Judging Positivism

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Setting the Stage: Practical Reason and Norms *Reconsidered*

IT IS HARD to conceive of living in a peaceful society that is not governed by law; it is equally difficult to comprehend the nature of law despite the essential role it seems to play in our lives. It has a presence that is at once familiar and elusive.[1] Laws are used to perform a set of rather well-known tasks, such as setting speed limits, regulating relations between landlords and tenants, and setting tax rates. They also address the darker side of human co-existence, through prohibitions against murder, rape and theft, laws set moral limits, albeit shifting ones, about the kind of behaviour that will be permitted in the society. The totality of laws serves as a reservoir for our collective history while simultaneously working as a force that shapes us individually and collectively. Of course, the views that find expression in legal form do not necessarily represent the views of all, but nonetheless the law offers a snapshot of lives lived.[2]

At times, the law has also operated as an instrument of injustice, working against the tide of good. History is littered with instances where the force of the law has been harnessed by rulers to bring about the unthinkable. At such times, law seems to be a tool of domination and subjugation. But, at other moments, the very idea of life under lawful rule is lauded as a cornerstone of civilization. It is viewed as a shield that protects individuals against arbitrary exercises of government power. How do we begin in our attempt to make sense of law's many moods?[3]

One seemingly obvious starting point is to attempt to say something about the way in which law works in the world. More precisely, it seems reasonable to begin with questions pertaining to law's role in bringing about and sustaining order in society. This starting point need not presuppose that the answer will be singular (or simple) in nature, but if we do not start with an enquiry into law's work in the world it seems rather hard for the inquiry to even get off

[1] HLA Hart, *The Concept of Law*, 2nd edn (Oxford, Oxford University Press, 1994) 14.

[2] See, eg N Lacey, 'The Jurisprudence Annual Lecture 2013 – Institutionalising Responsibility: Implications for Jurisprudence' 4 *Jurisprudence: An international Journal of Legal and Political Thought* 1, 4–11.

[3] L Fuller, *Anatomy of the Law* (Middlesex, Victoria, Penguin Books, 1968) 12.

the ground. Few would challenge the view that without law, achieving an orderly society would be difficult (if not impossible) insofar as the population has surpassed a certain numerical threshold. However, when philosophers give voice to the precise way in which law contributes to order, opinions quickly splinter. There are, nonetheless, dominant narratives that are readily identifiable in the literature. A number of philosophers, stretching back to Cicero, offer a story about law's coming into being which is supposed to illuminate the nature of law. Gerald Postema eloquently outlines this 'creation myth':

> Political authority and laws, Cicero tells us, were invented for the same reason: to establish and secure justice and equality of rights. When people were satisfied that this task could be accomplished by a single man, they accepted the rule of a king. However, they were forced to invent laws when they realized that they could not count on their kings being just. The special virtue of law, says Cicero, is that it is able to speak on matters of justice and rights to all citizens at all times with a single voice. In Pufendorf's version of this creation myth, royal faithlessness exposed not only the lack of royal accountability, but also, and more troubling, the people's inability to agree on standards by which to judge the king's justice. As their numbers increased, so too did the jarring dissonance of social life. People needed standards more dependable than the king's faulty sense of justice and more public than their particular and often dissonant judgments. The faithlessness of the king may have been the immediate problem, but the deeper need was to unify the judgment of the people, to enable them to speak the language of justice to each other in a single voice. Law taught them this language.[4]

Law, on this view, is conceived of as a set of public norms that serve to unite a populace that would otherwise descend into chaos. Law is able to unify judgment because it offers a set of rules that enjoy autonomy – that is to say, the citizenry can identify the content of any given legal norm without relying on moral arguments. This is important as moral issues are the source of disagreement and law's ability to unify judgment is therefore (according to this account) dependent on the ability of legal norms to offer practical guidance without recreating the very disagreements that legal norms are introduced to solve. This particular creation story reappears in various forms in the writings of a rather diverse list of philosophers, including 'Aquinas and Bentham, Hobbes, Pufendorf, Locke and Hume, Hart, Raz, MacCormick, and John Finnis'.[5]

Joseph Raz, one might object, does not belong on this list. If one reads *The Morality of Freedom*, for instance, we do not discover an account whereby concern with justice is weaved together with an understanding of law's order-

[4] GJ Postema, 'Law's Autonomy and Public Practical Reason' in R George (ed), *The Autonomy of Law: Essays on Legal Positivism* (Oxford, Clarendon Press, 1996) 79 (footnote omitted).

[5] *Ibid*, 80.

engendering role. Instead, Raz works to articulate the conditions under which legal norms enjoy moral authority. The considerations that factor into this enquiry include, but are not limited to, the ability of law to facilitate co-ordination and co-operation.[6] A close reading of this influential text could quickly lead any fair-minded legal philosopher to insist that Raz's account remains untouched by Postema's critique. In fact, Raz himself has responded in this fashion: he rejects the notion that he is committed to any particular account of law's function while simultaneously suggesting that legal philosophy, properly construed, does not place this question at its centre.[7]

At first glance, this response may appear to be satisfactory. In what follows, I will suggest that this conclusion is too hasty. We only have to return to his earlier works to see that, at least at one point in time, his theory of law is easily slotted into the list of thinkers whose lineage traces back to Cicero. Most notably, in *Practical Reason and Norms* Raz offers readers a clear vision of the way in which law creates and sustains order.[8] Raz does not offer any musings on justice, but the other key elements of the familiar narrative are nevertheless in place. Legal norms are understood as a set of public practical reasons that enjoy autonomy and, consequently, order is able to overtake chaos.

At the heart of this account lie Raz's core positivist commitments. As I elucidate further in this chapter, legal norms are understood as a set of factually ascertainable reasons for action that are identifiable based on their pedigree alone (the sources thesis). Moreover, legal norms do not simply offer citizens reasons for action, but reasons for action of an 'exclusionary' kind whereby all other competing reasons for action are displaced by legal norms (the pre-emption thesis). In *Practical Reason and Norms* we find another thesis, which may be less familiar to his readers. At the very centre of his account of the nature of law is an understanding of the role of judges: judges, Raz argues, are under a duty to apply the law.[9] That is, they are under a duty to *exclude* extra-legal considerations, including moral ones. Not only are individual legal norms thought of as exclusionary reasons for action, but the legal system in general is understood as exclusionary in nature. In light of these views, it is easy to see why the label 'exclusive legal positivism' is an apt one.[10] In this early work,

[6] J Raz, *The Morality of Freedom* (Oxford, Clarendon Press, 1986) 56.

[7] J Raz, 'Postema on Law's Autonomy and Public Practical Reason: A Critical Comment' (1998) 4 *Legal Theory* 1, 2,11. Also see ch 7.

[8] J Raz, *Practical Reason and Norms* (Oxford, Oxford University Press, 1999)

[9] *Ibid*, 137.

[10] Exclusive legal positivism is often contrasted with inclusive legal positivism. Inclusive legal positivists are united by their commitment to the separability thesis rather than the sources thesis. The claim is that law and morality are contingently connected. More precisely still, the criteria for validity of legal norms in a given system can include moral criteria, but it need not. It is 'conceptually possible' that legal systems exist where pedigree is the only determining factor for legal validity. I do not offer a direct challenge to this view. I do, however, share Coleman's recent thoughts on his own position: it occupies a logical space rather than a 'real world one'; indeed, its creation was

Raz insists that the judicial duty to apply the law is the very thing that accounts for the existence of order. If judges were not bound in this way we would return to a state of chaotic lawlessness. By applying the law, judges uphold and reinforce the practical force of the aggregate of legal norms. Discretionary activity, while an unavoidable part of the occupation of judging, is represented as a destablising force. Luckily the very existence of legal systems serves as a testament to the relatively marginal role judicial discretion plays in the courtroom (or so it is assumed).

