision-making is not restricted to such express statutory or constitutional mandates to engage in open-ended adjudication. When precise and clear statutes or constitutional provisions on their face appear to dictate a sub-optimal outcome, judges are encouraged, or at the very least authorized, to use a variety of devices to reach the right result instead of the statute-indicated result.26 These devices would include recourse to a number of canons of statutory interpretation allowing interpreters, when necessary, to avoid the literal meaning of the statutory language by looking instead to legislative intent, to statutory purpose,27 to the place of the particular provision in a larger regulatory or legal scheme,28 or simply to the necessity of avoiding an absurd result.29 In the academic literature, increasingly descriptive of judicial practice, we see calls to judges to engage in "dynamic" statutory interpretation,30 to reach the result that would involve the best public policy, to interpret a statute as if one were interpreting a work of literature,31 to decide only one case at a time,32 and, if necessary, simply to update33 a statute that the judge perceives to be obsolete.34

27 See, most famously, Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892).
28 See Principality of Monaco v. Mississippi, 292 U.S. 313, 329 (1934) (interpreting the word "another" in Eleventh Amendment to include "the same"); Hans v. Louisiana, 134 U.S. 1, 13 (1890) (same).
30 See generally WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994).
31 See generally RONALD DWORKIN, LAW'S EMPIRE (1986).
Although these perspectives and devices appear on their face to be different from each other, all share the common goal of empowering judges to reach the correct result in the particular case. When judges follow the literal words of a statute and in doing so come to what appears to be an inferior outcome, their decisions are condemned as mechanistic or formalistic, but the charge of formalism is of a piece with a dominant strain in modern American legal thought. Whether it be the focus on the particular urged and described by Legal Realists such as Jerome Frank and Karl Llewellyn, the emphasis on implementing in every case the real purpose of a law that was the characteristic of Lon Fuller and the Legal Process school of thought, or Ronald Dworkin's distinction between the superficial words of a statute and the "real" statute that reflected the full scope of a society's legal commitments, the overwhelming theme of American legal thought and of American adjudication has been pressure against the constraints of general rules and sympathy with the equitable idea, in the Aristotelian sense, of finding a way to remedy the defects that are frequently occasioned by the generality of legal rules.

On the basis of all of this, it would be tempting to conclude that the essence of law is its particularity. The job of a judge, it might be thought, is above all to be right, to make the best decision possible in this case. King Solomon,
after all, if often thought of as the quintessential judge, but Solomonic wisdom is not understood to be a function of obeying rules, following precedent, or fitting the dilemma of contested parentage of the baby into a pre-existing general category of cases of this type. Rather, Solomon is revered for having come up with the perfect solution to this case as he then perceived it personally and closely. If Solomon is law at its purest, then law at its purest is consummately particular.

III. IS LAW ABOUT JUDGING?

But is King Solomon law at its purest? In order to answer that question, we need to divide it into two categories. First, is Solomonic judging to be understood as judging at its purest? And, second, is judging, whether by King Solomon, Chief Justice Rehnquist, Judge Judy, or anyone else, to be understood as law at its purest?

For reasons that will become apparent presently, I want to take up the second question first, and thus to consider the implications of looking at the judge as the central legal player and thus to judging as central to law. Certainly the judge-focused view of law is, at least in the United States, omnipresent. Law students spend most of their time reading opinions written by judges and devote their classroom hours to struggling with whether the judge reached the correct result and justified that result in an appropriate way. Law professors write articles that, typically, criticize judicial opinions, and offer the analysis that the article's author would have given had she been a member of the relevant court and had been assured that he or she had been writing a compliant majority. Even that portion of the practicing bar that specializes in litigation is preoccupied with the identity, the competence, and the social, political, moral, and jurisprudential proclivities of the judge before whom they argue.

Yet although judges are everywhere in American law, in American legal scholarship, and in American legal education, judges occupy but a small corner of the law.\footnote{See Frederick Schauer, Judging in a Corner of the Law, 61 S. CAL. L. REV. 1717 (1988).} Judges are relatively invisible for much of regulatory law and almost all of transactional law. And although it is true that much of this practice takes place in the "shadow" of judging,\footnote{See generally Robert H. Mnookin & Lewis Kornhauser, Bargaining in the Shadow of the Law: The Case of Divorce, 88 YALE L.J. 950 (1979).} more often transactions are arranged and legal advice given on the basis of statutes, rules, regulations, and regulatory practices than on the basis of what judges are likely to do on the remote chance that the transaction actually winds up in the hands of a judge.

