THREE CONCEPTS OF RULES

MICHAEL S. MOORE*

Professor Frederick Schauer's contribution to this Symposium[1] is an explication of parts of a much richer manuscript soon to be published by the Oxford University Press.[2] In the latter work, Professor Schauer probes the nature of rules, ruleness, and rule-based decisionmaking generically, that is, without particular regard to the law. Professor Schauer presents his jurisprudential theory, which he calls "presumptive positivism," as one spin-off of his more general theses about the role of rules in all decisional environments.

In both works, Schauer has given us a well-organized, comprehensive, well-versed overview of how rules do and should enter into our decisions. He has drawn together the large body of literature that has developed regarding rules since 1950. These literatures have separately focused: on Wittgenstein's preoccupation with rule-following,[3] on H.L.A. Hart's model of law as the union of two kinds of rules,[4] on Joseph Raz's lifetime study of rules as they impact upon our practical rationality both within and without the law,[5] and on the varieties of indirect utilitarianism that have flourished in ethics since John Rawls's seminal article in 1955.[6]

My own contribution in this Article is intended largely to clarify which of the many possible enterprises in the study of rules is the one in which Schauer actually engages. I choose this largely clarificatory task because my reading of Schauer's work leaves me uncertain of the extent to which Schauer has accu-

* Leon Meltzer Professor of Law, University of Pennsylvania. A.B., 1964, University of Oregon; J.D., 1967, S.J.D., 1978, Harvard University.

1. Schauer, *Rules and the Rule of Law*, 14 HARV. J.L. & PUB. POL'Y 645 (1991).

2. F. SCHAUER, PLAYING BY THE RULES (forthcoming 1991). (Page references to this source in the footnotes of this Article are to the 1990 manuscript version of Schauer's forthcoming book.)

3. *See* L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (3d ed. 1958). The literature in the 1950s on rules inspired by Wittgenstein prominently included: P. WINCH, THE IDEA OF A SOCIAL SCIENCE AND ITS RELATION TO PHILOSOPHY (1958); R. PETERS, THE CONCEPT OF MOTIVATION (1958); and Melden, *Action*, 65 PHIL. REV. 529 (1956). There recently has been a revival of interest in Wittgenstein's treatment of rules. *See, e.g.*, S. KRIPKE, WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE (1982); WITTGENSTEIN: TO FOLLOW A RULE (S. Holtzman & C. Leich eds. 1981).

4. *See* H.L.A. HART, THE CONCEPT OF LAW (1961).

5. *See* J. RAZ, PRACTICAL REASON AND NORMS (1975).

6. Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 (1955).

rately located his enterprise. In any case, I intend such clarifications to help others who read what will surely become a seminal work on rules to grasp what it is that Schauer is, and is not, talking about.

I.

Let me begin with the familiar distinction between *describing* how we and others use rules in our reasoning and acting, and *prescribing* to ourselves and others how we ought to use rules. This is *not* the same as the distinction between descriptive and prescriptive rules with which Schauer begins his book.[7] With his distinction, Schauer intends to differentiate between the two tasks others engage in when they use rules: Sometimes they describe regularities with universally generalized statements ("descriptive rules"), and other times they prescribe to themselves or others what they ought to do in similarly general terms ("prescriptive rules"). In either case, when drawing this distinction, Schauer is not prescribing how we ought to use rules; he is describing two ways in which rules are in fact used.

Schauer's book, *Playing By the Rules*, describes how people use prescriptive rules. It is an essay in what H.L.A. Hart would call "descriptive sociology."[8] This phrase was Hart's characterization of his own classic, *The Concept of Law*, a book with which Schauer's *Playing By the Rules* may be fruitfully compared. In *The Concept of Law*, Hart distinguished an "external attitude" toward rules from what he called an "internal attitude."[9] An external attitude toward a rule is the attitude of one who does not accept the rule as having guiding force for his own or others' behavior, though he might recognize that others believe the rule to have such force. For example, the anthropologist studying primitive religious practices often exhibits such a detached attitude, because he does not accept such practices as desirable standards for his own or others' religious observances; he merely studies such standards as they are in fact employed by the natives being studied. By contrast, the anthropologist who "goes native" by coming to accept the practices as regulative ideals for his own and others' behavior exhibits an internal atti-

7. *See* F. SCHAUER, *supra* note 2, at 2; *see also* Schauer, *supra* note 1, at 647-48.

8. *See* H.L.A. HART, *supra* note 4, at v.

9. *See id.* at 54-56, 86-88. For a discussion of this distinction, see M. MOORE, INTRODUCTION TO H.L.A. HART'S *THE CONCEPT OF LAW* (1991).

tude toward such practices. That is, he sees them as standards of justification (for conforming behavior) and of criticism (for deviating behavior).

When Hart described his own book as "an essay in descriptive sociology," he realized that he had written the book from the external point of view. Occasionally, Hart's descriptions ignore the participant's own internal attitudes toward a rule and describe mere behavioral regularities. Hart called this the extreme external point of view;[10] in Schauer's terminology, this would be called a descriptive rule. More often, Hart's descriptions refer to the actors' internal attitudes toward a rule as essential to understanding what they are doing. Hart called this a moderate external point of view; in Schauer's terminology, this would be called a prescriptive rule. In either case, Hart does not reveal his own attitude toward the rules in question. He does not purport to tell us whether such rules are a good thing, that is, whether they give us reasons to act in conformity with them. He is the detached observer of other people's use of rules. "Descriptive sociology" is an accurate label for such a purely descriptive task.

In his book, Schauer like Hart engages in a purely descriptive sociology of how people in general use prescriptive rules in their reasonings. This is most evident in Schauer's conception of what a rule is, and in what sense it can be said that a rule exists. Because *qua* sociologist Schauer is describing a social phenomenon, rules exist for Schauer only relative to a person or group of persons; as he puts it, "the existence of a rule is in an important way agent-specific."[11] What Schauer means by this is that a generalization is a rule only when some agent treats it as a rule, *viz*, when an agent treats the generalization as itself providing a reason for him to act in conformity with it.[12] The existence of a rule for Schauer is thus a social fact, as it was for Hart. For both Hart and Schauer, the crucial social fact is not the mere coincidence of behavior in conformity with some generalization, but rather the attitude of individuals toward that generalization.