This is a self-conscious attempt to articulate what law *is* – Raz's account is not meant to serve as a warning to judges to suppress any inclinations to use their discretionary powers unnecessarily. In what follows, I argue that the claim that judges have a duty to apply the law is the theoretical 'weight bearing plank' – it supports the significance of the other thesis. But, Raz has long abandoned the claim that judges are under a duty to apply the law; instead, he now argues that judges are moral reasoners while situating his positivist thesis within a morally robust conception of authority. As mentioned above, he even eschews the suggestion that legal philosophers should concern themselves with accounts of law's function. Can Raz discard his claim that judges have a duty to apply the law without displacing his other theses which are at home in this early account? Can he find a new home for his core positivist theses and still retain their significance?

I argue that if we pull this particular thread – if we explore whether Raz can abandon his functional account of law – then the Razian edifice unravels. He never successfully combines his positivist theses, which are at home in his function-based account, with his morally robust non-positivist elements (including his moral theory of adjudication and his account of legitimate authority). Raz's influential positions, while creative and complex, are also deeply unstable. Specifically, I argue that Raz has changed his theory over time and that these changes have created deep inconsistencies and tensions that render his position untenable. My argument will focus on four of Raz's central works – *Practical Reason and Norms*, *The Authority of Law*, *Ethics in the Public Domain* and *The Morality of Freedom* (in chronological order) – in order to map the changes, before exploring the implications of these alterations. Attention will also be paid to a more recent work, *Between Authority and Interpretation*.[11]

motivated by the Hart/Dworkin debate and not by reflections on the world. J Coleman (2009) 22 *Ratio Juris* 359. This book will focus on 'exclusive legal positivism' and the term 'positivist' will be used to refer to Joseph Raz's version of positivism (which is often referred to as exclusive legal positivism). I will not directly address the arguments of the inclusive legal positivists. For a defence of this position see: J Coleman, *The Practice of Principle* (Oxford, Oxford University Press, 2001) ; WJ Waluchow, *Inclusive Legal Positivism* (Oxford, Clarendon Press, 1994); M Kramer, *In Defense of Legal Positivism* (Oxford, Oxford University Press, 1999).

[11] J Raz, *Between Authority and Interpretation* (New York, Oxford University Press, 2009).

While this book will offer a critical assessment of Raz's central theoretical commitments in some detail, his works are also a foil for exploring the assumptions that inform the dominant approach to jurisprudential enquiry today – an enquiry that can be traced back to the works of HLA Hart.[12] In his famous work *The Concept of Law*, Hart set out to carve a space between traditional natural law theory and legal scepticism and, in so doing, held out the promise of progress.[13] The animating idea is that an accurate understanding of the nature of law is available only when law is viewed through the cool eye of the detached observer. According to this view, the job of the legal philosopher is to determine the features necessary for the existence of a legal system, without dipping her toe in the murky world of political theory, wherein philosophers of past and present, championing contestable conceptions of human nature, are locked in a perpetual battle. Instead of clarifying the nature of law, political philosophy only leads us back to a debate about foundational value commitments, a quagmire in which the tradition remains embedded. In the face of such a dire prospect, Hart offers the promise of escape. This is why *The Concept of Law* is often viewed as the starting point for legal theory.

Raz endorses a similar approach. His defence of this method in *The Authority of Law* is clear and bold. He adopts the 'assumption of universality according to which it is a criterion of adequacy of a legal theory that it is true of all the intuitively clear instances of municipal legal systems'.[14] He then draws a sharp line between the work of the philosopher and that of the sociologist. The philosopher lives in the world of abstraction, while the sociologist wades into the messy, ever changing, world of particulars:

> Since a legal theory must be true of all legal systems the identifying features by which it characterizes them must of necessity be very general and abstract. It must disregard those functions which some legal systems fulfill in some societies because of the special social, economic, or cultural conditions of those societies. It must fasten only on those features of legal systems which they must possess regardless of the special circumstances of the societies in which they are in force. This is the difference between legal philosophy and sociology of law. The latter is concerned with the contingent and with the particular, the former with the necessary and the universal. Sociology of law provides a wealth of detailed information and analysis of the functions of law in some particular societies. Legal philosophy has to be content with those few features which all legal systems necessarily possess.[15]

The line in the sand has been drawn; the providence of jurisprudence has been defined. However, this is the very line I wish to call into question.

[12] See Hart, *The Concept of Law*, above n 1.

[13] *Ibid*, 154.

[14] J Raz, *The Authority of Law: Essays on Law and Morality* (New York, Oxford University Press, 1979), 104.

[15] *Ibid*, 104–05.

The tenability of the Hartian project rests on the viability of the sharp distinction between non-normative conceptual analysis and normative philosophy. The distinction between a non-normative theory of law and a normative theory of adjudication is eventually erected to protect the first, more foundational one. If this project is going to work, value assumptions about the nature of law must be kept out. In particular, if a theory of adjudication is fundamentally moral in nature, then it must remain quarantined in a separate sphere.[16] I will call into question the stability of both sets of distinctions, thereby raising serious doubts about this particular methodological approach.

The burden of defending a non-normative account is a heavy one to bear. As we shall see, it is remarkably difficult to keep value judgments out of one's theory. Value judgments do not simply take the form of morally robust claims about what law ought to be, but contestable assumptions about law and the human condition more generally are also threatening. For the positivist project to work, it must be a matter of fact that law is best understood as a set of facts.[17] To defend the foundational assumptions would be to admit that positivism rests on contestable philosophical underpinnings, immediately reconnecting it with the philosophical debates of old. But such assumptions are difficult to excise. The very attempt to preserve this particular methodological commitment (and the substantive commitments born out of it) negatively impact jurisprudential enquiry. Legal philosophers are easily led to adopt a defensive posture wherein their role is to ensure that any perceived value-commitments are kept out. The object of study becomes the theories themselves, and the pre-existing theoretical commitments all too often act as constraints on what can be said about law. In such instances, what should be the output of one's reflections enquiry often becomes the input. To the extent that this shift of focus has occurred, legal philosophy has lost its way. While there is no single way forward, there are certainly many dead ends.

In the remainder of this chapter, I set the stage for the central argument of this book by offering a close textual reading of *Practical Reason and Norms*. What is striking about *Practical Reason and Norms* is that Raz does not offer a theory of law that is separate from his theory of adjudication. Rather, his positivist theory of law is itself grounded in a positivist (or formalist) theory of adjudication. Admittedly, it is a creative account that is elegant in its symmetry. It also has the added advantage of presenting the relationship between the various theses in a transparent manner: all the parts of this concept of law are mutually supportive and interconnected. Nevertheless, as mentioned above, the entire

[16] Not so, of course, for the inclusive legal positivists.

[17] Note this point is made specifically in reference to positivists who are commited to the sources thesis, although the general point – that if an argument is offered to justify the starting point, the project is compromised – holds for all versions of non-normative positivism.

theory is dependent upon the claim that judges have a duty to apply the law, and this constitutes a fatal flaw. I will argue that Raz's non-normative account in *Practical Reason and Norms* is vulnerable to a powerful counter-example: common law adjudication. This practice fits uneasily with his claim that judges have a duty to apply the law (insofar as 'law' is defined as a set of fact-based norms). It is a point he acknowledges and attempts to grapple with but never resolves in a satisfactory way.[18] Raz has two options: he can either become a normative positivist and advocate reform of the common law (like Hobbes and Bentham before him) or he can try to account for this practice within his non-normative framework. He selects the second of the two options, although one of the central arguments of this book is that only the first option is available. Normative positivism, I will suggest, is all that there is, insofar as he desires to maintain his positivist theses.

