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THE RULE OF RULES: MORALITY, RULES, & THE DILEMMAS OF LAW. By *Larry Alexander* and *Emily Sherwin.* Durham: Duke University Press. 2001. Pp. viii, 279. $45.95.

Analytical jurisprudence[1] depends on a posited relation between rules and morality. Before we may answer persistent and important questions of legal theory — indeed, before we can even know what those questions are — we must understand not just the operation of rules but their operation in relation to morality. Once that relationship is formulated, we may then come to terms with the likes of inductive reasoning in Law, the role of precedent, and the fit, such as it is, between Natural Law and Positivism as well as even the coincidence (or lack thereof) between inclusive and exclusive positivism. That is the thesis of *The Rule of Rules* ("*Rules*").

Professors Larry Alexander and Emily Sherwin of the University of San Diego School of Law have written what would be (and what may be) a prolegomenon.[2] They use the rules-morality duality to reveal a cleavage in the Law that *could* intimate the ultimate moral impossibility of Law. So their critique is comprehensive. The cleavage,

* Rita Anne Rollins Professor of Law, The College of William and Mary School of Law. A.B. 1977, Lafayette; J.D. 1980, University of Illinois. — Ed. I am indebted to James Dwyer and Jay Mootz for helpful comments on prior drafts of this Review and to those who attended a faculty colloquium at The College of William and Mary School of Law.

1. "[A]nalytical jurisprudence . . . is concerned with the clarification of the general framework of legal thought, rather than with the criticism of law and legal policy." H.L.A. HART, THE CONCEPT OF LAW vii (1961). That observation, though, could not completely divorce the analytical from the critical. Certainly the conclusions of those who would determine, as an analytical matter, the nature of Law-morality relation necessarily resonate with the critical conclusions concerning the proper sources of adjudicative rules, particularly, and not incidentally, the moral integrity of reliance on precedent as a form of inductive reasoning. *See* Colloquy, *Against Legal Principles*, 82 IOWA L. REV. 739 (1997) (an issue devoted to Larry Alexander and Ken Kress's argument, in *Against Legal Principles*, and several responses to their thesis).

2. Several chapters of *Rules* have substantially and previously appeared as published law review articles. *See, e.g.*, Larry Alexander, *Are Procedural Rights Derivative Substantive Rights?*, 17 LAW & PHIL. 19 (1998); Larry Alexander, *The Banality of Legal Reasoning*, 73 NOTRE DAME L. REV. 517 (1998); Larry Alexander, *"With Me, It's All er Nuthin' ": Formalism in Law and Morality*, 66 U. CHI. L. REV. 530 (1999) [hereinafter Alexander, *Formalism in Law and Morality*]; Emily Sherwin, *A Defense of Analogical Reasoning in Law*, 66 U. CHI. L. REV. 1179 (1999). But the book is not just a collection of those earlier essays; it is a new synthesis of ideas, some of which have been presented in less comprehensive form in those earlier works.

or "gap," they identify is a function of rules' operation as the bases of authoritative settlement and it is authoritative settlement that responds to what a primitive, prelegal, community lacks.[3]

An account of *Rules*'s contribution must engage the authors' conception of the rules-morality tension because that tension provides the lens through which the authors build a jurisprudence, or at least a jurisprudential perspective. This Review considers the cogency of their conclusions if they have posited the rules-morality tension accurately and asks some of the questions required to determine whether their formulation can support the weight they would impose on it.

Part I of this Review offers a critical synopsis of *Rules*, summarily presenting the book's argument and challenging particular elaborations and applications of the thesis. Part II, more fundamentally, considers the nature of the morality metric. The question is not what particular moral system — Natural Law,[4] categorical imperative,[5] or consequentialist,[6] for example — best supports rules particularly or generally, but, instead, how must we conceive of the nature of the moral inquiry, and the relationship between morality and rules, in

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3. P. 25. Alexander and Sherwin reproduce Hart's understanding of the need for authoritative settlement:

> [I]f doubts arise as to what the rules are or as to the precise scope of some given rule, there will be no procedure for settling this doubt, either by reference to an authoritative text or to an official whose declarations on this point are authoritative. For, plainly, such a procedure and the acknowledgment of either authoritative text or persons involve the existence of rules of a type different from the rules of obligation or duty which *ex hypothesi* are all that the group has. This defect in the simple social structure of primary rules we may call its *uncertainty*.

P. 22 (citing HART, *supra* note 1, at 90).

4. *See, e.g.*, JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980). Neil MacCormick has fixed the place of Finnis's contribution to the Natural Law firmament as a:

> book which for British scholars has brought back to life the classical Thomistic/Arisotelian theory of natural law. A theory which more than one generation of thinkers had dismissed as an ancient and exploded fallacy kept alive only as the theological dogmatics of an authoritarian church was rescued from a whole complex of misunderstandings and misrepresentations.

Neil MacCormick, *Natural Law and the Separation of Law and Morals*, *in* NATURAL LAW THEORY 105 (Robert P. George ed., 1992). Natural Law also has its secular dimension and adherents. Michael S. Moore's *Moral Reality Revisited*, 90 MICH. L. REV. 2424 (1992) formulates a secular Natural Law perspective from "supervenience-naturalist, nonfoundationalist, externalist, bivalent, antinominalist as well as anti-idealist" morally realistic premises. *Id.* at 2450.

5. "Act according to a maxim which can be adopted at the same time as a Universal Law." IMMANUEL KANT, THE PHILOSOPHY OF LAW 34 (W. Hastie ed., 1887).

6. By "consequentialist" I intend to include utilitarian theories, such as the normative perspective of welfare economics as conceived by Louis Kaplow and Steven Shavell in *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 979 (2001): "Under welfare economics, normative evaluations are based on the well-being of individuals. Economists often use the term 'utility' to refer to the well-being of an individual, and, when there is uncertainty about future events, economists use an ex ante measurement of well-being, 'expected utility.' "

order to reach conclusions about the incidents of Law and legal analysis.

This Review argues that we need to formulate the nature of the moral inquiry before we can either appraise the fit between rules and morality or posit the discontinuity of rules and morality and the concomitant impossibility of Law. Rules, then, are ultimately unruly because when we understand rules as an elaboration of morality, we understand rules as relying on a foundation — morality — the substantiality of which analytical jurisprudence has not yet devised the means to appraise or even to take sufficient stock of.

I. RULES IN CONTEXT

H.L.A. Hart recognized the challenge confronting the next analytic jurisprude in his monumental *The Concept of Law*: "I hope that [the form of presentation pursued in *Concept*] may discourage the belief that a book on legal theory is primarily a book from which one learns what other books contain."[7] Though the contemporary genre — analytical jurisprudence — can claim a provenance tracing at least back to Austin,[8] it would be inaccurate to suggest that the analytical inquiry pursued by Alexander and Sherwin is merely responsive. While the authors do present a thesis dependent on the terms of their response to positivist discoveries in analytical jurisprudence, they also formulate the consequences for broader, jurisprudential conclusions and recognize the significance of those contributions. A brief summary of the path of the book's argument accommodates focus on the foundation of the authors' thesis.

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7. *See* HART, *supra* note 1, at viii; *see also* MICHAEL S. MOORE, EDUCATING ONESELF IN PUBLIC vii (2000) (acknowledging that "[t]he late Herbert Hart once wrote that jurisprudence has too often been about what other books have said").

8. Hart wrote in response to Professor J.L. Austin's "command" theory of Law. That theory was captured, according to Hart, in Austin's THE PROVINCE OF JURISPRUDENCE DETERMINED (Noonday Press 1954) (1832) and LECTURES ON JURISPRUDENCE OR THE PHILOSOPHY OF POSITIVE LAW (London, John Murray 1885). *See* HART, *supra* note 1, at 18-19. Actually, the particular animating tension between Law, as elaborated in rules, and Equity was recognized in Aristotelian ethics:

> [A]ll law is universal, and there are some things about which one cannot speak correctly in universal terms. In those areas, then, in which it is necessary to make universal statements but it is not possible to do so correctly, the law takes account of what happens more often, though it is not unaware that it can be in error. And it is no less correct for doing this; for the error is attributable not to the law, nor to the law-giver, but to the nature of the case, since the subject-matter of action is like this in its essence.