Professor Schauer's analysis of the ontology of rules is as sociological as is his analysis of rules' existence conditions.

10. *See* H.L.A. HART, *supra* note 4, at 87.
11. F. SCHAUER, *supra* note 2, at 177.
12. *See id.* at 192, 210.

"Rules . . . are [not] entities,"[13] according to Schauer. In particular, they are not abstract universals, as are scientific and moral laws. Rather, "a rule is most usefully understood as a *relationship*, or better yet, a *status*."[14] The relationship or status Schauer has in mind is that attained when a generalization is "entrenched" vis-à-vis its "background justification." The social nature of this ontology can be seen clearly when one sees what Schauer means when speaking of the "entrenchment" of a rule and of a rule's "background justification." For Schauer, as for Nelson Goodman, who also spoke of "entrenched predicates,"[15] the "entrenchment of generalizations . . . is in large part a psychological phenomenon."[16] A rule is entrenched whenever it is regarded by its addressee as itself providing a reason for acting in conformity with it. This is a psychological and social criterion of entrenchment because it takes the addressee's attitude toward the rule as it happens to be; it says nothing about the normative force a rule may truly have for that agent. Similarly, the "background justifications" against which Schauer sees rules entrenched are not moral values, for that would require Schauer to abandon his external, sociological stance. Rather, a background justification for Schauer is "the evil sought to be eradicated or the goal sought to be served"[17] by the rulemaker—again, a psychological and social criterion of justification, not a moral one.

The "regulative" or "mandatory" rules that interest Schauer have "normative force," as he describes it. "Normative force" (or the "normativity of rules") only meant for Hart the acceptance of (internal attitude toward) a rule by some group of people;[18] for Schauer, it simply means that such a rule constitutes a *subjective* reason for action. A subjective reason for action is the reason that some determinate person has by virtue of his psychological makeup. If such a person desires to eat cheese, then that person has a reason to act to acquire some cheese. Absent the desire, such a person has no subjective reason to act in this way. Schauer is quite clear that when he writes about the "nor-

13. *Id.* at 192.

14. *Id.* (emphasis in original).

15. N. GOODMAN, FACT, FICTION, AND FORECAST 123 (4th ed. 1983).

16. F. SCHAUER, *supra* note 2, at 73.

17. *Id.* at 47.

18. *See* citations and discussion in M. MOORE, *supra* note 9.

mative force" of a rule as providing a "reason for action" to an agent, he refers only to subjective reasons. As Schauer puts it:

> [R]ules are applicable only insofar as they supply reasons for action for some addressee of a rule, but their ability to supply such reasons for that addressee is not a function of that rule itself . . . . Rather, the applicability of a rule . . . is necessarily dependent on the addressee of the rule *treating* the rule as supplying a reason for action . . . .[19]

Schauer is *not*, in other words, in the business of charting what sorts of rules actually affect the rational and moral reasons for action. He is not, in other words, dealing with objective reasons, reasons we have for performing or not performing certain actions, irrespective of what we happen to desire.[20] Schauer *qua* sociologist has no more desire than Hart to fish these moral waters.

The use of subjective reasons for action to mark prescriptive rules' "normative force" leads Schauer to another aspect of rules that reflects in another way their essentially social nature. Because Schauer believes that rules give only subjective reasons for action, the degree to which they constrain an agent's decisional space (a dimension of rules Schauer aptly calls "ruleness") will also be a *psychological*, not a logical, matter. Thus, Schauer eschews specificity-vagueness as a criterion of ruleness in favor of an agent-specific criterion: How much does the agent, in the absence of the rule, already want to do the act that the rule dictates? "Ruleness," for Schauer,

> will be greatest where rules command the highest proportion of extensionally divergent results for a given agent or class of agents. Conversely, the property of ruleness will diminish insofar as a rule does not indicate, for an agent or a class of agents, actions different from those the agent or agents would have performed in the absence of the rule.[21]

Not surprisingly, this social conception of ruleness yields another aspect to Schauer's descriptive sociology of rules. According to Schauer, not only do rules exist only relative to an

19. F. SCHAUER, *supra* note 2, at 205 (emphasis in original). I am quoting here to the 1989 manuscript version of Schauer's book; he makes largely the same point at page 206 of the 1990 manuscript version.

20. For the distinction between subjective (or descriptive-explanatory) reasons and objective (or normative-justifying) reasons, see Moore, *Authority, Law, and Razian Reasons*, 62 S. CAL. L. REV. 827, 841-45, 878-83 (1989). *See also* T. NAGEL, THE VIEW FROM NOWHERE (1986).

21. F. SCHAUER, *supra* note 2, at 179.

agent or class of agents, but even relative to any given agent, their existence is itself a more-or-less affair, not a matter of yes-or-no. This scalar nature of rules is the logical inference to draw from Schauer's social conception of rules: In order to exist, rules must have ruleness; the social facts that make for ruleness—patterns of some agent's subjective desires without a rule, the patterns of behavior required by the rule, and the difference between the two patterns—are surely a matter of degree that can vary along a smooth continuum, as Schauer recognizes when he concludes that ruleness "is a variable dimension rather than a single condition that either obtains or does not";[22] therefore, the existence of a rule for an agent must also be a scalar phenomenon, not a bright-line distinction.

The individuation of rules is another area within Schauer's treatment of rules where his sociological focus surfaces. For Schauer, rules require a social existence to exist at all. This means that rules must have an historical formulation to exist. Such formulation may be a canonical laying down of a discrete set of symbols, as is done by a legislature in passing a statute. It may be a non-canonical set of statements, each of which is equally authoritative even though syntactically divergent because each means the same thing, as is sometimes the case with common-law rules. It may even consist of unspoken thoughts, the content of which is nonetheless an entrenched rule for the person having the thoughts.[23] Whichever kind of historical formulation there is, Schauer says, "without the formulation there is no rule at all,"[24] because "rules lie much more in rather than behind their formulations."[25] This identification of rules with their formulations creates a social theory of rules' individuation: If one formulation is more specific, more general, or in any other way semantically different than another formulation, then we have formulations of two different rules. As Schauer puts it, " 'No boisterous and annoying dogs allowed' is a different rule from 'No dogs allowed' . . . ."[26]

This formulation-specific individuation for rules leads Schauer to treat exceptions to rules as destroying their ruleness, and thus, their very existence as rules. As we have seen,

22. *Id.* at 18.
23. *See id.* at 122.
24. *Id.* at 120.
25. *Id.* at 114.
26. *Id.* at 113.