In chapter two I explore certain notable arguments in *The Authority of Law*. In this work, Raz introduces us to his sources thesis, which holds that discerning the content of law is a fact-finding mission and not an evaluative one.[19] Significantly, he defends this thesis by relying on the same functional account of law that appears in *Practical Reason and Norms*: law offers us a set of public practical reasons for action that serve to unify judgment in society. Raz is cognisant of the fact that if this account is going to be plausible, he must accommodate judicial practices where judges do not seem to be applying fact-based norms. In a later chapter in *The Authority of Law* he offers readers what he calls a rule-plus-exception model of common law adjudication that is supposed to achieve this end.[20] Upon close examination, this model proves to be little more than an artificial regimentation of the practice. Not only is his model vulnerable to counter-examples, but it also collapses from within. In the wake of that collapse, Raz inadvertently affirms some of Dworkin's basic ideas. The limitations of the fact/value dichotomy, which underpins his sources thesis, will also be investigated along the way.

Raz reconfigures his positivist account in *Ethics in the Public Domain*, and I evaluate the success of this move in chapter three.[21] He relies heavily on the distinction between a theory of law and a theory of adjudication, hoping to solve all of the aforementioned difficulties by means of this essential distinction. I

[18] This is not a novel claim. See AWB Simpson, 'The Common Law and Legal Theory' in AWB Simpson (ed), *Oxford Essays in Jurisprudence 2nd Series* (Oxford, Oxford University Press, 1973).

[19] Raz, *The Authority of Law*, above n 14, at 39–40. Raz writes: 'A jurisprudential theory is acceptable only if its tests for identifying the content of the law and determining its existence depend exclusively on facts of human behaviour capable of being described in value-neutral terms and applied without resort to moral argument'.

[20] *Ibid*, 185.

[21] J Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (New York, Oxford University Press, 1994).

argue that the shift in his account of adjudication negatively impacts his theory of law, especially the relevance of the sources thesis. The manner in which his theory of adjudication affects his account of law becomes visible when his thoughts about the nature of legal rights are explored. Raz, I will argue, becomes an accidental realist, echoing Holmes instead of Hart. The sharp divide between his theory of adjudication and his theory of law cannot be maintained, which has serious implications for Raz's theory and for legal philosophy more generally. I also argue that his thesis that all law claims authority cannot solve all the aforementioned problems.

In chapter four I examine Raz's attempt to connect his positivist account of law with a morally robust account of authority. I demonstrate that his pre-emption thesis sits in tension with his normal justification thesis. The pre-emption thesis requires individuals to pre-commit to treating a law or a set of laws as reasons for action; conversely, the normal justification thesis demands that individuals assess the moral worth of the norm. Raz spies the problem, but he fails to adequately address it. Instead of offering readers a coherent account, he vacillates between two incompatible models of authority. The tension can be traced back to incompatible methodologies: unlike the pre-emption thesis, which was born out of his positivist methodology, his morally robust account of authority is the product of the focal method. I propose that only a natural law conception can rid Raz's account of these deep tensions.

In chapter five I revisit the idea of law as a set of public practical reasons. This is the account of law's function which Raz originally champions and never successfully discards, despite many attempts. I argue that the pre-emption thesis is to blame and that Raz is still committed to the account of law that he champions in *Practical Reason and Norms*. Whenever he defends his pre-emption thesis, this vision of law's function follows closely behind it. Raz's many attempts to account for law's complexity prove to be unavailable to him because of the demands of his sources thesis, and more specifically because of his pre-emption thesis. It is not surprising to discover that the very same issue that doomed his original theory (in *Practical Reason and Norms*) continues to haunt his account. Moreover, in an attempt to secure a place for his sources thesis in the courtroom, Raz transforms the sources thesis into an ideal of legal reasoning.[22] I will argue that one of the implications of this move is that a normative version of positivism is the most he can strive for insofar as he wishes to maintain his positivist commitments.[23] Ultimately, I conclude that

[22] Raz, 'Postema on Law's Autonomy' above n 7, at 15.

[23] In this context, 'normative positivism' refers to the view that judges ought to seek to factually ascertain and then apply pre-existing legal norms. At other junctures the term may be used more broadly to capture the view that law should work as a set of public practical reasons. In ch 7 I explore the connections between these two versions of normative positivism.The precise countours of any of the normative positivist positions matter are of little relevance in this book: I am more interested in drawing the readers attention to instability of Raz's non-normative account of law.

Raz fails to account for the work of judges and this is why we must move beyond positivism and beyond the Hartian method altogether.

In chapter six I travel down the path not taken by revisiting the question of how law contributes to the preservation of order in society. I offer the beginning of an answer to this question by starting with the concepts and ideas that both Raz and Hart originally introduced us to. For instance, if we reflect further on Hart's notion of the 'critical reflective attitude', then an ideal account of the nature of law takes root, one that is competitive with the substance and method of legal positivism. A legal philosopher need not aim at constructing a legal ideal from abstract principles and normative concepts; it can grow from very prosaic roots. By telling (at least) two stories about the manner in which law can contribute to creating and sustaining order, we can learn about the nature of law and about ourselves.

Finally, I turn my attention back to *Practical Reason and Norms* and I explore the underlying contrast between legal order and a state of confusion. Raz blames judicial discretion for creating uncertainty, but this is not quite right. Not only can discretion be a stabilizing force, but the causes of instability and uncertainty are many. When we begin to identify them, a more accurate account of law materializes. Guided in part by the insights of Lon Fuller, my analysis leads to the doorstep of natural law theory. While I do not walk through the door, the questions of natural law (broadly construed) cannot be avoided. This poses a problem for positivists of all stripes.

In chapter seven I explore in detail the exchange between Raz and Gerald Postema.[24] By drawing on the arguments I make in the book, I maintain that Postema is correct in his assessment of Raz's position. This particular analysis allows me to discharge my argumentative burden while demonstrating the precise nature of Raz's tactics: he deflects every complaint, but he does not reconfigure his theory for his readers. Not only are his deflections misleading, but one of the main points of this book is that it will be very difficult, if not impossible, for Raz to fit all his theses together in a coherent whole.

My overriding concern, however, is not soley with Raz's position, but with the terms of the debate of which Raz is one voice, albeit a powerful one. The problems identified in Raz's account bring into view the way in which the debate is being carried out within artificially narrow boundaries. When the cracks and fissures appear in Raz's account, we should turn our gaze to law as it is manifest in experience and think afresh about law's complexity. My hope is that the debate will include a broader spectrum of theories and ideas and that the focus will return to law as it is manifest in the world. The internal

[24] Raz rarely responds to his critiques, but he does offer a lenghtly response to an article written by Postema. See Postema, 'Law's Autonomy and Public Practical Reason', above n 4. While originally published in 1998, it has been republished as the appendix of his recent book, *Between Authority and Intepretation*, above n 11.

collapse of Raz's account illustrates the manner in which the philosophical questions of old – questions about the nature of the human condition – remain relevant. Just as relevant, as we shall see, are the work of the lawyer and the concerns of the layman.

I. *PRACTICAL REASON AND NORMS* AND EXCLUSIONARY REASONS

A return to Raz's original theory of law as articulated in *Practical Reason and Norms* is crucial for a comprehensive understanding of Raz's exclusive positivist position in its more recent form. An understanding of *Practical Reason and Norms* foreshadows the nature of the challenges that Raz will encounter when he replaces the claim that judges have a duty to apply the law with the claim that judges do (and should) reason morally. Given the interconnected nature of the concepts in his original articulation of the theory, such a move promises to have implications for his theory as a whole.

