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Tribute to David Schuman

- I. To Serve the Law, We Must See Not Only Abstract General
Legal Rules, but Also the Real People Who Occupy Them 4
- II. To Serve the Law, We Must Beware of Two Professional
Dangers—Perversion of Power and Coldness of Heart 7
- III. To Serve the Law, We Must Forge a Public Life Worth
Living 9

In a law school commencement address, Judge David Schuman told the graduates that, as Dante proceeded through Hell and Purgatory to Heaven, he was accompanied by a teacher, Virgil. But Dante had referred to Virgil not as a teacher but as an authority. Judge Schuman explained that, to Dante, an authority was someone whose example enlightened and enabled. David Schuman served that role for me.

David was born and grew up in Chicago. As a youth, he was a speed skater; he later became an English professor, and then a lawyer. And, by the time he gave his commencement address, David was both a judge and a law professor. In that address, Judge Schuman proposed three principles: that to serve the law, we must see not only abstract general rules, but also the real people who occupy them; that we must beware of two professional dangers—perversion of power and coldness of heart; and that we must forge a public life worth living. David lived by those principles. We referred to David as the Shoe; we did so because he walked through life in those truths, abiding by those

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principles, every day, in both his life and in his work. I hope to demonstrate that to you with the three examples, of many, below.

I

TO SERVE THE LAW, WE MUST SEE NOT ONLY ABSTRACT GENERAL LEGAL RULES, BUT ALSO THE REAL PEOPLE WHO OCCUPY THEM

As an example of the first principle, take Judge Schuman's opinion in *State v. Ashbaugh*.¹ One of the issues in the case was whether the defendant had been detained in violation of her right, under Article I, section 9, of the Oregon Constitution, to be free from unreasonable seizure. Judge Schuman described the facts succinctly and compellingly, as he always did:

The undisputed facts are as follows. While patrolling a public park on their bicycles in the early afternoon, Beaverton Police Officers Barrowcliff and Schaer noticed defendant and her husband sitting on the ground in the shade of a tree. Because the couple were "middle-aged," they "didn't look like older people or people with kids" who frequented the park, and that fact aroused the officers' suspicion. One of the officers told the couple, "Hey, you're not in any trouble; do you have some I.D. we can see?" Defendant and her husband cooperated with the request, and the officers took their identification to check for warrants.

After a few minutes, the officers learned that defendant had no outstanding warrants, and they returned her identification to her. The check on her husband, however, revealed that defendant had a valid restraining order against him. Defendant acknowledged the existence of the restraining order but told the officers that she and her husband were trying to repair their relationship. The officers nonetheless arrested the husband for violating the order and called for a transport vehicle. While he was being handcuffed, defendant's husband asked, within earshot of defendant, if defendant could take his belongings with her. The officers said that she could. Defendant's conversation with the officers was "relaxed and nonconfrontational"; she knew that she was not being detained.

The officers led defendant's husband to a patrol car approximately 40 feet from where defendant stood. A few minutes thereafter—and 18 minutes after the officers first approached the couple—the officers went to retrieve their bikes. Defendant was still there. They asked her if she would take her husband's belongings. At that point, "something inside of [Schaer] made [him] want to ask" defendant if she had anything illegal in her purse, and he did so. Defendant told him that she did not. Schaer then asked if he could look inside her purse, and she consented. That conversation was also "relaxed

¹ *State v. Ashbaugh*, 225 Or. App. 16, 200 P.3d 149 (2008), *rev'd*, 349 Or. 297, 244 P.3d 360 (2010).

and nonconfrontational.” Schaer looked inside the purse and found methamphetamine.²

The issue before the court was limited. The state had conceded “that the officers violated Article I, section 9, when, without reasonable suspicion of criminal activity, they asked for and retained defendant’s identification and conducted a warrant check.”³ The question remained, however, whether the officers also violated the constitution when Officer Schaer later asked the defendant whether she had any contraband in her purse, and, when she said that she did not, asked for consent to search it. To answer that question, Judge Schuman explained, the court was required to “confront once again the vexing question of when an encounter between a police officer and a citizen becomes a stop.”⁴ That question, he said, depends on “whether ‘a reasonable person in [the] defendant’s position could have believed that the officers significantly had restricted her liberty or freedom of movement.’”⁵

