

## Book Review

### Some Moving Parts of Jurisprudence

BETWEEN AUTHORITY AND INTERPRETATION: ON THE THEORY OF LAW AND PRACTICAL REASON. By Joseph Raz. New York, New York: Oxford University Press Inc., 2009. 396 pages. \$85.00.

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#### I. Introduction

Jane Stapleton related to me something a scholar once told her. According to that scholar, the main difference between British and Australian book reviews on the one hand and American book reviews on the other is that Britons and Australians try to engage with the overall general arguments of the books that they review, whereas Americans pick and choose among the topics and arguments in the books mainly to push their own intellectual agenda.

I have some good reasons for going unabashedly American in reviewing Joseph Raz's *Between Authority and Interpretation*.<sup>1</sup> First, the book is a collection of articles, and unlike the articles collected in an earlier volume, *The Authority of Law*,<sup>2</sup> the ones in the new collection are not meant to, and have not been newly revised to, offer cumulative arguments. Sure enough, there are many intricate connections among the themes and arguments contained in the articles of the new volume. But they do not build on each other the way those in *The Authority of Law* do. Second, I do not think it would be wise to try to assess, or even get a good grasp of, the arguments contained in the new book without having quite an extensive acquaintance with Raz's earlier works. As a matter of fact, many of the arguments and assumptions in these articles are at times articulated quite impressionistically. (The book could

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1. JOSEPH RAZ, *BETWEEN AUTHORITY AND INTERPRETATION: ON THE THEORY OF LAW AND PRACTICAL REASON* (2009).

2. JOSEPH RAZ, *THE AUTHORITY OF LAW* (1979).

not be recommended to a newcomer to Raz's writings about the nature of law.) In effect, the articles in the new collection are like a set of appliances with disparate functions. It turns out, perhaps unsurprisingly given their common manufacturer, that the mechanical parts in many of the appliances, the ones that make the appliances do the respective works that they do, are the same. But those mechanical parts are often hidden from the consumer's view.

Instead of cataloguing and testing each appliance, I want to take some concentrated looks at the common mechanical parts. In the following pages, I will take up and examine a number of arguments and assumptions that Raz relies on in these articles—the arguments and assumptions that I believe do the real work in running these appliances—even when Raz does not explicitly or clearly invoke such arguments and assumptions in the pages of the new volume. I will take advantage of some references to and quotations from some of his older works when doing so will enable me to get a better look at the mechanical parts. I have chosen this way of going about things partly because for quite some time now I have been puzzled at some of the key features of Raz's approach to thinking about the nature of law, and I also have been astonished at how many and how often people take those features for granted in their own legal theorizing. The main disadvantage of my approach will be that I will not be giving the reader a good idea of what is contained in some of the articles in *Between Authority and Interpretation*. In particular, for space considerations, I have reluctantly decided not to include a part on the topic of legal interpretation, the topic that occupies Raz for five of the fourteen articles in this book.<sup>3</sup> I believe that the central argument that Raz makes on this issue, contained in "Intention in Interpretation,"<sup>4</sup> is a not-so-unpredictable application of the considerations of authority, which I will spend much time discussing in the following pages. I hope to have an opportunity to discuss Raz's ideas about interpretation more directly elsewhere.

Finally, a warning and a request before I proceed. Raz's writings are not kind on their readers. Anyone who has given a serious attempt to engage with them is bound to feel quite unsure of his steps and bearings. I am no exception, and I am less than fully confident that the positions that I attribute to him and go on to criticize in the following pages are really his. My guess is that at least some knowledgeable readers will examine my regimentations of his views and come away thinking that I have regimented them out of recognition, and that for this reason my criticisms miss their target. I have one request to make to such a reader: Try to formulate Raz's views and try to do so in a way that makes them reactive to and critical of H.L.A. Hart's benchmark views, as Raz clearly intended them to be. My guess and hope is that the reader will come away from such an exercise thinking that Raz's

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3. RAZ, *supra* note 1, chs. 9–13.

4. *Id.* ch. 11.

views are very much like the ones I attribute to him. With some amount of trepidation then, I proceed.

## II. Preliminaries I: Theories of Law

I begin with a couple of preliminary Parts. At one point in the book, Raz rather modestly situates his own theorizing about the nature of law as follows:

Hart was right to claim that a combination of what he called primary and secondary rules is essential to law. But he was wrong to intimate that therein lay the key to the study of jurisprudence. There are other essential properties to the law. I have argued, for example, that it is essential to the law that it claims to have legitimate, moral, authority, and that it is source-based, and that it claims to have preemptory force, etc. These claims do not conflict with Hart's view that necessarily the law combines primary and secondary rules, that it includes a rule of recognition, and that it is accepted by the legal officials, and normally also by many others in the population it applies to.<sup>5</sup>

I myself find it helpful to gain entry into Raz's views on the nature of law by trying to figure out where and why he departs from the benchmark views that Hart developed in *The Concept of Law*<sup>6</sup> and elsewhere.<sup>7</sup> And in the following pages, I will take up and examine each of the new elements that Raz names in the above passage, before taking up an additional one that is argued for in *Between Authority and Interpretation*. In this first preliminary Part, I will quickly outline the nature of legal philosophical theorizing as it has been pursued by Hart and those who have been influenced by him, and then outline Hart's own particular legal theory. In the next Part, the second of the two preliminary Parts, I will propose a way to translate or regiment Raz's personalized characterizations about law, clear examples of which are provided in the passage quoted above—e.g., about what *the law* claims.

In devising a philosophical theory of law, we are trying to explain, or account for, certain facts that obviously or uncontroversially seem to be features of communities of people governed or regulated by laws. Such facts together amount to the pretheoretical data, and our goal is to come up with a hypothesis about what law is that best explains those facts.

Here are some pretheoretical facts that have been important in the development of legal philosophy in the past half century:

(F1) Some laws are power-conferring rules (as opposed to duty-imposing rules).<sup>8</sup>

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5. *Id.* at 97.

6. H.L.A. HART, *THE CONCEPT OF LAW* (Penelope A. Bulloch & Joseph Raz eds., 2d ed. 1994).

7. See generally H.L.A. HART, *ESSAYS ON BENTHAM* (1982); H.L.A. HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* (1983).

8. HART, *supra* note 6, at 27–42.

- (F2) Some customary rules are laws even before being recognized as such by legal officials.<sup>9</sup>
- (F3) Some communities governed by laws are without legislators whose legal powers are unlimited.<sup>10</sup>
- (F4) Some laws retain their binding force even after the deaths of the lawmakers who enacted those particular laws.<sup>11</sup>
- (F5) A thriving legal system may exist in a community even in the absence of a law-identifying rule that is commonly or jointly accepted by the community's officials.<sup>12</sup>
- (F6) Even in hard cases—i.e., those cases in which decisions are not clearly determined by clearly valid laws—judges often consider their decisions as completely constrained by preexisting laws.<sup>13</sup>
- (F7) Laws create genuine reasons (and even duties or obligations) to behave as the laws say.<sup>14</sup>
- (F8) It is possible for unconfused people to have legal disagreements (as opposed to disagreements about what the law should be) that persist despite their agreements on all factual issues.<sup>15</sup>
- (F9) There can be legal systems whose laws are so immoral or so evil that no set of moral principles could justify the laws of such legal systems.<sup>16</sup>

I shall be referring to some of these facts now and then in the following pages. Hart famously argued in the early chapters of *The Concept of Law* that the theories, proposed by Jeremy Bentham and John Austin, that characterize laws as commands of sovereigns fail to explain satisfactorily facts like (F1)–(F4).<sup>17</sup> Ronald Dworkin argued in turn that the alternative

9. *Id.* at 44–49.