Let us begin where Raz begins: with a theory of practical reason, out of which his theory of law emerges. Raz seeks to establish that exclusionary reasons for action are a familiar part of our lives, even if they have yet to be identified as such. Note that in this early work Raz is aware that the burden is on him to establish that these kinds of reasons are commonplace. He is not simply making a point about what 'law claims' (as he does in his later works); rather he is interested in making sense of the practical workings of existing legal systems. The relationship between the exclusionary status of legal norms and the work of the judiciary is vital to this early account.

Exclusionary reasons are both first-order reasons that tell us what to do (or what not to do) and second-order reasons that serve to exclude all other competing reasons. To clarify these key ideas, he differentiates between two kinds of conflicts that can occur when we are deciding how to act. Resolutions of conflicts between first-order reasons are a matter of 'relative strength' or weight: we weigh up the pros and cons of acting in certain ways and the reasons for action that emerge as the weightiest are the ones that we act upon.[25] In such instances, we act according to the balance of reasons. For example, we might have a first-order reason to study and a first-order reason to go to a party: we decide which reason is more pressing (ie has more weight) and we act according to that reason.

Unlike conflicts between first-order reasons, conflicts between first and second-order reasons are different in *kind*. When first-order reasons come into conflict with second-order reasons, it is not a simple matter of *weighing* different reasons; rather, second-order reasons *exclude* all other relevant reasons. Raz explains:

[25] Raz, *Practical Reason and Norms*, above n 8, at 36.

> The presence of an exclusionary reason may imply that one ought not to act on the balance of reasons. The exclusionary reason may exclude a reason which would have been overridden anyway, but it may also exclude a reason which would have tipped the balance of reasons.[26]

Exclusionary reasons are game changers. They act like trump cards by excluding competing reasons for action. If I promised my mother that I would study, regardless of whether I would prefer to go to a party, my promise to my mother acts as a trump card that excludes other potential reasons for action. Raz is aware of the fact that the burden is on him to demonstrate that exclusionary reasons exist and that legal norms are best understood as exclusionary reasons. He must first overcome the fact that we do not commonly distinguish between first and second-order reasons when we speak about the process of decision-making. Raz uses examples to establish both that such reasons exist and that they are, in fact, an ordinary part of everyday life before turning his attention to the legal realm.

In one example, Raz introduces us to Ann. Ann is too tired to make a decision regarding the investment of her money. She does not weigh first-order reasons; rather, she excludes the very possibility of weighing first order reasons because she 'cannot trust her own judgment at this moment'.[27] This is an example of incapacity-based reliance on the exclusionary potential of reasons for action.[28] In another example, Colin promises his wife that when making decisions about his son's education he will only consider the interests of his son. Raz lists a host of potentially relevant considerations and states that Colin believes 'that because of his promise he should disregard such considerations altogether' unless they have an impact on his son's interest in having the best possible education.[29] In this regard, promises are best understood as exclusionary reasons. Raz's point is that 'Colin's promise, like Ann's fatigue, does not affect the balance of reasons' since it 'is not itself either a reason for sending his son to a public school or against doing so'.[30]

Finally Raz introduces us to Jeremy. Jeremy is a soldier who is 'ordered by his commanding officer to appropriate and use a van belonging to a certain tradesman'.[31] His friend points out that, on the balance of reasons, it is better to disobey the command. Jeremy concurs, but nevertheless recognizes that he must do as his commander says. Raz argues that the 'order is a reason for

[26] *Ibid*, 41.
[27] *Ibid*, 37.
[28] *Ibid*, 38. 'Ann's reasoning is typical of situations in which the agent cannot trust his own judgement because he is drunk or subject to strong temptation or to threats or because he realizes that he is influenced by his emotions, etc'.
[29] *Ibid*, 39.
[30] *Ibid.*
[31] *Ibid*, 38.

doing what you were ordered regardless of the balance of reasons'.[32] The order from the commanding officer is an exclusionary reason for action. Jeremy must do what his superior says, simply *because he says so*. It is the source and not the content of the command that matters. This last example, unlike the others, directly touches upon Raz's understanding of authority. Raz argues that 'Orders are orders and should be obeyed even if wrong, even if no harm will come from disobeying them'.[33] Indeed, this 'is what it means to be a subordinate'.[34] Raz argues that it 'may be that Jeremy is wrong in accepting the authority of his commander in this case', however, he adds: 'But is he not right on the nature of authority?'[35]

By obeying the command despite his reservations, Jeremy is recognizing his subordinate status and recognizing that the commander's directives are content-independent reasons for action. It follows from this that if Jeremy had disobeyed his commander, he would not have treated him as an authority. By suggesting that Jeremy has understood the nature of authority in general, Raz is signifying that the commander–subordinate relationship is indicative of authority as such. His military analogy brings into focus the difference between the conception of authority that he is operating within *Practical Reason and Norms* and the conception of authority that he uses in *The Morality of Freedom*. In the latter work, Raz grounds his conception of authority in general in a moral ideal of authority: legal norms are not authoritative simply *because* they are uttered by a superior (and then serve as content-independent exclusionary reasons for action); rather, such directives are only authoritative if and only if they have morally justified content.[36] Clearly this view cannot be squared with the military analogy: it accurately represents neither what does happen nor what should happen in the military. An understanding of Raz's military model of authority enables us to foresee the kinds of challenges Raz will face in reference to the coherence of his position when he alters the model in *The Morality of Freedom*.[37]

No doubt the idea of an exclusionary reason has great explanatory power in the military context. Subordinates are ordered to obey the commands (or face a severe sanction) and by and large they do. The key question becomes: is the same true of law? Can the idea of an exclusionary reason have the same explanatory power in the legal context? This idea of an exclusionary reason is an interesting one, but carrying it over to the legal sphere is a difficult task. In *Practical Reason and Norms*, Raz wants the idea to have near-complete explanatory power. The idea of an exclusionary reason is supposed to shed light on

[32] *Ibid.*
[33] *Ibid.*
[34] *Ibid.*
[35] *Ibid.*
[36] Raz, *The Morality of Freedom*, above n 6, at 74.
[37] See ch 4.

the nature of legal norms, on the nature of legal systems, on the nature of the judicial duty, and on the nature of authority more generally. Can it perform this demanding role?

The idea of an exclusionary reason is itself a demanding one. It takes us beyond the idea of law as social fact (which is a predominantly backward-looking claim) into the world of practical rationality (which is primarily forward-looking or action-guiding). On Raz's account, we first have to factually ascertain the content of the norm and then we must treat it as a reason for action, excluding all others. Yet, how do we know that, in any given case, an individual is actually treating a legal norm as an exclusionary reason rather than a weighty (first-order) reason for action? Raz's answer to this question leads him to consider the psychological state of the agent – a clear sign that the argumentative burden Raz must bear is weighty.

To begin with, Raz makes it clear that when agents rely on exclusionary reasons they can still *deliberate* about the merits of the authoritative directive in question; they simply cannot *act* on the defeated reasons. In other words, blind obedience is not at the core of his understanding of exclusionary reasons. Identifying cases where legal reasons are in fact treated as exclusionary reasons for action becomes even more difficult once we bear this qualification in mind. Consider, for instance, cases in which our personal judgment concerning the best path of action coincides with the requirements of the law in question. Are we acting for personal reasons only, or is the presence of the legal norm simply another first-order reason to be added to the list of reasons in favour of a certain action?

Raz spies this difficulty and maintains that we cannot act both for an independent first-order reason and for an exclusionary reason because if we did, we would be guilty of 'double counting'.[38] If the idea of exclusionary reasons is going to capture our reasoning process, our reasons for action must be simple and our intentions must be pure. If the idea of an exclusionary reason is going to illuminate the nature of law, then the norms must frequently serve as exclusionary reasons; otherwise, the idea of a weighty reason for action becomes the more plausible candidate.[39] Nevertheless, a degree of suspicion is warranted here. It seems that Raz has had to invent a crime of practical reason (double counting) in order to preserve his claim that people frequently rely on exclusionary reasons. In reality, people often have complex motivations and this fact

[38] *Ibid*, 58.