Schauer urges that a rule with an exception is a different rule than "the same rule" without it. "Don't kill except in self-defense" is a different rule from "Don't kill." Armed with this view of how to individuate rules, Schauer next notes that if the rule "Don't kill" is subject to a host of unformulated exceptions—like self-defense, defense of others, killing in a just war, et cetera—then it loses its ruleness, because the applier of the rule is actually free to make up new rules (via the exceptions) as he decides. There is thus no rule if it is understood that unformulated exceptions can be added to the general statement.

This tie of a single, individuated rule to its historical formulation, and the accompanying conceptual ban on unformulated exceptions, leads Schauer to his view that rules are always over- and under-inclusive. Because rules are individuated by their historical formulations, and because those formulations cannot be amended by supplying hitherto unformulated exceptions to meet the exigencies of the moment, rules will inevitably cover cases they should not cover, and not cover cases they should cover. These judgments of over- and under-inclusiveness of rules are not to be understood to be moral judgments. They are only instrumental judgments about how perfectly a rule serves the rulemaker's goal in enacting the rule to start with.

Schauer's descriptive sociology thus yields what I shall call the "social rules" concept of rules.[27] In the preceding paragraphs, I have identified ten features of this social rules concept:

1. *Existence Conditions.* Social rules do not exist in the abstract, but exist only relative to an agent and only when that agent entrenches that rule in his thought processes.
2. *Ontological Status.* Social rules are not abstract universals or entities of any kind. They are a state within some agent's psychology, a state constituted by the giving of a subjective reason for action.
3. *Entrenchment.* A psychological process that a rule must have to be a rule. Once the process reaches the state of entrenchment, a rule achieves a "life of its own" within

27. The phrase "social rule" in jurisprudence is most closely associated with H.L.A. Hart, who used it to distinguish rules about which some members of a group have the internal attitude—"social rules"—from mere habits (behavioral regularities engaged in without the internal attitude). *See* H.L.A. HART, *supra* note 4, at 55. *See also* Dworkin, *Social Rules and Legal Theory*, 81 YALE L.J. 855 (1972), *reprinted in* R. DWORKIN, TAKING RIGHTS SERIOUSLY 46 (1978).

some agent's psychology, meaning that the rule is a subjective reason for action for that agent.

4. *Background Justification*. The subjective goal or desire of the rulemaker that he intends the rule to serve; such justification is not the objectively valuable object that a rule might be made to serve.
5. *Normative Force*. The capacity of a rule to give an agent a subjective reason to act in conformity to the rule.
6. *Ruleness*. The constraint imposed on a given agent by a rule, measured by the divergence of what the rule demands from what the agent wants to do in the absence of the rule.
7. *Continuous Nature*. Rules exist for an agent on a continuum; they do not simply either exist or fail to exist.
8. *Individuation Conditions*. Rules are individuated by their historical formulations, such that a semantically different formulation creates a different rule.
9. *Unformulated Exceptions*. To the extent that a rule is subject in its applications to unformulated exceptions that relieve a decisionmaker from having to follow the (unexcepted) rule, a rule is not a rule.
10. *Over- and Under-inclusiveness*. A rule is necessarily over- and under-inclusive with respect to attaining the rulemaker's goal that serves as the rule's background justification.

II.

To say that Schauer is largely engaged in sociological description is not to disparage his work on rules anymore than agreeing with Hart that his own book, *The Concept of Law*, was sociological would disparage that legal classic. Schauer and Hart have both given us valuable and detailed descriptions of that part of our current social practice dealing with social rules. In particular, Schauer's book supplies what Hart's book glosses over,[28] namely, how rule-appliers are to treat the rules that they apply if there can be said to be a system of rules in operation in society. What deserves attention here, however, is what kind of work cannot be done—or even very well understood, when done by others—if one is armed only with the Hart-Schauer conception of social rules. I consider six debates in moral theory, political theory, and jurisprudence for illustration.

28. Hart deals with problems of rule application only in Chapter 7 of *The Concept of Law*. *See* H.L.A. HART, *supra* note 4, at 121-50.

A.

The first is the well-known debate about the general nature of the demands that morality makes upon us: Are these demands in the form of rules addressed to each of us personally, saying things like, "Don't kill an innocent person even if doing so would reduce the numbers of innocents killed by others"? Or are such demands in the form of a maximizing function providing that the right thing to do is determined by minimizing bad states of affairs, regardless of whether we or someone else directly causes such bad states of affairs? If morality takes the latter "agent-neutral" shape, are the states of affairs that we are to maximize by our actions themselves states of conformity to rules like "Don't kill," or are such states of affairs non-rule-conforming items, such as happiness, pleasure, or preference-satisfaction? These are familiar questions with a long history of competing answers.[29] These debates cannot even be understood, let alone solved, if one means by "rules" the social rules referred to by Schauer, because the moral rules at issue in these debates are not "entrenched" vis-à-vis some "background justifications." Rather, such rules, assuming they exist, are themselves right-making in the sense that acting in accordance with them is the morally correct thing to do. Such moral rules, unlike the social artifacts to which Schauer refers, are not *means* to doing the right thing, decisional aids to being moral. Conformity with such rules, if they exist, is intrinsically right.

If we are to understand this long-standing debate in moral theory, we need a different concept of rules than Schauer's social rules concept. I will call the needed concept the "real rules" concept of rules, adopting the phrase "real rules" from Schauer[30] but excising any disparaging connotations that the phrase may have for him. Real rules are not social artifacts of any kind. Their existence does not depend on anyone having a certain attitude toward them, or any group converging in their behavior under such rules. Such rules need not have an historical formulation in order to exist or in order to be individuated. Such rules exist whenever they are *true*, that is, whenever the

29. *See generally* Moore, *Torture and the Balance of Evils*, 23 ISRAEL L. REV. 280 (1989). (In an introduction to the extensive literature on these topics, I defend the view that morality consists in part of a set of "agent-relative" rules directed to each of us individually.) For a collection of essays expressing diverging views on this matter, see CONSEQUENTIALISM AND ITS CRITICS (S. Scheffler ed. 1988).