10. *Id.* at 66–78.

11. *Id.* at 61–66.

12. See generally RONALD DWORKIN, *LAW'S EMPIRE* chs. 1, 4 (1986) [hereinafter DWORKIN, *LAW'S EMPIRE*]; RONALD DWORKIN, *The Model of Rules I*, in *TAKING RIGHTS SERIOUSLY* 14 (1977) [hereinafter DWORKIN, *Rules I*]; RONALD DWORKIN, *The Model of Rules II*, in *TAKING RIGHTS SERIOUSLY*, *supra*, at 46 [hereinafter DWORKIN, *Rules II*]; cf. HART, *supra* note 6, ch. 10.

13. See generally RONALD DWORKIN, *Hard Cases*, in *TAKING RIGHTS SERIOUSLY*, *supra* note 12, at 81 [hereinafter DWORKIN, *Hard Cases*]; DWORKIN, *Rules I*, *supra* note 12; DWORKIN, *Rules II*, *supra* note 12.

14. DWORKIN, *LAW'S EMPIRE*, *supra* note 12, at 108–13; DWORKIN, *Rules II*, *supra* note 12, at 48–49; JOSEPH RAZ, *PRACTICAL REASON AND NORMS* 56–58 (2d ed. 1990).

15. DWORKIN, *LAW'S EMPIRE*, *supra* note 12, ch. 1.

16. H.L.A. HART, *Legal Duty and Obligation*, in *ESSAYS ON BENTHAM*, *supra* note 7, at 127, 150 [hereinafter HART, *Legal Duty*]; Ronald Dworkin, *The Law of Slave Catchers*, *TIMES LITERARY SUPP.* (London), Dec. 5, 1975, at 1437; H.L.A. Hart, *Comment*, in *ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY* 35, 40–42 (Ruth Gavison ed., 1987) [hereinafter Hart, *Comment*].

17. HART, *supra* note 6, chs. 2–4.

theory that Hart developed fails to explain facts like (F5)–(F8).<sup>18</sup> And Hart countered that Dworkin’s legal theory fails to account for (F9).<sup>19</sup>

Of course, a proponent of a legal theory can dispute that certain putative facts are genuine data that need to be accounted for, as Hart did with respect to (F6) and (F7).<sup>20</sup> And a theorist can also try to show that his theory has resources to explain the proffered facts. That is what Hans Kelsen did, on Bentham and Austin’s behalf, with respect to (F1) by characterizing power-conferring laws as fragments of duty-imposing laws addressed to legal officials.<sup>21</sup> Like the Ptolemaic attempts to explain planetary trajectories by positing epicycles, success of any such attempts depends very much on how cumbersome they get, and also on what alternative explanations are available.

Hart argued that most (if not all)<sup>22</sup> of the pretheoretical data that need to be explained, including (F1)–(F4), can be explained by conceiving existence of laws in the following way. Laws (or *legal* rules) come in hierarchically structured packages, with some specific kinds of second-order rules, or rules governing the operation of the rules within the package. These second-order rules—which Hart calls *secondary rules* to distinguish them from *primary rules* that directly govern conduct—include: the *rules of change*, which regulate any modification in the rules of the system; the *rules of adjudication*, which regulate settling of disputes about the content and application of the rules of the system; and the *rule of recognition*, which regulates the identification of the rules of the system. A legal system exists or prevails in a community if some powerful subset of the members of the community—call them the “officials” of that community—*accept* the secondary rules (in the sense to be specified presently) and follow them as the result, and the rest of the community at least follow the rules that are valid according to the rule of recognition prevailing in that community. A person accepts a rule, or takes an “internal point of view” toward that rule, according to Hart, when he believes there to be reasons to follow it.<sup>23</sup> Such acceptance is constituted by the person’s dispositions to regulate his own conduct in accordance with the rule, to justify his own and others’ conduct by appeals to that rule, and to criticize his own and others’ deviance by appeals to that rule.<sup>24</sup> Presumably, to treat a rule of recognition as reason giving is to treat

18. See sources cited *supra* notes 12–15.

19. See sources cited *supra* note 16.

20. H.L.A. HART, *1776–1976: Law in the Perspective of Philosophy*, in *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY*, *supra* note 7, at 145, 156–58; HART, *Legal Duty*, *supra* note 16, at 161; Hart, *Comment*, *supra* note 16, at 35–40.

21. HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 143–45 (Anders Wedberg trans., 1945).

22. See Hart’s qualification on this point in HART, *supra* note 6, at 99.

23. *Id.* at 56–57, 89–91, 114–16.

24. Raz misleadingly characterizes Hart’s theory when he at one point says that Hart gave an account “from the internal point of view.” RAZ, *supra* note 1, at 93. Notice that the account I

generally the rules that are valid according to that rule of recognition as reason giving. Hart does not go into how thoroughly a person must be disposed to treat each valid law as reason giving to count as accepting a rule of recognition, but we can assume that some general tendency must be there. (Notice the difference between on the one hand the hypothesis of rule-acceptance that Hart employs to explain facts like (F1)–(F4), and on the other (F7).)

Those are the facts that would amount to the existence of a legal system in a community of people, according to Hart. A law with a particular content exists or prevails in a community if a legal system exists or prevails in that community and a rule with that particular content is valid according to the rule of recognition that is accepted by the officials of that community. But Hart was at pains to point out that not all legal statements are aimed at describing or representing such facts. Some legal statements, which Hart called “external legal statements,” do actually purport to describe such facts.<sup>25</sup> These are analogous to the statements of sociologists or anthropologists whose goal is to describe the mores of a community without thereby expressing their own commitments to those mores. Other legal statements are more akin to the moral statements that speakers make in their morally committed hours. In uttering such “internal legal statements,” as Hart called them, speakers do not *describe* or *represent* people’s acceptances of a set of rules that constitute a legal system, but instead they *express* their own acceptances of such rules.<sup>26</sup> In other words, they display their commitments to be guided by the relevant rules, and to assess their own and others’ conduct by appeals to such rules. Whereas external legal statements are descriptive or factual statements, internal legal statements are normative statements. In arguing that the existence of a legal system consists partly of at least some people in the relevant community accepting some secondary rules, Hart was arguing that where a legal system exists, at least some people are disposed to regulate their own conduct and to try to influence others’ by way of the normative assessments that internal legal statements express.

This theory of law forms arguably the most important part of the backdrop for Raz’s own theorizing about the nature of law. Moreover, I believe, we can domesticate many of the sometimes striking and surprising claims that Raz makes by determining how exactly such claims mark Raz’s departures from the benchmarks provided by Hart’s legal theory.

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outline in the text is one that tries to depict or describe accurately the workings of legal systems, including those having to do with the attitudes and behavior of the participants who take the internal point of view towards their laws. Hart tried to give an account that depicts accurately people’s internal point of view; but the account itself is not from the internal point of view.