[39] This is not the way that Raz currently frames his argument. See chs 3 and 4 for a discussion of the idea that all law claims authority. Note that Raz does mention his thesis that law claims authority in *Practical Reason and Norms*, but he only connects it to the idea that law claims to be supreme (ie regulate any kind of behavior). There is no mention of the ideal of morally justified authority. See Raz, *Practical Reason and Norms*, above n 8, at 151.

is not accurately captured by Raz's account.[40] Without an additional argument, Raz has simply defined away the competition.

Raz does offer readers an additional argument. He articulates a test by which we can distinguish weighty reasons from exclusionary reasons. The test appeals to a familiar feeling of unease: if a feeling of unease is experienced, either by the decision maker or by one who is judging whether or not the decision made was in fact the correct one, then this is evidence that the agent has acted on an exclusionary reason. That is, we feel uneasy when we think someone should have acted on the balance of reasons instead of the exclusionary reason, or vice versa.[41]

To see how this test works, he asks us to consider Jeremy's plight once again. Recall that he has been given an order by his superior – an order that he thinks is wrong. Jeremy then proceeds to instruct his subordinate, Dick, to carry out the order. Dick also thinks the order is wrong and he chooses to disobey Jeremy. Raz argues that Jeremy is 'torn between conflicting feelings'.[42] Jeremy is convinced that Dick did both the right thing and the wrong thing: 'He wants to praise and blame him at the same time'.[43] Raz argues that this is a common situation, it also occurs frequently when children disobey their parents' instructions.[44] Now the main point that Raz needs to convince us of is that people who are experiencing a first-order conflict do not experience the same sense of being torn:

> The importance of these cases is that they can hardly be interpreted as ordinary first-order conflicts. When a person having full knowledge of all the relevant factors acts on the weaker reasons, either because he does not appreciate the full weight of the stronger reasons or for some other motive, we may find various mitigating circumstances but we do not feel torn in the same way. The peculiarity of the situations we are concerned with is that we are aware that the action can be assessed in two ways which lead to contradictory results.[45]

He concludes that 'when we judge that such mixed reactions are appropriate we indicate our belief in the validity of exclusionary reasons'.[46] We recognize both that an exclusionary reason exists and that it makes a claim on us. We would not feel uneasy when disregarding such reasons if we did not think that we should obey them. So Raz assumes that we believe that we should obey authoritative directives even if the content of those directives offends our moral sense of right and wrong.

[40] See ch 6 for an exploration of this point.
[41] Raz, *Practical Reason and Norms*, above n 8, at 41.
[42] *Ibid*, 43.
[43] *Ibid*.
[44] *Ibid*.
[45] *Ibid*.
[46] *Ibid*, 45.

Contra Raz, such mixed feelings can surely be felt in response to first-order conflicts of weight as well. When two paths of action are equally desirable, we may feel uneasy when we are forced to choose between them. As Sartre notes, a deep tension may arise if we are forced to choose between accepting a new position overseas and caring for one's sick mother.[47] It is more than likely that we regret the forsaken option and, further, we can see how either choice could warrant praise and blame at the same time. So the feeling of unease can occur even if an exclusionary reason is not in play. The test is not as helpful as it is meant to be. After all, the very point of the test is to shore up his claim that exclusionary reasons exist and that we can identify them.

There is yet another serious problem with Raz's proposed test: it only works in instances where there are conflicting reasons at play. That is, the test works in cases where an authority tells you to do something you do not want to do. So either the authoritative directive is morally bad and you are good, or your moral compass has gone astray and the law is good.[48] But again, if we are dealing with situations where the law coincides with what you want to do independently of it, it is far more difficult to determine if the legal norm is being treated as an exclusionary reason for action rather than as a weighty reason. The feeling of unease will not be present in such instances.

Again, the burden is on Raz to establish that legal norms are best understood as exclusionary reasons for action. In *Practical Reason and Norms*, Raz attempts to discharge this burden, albeit with limited success. Raz no longer aims at this end as he has re-conceptualized his position in a way that takes the emphasis away from empirical claims about the world and about the manner that we actually reason with rules. Instead Raz shifts to the features that law must have if it is *potentially* going to serve as an authoritative (or exclusionary) reason for action. Law, Raz insists, claims authority over us. It claims to give us pre-emptory (or exclusionary) reasons for action, but whether it actually serves as an exclusionary reason is of little moment from a jurisprudential perspective.[49] The focus is on determining whether a law or set of laws enjoy the moral authority claimed, rather than on the relationship between law and order. Implicit in this shift in Raz's account is new understanding of what kind of things we must think about in order to grasp law's nature: we can understand the nature of law without attending to the way in which law works in the world; we can understand the nature of law without thinking about the relationship between legal norms and those who are meant to be governed by them. When we explore Raz's conception of law in *Practical Reason and Norms* we find that his entire theory about law's nature is a functional account about the precise way in which law guides the conduct of the citizenry. As mentioned, at the centre of

[47] Jean-Paul Sartre, *Existentialism and Humanism* (London, Eyre Methuen, 1948) 35.
[48] See ch 6 for an elaboration of this point.
[49] Raz, 'Postema on Law's Autonomy' above n 7, at 11–12.

his account is the thesis that judges have a duty to apply the law. Moreover, he is not simply worried about the promulgation of norms by legal officials, but with the relationship that those norms have with law's subjects.

There is no doubt that Raz has altered his position in a significant manner. The question that remains is whether these alterations are successful: is Raz's current position a viable one? In upcoming chapters, I will raise serious questions about the tenability of Raz's current accounts about the nature of law and authority. The remainder of this chapter will set the stage for the arguments to come. Raz, as we have seen, spends a lot of time establishing his core claim that exclusionary reasons exist and are commonplace. His next task is to demonstrate that legal reasons are best understood as exclusionary reasons. Instead of adopting the external perspective, offering observations about the nature of law from afar, Raz takes us directly into the world of the judge and the citizen in order to attempt to establish the salience of his contention that law is best understood as a set of exclusionary reasons for action. It is an ambitious and difficult goal, but the very fact that Raz no longer aims at this end may indeed be a sign that it is not a tenable project in this form.

II. EXCLUSIONARY REASONS AND THE LEGAL SPHERE: ISSUES OF METHOD AND SUBSTANCE

Raz's next move is crucial for the success of *Practical Reason and Norms*. He must connect his understanding of exclusionary reasons for action with his understanding of law. Raz argues that mandatory norms (such as legal norms) are exclusionary reasons for action.[50] Raz will, of course, have to substantiate this claim, but there is another feature of mandatory norms that must be dealt with first: mandatory norms are not simply reasons; they are usually rules or principles.[51] Raz argues that we must distinguish rules (a term he uses interchangeably with principles) from other reasons. Weight does not distinguish the two, since rules differ in their weight, as do reasons. Raz concludes that one 'is thus forced to look to content-independent features of rules to distinguish rules from reasons which are not rules'.[52] Here we have come across a key connection with the sources thesis. Rules must be identifiable in a *content-independent* way. This is a factual test for the existence of a mandatory rule because it is the pedigree of the rule, not its content, which determines whether or not it is a mandatory norm. Since mandatory norms are exclusionary reasons for action, we find that the notion of 'exclusionary reasons' is wedded to the notion of 'content-independence'.

[50] Raz, *Practical Reason and Norms*, above n 8, at 62.
[51] *Ibid*, 49–50.
[52] *Ibid*, 51.