30. *See* F. SCHAUER, *supra* note 2, at 114 n.18.

entities and properties to which they refer exist. Such real rules are of course what we mean when we speak of moral laws. They are abstract entities—universals, just like scientific laws.

A useful expository device with which to lay out the real rules concept of rules is to analyze it in the same ten dimensions that I used to clarify Schauer's social rules concept. A contrasting exposition of the real rules concept along these ten dimensions is as follows:

1. *Existence Conditions*. A real rule exists whenever it is true, *viz*, whenever the entities, qualities, and relations to which its terms refer exist.
2. *Ontological Status*. Real rules are abstract universals, not acts, conventions, convergent behavior, or shared mental states of historically situated persons.
3. *Entrenchment*. Real rules are entrenched, not in the sense that any individual or group entrenches them within his, her, or their own psychology, but rather in the sense that such rules provide overriding reasons to rational and moral agents to act in conformity with them.
4. *Background Justification*. Conformity with such rules is an intrinsic good, so that, although such rules have a justification, that justification is *not* in terms of some further value served by the existence of such rules.
5. *Normative Force*. The capacity of a rule to give all persons an objective reason to act in conformity with the rule.
6. *Ruleness*. Real rules are true generalizations about what it is right to do and are thus not, as such, guides for decision. Thus, they do not have a dimension of constraint, nor do they have any dimension of "degree of fit" with actions. They either apply or do not apply to any given action.
7. *Non-continuous Nature*. Rules either exist (are true) or they do not exist (are false). They do not "more-or-less exist" any more than they "more-or-less apply" to any given situation.
8. *Individuation Conditions*. Rules, being abstract universals, are individuated in whatever way such universals are individuated. Individuation is not affected by any social practice, such as historical formulation.
9. *Unformulated Exceptions*. A rule may (but need not) be subject to an indefinitely large number of exceptions that have never been formulated by anyone.[31]
10. *Over- and Under-inclusiveness*. Any rule that exists (and

31. One might have a different view regarding whether unformulated exceptions to

> therefore is true) is exactly right; that is, there will be an exception for any situation in which the rule would yield the wrong decision. If there is no exception, action in conformity with the rule is intrinsically right. Therefore, real rules necessarily can be neither under-inclusive nor over-inclusive.

The debates between agent-relative versus agent-neutral, and deontological versus utilitarian, moral theorists are not about the existence of social rules. Such debates are about the existence of real rules. Of course, someone enamored of the social rules concept of rules might deny the existence of real rules and even deny that *their* existence is really at issue in the above debates. In response to moral theorists who often think that they are debating the existence of real rules, such a person might say that what moral theorists are really debating is the place of social rules within the moral conventions of our society, because that is all that it is possible to debate.

Schauer appears more cautious than this. He sees that his enterprise of describing the operation of social rules is valuable, which it is, and does not need the justification that "it is the only game in town" about rules. Thus, Schauer notes at one point that his "account is about a set of problems not directly touching categorical and ultimate rules of a Kantian variety."[32] Those who applaud Schauer's social rules analysis are not always so guarded in the claims that they make for the analysis. Professor Margaret Jane Radin, for example, has recently urged that social rules are the only rules that exist.[33] "Rules depend essentially on social context,"[34] she urges. "Only the fact of our seemingly 'natural' agreement on what are instances of obeying rules permits us to say there are rules."[35]

This is not the place for a frontal assault on the conventionalism about morals that such a view represents. It is sufficient here to note that the social rules concept cannot do the work that Radin would demand of it. One cannot substitute the social rules concept for the real rules concept in the debates mentioned above and still have anything close to the same kind of

---

real rules exist, depending on how one thinks of moral dilemmas. *See* Moore, *supra* note 20, at 846-48.

32. F. SCHAUER, *supra* note 2, at 149 n.15.

33. *See* Radin, *Reconsidering the Rule of Law*, 69 B.U.L. REV. 781 (1989).

34. *Id.* at 797.

35. *Id.* at 799.

debate. This is because such debates are not third-person exercises in social description in which the participants do not betray their own commitments; rather, such debates are attempts by committed individuals to state the general nature of their own commitments. Such debates cannot be about the place of social rules in the moral conventions of our society and still retain the "internal attitude" of the participants of such debates toward their subject matter.

Radin might believe that she can escape this problem by identifying the objects of one's commitments or attitudes to be social rules; then, third-person description would be first-person commitment. There are limited situations for which such an identification is plausible, namely, for those social rules that solve coordination problems that everyone is obligated to solve. As an across-the-board identification, however, treating all social rules as the content of one's own moral commitments runs counter to everyone's moral experience, Radin's included. We each sense the possibility that a diverging moral judgment that we make about the right rule might be correct even when it disagrees with the social rules of our society. As Radin notes, "law and its institutions may indeed exhibit integrity or coherence . . . and yet be coherently wrong. A main task for nonfoundationalist theory is to find room for this kind of judgment."[36] If we generalize a bit, we should say that any conventionalist theory of moral rules—including Radin's nonfoundationalist theory—has to find room for non-conventional moral judgments.

This is not a proof of moral realism. It is an argument that an important debate about rules that we all have in our daily lives cannot be carried on using the social rules concept. What is needed is a concept adapted to some first-person, non-descriptive, committed, internal point of view. The real rules concept is one such concept. Anti-realists about morality could propose others. Simon Blackburn, for example, sees clearly that no social rules concept can account for "one of the essential possibilities for a moral thinker," namely, "the thought that our own culture and way of life leads us to corrupted judgment."[37] This rejection of the social rules concept does not leave a moral

36. *Id.* at 805 n.85.