25. HART, *supra* note 6, at 102–03.

26. *Id.*

### III. Preliminaries II: Translating the Law's Claims

In the passage that I quoted at the beginning of Part II, Raz says that one of the important necessary features of law that Hart failed to notice is that the law “claims to have legitimate, moral, authority.”<sup>27</sup> One characteristic feature of Raz’s writings over the years that many have found suspect is his tendency to personalize the law in just this way. Raz explicitly addresses such qualms at a couple of places in the new volume. He says that he finds nothing amiss in such personalization, and goes on to say:

The law’s actions, expectations, and intentions are its in virtue of the actions, expectations, and intentions of the people who hold legal office according to law, that is we know when and how the actions, intentions, and attitudes of judges, legislators, and other legal officials, when acting as legal officials, are to be seen as the actions, intentions, and expectations of the law.<sup>28</sup>

This is consistent with what Raz says at one point in *The Morality of Freedom*<sup>29</sup> when he explains the usefulness of availing ourselves of the personalized claims as follows: “The law requires, permits and claims what the organs of government, acting lawfully, and in particular the courts, say that it does.”<sup>30</sup> And the officials of a community who are presumed to accept the law are also then in turn presumed to accept the law’s claims.<sup>31</sup>

These explanations, along with some other things that Raz says in the new volume and in some of his older works, I believe, warrant the following reconstruction of what Raz means when he says that law claims to have legitimate, moral, authority. Legal officials, when they are acting as officials and are enacting, enunciating, and interpreting the laws of their legal system, treat the laws of their legal system as legitimately, and morally, authoritative. Such treatment consists of the particular kind of normative attitudes that officials take towards the laws of their legal system, and the particular kind of normative force that the normative statements meant to enunciate and interpret the laws of their legal system purport to have. In the preceding Part, I described Hart as espousing the view that where a community is governed by laws, its officials accept the rules that make up their legal system, and the internal legal statements they make express such acceptance. And such acceptance amounts to treating the relevant rules as furnishing reasons to behave as those rules say. If this part of Hart’s legal theory could be called “Acceptance Rationalism,” then Raz can be seen as espousing a particular version of it that could be called “Acceptance Moralism.” According to Raz, when a community is governed by laws, its officials treat the rules that make

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27. RAZ, *supra* note 24, at 97.

28. RAZ, *supra* note 1, at 38, 93.

29. JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1986).

30. *Id.* at 70.

31. RAZ, *supra* note 1, at 277.

up their legal system as furnishing *moral* reasons to behave as those rules say, and the legal statements they make express this particular kind of normative attitude towards the rules of the legal system.

Actually, in invoking the notion of authority, Raz is offering an even more specific version of Acceptance Moralism.<sup>32</sup> To treat a rule as legitimately authoritative is to treat it as furnishing what could be called “protected reasons.” In addressing to someone a normative statement that purports to furnish such protected reasons, the addressor intends to furnish reasons for the addressee to act in some ways and also second-order reasons that exclude or preempt contrary first-order reasons. In saying that law claims to have legitimate, moral, authority then, Raz seems to mean that, where a community is governed by laws, the community’s officials treat laws as furnishing protected moral reasons to behave as the laws say. And such treatment consists of the normative attitudes they take towards the laws of their legal system and the normative statements they make in enunciating and interpreting the laws. Actually, there are indications that Raz means something even more specific than that, and I will discuss these specificities in due course.

There is an all-important wrinkle in Raz’s view that I have not yet pointed out. Raz is *almost*, but *not quite*, of the view that where laws exist legal officials of the relevant community necessarily take laws as furnishing protected moral reasons. Instead, he is of the view that legal officials either genuinely take *or only pretend to take* laws as furnishing protected moral reasons. They behave *as if* they take the laws as furnishing such reasons, and their internal legal statements often state the existence of protected moral reasons only in the pretended or simulated sense. These last kinds of legal statements are what Raz calls “detached legal statements,” to be distinguished from “committed legal statements.” The fact that according to Raz’s view legal officials can take the laws of their community as real laws without thereby necessarily thinking that such laws furnish protected moral reasons is one of the features of his theory that enables Raz to claim to be a legal positivist.<sup>33</sup>

In sum, whereas Hart argues that in a community governed by laws, at least some members of the community—especially those who are in charge of the workings of the legal system—treat the rules that make up the legal system as furnishing reasons for action, Raz is of the view that in such a community the same kind of members of the community treat, or pretend to treat, the rules of the legal system as furnishing protected moral reasons to do as those rules say. That is what I take Raz to mean when he says that the law claims legitimate, moral, authority. I want to assess this aspect of Raz’s thinking about the nature of law. I shall do so by breaking Raz’s view into

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32. The necessary textual support for my characterizations in this paragraph will be given in Part V, *infra*.

33. RAZ, *supra* note 1, at 100, 113–14.

two components and assessing them in separate steps: First, in Part IV, I address his view that legal officials take laws as furnishing moral reasons. Second, in Part V, I address his view that legal officials take laws as furnishing protected reasons (or protected reasons of some very specific variety that I will specify in due course). To facilitate my exposition, I would also like to dispense with the above-named wrinkle in the following pages, unless I specifically flag otherwise. When I talk about officials' and others' treatment of laws as furnishing reasons for action in outlining Raz's view, I should be taken as talking about their *sincere or pretended* treatment of laws as furnishing reasons for action.

#### IV. Acceptance Moralism

Hart adopted Acceptance Rationalism in order to explain facts like (F1)–(F4), listed in Part II above, which were not readily explained by command theories of law of the sort proposed by Bentham and Austin. In order to explain the existence of customary laws, laws that confer powers (as opposed to those imposing duties), laws that limit the powers of legislators, etc., Hart argued that we need to characterize the members of a community governed by laws as constrained in their behavior and practical thoughts by their allegiance to the rules themselves, rather than by their habit of obeying the persons who impose the rules.

I am not sure that Hart actually needed to adopt something as strong as Acceptance Rationalism to account for facts like (F1)–(F4). It seems to me that a compelling case could be made that so long as a sufficient number of the members of a community or its officials take themselves to have strong enough extraneous or extralegal reasons to behave as their laws demand, a legal system, very much with the features explanatory of (F1)–(F4), could prevail in that community without the members or their officials treating the laws themselves as furnishing reasons to act as the laws say. I do think, however, that the need to account for facts like (F6) and (F8) gives Hart compelling reasons to accept Acceptance Rationalism—which is a bit ironic in retrospect, given that it is Dworkin's view that the inadequacy of Hart's legal theory is revealed in its inability to explain facts like (F6) and (F8). (More will be said on this issue in Part VII below.)

What is important here is that Hart adopted Acceptance Rationalism, and in this Raz has followed him, for explanatory purposes. A question that naturally arises is what the explanatory payoffs are for adopting Acceptance Moralism, a particular version of Acceptance Rationalism that Raz has adopted and Hart has rejected. Raz seems to think that Acceptance Moralism is necessary to explain something like the following:

Many people treat the laws of their community as furnishing reasons, and even duties or obligations, to act as the laws say, and they consider such reasons and duties/obligations as applicable to or binding on individual persons—even in some central areas of life—

whether or not those individuals are personally committed to the relevant laws or the legal system as a whole.