ARISTOTLE, NICOMACHEAN ETHICS 100 (Roger Crisp trans. & ed., 2000). That excerpt contemplates a cleavage between Law and morality and in doing so formulates, at least implicitly, a linear conception of the morality metric, about which more will be said below. *See infra* notes 59-63 and accompanying text. Dean (then Professor) Heidi Hurd used a portion of that excerpt from another translation of the *Nicomachean Ethics* as the frontispiece of her *Moral Combat*. *See* HEIDI M. HURD, MORAL COMBAT (1999).

Appreciated as constraints on reasoning, rules circumscribe the operation of Reason in ways that facilitate corporate and coordinated action, though imperfectly:

> The result is a practical paradox. Reason requires resort to Will, but Will can never capture Reason. The paradox lies at the heart of law. It surfaces not only in the perennial clash of jurisprudential titans, natural law (Reason) and legal positivism (Will), but also in puzzlings over interpretation, precedent, legal reasoning, and many other jurisprudential matters, as well as in controversies about legal doctrine, which are replete with synchronic and diachronic clashes of reason and Will. (p. 8)

From this premise, Alexander and Sherwin proceed to describe the role of rules in authoritative settlement. The first part of *Rules*, "The Circumstance of Law," describes how rules provide the means for a community to settle authoritatively moral disagreements. Once established, the rules "supplant the reasons upon which they are based."[9]

In Chapter One, the authors survey the benefits of such authoritative settlement and reveal the problems it may create. Rules are simultaneously the means of a community's achieving authoritative settlement and the source of resulting complications. In the course of reconciling authoritative settlement and the circumstance of Law, Alexander and Sherwin consider the contributions of Hart and reflect on the fit between their conclusions and Hart's observations. Ultimately, they conclude, "although Hart does identify problems that would plague his imagined primitive community, these problems are all aspects of a single problem, namely, the absence of authoritative settlement by means of rules" (p. 24).

Chapter Two considers in greater depth the nature of authoritative rules that determine the circumstance of Law in the community, and, in so doing, distinguishes among the different types of rules that inform behavior and establish the coordination of normative considerations. Alexander and Sherwin distinguish "rules" from "norms" and "standards" in terms that accommodate a taxonomy of authoritative settlement. For example: "The quality that identifies a rule and distinguishes it from a standard is the quality of determinateness. A norm becomes a rule when most people understand it in a similar way."[10] Those premises support the authors' conclusions regarding the

9. P. 13 (citing JOSEPH RAZ, THE AUTHORITY OF LAW 24-25, 30-33 (1979); Joseph Raz, *Authority and Justification*, 14 PHIL. & PUB. AFF. 3 (1985); and Joseph Raz, *Authority, Law and Morality*, 68 MONIST 295 (1985)).

10. P. 30. The relation between rules and norms is also crucial in our appreciating the nature of morality as a foundation of rules. *See infra* note 11. At this point in Chapter Two, Alexander and Sherwin recognize that rules and standards describe points on a generality-determinateness continuum: "Although a standard is transparent to background moral principles and requires particularist decision-making, rules can be applied without regard to questions of background morality." P. 30; *see also* Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 49 (1997) (" '[R]ules' and 'standards' do not so much define a dichotomy as reflect a range along a continuum.").

role of rules in terms of coordination, expertise, and efficiency. At this point, the authors examine the "built-in imperfection of rules" and take account of Frederick Schauer's description of rules as "entrenched generalizations."[11]

In their third chapter, Alexander and Sherwin discuss the "Hierarchies of Rules." They investigate the moral function of rules in terms of the authoritative settlement requisite, and find, "the morally best rules on which agreement can be obtained are in some sense the morally best rules" (p. 42). They then treat what they term rule "pathologies" — misinterpretation, revolution, and fragmentation.

Part II concerns "Acting Under Rules." Chapters Four and Five examine the dilemma of the rational moral actor confronted with a rule whose prescription is inconsistent with the actor's appraisal of the circumstance she confronts.

In Chapter Four, the authors treat the "gap" between the lawgiver's (Lex's) reasons for promulgating a rule and the subject's reasons for action. The gap is a persistent irritant that focuses the inquiry on the role of rules and challenges jurisprudential perspectives that endeavor to take account of the rules' operation. This portion of the study affords Alexander and Sherwin an opportunity to confront the conclusions of Schauer and others regarding the responsibility of the moral actor to afford rules some, albeit not absolute, deference. Rules function, we are reminded, "to translate moral principles into a set of directions that can be understood by people who previously disagreed or were uncertain about the meaning of those principles" (p. 54).

So the moral failure of rules, then, may merely be the failure of information or calculation. Indeed, another way to depict the rules-

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11. P. 35. It is worthwhile to reproduce Schauer here, in pertinent part:

> Entrenchment makes the properties suppressed by generalization less subject to recall on demand, and entrenched generalizations mould our imagination and apprehension in such a way that methods of thinking that would focus on different properties become comparatively inaccessible. . . .
>
> To the extent that generalizations become entrenched, the inclusions of past generalizations facilitate dealing with the future when it is like the past, but the suppressions of past generalizations impede dealing with the future when that future departs from our prior expectations.

FREDERICK F. SCHAUER, PLAYING BY THE RULES 43 (1991). It seems to me that there is an aspect of Schauer's "entrenchment" that may be suppressed by Alexander and Sherwin's invocation of it. Rules do not channel thought *simpliciter*; they change the way we think about problems, the way we make choices — they "mould our imagination." Insofar as the moral measure of our actions may be determined by reference to the imagination we impose on choice, rules as facts can shift the moral firmament, just as Law and norms are in symbiotic tension. *See* Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649, 1651 n.2 (2000) ("By 'expressive function of law' and (for short) 'expressive law,' I refer to the positive claim that law influences behavior independently of its sanctions."). We can go further: Law not only influences behavior, Law is influenced by behavior; further, Law influences thought just as thought influences Law.

morality tension would be to understand morality as fully elaborated guides to action. A sense of rules as conceptions emerges; and conceptions rely, perhaps tautologically, on concepts that operate at a level of abstraction. It *is* a tautology to assert that the abstraction cleavage may be discontinuous with the constituents of fit between rules and morality; there is morality in the cleavage.

Chapter Five formulates the interpretation of rules and investigates at length the fit between the lawgiver's intentions and the subject's disposition to order her affairs in a manner consistent with those intentions. That requires, of course, a means to discern the lawgiver's intent and to appraise the subject's actions. Here the authors respond to Lawrence Lessig's analysis of these issues[12] and to the conclusions of Saul Kripke on Ludwig Wittgenstein.[13]

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12. Pp. 107-12. Alexander and Sherwin respond specifically to Lessig's equation of interpretation and translation in the case of rule interpretation in circumstances not within the contemplation of the legislator. *See* Lawrence Lessig, *Fidelity in Translation*, 71 TEXAS L. REV. 1165 (1993). Their response to Lessig answers the question that the authors pose about interpretation generally: "[I]s there in fact something Lex intends to prescribe for his subjects in those cases not actually contemplated by Lex when he issues his rule? Put differently, does Lex have an intention regarding what ought to be done in cases not before his mind when he communicates?" P. 100. It may be that Alexander and Sherwin conflate two aspects of Lex's inchoate intent here. When Lex legislates, his object is both to determine results and to determine the process by which results are achieved. That is not just to say that Lex is fixing both substantive and procedural law. He is doing more. He is formulating rules in a manner cognizant of adjudication and rule-following behaviors.