The most significant problem with a judge-focused view of the law, however, is not that judging occupies only a small portion of the phenomenon of law. More serious is the fact that the small portion of the law that judging does occupy is a dramatically skewed sample of the full universe of legal events.
From Karl Llewellyn to Richard Posner to George Priest and William Klein, those who are sensitive to the dynamics and incentives of dispute resolution have recognized that few legal events and few legal disputes wind up in court. Rather, only those disputes in which two opposed parties holding mutually exclusive positions each believe that they have an appreciable chance of prevailing are likely candidates for litigation. As a result, the universe of litigated cases, unlike the universe of legal events and even unlike the universe of filed cases, consists disproportionately of those disputes in which the law is sufficiently uncertain that both of the parties holding mutually exclusive positions believe that they might actually prevail, even though only one of them actually will. And of course the same phenomenon exists even more so on appeal, since from the set of all decided cases the only ones that are likely candidates for appeals pursued through judgment and opinion (when an opinion is actually issued) are those in which, again, both sides, even after judgment, believe that they might win, even though only one will. And at the pinnacle of the system, the eighty-five or so cases a year that the Supreme Court decides on the merits with full opinion from the more than seven thousand they are asked to decide, it is no surprise to discover that almost none of those cases are easy, and that in all of them the law was essentially in equipoise prior to the Court’s decision, either because, rarely, there was virtually no law, or because, much more commonly, the law that was available in the form of statutes, cases, regulations, and reported judicial opinions was such that the law could plausibly – professionally respectably – have supported a victory for either of the opposing parties.

What it suggests, of course, is that King Solomon himself existed at the edges and not at the center of the law. Indeed, perhaps the most interesting aspect of the tale of Solomon is that it arose in the context of such an unusual event. Although adjudication became necessary when it turned out that two


47 In the 2000 term, the Supreme Court decided 86 cases with full opinion, and was asked to decide 7713. The Supreme Court, 2000 Term: The Statistics, 115 Harv. L. Rev. 539, 546 (2001).

48 See generally Frederick Schauer, Easy Cases, 58 S. Cal. L. Rev. 399 (1983).

49 This is the central lesson of Karl N. Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed, 3 Vand. L. Rev. 395 (1950). Llewellyn focused only on the canons of statutory construction, but his lesson about the common availability of canonical or authoritative legal to support both of two mutually exclusive positions in a lawsuit applies much more broadly.
different women both claimed motherhood of the same child, it is noteworthy that neither King Solomon nor any other judge was likely called upon to decide those cases in which a childless woman desired another woman's child because the childless woman thought she would be a better mother, or desired a child more than did some child's natural mother. The decision by Solomon was indeed an act of law, but so was the prevailing practice in which the overwhelming majority of natural mothers were allowed to keep their children even when others desired them or could better care for them. Similarly, although judges are called upon to decide cases in which question about times and dates are contested for various unusual reasons, law is no less present when judges are not called upon to decide those cases in which a legally enforceable deadline or time limit is contained in a statute, regulation, or other legal instrument.

There is, then, a more than plausible argument to be made that focusing on judging is a misguided method for identifying the nature, essence, or character of the phenomenon that is law. But even if my claim is mistaken, and judging is indeed law at its purest, it does not follow that Solomonic judging is law at its purest. Solomon, of course, was forced into making the decision he did because there was no law for him to interpret, at least on the very matter at issue. There might have been, but was not, a statute providing that in cases of disputed parentage the decision should be in favor of the older, or the younger, or the richer, or the poorer, or the higher-classed, or the lower-classed, or the married, or the single, or even the one who was better able to persuade a jury of twelve by a preponderance of the evidence that she was in fact the biological mother. Yet none of these tie-breaking or dispute-resolving statutes or rules existed, and thus Solomon was forced not to apply law but to make it, and Solomonic judging might best be understood as an example of the fact that when there is no law it is incumbent upon the judge to make some.

