

#254: Unfair laws / Why judges should be originalists (Will Baude)

Julia Galef: Welcome to Rationally Speaking, the podcast where we explore the borderlands between reason and nonsense. I'm your host, Julia Galef.

And before we dive in to today's episode, I wanted to make a personal announcement – that I wrote a book, and it's coming out very soon, on April 13th! It's called THE SCOUT MINDSET, which is my term for the motivation to see things as they are, not as you wish they were; to be intellectually honest and objective, and curious about what's actually true.

The central metaphor of the book is that we're often in "soldier mindset," motivated to defend our beliefs against evidence that might threaten them. And scout mindset is an alternative to that; a scout's goal isn't to attack or defend, but to go out and get an accurate map of reality.

And in the book I talk about how to be more of a scout, and why we should want to do that. For example: How to tell whether you're in scout or soldier mindset. How to make it easier to learn from opposing perspectives. How to acknowledge uncertainty without looking weak.

So, THE SCOUT MINDSET, it's coming out April 13th but you can pre-order it now – and pre-orders are very helpful to an author – and you can also pre-order the audiobook, which I narrated myself. I'll put a link on the podcast website, but you can also easily find THE SCOUT MINDSET on Amazon or on the Penguin Random House site.

Now, on to today's episode. My guest is William Baude, who is a law professor at the University of Chicago focusing on constitutional law, and you may have read some of his writing over the years in the media or on the blogs Volokh Conspiracy or Summary Judgment. And I've actually been a fan of his since back in 2003 or so, when he was writing about law and philosophy on his blog, Crescat Sententia. Oh, another fun fact about Will is that he used to clerk for Chief Justice John Roberts on the Supreme Court.

I invited Will on the show mainly to talk about two things: First, a couple of laws that seem to me to be crazy and unfair, and I wanted his help understanding what could possibly justify them. And second, the debate over whether judges should be originalists, trying to interpret the original meaning of the constitution in their rulings, or not. And Will is pro-originalism but I think he does a great job of presenting both sides.

Without further ado, here is my conversation with Will Baude.

[musical interlude]

Julia Galef: Great to have you on the show. As I mentioned, one of the main things I wanted to talk to you about is one of your central areas of expertise -- a topic on which you've actually been cited in Supreme Court opinions --

and that is qualified immunity. So could you just start off by explaining what that is?

Will Baude: Yes. So the doctrine of qualified immunity is a doctrine that says that when you sue a government official for violating your constitutional rights, particularly when you sue them for damages -- they've done something to you in the past and you want reparations or compensation now -- the doctrine says that you usually can't get anything. You usually can't get a remedy, even if they violated your constitutional rights, unless they violated what's called "clearly established law."

And according to the Supreme Court, clearly established law means that only somebody who was intentionally trying to violate your rights or basically completely incompetent, could have done this. So it's very hard to get a remedy to enforce your constitutional rights.

Julia Galef: Right. So I'm not a legal scholar or anything, but this just seems so unjust to me that I can't fathom how it can be a thing. I see these cases where, like, a cop tried to shoot the family dog -- who was not being threatening as far as witnesses say -- and he missed and he ended up shooting the family's young son... and he gets off scot-free, because qualified immunity. This just makes my blood boil.

And so, part of my goal in having you on the show is to help me understand: What is the defense of this? Why was it ever allowed to become a thing?

Will Baude: I know the case you're thinking about, and I had the same feeling of shock. And maybe I'm the wrong person to do this, but I take steel-manning opposing arguments very seriously, so I will try!

Julia Galef: No, I know you do! And that was part of why I really wanted to have you on the show, is that I've seen you try to explain the views of people who disagree with you, and I thought... I don't know if they endorse it or not, but it at least seemed like a reasonable thing someone would say, and not like a straw man.

So I thought you could help me not only present the critique of qualified immunity, but also why this is even a thing we're debating. So yeah, go ahead.

Will Baude: Okay. So I'm just going to rattle off a bunch of different possible things people could think, and then you can tell me which one seems worth talking about. Is that the right-

Julia Galef: Okay! Sure, yeah.

Will Baude: All right. So one way to think about it is just, this is the way it works. This is the way courts have said that the doctrine works for over 50 years, and the legal system is heavily based on precedent. And frequently that

involves a doctrine that you think, "Wow, this is bad," but it's just the way things are. And so, until somebody changes it, we're stuck with it.

Now, another way to think about it is, "Now, how did we get there? How did the doctrine come into being?"

Julia Galef: Yes. Indeed.

Will Baude: So, some people justify it on the basis of history. And I think they're wrong about this, but they think this doctrine goes [back], not just the past 50 years, but this doctrine has been around for hundreds of years. It's just a well-established rule for how government officials work. And so it's one of those pieces of the fabric of the law.

Some people justify it instead on policy grounds -- that it's just really hard to be a government official, especially to be a police officer. And you're frequently put in these situations where you have to make split-second decisions. And we either think it would be bad policy, or unfair, if the officer had to constantly be second-guessed for mistakes they make while they're happening. So there's precedent history and policy, I don't know.

Julia Galef: Yeah. I do, at some point, want to talk about why you think the people who defend qualified immunity on historical or precedent grounds are wrong. But for now I want to talk about this policy justification.

So I guess, first, to clarify: Do the defenders of qualified immunity claim that, in the specific cases where it has been granted, like the one I was talking about, a reasonable... Are they actually claiming that a reasonable cop could have been unsure whether this was a good thing to do or not?

Or do they instead say, "Look okay. Yes. This case is obvious. He screwed up. It was clearly a mistake. But it's a slippery slope. If we convict someone for this case, then that could set a precedent for convicting officers for more ambiguous things in the future. And so, we should just draw a hard line, even though this case seems clearly like he behaved in a clearly unreasonable way"?

Which of those two defenses do they tend to make?

Will Baude: Unsurprisingly, both. I think more of them are the slippery slope kind. The most outrageous facts, relatively few people will say, "Oh yes, this is the heartland of what should be protected."

But even in the case of the cop who tries to shoot the dog and accidentally shoots the kid, I think they'd say:

"Look, he was chasing a suspect in this case, and he didn't know where the suspect was. It's a manhunt against somebody I think might be dangerous.

Then he suddenly finds himself in a strange situation. You suddenly see a dog. You only have a minute to figure out if the dog is a friendly dog or dog's going to attack you. And a dog's life in the law is not worth very much. Animal rights are not taken very seriously by the law.