This may seem a mere restatement of Acceptance Rationalism, albeit one that explicitly characterizes the reasons supposedly furnished by laws as categorical reasons, and that explicitly mentions that some of the reasons may amount to duties or obligations. But Raz seems to think that once the thesis of Acceptance Rationalism is put explicitly like this, there is no way to avoid ending up with Acceptance Moralism. That was what he asserted in some of his older works,<sup>34</sup> and he repeats them in the chapter called “Incorporation by Law”: “[W]hatever else we grace with the title ‘moral,’ principles that impose, or give people power to impose on others, duties affecting central areas of life are moral principles. That much about the nature of morality is clear.”<sup>35</sup> Raz’s reasoning then seems to be that any plausible explanation of the nature of law must explain how people can believe that the laws of their community can impose categorical reasons and even duties to behave as the laws say,<sup>36</sup> and the only way to discharge that explanatory burden is to characterize people as treating legal rules as moral rules—that is, as furnishing moral reasons.

It appears here that there is a reductionist assumption running in Raz’s line of thinking. He seems to think that all rules that furnish categorical reasons and obligations are moral rules. But why should we think this exactly? Why should we not think that there may be different types of rules that can be taken to give rise to categorical reasons and obligations? I do not think that Raz has ever really given an adequate explanation of his position on this point,<sup>37</sup> and as far as I can see, there is nothing new in the new volume that enhances the credibility of his position on this issue. Raz may be of the view that normative commitments on certain subject matters, or deontic commitments in general, are necessarily moral commitments. But in this dialectical context, such positions, without further arguments in support, would be question begging.

Richard Holton also argues for Acceptance Moralism and seems to offer a sharp articulation of what may be motivating Raz as well.<sup>38</sup> Holton takes

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34. Joseph Raz, *Hart on Moral Rights and Legal Duties*, 4 OXFORD J. LEGAL STUD. 123, 130–31 (1984); Joseph Raz, *The Purity of the Pure Theory*, 35 REVUE INTERNATIONALE DE PHILOSOPHIE [R.I. PHIL.], 448, 454–55 (1981) (Belg.) [hereinafter Raz, *Purity*].

35. RAZ, *supra* note 1, at 188; *cf. id.* at 278 (“Why must those involved in making or applying the law believe in its moral acceptability? Because the law purports to determine or reflect (moral) rights and duties of its subjects.”).

36. Christine Korsgaard places an analogous explanatory burden on any plausible explanation of the nature of morality. CHRISTINE M. KORSGAARD, *THE SOURCES OF NORMATIVITY* 13 (1996).

37. I have elsewhere discussed Raz’s earlier arguments. Kevin Toh, *Raz on Detachment, Acceptance and Describability*, 27 OXFORD J. LEGAL STUD. 403, 414–20 (2007) (criticizing Raz’s argument that the acceptance needed for an adequate portrayal of internal legal statements is necessarily a moral endorsement).

38. Richard Holton, *Positivism and the Internal Point of View*, 17 LAW & PHIL. 597, 600–06 (1998).

note that according to Hart a person can accept a law, in the sense of thinking that there are reasons to act as that law says, while thinking that morally speaking he ought not to accept that law. Holton then wonders: “How can one both think that one morally ought not accept the law, and yet still think that its demands are justified?”<sup>39</sup> But there is no mystery here. People like Friedrich Nietzsche and Bernard Williams had no problem noticing that morality points us in one direction, while arguing that we ought to think and act differently;<sup>40</sup> and we have no problem understanding what they meant. Nor do we have to resort to such extreme examples. To borrow Raz’s own example from another article, a woman may recognize the moral reasons in favor of continuing her job of helping the homeless but still also recognize and go on to act on the reasons to give up her job in order to have a baby.<sup>41</sup> It may be thought here that this example does not really counter Holton’s point because, although there are moral reasons for the woman to keep her job helping the homeless, she is not morally obligated to do so, and she is morally permitted to quit her job and have a baby. Holton’s point may be that a person cannot think that he has reasons or obligations to do what he thinks he has moral obligation not to do.<sup>42</sup> But that seems to assume that a person can be thought to accept only one consistent set of obligations, or at least that a person can be thought to accept a set of moral rules only if he takes the obligations such rules issue as always overriding other considerations. Should not our moral psychology allow for greater complexity than what such an assumption entails?<sup>43</sup>

It seems that a sensible approach on this issue would be to come up with the best theory of morality and the best theory of law we can muster,<sup>44</sup> and then to see whether legal rules are necessarily moral rules—that is, whether our treatment of the rules that make up legal systems necessarily amounts to

39. *Id.* at 603. Although I disagree with Holton’s Acceptance Moralism, I completely agree with him that Hart’s exposition of the considerations against that view is marred by his conflation of several senses of “reason.” For Holton’s extremely helpful clarification, see *id.* at 603–04.

40. See generally FRIEDRICH NIETZSCHE, *ON THE GENEALOGY OF MORALITY* (Keith Ansell-Pearson ed., Carol Diethe trans., Cambridge Univ. Press 2006) (1887); BERNARD WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* (1985).

41. Joseph Raz, *On the Moral Point of View*, in *REASON, ETHICS, AND SOCIETY: THEMES FROM KURT BAIER, WITH HIS RESPONSES* 58 (J.B. Schneewind ed., 1996), reprinted in JOSEPH RAZ, *ENGAGING REASON* 247, 268–69 (1999).

42. In his discussion of the example, Raz himself resists imputing such decisive importance to the distinction between moral obligations on the one hand and moral reasons in general on the other to explain the seeming justifiability of the woman’s decision. *Id.* at 269–70.

43. According to one plausible interpretation of the oft-mentioned example of Huckleberry Finn, Huck thought he was morally obligated to turn Jim in, yet also thought he had more compelling contrary reasons, upon which he eventually acted. Obviously, what is important here is the plausibility of the thought that someone could find himself in such a situation, not the faithfulness of my interpretation to Mark Twain’s novel. See generally MARK TWAIN, *ADVENTURES OF HUCKLEBERRY FINN* (Oxford Univ. Press 1999) (1884).

44. To clarify, the theories I am talking about here are metatheories—i.e., theories about the nature of law and about the nature of morality—not first-order normative theories about how to act or what to pursue.

our treatment of them as furnishing moral reasons. In chapters 5 and 6 of *The Concept of Law*, Hart develops what he considers the best legal theory in the shape I outlined in Part II. And in chapter 8 of that book, for the purpose of assessing natural law theories, Hart specifies the rudiments of a theory of morality. The four features of moral rules that he names there—purported importance, immunity from deliberate change, voluntary nature of the offenses they address, and specific types of emotional pressures that they involve—seem to distinguish moral rules from legal rules.<sup>45</sup> But whatever the eventual fortunes of a theory of morality along such lines, what is important is that Raz needs a worked-out theory to ground his claim that legal rules are necessarily moral rules. In the absence of such a theory, it seems, the fact that legal rules can be deliberately modified whereas moral rules in general cannot, as well as the fact that violations of moral rules are thought to warrant necessarily the emotion of guilt on the part of the violator and that of resentment on others' whereas violations of legal rules do not, seem enough to create a fairly strong presumption against Acceptance Moralism.