Consider an analogy: when you throw a ball to a receiver you "lead" her, so that the ball will arrive at her hands at the desired location (*i.e.*, at or past the first down marker). If you throw the ball to the point where the receiver is at the moment you release it, the ball will be thrown behind the receiver and she will likely not catch it; indeed, it may well be intercepted. Similarly, those who promulgate authoritative rules "throw" them in a manner that anticipates the fit between morality and the rule (in light of whatever factors may determine *movement* in that fit). Indeed, the thrower (Lex) may "put some air under the ball" to permit the receiver (the adjudicator) to adjust as necessary to the ball (the rule) in order to assure a reception, the best fit between the rule and morality. Too limited a conception of the rule-morality fit will obscure the community's reliance on Lex's prescience.

Alexander and Sherwin seem to appreciate the problem revealed in the foregoing analogy: "[I]n interpreting Lex's rules, what is the role of rules or norms of interpretation that come, not from Lex, but from the basic agreement constituting Lex as authoritative for what ought to be done?" P. 100. So could we find in that agreement some license for interpretation that would account for the adjudicator's role as custodian of the rule-morality fit? Alexander and Sherwin seem to think not:

> It is possible that a community would also adopt preconstitutional norms holding that Lex's rules should be "interpreted" to avoid results that are seriously unjust or absurd. For a community interested in settlement of moral controversy, however, norms of this kind seem inadvisable. If Michael [the adjudicator] measures each application of Lex's rules against a standard of justice (which presumably is the ultimate end of the body of rules) or absurdity (meaning moral absurdity), the rules are no longer capable of settling moral controversy. Instead, the controversy is reopened in the process of assigning meanings to the rules. The principal difference is that settlement authority shifts from Lex to Michael, who was not the community's first choice to serve as moral decision-maker. It seems preferable, therefore, that moral absurdity and injustice should not supplant, but should serve only as evidence bearing on, Lex's intended meaning.

P. 121. It may be that if we relax Alexander and Sherwin's assumption about the nature of morality's relation to rules, or at least admit of the possibility that Lex is not clairvoyant and that Lex recognizes that deficiency in himself, the constituting authority might prefer a

Part III of *Rules* surveys "Issues of Legal Reasoning" and begins in Chapter Six with an investigation of "Reasoning by Analogy." The authors offer a "qualified" defense of analogical reasoning in terms of the competence of different actors to make rules and conclude, "if analogical reasoning is justified at all, it is justified on second-best grounds, much like those that support Lex's use of rules" (p. 134). They find, "[t]here is nothing in the nature of prior decisions to ensure that analogical reasoning based on those decisions will have advantages of the kind associated with rules" (p. 131).

Chapter Seven addresses "Precedent," and proceeds from the judgment that "[t]he authority of precedents becomes important only when judges think the precedents are wrong" (p. 137). That perspective supports the authors' analysis of three models of precedent (the "Natural,"[14] "Rule,"[15] and "Result"[16] models) and, ultimately, the authors' despair that many of the uses of precedent as a means to determine the scope of rules are deficient. The analysis here requires that Alexander and Sherwin formulate the role of different actors in the rule-applying scheme and offers important conclusions about the relative fitness of those actors to coordinate their actions to maintain the normative integrity of rules.[17]

Chapter Eight confronts Ronald Dworkin's account of legal principles.[18] Alexander and Sherwin consider alternative subdivisions of legal norms in order to respond to Dworkin's conception of the role and function of "legal principle." They read Benjamin Cardozo's

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Michael *in situ* to Lex on high. Indeed, Lex might conclude, as the omniscient moral agent that he is, that he needs to leave some air under his rules. All of that does depend on our conception of the nature of the rules-morality relation though, and may not come into focus until we formulate that relation more clearly. What is important now is that we appreciate that Alexander and Sherwin's conclusion about the limits of "interpretation" — or the operation of supplements to interpretation — is dependent on a particular understanding of that relation.

13. Pp. 112-14. Here Alexander and Sherwin engage summarily Saul Kripke's interpretation of Ludwig Wittgenstein to make the point that we find determinacy "not in mental states alone, but in mental states coupled with skills learned as part of forms of life." P. 114.

14. "Under what we call the natural model of precedent, judges give prior decisions just the force they naturally would have in a full assessment of reasons for decision. . . . [T]he natural model describes the reasoning of morally motivated judges who are not constrained to follow decisions with which they disagree." P. 137.

15. "Unlike the natural model, the rule model *is* a model of authoritative precedent. . . . [J]udges are bound by rules announced in the opinions of prior judges." P. 140.

16. "Under the result model . . . what is binding is not the rules established by past judges but the past judges' actual decisions." P. 142.

17. Recall that to determine how to interpret Lex's rules we need to know what the authority that constituted Lex had in mind when it "let Lex decide." *See supra* note 12.

18. Alexander and Sherwin engage principally Ronald Dworkin's LAW'S EMPIRE (1986) (especially chapters 6 & 7) and TAKING RIGHTS SERIOUSLY (1978) (especially chapters 4, 6, & 7).

MacPherson v. Buick Motor Co.[19] decision as a means to come to terms with the "judicial technique of surveying the past decisions in an area of law and distilling a legal principle from those decisions that is not (necessarily) the stated ground for any of them" (p. 164). Alexander and Sherwin conclude, "the case for legal principles fails" (p. 168). That is a provocative conclusion and one at odds with a good deal of jurisprudential thought.[20]

Finally, in Part IV of their monograph, comprising Chapters Nine and Ten, Alexander and Sherwin present their "account of the moral function of authoritative rules" (p. 183) and from the premises established in that presentation engage several phases of the jurisprudential debate concerning the nature of legal theory from diverse perspectives. Chapter Nine describes the relation between the Natural Law and Positivist perspectives as a tension between the Law's settlement function and morality. The two perspectives are, Alexander and Sherwin conclude, more complementary than opposed. The Chapter treats as well the inclusive/exclusive positivism "conflict."[21] Chapter Ten applies Alexander and Sherwin's conception of rules' settlement function to persistent, jurisprudential questions: pathological legal systems, the obligation to obey Law, and the objectivity and determinateness of Law.

19. 111 N.E. 1050 (1916). Alexander and Sherwin conclude that Judge Cardozo "purported to derive his principle from the extant law, not from morality." P. 165. That may not be a fair reading of *MacPherson* or of Cardozo's method. It may be that Cardozo read the precedents as indicative of all the morality Cardozo needed. That is, we cannot know that Cardozo divorced the Law from morality in the way Alexander and Sherwin impute to him unless we could know that Cardozo *chose* legal principles over moral principles. Cardozo's reference to the "law" as the source of Buick's obligation should not be read to confirm so certainly Cardozo's inattention to morality; it may have been nothing more than a rhetorical flourish. The foregoing may only be a quibble with Alexander and Sherwin, but it does remind that Law could encompass legal as well as moral principles, and contemplate their interrelation too. Indeed, it would be difficult for students of the contract Law familiar with Cardozo's opinions in, for example, *Allegheny College v. National Chautauqua County Bank*, 159 N.E. 173 (1927), and *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214 (1917), to conclude that those decisions betray a slavish preoccupation with following *legal* rather than moral principles. Cardozo's opinion in *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (1928), would provoke the same skepticism. I am indebted to Kelli A. Alces for that observation.

20. The Colloquy issue of the *Iowa Law Review* devoted to Larry Alexander and Ken Kress's article *Against Legal Principles*, 82 IOWA L. REV. 739 (1997), includes seven scholars' responses (Stephen R. Perry, Gerald J. Postema, Jeremy Waldron, Michael S. Moore, Gary Lawson, Brian Leiter, and Frederick Schauer) as well as Alexander and Kress's response to the responses. Suffice it to say, though, that if Alexander and Sherwin are right about legal principles, the way Law is taught in American law schools may be wrong, or, at least, morally deficient.