So he made a reasonable decision to protect himself from the threat. And then, as it happens, he missed, but you can't hold that against him."

Julia Galef: Uh-huh. I guess maybe I should back up and ask: Do you have any examples of cases where they tried to use qualified immunity, and it failed, because it was just so... I'm having a hard time thinking of things that are so obviously beyond the pale that they *wouldn't* get qualified immunity, given how widely it seems to be applied.

Will Baude: Yeah, you're right about this. The doctrine used to be, I think, a more qualified doctrine, and over time it has become more absolute.

The Supreme Court in my lifetime has only had, I think, three cases where an official's conduct has been held not to get qualified immunity. And one of them was a case called *Hope vs. Pelzer*, where prison officials decided to punish people by using, what I guess is called the "hitching post." So they were out in the sun. They basically punished them, when they didn't obey some prison rule, by chaining them to a post for hours at a time.

And the Supreme Court said, "Look, we didn't have any precedent saying this is squarely unlawful..." Or, I mean, there were previous precedents and they were technically a little different, like, "Was the prisoner's hands above his head or not? Did they get water breaks or not?" So you couldn't say, "This has squarely been held to be unlawful," but the Supreme Court said, "You should know this is obviously a cruel and unusual way to punish people."

Julia Galef: Okay, so there's some floor on this thing! That's good to know.

Will Baude: Yeah, there is. And I mean, this is actually how judges react to this. I think they apply the doctrine a lot of the time in a lot of cases, and then every so often something seems so outrageous to them, they say, "Okay, well, this one is too far."

Julia Galef: But maybe I didn't really know the details of the case I brought up where the cop tried to shoot the dog and shoots the kid, but my impression has been that there are other cases that don't have the feature you described, of split-second decision-making. Where a cop shoots someone who's not close to him, and not posing any threat, and he's not making a split-second decision with a reasonable fear for his life or anything like that -- and he still gets qualified immunity. Am I wrong about that?

Will Baude: No, you're not wrong. I mean, I think split-second decisions are a lot of it, but they're definitely not all. There are plenty where the officers have time to think about it and they still do the wrong thing.

And I mean, look, the law is complicated and technical and not always intuitive. So it's not that hard for a judge to say, "Well, yes, I see how this looks bad, but it's not so clear it was unlawful."

I think the problem is that whole way of thinking about it really stacks the deck in an unfair way.

Julia Galef: Where "that whole way of thinking about it" is the standard that they're supposed to be using?

Will Baude: Yes. The whole way of thinking about it, asking, "Is this so obvious? Is this so outrageous that we ought to enforce the constitution?" Rather than starting from the point of view of just, "Has somebody's rights been violated? And if so, presumptively, we ought to do something about it. Unless there's some special reason not to."

Julia Galef: Another thing that confuses me about that reasoning is that... I understand that logic, that people in difficult jobs, where some things are going to go wrong sometimes even if you're doing a good job... people in those situations, we don't want them to be afraid to do anything, to take even good risks for fear of being sued or convicted if things go wrong. I understand that logic, in theory.

But in practice, it seems like we don't actually... The qualified immunity solution to that problem can't be ideal, because we don't apply that to lots of other contexts where in theory it should apply.

Like medicine. If a surgeon does something grossly irresponsible but not actively malicious -- like, say, he performs surgery drunk, and kills a patient or something -- we don't let him off the hook because, "Well, we don't want surgeons to be scared to do their jobs." We make an effort to distinguish, "Was this something that a responsible surgeon could've gotten wrong or not?"

And so, what is the difference between the two situations? Why are we applying this much more lenient rule to the case of cops and not surgeons?

Will Baude: Right, good. So, first of all, I'm not sure -- it might be that the judges who have developed qualified immunity would also apply that doctrine... If they got the chance to develop that doctrine for medical malpractice suits, they might do that too. That is, the doctrine might just reflect a general skepticism about our tort system and the way it works.

Julia Galef: And just, no one ever introduced that possibility in the case of medicine?

Will Baude: So for boring legal doctrinal reasons, the Supreme Court thinks it has more of an ability to make up these rules in the context of enforcing constitutional rights than in the context of when doctors get sued. Based

on what's governed by state law, and what's governed by federal law, in areas where it seems like the courts have a common law power.

So it may just be a kind of accident of jurisdiction. But people who do think there's a justification, they would say:

"The difference is that the doctor really internalizes the benefits of what they do. They charge a lot of money. And if they're running a really valuable service, they can charge you more money. And so, yes, they're getting sued -- but the system, it washes out. We pay surgeons a whole lot of money. They use it to buy malpractice insurance. Whereas for police officers, we're worried for some reason that they can't do that, that they can't internalize the benefits they're providing to society."

That's the theory. Now, developments in insurance-

Julia Galef: I feel like I could make lots of other arguments that the asymmetry should go the other way. Like: People can choose their surgeons, they can't choose which cops are going to stop them on the highway or whatever.

Will Baude: Right. And I think you can make lots of arguments that would go the other way. But I think, in the decisions that do this, the way they see the balance is the public has this interest in making sure government officials are not too scared.

Julia Galef: Right. Okay, well, maybe let's go back to the procedural question -- I forget what name you gave it, but your point that we shouldn't be using this standard in the first place. That the way that we ended up applying the standard was not the right way to go about it. I don't want to put words in your mouth, but could you elaborate on that point?

Will Baude: Sure. Okay. So this gets a little bit into things like the separation of powers. So the way we got here... We have a constitution that gives us all rights against the government. And then we have a statute enacted by Congress that gives you what's called a "cause of action," which is an ability to sue people, and to go into court and get the court's jurisdiction when your rights are violated. So there's a statute, it was passed after the Civil War, that says that when somebody acting on behalf of the government violates your rights, you get to sue them, and you get to seek a remedy. Those are the two pieces of written law that govern these cases.

What happened is that in the 1960s, the Supreme Court decided that those two pieces of written law were incomplete. So even though the constitution gives you these rights, and then Congress has given you this right to go in front of the courts and to sue, the Supreme Court decided that Congress couldn't have meant for that to be taken literally.

And the Supreme Court decided that the Supreme Court should be in charge of deciding when those rights really applied, and when you got a

defense that made sense to the court. And so they delegated themselves this power and then used it to invent the doctrine of qualified immunity.