When there is law, however, the situation is most often quite different. Although commonly in the United States and occasionally in other countries we praise the judges who ignore or bend the law in order to do the right thing, the experience of most judges is not one of pushing, bending, or breaking the law. Rather, the experience of most judges is of following the law. Although the New York Court of Appeals achieved jurisprudential immortality— with the help of Henry Hart and Albert Sacks, and then of Ronald Dworkin— by de-

50 See, e.g., United States v. Locke, 471 U.S. 84 (1985) (statute mistakenly set the deadline as "prior to December 31" even though it was obvious that the intention was to make the deadline "on or prior to December 31").


deciding in *Riggs v. Palmer*\(^{54}\) that a grandson who murdered his grandfather in order to accelerate his inheritance could not claim under the will regardless of what the Statute of Wills then provided, it turns out that almost all of the courts deciding similar cases at the time held in favor of and not against unworthy beneficiaries.\(^{55}\) That the vast majority of federal appellate cases are now decided without an opinion that the deciding court deems necessary for publication\(^{56}\) again offers strong support for the proposition that a significant dimension of judging is following the law even when politics, morality, or sympathy would militate otherwise. Even if law is about judging, therefore, it is far from clear that judging is about deciding cases in which there is no law, as with Solomon, or deciding cases against and in spite of the law, as in *Riggs v. Palmer*.\(^{57}\)

### IV. THE GENERALITY OF LAW

Exposing the epiphenomenal dimensions of Solomonic wisdom enables us to see the particularity of law in its proper light. Imagining that law is particular turns out to be a function of understanding law as judging, and of understanding judging of a certain kind—deciding hard cases with little legal guidance from authoritative legal sources—as a higher form of law than judging of another kind—deciding cases in which authoritative legal materials focus the inquiry and often strongly indicate the outcome. When Justice Thurgood Marshall is scorned for concluding with six of his brethren in *United States v. Locke*\(^{58}\) that "prior to December 31" means prior to December 31, an obvious congressional scrivener's error notwithstanding, he is scorned for adopting a

\(^{54}\) 22 N.E. 188 (N.Y. 1889).

\(^{55}\) Some of whom had murdered the testators, Wall v. Pfanschmidt, 106 N.E. 785 (Ill. 1914); Owens v. Owens, 6 S.E. 794 (N.C. 1888); Shellengerger v. Ransom, 59 N.W. 935 (Nebr. 1894); In re Carpenter's Estate, 32 A. 637 (Pa. 1895), and some of whom had not. Graham v. Burch, 55 N.W. 64 (Minn. 1893); In re Evans' Will, 98 N.Y. Supp. 1042 (App. Div. 1906); In re Wolf, 150 N.Y. Supp. 738 (Surf. Ct. 1914).


\(^{57}\) See generally Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231 (even in the Supreme Court most statutory interpretation cases are decided by looking to plain meaning of statutory text).

\(^{58}\) 471 U.S. 84 (1985).
view of judging that is routinely castigated as formalistic and mechanistic. Yet the very question of whether Justice Marshall was faithful to or departed from an understanding of legal reasoning or thinking like a lawyer is exactly the matter at issue, and as a consequence it is question-begging in the extreme to announce that Justice Marshall's decision was less law-like just because it was less particularistic, as it most assuredly was.

Indeed, if we are engaged in a determination of what legal reasoning is, what thinking like a lawyer is rather than what it should be, the inquiry would more plausibly be empirical than normative. And although there is room in jurisprudential thought for Max Weber's notion of an ideal type - the 1999 Yankees as embodying baseball more than a pick-up game using jackets for bases and a ball patched together with black electrical tape, even though the latter empirically dominates the former - the claim of thinking like a lawyer cannot avoid having an inescapable empirical dimension. Just what is it that lawyers actually do that distinguishes them from other people and from other professionals?

