Walter V. Schaefer: An Appreciation

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There never was a judge who cared more about the facts than Walter V. Schaefer. He once wrote: “The principal stimulus . . . comes from the facts of the case. The interaction between fact and law is close and continuous . . . . Each decision of a court measures the existing body of legal doctrine against the particular facts before the court. Once rendered, the decision becomes itself a part of the existing body of precedent. Its adequacy, in turn, is measured by the impact of the facts of future cases.”

A series of law clerks (I among them) urged Justice Schaefer to draft his opinions more for the law reviews and for the future. We knew that the measure of a judge (and, indeed, of a law clerk) was his influence on “the law.” Wiser and less vain than we, Justice Schaefer resisted our importuning. He understood that generalizations were not the measure of a judge, not even a judge on an appellate court. Indeed, Schaefer feared aggrandizing generalization and avoided overruling precedents or reaching doubtful issues of law in advance of necessity. He realized that a judge could properly govern the future only as an incident of performing his judicial duty. This duty was to uphold the law and, within its limits, to render justice to those who came before him.

Schaefer’s emphasis on the particular bespoke no lack of vision and no aversion to abstract thought. To the contrary, he loved “lawyers’ law.” His general explorations of law appeared primarily, however, in scholarly writings that continued during and after his service on the court. These writings repeatedly addressed the most difficult procedural issues of Schaefer’s time—prospective overruling, the appropriate role of precedent, collateral estoppel and double jeopardy, the successes and limitations of America’s adversary system, and the allocation of judicial power within a federal system.

Editor’s Note: Walter V. Schaefer, a 1928 graduate of the Law School, died on June 15, 1986, at the age of eighty-one. Following his appointment to the Illinois Supreme Court by Governor Adlai Stevenson, Schaefer served on the court for more than twenty-five years. Earlier he had been a lawyer, held a number of positions in state and municipal government, and had been a professor of law at Northwestern University. He continued to practice and teach following his mandatory retirement from the court at age seventy.

Schaefer’s judicial service was marked by extraordinary distinction. That he was one of the two or three preeminent state court judges of his time was a common and entirely undisputed observation. His extensive extrajudicial service included teaching at the New York University Appellate Judges’ Seminar and the Salzburg Seminar in American Studies, chairing the Criminal Trial Committee of the American Bar Association Project on Standards for Criminal Justice, working on the Council of the American Law Institute, and chairing the Law School’s Visiting Committee. Among his many honors were the A.B.A. Medal (the highest award of the American Bar Association) and honorary LL.D. degrees from Northwestern University, the John Marshall Law School, and the University of Chicago. In this essay, Mr. Alschuler, a law clerk to Justice Schaefer in 1965–66, offers a personal retrospective.

70 Harv. L. Rev. 1 (1956).
and Brown v. Allen had eroded state court prerogatives.

Schaefer addressed his remarks to these critics (including many of his fellow state court judges) as well as to the students and faculty at Harvard:

The Supreme Court's position at the summit also gives it a different perspective from that of state courts . . . The "insulated chambers afforded by the several States" are sometimes an advantage. But they may be too well insulated. Someone once wisely said that the basic trouble with judges is not that they are incompetent or venal beyond other men; it is just that they get used to it. And it is easy indeed to get used to a particular procedural system. What is familiar tends to become what is right.

In his Holmes lecture, Schaefer offered a blueprint for the coming due process revolution, one that, as he envisioned it, would have included a constitutional right to counsel for indigent defendants, a broad habeas corpus remedy, and a constitutionally based exclusionary rule for the products of illegal searches and seizures (an exclusionary rule that apparently would have been qualified, however, by a "reasonable good faith" exception).

Schaefer's due process revolution also would have included guarantees of dignified treatment during police interrogation; but, as he later emphasized in his Rosenthal lectures at Northwestern, it would not have included generalized Miranda-style safeguards. Schaefer considered the development of prophylactic "systems" for the protection of rights incompatible with the appropriate judicial role. In addition, he believed that a sensible society does seek evidence from people accused of crime (just as employers seek explanations from employees accused of wrongdoing and parents ask questions of children suspected of misconduct). One wonders whether a due process revolution grounded on Schaefer's concepts of everyday morality might have proven even stronger than the revolution in criminal procedure that the Warren Court accomplished.

Schaefer ended his Holmes lecture with a reminder of the special responsibility of the tribunal "at the summit". "The quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law. That measurement is not taken merely in retrospect by social historians of the future. It is taken from day to day by the peoples of the world, and to them the criminal procedure sanctioned by any of our states is the procedure sanctioned by the United States."

When a generalized issue of law was clearly presented, Schaefer did not shy from it in his judicial work. His decisions abandoned outdated precedents and shaped the future in other ways. A number of them found their way into law reviews and casebooks. To emphasize a single theme of these decisions is to slight their diversity and complexity, yet one consistent theme was an insistence on legal responsibility for wrongdoing, both private and governmental. In the jurisprudence of Walter Schaefer, interstate businesses did not find sanctuary in traditional, restrictive concepts of in personam jurisdiction, and neither governmental units nor charities were able to shield their wrongs behind traditional immunities. Justice Schaefer was, moreover, no more enamored of stylish new claims of privilege than he was of hoary old ones; his insistence on legal responsibility for wrongdoing led him to resist assertions of constitutional privilege for defamatory speech.