37. Blackburn, *Reply: Rule-Following and Moral Realism*, in WITTGENSTEIN: TO FOLLOW A RULE 163, 171 (S. Holtzman & C. Leich eds. 1981).

non-cognitivist like Blackburn with a real rules concept with which to ask questions about the correctness, say, of consequentialist moral theory. It does leave him with what he might call a "quasi-real rules" concept, a concept just like the real rules concept except that it disavows the existence of objective reasons of morality in any sense other than as projections of individual (not social) creation.

Although serious problems exist with non-cognitivist accounts like Blackburn's, on this both the realist and the non-cognitivist can agree: No social rules concept can make sense of the practical debates about the general nature of moral norms.

B.

A second debate about rules in moral reasoning that cannot be understood using a social rules concept of rules is the flourishing debate between rule-utilitarians and act-utilitarians. To be sure, some of that debate concerns the optimal decision-procedures for the rational agent striving to maximize utility with his decisions. Framed in this form, the issue is whether utility is maximized by the agent calculating utility directly in each case, using rules only as epistemic aids ("rules of thumb"), or whether utility is maximized by indirect pursuit through a two-step procedure: (1) calculating the rule that maximizes utility, and (2) applying the rule to individual cases without recalculating utility in any such applications. If the debate is framed in these terms, Schauer's social rules concept of rules is appropriate.

The social rules concept is inappropriate if the debate is framed in another form, however. In this form, the debate is not about optimal decision-strategies (or institutional designs) for utilitarians. Rather, it is about the truth conditions of moral propositions. The debate is not about how we can individually reach the correct decisions, nor even about how we should design institutions to maximize the numbers of right decisions they reach. Rather, the debate is about the rule-based (or not rule-based) character of the right decisions that should be reached if utilitarianism is true. When David Lyons, for example, argues that rule-utilitarianism collapses either into act-utilitarianism or into some non-utilitarian ethics,[38] we should not

38. *See* D. LYONS, FORMS AND LIMITS OF UTILITARIANISM (1965).

understand him to be talking about decision-procedures. Rather, Lyons is talking about the truth of certain moral propositions. Specifically, Lyons argues that the only way a rule-utilitarian could be a utilitarian at all would be if he conceived of his rules as generalizations of potentially unlimited complexity; otherwise, rule-utilitarianism is not equivalent to simple utilitarianism, and it must be shown to be true on some other basis.

Schauer recognizes that Lyons's concept of rules diverges from Schauer's social rules concept in such dimensions as ruleness, individuation conditions, unformulated exceptions, and over- or under-inclusiveness. For Lyons, the rules that make rule-utilitarianism conceptually possible are neither identical to, nor individuated by, their historical formulations; rules may have unformulated exceptions; and rules match perfectly the right decision. Schauer thinks that Lyons's rules may be "rules only in form and not in effect . . . [because] exclusion of these features of continuous malleability and unlimited specificity is necessary to the definition of the concept of a rule . . . ."[39] Schauer fails to perceive, however, the poverty of the social rules concept in making sense of the debate in which Lyons is engaged. Lyons uses what I have called the real rules concept when he argues that the only rule-utilitarianism there can be that is not a contradiction in terms is a *real* rule-utilitarianism. This is a plausible argument if Lyons is using the real rules concept of rule-utilitarianism; it would be a ridiculous conceptual argument if he were using Schauer's social rules concept.

C.

Schauer's social concept rules of rules also cannot be applied to a third debate within moral and political theory. Unlike the previous two debates, however, the real rules concept of rules is also not adequate. I refer to the debate about the impact of the exercise of authority upon our preexisting moral obligations. There is a seemingly heterogeneous set of phenomena that can alter the moral obligations we have. If a friend makes a request of us, if we promise to do something, if we take an oath to fulfill a role, if we consent for another to do something, or if we are commanded by legitimate authority over us, we may

39. F. SCHAUER, *supra* note 2, at 143.

have changed what would be obligatory for us to do or refrain from doing in the absence of such a transaction. Joseph Raz helpfully labels all such phenomena as the exercise of normative powers, because each such phenomenon is an example of the limited ability we possess to change what morality requires of us.[40]

The debate within contemporary moral and political theory is this: In what way do normative powers change our previously existing moral obligations? Raz has centered much of his writing on this question, elegantly detailing one view: that exercises of legitimate authority both provide a new reason for action and protect that new reason from competition with antecedently existing reasons by excluding the latter reasons from counting in determining the rightness of actions.[41] An alternative view, held by myself,[42] concedes that the exercise of legitimate authority does create a new reason for action for the actors subject to such authority, but denies that such a new reason is in any way protected from competition with antecedently existing reasons in determining the rightness of actions. A third view, held by Heidi Hurd, Larry Alexander, and Donald Regan, among others,[43] denies that legitimate authority ever creates new reasons for action. Rather, they assert that promises and commands create only new reasons for belief about what are the true reasons for action that we have (and had before the exercise of authority). Commands of authority then become epistemic guides to our antecedent obligations, but they do not change those obligations.

As before, who has the better of this argument is not our present concern. Instead, we should see the proper terms in which this debate is framed. No party to this debate is asking whether we should treat the commands of authority as a social rule. The debate is not about an optimal decision-procedure at all. Rather, the debate among Raz, myself, and others is about the truth conditions of certain moral propositions. Is it true

40. *See* Raz, *Voluntary Obligations and Normative Powers*, 46 THE ARISTOTELIAN SOCIETY 79 (1972).

41. For a summary of Raz's view, and citations to the relevant work, see Moore, *supra* note 20, at 829 n.1, 849-53.

42. *See* Moore, *supra* note 20.

43. *See* Hurd, *Sovereignty in Silence*, 99 YALE L.J. 945, 1007-22 (1990); Hurd, *Challenging Authority*, 100 YALE L.J. 1611 (1991); Alexander, *Law and Exclusionary Reasons*, 18 PHIL. TOPICS 5 (1990); Regan, *Authority and Value: Reflections on Raz's "Morality of Freedom"*, 62 S. CAL. L. REV. 995, 1001-40 (1989).

that the utterance of a legitimate authority becomes a new moral rule, giving actors subject to that authority a new reason to act in conformity with that rule, as Raz and I, but not Regan, Alexander, and Hurd, would assert? If so, is it true that such a new moral rule makes right behavior in conformity with it because it excludes antecedently existing reasons from counting any longer, as Raz but not I would hold? The rules, the existence and nature of which are at issue here, are not Schauer's social rules giving actors *subjective* reasons for action, but some other kind of rules giving actors *objective* reasons for action.

