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Sala de Professores¹

Interviewed: Barry Friedman

Jacob D. Fuchsberg Professor of Law and Affiliated Professor of Politics. E-mail: barry.friedman@nyu.edu

Interviewers: Diego Werneck Arguelhes (Professor of Law – FGV Direito Rio) and Jane Reis Gonçalves Pereira (Professor of Law – Universidade do Estado do Rio de Janeiro)

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Diego Werneck Arguelhes (DWA): We wanted to start by hearing a little more about the choices that took you to where you are right now. Why did you choose to become a law professor and why constitutional law in particular?

Barry Friedman (BF): I never really thought about being a law professor. I was in a relationship that caused me to take a job in Alabama after I clerked for a federal judge, and I did not know what to do in Alabama. So, I got a job doing capital punishment defense. But before I started, I received a telephone call telling me that the University of Alabama needed a constitutional law professor. I went to the interview, and they offered me thirty thousand dollars a year to teach constitutional law - which seems to me to be more money than I could ever imagined. And so, I took the job. I taught for a year and I loved it. But I left there after the year and went into private practice, and taught at Georgetown Law on the side. But I decided I would go eventually to the teaching market. I always wanted to teach constitutional law, but it's very hard in the United States because so many people want to be a constitutional law professor. So, I originally started teaching civil procedure

¹ This interview was transcribed by Renan Medeiros de Oliveira, edited and revised by the interviewers. The final text, which was approved by Professor Barry Friedman, keeps the informal and oral nature of the conversation.

and federal jurisdiction – “federal courts”, which is a kind of specialty here in the United States, because we have two separate court systems in the states and the federal government. Eventually I started writing in the area and I started to teach constitutional law. I don't actually teach constitutional law very much these days. Sometimes I do, but I don't like to teach it. And the reason I don't like to teach is because it's too political. There's not enough doctrine, not enough “law” in constitutional law. So, I teach mostly criminal procedure, judicial decision-making, things about policing. But sometimes I teach constitutional law.

DWA: It is interesting that you said that constitutional law seems too political nowadays, since and you made substantive contributions, in your career, in the intersections between politics and constitutional law, especially judicial behavior and judicial politics. Did you ever feel that what you wrote would have an impact on how judges and courts dealt with the boundaries between law and politics?

BF: That's a great question. The work that I do on policing, I feel, is going to have an impact and it already had an impact in the world. And I'm passionate about it for that reason. Judicial review, which has interested me very, very much as you know, has led me to many interdisciplinary collaborations that have been very important to me. I don't know if I thought that I normatively would affect the world. So, I have views about constitutional law, signed many amicus briefs in many cases. But, in terms of the study of judicial review, I don't know if I ever thought that would affect the way the cases got decided. I was really just trying to understand the institution and how it works.

Jane Reis Gonçalves Pereira (JRGP): Do you think that constitutional law should be more “legal” and less “political” than it is?

BF: I don't think that's possible. I mean, you can choose judges differently, right? You could have professional judges as opposed to the kind of appointment process we have in this country; there are places where the judges are professionalized, but there is still politics. So, it may not be possible. But, Jane, one way that constitutional law frustrates me in terms of teaching is because American constitutional law uses some very broad tests. “Equal protection” and “due process of law” leave a lot of room for a judge to decide. Whereas in criminal procedure, which I like to teach,

or in federal jurisdiction, there is a lot of doctrine. And even though I think that politics still seeps into the doctrine, from that standpoint of teaching students there's more law to teach and less the sort of – question like, you know, “How do you feel about abortion?” “Who is in favor?” “Who's against?”

DWA: To what extent are these perceptions you have of constitutional law a cause of your partnership with political scientists – and to what extent was it an effect? Or both?