In *On the Moral Point of View* and a number of related writings, Raz has argued against the idea that moral reasons form a distinct set of reasons that differ in a theoretically significant way from those involved in other areas of practical thought.<sup>46</sup> Perhaps these arguments amount to a response to a demand like mine for a worked-out theory of morality. Perhaps Raz can resist that demand by showing that such a theory would be poorly motivated. But such a move, with respect to the issue of Acceptance Moralism, would cut both ways. At least on first blush, there seems a difficulty in arguing both for Acceptance Moralism as a significant thesis and for the rejection of the conception of moral reasons as a significantly distinct set of reasons. Raz allows that there could be nonproblematic context-sensitive deployments of the distinction between moral reasons and other kinds of reasons,<sup>47</sup> and this is what enables him to formulate the above-described example. And perhaps in arguing for Acceptance Moralism, Raz intends to make a context-sensitive distinction of the sort that he finds unobjectionable.<sup>48</sup> But this suggestive

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45. HART, *supra* note 6, at 168, 173–80. For similar conceptions of morality, see generally R.B. BRANDT, *A THEORY OF THE GOOD AND THE RIGHT* (1979); ALLAN GIBBARD, *WISE CHOICES, APT FEELINGS* (1990); and John Skorupski, *The Definition of Morality*, in *ETHICS: ROYAL INSTITUTE OF PHILOSOPHY SUPPLEMENT 35*, 121 (A. Phillips Griffiths ed., 1993), *reprinted in* JOHN SKORUPSKI, *ETHICAL EXPLORATIONS* 137 (1999).

46. RAZ, *supra* note 29, ch. 12; Raz, *supra* note 41, at 247. See generally Joseph Raz, *The Amoralist*, in *ETHICS AND PRACTICAL REASON* 369 (Garrett Cullity & Berys Gaut eds., 1997), *reprinted in* *ENGAGING REASON*, *supra* note 41, at 273; Joseph Raz, *The Central Conflict: Morality and Self-interest*, in *WELL-BEING AND MORALITY: ESSAYS IN HONOUR OF JAMES GRIFFIN* 209 (Roger Crisp & Brad Hooker eds., 2000), *reprinted in* *ENGAGING REASON*, *supra* note 41, at 303.

47. Raz, *supra* note 41, at 250–51.

48. Raz may be relying on a similarly context-sensitive distinction when he says that judgments about the functions of law are based on “evaluative,” though nonmoral, considerations. Joseph Raz, *Authority, Law, and Morality*, 68 *THE MONIST* 295 (1985), *reprinted in* JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 194, 204–14 (1994) [hereinafter Raz, *Authority*]; Joseph Raz, *The Problem About the Nature of Law*, in 3

idea of context-sensitive distinctions is not sufficiently developed or even articulated by Raz for us to assess its viability. More important, Raz has insufficient bases for thinking that there cannot be a theoretically robust distinction between moral and other practical considerations. The conceptions of morality that he enumerates in the relevant writings, for the purpose of rejecting them thereafter, are quite specific and for this reason severely limit the implications of Raz's conclusions. In *On the Moral Point of View*, for example, Raz conceives moral values and reasons as aggregations of relational values and reasons.<sup>49</sup> In *The Amoralist*, moral reasons are conceived as reasons stemming from people's status as values in themselves.<sup>50</sup> Because of the very specific nature of Raz's conceptions of morality in such writings, even if Raz's arguments meant to cast doubt on the theoretically distinct status of morality as thus conceived were cogent and wholly successful,<sup>51</sup> that would not be enough to cast a *general* doubt on attempts by Hart and other like-minded philosophers in specifying the features of moral thought and practice which distinguish them from other kinds of practical thought and practice in a theoretically robust way. And if the distinction between morality and law, made partly by way of those features, were explanatorily useful, then that should be enough to deflect Raz's skepticism.

In sum, I find the considerations to which Raz can be seen to have appealed to argue for Acceptance Moralism quite insufficient for their purposes.<sup>52</sup>

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CONTEMPORARY PHILOSOPHY: A NEW SURVEY 107 (Guttorm Fløistad ed., 1982), *reprinted in* ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS, *supra*, at 179, 193 [hereinafter Raz, *Problem*].

49. Raz, *supra* note 41, at 257.

50. JOSEPH RAZ, *The Amoralist*, in ENGAGING REASON, *supra* note 41, at 274.

51. This is a big "if." In particular, at key junctures in his arguments, Raz relies on a quite controversial conception of practical reason. According to this conception, practical reasons are necessarily considerations in light of which the option an agent pursues is seen by him as valuable or good. See generally JOSEPH RAZ, *Agency, Reason, and the Good*, in ENGAGING REASON, *supra* note 41, at 22; Joseph Raz, *Incommensurability and Agency*, in INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON 110 (Ruth Chang ed., 1997), *reprinted in* ENGAGING REASON, *supra* note 41, at 46; Joseph Raz, *When We Are Ourselves*, in 71 PROC. ARISTOTELIAN SOC'Y 211 (1997), *reprinted in* ENGAGING REASON, *supra* note 41, at 5. This is not the place to try to evaluate this conception of practical reason. But it should be noted that many philosophers reject it. See generally Michael Stocker, *Desiring the Bad*, 76 J. PHIL. 738 (1979); Michael Stocker, *Raz on the Intelligibility of Bad Acts*, in REASON AND VALUE: THEMES FROM THE MORAL PHILOSOPHY OF JOSEPH RAZ 303 (R. Jay Wallace et al. eds., 2004); J. David Velleman, *The Guise of the Good*, in 26 NOÛS 3 (1992), *reprinted in* J. DAVID VELLEMAN, THE POSSIBILITY OF PRACTICAL REASON 99 (1999).

52. There is one particular sense of *moral* that Raz could be employing in arguing for Acceptance Moralism that I have intentionally avoided considering. Following Kelsen, Raz has taken the position that in order to characterize in an adequate way people's normative attitudes, we (the theorists) have to deploy first-order normative statements ourselves. JOSEPH RAZ, *Legal Validity*, in THE AUTHORITY OF LAW, *supra* note 2, at 146 [hereinafter RAZ, *Legal Validity*]; Raz, *Purity*, *supra* note 34. And Raz has followed Kelsen also in thinking that any such first-order normative statements are moral statements. Here, the contrast between "moral" and "nonmoral" is the contrast between first-order normative and metanormative. There are many moments in

## V. Acceptance Protectionism and Acceptance Autonomism

At the heart of Raz's thinking about the authoritative nature of law is the notion of exclusionary reason. In a 1979 article, Raz says: "The law's claim to legitimate authority is not merely a claim that legal rules are reasons. It includes the claim that they are exclusionary reasons for disregarding reasons for non-conformity."<sup>53</sup> Raz introduced the notion of exclusionary reason in his seminal book *Practical Reason and Norms*.<sup>54</sup> In our practical reasoning, we do not treat all reasons for or against each of our available options as of a same kind, so that our job is merely that of balancing all known applicable reasons. Instead, some of the reasons that we respond to are those that call for or against our acting on other reasons. Those among these "second-order reasons" that call for the agent to refrain from acting on certain first-order reasons, and thereby *exclude* those first-order reasons from the agent's deliberative consideration, are what Raz calls "exclusionary reasons."<sup>55</sup>

According to Raz's conception of the law as "claiming legitimate authority" then, the officials of a community governed by laws treat their laws as authoritative. That means that they accept the rules that make up their legal system, in the sense not only of treating those rules as generating reasons to behave as those rules say but also treating those rules as generating exclusionary reasons to refrain from acting on reasons against acting as those rules say. And the legal statements, by way of which the officials enunciate and interpret laws, purport to give both first-order reasons and exclusionary reasons that exclude contrary first-order reasons. Raz uses the term "protected reason" to refer to this combination of a first-order reason and an attendant exclusionary reason that excludes contrary first-order reasons.<sup>56</sup> "Acceptance Protectionism" is my not-so-lovely neologism to refer to the aspect of Raz's view of the nature of law that I have just outlined. In stating that law claims "legitimate, moral, authority," Raz is endorsing both Acceptance Moralism and Acceptance Protectionism.