On this point, Schauer appears to disagree, because he finds that "Raz's account of rules as exclusionary reasons is largely consistent"[44] with his own conclusions regarding the place of social rules in optimal decision-strategies. Yet Raz's account of rules as exclusionary reasons is neither "largely consistent" nor largely inconsistent with Schauer's account of social rules; the two accounts simply refer to different subject matters. Raz is not talking about optimal decision-strategies. Thus, when he is talking about exclusionary reasons, he is not talking about whether a social rule should be used to exclude other items from consideration. Early in his career, Raz noted that interpreting him to be talking about decision-procedures would transform exclusionary (second-order) reasons into "ordinary (first-order) reasons not to consider the merits of the case (i.e. not to perform a certain mental act)."[45] This interpretation of Raz destroys his distinction between antecedently existing, first-order reasons for action, and exclusionary, second-order reasons (like those created by the exercise of legitimate authority), because second-order reasons get collapsed into first-order reasons "not to perform a certain mental act." Moreover, Raz urged that, taken as a claim about psychological decision-procedures, the claim that rules give exclusionary reasons would be "obviously wrong" because "there is no reason to prevent a person . . . from going through the [excluded] arguments to amuse himself or as an exercise . . . ."[46] Raz has recently repeated these disavowals of any psychological, decision-procedure interpretation of his claim about authority,[47] in re-

44. F. SCHAUER, *supra* note 2, at 155.
45. J. RAZ, *supra* note 5, at 48.
46. *Id.*
47. *See* Raz, *Facing Up: A Reply*, 62 S. CAL. L. REV. 1153, 1157 (1989).

sponse to my charge that he had, on occasion, unwittingly slipped into a decision-procedure discussion.[48]

Raz's opponents are not talking about the role of social rules in decision-procedures, either. Most of my opposition to Raz's exclusionary-reasons analysis of authority is to the idea that the rules that are exercises of legitimate authority ever give us reasons to exclude previously existing, objective reasons that we have for acting contrary to the rule. Even Hurd, Alexander, and Regan, who ultimately analyze authority in terms of optimal decision-procedures, argue against Raz's and my positions by denying that authoritative commands create new reasons for action (new moral rules). At issue for everyone here is thus *not* the place of social rules in desirable decision-procedures, but rather what rules determine that some decisions, but not others, are right.

I mentioned earlier that the real rules concept of rules was also not adequate to explicate this debate about authority. This is because the rules at issue in this debate only partially have the character of real rules. Like real rules, rules that exist because of the exercise of legitimate authority give objective, not subjective, reasons for action. Unlike the real rules of morality, however, rules that come about because of a promise or a command have an historical existence; they exist only because, at some point in time, the actor promised or received a command. Moreover, such rules have an historical formulation in the speech act that constitutes the promise or the command. Therefore, a third concept of rules is needed in order to understand the debate about authority.

I will call this the "authoritative rules" concept of rules. Using the previously articulated ten dimensions of ruleness, an authoritative rule has the following characteristics:

1. *Existence Conditions*. Authoritative rules exist when, but only when, a normative power has been validly exercised by one in possession of it.
2. *Ontological Status*. Authoritative rules are the propositional contents of the speech-act constituting the exercise of a normative power.
3. *Entrenchment* (a feature that Raz but not I would assert that authoritative rules possess). Authoritative rules give exclusionary reasons, that is, reasons that disen-

48. *See* Moore, *supra* note 20, at 854-55.

franchise other reasons (that before the exercise of authority were proper reasons for action) from being proper reasons on which to act.

4. *Background Justification.* Either the (subjectively) intended consequence that an exerciser of legitimate authority intended to achieve with his promise or command (as Raz believes[49]) or the (objective) value that can be served by the rule issued by a legitimate authority (as I believe[50]).
5. *Normative Force.* The capacity of an authoritative rule to change (by exclusion or otherwise) the balance of objective reasons that determine the rightness of any action.
6. *Ruleness.* The constraint exercised on a given action, measured by the divergence of what the rule demands from what the real rules of morality would demand in the absence of any exercise of a normative power.
7. *Non-continuous Nature.* Authoritative rules exist if the real rules of morality create a normative power in a person. Accordingly, if those real rules are non-continuous, authoritative rules are non-continuous in the sense that they either exist or they do not.
8. *Individuation Conditions.* Authoritative rules are individuated by their precise historical formulations, so that a *syntactically* different formulation creates a different rule.
9. *Unformulated Exceptions.* To the extent that a rule is subject in its applications to unformulated exceptions, the rule is not a rule.
10. *Over- and Under-inclusiveness.* An authoritative rule may, but need not, be over- or under-inclusive with respect to its background justification, depending on whether or not that background justification is itself a real rule of morality with a content identical to the content of the authoritative rule.

Whether rules with these characteristics exist—not whether social rules exist, nor whether social rules play the roles that Schauer says they play in decisionmaking—is the subject of the debate about authority.

D.

A fourth debate also requires that we conceive of rules as authoritative rules and not as social rules. This is the debate in

49. *See* Raz, *Authority, Law, and Morality*, 68 THE MONIST 295 (1985).

50. *See* Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 338-58, 383-86 (1985).

political theory regarding whether laws, at least in a democratic and reasonably just society, obligate citizen obedience. The key question is whether laws can possess legitimate authority in at least my minimal sense: Can laws create new reasons for action? The traditional answer was "yes," but more recently, a number of scholars have answered "no."[51] To understand this debate, we cannot equate "laws" with "social rules," because the question is not, "Do laws give actors subjective reasons to act in conformity with them?" In legal systems that attach sanctions to their laws (as all do), framing the question this way makes the answer obvious. As Schauer observes, "a fear of sanctions . . . might still provide for most agents a reason for obeying the law *qua* law even if there is no moral obligation to obey the law."[52] When we come across a long-standing debate between intellectually well-armed opponents and resolve it this easily, it is probably because we have misunderstood what the debate is about. The question whether laws obligate is not a question about whether laws are social rules giving actors subjective reasons to act in conformity with them. The question is the much more difficult—but much more interesting—one of whether laws are authoritative rules. In other words, do laws give objective reasons to act in conformity with them just because they are rules created through a fair and just process, such as democracy?