BF: It was a cause. The many law articles I wrote before writing my book “The Will of the People” were history, the discipline that I had been working in for many years. I wrote about historical methods as well. And, after the articles, but before I wrote the book, I started to study political science. The first political scientists I actually looked at were people like Mark Graber, Keith Whittington, Howard Gillman – the historical institutionalists-- whose work is very historical. But then eventually I started to look more at the empirical social scientists, Lee Epstein, Jeff Segal, Tom Clark, Andrew Martin, Sarah Benesh, and all of those folks. In the United States, law professors will very often take a number of their articles and then tie them together into a book. My friends could not understand why I was taking so long to do that, just take my articles and put them together into a book. But I decided not to simply stitch the articles together, but to learn a lot of political science instead. When I came to write *The Will of the People*, it was informed by all that political science. I wrote “The Politics of Judicial Review”, I started to attend conferences, I started to do some empirical work. I think it's a great way to learn other disciplines and other materials. One way is deciding “I want to be a political scientist”, or “I want to be a historian”, and then go off and learn the methods. But often the best way to learn is to have a question you want to answer and then try to find any tool that you can to answer the question. I'm about to write about what we mean by public safety, and for the first time in my life I'm about to read a lot of philosophy. You just look for whatever tool there is to address your question.

DWA: You have written a book of advice for future law students. What do you think are the issues that you would recommend that any future lawyer or legal scholars, anywhere, should be paying attention to at this point?

BF: I think there is a real importance to lawyers learning to be good doctrinal lawyers, even though, as you both know, a lot of your work interest is in the boundaries between politics and law. I still

find it is really important to be a lawyer. I wear different hats. So, if I am acting as a legal scholar, I'm very conscious of the fact that it is my job to be scholarly, and if I'm acting more from an activist perspective, then I realize that I am pushing forward a position. But I still think it's important to try to use the methods of a lawyer, to try to understand those methods, and I spend a lot of time trying to persuade political scientists, for example, that it is pretty important that we all try to be good lawyers.

DWA: And, in these conversations with political scientists, how successful and persuasive do you think you have been so far?

BF: You should tell me. I think it depends on the political scientist. I wrote a little piece called "Taking law seriously" - it is one of the things that I wrote that has been cited most often. I think it affected a lot of political scientists. It asked them to, well, take the idea of law seriously. Social scientists will often ask how can you falsify law, and I always laugh and say: I can't falsify the influence of love, either, but it seems to have a big impact on the world. I feel the same way about law and legal doctrine. I think the way you ask questions and the way you analyze them affects how the answers come out. And so I hope that I had a hand in showing a generation of political scientists that law and legal institutions do matter and that it's worth studying them in that way.

JRGP: Sometimes you do represent some causes, like the Mixed Martial Arts (MMA) tournament in New York. Can you tell us more about it? (and where MMA would be located in the boundaries between politics and law?)

BF: MMA is just elegant force, so it's neither of the two. I was retained to represent the Ultimate Fighting Championship (UFC), which was struggling to legalize MMA here in New York. They had tried for many years to get legalized in the legislature. And so we filed a lawsuit arguing, among other things, that the performance of mixed martial arts was protected by the first amendment. Though we did not win the case, I am persuaded that in fact we should have won, and I'm fascinated to this day by the first amendment argument. One of my students who helped with the case is now a professor at Chicago, Genevieve Lakier; she wrote an article about free speech and sports. As a constitutional lawyer, I wish we'd been able to litigate that issue all the way up to the Supreme Court. I think it would have been absolutely fascinating to have that conversation. After all, it is mixed martial *arts*. It was a great case and it was a great team to work

with. We had a lot of fun. And then eventually the New York legislature capitulated. The New York legislature tapped out and legalized MMA.

DWA: We would like to talk a little bit more about this transition to the Policing Project. In *Unwarranted*, your most recent book, you do focus on issues of law enforcement, but it is still very much a legal scholarship book. In the Policing Project, however, as you described it, there is this clear goal to have an impact. Why did you choose to get involved in this project? And how does it feel, from the point of view of somebody who is coming from a very distinguished scholarly career, to focus on having a direct impact on the community?