21. *See* JULES L. COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENSE OF A PRAGMATIST APPROACH TO LEGAL THEORY 103-19 (2001); Stephen R. Perry, *Method and Principle in Legal Theory*, 111 YALE L.J. 1757 (2002).

II. RULES IN FOCUS

The soul of Alexander and Sherwin's thesis is presented in Chapter Four: "The Problem of Rules." In the preface, the authors acknowledge that Chapter Four "is perhaps the most important chapter" of the book, "for it asks at the deepest level whether and under what conditions the settlement function is possible" (p. 4). The *im*possibility of the settlement function, if there is such, would be the impossibility of Law[22] that would result from its being morally "right to issue authoritative rules but sometimes [morally] wrong to follow them."[23] The tension between morality and rules — the fundamental tension of contemporary, analytical jurisprudence — is thereby put at the center of *Rules*'s argument.

Given the place of that tension in the scheme of *Rules*, and, indeed the place of that tension in the jurisprudence generally, a great deal may be gleaned about the accomplishments and disappointments of legal theory once we come to terms with the rules-morality dynamic. Alexander and Sherwin discover a paradox in the rules-morality relation and respond to other scholars' treatment of the paradox. This Part of the Review examines the paradox, and Alexander and Sherwin's presentation of it in Chapter Four, in order to pose questions that would inform appraisal of contemporary, analytical jurisprudence, and *Rules*'s place in it.

Is inductive legal reasoning based on arguments by analogy and legal precedent tenable? Alexander and Sherwin would say, generally, "no." But their conclusion is a product of their conception of morality, not *a* morality, but the nature of the morality metric itself — the type of human endeavor moral "reasoning," perhaps a misnomer, may be.

Rules function "to translate moral principles into a set of directions that can be understood by people who previously disagreed or were uncertain about the meaning of those principles."[24] While that reduces moral costs (of expertise, coordination, and inefficient deliberation (p. 26)), something is obscured, if not altogether lost, in the

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22. *See* Alexander, *Formalism in Law and Morality*, *supra* note 2, at 565: "The concept of law is bound up with the existence of formal rules. Surely the benefits of law are synonymous with the benefits of formal rules. If that is the case, then the impossibility of formal rules means in the most important sense the impossibility of law."

23. *Id.*

24. P. 54.

Thus, if men were gods — morally omniscient — but not angels, morality would be an inadequate guide to behavior and posited norms would be unnecessary. If, however, men were angels but not gods, then posited norms in the form of determinate rules would be necessary to implement morality. Formalistic law is a solution to a cognitive, not a motivational, problem.

P. 232 n.4. Alexander and Sherwin at that juncture cite Gregory S. Kavka, *Why Even Morally Perfect People Would Need Government*, 12 SOC. PHIL. & POL'Y 1 (1995).

translation. Alexander and Sherwin describe that something as the "gap" between the justification for and instantiation of a rule:

> Lacking omniscience, Lex cannot anticipate all future problems that will meet the concrete conditions stated in the rule; and if he could do this, the rule would be far too complex for practical application. Lex's rules, therefore, will sometimes dictate the wrong result. . . . In other words, a "gap" lies between what Lex has reason to prescribe (and his subjects have reason to want him to prescribe) and what his subjects have reason to do, all things considered. (p. 54)

Nonetheless rules make sense — perhaps even moral sense — because they facilitate authoritative settlement, the crucial function of Law.

Moral practicality notwithstanding, Alexander and Sherwin's conclusion and despair that the gap cannot be closed or meaningfully diminished inform their reaction to fundamental questions of legal theory. In fact, their discovery of the gap is redolent of tautology, but not in a pejorative sense because tautology has analytic, pedagogic value. Consider: morality, any particular morality or just the idea of morality, contemplates a data set. That set must be fixed, or at least the nature of its constituents must be fixable, for otherwise there could be no basis for elaboration or translation of that moral data into the form of a rule. A rule is a heuristic device — it translates moral principles into "a compressed package of information, applicable to many cases."[25] But a "serious"[26] rule is also more than just a heuristic device. By sanction or otherwise it orders behavior, thereby changing the moral calculus.

For a typical and accessible example, if a rule provides that you may not swim after sundown when there is no lifeguard present, should you decide to swim after sundown when there is not a lifeguard present you will have violated the rule and will be subject to sanctions therefor. The justification for the rule — say, safety or full employment of lifeguards — may be overcome by the particular instantiation that provokes contravention of the rule: the subject's efforts to save a drowning child. The moral thing to do may be to disobey the rule

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25. *See* MURRAY GELL-MANN, THE QUARK AND THE JAGUAR 77 (1994) (discussing "theory").

26. In their own words, Alexander and Sherman state:

> Our focus is on rules that are practical (prescriptive) norms and thus can be obeyed or violated, what we call "serious rules." Serious rules contain a factual predicate or hypothesis and a prescription. . . . The most important characteristic of a rule, as we use the term, is that it purports to state a prescription applicable to every case that falls within the rule's factual predicate or hypothesis.

P. 27.

Frederick Schauer captured the same idea: "We . . . see rules as essentially frustrating, exercising their influence by getting in the way. They impede access to those facts that would otherwise, under a given theory of justification, be relevant to making the decision, and they interpose facts that would otherwise be irrelevant." SCHAUER, *supra* note 11, at 87.

and to swim to save the drowning child.[27] That is the morality in the cleavage between justification and instantiation. That is the gap.

Conceived in terms of that type of illustration, the fundamental (in the sense of "source") morality fixes a data set (a portion of which might be "do not go into the water unless the risk of misadventure is reduced by the presence of a lifeguard"; "go into the water if it is necessary to do so in order to save a life") and the rule fixes another, *derivative* data set (*i.e.*, "if it is after sundown, do not go into the water unless there is a lifeguard present"[28]). Following the rule generally saves moral cost;[29] that is why the promulgation of rules provides a moral benefit. But that quantum of moral benefit may be overcome, in the particular instance, by the moral cost of permitting a child to drown.[30] There is, in other terms, discontinuity between the morality and rule-data sets; there is morality in the cleavage and that morality in the event would overcome the moral gain of rule following.

That conception of the rule-morality relationship and the description of the schemata constituents of rules and morality that it contemplates emerge from the Alexander and Sherwin exegesis. One means

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27. Is the actor's jumping in to save the child less moral than it would be if there were no prohibition on swimming? The fact that a direction takes the form of a rule would seem to enhance its moral content in a rule-following society because following rules is consistent with the object of Lex's promulgating them. But Alexander and Sherwin conclude, "consent or commitment to follow rules simply does not create a moral obligation to follow rules in particular cases." P. 75. It is not clear, though, that that conclusion takes sufficient account of Alexander and Sherwin's arguments in favor of authoritative settlement. The reduction of coordination costs, and the gains from efficiency and Lex's expertise are *moral* gains. So it would seem that participation in such a system, by following rules, would likewise be a moral gain. And if that is true, then consent or commitment to follow rules would seem to enhance morality, though, admittedly, the *fact* of consent would not "create a moral obligation."

28. *See* SCHAUER, *supra* note 11, at 53-54:

> [A] generalization serves to make a justification more specific, or more concrete, in the same way that the result of a calculation is more concrete or more specific than the formula indicating the way in which the calculation is to be performed. . . . Because generalizations apply and specify their justifications, I will at times refer to the generalization constituting a rule as the *instantiation* of that rule's background justification.

The difference between justification and instantiation is the difference between the detail of the morality and its elaboration as a rule. Gell-Mann has described a similar idea that physicists refer to as "coarse graining": "[W]hen defining complexity it is always necessary to specify a level of detail up to which the system is described, with finer details being ignored." GELL-MANN, *supra* note 25, at 29. Similarly, the acuity of a rule is a measure of its coarse graining vis-à-vis its justification. That analogy would support the application of complexity theory parallels to the rule-morality relation. *See infra* text accompanying note 64.

