THE RULES OF JURISPRUDENCE: A REPLY

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The Editors of the *Journal* have been kind enough to permit me to respond to the comments of Professors Alexander, Coleman, Gavison, Moore, Postema, and Radin. My first reaction was to pass. All of these comments raised such interesting and important issues that to respond briefly might undervalue their importance. Moreover, a brief response might overstate the relative significance of my original contribution to what has turned out to be a discussion ranging much farther and deeper than I had originally anticipated.

But passing is not my style. Even apart from my unfortunate willingness to say just a little bit more, the discussion embodied in this Symposium is one whose style as much as its substance deserves continuation. Unlike far too much of legal scholarship, all of these papers demonstrate charity in interpretation, genuine engagement of issues actually raised, argument by substance and not by label, cooperation in the pursuit of common goals, willing acknowledgement of the contributions of others, and modesty in claims of innovation. That these commentators have taken the time to comment on my work in such a sympathetic and directly engaged way is enormously flattering. Here, I attempt to repay the compliments by trying, although more briefly, to be as generous to their work as they have been to mine.

As I reflected on the contributions of the commentators, certain themes seem linked and recurrent, and I will concentrate on them here. As to those criticisms that I ignore, the omission should not be taken to indicate that I think the arguments unsound or the claims unimportant. Quite to the contrary, I do not discuss in this Reply issues that have caused me to reevaluate my own thinking or that are so large that more extensive treatment is necessary than would be practical here.

I. THE PERILS OF "POSITIVISM"

In talking about "trouser words," J.L. Austin concluded that

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there were some terms whose meaning could be determined only by starting with their negation.[1] Similarly, John Searle's declaration of "No remark without remarkableness" demonstrates the way in which most uses of language take place against a background in which the plausibility of a negation is commonly presupposed by any assertion.[2] Consider, for example, what would be the effect of an entirely correct observation that Professor Alexander was sober throughout the live version of this Symposium.

We can usefully think about "positivism" in much the same way. As a term absent from ordinary language and having a variety of different meanings within different technical discourses,[3] perhaps it is best to consider the meaning of positivism in light of the claims it has sought to challenge.

Historically, positivism has been the counter to natural law, which maintains that moral correctness is a necessary condition for the existence of law in any possible society. If one wishes to deny *that* proposition, then, as Professor Coleman wisely points out, one need identify only one possible legal system in which moral correctness is not a condition of the existence of law.[4] But identifying one (or more) such system is not inconsistent with there being many legal systems, including arguably that of the United States, in which moral correctness is a necessary condition for legality.[5] Thus, if the most germane negation of positivism is natural law, then the "limited-domain conception" of positivism is beside the point, as both Coleman and Gavison maintain.[6]

Suppose, however, that there existed a descriptive thesis maintaining that some or all legal systems empowered their decisionmakers to employ an undifferentiated set of social

1. *See* J.L. AUSTIN, SENSE AND SENSIBILIA 15-19, 70-71 (1962). I expressly disavow the sexist terminology for what remains an important point.

2. *See* J. SEARLE, SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE 143-45 (1969).

3. Positivism in the philosophy of science, for example, means something quite different from logical positivism, which in turn has virtually nothing to do with any version of legal positivism.

4. *See* Coleman, *Rules and Social Facts*, 14 HARV. J.L. & PUB. POL'Y 703, 715-17 (1991).

5. *See* J. COLEMAN, *Negative and Positive Positivism*, in MARKETS, MORALS AND THE LAW 3 (1988). *See also* Lyons, *Principles, Positivism, and Legal Theory*, 87 YALE L.J. 415 (1977); Soper, *Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute*, 75 MICH. L. REV. 511 (1977). I also take the best reading of Kelsen to support this perspective, and on this I have benefitted from numerous conversations with Stanley Paulson.

6. *See* Coleman, *supra* note 4, at 724; Gavison, *Comment: Legal Theory and the Role of Rules*, 14 HARV. J.L. & PUB. POL'Y 727, 754-55 (1991).

norms in making their decisions. Let us call this descriptive thesis the non-differentiation thesis. The denial of this thesis, rather than the denial of the natural law thesis, is what Dworkin (who, with qualifications, holds the non-differentiation thesis) calls "positivism." Eliminating the double negative produces the view that positivism is a descriptive thesis about differentiation (or "limited domain"),[7] and this is what Dworkin (who denies its descriptive correctness), Raz, Hart, and I all maintain. Of these only Raz maintains that differentiation is a necessary feature of all possible legal systems,[8] and thus Hart, Kelsen, Coleman, and I agree that a society could contingently designate its legal officials to treat as law the full range of extant social norms, with the conditions for social recognition being sufficient for legal recognition as well.