When questions are vexing, the ice is slick. Nevertheless, Judge Schuman skated deftly past the dissent’s view that the encounter was no more than “a noncoercive conversation.”⁶ Judge Schuman persuaded the majority of his court that that was not how a reasonable person would have seen the encounter:

Although [defendant’s] conversation with the two officers was “relaxed and nonconfrontational,” it was a conversation between one citizen and two uniformed, armed police officers who had, within the previous 20 minutes, required her to produce identification; had, as she watched, arrested her husband, handcuffed him, and put him in a patrol car for transportation to jail; had approached her again and asked if she was carrying contraband; and, obviously not believing her denial, had asked to search her purse. If, in those circumstances, she believed that she could not refuse the request and leave, that belief was a far cry from unreasonable.⁷

Judge Schuman refused to rely on an earlier case that had held that a juvenile defendant had not been stopped when he “was startled by a

² *Id.* at 18–19, 200 P.3d at 151.

³ *Id.* at 20, 200 P.3d at 152.

⁴ *Id.* at 22, 200 P.3d at 153.

⁵ *Id.* at 25, 200 P.3d at 155 (quoting *State v. Toevs*, 327 Or. 525, 536, 964 P.2d 1007, 1014 (1998)).

⁶ *Id.* at 37, 200 P.3d at 161 (Edmonds, J., dissenting) (“Here, although [the officer] made inquiries of defendant that a private citizen would not have made, he engaged in only a noncoercive conversation in a manner that would not be perceived as offensive had the conversation occurred between two ordinary citizens.”).

⁷ *Id.* at 25, 200 P.3d at 154–55.

uniformed and armed police officer who approached him from behind, informed him that there had been complaints about drug use in the area, and then asked him for permission to search his person.”⁸ For one thing, Judge Schuman said, that case “was wrong when it was decided.”⁹ From Judge Schuman’s perspective, the court’s conclusion that the defendant would have been unreasonable to believe that he was not free to ignore the officers’ request and leave “might make sense to those of us who are schooled in the nuances of search-and-seizure law, but to everybody else, it is fanciful.”¹⁰ Instead, Judge Schuman turned to other cases and drew what he considered to be a more salient underlying principle “that a person who knows that he or she is being investigated by a police officer during an encounter could reasonably believe that, for that reason, his or her freedom of movement has been restrained.”¹¹

Then, returning to the defendant in *Ashbaugh*, Judge Schuman reasoned that she knew from the officer’s request to search her purse that she was being investigated and, therefore, that she reasonably could believe that she had been detained.¹² And, Judge Schuman instructed, the defendant reasonably could have drawn that conclusion no matter how politely the officer had asked for her consent to search.¹³

On review, the majority of the Oregon Supreme Court slid away from that analysis. Instead of focusing on the investigation that the officers apparently were conducting, the majority focused on the “relaxed and nonconfrontational” nature of the encounter.¹⁴ The majority took the position that, during the encounter, the officers had not “intentionally and significantly”¹⁵ restricted or interfered with the defendant’s liberty:

[W]hile it may have been true that defendant had been unlawfully detained by police some minutes before and had watched a clear show of authority directed at her husband, those circumstances had ended. They did not create the kind of atmosphere that would convey to a citizen that she was not free to go at the later time.¹⁶

⁸ *Id.* at 26, 200 P.3d at 155 (discussing *State ex rel. Juv. Dep’t of Multnomah Cnty. v. Fikes*, 116 Or. App. 618, 842 P.2d 807 (1992)).

⁹ *Id.*

¹⁰ *Id.* at 26, 200 P.3d at 155.

¹¹ *Id.* at 28, 200 P.3d at 156–57.

¹² *Id.* at 28, 200 P.3d at 156.

¹³ *Id.*

¹⁴ *State v. Ashbaugh*, 349 Or. 297, 317, 244 P.3d 360 (2010).

¹⁵ *Id.* at 317, 244 P.3d at 370–71.