29. Lex's appointment enhances morality because it achieves greater coordination and efficiency and provides the means to assure that the society's rules reflect Lex's expertise. Efficiency, coordination, and expertise are moral desiderata.

30. This is similar to the tension between *rule* and *act* utilitarianism. Rule utilitarianism focuses on a "*practice*, rather than an isolated incident . . . . Instead of asking whether hanging *this* innocent man has good consequences it asks whether the practice of hanging *the* innocent is beneficial. . . . Thus in working out the application of the principle of utility generally desirable criteria should sometimes yield to individual judgment." M.D.A. FREEMAN, LLOYD'S INTRODUCTION TO JURISPRUDENCE 201 n.12 (7th ed. 2001).

to arrive at the conclusion that there is a gap — a normative discontinuity — is to conceive of rules and morality as related though independent and perhaps interdependent data sets. When Lex formulates the rule he does so by reference to the moral data. The rule, then, is formulated in terms of that data, but not all of it: it is the fact that rules, even serious rules, translate moral data into heuristic form, rule data, that assures something gets lost between justification (morality) and instantiation (rule). Keep in mind, though, that reliance on rules is in a sense moral even when their application vindicates the immoral result, because of the moral cost saved by rules' operation.

The bulk of Alexander and Sherwin's crucial Chapter Four is devoted to responses to other theorists' efforts to manage the gap. For present purposes — determining whether understanding the rule-morality tension in terms of parallel but discontinuous data sets accurately captures Alexander and Sherwin's theory — review of those responses is worthwhile insofar as it reveals more, or confirms what we may already imagine, about the schemata of rules and morality.

First, Alexander and Sherwin consider whether what Schauer termed "rule-sensitive particularism"[31] responds to the gap paradox. When an actor takes into account the value of following rules gen-erally in deciding whether to follow a rule in the particular instance, he is a rule-sensitive particularist. And to him,

> Lex's rule "No swimming" represents Lex's opinion that it is probably a mistake to think one can safely swim. If Lex is credible on this point, his rule gives Leo some reason, though by no means a conclusive reason, to believe that he is in fact mistaken [if Leo thinks that he can swim safely under the circumstances]. Thus, while issuance of a rule does not narrow the objective gap between what Lex has reason to demand and what his subjects have reason to do, it may bring their judgments closer together. (pp. 61-62)

In this case, where the justification for the rule is based on Lex's superior information or expertise, "rule-sensitive particularism transmutes serious rules into advisory rules of thumb" (p. 62). Such heuristics, however, merely narrow the gap. They do not overcome it.

The case is much the same when a rule solves a coordination rather than a superior information or expertise problem. A coordination rule "prescribes one of several equally attractive courses of action"; the prototypical example is the "drive on the right" rule of the road.[32]

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31. P. 61 (quoting SCHAUER, *supra* note 11, at 94-100).

32. Pp. 62-63. That conception of the benefits of coordination is similar to the "network effect" in the economics literature. *See* STAN J. LIEBOWITZ & STEPHEN E. MARGOLIS, THE ECONOMICS OF QWERTY 54 (2002) ("The circumstance in which the net value of an action (consuming a good, subscribing to telephone service [, following rules?]) is affected by the number of agents taking equivalent actions will be called a *network effect*. Broadly defined, network effects are indeed pervasive.").

Alexander and Sherwin offer examples of different types of coordination rules,[33] but all lead to the same conclusion: "[I]f everyone is and is known to be a rule-sensitive particularist, there is nothing left of serious rules about which particularists can be rule-sensitive. In a world of particularists, serious rules would be nothing more than rules of thumb."[34] And rules of thumb neither are the rules that Alexander and Sherwin care about, nor are they the rules that can tell us anything about the fit between Law and morality. The result of turning serious rules into rules of thumb is the evisceration of rules. Even in the case of mere coordination rules, Lex will have good moral reason to issue rules (*i.e.*, "the errors of noncompliance are likely to exceed the errors of compliance" (p. 67)) but his subjects will have good particularist-moral reasons for not following them by basing their nonconformity on the moral cleavage. Such decisions in the gap undermine rules and, at the same time, intimate the impossibility of Law.

Alexander and Sherwin next confront Schauer's reaction to the gap: what he terms "presumptive positivism."[35] The difference between "rule-sensitive particularism" and "presumptive positivism" seems to be one of degree (and perhaps technique). Schauer's formulation captures the continuum (though that was not his object):

> Presumptive positivism is a way of describing the interplay between a pedigreed subset of rules and the full (and nonpedigreeable) normative universe, such that the former is treated by certain decision-makers as presumptively controlling in this not-necessarily-epistemic sense of presumptive.[36] As a result, these decision-makers override a rule within the pedigreed subset not when they believe that the rule has produced an erroneous or suboptimal result in this case, no matter how well grounded that belief, but instead when, and only when, the reasons for overriding are perceived by the decision-maker to be particularly strong.[37]

That is the formulation of presumptive positivism to which Alexander and Sherwin respond.

We must note at the outset that Schauer was offering a *description* of presumptive positivism and was not *prescribing* the perspective as a

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33. Pp. 63-65. The authors also offer as illustrations "Spray for ants on the first of May" and "No marking in books." *Id.*

34. P. 65. That is because the coordination value of rules is lost once the certainty of coordination is lost.

35. *See* SCHAUER, *supra* note 11, at 202-05; *see also* Stephen R. Perry, *Second-Order Reasons, Uncertainty and Legal Theory*, 62 S. CAL. L. REV. 913, 966 (1989); Gerald J. Postema, *Positivism, I Presume? . . . Comments on Schauer's* "Rules and the Rule of Law," 14 HARV. J. L. & PUB. POL'Y 797, 809-22 (1991).

36. Schauer distinguishes his sense of "presumptive" from the epistemic idea of a presumption that we are familiar with from the evidence Law: "We might prefer the norms emanating from one source to those emanating from another for epistemic reasons, but the same preference might instead emerge from any of a number of non-epistemic reasons for allocating jurisdiction in one way rather than another." SCHAUER, *supra* note 11, at 204.

37. *Id.*

means to overcome the gap.[38] But at most that is a clarifying quibble that enjoins the reader not to blame Schauer the messenger. It is important to keep in mind, however, that an accurate description of the ways rules work in fact may be at odds with the logic behind some understanding of how rules should work given a particular conception of rules' relation to morality. The fact of that opposition would not establish a deficiency of the description; it may instead suggest a deficiency in the rule-morality conception. More on this later.[39]

For now, though, Schauer's view of serious rules as a "subset" vis-à-vis the "full (and nonpedigreeable) normative universe" may be revealing. That depiction of the relationship between rules and their normative source — one the subset of the other — contemplates a comparison of the partial to the complete, or "full": The rule is a partial elaboration of a normative universe; reference to the full normative universe would entail costs (in coordination, expertise, and efficiency) that would overcome the moral benefit realized thereby.

That understanding of the gap works well with Alexander and Sherwin's explanation of the deficiencies of presumptive positivism. Conceived as the source of an additional reason for acting in a manner consistent with a rule rather than as an irrebutable injunction to follow a rule, presumptive positivism does not solve the gap: "[A] presumption in favor of rule-following is in fact an additional rule, which subjects may have [moral] reason to disobey" (p. 73). The gap is not eliminated; it is merely, at best, shifted.