So it turns out that, as a matter of linguistic sociology, how one uses the word "positivism" is largely a function of the debate in which one is involved. When asking questions of what Coleman calls "general jurisprudence," questions about what must be true for all possible legal systems, the term designates the position that moral correctness does not have to be a condition for the identification of law in all possible legal systems. But when asking questions about what is true in some legal systems, the word "positivism" marks the position that there is a domain of legal norms not coextensive with the domain of moral or political norms then accepted in the society within which the legal system exists.

I do not claim that positivism in the latter sense is derived from positivism in the former, and thus Coleman is correct that one cannot "get" to the latter from the former, although incorrect in supposing that I try to do so. The latter debate, of which positivism represents one side, is a debate what Hart calls "descriptive sociology," and thus one could derive a descriptive position about some legal systems from what necessarily must be true in all legal systems, but not a position about what is true about this or some legal systems from what need not necessarily be true in all legal systems.

All of this is largely about terminology. Coleman, first in

7. I agree with Coleman that, strictly speaking, a pedigree standard does not exhaust the standards that could distinguish the domain of the legal. *See* J. COLEMAN, *supra* note 5, at 343 n.1.

8. *See* J. RAZ, *Legal Positivism and the Sources of Law*, in THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 37 (1979).

"Negative and Positive Positivism,"[9] and now here, has importantly clarified different conceptions of positivism. Gavison, with her reference to first-stage law,[10] has shown that one can talk about what Raz, Dworkin, and I want to talk about without using that conception of positivism and without using the word "positivism." If that were all there was to it, I would be happy to concede the terminological turf, albeit with perhaps some regret at the loss of the alliterative attractiveness of "presumptive positivism." But Dworkin has been too influential for that. If one wants to maintain that which Dworkin wants to deny, then it may be necessary to work within Dworkin's terminology. If what he wants to attack is the descriptive thesis he calls "positivism," then it may be necessary, if confusing, to use that name to describe the descriptive thesis that we want (partially in my case and completely in Raz's) to maintain.

II. The Locus of Legal Decisionmaking

As Moore correctly points out, the rules I seek to analyze are different in kind from those foundational moral directives whose very foundationalism prevents them from having background justifications and thus prevents them from being under- or over-inclusive.[11] Instead, I am interested in rules as instrumental components of decision-procedures, in rules that seek to serve other values, where those values may themselves take the form of foundational moral rules.

Thus, I am concerned with decisionmaking and, more specifically in "Rules and the Rule of Law," with legal decisionmaking. But to have that concern is *not* necessarily to have a preoccupation with *judicial* decisionmaking. I am concerned with judicial decisionmaking, but only as one form of legal decisionmaking, and one that is less central than often supposed.

From this broader perspective, the universe of legal decisionmaking includes the decisions of anyone for whom the existence of law is potentially a factor in her decision. I am a legal decisionmaker when I decide whether to stop at a stop sign in

9. *See* J. Coleman, *supra* note 5.

10. *See* Gavison, *supra* note 6, at 740-41. *See also* Gavison, *Comment*, in Issues in Contemporary Legal Philosophy: The Influence of H.L.A. Hart 21 (R. Gavison ed. 1987).

11. *See* Moore, *Three Concepts of Rules*, 14 Harv. J.L. & Pub. Pol'y 771 (1991).

the middle of the night with no cars for a mile around.[12] A police officer is a legal decisionmaker when she decides whether to give a *Miranda* warning. The members of Congress are legal decisionmakers when they decide whether the Constitution permits them to pass a statute outlawing desecration of the flag, and judges are legal decisionmakers when they decide the typically hard cases that lawyers present to them. The preoccupation with courts and judges is the conceit of the American lawyer, perhaps a justifiable conceit in light of the importance of judges in the United States, but a conceit nonetheless.

When I consider (descriptively or normatively) the possibility of rules being important in legal decisionmaking, I thus do not restrict myself to judging, especially because I do not believe that other forms of legal decisionmaking are parasitic on judicial decisionmaking. With great frequency, the law intrudes on decisionmaking, even when the possibility of ultimate adjudication in a court is slight.