Julia Galef: They can do that?

Will Baude: Well, they did.

Julia Galef: That's... hmm.

Will Baude: So, no, I guess that I'm skeptical that they can do that. Especially when I put it that way.

And the court doesn't quite admit this is what they did. So they say, "When Congress enacted this statute, they surely didn't mean to change things that had been around for a long time that they didn't really mention. So if it were true that this doctrine of qualified immunity had been around for hundreds of years before Congress passed this law, maybe they just assumed that's the way things would keep working." And so, says the court, "Therefore, we're going to apply this doctrine."

Now, in fact, the doctrine hadn't been around at the time, and it is something more like the court had just created it because they thought it was a good idea, but they pretend that they're not doing that because they're not supposed to do that.

Julia Galef: And so, how do we go about forcing them to reconsider it?

Will Baude: Well, here's the thing, you can't force the Supreme Court to consider things. So in another category of self-dealing rules, the Supreme Court has what's called discretionary jurisdiction. So they decide what cases they want to consider, and it takes four of the nine of them to agree to consider a case or an issue.

And over the course of the past couple of years, a bunch of lawyers and public interest groups brought a bunch of cases to the court and said, "These cases show you should reconsider the national qualified immunity." One of them was the dog shooting case we were talking about earlier.

And through various sort of clues you can get from watching the court's docket, it was clear they were thinking about these very carefully. They held them for an unusually long time. It seemed like they might do something.

And then in the end, the court announced they were refusing to hear any of these cases. And Justice Thomas wrote a dissent saying, "We should hear these cases because this doctrine has gone wrong, and the majority doesn't provide any explanation for why they don't want to do these cases."

Julia Galef: Well, before we leave this topic, I wanted to ask you about one other policy that's in the same category in my mind as qualified immunity -- where the category is "policies that make me angry and incredulous about why this is allowed."

And that other policy is civil asset forfeiture, which allows cops to -- and feel free to correct my explanation if you think it's wrong, but civil asset forfeiture allows cops to take your property, including your money, if they think there's a reasonable suspicion that you obtained it illegally. And they never have to actually prove that in front of a jury, so they can just confiscate thousands or millions of dollars from you and never give it back.

And it just boggles my mind that this is allowed. So first, is that the right explanation of civil asset forfeiture? And second, why is this a thing?

Will Baude: Okay. So one caveat is sometimes they do have to prove a little more than that. Although they don't have to prove as much as they do to convict you of a crime. So I think some places they seize the property on reasonable suspicion, but then you can complain and demand proof, and then maybe eventually they have to prove by a 51% chance that it's guilty or things like that. The exact procedures--

Julia Galef: That's not official though, right? You're just gesturing at the level of proof needed or...

Will Baude: No. All the States allows civil asset forfeiture, and they all have complicated legal regimes on exactly what you have to do, what the burdens of proof are, how much procedure you get. So I'll just say it's, sometimes, you have a few more rights than what you just described. But still not nearly enough rights.

Julia Galef: And they're just making that case for why you probably obtained it illegally. They're making that to a judge?

Will Baude: Usually yes. One of the many things you don't get, you don't get a right to a jury, you don't get the same kind of rights you get in a criminal proceeding.

Julia Galef: Yeah.

Will Baude: So this is a thing because of boats.

Julia Galef: What? Boats?

Will Baude: Boats, big ships.

Okay. So the doctrine originates in the way we dealt with piracy and other form of misbehavior on the high seas. You would capture a boat that was

smuggling something or otherwise violating international law. Often the owner of the boat would be nowhere in the jurisdiction, very hard to find.

And so, the punishment the law came up with instead was to punish the boat. So if you caught a boat smuggling goods, you could seize the boat and keep it. And that was a way of enforcing the law when you couldn't reach the real owner.

That's the original sort of common law doctrine that has evolved into civil asset forfeiture, the fiction that the goods are guilty of the crime. And therefore you can punish the goods by taking them and keeping them, and then selling them for profit, rather than the owner.

Now, obviously, the strongest reasons for having that doctrine, in the case of boats that are sailing around the world when you can't find the people who are ultimately responsible, don't necessarily carry over...

Julia Galef: Right. That seems like a very relevant feature of the situation, yeah.

Will Baude: Yeah. Right. Although, given the way legal precedent works, once you have the precedent that you can go after the goods separately from the person, and you do the procedure this way... I mean, the way the law often works is to start carrying those things forward.

Julia Galef: Is that a feature or a bug? Not to derail you, but I'm often confused about how precedent works. Because it seems like the way it *should* work is that the relevant features of the original decision -- like in the case of the boats without the owner around -- those features should be carried forward, when you decide when to carry the precedent forward.

So why would that not be the case?

Will Baude: It should be, but... what people go to law school for, and make big bucks figuring out how to do, is arguing about which features are the relevant ones.

So, is it the inability to find the owner? Because that's actually often true in drug smuggling cases too, where the real kingpin is in Mexico. And we could spin out lots of different versions of when are these the relevant features or not. But fighting about these kinds of analogies is a big part of the fun of law school.

Julia Galef: Is there a kind of game of telephone type process that happens where each step it seems pretty reasonable to carry forward the precedent, but by the time you get to the end, you're just like, "If this was all done in one step, it would clearly not have been a reasonable inference or separation."?

Will Baude: Yeah. Definitely that happens a lot. Sometimes it's accident. And then, I don't know if you've ever had friends in the game of telephone who were

clearly intentionally subverting the message, but sometimes it's intentional.

Julia Galef: Nice analogy. Yeah.

Will Baude: So from the modern policy point of view, in defense of civil asset forfeiture -- which I don't defend, but in defense of it -- it brings in a lot of money to municipalities. And as far as ways for the government to raise money go, taking money from bad guys who are breaking the law is better than the other stuff that government does --

Julia Galef: But they're not -- they haven't been shown to be bad guys who are breaking the law! That's the whole thing of it.

Will Baude: Well, they're more likely the bad guys who are breaking the law than people who are merely earning an income or the other things government does to tax people.

Julia Galef: I really hope that you're just doing a bad job at presenting the other side's view in this case, because if that's actually the argument, then it's horrifying.

Will Baude: Fair enough.

Julia Galef: I mean, not to accuse you of doing a bad job, I'm just saying that... I can't accept that as a reason to keep a policy like this, that seems so unjust.