In his description of presumptive positivism, Schauer relies on Joseph Raz's understanding that rules provide exclusionary reasons for acting in one way rather than another;[40] that is, rules preclude some actions because they are rules.[41] Alexander and Sherwin engage Raz in order to demonstrate that conceiving of rules as exclusionary reasons does not solve the problem presented by the gap: "A rule [as a 'second-order' reason] is derived from the same first-order reasons that normally would govern its subjects' decisions, but because subjects are likely to err, it preempts these first-order reasons and

38. In addition to the fact that Schauer's definition of presumptive positivism begins with an acknowledgment that it "is a way of *describing*," immediately following the portion of his text excerpted above, Schauer also acknowledges that he "cannot . . . prove the *descriptive* accuracy of presumptive positivism." *Id.* (emphasis added). Also, the last sentence of the chapter that posits Schauer's thesis concludes: "I will . . . conclude this chapter only with the *descriptive* assertion that presumptive positivism may be the most accurate picture of the place of rules within many modern legal systems." *Id.* (emphasis added).

39. *See infra* notes 56-66 and accompanying text.

40. *See* SCHAUER, *supra* note 11, at 88-93.

41. *See* JOSEPH RAZ, PRACTICAL REASON AND NORMS 39 (1975) ("A *second-order reason* is any reason to act for a reason or to refrain from acting for a reason. An *exclusionary reason* is a second-order reason to refrain from acting for some reason."). Rules are exclusionary reasons.

replaces them with the prescription of the rule" (p. 74). So rules, as second-order exclusionary reasons, are *derived from* the first-order, or moral, reasons if Alexander and Sherwin's construction of Raz is accurate — and we may assume it is for the present purpose of discovering Alexander and Sherwin's understanding of the rules-morality relationship.

Consistent with their appreciation of the gap heretofore, Alexander and Sherwin conclude that appreciating rules as "exclusionary" reasons does not overcome the gap because what the rules exclude is *some* morality — the moral cleavage. Because rules and morality are, essentially and necessarily, not coextensive, Lex cannot formulate rules that exclude the moral calculus even if he can formulate rules that exclude reference to morality. The gap is not bridged by the pronouncement or even by the understanding[42] that what the rule provides is the moral thing. For something to be a rule *ab initio* it must truncate morality.

The fourth strategy for closing the gap considered by Alexander and Sherwin is sanctions. And what is interesting here is not so much the fact that sanctions do not close the gap, but the fact that the existence of sanctions changes the moral calculus. More particularly, the way sanctions change the moral calculus reveals something about the function of the interrelation between morality and rules.

Consider: "[I]f we assume that at some point, a threat of punishment assumes moral significance, either because punishment will cause grave harm to the actor or because it will cause indirect harm to others, then sanctions can tip the balance of reasons in favor of compliance with rules" (p. 77). Sanctions narrow the gap not so much by making rules more moral in their operation — arguably a good depiction of the first three strategies — as by changing the moral foundation of which the rules are an elaboration. That sense emerges particularly from Alexander and Sherwin's appreciation of the situation faced and presented by the strict-moral judge.[43]

The strict-moral judge will impose sanctions only when an actor has acted immorally. So if the actor swims after sundown when a lifeguard is not present but by doing so saves the life of a child, the

42. Alexander and Sherwin also consider the argument that the gap would be eliminated were Lex's subjects understood to have consented to forego the reference to first-order reasons when they commit themselves to obey Lex's direction. The authors confirm that because you cannot assume a moral obligation to act immorally, any consent to follow second-order reasons in place of their first-order antecedents would not overcome the moral dilemma. "[I]f it would otherwise be wrong to follow a rule in particular circumstances, prior consent or commitment does not change this conclusion." P. 75.

43. Alexander and Sherwin also consider the reaction of the "rule-bound judge" and the "compassionate moral judge." Pp. 78-79. The rule-bound judge would punish every violation of a rule. The compassionate-moral judge would only punish those rule breakers who acted culpably. So the compassionate-moral judge would not punish a rule breaker who reasonably believed he was acting morally.

judge will not punish the actor. To make the illustration more salient, put values on the behavior — a scale of 1 to 100 works well. The rule against swimming after sundown without a lifeguard present is designed to avoid behavior that would score below 50 on that morality scale. While there may be advantages to swimming at any time, the combination of advantages and disadvantages *generally* totals no more than 49, taking into account the risk to the swimmer's life, the cost of trying to save the swimmer after dark, and the moral loss to the community if those who care about and perhaps even depend upon the swimmer are deprived of the swimmer's support and company. The rule against swimming after sundown when there is not a lifeguard present represents Lex's judgment that the behavior it proscribes could yield no more than a 49. We know that must be so once we decide, *deus ex machina*, that the rule is designed to proscribe behavior valued at less than 50.[44]

Next imagine that Lex's subject breaks the rule in order to save a drowning child. In that case, the proscribed activity would have a value approaching perhaps 100.[45] We can give that activity the hypothetical value of 90. The strict-moral judge would not impose a sanction on account of the actor's having violated the swimming restriction. We would not want to discourage behavior that results in greater moral benefit than rule following (which surely would be valued at less than the life of a child but would not be valueless, would it?[46]). But once the strict-moral judge refuses to impose a sanction, the moral firmament shifts: "[The strict-moral judge] must . . . consider the impact of her decision on the overall effectiveness of the rule. . . . [T]he effect of one judge's leniency on the value of a rule depends on the practice of other judges" (pp. 81-82). Similarly, in the case of a rule-sensitive-moral judge:[47] "[P]unishment can have a corrective function with respect to moral costs that follow from the example of an unpunished violation of rules: punishment can make morally right a violation that otherwise would be wrong because it would undermine the value of the rule."[48] Individual and official actions in reference to

44. The measure of the rule on the morality scale would be determined by reference to its constituents' continuity with morality, whatever moral systems (or system) provide(s) the source of the rule's constituents. That relationship between the rules and the source of their constituents will reveal something about both what we mean to signify when we use the term "morality" and how that conception operates in the authoritative settlement calculus.

45. It would certainly be less than 100 because we know that we make social choices that result in children drowning, *e.g.*, we do not outlaw swimming pools in neighborhoods where there are children present.

46. See *supra* note 27 with regard to the moral value of rule following qua rule following.

47. P. 81. Note that a strict-moral judge may also be a rule-sensitive particularist.

48. P. 83.

rules change the moral calculus. There is an "echo" or "feedback" effect.[49]

Using the hypothetical values offered above, a judge's decision not to impose a sanction impairs the seriousness of the rule. The rule no longer controls behavior in the same way it did before the judge's decision not to impose the sanction. If *A* violates a rule and is not punished therefor, the rule will have less deterrent effect than Lex intended. That is true even if *A* was morally correct not to follow the rule; that is, *A*'s action was within the moral cleavage — the rule was either over- or under-inclusive (in the particular instance) in relation to the moral principle of which it was an elaboration. A rule originally designed to proscribe behavior valued at less than 50 will now, perhaps, only effectively proscribe behavior valued at less than 45.[50] So

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> In a certain range of cases, rule-sensitive-moral adjudication also suffers from an internal paradox. The reason for this is that punishment can have a corrective function with respect to moral costs that follow from the example of an unpunished violation of rules: punishment can make morally right a violation that otherwise would be wrong because it would undermine the value of the rule. For example, suppose [Judge] Heidi is presiding over the case of Stephen, who was apprehended marking in a library book. She reaches an initial conclusion that Stephen's act was justified: despite a rule, "No marking in books," and a general practice of compliance with the rule, his reasons for marking outweigh the harm to future readers — though not by much. Then Heidi recalculates, taking into account the effect that Stephen's example and her own decision not to punish Stephen may have on others, including both rule-subjects and other judges. This tips the scales, so that Stephen's act now appears to have been unjustified. Heidi is now inclined to punish. But if she imposes sanctions on Stephen in a public decision, these sanctions will eliminate the exemplary effects of both his act and her own leniency. The act is once again a justified act.

Id.