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*Between Authority and Interpretation* where this conception of morality seems to surface. But I have intentionally avoided discussing this aspect of Raz's thinking for a couple of reasons. First, Raz's reasoning for adopting Kelsen's positions on these issues strikes me as quite inadequate, as I have tried to show elsewhere. Toh, *supra* note 37, at 421–26. And there is nothing new in the new volume that adds credibility to the Kelsenian positions. Second, given this inadequacy, we have reasons to figure out whether what Raz says about the moral nature of legal rules can be construed in alternative ways. And further given that Raz says many things that do not tie him to the Kelsenian lines just described, we should follow up on those leads. That is what I have tried to do in Part IV *supra*.

53. JOSEPH RAZ, *The Claims of Law*, in THE AUTHORITY OF LAW, *supra* note 2, at 28, 30; see also JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 233–34 (1980).

54. RAZ, *supra* note 14, § 1.2.

55. *Id.*

56. RAZ, *supra* note 1, at 216; RAZ, *supra* note 14, at 191.

So, why should we accept Acceptance Protectionism? In *Practical Reasons and Norms*, Raz argued that the way mandatory rules<sup>57</sup> figure in our practical thinking should be modeled in terms of exclusionary reasons.<sup>58</sup> Mandatory rules are those that we think of as imposing obligations or duties, and perhaps more widely those that are formulated in terms of “must” and “ought.” Raz proposes to conceive each such rule as furnishing a protected reason—i.e., a combination of a first-order reason to do something and an exclusionary reason that demands refraining from acting on contrary first-order reasons. This quite plausible conception of mandatory rules has obvious explanatory payoffs for theorizing about the nature of law. Undeniably, many legal rules purport to impose obligations or duties, and Raz’s analysis provides us a compelling way of explaining how such laws figure in our practical thinking. Hart, for one, in one of his last articles, endorses and makes use of Raz’s analysis in explaining legal obligations.<sup>59</sup> And it is not just duties or obligations that can be explained in terms of exclusionary reasons. Raz has also offered quite compelling arguments to show that significant classes of permissions and normative powers should be explained in terms of exclusionary reasons.<sup>60</sup> What he has shown, in my opinion, is that at least a significant portion of our practical thinking involving deontic concepts, including legal thinking, can be explained in terms of exclusionary reasons.

What we have in the resulting Acceptance Protectionism is a relatively thin conception of what it is to treat some rules as authoritative, and what I consider a well-motivated rationale for it based on its explanatory payoffs. We find in the pages of *Between Authority and Interpretation*, and in Raz’s recent works more generally, some thicker or more inflated conceptions of the attitudes that officials and others take towards their laws in treating them as authoritative. I want to spend the rest of this Part outlining and assessing a number of such thicker conceptions. All of the ones that I will take up are variations on the idea that in treating some rules as authoritative, people treat them as furnishing not merely protected reasons, but *content-independent* protected reasons, in the sense to be specified presently. Let me call such a conception of the attitudes of acceptance of laws “Acceptance Autonomism.” There is some evidence for thinking that Raz is of the view that, in treating some rules as authoritative in the sense of treating them as furnishing

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57. Raz uses “mandatory norms.” RAZ, *supra* note 14, at 49. By “norm,” Raz intends to refer to “rules” and “principles” that are “mandatory” in the sense specified in the text. *Id.* at 9, 49. My guess is that Raz saw a need to mention both rules and principles given the significance that Dworkin attached to the existence of principles in his early criticism of Hart. *See generally* DWORKIN, *Rules I*, *supra* note 12. Like Hart, and unlike Dworkin and Raz, I use the term “rule” to refer to all kinds of practical standards, including what Dworkin calls principles.

58. RAZ, *supra* note 14, at 73–84.

59. *See generally* H.L.A. HART, *Commands and Authoritative Legal Reasons*, in *ESSAYS ON BENTHAM*, *supra* note 7, at 243.

60. RAZ, *supra* note 14, at 85–106.

content-independent protected reasons, people have to posit or presuppose the existence of some rule makers or “authors” of the rules. I will first examine the strong and weak versions of such “Authorial Acceptance Autonomism” before taking up the strong and weak versions of “Non-authorial Acceptance Autonomism.” I am chagrined by the proliferation of such unattractive labels, but I adopt them because they will much facilitate my subsequent exposition.<sup>61</sup>

It is a striking fact about Raz’s discussions of the authoritative nature of law that he (almost) invariably speaks of laws as issued by some authoritative persons or institutions. And that is certainly the case in the pages of *Between Authority and Interpretation*. It is not clear to me whether in such instances Raz is displaying a commitment to the view that in treating some set of rules as authoritative, a group of people have to see such rules as issued by some authoritative persons. Raz seems to disavow such a commitment in the 1979 article *The Claims of Law*, when he says:

Authority was analysed in the context of a person in authority and his authoritative utterances. Such an analysis could in principle apply to a legislator and his acts of enactment. But not all law is enacted. Customary rules can be legally binding. Can they be authoritative despite the fact that they are not issued by authority? It is possible to talk directly of the authority of the law itself. A person’s authority was explained by reference to his utterances: he has authority if his utterances are protected reasons for action, i.e. reasons for taking action they indicate and for disregarding (certain) conflicting considerations. The law has authority if the existence of a law requiring a certain action is a protected reason for performing that action . . . .<sup>62</sup>

Regardless of this earlier disavowal, however, it may be that Raz now subscribes to Authorial Acceptance Autonomism. That is what Andrei Marmor has argued in a recent article.<sup>63</sup> In particular, Marmor argues that the positing of authoritative figures (or “authors,” as he puts it) is necessitated by the fact that people who treat some rules as authoritative treat them as generating content-independent protected reasons.<sup>64</sup> Some fact is supposed to constitute a content-independent reason to perform some action

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61. I am also unhappy about the fact that nothing snappier than “Acceptance Autonomism” seems available as a label for the relevant conception of rule-acceptances.

62. RAZ, *supra* note 53, at 29.

63. See generally Andrei Marmor, *Authorities and Persons*, 1 LEGAL THEORY 337 (1995), revised and reprinted in ANDREI MARMOR, POSITIVE LAW AND OBJECTIVE VALUES 89 (2001). And that is also what David Enoch has argued in conversations. Thanks to Enoch for pointing me to Marmor’s article. In his article, Marmor does not mention the above-quoted passage from *The Claims of Law*, and more generally does not mention any change in Raz’s position on this issue. In personal communication, Les Green told me that he too suspects that Raz is committed to an authorial conception of authority, but Green also expressed a puzzlement as to how such a conception can be squared with the goal of explaining customary laws.