The Schaefer rulings that attracted general professional attention may have revealed less of what was remarkable about him than an obscure case that did not alter the law at all—the case of Arthur Gardner, a large, twenty-eight-year-old black man of subnormal intelligence who lived with his mother, who attended church regularly, who enjoyed a good reputation among his neighbors, and who had never been in trouble until his arrest for rape on September 15, 1963.

The Illinois Supreme Court was not required to hear Gardner's case. Far from presenting a legal issue of
statewide importance, this case raised only a question of the sufficiency of the evidence to support a criminal conviction. Not only had a jury convicted and a trial judge denied a motion for a new trial, but the Illinois Appellate Court had affirmed the conviction. Moreover, clear evidence established that a rape had occurred, and the victim of the crime had unequivocally identified Gardner as the person who committed it. A conscientious state supreme court justice might well have declined to review a previously reviewed conviction supported by direct, unambiguous testimony. Indeed, a conscientious justice might have given Gardner’s petition for leave to appeal only cursory attention.

One of the things that captured Justice Schaefer’s attention, however, was the testimony of a photographer who had viewed the scene of the crime. This photographer had expressed doubt that the defendant could have fit through the window that the victim claimed he had entered. Schaefer was concerned that an issue so easily resolvable had been raised and left hanging. Had our adversary system failed?

As it happened, the victim’s apartment was not far from the University of Chicago Law School; and on a Saturday, rather than commute from my south side apartment to Justice Schaefer’s chambers downtown, I worked at the law school library. At noon, I walked to Blackstone Avenue, climbed up the back stairs of a tenement, located the victim’s apartment, and studied the window. On Monday, I reported to Justice Schaefer that the defendant could have fit through it. I thought that Justice Schaefer might be relieved.

Instead he was furious. He advised me in stern tones than I had ever heard him use that my extra-record investigation had been improper. “If a trial judge took it upon himself to view the scene of a crime in the absence of counsel, we’d reverse him in a minute.”

Although some of the apparent flaws in the state’s case against Gardner were red herrings, the case remained troublesome. The victim’s identification had been obtained under extraordinarily suggestive circumstances—circumstances that a few years later might have been held to violate the Federal Constitution. While undergoing a physical examination after the crime, the victim was asked if she could identify the rapist. When she said that she could, Arthur Gardner was brought before her. Although Gardner did not closely fit the description that the victim had given the police, she made the identification that she later repeated at trial.

Gardner had been arrested within four blocks of the victim’s apartment more than an hour after the crime. He was walking toward the apartment rather than away from it. A microscopic examination of his undershorts by the Chicago Police Department revealed “no spermatozoa or measurable amount of acid phosphatase activity.” Gardner told the police at the time of his arrest that he was walking home from a movie. He could not remember the titles of the two movies he said he had seen; but when he was searched before being jailed, the police discovered a theatre ticket stub. The manager of the theatre where Gardner claimed to have been testified that he could identify the stub. A person who had bought this ticket and stayed through the entire program would have left the theatre at 11:00, approximately one hour after the crime.

Gardner testified that he had begun walking home after leaving the theatre. A few minutes later, he saw a man he knew and spoke to him. This man, who had been an insurance counsel in Chicago for fifty-two years, testified as a defense witness. Although he was unsure which Sunday he had seen the defendant, he remembered the incident. He had failed to recognize the defendant until the defendant had said that he was “Arthur” who “used to be your paper boy.” The witness was confident that the meeting had occurred shortly after 11:00 p.m. on a Sunday; he had just left a church service that had ended at that hour.

One could speculate about reasons for the defendant’s conviction. The defense attorney might have antagonized the jury when he asked the complaining witness baseless questions about “gentlemen companions” on the evening of the crime and when he accused the prosecutors of being “worse than Russian Communists.” It also might have made a difference that the defense attorney was black and the jury (if typical of Cook County juries at the time) predominantly white. More important, neither the defense attorney nor the prosecutors had assembled the facts in as orderly a fashion as they later appeared in Justice Schaefer’s opinion. The jury was confronted with a jumble of times and places—so much so that, when one of the prosecutors appealed to “reason” in his closing argument, he apparently saw no incompatibility between the defendant’s alibi and the victim’s accusation: “Now, let’s use our common sense and reason. Here’s a man who is claimed to be retarded, 28 years old, and who has never gone out with a girl, sees a movie about sex. Isn’t this sufficient to arouse the passion of the retarded man? A man who has never been with a woman?”

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Issues of credibility are almost always for the jury. Nevertheless, Justice Schaefer recognized no higher responsibility than ensuring that the innocent are not punished for crime. He wrote an opinion for the Illinois Supreme Court that said, “Upon these facts we do not have that ‘abiding conviction’ of defendant’s guilt that is necessary for an affirmation of the defendant’s conviction.”