Moore thus moves more quickly from legal decisionmaking to judicial decisionmaking than is warranted either by my perspective or the evidence.[13] In addition, Moore draws a problematic, albeit interesting, distinction between the idea of a correct judicial decision and the procedure that some judge might employ to reach it. Moore claims a lack of interest in the latter,[14] but that does not eliminate questions about the relationship of a correct judicial decision to a hypothetical correct decision for all decisionmakers regardless of situation or role. Because Moore is still concerned with the idea of a correct judicial decision, and with the obligation of a judge to reach (by whatever procedure) the morally correct decision, this begs the question whether, as a matter of institutional design, it is appropriate that we empower or instruct any given class of decisionmakers to reach the morally correct decision. Occasionally, however, for reasons such as separation of powers or distrust of a given class of decisionmakers, we might not want every decisionmaker to seek the all-things-considered morally correct

12. *See* Regan, *Law's Halo*, in PHILOSOPHY AND LAW 15 (J. Coleman & E.F. Paul eds. 1987).

13. Coleman is entirely correct in saying that I do *not* here provide an account of adjudication, for such an account would have to deal with a range of empirical questions, especially ones relating to the actual (as opposed to articulated) grounds for judicial decisions.

14. *See* Moore, *supra* note 11; *see also* Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 396 n.218 (1985).

decision. When this is the case, we employ methods, such as sanctions, that attempt to create an environment in which reaching the all-things-considered morally correct result is not the goal for certain decisionmakers.

Moore claims to find these questions of role allocation and institutional design "uninteresting." For him, the interesting questions are about what an unsanctioned morally autonomous decisionmaker, including a judge, should do. In being concerned solely with this question, Moore places himself well within the traditions of most of contemporary moral philosophy. This tradition, however, has commonly ignored the equally important question of the moral responsibilities of an agent who confronts the possibility of immoral behavior on the part of another. It is possible that one has a moral obligation to prevent another from acting immorally, especially if third parties are involved. If that is so vis-à-vis individuals and particular cases, then someone confronting the possibility that some class of people might act immorally in some large number of cases might also have such a moral responsibility to prevent or lessen the impact of the moral mistakes of others. Then rules come into play, for rules are the implements of generalized, rather than particular, control. This perspective may be uninteresting to Moore, but we should not take Moore's interests (as he himself would not) as coincident with the realm of important questions about morality. One such question is that of institutional design to minimize moral error, and another is the question of the responsibility of one who sees another committing moral error. Both of these questions are important, and both are interesting to me, but we can address neither very well by focusing only on decisionmaker obligation. Thus, even if we distinguish judicial decision-procedure from judicial obligation, I still want to deny the conflation of judicial obligation with moral correctness that Moore takes to be self-evident.

III. The Problem of Presumptions

These issues of role allocation explain much of my disagreement with Postema, and explain as well why the disagreement is smaller than may initially appear. Postema purports to demonstrate, as a logical matter, that presumptive rule-based decisionmaking is logically identical and extensionally equivalent to rule-sensitive particularism, because the weight of

the presumption will be identical to the weight that the rule-sensitive particularist will give to the value of having rules.[15]

Postema's position assumes that the weight placed on having rules in both procedures is necessarily the same, but that is exactly what I deny. I can deny it, however, only by focusing again on standpoints other than that of the morally autonomous decisionmaker deciding what to do when operating as the addressee of rules set forth by others. I cheerfully admit that the morally autonomous decisionmaker deciding what presumption to give to a rule will give that presumption the same weight that she would give to rule-based values in deciding what to do in this case, taking everything, including the value of having a rule, into account. I also maintain, however, that the morally autonomous decisionmaker is often likely to undervalue rule-based values, especially when they are values of separation of powers and decisionmaker disability, rather than values of predictability and certainty. When such an undervaluation of rule-based values is expected, the designer of a decisionmaking environment might wish to have a decisionmaker apply a presumption heavier than the weight that that decisionmaker might herself give to rule-generating values if she were evaluating the importance of those values in each individual case.