Raz then turns his attention to legal institutions, which he divides into three categories: norm-creating, norm-applying, and norm-enforcing (otherwise known as the legislator, the courts, and the police force).[53] Raz argues that it is 'Norm-applying institutions and not norm-creating institutions' that hold the key to an accurate understanding of an institutionalized system.[54] In other words, the judiciary is the central institution that enables us to understand the nature of legal systems and the nature of law. Raz gives two main reasons for placing law-applying organs at the centre of his theory: (1) he identifies law-applying organs as a necessary (and hence *universal*) feature of legal systems; and (2) he identifies law-applying organs as key to the law's ability to perform the central function which he allocates to it, namely, the regulation of social relations.[55] While much confusion has surrounded what precisely it means to identify a 'necessary' feature of law, one can look to the way Raz argues for the centrality of law-applying organs for clues.

For one, Raz argues that force or coercion is not a necessary feature of the concept of law. He provides two reasons: first, a society of angels would need rules, but not force; and second, it is conceivable that legal systems with law-applying organs but no law-enforcing organs could exist.[56] He does accept that such a coercion-less system, while logically possible, might be humanly impossible.[57] Clearly, Raz is not considering the limitations of human society when discriminating between necessary and contingent features of law. The key point is that for Raz, the presence of law-applying organs is a necessary and universal feature that is shared by all existing legal systems. In other words, the *presence* of law-applying organs does not vary from country to country or time to time: such organs, according to Raz, necessarily exist if the system in question is to qualify as a legal system.

We have thus far established a key methodological assumption operating in *Practical Reason and Norms*: that one should look to identify features shared by all legal systems that are necessary to the very functioning of law. If such features were removed, then legal systems would cease to be legal systems. The judgment about what features qualify as necessary in this way is inseparable from Raz's view of law's function:

> The claim that the presence of a primary organ is a defining feature of institutionalized systems is based not only on our common knowledge of typical cases of legal and similar systems but also on the crucial role such institutions, when present, play in regulating social relations.[58]

[53] *Ibid*, 132.
[54] *Ibid.*
[55] *Ibid.*
[56] *Ibid*, 158–59.
[57] *Ibid*, 158.
[58] *Ibid*, 137.

Raz elaborates on this role, saying that law-applying organs serve to officially settle disputes, adding that 'the difference between normative systems which provide systematic and institutionalized methods of settling disputes and those which do not is of momentous importance to their utility and function in regulating social behaviour'.[59] The important function that law-applying organs have in society is one key reason why Raz isolates and prioritizes this particular institutional aspect of legal systems. Thus, we can see that in Raz's original articulation of his theory of law in *Practical Reason and Norms*, he is very concerned with the precise way in which legal norms (and the work of officials) engender order in society. He views this issue as intimately related to, and indeed responsible for, his theory about what law *is*. It is especially noteworthy that Raz now denies that his theory is connected to a theory about law's function in any philosophically salient way.[60] The reasons that may lead him to make this claim will be explored in upcoming chapters, but it is useful at this juncture to put the pieces of his conceptual puzzle together.

The next step of the argument, and the most crucial, involves looking at the details of Raz's theory of law. This will clarify both why Raz views law-applying organs as vital for an understanding of law as well as the implications of this choice. It will also become clear how precisely Raz ties in his theory of exclusionary reasons with his theory of law. The tidiness of his theory and the interconnectedness of its various elements will also come to the fore. All this will be achieved by focusing on the key distinction between legal systems and systems of absolute discretion.

III. BETWEEN CHAOS AND ORDER: JUDGES AS WIELDERS OF OUR COLLECTIVE FATE

The idea of exclusionary reasons is the cornerstone of Raz's theory of law and the judiciary (which he refers to as the law-applying organ) is the central legal institution. When combined, a markedly formalistic vision of law emerges from the pages of *Practical Reason and Norms*. Judges, Raz argues, have a duty to apply the law: legal systems 'contain, indeed, consist of, norms which the courts are bound to apply regardless of their view of their merit'.[61] This duty to apply the law is the thesis that unlocks Raz's account of law and brings his theory to life. Judges are not simply important players in a political game of power and principle. Instead, they are charged with the responsibility of maintaining a stable body of norms that the citizens can turn to for guidance. The very same norms that guide our behaviour serve as the standard by which

[59] *Ibid.*
[60] Raz, 'Postema on Law's Autonomy' above n 7. See also ch 7.
[61] Raz, *Practical Reason and Norms*, above n 8, at 139.

judges evaluate our behaviour. Judges must treat citizens *as if* they too are required to treat legal norms as exclusionary reasons for action. In this regard, the judicial duty to apply the law does not simply secure the exclusionary nature of legal norms. This duty also gives shape to the legal system more generally. Legal systems are themselves exclusionary in nature. This is Raz's account in a nutshell. By exploring the distinction between legal systems and systems of absolute discretion, we clarify the way in which his positivist theory of law connects to his vision of adjudication. Moreover, this distinction offers a kind of creation myth that is meant to highlight the features that all legal systems must possess. As we shall see, the features highlighted – an autonomous set of legal norms that can serve as reasons for action of the populace enabling order to triumph over chaos – places Raz within the tradition tracing back to Cicero, of which Postema speaks.

Systems of absolute discretion are hypothetical constructions that are meant to serve a specific didactic purpose in Raz's account.[62] By contrasting legal systems with what they are not, we are supposed to gain a better understanding of what they are. In purely discretionary systems, judges have no duty to apply the law and hence judicial decisions do not perform a guiding function. Judges are not required to follow precedents, nor are they required to apply any particular norms, whether they be legislated or customary. Rather, they are subject to a single instruction: 'they are always to make the decision which they think best on the basis of all the valid reasons'.[63] Raz argues that legal systems, by contrast, 'contain, indeed, consist of, norms which the courts are bound to apply regardless of their view of their merit'.[64] In other words, the law consists of norms that 'primary organs are bound to apply and are not at liberty to disregard whenever they find their application undesirable, all things considered'.[65]

To reiterate, for judges who are permitted to exercise absolute discretion, decision-making is a matter of weighing all the relevant reasons in each and every case. This does not mean, of course, that judges are entitled to decide in an arbitrary way. They must do what they think is best on a case-by-case basis and they may appeal to ultimate values such as justice and fairness in order to justify their decisions. However, such a system of law involves a great sacrifice, according to Raz: consistency over time is lost.[66] When judges create new laws instead of upholding pre-existing norms, citizens will be uncertain about what kind of behaviour is permissible and prohibited. In other words, the guidance function of law will be compromised. If judges

[62] *Ibid*, 137.
[63] *Ibid*, 138.
[64] *Ibid.*
[65] *Ibid.*
[66] *Ibid*, 139.

apply the law instead of exercising discretion, they reinforce the exclusionary status of legal norms. Not only do they maintain a stable body of norms, but the formalistic approach ensures that citizens can have the requisite motivation to allocate legal norms' exclusionary force. Judges, Raz argues, 'must judge individuals *as if* they should take the legal requirements as exclusionary reasons' (my italics).[67]

Indeed, only when judges apply the pre-existing set of norms can we (as citizens) identify our legal rights.[68] According to Raz, the judicial duty to apply the law is responsible for the creation and maintenance of stable rights; citizens look to these rights for guidance in order to determine how to act and they expect these rights to be reinforced by the courts. This point becomes clear when Raz argues that, contrary to systems of absolute discretion, legal systems do provide guidance because of the law-applying duty of officials:

> Legal and similar systems, on the other hand, do provide guidance to individuals. They contain norms determining the rights and duties of individuals. These are the very same norms that the primary institutions are bound to apply and that is the reason that they also provide guidance to individuals as to their rights and duties in litigation before the primary organs.[69]

When judges apply the law they reinforce the set of stable norms that serve to guide the conduct of citizens and function as the storehouse of their rights and duties. Citizens have a reason to treat legal norms as exclusionary reasons for action because they can expect judges to reinforce the exclusionary force of legal norms. The operative assumption is that the work of the courts has a direct influence on the motivation of the citizenry to treat legal norms as exclusionary reasons.[70] Conversely, in systems of absolute discretion, the lack of the said duty means that consistency is lacking. Given such frequent changes to the law, the system fails to produce a stable set of norms. Consequently, citizens cannot look to these norms to identify their rights and duties. Only when law is treated by judges as an autonomous set of norms can it serve as a storehouse of rights and duties; only when the system functions as a storehouse of rights and duties does it actually qualify as a legal system.