Will Baude: Yeah... Does it depend on what it is? So it's one thing if it's money. But if it's like, we find a bunch of guns, and we think the guns are probably owned by a bunch of drug dealers who are going to use them to threaten people illegally...

Now, we're not sure, but we've got to decide what to do with the guns. Our two choices are to sell them and use them to build a new public school, or give them back to the people who are probably criminals, but we can't prove it."

Julia Galef: Hmm. It's a good test case, or intuition pump or whatever.

I want to say that we should have maybe different standards for how confident you should need to be to take the goods. If they're goods that are clearly important to someone supporting themselves, for example, versus goods that aren't, like guns.

But even in the case of the latter, I feel like there should be a window of time in which the police get to make their case, or build a case that these goods were obtained illegally. And if they fail to, then you should get the property back no matter what it is.

Will Baude: Okay. Fair enough... And this is where maybe --

Julia Galef: I mean, I realize I'm putting you in the position of having to defend this thing you don't actually think is good! So if you can't defend it, that's not your fault.

Will Baude: No. Right. I think I agree with you that if we were reforming it, the seizures of things like cash and cars, things that all law abiding people also have, and that have just as much value to law abiding people as they do to criminals, may be the place to start. And the seizures of things like drugs and weapons, some of which we might be more cavalier about, if we had to draw a line or make a compromise, that might be the way we would start.

Julia Galef: All right. Well, my blood pressure is high enough for the moment. Maybe let's switch gears.

So another topic for which you are well known is your defense of an originalist interpretation of the constitution. Could you explain what originalism is, and maybe also what is it an alternative to?

Will Baude: Yeah. I'm curious which way your blood is going to boil on this one! Or maybe it will be calmer.

Originalism is the idea that when you're interpreting a law, the meaning of the law is the same thing as it was when the law was enacted, unless something has happened to lawfully change it. So, the constitution is enacted; we have some constitutional amendments that are enacted through a particular process; but if we haven't done that, then the meaning of the law is the same as it was back at the time it was enacted.

Now, of course -- and we already talked about this a little bit -- that doesn't mean that it literally applies to the same items as it did when it was enacted. So we have states in the union that weren't there at the founding. We have things like cars or railroads that weren't there at the founding. And you have to figure out how to apply the original rules to them.

But the rules themselves stay the same, until they're lawfully changed.

Julia Galef: And when you talk about the "meaning" of the rules, are we talking about the meaning as it was intended by the people who wrote the laws, or as it was interpreted at the time, or...?

Will Baude: So I think all answers to that question end up being under the umbrella of originalism. So there are original intent originalists who think intention, original meaning originalists who subdivide into original public meaning originalists, and original legal meaning originalists, and so on.

And I think -- of course, I have to have my own spin on it, but -- I think the right framework is just *whatever the original law was*.

So, then and now, we have legal doctrine that creates something called *the law*, the legal meaning of this provision. Taking into account what it says, and what the intent was, and these various principles of interpretation. And essentially, a court today should say the meaning is the same thing as a court would have said when it was enacted.

Julia Galef: And so, to figure that out, you'd be looking at the reasoning in legal cases at the time that applied that law?

Will Baude: Yes. And the reasoning of, I mean, often people who proposed or opposed a provision. So the proponents will say, "We should adopt this because it will do X, Y, and Z." And then the people opposing it, often they'll agree and say, "Yes, it will do X, Y, and Z, and those are bad." And then we have pretty good confidence about what they thought it meant.

When there's disagreement, it's more complicated, but...

Julia Galef: Okay. And what is the alternative? The people who explicitly say they're not originalists, what are they?

Will Baude: So I think the biggest alternative is the family of things called living constitutionalism, which means that somebody later gets to change the meaning on the basis of something that's happened later.

This is always a little bit vague, but the usual example would be judges interpreting the provision can decide later, "The interpretation, the meaning, they had is not good. It doesn't make as much sense. And we can now, in our own wisdom and experience, replace it with what we think is a better meaning."

And then a lot of people are mushy about this. They call themselves pluralists, which means they do multiple things at once, without any firm rule for how much of each thing to do, and so it's a little mushy.

Julia Galef: But the living constitutionalists judges, how do they decide what makes a better interpretation of the meaning of the law?

Will Baude: Yeah. So the uncharitable answer would be, they just pick what they like. I think that's not sufficiently charitable.

Julia Galef: Okay.

Will Baude: I think... so, they usually draw on several things you might think might make sense. They might draw on precedent and practice that's happened since the provision was enacted. So maybe it originally meant one thing, but for the past 40 years, we've all been treating it like it means this other thing, so maybe there's more reason to stick with that.

They might draw on just sort of advanced new moral insights. So we now recognize that gender discrimination is very bad, and maybe the framers

of the constitution didn't recognize that, so we'll replace their meaning with ours, because we know what's right.

Julia Galef: So is that like an extended indirect originalism maybe, where they're basically saying, "Look, we now have this knowledge, maybe moral knowledge, that if the founders had that knowledge, they would have interpreted the law in such and such way, so that's the way we should interpret it." Is that what they're doing?

Will Baude: Sometimes, but not always. And I think often, again, people are a little bit unclear about which they're doing so... Right, sometimes people would say, "Yes. If they only knew what we know now, they would have meant this."

But I think there are people who, in some ways, are more candid and will say, "Look, it's not that we know something they didn't know, it's just that we have views that they didn't have."

Now, maybe this all turns on what your theory of meta-ethics is, like what is mortality of fact? Is that a thing you know or is it just a view that you have? Which, law professors often don't think or speak carefully about.

Julia Galef: Well... So justices who explicitly, knowingly, choose a different meaning for the law than what they believe was intended or what the original meaning was, do they consider that in the scope of their job? Not to be snarky, but it's like... I guess, it feels a little bit more like being a policymaker to me than a judge.

Will Baude: Me too. And this is one of my reasons for being an originalist, but they would --

Julia Galef: Yeah, what would they say?

Will Baude: They'd say some mix of... "You really can't avoid policymaking. All judges have to do some policy-making."

We've seen that just in our own discussions about these various legal doctrines and in figuring out whether to carry a precedent forward, and what counts as the most important part of it. There's a lot of policy-making in there anyway. And what they're doing is actually being more clear and honest about the role of policymaking rather than trying to hide it through those legal moves.