In theory, this diversity in weight, which defeats Postema's claim of extensional equivalence between rule-sensitive particularism and presumptive rule-based decisionmaking, could exist within a single decisionmaker. A decisionmaker conceivably could decide to impose upon herself a presumption stronger and more opaque to case-by-case reevaluation than the weight that rules would have in a more particularistic decision procedure. Consider breaking a rule in secret. Under a standard view of what I call rule-sensitive particularism, the fact that a rule can be broken in secret and would thus be substantially less likely to encourage future and possibly less justified rule-breakings is relevant in determining whether a rule should be broken.[16] But under a view rejecting rule-sensitive particularism, the lessened consequences of secret violations would not be

15. *See* Postema, *Positivism, I Presume? . . . Comments on Schauer's "Rules and the Rule of Law"*, 14 HARV. J.L. & PUB. POL'Y 797, 813-17 (1991).

16. *See* Regan, *supra* note 12. *See also* Regan, *Reasons, Authority, and the Meaning of "Obey": Further Thoughts on Raz and Obedience to Law*, 3 CAN. J.L. & JURISPRUDENCE 3 (1990); Regan, *Authority and Value: Reflections on Raz's "Morality of Freedom"*, 62 S. CAL. L. REV. 995 (1989).

open for case-by-case determination. Instead, a decisionmaker might determine in advance that she is systematically prone to underestimate the likelihood that rule-breakings would encourage future rule-breakings, and therefore decide in advance that the weight of a rule will always be x in the decisionmaking process, *even if it subsequently seems to her that the reasons for that weight are inapplicable in this case.* This presumptive rule-based decisionmaking procedure makes the presumption, whatever its weight, opaque to the reasons for having the presumption, in much the same way that rules can be opaque to the substantive justifications behind them. So long as this opacity can exist, and so long as we can imagine at least one case in which a rule would carry a strong presumption even if there were no reason in the particular case to give it any presumption at all, then the claim of extensional equivalence fails.

I do not find this picture of divergence implausible even for an individual decisionmaker. As Hare has explained in *Moral Thinking*,[17] we operate in more or less reflective modes at different times, and it may be that we can in our more reflective modes adopt rule-sensitive particularism, and in our less reflective modes refrain from evaluating the applicability of rule-generating justifications in each case. But even if this possibility seems psychologically implausible to some, it becomes much more plausible if we focus on presumptiveness not as a strategy that a decisionmaker might adopt for herself, but rather as one that might be imposed upon her.

Postema concedes that a totally opaque rule-based decisionmaking procedure would be different from rule-sensitive particularism. Suppose then that a decisionmaker is instructed to operate in a strictly rule-based manner. Further suppose that there is an array of sanctions supporting those instructions, such that the decisionmaker would be punished when she did not follow the rule, even if it appeared to her to be best at the time of the decision to ignore the rule, and even if it turned out best in the end to have ignored the rule. All agree that this is a different procedure from one in which the decisionmaker decides in each case whether to follow the rule, taking into account the value of having a rule. But now suppose we add what we might call the "Nuremberg rider." Suppose the deci-

17. R.M. HARE, MORAL THINKING: ITS LEVELS, METHOD AND POINT (1981).

sionmaker is instructed and sanctioned to follow the rules in all cases, except when following the rules would produce moral horrors equivalent to those that led to the rejection of the "I was only following orders" defense in the Nuremberg trials.

Obviously, this is a presumption of enormous strength. Indeed, I would expect that in normal operation it would produce the same outcomes as strict rule-based decisionmaking. But it is a presumption nevertheless, rather than a strict rule; and if total opacity and rule-sensitive particularism are different, it is implausible to suppose that the mere addition of this quite remote qualification produces extensional equivalence where before none had existed. And if the Nuremberg rider does not produce extensional equivalence, then there is nothing about the change from opacity to presumptions of lesser strength that necessarily produces extensional equivalence. Extensional equivalence between presumptive rule-based decisionmaking and rule-sensitive particularism is thus psychological and not logical. As the presumption weakens, the point at which extensional equivalence attaches will vary from decisionmaker to decisionmaker. Consequently, there is no basis for assuming that the two decisionmaking procedures are extensionally equivalent for all or even most decisionmaking environments.

Radin shares Postema's sympathy with rule-sensitive particularism, but appears to agree with me that presumptive rule-based decisionmaking is different.[18] She is concerned, however, that this latter procedure may have less decisional bite than I suppose. This concern is reflected by her belief that decisionmakers are likely to override the presumption when the moral stakes are largest, the result being that the weight of the rule will matter most in a morally trivial array of cases.