64. MARMOR, *supra* note 63, at 97–98.

if that fact is a reason for performing such an action, and that fact is not directly related to the nature or character of the called-for action.<sup>65</sup> According to Raz and Marmor, in treating certain rules as authoritative, people treat the fact that an authoritative figure has issued or instituted those rules, instead of the facts having directly to do with the nature or character of the actions those rules call for, as the reason to adhere to those rules.<sup>66</sup>

It seems undeniable that people often treat the laws of their community as furnishing content-independent reasons. The fact, noted in the preceding Part, that laws are amenable to modification at will seems to imply that at least in some cases people will treat their laws as furnishing content-independent reasons. The question is whether such treatment really requires, as a conceptual matter, authoritative figures as the authors of those laws. Much here depends on how strongly or literally we interpret the alleged requirement of authoritative figures. If we were to require persons or institutions that deliberately make laws, then we would be ill-equipped to explain people's treatment of customary laws as authoritative. That was what motivated Raz earlier to disavow the authorial conception of authority. Even Marmor admits that customary laws present a problem for thinking that authoritative figures are necessary.<sup>67</sup>

Marmor, however, seems amenable to adopting a weaker version of Authorial Acceptance Autonomism when he highlights what he deems "the crucially important point" that "customs do reflect the view of the bulk of the community about how they themselves ought to behave."<sup>68</sup> This statement seems intended to reflect a view of customary laws articulated earlier by Raz.<sup>69</sup> Also relevant here is the fact that when Raz appeals to the considerations having to do with authority to argue for what he calls the "Authoritative Intention Thesis" in the chapter entitled "Intention in Interpretation"<sup>70</sup>—according to which, the intentions of lawmakers should be treated as the controlling considerations in interpretations of laws—he explicitly limits the scope of that thesis to "deliberately made" laws, and leaves out "practice-based" laws.<sup>71</sup> In such moments, both Raz and Marmor seem to recognize that if their goal is to provide a general explanation of people's treatment of laws as authoritative—i.e., an explanation that applies to people's treatment of customary laws as authoritative as well as to such treatment of deliberately

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65. HART, *supra* note 59, at 254; RAZ, *supra* note 1, at 210; RAZ, *supra* note 29, at 35. The possibility that Raz may have changed his mind after 1979 on the need for authoritative figures gains some plausibility once we notice that he was probably not fully mindful of the content-independent nature of the reasons stemming from authoritative directives until Hart's 1982 article *Legal Duty and Obligation* appeared.

66. RAZ, *supra* note 1, at 210; MARMOR, *supra* note 63, at 97–98.

67. MARMOR, *supra* note 63, at 110.

68. *Id.*

69. Raz, *Authority*, *supra* note 48, at 205.

70. RAZ, *supra* note 1, ch. 11.

71. *Id.* at 275, 289.

enacted laws—then they cannot stick to the strong or literal version of the personal conception of authority. People do not necessarily posit deliberate lawmakers in treating laws as authoritative. At most, people need to think that their laws reflect the judgments of some persons, who may or may not have deliberately enacted those laws, as to how the people ought to behave.

But it is unclear that even this weaker form of “authorship” is required. What Marmor emphasizes is the fact that people often treat their laws as furnishing content-independent reasons. What exactly is it to treat some rules as furnishing content-independent reasons? It seems to me that Raz has something like the following in mind: in accepting a set of rules as furnishing content-independent reasons, a person is motivated to act as the rules demand out of his desire to do *what those rules demand*, where this italicized phrase is read *de dicto* rather than *de re*. In other words, it is not that there are certain things that the relevant rules demand of the person, and the person desires to do those things (*de re* reading); instead, the person desires to do whatever things are required of him by those rules (*de dicto* reading). A person motivated by the second type of desire is someone who treats the rules as furnishing content-independent reasons. Even if the relevant rules were to require him to do things quite at variance with what they actually require, the person would be motivated to act in those alternative ways. Now, it seems to me that a person can treat some laws of his community as furnishing content-independent reasons in this sense without having to think that those laws reflect the judgments of some persons as to how the members of his community ought to behave. It may be wondered how anyone could develop a trust or confidence of a requisite kind in a set of rules without thinking that those rules reflect some trusted person’s judgment. Here is one possibility. One may think that heavy selection pressures (dissociated from people’s normative judgments) over time favor adherents of good rules and weed out adherents of bad rules, so that the rules that survive and prevail in one’s community are more likely than not good, trustworthy rules. I am not sure how plausible a hypothesis like this is, and when if ever we are warranted in taking such a view of some set of rules. But clearly, the hypothesis is not a conceptual impossibility, and at least some influential writers have taken seriously a similar view of the laws prevailing in their communities.<sup>72</sup> And we can cook up other hypotheses. For example, a group of people could treat some rule as generating content-independent reasons without thinking that the rule represents someone’s normative view; instead, they may simply think, for example, that that is how things have been done over the years.<sup>73</sup> My example here resembles an example that Raz himself uses at one point in

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72. See generally EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (Conor Cruise O’Brien ed., 1976) (1790); MONTESQUIEU, THE SPIRIT OF THE LAWS (Anne M. Cohler et al. eds., 1989) (1748).

73. If I am not mistaken, I have met at least half a dozen English people who have family traditions of exactly that sort—e.g., what kind of pudding to eat on Christmas.

*Reasoning with Rules.* A person may have a personal routine of taking a particular route in walking to and from work, and the existence of that routine, Raz says, could be a content-independent reason to walk along that route on some particular day.<sup>74</sup> Such a routine does not have to be seen by the person as a normative opinion of anyone, not even his earlier self, as to how he ought to behave. These considerations seem enough to show that a person can treat some rules as furnishing content-independent reasons without thereby thinking that those rules reflect normative judgments of anyone. In the first hypothetical case I discussed, for example, what a person defers to is not someone's normative judgments, but instead the mechanism that applies the selection pressures. Analogous things could be said about the other examples.<sup>75</sup>

I am then inclined to reject both versions of Authorial Acceptance Autonomism, to one or the other of which Raz *may* be committed. The fact that laws are often treated as furnishing content-independent protected reasons does not seem to require positing authors in either the strong or weak sense we have just discussed. The second pair of Acceptance Autonomism I want to consider are those according to which people treat the laws of their community as furnishing content-independent protected reasons, without thinking thereby that there are deliberate lawmakers or tacit endorsers. Once again, there are strong and weak versions of such Non-authorial Acceptance Autonomism. I believe that the strong version is problematic, whereas the weak version is probably correct.

As noticed above, people often treat the laws of their community as furnishing content-independent reasons. But how thoroughly or extensively can they do so? When it comes to nonlegal rules, there are often clear limits as to how thoroughly content independent the output reasons can be so treated. Raz says the following at one point in *Reasoning with Rules*:

It is important not to confuse content-independence with unlimited jurisdiction. A justification can be, and typically will be, both content-independent and limited. The club committee [authorized e.g., to decide how many guests could be invited by members] cannot

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74. RAZ, *supra* note 1, at 213. Raz comments that the justification of such a decision would not be "entirely content-independent" since the appeal to the routine would have been insufficient if alternative routes were much more attractive. But that alone does not undermine the point I am making. The non-existence of clearly more attractive alternative routes underdetermines the choice of the route picked out by the routine. The existence of the routine is necessary to pick out that particular route, and therefore amounts to a content-independent, albeit content-sensitive, reason for taking that route.

75. Both Raz and Marmor distinguish practical authorities from theoretical authorities by saying that the former make, whereas the latter do not, "practical differences" of the following type. MARMOR, *supra* note 63, at 100–01; RAZ, *supra* note 29, at 30. Even when a person judges that the particular directives of a practical authority were mistaken, he could treat those directives as furnishing reasons. Notice that this requirement could be satisfied in the hypothetical scenarios I am imagining. For example, even when a person judges that some particular rule generated by a selective mechanism is a bad rule, he may abide by it out of concerns about societal coordination or some such.

be authorized to commit or order others to commit murder, etc. It is, if you like, content-sensitive in that it does not allow for any content whatsoever, while being content-independent, in not being specific to one rule. What makes a justification content-independent is not whether it can justify more or less possible rules . . . . That there are other rules which, because of their content, the justification does not show to be binding is immaterial.<sup>76</sup>

It may be thought that legal authorities and rules are no different. There are invariably limitations on the powers of legal authorities, and also limitations on the kind of contents that legal rules can have. Such limitations are imposed for example by constitutional provisions, and people's commitments to such constitutional provisions do not usually amount to treating them as furnishing content-independent reasons. In other words, people's commitments to those provisions are conditional on what those provisions actually say. And that would mean that ultimately, people's acceptances of their laws usually are not thoroughly content independent.