E.

The fifth debate is one in which Schauer does wish to participate,[53] and one to which his social concept of rules is at least one appropriate approach. This is the debate in jurisprudence

51. This is the position of Hurd, Alexander, and Regan, for example. *See* sources cited *supra* note 43.

52. F. SCHAUER, *supra* note 2, at 209 n.15.

53. In her essay in this Symposium, Professor Ruth Gavison expresses some reservations about whether a general jurisprudence, such as that articulated by Hart, must include a theory of adjudication. *See* Gavison, *Comment: Legal Theory and the Role of Rules*, 14 HARV. J.L. & PUB. POL'Y 727, 744 (1991). If not, Schauer's work is not related to the debate in general jurisprudence that I reference in the text, because Schauer's explicit aims are only within the theory of adjudication. Although there is a distinction between questions of general jurisprudence—when do we have law, in the sense of a legal system—and the questions asked by a theory of adjudication—how do and should judges decide cases—I nevertheless see Schauer's kind of enterprise to be a necessary accompaniment to Hart's general jurisprudence. If we are going to analyze law as consisting of a certain hierarchical ordering of social rules as Hart does, we need to at least show how such rules can attain their claimed benefits (predictability, et cetera) through their power to constrain judicial decisions.

about the nature of law. Does law (that is, a legal system) consist of a set of social rules in existence in some society? H.L.A. Hart famously answered that question affirmatively,[54] and Schauer seeks to align himself with Hart through a legal theory he dubs "presumptive positivism." Yet the debate about the Hart-Schauer position requires more than the social rules concept of rules, because the claims of their opponents are precisely that law is not a set of social rules, but rather, a subset of real moral rules (a pure natural law position), or, alternatively, a set of authoritative rules (which could be either a natural law or a legal positivist position).

Of course, if Hart and Schauer were obviously correct in this debate, the fact that others have opposed them would hardly vindicate alternative concepts of rules for understanding the nature of law. The Hart-Schauer view, though, has a very well-charted difficulty: It seems to leave out the normativity of law. Hart himself reacted to the earlier views of Austin and Bentham by urging that their accounts of law—in terms of sanctions and habits of obedience—did not adequately account for law's essential normativity. Following St. Augustine, Hart thought that law must differ from the orders of a gunman by virtue of something other than mere generality. Law, Hart said, must *obligate*, and not merely *oblige*, obedience. Yet conceiving of law as a set of social rules fails to account for legal obligation, as critics as diverse as Finnis, Dworkin, Lyons, and Raz have argued.[55] If law must obligate in order to be law, then how can law merely be a collection of social rules and still be law? Such social rules, when internalized by a society in the way Hart and Schauer describe, might well be *thought* to be law by those who internalize such rules. Unless the rules obligate, however, as only real rules and authoritative rules can do, then those who believe that they have law in such a system will simply be mistaken.

Thus, it is far from clear that Hart and Schauer are right in conceiving of law as made up of social rules, for both have to answer the nagging question of how such rules can be said to be obligatory. This is not to deny that both might be right in

54. *See* H.L.A. HART, *supra* note 4.

55. *See* J. FINNIS, NATURAL LAW AND NATURAL RIGHTS 12-15 (1980); Dworkin, *supra* note 27; D. LYONS, ETHICS AND THE RULE OF LAW 52 (1984); Raz, *Hart on Moral Rights and Legal Duties*, 4 OXFORD J. LEGAL STUD. 123 (1984).

their sociological enterprise of describing some society's (or even all societies') *concept* of law.[56] Such sociological inquiries, however, do not foreclose a quite different jurisprudential enterprise that requires concepts of both real and authoritative rules.

F.

The sixth and final debate that I wish to discuss is within that part of jurisprudence dealing with the theory of adjudication, often called the theory of legal reasoning. Here, at least, Schauer's social rules concept *seems* fully at home, for it is Schauer's explicit aim to discuss the role of rules in decisionmaking, including, as a special case, *judicial* decisionmaking.

Schauer implicitly distinguishes five models of how social rules might operate in various decisionmaking environments. He calls the first "particularism."[57] In this model, the decisionmaker simply ignores the rule and decides on the basis of the background justification itself. The second model is particularism with an epistemic allowance for rules: The decisionmaker treats the rule as a "rule of thumb" (or an "indicator rule" or a "summary rule"), which is to be used, as all heuristics are used, as an aid in decisionmaking.[58] Such heuristic devices are to be distinguished from rules that are themselves grounds for decision, that is, rules that are entrenched by the decisionmaker in the sense that he treats them as providing a reason for acting.

Schauer calls the third model "rule-sensitive particularism," of which I am supposed to be an exemplar.[59] A rule-sensitive particularist is a particularist because the grounds for his decision are the background justifications themselves, not some intermediate social rule. He is "rule-sensitive," though, because he considers both the value of having a rule, and how much any decision flouting such a rule would disserve this value, in his calculation of how well a decision serves its justification.

Schauer calls his fourth model "presumptive" rule-follow-

56. For a discussion of the difference between seeking to explicate our *concept* of law, and seeking to explicate the nature of law itself, see Moore, *Law as a Functional Kind*, in NATURAL LAW THEORIES (R. George ed. 1991).

57. *See* F. SCHAUER, *supra* note 2, at 134.

58. *See id.* at 180-90.

59. *See id.* at 160-69.

ing.[60] A presumptive rule-follower generally assumes that he is precluded from deciding on the basis of the background justification for some rule; rather, he presumes that he is to decide on the basis of the rule alone. He allows himself, however, a "peek" at the background justification to see if this might not be a case where the presumption should be overcome. The presumption is not an epistemic one, because it is not a mere heuristic but is instead a policy-based presumption that is to be given weight even if the decisionmaker decides that the background justification would clearly be somewhat better served by a decision going against the rule. Therefore, overcoming the presumption in order to decide against the rule should be a rarity for the presumptive rule-follower.