The over-arching message is clear: when judges act dutifully, society is richly rewarded with a stable set of norms that the citizenry can treat as reasons for action (of an exclusionary kind). When law's autonomy is breached regularly by appeals to ultimate values, the price paid by all is steep. An appeal to values on the part of judges threatens the predictability of decision-making, leaving citizens uncertain about what kind of behaviour is permissible and

[67] *Ibid*, 144.
[68] *Ibid*, 138
[69] *Ibid*.
[70] Raz now denies this connection. See chs 3 and 7 for an exploration of this point.

what kind of behaviour is prohibited. The exercise of judicial discretion moves society towards uncertainty and chaos. In *Practical Reason and Norms* it is the judicial duty to apply the law that holds the key to creating and sustaining an orderly society.

Not only is the law-applying function of judges responsible for guidance and evaluation, it is also responsible for identifying the discrete set of norms that belong to a given system (a task which is of interest to officials, citizens and legal philosophers alike). 'Indeed the test by which we determine whether a norm belongs to the system is, roughly speaking, that it is a norm which the primary organs ought to apply when judging and evaluating behaviour'.[71] This point adds another dimension to the tidiness of Raz's theory: the law-applying duty of judges is the basis for identifying the norms of the system and ensures that legal norms perform the double role of guidance and evaluation.[72] Excessive law-creation undermines the ability to identify the norms of the system, thereby reaffirming Raz's commitment to a relatively formalistic theory that meets the requirements of the strong autonomy thesis. Raz denies that he is committed to this thesis, and while his current views do not align with his former position (as considered here), I will argue that he has a very difficult time shedding this particular commitment.[73]

To be clear, the duty to apply the law is not to be understood in an overly simplistic way, as if judges mechanically identify a rule and apply it to situations in *every single case*. This view is clearly implausible and is a mere caricature of adjudication. Raz insists that judges are not 'computing machines always applying pre-existing rules regardless of their own views of which rules or which decision is the right one'.[74] Judges do not always apply the law. Sometimes they make mistakes and inadvertently create new law.[75] Of course, this particular qualification does not take the pressure off the law-applying duty of the judge. Discretionary activity enters at other junctures as well. It is possible, perhaps inevitable, for disputes to arise that are not regulated by law. When the law is silent, judges can appeal to ultimate values to fill the void. Furthermore, because of 'the vagueness, open texture and incompleteness of all legal systems, there are many disputes for which the system does not provide a correct answer'.[76] Here Raz echoes Hart's familiar point that laws, like language, have 'open texture'.[77] This is an inevitable feature of law and an inevitable source of discretionary activity.

[71] Raz, *Practical Reason and Norms*, above n 8, at 139.
[72] *Ibid*, 142.
[73] See ch 3.
[74] Raz, *Practical Reason and Norms*, above n 8, at 139.
[75] *Ibid*, 145.
[76] *Ibid*, 139.
[77] Hart, *The Concept of Law*, above n 1, at 128.

Raz tries to incorporate these qualifications into his general position. He argues that judges 'are to follow a certain body of norms regardless of their views of their merits and are allowed to act on their own views only to the extent that this is allowed by those norms'.[78] Herein lies perhaps the most powerful objection that a Razian could put forth to challenge the largely formalist interpretation of Raz's theory of law that I am currently setting out. The extent of discretion that a judge has depends on the extent to which the law (and the conventions that govern the interpretation of laws) allows judges to exercise their personal moral judgment. Some jurisdictions allow for more freedom in the courtroom, others less. Whether judges are instructed to create new law or apply existing law is thus a contingent matter that depends on the content of the master rule(s) in question. Defenders of Raz who launch this challenge might argue that *Practical Reason and Norms* should be read in the context of his later works. For instance, in *Ethics in the Public Domain*, Raz stresses that the law can give official directives – it can direct officials to go beyond the law in certain circumstances.[79] This newer argument sees the rule of recognition (the 'master' rule that contains the criteria of validity for all the legal norms) as a content-independent rule rather than an exclusionary one.[80] Despite any appeal this objection might have, it is not particularly powerful when set against the arguments forwarded in *Practical Reason and Norms*.

Raz's formalist conception of the judicial role is defended in an explicit manner in *Practical Reason and Norms*, leaving very little room for interpretation on the part of judges. Even if judges do not always apply the law for the reasons listed above, Raz insists that applying pre-existing norms is their job. To underscore this point, Raz asks us to compare the work of a judge with that of a minister of transport. The minister must consider economic factors, but his policy must be based on the assessment of *all* the relevant variables. He is *not* required to base his decision on what Raz refers to as a 'partial judgment' from the economic point of view.[81] Conversely, Raz argues that the judge 'both regards his judgment as based on a partial assessment of the valid reasons and as justifying action'.[82] Legal systems, Raz argues, 'possess their own internal system of evaluation'.[83] Such evaluation takes place from 'the legal point of view' – all extra-legal considerations are to be excluded.[84] The

[78] Raz, *Practical Reason and Norms*, above n 8, at 139.

[79] Raz, *Ethics in the Public Domain*, above n 21, at 333.

[80] The idea of a rule of recognition is introduced to us by Hart. This master rule enables us to determine whether a given norm is a valid legal norm. See Hart, *The Concept of Law*, above n 1, at 94.

[81] Raz, *Practical Reason and Norms*, above n 8, at 144.

[82] *Ibid.*

[83] *Ibid*, 139.

[84] *Ibid.*

legal system is itself an 'exclusionary system'.[85] Law offers a limited domain of reason – reasons that judges are under a duty to apply. It is this duty that, according to Raz in *Practical Reason and Norms*, has near-complete explanatory power. By understanding what judges do, we can then understand how law works and the precise job of legal norms. They are, as Raz famously maintains, exclusionary reasons for action.

The reason why Raz considers law-application to be the only necessary feature of legal systems is that systems of absolute discretion: (a) are not legal systems by definition and (b) do not exist. However, if Raz admits that the amount of discretion judges enjoy is a contingent matter, then he will have to acknowledge that discretionary systems are not merely a hypothetical concoction and that the distinction between discretionary systems and legal systems breaks down. Raz would then have to rewrite his entire theory of law, erasing the centrality of law-application and its implications: consistency would not be a virtue (or it would be achieved via means other than law application); guidance would not rest on the reinforcement of a stable body of norms; legal norms would no longer be a source of rights and duties; and citizens would have to be motivated to treat law as a body of exclusionary reasons despite knowing that they might not be able to rely on judges to treat laws as if they were exclusionary reasons. It is clear that once the law-applying duty of the judge is removed, Raz's entire theory unravels.

This, as we will see, is precisely what happens. The problem is that the discretionary activities of the judiciary are not limited to the hypothetical realm. They are a common feature of practice and Raz's failure to accommodate this point dooms his original theory. Raz ultimately fails to offer an explanation of common law adjudication that is consistent with his positivist story.