BF: First, by distinguishing between law and politics I don't mean that law is unimportant as a vehicle for social change. I think it's incredibly important for social change. When I was a young lawyer, I was the president of the American Civil Liberties Union of Tennessee; I've done a lot of work on reproductive rights, first amendment litigation, other constitutional issues. So, I've always been active in the advocacy community. Thus, there are two separate questions: why did I write *Unwarranted* - and then why the Policing Project. The answers are similar, but different. I wrote *Unwarranted* because of my book *The Will of the People*. I am really passionate about policing issues and the Fourth Amendment, and I was frustrated because I think the doctrine is terrible. The courts have done a really terrible job of regulating the police. I wanted to change that, and I didn't know how. All of a sudden the light bulb went off in my head: I had just written a book that said that, if you want to change what the courts do, you have to change public opinion. So, I thought, why don't I write a book about policing aiming to affect public opinion, in the hope of affecting the way the courts read the Fourth Amendment?

Unwarranted started as a book largely about the Fourth Amendment, but then I got involved in policing, and it became a book about policing more generally. There's a well-known judge in Texas who reviewed my book and said: This book is not going to make judges happy, but they should read it anyway.

Things in the real world have had a big impact on me. Edward Snowden's disclosures affected me deeply. I don't know to this day whether I think what the NSA and the rest of the government was

doing was wrong from a policy perspective. Collecting everybody's information - is that a good or a bad idea? It depends on whether it works, whether it will keep us safe, and lots of other things. But I was sure that it should not have been done without asking the permission of the people. I could not believe that the government had just decided to do that without telling anybody. I was really frustrated. That made me think my book might have some impact in the world, so I went to my Dean and we agreed to start the Policing Project. And then Ferguson, Missouri happened. I remember sitting every night and watching the images of police officers who looked more like soldiers, pointing rifles at members of the public. There's one particular image, of an African American man with dreadlocks with his hands up and officers in combat gear with assault weapons pointed at him, and I just thought: things were completely off the rails. I was sick. So, we started the Policing Project and all of a sudden we were very, very, very busy. We do all kinds of different things, actually very little litigation so far, and we're very directly involved in the world.

JRGP: The policing project deals with a problem that many countries face, which is the difficulty to transpose constitutional liberal principles to the police practices. In the U.S., which is seen as a solid democracy, this issue appeared in episodes like Ferguson. In other countries, that passed through authoritarian experiences, that difficulty is deeply rooted. That's kind of a blind spot on the rule of law. Do you think your work may be useful in other countries?

BF: I would very much like to tackle these issues outside the United States. I'd like to have the kinds of conversations on what causes this across countries, including those with authoritarian pasts. I think you're absolutely right about that. In the Policing Project, we do four categories of things. First, we write rules and policies and best practices for policing. I am the reporter on policing for the *American Law Institute* – we are writing a set of principles of policing. We just had approved by the full membership our principles on the use of force. What we're doing the most is what we call community engagement: trying to democratize policing. We're experimenting with different ways to give people a voice. In Chicago, for example, we're working with a group of neighborhood activists to write an ordinance to create a police commission that will put the police department under public control.

We're also working very closely in neighborhoods in Chicago to figure out how to give people in the neighborhood voice in policing in their districts.

In Nashville, we are doing a cost-benefit analysis of traffic stops. The police in the United States often use traffic stops as an excuse to look for other violations – like drugs or guns or something. Everyone violates the many traffic laws in some way or another, so police stop people as they wish, and try to get more information. This is very common, but often has a discriminatory effect. We're doing something unique in Nashville, using the same technique we use in many other areas, which is cost-benefit analysis of policing. Even though officials in government use cost benefit analysis for many things, they don't when it comes to policing. And even if they sort of try to use cost-benefit techniques, they never account for the social costs (and benefits) of policing. So you might say we hire more officers, and we stop more people on the streets. But nobody ever asks: what is the cost to all these people of being stopped? How do you value the loss of community trust that you have because the community thinks that the government is acting in a discriminatory way.

The remarkable thing, that we didn't expect when we started the Policing Project, is how quickly change can happen if a police chief is willing to try new things. They can act quickly, because they are hierarchical organizations.