¹⁶ *Id.*

On the frozen rivers of justice, Judge Schuman skated as a Chicagoan skates—with eyes open to the real world about him. The Supreme Court’s majority glided, fancifully, away.¹⁷

II

TO SERVE THE LAW, WE MUST BEWARE OF TWO PROFESSIONAL DANGERS—PERVERSION OF POWER AND COLDNESS OF HEART

To the second principle, take Judge Schuman’s dissent in *State v. Howard*.¹⁸ There, the majority decided that police officers did not violate the defendant’s right to be free from unreasonable search and seizure under Article I, section 9, of the Oregon Constitution, when, instead of obtaining a warrant to permit them to search the defendant’s garbage for evidence of drug manufacture, they asked the company that provided sanitation services in the defendant’s neighborhood to collect the defendant’s garbage and turn it over to them for search.¹⁹ The majority reasoned that the defendant had no constitutionally protected possessory interest or privacy interest in the garbage once it was collected and, therefore, that the warrantless search was not unreasonable.²⁰ Judge Schuman’s dissent was characteristically pointed:

Police, apparently recognizing that they lacked authority to go on defendant Howard’s property in order to seize her curbside garbage container, arranged to have her garbage collection service pick up the container and immediately turn it over to them. The officers then took the container away, extracted its contents, and inspected them. . . . The state . . . argued below (and continues to argue on appeal) that the provision of the Oregon Constitution guaranteeing “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search” leaves government officials free to have people’s garbage seized from their property—without telling them, without a warrant, and without any reason to believe that they have done anything wrong—and then to harvest from the garbage whatever personal information it may yield. The trial court agreed. So does the majority. I do not.²¹

When the case reached the Oregon Supreme Court, that court, as it later did in *Ashbaugh*, approached the question presented based on our

¹⁷ See *id.* at 320–29, 244 P.3d at 372–77 (Walters, J., dissenting).

¹⁸ *State v. Howard*, 204 Or. App. 438, 129 P.3d 792 (2006).

¹⁹ *Id.* at 440, 129 P.3d at 793.

²⁰ *Id.* at 449, 129 P.3d at 798.

²¹ *Id.* at 449–50, 129 P.3d at 798–99 (Schuman, J., dissenting).

own understandings of “social and legal norms of behavior.”²² The court granted Judge Schuman’s point that the state invades constitutionally protected privacy interests when it engages in acts, that, “if engaged in wholly at the discretion of the government, will significantly impair the people’s freedom from scrutiny.”²³ But it looked past his blunt observation that, when the government digs through the people’s garbage, without establishing probable cause to do so and without obtaining a warrant permitting a search, it acts contrary to people’s expectations about what will happen to their garbage. Bypassing that reality, the court instead relied on “the legal relationship between defendants and the sanitation company.”²⁴ We said that “when a person gives up all rights to control the disposition of property, that person also gives up his or her privacy interest in the property in the same way that he or she would if the property had been abandoned.”²⁵

It was not until many years later, and shortly before Judge Schuman’s death, that the Supreme Court overruled its decision in *Howard*. In *State v. Lien*,²⁶ the court recited the question as Judge Schuman had framed it in his dissent in *Howard*: “Did the police do something that, if they could do it in similar circumstances whenever they wanted, would diminish the freedom from unwanted government scrutiny to which an Oregonian is entitled?”²⁷ And, in *Lien*, we recognized that, in *Howard*, Judge Schuman had taken “particular aim” at the issue that now troubled us—“the secret use of the sanitation company as an extension of the police officers.”²⁸ In *Howard*, Judge Schuman had explained that he had been

unwilling to endorse a rule under which government authorities—for good reason, bad reason, or no reason at all—are free, through the expedient of recruited civilians, surreptitiously to arrange for the seizure and subsequent inspection and analysis of the contents of garbage containers that people leave at curbside for pickup and delivery to the dump or recycling facility. Such a rule would result in

²² *State v. Howard*, 342 Or. 635, 642, 157 P.3d 1189 (2007) (quoting *State v. Campbell*, 306 Or. 157, 170, 759 P.2d 1040 (1988)), *overruled by* *State v. Lien*, 364 Or. 750, 441 P.3d 185 (2019).

²³ *Id.* at 639, 157 P.3d at 1191 (quoting *Howard*, 204 Or. App. at 450, 129 P.3d at 799 (Schuman, J., dissenting)).

²⁴ *Id.* at 642, 157 P.3d at 1193.

²⁵ *Id.* at 642–43, 157 P.3d at 1193.

²⁶ *Lien*, 364 Or. 750, 441 P.3d 185.

²⁷ *Id.* at 775, 441 P.3d at 199 (quoting *Howard*, 204 Or. App. at 452, 129 P.3d at 800 (Schuman, J., dissenting)).