In preparing this reminiscence of Gardner’s case, I again conducted an extra-record investigation and discovered that Gardner’s mother still lives at the address where she and Gardner lived in 1963. Mrs. Gardner reported that, following his release from prison, Arthur Gardner had continued to live quietly with her and had avoided any further involvement with the law. He had suffered a heart attack and died about two months before Justice Schaefer.

Schaefer provided consistent inspiration in things personal as well as things professional. During his judicial service, two Illinois Supreme Court justices resigned following disclosure of their financial dealings with a criminal defendant. Some of Justice Schaefer's obituaries credited him with restoring integrity to the court following this incident. I wondered how readers who did not know Justice Schaefer might have viewed these statements about his integrity. Was it news that, unlike some of his fellows, a judge had not taken bribes? Anyone acquainted with Justice Schaefer, however, would have known how much more integrity meant to him than the simple avoidance of wrongdoing.

I learned of Schaefer's integrity before I went to work as his law clerk in 1965. The Americans then fighting in Southeast Asia were mostly members of my generation who had lacked some advantages that I had enjoyed. One reason for the continued exemption of some privileged twenty-five year olds from military service was that local draft boards gave deferments to judicial law clerks. Judges throughout America wrote letters in which they declared their clerks' services essential to the national security, and draft deferments followed.

Many judges undoubtedly believed what they wrote. Others may have regarded their letters as "legal fictions." When I requested a letter from Justice Schaefer, however, he refused. He was not sure that his own work was essential to the national security; and even if it were, he could, with regret, get along without me.

Schaefer's special integrity was manifested in countless ways. He insisted on sharing the honoraria for his lectures with his secretary and with those of us who had provided trivial research assistance. He scrupulously recorded and disclosed every action of his that conceivably might have been questioned. He firmly rejected what others would have regarded as the ordinary perquisites of office.

Francis A. Allen once observed that, for Walter Schaefer, the practice of kindness was a fine art. People who encountered him even briefly knew it. Prospective litigants often appeared before Justice Schaefer on "motion day." Some of them filed difficult to understand motions in lawsuits that alleged far-flung conspiracies. (The litigants' allegations were not always as outlandish as they seemed; one of the litigants whom Justice Schaefer heard most frequently later uncovered the evidence of conspiracy that led to the resignation of two Illinois Supreme Court justices.) Schaefer treated these litigants no differently from the LaSalle Street lawyers who argued multi-million dollar lawsuits. As with the lawyers, Schaefer was unyielding when the litigants engaged in deliberate abuse. More commonly, he provided sympathy and patient explanations as self-important lawyers fumed about the delay.

Apart from the members of his family, no one benefited more from Schaefer's kindnesses than his law clerks. He seemed far more interested in teaching us than in using our exertions to reduce his own. In asking a law clerk to draft an opinion, Justice Schaefer always revealed the court's "impression vote" and his own vote. Then he admonished, "Write it as you see it, and we'll talk." I was slow to realize that I could rarely alter Justice Schaefer's views, that I was not really a justice of the Illinois Supreme Court, and that I probably ought to give some help to the person who was. I believe that I became genuinely useful to Justice Schaefer just as I was about to leave the job.

The Illinois Supreme Court heard arguments in Springfield, where there was little work for a law clerk to do. Nevertheless, unlike most other members of the court, Justice Schaefer asked every law clerk to accompany him to Springfield to hear arguments during one or two weeks of a year-long clerkship. It was an unforgettable experience—riding over the prairies on the Illinois Central as the justice reminisced and talked cases, discovering how ordinary most of the arguments were and how good some of them were, taking every meal with the justices in their living quarters on the top floor of the Supreme Court Building, touring the Illinois State Museum with Justice Schaefer as a guide, and going out on the town with justices from rural and small-city areas while the justice from Cook County read a book.

It all fit together. Justice Schaefer's spare, clear writing style matched his careful judicial restraint. His judicial restraint matched his personal humility and gentleness. His preoccupation with the facts and his passion for justice duplicated his concern for the people who entered his life. His high intellectual standards duplicated his high personal standards. The integrity of his work was one aspect of the integrity of his life. Walter Schaefer was complete.

And it was my privilege, early in my career, to be associated with one of the genuinely great figures of my profession.

Fortunately for me, my friend Philip Johnson (J.D. '65) had the same local draft board as I. Following his graduation from law school, Johnson had become a law clerk to Chief Justice Traynor of California, and Traynor had written the customary letter. After Johnson had secured his deferment, I advised the board that my work for Justice Schaefer did not differ significantly from the work that Johnson was doing for Chief Justice Traynor. I suggested that it would be inequitable to treat Illinois clerks less favorably than California clerks. Perhaps because my local board was located in Illinois, I received a deferment. I probably would write the same letter to my draft board again. I doubt, however, that Justice Schaefer, who abhorred special privilege, would have acted as I did.