When we formulate the question in this way, we see, initially, that what is supposedly so wonderful about particularistic lawyers and judges is no less wonderful when it appears in physicians, psychologists, detectives, social workers, architects, and teachers. In all of these professions we laud, and properly so, the exercise of particularistic judgment. Physicians are expected to find the right diagnosis and treatment for this patient, just as psychologists are expected to do the same with their patients; detectives are expected to solve this crime; social workers are expected to be able to manage this social situation; architects are expected to produce unique buildings; and teachers are expected to understand the educational needs of individual students. We can and do praise lawyers and judges when they make the right argument for this particular situation and reach the right decision in this particular case, but it turns out that such praise gets us nowhere in identifying those characteristics - if any - that distinguish legal reasoning from any other sort of reasoning. Lawyers and judges, after all, are praised not only when they are particularistic, but also when they are compassionate, empathetic, eloquent, intelligent, trustworthy, loyal, helpful, friendly, and brave, but no one would suggest that any of these traits, however admirable they are and however important it is that lawyers possess them, captures the idea of legal reasoning or thinking like a lawyer, and that is because no


61 Younger readers will probably not even recognize the activity described in the text. Too bad for them.
one would suggest that these traits, praiseworthy as they are when they appear in lawyers, are in any way unique to or even disproportionately represented in lawyers or in what lawyers do.

Things become quite different, however, when we look not a particularity but at generality. For when we focus on generality, and look at those aspects of legal decision-making that embody generality rather than particularity, it turns out that some of the characteristic devices of legal argument and legal thinking appear to be less present and less praiseworthy in other domains than they are in law. And even if it is too strong a claim to make that legal reasoning consists of those methods of thinking that are all of law and none of anything else, it would be a plausible argument that we have identified the core of what it is to think like a lawyer if we were to identify those forms of decision-making and those forms of reasoning, if there are any, that loom much larger in law than they do in other domains.

Consider first the idea of rule-based decision-making. What makes a rule a rule is its generality, and it is a defining feature of rules that they collect numerous relevantly different events and treat them the same way. "Speed Limit 55" applies to a large array of drivers, cars, and driving conditions, and treats them all in the same way. Section 16(b) of the Securities and Exchange Act of 1934 penalized all those who sell and buy or buy and sell within a six month period if they are officers, directors, or holders of more than ten percent of the stock of a registered company regardless of whether or not they have traded on the basis of inside information, and penalizes none of those who fall outside of these designated categories and boundaries regardless of how much inside information they used when they traded. The First Amendment protects much unworthy "speech" and little worthy "non-speech," just as the Seventh Amendment grants the right to a jury trial to all of those whose claims at law exceed the twenty dollar limit and none of those whose claims fall below it. In all of these instances and millions more, it is in the very nature of a rule that the rule gathers together arguably dissimilar particulars and subjects them to similar

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64 U.S. Const. amend. I.


66 U.S. Const. amend. VII.
treatment. Aristotle might well have said that like cases should be treated alike and unlike cases unalike, but it is the defining feature of a rule that it frequently treats like cases unalike and even more frequently treats unalike cases alike.

At the core of the idea of a rule, therefore, is the idea of generality. A rule prohibiting pit bulls generalizes about pit bulls and bans even the docile ones. A mandatory retirement rule generalizes about the correlation between age and characteristics such as decreased night vision, speed of reflexes, and declining hearing acuity, and thus treats keen-seeing senior citizens in the same way it treats those whose vision is declining. And, as the old jurisprudential chestnut informs us, a rule prohibiting vehicles in the park excludes not only those vehicles that are noisy and dangerous, but those vehicles that create no problems whatsoever.

The generality that is characteristic of rules exists in other areas of law as well. The idea of precedent mandates that we decide today’s case in the same way as we decided yesterday’s, even if today’s case is relevantly different from yesterday’s case, and even if we think that yesterday’s case was decided wrongly. Decision-making according to precedent requires a decision-maker to group together at least two cases that look to that decision-maker to be relevantly different. Even more importantly, the determination of which case is a precedent for which other case (a case involving a red car is rarely a precedent for a case involving a red house, at least not because of their shared redness, but a case involving a red car will often be a precedent for a case involving a blue car just because of their shared car-ness) involved determining which category—

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70. As, for example, the still-existing Age Sixty Rule, 14 C.F.R. § 121.383(c) (2004), pursuant to which the Federal Aviation Administration Authority prohibits commercial airline pilots from flying after they reach age sixty.