That proof is clever. And it also goes a long way to reveal the nature of Alexander and Sherwin's sense of morality. Recall that the subtitle of *The Rule of Rules* is "The Dilemmas of Law." Yet absent from their proof is any consideration of the consensus and perception dilemmas that would undermine their conclusion in anything approaching a real world — a world where morality may not usefully be conceived as a fixed or fixable data set. For a discussion of the consensus and perception dilemmas, see Peter A. Alces, *Contract Reconceived*, 96 NW. U. L. REV. 39, 49-50 (2001). Nonetheless, it is worthwhile to note that the authors appreciate the impact of decision publicity on rule following even if they do not examine the impact of decisions as well as their publicity on morality, the foundation of rules.

49. *Cf.* GELL-MANN, *supra* note 25, at 17 (discussing the role of feedback in complex adaptive systems).

50. *See* p. 82.

> Judges may err in calculating the effects of their decisions on the value of rules. In fact, errors of this sort are particularly likely because, for a judge deciding a single case, the impact of the decision on the parties immediately involved will be more salient and "available" than remote effects on future actors. If errors of judgment exceed the errors that would result from strict adherence to the rule, moral adjudication may produce *morally inferior* decisions.

Id. (emphasis added).

Alexander and Sherwin describe the foregoing result as a consequence of judges' errors in "calculating the effects of their decisions on the value of rules." *Id.* I am not so sure that morally inferior decisions would only result from such error. A strict-moral judge may be constrained to reach a decision that is moral in the particular case but will lead to immoral subsequent decisions. The tension is the familiar one between act and rule utilitarianism. *See supra* note 30. You cannot serve two masters simultaneously because the cost of morality today may be the possibility (even probability) of immorality (or less than optimum morality) tomorrow. Alexander and Sherwin may not resolve that tension; it may not be soluble.

moral decisions — those decisions made on the basis of moral principles rather than rules which are an elaboration of them — may actually increase the size of the gap *in futuro* even if they narrow the gap in the particular instance. The converse would be true as well.

Fifth and finally, Alexander and Sherwin consider deception as a strategy to close the gap: Lex can deceive his subjects as to the way that rules correct moral conduct. The rule may be formulated in an imperative form not actually supported by its justification. For example, "No swimming" may suggest to subjects that swimming is never the moral choice (not even when it is the only way to save a drowning child). Lex may also deceive at the level of adjudication, leading subjects to believe that every contravention of a rule will entail imposition of a sanction. That does not mean that Lex's judges will not in fact be lenient in the event, but assumes that the appearance they will not enhances effectiveness of the rule.[51]

Alexander and Sherwin ultimately reject deception as an unqualifiedly effective strategy to redress the gap, finding "serious practical, political, and moral objections" to the strategy (p. 89). Perhaps most probative of the nature of morality, deception

> puts an end to discussion of the moral questions that lie behind the rules. For Lex, this can mean the loss of important resources. If Lex relies on public debate for information about the success of his rules and ideas about how they could be improved, less debate means less feedback. Loss of this information becomes a cost of authoritative settlement. (pp. 89-90)

Now if Lex and Lex's rules can be improved — become *more* moral by leaving less cleavage between instantiation and justification — as a result of that feedback, then either Lex was not the ultimate arbiter of rules and morality that we needed to assume he was *ab initio*, or he could not foresee the dynamic of the rule-morality fit. In either event, we may conclude that Lex *necessarily* lacks the omniscience to assure that his rules have not codified epistemic errors or errors of coordina-

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Indeed, its insolubility may intimate the mercury-like nature of morality's substance: most elusive when you try to pick it up.

Still, Alexander and Sherwin could argue that we need to compare the moral totals of (1) the value of the judge's abrogating the rule in a particular instance *plus* the cost of that abrogation on net morality in a future governed by that impaired (or at least changed) rule with (2) the cost of the judge's following the rule in the moral cleavage *plus* the value of that rule-following on net future morality. But it would seem curious to conclude that a judge who cannot foresee the future "errs" in any morally or even epistemically meaningful way, unless we measure judges in terms of their clairvoyance.

51. P. 88. This would be an instance of what Meir Dan-Cohen describes as "acoustic separation." *See* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 630-36 (1984).

tion or expertise.[52] And, of course, insofar as Lex's subjects would be no less (and indeed likely more) prone to epistemic error than would Lex, they may have erred when they decided that Lex was the optimum lawgiver.

Once we admit the possibility of Lex's epistemic deficiencies, a point made by Brian Leiter may merit further attention. In his response to Larry Alexander and Ken Kress's argument in *Against Legal Principles*,[53] Leiter concluded, summarily and at the outset of his response, "[t]he argument [in *Against Legal Principles*] seems to falter on the largely tacit, but false, assumption that there are no significant epistemic limitations on determining moral optimality."[54] In their response, Alexander and Kress do not take Leiter up on that issue and it strikes me that Leiter captured, albeit perhaps too succinctly, the fundamental omission in Alexander and Kress's as well as Alexander and Sherwin's conception of the rules-morality dualism. The conclusion of Alexander and Sherwin about the deficiencies of deception may in fact acknowledge the very falsity of the "assumption that there are no significant epistemic limitations on determining moral optimality."[55] That does not mean, however, that we have yet figured out the *proper* response to that epistemic limitation, or, for that matter, that we have yet described the nature of our response in fact. To get there, we need to better appreciate the unruliness of rules.

III. THE SOURCE OF RULES' UNRULINESS

Before we can reach reliable conclusions about the fit between rules and morality, we must agree about what we intend to flow from those conclusions. If the object is to identify a discontinuity between rules and morality, that tautology may do no more than prove what it assumes: Rules, in order to be rules, must constrain morality. A system of rules, then, could not be moral, and Law as a moral system is impossible. That, in far too summary a fashion, is the conclusion of *The Rule of Rules*. But the power of the book, particularly in what it intimates about analytical jurisprudence generally and positivism particularly, goes beyond syllogism to reveal the limits of the conception of the rules-morality dynamic that has endured at least since Aristotle, and which has attracted so much attention since Hart.

The fundamental deficiency of the familiar positivist conception is only revealed in full relief once Alexander and Sherwin demonstrate

52. Alexander and Sherwin only assumed that Lex was chosen by his subjects to be the lawgiver because he has "proven in the past to possess the reasoning ability and the knowledge to resolve moral controversies well." P. 16. Admittedly, they never said he was perfect.

53. *See supra* note 20.

54. Brian Leiter, *Explanation and Legal Theory*, 82 IOWA L. REV. 905, 905 (1997).

55. *Id.*

the limits of understanding rules as an incomplete elaboration of morality and, concomitantly, morality as the full elaboration of rules. Morality so conceived fails as morality. So we need to refocus and Alexander and Sherwin help us do that, though they do not do it for us. A reconception could proceed along lines that reappraise not the content of morality in relation to the content of rules, but the nature of the metric or function that fixes the rules-morality relation.

Once we conceive of the morality that is the source of rules, in some way, as a data set,[56] the object of Law is to formulate rules — a corresponding data set — that are an elaboration of the moral data set. The only difference between the fundamental-moral data set and its elaboration in the rules data set are the instrumental benefits of efficiency, expertise, and coordination: the "value added" Lex provides. There is nothing else, according to Alexander and Sherwin. What emerges from that simple depiction is, the authors reveal, too simplistic. The consequence of our acknowledging the rules-morality relation in that way is the moral — if not practical — impossibility of Law.

What Alexander and Sherwin compel us to do is to find another explanation of the fit between rules and morality, or, more accurately, another way to *conceive* of the intervening metric or function. We may draw upon analogies,[57] and while they may not be new conceptual paradigms, their application to Law may be a worthwhile innovation. Prerequisite to appreciating those sources of analogy is an investigation of some of the ways that morality may defy formulation in rules. That is, once the rules-morality relationship is reconceived, the problem identified by Alexander and Sherwin may no longer be a problem. So their premises may be assailable. The following list of alternative conceptions is *illustrative* only and not intended to suggest a comprehensive catalog of perspectives.