We are working on some new we are really excited about. One is creating a way for the community to score the police department, so you can evaluate whether your police department is good or bad. Another is related to how we regulate surveillance technology, which I think is the big question for the future: how the government collects information about all of us.

DWA: Jane mentioned how different the US scenario is in this regard if you compare to Latin American countries. In Brazil, for example, we have a military police, with all the signals in the wrong direction.

BF: Ironically, in the United States, I often think that the military is better regulated than the police. But I get the problem. If the police are themselves the military, it's a very difficult problem.

JRGP: It becomes a black hole for the rule of law.

BF: Yes, I agree, and that's the whole point of my book: at some level, the police should be the most democratized part of the government: they have monopolies on the use of force and surveillance; they have the ability to affect us most profoundly. At a minimum they should be responsive to democratic views and values. But the other big problem is the police focusing unequally on particular minority groups, because maybe that is what a popular majority else wants. That's a worry too.

DWA: In the last decade or so, with the rise of social media, did you feel a big impact on some or all these professional fronts?

BF: Seven, eight years ago I was asked to give a series of talks to young scholars about social media, and I made the point that these days you can't just write your article and then focus on the next article. You have to become an entrepreneur for your own scholarship. You have to blog about it, then you need to tweet about your blog. And I do think it's true that we all need to be entrepreneurs, and that social media lets us do that. The Policing Project has one very active Twitter account. I have my own as well. But I hate the echo chamber that social media so easily becomes. And there is so much more we can all write about.

DWA: One of your most important works (*The Will of the People*) deals with the relationship between constitutional law over time and public opinion. Imagine what a future Barry Friedman would have to do to analyze this period right now, and incorporate all these voices in their work. How different would his or her methods and approach need to be?

BF: I was very conscious of this question as the historical chapters of the book moved into the electronic age. And particularly when television became important; I didn't go watch lots of television archives, but I read some transcripts. My book was written mostly by print sources. I think about historians now, and how do you capture all of this electronic media? My book ends in 2005. And that's right at the cusp of social media becoming rampant, and I think any historical work like that would have to take account of social media - and it would be very, very difficult to do that.

DWA: As you said, the book ends around 2005. Looking at this last decade, would you say that the Supreme Court of the United States is in a period of

more alignment or misalignment with public opinion? And is this different across different areas of law?

BF: That's hard. I have seen a number of articles on how carefully Chief Justice Roberts is trying to stay in the middle. And I always think that, whether he ever read my book or not, he understands it better than anybody on the planet. He behaves just like he completely understands what I wrote. I'd like to meet him someday - I never have – and ask "Have you read my book?". I predict that, in some amount of time in the future, maybe 15 years, there's a high chance of us having another crisis around the judiciary in this country. That is especially true given Justice Kennedy's retirement. We're going to end up with a very conservative court, even more conservative than it already is. And I don't really believe that the country's values are becoming that conservative. I think we're living through a last gasp of white male hegemony, and people are freaking out because the country is diversifying so much. Diverse doesn't mean liberal, of course, but I think the court is seriously at risk of getting wildly out of touch with public opinion. And when that happens, if that happens, I think there will be a very big backlash.

DWA: And maybe getting things wrong with public opinion might cause a reaction that might take reality to judges.

BF: Exactly.

JRGP: I follow some American judges in Twitter, and I think they behave like stars. What do you think of judges and authorities using social media? In Brazil, some judges of the Supreme Court use social media. They are on Twitter. How do you feel about it?

BF: That's all so complicated. I definitely think... Well, now you're making me think. I would not want you [as a judge] to get off Twitter.

DWA: Let me rephrase it in a very specific way: if you were a judge, would you keep using Twitter? How would you feel about that?

BF: The honest answer is that Barry Friedman won't be a judge. I'd hate the job. It's not my personality, because I do think judges have to be removed from the world and they have to be patient - and I'm not very patient. I could never sit on the trial bench, because I would be bored out of my mind. And I don't love the generalist mix of cases on most appellate courts. So a Constitutional Court -- I would be interested in that. But there's no chance of that. So, I don't have to answer your question!

DWA: Fair enough.