I am largely in agreement with this point, subject to a clarification of the idea of "triviality." I think that what Radin means to get at is the range of cases in which the moral differential between the opposing positions is small. This state of moral equipoise might arise in any of three ways. One is the case that is simply trivial by any calculation, such as where the stakes are low and the issues largely technical, rather than moral.[19] An-

18. *See* Radin, *Presumptive Positivism and Trivial Cases*, 14 HARV. J.L. & PUB. POL'Y 823 (1991).

19. *See* Schauer, *Statutory Interpretation and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. —.

other is where the stakes are large but the moral component will appear to the decisionmaker to be negligible. *Pennzoil Co. v. Texaco, Inc.*,[20] comes immediately to mind, but others can substitute their own examples. Finally, there is the case in which the moral stakes are large, but where those stakes, or the moral worth involved, are approximately equivalent. Here, I am thinking of some variant on the classical moral dilemma.[21] If the moral issues are truly as strong on one side as the other, then non-moral factors may operate as tie-breakers, even though the moral import of the outcome is far from trivial.

With this qualification about the meaning of "trivial," I believe that Radin is basically correct. We can see a good example in a number of recent Supreme Court cases, where reliance on plain meaning, a variant on rule-based decisionmaking, seems to exert substantial decisional weight in comparatively technical cases involving what the justices are likely to perceive as morally uninteresting cases.[22] Plain meaning, however, exerts virtually no substantial weight in statutory construction cases involving issues of great moral import, such as affirmative action and gender discrimination.[23]

Radin appears to take this phenomenon as a given. Her point about the instability of rule-following (or rule-avoidance) reinforces her conclusion that we should expect a decisionmaker's strong moral views to be dominant in all decisionmaking environments. The strength of those beliefs may indeed be fixed, but neither the firmness nor the weight of a decisionmaker's moral beliefs need be determinative of the degree to which a decisionmaking environment might be structured, with suitable incentives, to suppress those beliefs to a greater or lesser degree. The more we reward decisionmakers for following rules and punish them for breaking rules, the more we should expect that the strength of their moral beliefs will have to increase in order to outweigh the rule-following incentives. As a result, the degree of triviality will not be a given, but will rather be a function of the weight of rule-based values in the process of deci-

20. 481 U.S. 1 (1987).

21. *See generally* W. SINNOTT-ARMSTRONG, MORAL DILEMMAS (1988).

22. *See, e.g.*, Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120 (1990); Hallstrom v. Tillamook County, 493 U.S. 20 (1989). *See generally* Schauer, *supra* note 19.

23. *See, e.g.*, California Federal Savings & Loan Ass'n v. Guerra, 479 U.S. 272 (1987); Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984); Steelworkers v. Weber, 443 U.S. 193 (1979).

sion. No matter how fixed that weight might be for an uninfluenced decisionmaker, it is less likely to be fixed for decisionmakers responding to various incentives, and thus the degree of triviality of the cases in which rules matter will vary inversely with the extent of rule-promoting incentives.

IV. Alexander's Gap

Most of my comments in this Reply have coalesced around a single theme, the same theme explored by Alexander, with whom I am largely in agreement.[24] In fact, my only major disagreement is with Alexander's claim that I am attempting to eliminate "the gap" between how authority looks from the perspective of the subject and how it looks from the perspective of the authority. I am not, and I agree that the gap is essentially unbridgeable.

It is ordinarily the case that correct views are commonplace and novel ones mistaken, but Alexander's position has the dual virtues of soundness and originality. This is apparent if we examine a recent series of exchanges about the perspective offered by Hare.[25] Substantially abetted in this understanding by Hare's distinction between "archangels" and "proles," Bernard Williams objected to distinctions among better or worse moral reasoners, calling that position "Government House utilitarianism," although ultimately concluding that this despicable view was not Hare's. T.M. Scanlon similarly objected to the purported distinction among classes of moral agents, although also concluding that a charitable reading of Hare's view (although not Hare's terminology) would reject the view. And Hare himself disavowed what he called the "libel," saying that he was talking only about the different moral postures that individuals might take at different times.

It seems strange that prominent moral philosophers are huffing and puffing to distance themselves from the possibility that some people might be better at moral reasoning than others, and that bad moral reasoning might have unfortunate consequences. It is true that some notion of equality requires that all

24. *See* Alexander, *The Gap*, 14 Harv. J.L. & Pub. Pol'y 695 (1991).