71. See Lon L. Fuller, Positivism and Fidelity to Law – A Reply to Professor Hart, 71 HARV. L. REV. 630, 663-64 (1957).


which generalization — includes both the precedent case and the instant case. Consequently, by insisting that the very existence of a previous decision is a reason for following it, the concept of precedent forces legal decision-makers to engage not in an act of particularization, but in an act of generalizing, an act of constructing (or following) the category that includes not just this case, but this case, the previous case, and possibly a whole raft of other cases besides.

Or consider the idea of reason-giving. It is true that the numerous parts of the law do not require legal decision-makers to give reasons. Juries are not compelled to give reasons for their decisions, and the Supreme Court rarely provides reasons for its denials of certiorari. Yet despite such examples, reason-giving is a pervasive and frequently praised feature of legal decision-making, and a legal decision-maker who provides reasons for her decisions is considered a better legal decision-maker than one who does not, just as the better lawyer or better judge is the one who provides reasons rather than assertions or emotional appeals. To put it differently, reason-giving is centrally about reasoning.

Reason-giving too, however, is a form of generalization. To provide a reason for a decision is to provide the contours of the category that the particular decision is a member of, as when we say that this particular cotton dealer does not have to pay for this particular shipment of cotton arriving on this particular ship because there was a mutual mistake — because the transaction between the dealer and the shipping agent fell within the larger category of transactions in which the parties have different conceptions of the underlying factual basis of the transaction. To give a reason for a decision is to place an argument within a category, and reason-giving is thus, as with decision-making by rule and decision making according to precedent, a process of engaging in decision-making by generalization, a connection that becomes even more apparent once we recognize that the commonly lauded practice of "principled adjudication" is at its core the willingness of a court to follow in future cases, and thus to generalize, the reasons it has given in a previous case.

Consider in this regard the typical goal of the traditional (or at least the ideal type) Socratic interrogation of a first-year American law student. After

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having been dragged through the recitation of the facts of the case in which some penniless widow has been unable to recover against a wealthy but non-negligent corporation, the student is asked whether the result was correct. “No,” the student announces, making clear that he thinks that this widow ought to be able to recover against this corporation in these circumstances. But then the professor, assisted more by having conducted the same interrogation on the same facts in the same case for the past forty-seven years than by any great insight, offers a series of hypotheticals, all designed to demonstrate to the rest of the class at this student’s expense that any legal rule allowing this widow to recover against this corporation would entail much worse results in other cases and would thus be bad policy. The goal of the Socratic interrogation, therefore, is to help (or force) the students to understand that morally relevant features are not necessarily legally relevant, and thus that legal reasoning involves grouping together morally, politically, socially, and possibly economically different events under the same legal heading. At least in its traditional guise, the Socratic examination is designed to involve training in generalization.

Some of the good features of Socratic examination have gone by the wayside as its numerous bad features—professional bullying, most notably—have become largely and deservedly unacceptable. But it is important not to lose the sense of the goal of the Socratic examination, and in an important way the goal of legal training. The Socratic examination was located and to some extent is still located at the intersection of thinking about rules, thinking about precedent, and thinking about reason-giving. At this intersection lies the idea of generality and generalization, and if we think that rules, precedent, and reason-giving are important to law then we have to think that generality is important to law as well.

Unlike particularity, however, generality is not just important to law in the same way it is important to medicine, psychology, social work, architecture, and criminal investigation. All of these endeavors use rules, but they use them less, they use them less strongly, and they do not train their practitioners in the use of rules as such, even if they may at times train their practitioners to use particular rules. So too with reason-giving. All sorts of professions and human activities require the giving of reasons, but none obsess about it the way law does, and few—philosophy may be an exception—consider reason-giving a central feature of the enterprise.