Schauer's fifth model is what he calls "rule-based decisionmaking."[61] In this model, a decisionmaker eschews entirely any resort to the background justification as a ground for his decision. Rather, he simply decides according to the rule, which is fully entrenched for him.

In the context of *judicial* decisionmaking, Schauer plumps for the fourth of these models, and calls this mode of judicial decisionmaking "presumptive positivism." In his book, Schauer defends presumptive positivism purely as a descriptive thesis: This is how judges in fact decide cases. In his contribution to this Symposium, Schauer also defends presumptive positivism as a normative thesis: This is how judges ought to decide cases, because, among other reasons, presumptive positivism allows various allocations of power.[62]

In the course of Schauer's description of his five-part taxonomy, and in the course of his defense of presumptive positivism, Schauer makes many insightful, true, and helpful points. Again, however, I come neither to praise such points, nor even to bury some of their comrades. Rather, I seek to dress them properly. To do so, let me focus on that part of Schauer's debate that I best understand: his arguments against me as an example of that "common mistake" known as rule-sensitive particularism.

In the work of mine to which Schauer refers, I do not defend rule-sensitive particularism as a decision-procedure that our

60. *See id.* at 338-39.
61. *See id.* at 134.
62. *See* Schauer, *supra* note 1, at 679-91.

judges either do or should use in their decisions. If I were to defend a decision-procedure, Schauer is correct to intuit that rule-sensitive particularism is one that I would probably favor. In the work on which Schauer relies, however, I was not defending any decision-procedure for judges, either descriptively or normatively.[63] Rather, I was describing what I took to be the right-making characteristics of judicial decisions, both of the statutory and of the common-law kind. About judicial decisions involving interpretation of a statute or a constitutional text, I urged that the correct decision is one that gives the correct weight to four ingredients: antecedent *ordinary* meaning of the words of the text, antecedent *legal* meaning of the words of the text to the extent prior interpretations of the text by courts gave such distinctive legal meaning, the *purpose* (in the sense of value, not intention) that the text should serve, and general *justice* considerations.[64] With regard to judicial decisions under the common law, I have urged elsewhere that the correct decision gives the correct weight (in terms of equality and other values) to the fact that prior litigants have been treated in a certain way in precedent cases, and correctly balances that moral freight of history with a judgment of what, if there were no such history, would be the best decision, all things considered.[65]

Neither of these theories purported to be about what judges do consider, or should consider, when they make decisions. Rather, these were theories of what the right decisions *are* for judges to reach, however they reach them. For example, some judges may do better—better even as judged by my theory of the right decision to reach under a statute—if they "hunch" their decisions than they would do if they were to follow my four-part interpretive schema for statutes as a decision-procedure. What succeeds as a decision-procedure is an empirical question of psychology that could match any of Schauer's five models and still be compatible with my theories of interpretation and of precedent.

That is why I labelled my theories with the jurisprudential labels "natural law theory of interpretation" and "natural law

63. I stated this explicitly. *See* Moore, *supra* note 50, at 396 n.218.

64. *See id.* at 396-97.

65. *See* Moore, *Precedent, Induction, and Ethical Generalization*, in PRECEDENT IN LAW 183 (L. Goldstein ed. 1987).

theory of precedent." Such theories are metaphysical theories about the truth conditions of those singular propositions of law[66] that decide concrete cases. Schauer's own jurisprudential label, "presumptive positivism," is misleading because he is not really debating my natural law theories of interpretation and of precedent. His is not a competing thesis about the truth conditions of singular propositions of law, nor is it a thesis about the nature of law at all.

This obliqueness of Schauer's "presumptive positivism" to my own natural law theories relates to the three concepts of rules explicated here in the following way. If Schauer wishes to debate about how judges do and ought to reason their way to their decisions—and it is a perfectly worthwhile debate in which to engage—then the concept of rules as social rules is one appropriate concept to figure in such debates. If Schauer wishes, however, to engage me or others on the truth conditions of singular legal propositions, he has to abandon the social rules concept of rules, because my theories speak to different concepts of rules. For my theories say in brief that statutes are authoritative rules, deriving their authority from certain rule-of-law values, which values then dictate the four-part theory of interpretation of those statutes, which interpretive theory then gives the truth conditions of singular propositions of statutory law. Likewise, common-law rules are not authoritative rules but are the real rules of morality as applied to the non-ideal situation of a society whose history diverges from perfect justice; this application of the real rules of morality to the non-ideal world gives the truth conditions of singular propositions of common law.

Someone who disagrees with my theory of statutory interpretation might say that statutes are not authoritative rules. Alternatively, some might argue that statutes are authoritative rules but for different reasons than those I defend. They could yet again believe that the rule-of-law values that do give statutes the status of authoritative rules justify a different set of right-making characteristics than the four I defend. Likewise, someone who disagrees with my theory of precedent might say either that common-law rules are not real moral rules but are

66. A singular proposition of law is a proposition that is not universally generalized. "All valid, non-holographic wills require two witnesses" is a general proposition of law; "this will is valid" is a singular proposition of law. *See generally* Moore, *supra* note 56.

authoritative rules or, alternatively, that common-law rules may be the real rules of morality but that their application is quite different from what I describe. Such disagreements, of course, *use* the concepts of real rules and of authoritative rules, as they must if they are to be about the truth conditions of (and not about the psychological recipe for discovering) legal propositions.

Conclusion

In closing, let me reiterate what I have said throughout this essay. It is not much of a criticism of Schauer's work to say that it does not occupy the field of what is worth talking about with regard to rules. This is particularly so in light of the fact that what Schauer does talk about is a quite worthwhile subject. My remarks have been directed at preempting the thought that such a work is a complete treatise on rules. Indeed, Schauer himself at times seems to succumb to that temptation when he allows himself certain imperialistic construals of others' work on rules. Schauer's book will be a focal point for future discussion of how social rules work in decision-procedures in daily life and in the law. This essay is only a reminder that there is other worthwhile work to be done on rules, work that demands concepts of rules other than Schauer's social rules concept.