1. Morality, or at least our perception of it, may be dynamic. That is, it may change over time both from the individual and the corporate (meaning "group") perspective. By acknowledging that possibility we are not concluding that slavery or National Socialism ever were moral; all we need understand is that morality becomes clearer to us as our social institutions evolve.[58] That may but need not contemplate a teleology of morality or moral awareness.[59]

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56. Here we must be clear that we are not endorsing, and Alexander and Sherwin are not endorsing, any particular morality. They are concerned with the fit between rules and morality, not with the bases to posit a morality. The focus on comparing the rules-morality data sets as related data sets supports that agnosticism about the content of our morality.

57. *See infra* text accompanying notes 58-66.

58. "[E]specially as the temporal gap between law-making and law-application widens, the normative consensus that once endorsed the originally understood meaning of a constitutional provision may weaken or even dissipate completely, and the factual or normative predicates may be altered." Fallon, *supra* note 10, at 45; *see also* CHARLES FREEMAN,

2. Morality may describe a predisposition, in the sense of a perspective, rather than a data set. So conceived, there may be as many moralities as there are self-conscious beings on the planet. But this is not to adopt relativism;[60] it is only to acknowledge that there is sufficient dissonance in the constituents of morality (including the likes of intelligence and perceptual acuity) so that it makes more sense to understand morality as the product of perception and consensus dilemmas (confusions) than it does to understand morality as fixed and determinate for purposes of measuring actions or rules by reference to morality.[61]

3. Morality may be the function of rules to no less an extent than rules are a function of morality. So when we enact rules we may determine morality by changing the norm calculus.[62] By the same token, when we act in accordance with rules, we may impact the social acceptability of both the action and the rule in ways that influence the content of what we deem morality. Alexander and Sherwin seem to acknowledge this.[63]

4. The relationship between rules and morality may otherwise not be linear, by which I mean that a change in morality may not register in any *predictable* way as a change in rules.[64] And if that is true then it

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EGYPT, GREECE AND ROME: CIVILIZATIONS OF THE ANCIENT MEDITERRANEAN 12 (1996) (evolution of ancient Greek thought on sex crimes); STEPHEN JAY GOULD, THE MISMEASURE OF MAN (1996) (debunking "scientific" theories of genetic difference). Both Freeman and Gould demonstrate the relationship between scientific understanding and moral positions.

59. Hegelian and Habermasian historicism may supply a worthwhile model or basis of analogy here. *See* G.W.F. HEGEL, INTRODUCTION TO THE PHILOSOPHY OF HISTORY (Leo Rauch trans., 1988); JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (Wiliam Rehg trans., 1996).

60. I understand "relativism" in the sense that term is explored in chapter two of HURD, *supra* note 8, and Heidi Margaret Hurd, Note, *Relativistic Jurisprudence: Skepticism Founded on Confusion*, 61 S. CAL. L. REV. 1417 (1988). Because of space limitations, the consequences of Dean Hurd's conclusions for the argument of this Review could not be treated here. But it may suffice, for present purposes, to suggest that her definition of "relativism" addresses morality *after* allowing for the possible intellectual and perspectival discontinuities noted in the accompanying text. I would agree with much of her argument once we control for such discontinuities, that is, "all things considered." Joseph Boyle captures this sense with regard to "virtue ethics": "Since the character traits valued as virtues vary across communities of people, the universalism of ethical theory is avoided without an apparent implication of relativistic subjectivism." Joseph Boyle, *Natural Law and the Ethics of Traditions*, *in* NATURAL LAW THEORY, *supra* note 4, at 3.

61. What I intend to suggest here is something in the nature of Nietzschean perspectivalism. *See* FRIEDRICH NIETZSCHE, BEYOND GOOD AND EVIL (Walter Kaufmann trans., Vintage Books 1966) (1886); FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALS (Walter Kaufmann ed., Walter Kaufmann & R. J. Hollingdale trans., Vintage Books 1989) (1887).

62. *See generally* McAdams, *supra* note 11.

63. *See supra* notes 43-49.

64. What I mean to imply here is that the relationship between rules and morality may be "complex," in the technical sense, and therefore subject to the same type of vicissitudes as

undermines our ability to understand rules as an elaboration of morality, because we may have no way to discern or even identify morality through rules.

5. Morality may represent, vis-à-vis rules, the striving, or the rapprochement from certain though elusive fundamental principles to rules in the sense of, for example, the likes of Kantian maxims.[65] In which case the focus might better be on the element of striving — an Aristotelian conception — rather than the ultimate similarity of the rules-morality data sets.

6. Morality may be the type of thing that we cannot formulate meaningfully for purposes of appreciating the rules-morality fit because we cannot achieve sufficient remove from our subjective perspective to glimpse it. It may be a phenomenon that we cannot get out sufficiently of our human condition to perceive.[66]

What must not be lost though is the contribution of *Rules*: Important rules-morality questions emerge from Alexander and Sherwin's study. These scholars show us, very clearly, the limits of our jurisprudence and they challenge us to look in areas — critical philosophy, language theory, complexity theses, and psychological insights — that have not yet been sufficiently exploited in the cause of analytical jurisprudence. Alexander and Sherwin's study and thesis force us to refocus on the constituents of the rules-morality *relation*. Just as you do not understand the chemical reaction by simply comparing the "before" and "after" of the involved elements, you do not understand the rules-morality dynamic in terms that can inform the resolution of important issues unless you appreciate the operation of the jurisprudential catalyst, if there is one.

Alexander and Sherwin in their formulation of rules as an elaboration of morality — a conclusion in line with analytical jurisprudence — understand that the data set "rules" is derived from the substance "morality." That may be. But from that premise we need to understand what happens in the translation process; how do the constituents

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those that concern complexity theorists in the economics literature. *See*, *e.g.*, W. Brian Arthur, *Path Dependence, Self-Reinforcement, and Human Learning*, *in* INCREASING RETURNS AND PATH DEPENDENCE IN THE ECONOMY 133 (1994).

65. For a sense of Kantian maxims, see MANFRED KUEHN, KANT: A BIOGRAPHY 145 (2001):

> Character is built on maxims. . . . Kantian maxims are for the most part really ordinary sorts of things — at least in the way he described them in the context of anthropology. They are precepts or general policies that we have learned from others or from books, and that we choose to adopt as principles to live by. They show us to be rational creatures, or creatures who are capable of guiding their actions by general principles and not just impulse. Yet, and this is important, Kant did not think that they originate simply from our own reasoning. They are not primarily private principles but subjects of public discourse. . . . Maxims, in a sense, are all around us; the question is which we should adopt.

66. Quine may be some help here. *See* W.V. QUINE, ONTOLOGICAL RELATIVITY AND OTHER ESSAYS (1969).

of morality become, in truncated form, the constituents of rules? That is the point on which we must focus: We must understand the morality metric or function or algorithm, the whatever it is that determines, whether or not on a predictable basis, the way the data-set *morality* gives rise to the data-set *rules*.

IV. CONCLUSION

Alexander and Sherwin in *The Rule of Rules* describe the rules-morality tension and the consequences for Law and the incidents of legal analysis and practice that flow from it. They reveal the fundamental incongruities in terms that are both accessible and sophisticated. They fix the place of their critique in the jurisprudential firmament and reveal the limits of others' logic. Conscientious readers will generally follow with nodding approval.

To appreciate the contribution that Alexander and Sherwin have made to the literature, though, we will need to appreciate what their exposition and analysis tells us about the rules-morality relation. Understood as a matter of communication, that is a communication between morality and the rules that will be an elaboration of that morality, the impossibility of Law is ultimately a failure of communication or at least our failure to understand the incidents of that communication in terms that would inform our better understanding of what Law can be. So the next step is ours: Alexander and Sherwin have taken us to the precipice.