Julia Galef: Okay. Actually let's stop here and talk about... Or not stop, but let's stop this thread and talk about an example or two of a case that originalist judges ruled on differently from living constitutionalist judges, just so that people can see the difference.

Will Baude: Sure. Let me think...

Julia Galef: Like for example, I don't know a lot of legal cases, but my understanding was that Roe v. Wade was considered to be not a great exemplar of originalism.

Will Baude: Great. Yeah. Let's do that. Right. All of them are contested, but sure...

Right, so to take a classic example, let's take the right to an abortion, recognized by the Supreme Court in Roe v. Wade and Planned Parenthood versus Casey. Where I think most originalists would say the constitution certainly doesn't specifically guarantee anything like a right to reproductive freedom. And even the parts of the constitution that might seem like open-ended rights provisions, were definitely not originally understood to mean anything like this.

And then defenders would say, "That's all true..." and some of them might try to make this meta-originalist move you were talking about – "They didn't really understand how abortion works or what its impact would be, but if they had, maybe they would've been okay with this."

But most of them would just say "No, because of the sexual revolution, the growth in women's equality and feminism, and just generally changing understandings of the way the world works, we now recognize it's really important that we protect women's right to choose. And they didn't know that, but now it's really important. And it has precedent. For the past 40 or 50 years, the Supreme Court has said that's protected, and generations of women have understood that that's something that they have and that's important. And so, the court should keep protecting it."

Julia Galef: Okay. So you mentioned theory of meta-ethics a few minutes ago, and this is related to one of my deep confusions about originalism versus the alternatives. Which is that when I listen to debates over originalism, I feel confused about what kind of disagreement this even is.

Is it akin to a disagreement over theories of ethics, as you mentioned, where you and I may just have different intuitions about which kind of ethics makes most sense, about what seems morally right? So is it like that? Or is it more like each side thinks the other one is just making a logical error or a factual error?

I'm just so confused about how to even adjudicate this disagreement, how to even decide which side is correct.

Will Baude: Yeah. Look, I think most people participate in these debates are confused too.

So I think there's a level of rule consequentialist debate, where people are just debating which system of interpretation will lead to better consequences on the whole -- letting judges do what they think is right? Or telling judges not to do what they think is right, because it's a matter of

principle that we think it'd be better if that decision is made by the people?

There's also something more like the meta-ethics debate – that, like, “What is the job of a judge?” question. Which has, I think, sort of an interpretive and a conceptual aspect.

Then there's also what I think is best called a jurisprudential debate, which is to ask -- I guess maybe this is another version of that – like, “What is our actual system of law right now?” Law is just an artificial practice any society develops. So if you're just trying to even understand what are the rules of our own artificial practice, what do those imply about the way you should interpret?

I think at least all three of those are going on. And often people slide between them without even been clear which ones they're doing.

Julia Galef:

I see. Yeah. So if someone's making an argument, an appeal to consequences saying, “Well, we should do living constitutionalism because it allows us to create better consequences,” they're already kind of... begging the question, I guess? I don't know if that's technically the right meaning. But that criterion wasn't a thing that the other side had even conceded should be the criterion -- and so they're talking past each other, I would think.

Will Baude:

Yeah, this is helpful, actually. So I think, to generalize: The more consequentialist or living constitutionalist you are, the more likely you're arguing the lowest down in the chain. You probably think just this is a consequentialist question.

And people who are originalists or textualists or other kind of formalists usually are actually making arguments that are higher up the chain. They're either not act consequentialists, but rule consequentialists; they're not rule consequentialists but some kind of “role ethics” or some kind of jurisprudential argument; and they're often arguing from up there.

And sometimes people will join issue about that. So sometimes then what the living constitutionalists will say is, “You haven't yet convinced me there are any useful role ethics or jurisprudential principles here. It just seems like it's just kind of a mess there. So let's just go to the one thing we know, which is consequences.”

Julia Galef:

Yeah. Right.

Will Baude:

I feel like you see that in debates in meta-ethics, right? The people who are most skeptical about a lot of more abstract or complicated ethical principles, just as a thing, then end up being utilitarians.

And if you want to resist utilitarianism, by making those arguments that are higher up the chain, you often first have to show people that's even a

useful realm of engagement. And then explain why you should look at that, "There's a thing called rights, that's a real thing. And that should control –"

Julia Galef: And that doesn't just cash out in terms of consequences.

Will Baude: Right.

Julia Galef: Right. Okay. So you mentioned a minute ago that your preferred criterion is the jurisprudential one, the, "What is our law right now?"

Could you elaborate on that?

Will Baude: Okay. So there's a theory in jurisprudence called "positivism." The modern version is most famously attributed to somebody named H.L.A. Hart.

The basic claim, which I think is basically right, is that law is basically an artificial social practice, like etiquette, grammar, sports. It's just a kind of system of rules that humans made up for ourselves because we found it really useful. Although having made it up, it has a bunch of complicated rules that none of us can unilaterally change. I can't just change the rules of grammar just because I think it would be useful if something was a word. And the idea is, law basically works like that.

So the first step, if you're a participant in a legal system, is just to really try to get your handle on, what are the sort of social rules of our legal system? What are the principles that we've all implicitly agreed on or jelled on?

Julia Galef: And you think the other side would disagree with that description of what we should be trying to do?

Will Baude: Well, so again, some people, I think, just think that's not a coherent thing to think about. That's too abstract for them, and we should just get down to consequences.

Other people would accept that picture and they would say, "Yes, I agree with you, that's the question." And then the two of us would have what's really an empirical dispute, about what is our social practice? And I would say "Here is all this evidence that the original meaning of the constitution is legally controlling. Look at the way we treat the constitution, look at how rarely courts ever make anti-originalist arguments."

And they would say, "Yes, but look at all these other things we do that seem like they can't be squared with originalism. Look at..." And then we'd write long law articles at one another, trying to go through all the evidence, trying to figure out the best way to understand it.

Julia Galef: And what about someone who says, "Yeah, I agree with your descriptive or positive picture of how things tend to be done, but I don't think that's how they *should* be done. I think they should be..."

So they accept your construct. They're not like the people you were describing, who were like, "What are you even talking about? Let's just talk about something real, like consequences." They're not doing that. Instead they're just saying like, "Yeah, I agree with your description of what *is* happening, but we should do something else. That's not how we *should be* interpreting the law."