25. I refer here to Hare, *Comments*, in Hare and His Critics: Essays on Moral Thinking 199 (D. Seanor & N. Fotion eds. 1988); Scanlon, *Levels of Moral Thinking*, in Hare and His Critics: Essays on Moral Thinking, *supra*, at 129; and Williams, *The Structure of Hare's Theory*, in Hare and His Critics: Essays on Moral Thinking, *supra*, at 185.

be treated as morally autonomous agents. But what is the moral responsibility of the morally autonomous agent when she has the power to prevent another from acting immorally to the detriment of third parties? It is far from evident that passively allowing another to do moral damage in the name of moral respect for the damage-causer is the appropriate course of action, and the opposite position seems in fact much more justifiable.

If I am right about this, then I see no reason why it would be inappropriate for someone in a position of authority to take the same view with respect to classes of potential moral damage-causers. Indeed, this is what much of criminal law is all about. But not only criminals cause moral damage, so too do others who might be more well-meaning but mistaken, and perhaps here the model should include the conscientious police officer systematically undervaluing the protections of suspects. If (as a court or supervisor, for example) I have reason to believe that police officers will make mistakes to the detriment of other moral values, I have good reason to try to induce police officers to relinquish their own judgment, even though, from the perspective of police officers, it would be wrong for them to relinquish their moral autonomy. No matter how much the introduction of sanctions from the perspective of the authority may cloud the purity of Moore's subject-based moral inquiry, it is hardly apparent that thinking about ways of preventing moral error is not itself a morality-based enterprise. As a result, even putting the proposition in its most pejorative way, authorities may occasionally have good moral reasons to treat subjects as proles even as those subjects should treat themselves as archangels, which is just what Alexander and I are trying to claim.

V. The Rules of Jurisprudence

At its most patent level, this Symposium has hopefully demonstrated the relevance of thinking about rules in confronting many of the enduring questions of jurisprudence. At a less obvious level, however, it may demonstrate as well that jurisprudence is a practice, and like other practices it too has rules. These rules determine what is deemed interesting and what is not, what is considered important and what is regarded as epiphenomenal, what questions are central and what are pe-

ripheral, and what the practice of jurisprudence is about and what it is not.

Gavison's paper well demonstrates the contingency and contextuality of these rules. Where to an American jurisprude the claims for particularism seem ever-present, Gavison gently chides me for taking them too seriously. Even with respect to my tentative defense of presumptive rule-based decisionmaking, she takes me to task for concentrating excessively on the presumption-overcoming components of that procedure and insufficiently on the virtues of rules in stronger form.

I have no reason to defend myself against criticisms coming from that direction, for I agree with Gavison that, in many contexts, strong or even totally opaque rules have their importance. I also agree with her that, in a very important way, rights are rules,[26] and that only if we consider rights unimportant (a position not so implausible, albeit not mine) should we consider rules unimportant.

Gavison's comments illustrate, however, that the questions that jurisprudential communities take to be important are quite contingent. It may thus be valuable to consider the exchanges in this Symposium in two ways. Some of the exchanges are about the right answers to some of the traditional questions of jurisprudence. Others, however, are best seen as exchanges about what those questions should be, and as exchanges generated by the attempts of some of us to reorient the jurisprudential terrain. For some of us, the traditional concentrations on the subject and not on the authority, on the addressee of a rule and not its maker, on ideal theory and not on non-ideal theory, on individual responsibility and not on institutional design, and on what is necessarily true of all legal systems and not on what is true and interesting about a particular system, are all contingent and all in need of reexamination. Other concentrations, in particular the reverse of each of the traditional concentrations, are equally legitimate candidates for inclusion within the realm of analytical or philosophical jurisprudence, and debates about the scope or focus of jurisprudence are very much a part of this Symposium. When Coleman writes that questions other than those of the necessary conditions for legality in all possible worlds are not part of analytical jurisprudence, or when Moore

26. *See* Schauer, *Rights as Rules*, 6 LAW & PHIL. 115 (1987); Schauer, *The Second Best First Amendment*, 31 WM. & MARY L. REV. 1 (1989).

writes that questions about sanctions are not interesting, they are taking sides in a debate about the rules of the practice of jurisprudence that I and others (and they at other times) seek to question. If the result of the exchange that this Symposium introduces is to put some of those rules into question, it will have done even more good than the good it may do in advancing thinking about what have always been the questions of jurisprudence.