²⁸ *Id.*

an unwarranted and significant reduction in the people's freedom from unwanted scrutiny.²⁹

We agreed. In doing so, we acknowledged that, in deciding *Howard* and earlier cases, we had incorrectly colored over the agency relationship that arises when the police ask private parties to procure evidence for the state's use.³⁰

On the constitutional parchment, Judge Schuman wrote as a Chicagoan does—bluntly and with an understanding of the ways in which power can be abused. In its initial decision, the Supreme Court used legal concepts to avoid grappling with that danger; on further reflection, it too faced and addressed it.

III

TO SERVE THE LAW, WE MUST FORGE A PUBLIC LIFE WORTH LIVING

To the third principle, I give you one of Judge Schuman's many contributions to the public discourse. In response to a published assertion that federal trial and appellate judges, who had temporarily stayed enforcement of President Trump's travel ban, were driven by their progressive political biases and overreached their constitutional authority, Judge Schuman—then retired—spoke out to make three points.³¹

First, he explained that there was no evidence that the judges acted to further a progressive political agenda. Second, he said that the author's assertion that judges who exercise judicial review of a presidential executive order "tread on dangerous constitutional ground" was, "not to mince words," just "dead wrong."³² Giving the example of *Korematsu v. United States*,³³ a case in which the Supreme Court had heard a challenge to the constitutionality of a presidential order requiring the internment of Japanese Americans during World War II, Judge Schuman informed the public that the Supreme Court's authority to hear such challenges had long gone unquestioned. And

²⁹ *Howard*, 204 Or. App. at 456, 129 P.3d at 800 (Schuman, J., dissenting).

³⁰ *Lien*, 364 Or. at 780–81, 441 P.3d at 202 ("[C]ommon law agency principles now require us to view the police officers in [Howard] as the principals who, through the use of their agent, were vicariously responsible for segregating and procuring the contents of defendants' garbage bin for exposure to police search, thereby invading defendants' privacy rights without a warrant.").

³¹ David Schuman, *Travel Ban Rulings Based on Law*, REG. GUARD, Feb. 22, 2017, at A9.

³² *Id.*

³³ *Korematsu v. United States*, 323 U.S. 214 (1944), *abrogated by* *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

third, Judge Schuman took issue with the author's suggestion that the president could refuse to obey a court order because judges have "neither armies nor squads of police to enforce their decision," calling that suggestion "unoriginal, unwise and unpatriotic."³⁴ Judge Schuman recognized that each branch of the federal government has the "raw power" to "hobble, and even destroy, the others."³⁵ But, he said, members of each branch

understand that the survival of our constitutional democracy, the delicate experiment that has endured for longer than any other constitutional democracy in history, depends on conformity to certain prudential constraints on the exercise of raw power, because the exercise of raw power leads to constitutional crisis. One of these constraints is that final judicial judgments must be obeyed, even if the judicial branch has "neither armies nor squads of police" to enforce them.³⁶

Judge Schuman expressed his confidence that members of the judicial branch would adhere to prudential constraints on their raw power and avoid constitutional crisis. Left unsaid was his hope that the other branches would do the same. On the streets of our town, Judge Schuman engaged and educated. He spoke like a Chicagoan—with skill and strength. He believed in our democracy and our system of justice. He spoke out about how that system should work and our obligation to ensure that it does work—for everyone.

Judge Schuman was a brilliant jurist who appreciated the law, but who was not limited by its strictures. In the commencement speech with which I began, he described the laws of Athens as giving Socrates "his identity and his roles, which bound him to others in a web of support and obligation, and in so doing made it possible for him to be a human animal."³⁷ He described Dante's Beatrice as representing "his transcendence of self, his connection with the human community."³⁸ David Schuman was a revered judge, but that did not set him apart. He knew so well that our mutuality is inescapable and that it is our human connections that set us free. During his life, the Shoe walked in shoes that were deliberately ordinary, but he was no ordinary man. He was an authority like no other, and I loved him.

³⁴ Schuman, *supra* note 31.

³⁵ *Id.*

³⁶ *Id.*

³⁷ Martha L. Walters, *Epilogue to A VOICE FOR JUSTICE: WRITINGS OF DAVID SCHUMAN* (Sharon J. Schuman ed.) (forthcoming July 2021).

³⁸ *Id.*