Will Baude: Yeah. So this is an area... I don't have as strong of a view. So there are other countries that are not as originalist as we are, and I'm not convinced they're doing it wrong and should switch to our way. But I guess I'm also not convinced we should switch. So then I think this is where some of the role ethics, or role meta-ethics would kick in. I'd say-

Julia Galef: Could you just define role ethics? I forget if you already did, but --

Will Baude: Well I sort of made it up, in our... What I mean is, I'm coming up with a fancy word for Julia's question of, "Is this what a judge is supposed to do?"

Julia Galef: Oh, okay. All right.

Will Baude: Okay. So I would say: Suppose you were newly appointed as a judge. Is your job to figure out how you think it should be done, or to enforce the law the way we do it around here?

And I think probably, your job as a judge is the second. When we make you a judge, we make you take an oath to uphold our constitution. By which we mean the one we currently have, not some new one you might want to impose. We have lots of reasons for being worried about suddenly appointing some new judge with entrepreneurial ideas that's going to change everything.

So I do think, while it might make sense to change our system, it's not the job of individual judges to think like, "I've got a better idea."

Julia Galef: That's so interesting -- because, I guess I had just been assuming that if someone's an originalist, they think that the originalist interpretation is how things *should* be done.

And you're not actually saying that. You're just saying, "No, that is actually how things *are* done, and anyone who says otherwise is trying to alter the status quo. They're not actually describing the status quo. And then the question about how things *should* be done is a separate question we should talk about separately."

Is that accurate?

Will Baude: Yes. That's accurate.

Julia Galef: Okay, great. Oh, that's helpful. But then I assume there are people who call themselves originalists who are actually either conflating the descriptive and the normative, or they're just talking about the normative, or...?

Will Baude: Both. Yeah. So there are plenty who conflate them, and there are others who are more firmly committed than I am to the normative question. And they have various arguments about why originalism is the most consistent with democracy, or with popular sovereignty, or other values you might want to get out of our legal system.

Julia Galef: Okay. And is it easy to give an example or two of the kind of evidence that you think supports your picture of why originalism is how we do things? You mentioned looking at how past justices have justified their decisions, if they've used originalist reasoning or not, is there anything else you want to mention?

Will Baude: Right. So I think the most important evidence is, what do people do when the different sources of law, or argument, come into conflict? So you can find lots of canonical cases where the court will say things like, "Well, this is what the text and the original understanding require. And even though the consequences might not be good, we've got to do it." And you can't find any cases of the reverse. You can't find any cases where they say, "Well, this is what they require. We definitely agree. This is what they require, but we're just not going to do it because it's a bad idea." And I think that kind of evidence is some of the most powerful.

Julia Galef: Will, you know what your approach just reminded me of? It reminded me of the descriptivist versus prescriptivist approaches to language. Where one side is like, "This is what the word does mean," and the other side is like, "Well, maybe that's what it once meant, but people have been using it..." -- So, the first camp will say, "You guys were using the word wrong." And then the second camp will say, "Well, if enough people use it, quote, unquote, wrong, then it's not wrong anymore. That's just what the word means."

And so this made me wonder -- could you lose this argument if just enough living constitutionalists managed, through whatever means, to get into positions of judicial power -- and then, now you're wrong?

Will Baude: Yes. I think it wouldn't *just* be about judicial power, because -- we've been talking about judges, but if enough, if a whole generation of people just changed the way they thought about things, then I think our legal system would change. Look, we used to have the legal system of Great Britain, and then we decided not to, got rid of it, and replaced it with our own. Revolution can happen.

Julia Galef: But we did that explicitly, not just through slow creep.

Will Baude: That's right. That's right. I do think the slow creep can happen. Change through slow creep can happen.

Although it's harder, because I think what's happened now... So, we've slowly crept away from practices that are correct under an originalist point of view, but we've never done it knowingly and openly. And so we haven't yet come to the point where we've had to say, "Oh, we reject the authority, the original constitution in favor of," pick your mode of practice.

Julia Galef: Oh, I see. So it wouldn't count as a slow creep away... It wouldn't count as gradual accumulation of evidence against you, if people keep claiming to do originalism, but not actually doing it well?

Will Baude: Right. A different way of putting it is, our practice has both aspects. It has the individual things we do -- that might be not originalist -- and our practice of trying to justify things by looking at the constitution.

Julia Galef: And the latter is what you think is more important.

Will Baude: At least as important, anyway. So, until those things come into conflict, we don't really know which one we've picked. And I do think probably, yes, the principles of justification -- because law's about justifications for things -- the principles of justification probably are more important, but at least a tie.

Julia Galef: Okay. So I want to throw a couple of critiques of originalism at you, which I'm sure you're familiar with.

One critique I've heard of the originalist approach is that it's just too flexible, that you can basically interpret the constitution however you want, to get the outcome you happen to like. And you can always come up with a justification for why that's actually in keeping with what the Founders meant.

And in fact, we see this happening -- that different originalists judges, or judges who claim to be originalist, can rule differently on a case and give different justifications. And so that, allegedly, undermines the whole idea of originalism.

I know that Richard Posner has made this critique, and I'm sure others have as well. What do you think about that?

Will Baude: Okay. So, one, I think it's not completely true.

Julia Galef: The premise?

Will Baude: The premise is not completely true. The critique works by focusing on the examples of the most disputed cases, and ignoring all of the easy cases. And originalism just produces a whole field of easy cases that we don't

talk about. Even just obvious examples like, "Do all states get the same number of votes in the Senate?," even though, now, we don't think there's a very good justification for that. That's an easy case. Nobody argues about it anymore. So I don't think the premise is true.

But I also think it's also the wrong test. So I actually think it's right, that in hard cases, originalism can't force judges to follow it, or not to cheat. Although I'm not sure very many methodologies can do that. But I do think that if you are an honest judge, who wants to get the right answer, who wants to have a criteria other than your own politics for deciding your case, I think originalism can still supply that in the hard cases. But it might be that because they're hard cases, people won't always get the same answer.

Julia Galef:

You know what this reminds me of is arguments I've had over the idea of objectivity as a standard. Not in a legal context, just in reasoning about stuff in general. The notion of objectivity, or being unbiased.