IV. COMMON LAW SYSTEMS: A COUNTER-EXAMPLE

Those familiar with Raz's theory often view his corpus of works from the perspective of his later works and hence agree with Raz that he can separate his theory of law from a theory of adjudication. But, in *Practical Reason and Norms*, it becomes particularly difficult to arrive at conclusions other than those drawn above. These conclusions are not without consequences for Raz's theory. If we accept Raz's theory as it stands, we find that it is an extremely tidy theory of law – in fact, it is too tidy and fails to appreciate the everyday practice of law in common law systems. Do pre-existing legal norms *really* play the double role of guiding conduct and serving as standards of evaluation for judges? If judges fail to apply the law, will it *actually* corrode into the chaos that is a system of

[85] *Ibid*, 145. Raz explicitly states that the legal point of view is 'an exclusionary point of view'.

absolute discretion? The answer to both these questions appears to be 'no'. The existence of common law systems, where no such law-applying duty appears to exist in the precise way that Raz has conceptualized it, provides a counter-example to his theory.[86] He realizes this and attempts to answer the challenge presented by such systems.

Raz acknowledges that in 'many legal systems, for example in ours, there are courts with power not only to settle at their discretion unsettled cases but also to overrule established precedent'.[87] He notes that they 'are entitled, in fact, to repeal laws and replace them with rules which they judge to be better than old ones'.[88] Raz is aware that the presence of these systems 'might be claimed to provide a counter-example to my claim that the law consists only of rules which the courts are bound to follow'.[89] He responds to this challenge by appealing to what he calls 'ultimate laws of discretion'. However, in the process of doing so, he points to one of his key commitments: the bindingness of rules. Raz writes:

> A rule which the courts have complete liberty to disregard or change is not binding on them and is not part of the legal system. But the courts in Common Law jurisdictions do not have this power with respect to the binding Common Law rules. They cannot change them whenever they consider that on the balance of reasons it would be better to do so. They may change them only for certain kinds of reasons. They may change them, for example, for being unjust, for iniquitous discrimination, for being out of step with the court's conception of the body of laws to which they belong.[90]

Here Raz restates his position on the bindingness of rules: rules are binding when the court is not at liberty to disregard them. How, then, are the primary rules of common law jurisdictions binding? Raz's answer is that they are not. Rather, his claim is that the 'Common Law rules' are binding on judges (ie the rules that determine whether and in what circumstances they can alter existing law).

We might wonder whether Raz escapes the challenge that common law systems present to his theory. Raz wants to turn to the bindingness of common law rules, the rules that direct the behaviour of judges, in order to shore up his theory. Up until this point in *Practical Reason and Norms*, Raz's discussion

[86] If the duty to apply the law is interpreted in a broad sense (ie to stand for the claim that judges must make reference to previous rulings and statutes) then no issue exists. I have argued that the duty to apply the law stands for a more narrow and robust claim whereby judges are duty-bound to apply factually ascertainable legal norms, regardless of the view of their merits. The fact Raz flags common law systems as problematic is further evidence that the narrow reading is correct. More will be said about common law adjudication in ch 2.

[87] Raz, *Practical Reason and Norms*, above n 8, at 140.

[88] *Ibid.*

[89] *Ibid.*

[90] *Ibid.*

of the bindingness of rules revolves around primary rules, not the rules of discretion that apply to judges (labelled by Raz as binding common law rules). Yet, recall Raz's argument that a legal system consists of 'norms which the courts are bound to apply regardless of their view of their merit'.[91] Since the duty to apply the law is a defining characteristic of law, how can Raz allow that this duty does not hold in certain systems without undermining his theory? In common law systems judges do not have a duty to apply pre-existing laws: the merit of the primary norms is precisely what judges are ordered to consider. Indeed, they are given discretion to change the primary rules if they happen to be 'unjust', 'iniquitous', or 'out of step with the court's conception of the body of laws to which they belong'.[92]

There are several causes for concern about this attempt to patch up the theory. First, one should note that judges who operate under such instructions seem to be given a great deal of leeway with the primary rules of the system. In other words, judges would be hard-pressed to disobey the rules of discretion of such a system. In fact, these instructions have more in common with the instructions given to judges in systems of absolute discretion than those in legal systems. Second, and perhaps more importantly, concrete decisions do not sit in a unidirectional relationship with the rules of discretion: the rules guiding judges can be given more specific content in light of particular decisions. In other words, changes in the law can impact on the rules and conventions that govern the behaviour of judges. Elsewhere Raz acknowledges this point when he argues that law-making procedures include conventions of interpretation.[93] He explains that 'a change in the conventions of interpretation of a legal system changes its law'.[94] The illustration Raz gives us is telling: if the legal definition of 'person' is extended to include 'foetuses', such a change has occurred.[95] Given that a change in the conventions of interpretation can be brought about by a judicial decision concerning the primary rules of a system (ie a decision that renders abortion illegal), this means that judges can change the rules that guide them. Hence, Raz's statement that judges in common law jurisdictions cannot alter the rules governing their behaviour is false.

As I have shown, the existence of common law systems threatens the viability of Raz's theory. Such systems violate the criteria of Raz's definition of legality, which is supposed to capture the universal and necessary features of *all* legal systems. At a minimum, the existence of counter-examples undermines the key elements of Raz's theory in *Practical Reason and Norms*. Consider the guidance function: if existing systems do not instruct judges to apply the

[91] *Ibid*, 139.
[92] *Ibid*, 140.
[93] Raz, *Ethics in the Public Domain*, above n 21, at 236.
[94] *Ibid*.
[95] *Ibid*.

law, then clearly this duty is not necessary for the maintenance of order. In response to other notable attempts to accommodate common law systems, Raz attempts to devise a theory of common law that is consistent with his positivist theory while offering a theory of adjudication that coheres with the way in which common law judges perform their role. In later chapters, I will prove that neither strategy succeeds.

In chapter two, I illustrate why Raz's attempt to accommodate common law reasoning into his theory is unsuccessful. Instead of presenting us with a nuanced theory of common law adjudication, Raz presents us with an artificial regimentation that coheres with his pre-existing positivist commitments. This first attempt to accommodate the common law into his theory is made in *The Authority of Law*.[96] In his more recent book, *Ethics in the Public Domain*, he introduces a theory of adjudication in addition to his theory of law – a move that also proves to be problematic.[97] On the surface, this strategy seems successful, but a closer look at the interconnections between the elements of his theory reveals the source of tension: as chapter three will make clear, one cannot abandon the view that judges apply the law and hope to keep the other core pieces of the puzzle in place.

Once Raz's view of judges as law appliers is replaced by a view of judges as moral reasoners, he has quite a bit of work left to do if he is going to provide us with a coherent theory of law. Legal sources, which are of the utmost importance in *Practical Reason and Norms*, become less important. Recall that in *Practical Reason and Norms,* legal sources have a backward-looking and a forward-looking aspect: not only must citizens and judges ascertain the content of these norms, but judges also have a duty to apply them.[98] Once Raz states that judges are moral reasoners who do and should look to extra-legal moral reasons when making decisions, the sources thesis becomes problematic. That is to say, it only identifies pre-existing law (the backward-looking aspect) and it does not identify the set of norms that judges must apply (the forward-looking aspect). Raz also has to account for the motivation of citizens: if they cannot expect judges to reinforce the exclusionary status of legal norms, why should they grant these norms exclusionary force? If citizens do not do that in practice, then should we still conceive of law as a set of exclusionary reasons? These questions and a number of additional ones will be asked along the way. In his next book, *The Authority of Law*, Raz tries to avoid all of these difficulties. He offers us a model of adjudicative reasoning that is supposed to accommodate common law reasoning into his positivist framework.[99] It is to this argument that we will now turn.

[96] Raz, *The Authority of Law*, above n 14, at 185.
[97] Raz, *Ethics in the Public Domain*, above n 21, at 326.
[98] Raz, *Practical Reason and Norms*, above n 8, at 137.
[99] Raz, *The Authority of Law*, above n 14, at 180.