The point is even more extreme when we turn to the idea of precedent. In the case of precedent, what the law often lauds is scorned in other areas. Philosophers treat an argument from precedent as essentially a fallacy, and in the world of public policy the idea of precedent drops out almost entirely. That George W. Bush should do something because Bill Clinton did it is, except in very rare circumstances, simply not a credible argument at all. In the world of policy and politics the practitioners are expected to make the correct decision on this occasion, and the idea that one would make an incorrect decision on this occasion because a similar incorrect decision was made in the past is not an idea
THE GENERALITY OF LAW

that has much purchase in the world of public affairs, let alone in the world of medicine, social work, architecture, psychology, or criminal investigation.

In law, it thus seems, generality has a disproportionate presence, but particularity has only a proportionate presence. If this is right, and I put it in the subjunctive only to stress that this is in the final analysis an empirical claim that I cannot test rigorously in this context, then we may in the idea of generality have located what is, although hardly unique to law and although hardly absent outside of law, a form of thinking that would undergird law's claim to be different, and our hypothetical law school dean's claim that there is something to the idea of legal reasoning, and something to the idea of thinking like a lawyer.

V. CONCLUSION: THE STABILITY OF LAW

My goal here has not been to justify the distinctiveness of law but only to locate it. Like anchovies, which do exist even though I find them distasteful, the ability to identify something is not to endorse it. Still, it may be worth closing with a few observations about the values that may underlie law's obsession with generality.

First, generality may be the vehicle of stability. By treating unalike cases alike, law, and not just in the areas of precedent, embodies Justice Brandeis's conclusion that "in most matters it is more important that the applicable rule of law be settled than that it be settled right."80 In reaching this conclusion, Justice Brandeis recognized that the particular mission of law may be that of achieving certainty for certainty's sake, consistency for consistency's sake, and stability for stability's sake. These are hardly the only goals of any system of social organization, and often it is more important to be right than to be consistent, more important to be flexible than to be stable, and more important to be wise than to be certain. Yet any complex social structure will engage in substantial separation of powers, in the non-technical sense of that term, and will recognize the virtues of functional division of responsibilities. When this is so, it may well be that some institutions are more likely to be the vehicles of change and other more likely the vehicles of stability, and thus it may well be that law is best understood as having the particular vocation of stability while it leaves to other institutions the vocation of change.

This idea of stability as the particular mission of the law relates closely to the second argument for seeing law, normatively as well as descriptively, through the lens of generality. When the "rule of law" is contrasted with the "rule of men," the core idea is that individual power, creativity, initiative, and discretion have their dark side. The rule of men would be fine if all men were good, but when many men are not so, and when a degree of risk-aversion is justified, we may often prefer to lose the most positive efforts of the best of men in

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order to guard against the most negative efforts of the worst of them.81 When such a view of official power prevails, law looms large, and law may be the institution charged with checking the worst of abuses even if in doing so it becomes less able to make the best of changes. Once again, therefore, the idea of generality, putting official action in larger categories rather than relying on the individual discretion of individual officials, links closely with that understanding of law that generations of rule of law rhetoric have attempted to capture.

Finally, generality relates closely to the idea of authority. Authority, also the characteristic mode of the law,82 is once again about generalization, because authority is about treating the emanations from certain sources—certain courts, certain books, certain institutions—as being important just because of their source. And if the source and not the content is to be important, then it must be that the source itself is a generalization, and that the idea of authority is at the very least a close cousin to the idea of generality.

As with precedent, authority is hardly a universal good. In many domains it is best to do what is right rather than what someone else thinks is right. But if again in a complex world there is room for authority and authorities, then the fact that authority is more important in law than elsewhere says a great deal about the distinctiveness of legal reasoning, and the distinctiveness of the idea of generality that undergirds authority itself.

Much of this may be depressing to those who see law in more idealistic ways. If law is a vehicle of stability and not of change, of pessimism about human nature and not of optimism, of restraint and not of progress, and of the past rather than the future, it may not be at all times and at all places the instrument of social change. If law is a shield and not a sword, its power may be limited even though its necessity is no less. Yet of course we know that law is often the latter element of each of these pairs, and that it is often used for change, for progress, and to break down the encrustations of existing thought. When it does this, however, it may do this not because it is being law-like, but precisely because it is not. Law as a system may often be an agent for particularistic creativity, but law as a mode of thinking may even more often be an agent for the stability and consistency that only generality can bring.