And people will sometimes say, "Objectivity is a sham and we should stop even pretending that it's possible, because look at all these people who claim their opinion is objective, but it blatantly isn't and they actually totally disagree with each other."

And my reaction to that is always, "Yes, people misuse the word. Yes, it's impossible to be 100% objective, but it's still the standard we should be trying to strive for. And we can have arguments about whether or not someone is being objective, or how objective they're being. And we can look at evidence that bears on that question. Like, are they demonstrating intellectual consistency across different cases? That's one thing that indicates how objective they're being.

So we can disagree, but we should still be using that standard instead of giving up on it entirely. And it feels really parallel to me.

Will Baude:

I think it is really parallel. I guess this reminds me of another point, which is just, there's a whole cottage industry of arguing that originalists are not being true to their own principles. Because, "They ruled this way, but the original meaning really requires that."

And the funny thing is there's no cottage industry of this for other legal methodologies. Nobody ever says, "Oh, you say you're a living constitutionalist, but you interpreted the constitution to evolve this way. And the true living constitution would have evolved that way," because everybody understands this is so subjective.

Julia Galef:

So, yeah. That's a good point. When you started to describe that, the objection that never happens, I'm like, "Well, of course no-one would ever say that." And then my brain finished the sentence, "Well, because there's no rule they're claiming to try to follow."

Will Baude: Yeah.

Julia Galef: Yeah. I guess they wouldn't see that as a fatal flaw or anything.

Will Baude: Right, right. It may really come down to, "Do you even believe right and wrong are possible?"

Julia Galef: Right. So I have the impression that originalists tend to be political conservatives. Is that correct?

Will Baude: I think it's correct right now. It hasn't always been correct in history. So in the 20th century, the first prominent originalist justice was Hugo Black, who was a Franklin Roosevelt appointee, who was a very liberal justice, especially on civil rights issues and economic issues.

And then the valence turned sometime around *Roe vs. Wade*. So I'm inclined to think it's more that people who are skeptical about either the current doctrine, or the moral views of most judges right now, are the most likely to be attracted to originalism. Right? Because if you're told, "Oh, don't worry, we're just going to keep things the way they are -- except when the judges think that they need a little bit of improvement, and the judges will improve them" ...the people who are most likely to think, "Well, that doesn't sound very good," are people who either think the current doctrine is so wrong that we need to find an external party to criticize it, or the current set of judges are not going to be particularly good at doing that. And so again, they need an external standard.

Julia Galef: So, but that logic wouldn't have applied back in, a hundred years ago. It wouldn't have been the case that the people drawn to originalism are the ones who want things to stay the way they are?

Will Baude: Well, not quite. I guess what I mean is... so Hugo Black was drawn to being an originalist because he thought the court was way too conservative. And he was thinking of a way to voice what were all these doctrines and things they were getting wrong. And at the time the court was conservative, and so he was a left wing originalist.

Then when the court was doing things like creating a right to abortion, the originalist voices tend to be conservative, saying, "Wait a minute, how does the court get the power to create a right to abortion? What's wrong about that?"

Julia Galef: Oh, I see. So it's often motivated by a corrective impulse to correct what they see as bad applications of the law.

Will Baude: Right. And so if I'm right about that, the prediction would be that originalism, if the court stays as conservative as it is, the correlation between conservatives and originalists will decrease. And that's my prediction.

Julia Galef: Interesting. And that correlation would be seen in other judges, not on the Supreme Court? That's the outcome variable, or?

Will Baude: So, yeah. We can do other judges, or we could do maybe legal scholars. So we'll see more conservative legal scholars saying, "I'm not an originalist. I'm just a conservative." So Professor Adrian Vermeule at Harvard has started putting forward this theory that conservatives shouldn't be originalists. They should just believe in common good constitutionalism where judges just try to promote the common good.

Julia Galef: That would be like a form of living constitutionalism?

Will Baude: Conservative living constitutionalism. Exactly. Which will seem more attractive because the court is in the hands of the conservatives.

Julia Galef: Right. Interesting.

Will Baude: And then we'll see more liberals interested in making originalist arguments, trying to critique the court's doctrine by sincerely adopting originalism as a way to constrain or critique the court.

Julia Galef: Interesting. So this reminds me of an op-ed I saw you wrote in, I think it was, The Washington Post, in which you were describing this argument that other people make, that political or ideological bias is just rampant and unavoidable on the Supreme Court. Well, in judges in general, but including the Supreme Court, and that therefore the court should just be explicit about the bias, should acknowledge it openly in their reasoning.

And you were disagreeing with that argument. Could you summarize why you disagreed? I have a question about it, but-

Will Baude: I can try to remember.

Julia Galef: I can also try to summarize it.

Will Baude: Okay. Why don't you go first?

Julia Galef: All right. All right. So-

Will Baude: I'm sure I meant it.

Julia Galef: I probably read it more recently than you did.

So your disagreement was basically... kind of what I was saying about the objectivity, my defense of objectivity, that, "Yes, we're always going to fail at least somewhat," but your argument was, if we explicitly talk about being biased or about bias influencing the decisions, that will actually have a bad effect. That will make it harder for us to strive for unbiasedness, as judges.

And so even though we're never going to hit the mark perfectly, we shouldn't explicitly acknowledge that we're not hitting the mark. Maybe I'm not summarizing this right.

Will Baude: Okay. I think I know what you're talking about. Right. So I guess I'd say my response is, there's a big difference between having a good standard and failing to meet it, and then just giving up on having a good standard and deciding to live down to the bad standard. And it changes the whole dynamic going forward.

So if you're trying, then you're imperfect, and there's a certain amount of error, but it stays at a certain level. If you stop even trying, then there's lots of reasons to think the bad things get even worse. Because now, you don't even have the check of trying not to do them.

Julia Galef: And you think that explicitly acknowledging that the court is hopelessly biased makes it harder to try, or that is equivalent to, "We stop trying?"

Will Baude: Yes, I guess I think that the court's job is to be neutral and unbiased, in some sense. And so it's hard to live up to that, they don't live up to that perfectly, but at least trying to live up to that puts some gates and some check on how biased they become, and on for how long.

Julia Galef: Yeah. The analogy you gave, I'm now remembering, was a professor who posts a list of their favorite students, or ranks their students. We would say that's actually a bad thing, even though we acknowledge it's the case that professors tend to have favorite students and un-favorite students, but making that explicit weakens their ability to try to live up to the unbiased standard.

Will Baude: Yes, exactly.

Julia Galef: Does that ring a bell? Yeah?

Will Baude: It does.

Julia Galef: Okay. So here's my question. My intuitions lie with you on your take on that issue, of whether we should be explicit about the bias. But my intuitions go in the opposite direction in the context of just private individuals debating their views.

Like, in a normal disagreement between people, I tend to think it's better to be explicit about the things that might be biasing you, or your prior commitments or whatever. Partly because I just think that's more honest, and also maybe because I think it helps you adjust for those biases.

And so I'm wondering if you agree in that context, and if so, what do you think is the difference between that context and the context of the courts, where we think it's not healthy, or not helpful, to explicitly discuss biases?

Will Baude: So my instincts are with you in the private context as well. And I guess... so, I'm thinking out loud here. I do think one difference is just what we mean by "acknowledging the biases," and how you react to that.

So even if the judge has said openly, "Of course we're biased, but that's bad, and we're trying very hard to root those biases out, and here's our best attempts to root them out and to counterbalance them," that would not be so bad. That would not be so bad as just saying, "Well, we're biased. And so, that's just the way it is, and we're just going to be biased because we can't help ourselves."

So I feel like in private conversation, the same thing. If you meet somebody who says, "Well, I'm just not very good at thinking clearly, so I'm not going to try," that would be more disturbing.

But I guess the other difference is that, all of us are both trying to do a good job on our own, but also participating in the perpetuation of various social norms. And especially when judges say things officially, the social norm part is doing a lot of work.

And that's part of why I do think, even in a private context, a professor... it's one thing as a professor to admit when talking to your colleagues about how to grade fairly, "Now, what do you guys do when you have one of your own research assistants in your class, and you're really trying to counterbalance your own biases?" We have blind grading to help deal with that kind of problem. And it still would be different to announce that to all your students, the same thing. "And you should all know that so-and-so is my favorite student, but I promise you, I'm trying hard to overcome that bias."

Julia Galef: Right. Mo, that's actually a great point. And it reminds me of an interesting defense of hypocrisy that I've read. I can't remember who to cite for it, but yeah, this defense also made the distinction between the impact of your behavior privately, versus the impact of talking about that behavior publicly, in a way that shifts social norms, that's a whole separate damaging effect. So yeah, that's a great point.

Julia Galef: I see that I only have you for about 10 more minutes and there was one other thing on my wishlist that I really wanted to make sure I got to ask you.

Will Baude: Okay, let's do it.

Julia Galef: So I'm going to switch over to that. So I've seen that you're a fan of at least some rationalist bloggers, or thinkers, like Scott Alexander. And you've mentioned that your teaching and your scholarship have been influenced by rationalist principles, which of course piqued my curiosity. Could you elaborate on that?

Will Baude: Sure. So, most important example in teaching has been, I think, the importance of steel manning, charitable reconstruction, and the various other kinds of, I think of them as good argumentative hygiene that I, especially as a lawyer, it's easy not to do that a lot of the time. But I think it's really important to teach the students how to do that, both for their own good and because it's useful. So for instance, I started asking a question on exams where I forced students to steel man by forcing them to argue both sides. So I say, "Here's a case, write the opinion. Now write a dissent, devastating your opinion. You'll be graded on whichever one of these is worse." So-

Julia Galef: Oh, nice. I love it.

Will Baude: And I was motivated to do it in part by seeing students who could do, just sometimes had a really hard time even bringing themselves to articulate, "What could the judge ruling on the other side be thinking?" And so it's something I now try to force them to do, especially in the kind of cases that seem indefensible.

Will Baude: For myself, I'd say just the general approach of trying to make sure that I am seeking to understand the world as it is, rather than the way I wish it was. And there is, I feel it in myself sometimes, I wrote this article criticizing the doctrine of qualified immunity. Somebody recently put out an article, coming out in, The Stanford Law Review, arguing that I am wrong, that I misunderstood the history. This doctrine really is well-rooted. And the first time I read the article, the first three times I read the article, I'll admit, I was in soldier mindset, as you'd say. I had written this article. I was right. I cared a lot about it. He couldn't be right. So I was poking holes in it.

Will Baude: And then I calmed down, and actually the next thing I did is I just gave my article and his article to several other people, including some research assistants who don't necessarily share my views, and said, "I want you to read these and I want you to figure out, what do you think he's right about? What do you think I'm right about? It's okay if I'm wrong, that's fine. I just need to know. I need to know."

Julia Galef: I like the feature of that story where it sounds like you were explicitly trying to not guide their answer, or to try to correct for the bias that they might have to try to give you an answer that they think you want to hear.

Will Baude: Yes.

Julia Galef: It's easy to not do that step and then come away feeling all virtuous that you went and sought out unbiased feedback, but you didn't actually try hard enough to correct for people's tendency to tell you what you want to hear.

Will Baude: Right. No. And actually they concluded and convinced me that I was wrong about one of the steps in my argument.

Julia Galef: Oh really? Is it easy to summarize which one? Or is it just too complex to get into?

Will Baude: So I thought there was nothing like the doctrine of qualified immunity in the 19th century. And they convinced me and he convinced me there was something kind of like the doctrine of qualified immunity. Now I still think, having investigated it, that document was not that much like the doctrine of qualified immunity, but there was more there than I thought there was, and I had minimized it, wrongly. But I think especially that kind of thing, the truth or falsity of something you care about deeply, it's really important, especially for academics, who have no other reason for existing than truth, to try to make yourself care about the truth.

Julia Galef: Excellent. Will, it was such a pleasure talking to you. My 19-year-old self would be totally psyched.

Will Baude: Likewise, I've been listening to the podcast for a while and I'm just thrilled to get the chance to be on it myself.

Julia Galef: Oh, lovely.

[musical interlude]

Julia Galef: That was Will Baude, professor of law at the University of Chicago. And you can read more from him on his blog, Summary Judgment. And follow him on Twitter, where his handle is WilliamBaude – Baude is spelled B-A-U-D-E. I'll link to some of his articles about qualified immunity and originalism on the podcast site.

... Along with of course a link to my new book THE SCOUT MINDSET, coming out April 13th and available now for pre-order.

This concludes another episode of Rationally Speaking. Join me next time for more explorations on the borderlands between reason and nonsense.