Raz has, however, argued that laws can and must ultimately be treated as furnishing content-independent reasons in a completely thoroughgoing way. At one point in *The Morality of Freedom*, he says:

In most contemporary societies the law is the only human institution claiming unlimited authority. . . . Parliament, according to English constitutional theory, can make and unmake any law, on any matter, and to any effect whatsoever. . . . [And] things are much the same in countries with strong constitutional traditions. The American Congress's power to legislate may be limited by the Constitution, but the Constitution itself may be changed by law. Hence, even in the USA, the law claims unlimited authority.<sup>77</sup>

Raz goes on to add:

Any conditional or qualified recognition of legitimacy will deny the law the authority it claims for itself. . . . [T]he law provides ways of changing the law and of adopting any law whatsoever, and it always claims authority for itself. That is, it claims unlimited authority, it claims that there is an obligation to obey it whatever its content may be.<sup>78</sup>

According to Raz's reasoning, in recognizing that any existing legal limitations on a community's laws could be changed by the law itself, people conceive their laws as generating reasons that are *ultimately* thoroughly content independent.

There is, however, a tension between such a conception of laws and what Raz calls the "Normal Justification Thesis." According to that thesis, a person's treatment of some rule as authoritative is normally or primarily jus-

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76. RAZ, *supra* note 1, at 211 n.13.

77. RAZ, *supra* note 29, at 76.

78. *Id.* at 76-77.

tified only if that person, by being guided by that rule, would better conform to the reasons that apply to him anyway than he would otherwise.<sup>79</sup> The thesis, or more generally Raz's *Service Conception of Authority* of which the thesis is a central component, has been a topic of much philosophical controversy, and Raz spends one of the longest articles in the new volume responding to a number of the criticisms that that conception has elicited.<sup>80</sup> But I do not think that these criticisms bear on the point that I here want to make in relation to the Normal Justification Thesis; I think we can assume here that the thesis is roughly true. According to the thesis, in treating certain rules as authoritative, people would be treating those rules in a way that would be warranted normally or primarily only if such treatment would enable them to better conform to the reasons that apply to them anyway. We may or may not be warranted in assuming that people are at least implicitly cognizant of the (rough)<sup>81</sup> truth of the Normal Justification Thesis (although obviously not by that name). Raz has observed that people cannot accept advice without some understanding of the reason for which they should normally take advice—i.e., that the advice is likely to be sound.<sup>82</sup> Analogously, we might assume that people cannot treat some set of rules as authoritative without some understanding of the reasons for which those rules are to be so treated. This would mean that people could not normally treat any set of rules as furnishing protected reasons that are as thoroughly content independent as Raz seems to think that those furnished by laws are. Presumably, people have opinions and commitments about what ground-level reasons apply to them anyway. And assuming that they are cognizant of the truth of the Normal Justification Thesis, people could not in most cases coherently treat a set of rules as authoritative—in the sense at least of treating them as generating protected reasons—unless they believed that those rules, generally speaking, effectively mediate between the applicable reasons and their actions. Or at the least, people could not believe that the rules they treat as authoritative in fact undermine or adversely affect, in a systematic way, their abilities to conform to the applicable reasons.

Alternatively, we might assume that people are not generally cognizant of the truth of the Normal Justification Thesis. Even in that case, if we were

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79. RAZ, *supra* note 1, at 136–37, 216; RAZ, *supra* note 29, at 53.

80. See the chapter entitled “The Problem of Authority: Revisiting the Service Conception” for a treatment of this issue. RAZ, *supra* note 1, ch. 5. In this chapter, Raz actually introduces a condition for justification of authoritative treatment additional to the one that the Normal Justification Thesis designates. He says that not only must the relevant person do better in conforming to applicable reasons by being guided by the relevant rules than otherwise but also that on the issue at hand it is more important for the person to conform to reason than to decide for himself without deferring to the rule issuer. *Id.* at 136–37. I doubt, however, that this is an improvement over the original self-standing Normal Justification Thesis. Why should we not see the set of reasons that apply to the person anyway as including the reasons having to do with autonomy or independence?

81. I will dispense with this qualifier in the sequel.

82. RAZ, *supra* note 29, at 54.

to take Raz's position that people conceive of their laws as furnishing reasons that are ultimately thoroughly content independent, and at the same time assume as we should that they have opinions and commitments about what ground-level reasons apply to them, then we would be characterizing them as having normative attitudes that are systematically incorrect. In effect, people would be seeing themselves as having reasons to behave as the laws demand no matter what those laws say, and according to the Normal Justification Thesis, such attitudes would be normatively defective. And given the systematic incorrectness of such attitudes, we should attribute them to people only if such attribution is really unavoidable because no comparable alternative explanation is in the offing.<sup>83</sup> In the current case, we actually have a plausible alternative explanation. We can distinguish between two versions of Non-authorial Acceptance Autonomism, both of which recognize that people treat laws as furnishing content-independent protected reasons, and neither of which necessarily posits some lawmaker. According to one, the one which Raz seems to support, the furnished reasons can and must be thoroughly or unlimitedly content independent. According to the other version, which amounts to the alternative we want, the reasons can be content independent only to some limited extent (which we need not specify). As far as I can see, the stronger version of Non-authorial Acceptance Autonomism does not offer any additional explanatory payoffs, and we can reject it without regret. In sum, whether or not we assume that people are cognizant of the truth of the Normal Justification Thesis, we should reject the strong version of Non-authorial Acceptance Autonomism in favor of the weak version. Such rejection is required by the Normal Justification Thesis, which builds in a certain amount of content sensitivity to people's treatment of rules as authoritative.

To recapitulate this relatively long Part, we began with the simple Acceptance Protectionism, according to which people treat their laws as generating protected reasons. We then took up and assessed thicker or more inflated conceptions of the attitude of rule-acceptance—the four versions of Acceptance Autonomism—each of which recognizes the fact that people treat laws as furnishing content-independent protected reasons. We rejected the two authorial versions of Acceptance Autonomism. And as for the non-authorial versions, we accepted the version that recognizes some content sensitivity, while rejecting the version that does not. In effect, according to the version of Acceptance Autonomism that is left standing, the one that Raz is entitled to in saying that the law “claims legitimate authority,” people treat the laws of their community as furnishing limitedly content-independent

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83. For similar reactions to J.L. Mackie's “error theory” in ethics, see Simon Blackburn, *Errors and the Phenomenology of Value*, in *ETHICS AND OBJECTIVITY* (Ted Honderich ed., 1985), reprinted in SIMON BLACKBURN, *ESSAYS IN QUASI-REALISM* 149, 149 (1993); David Lewis, *Dispositional Theories of Value*, 63 *PROC. ARISTOTELIAN SOC'Y* 113 (1989), reprinted in DAVID LEWIS, *PAPERS IN ETHICS AND SOCIAL PHILOSOPHY* 68, 92–93 (2000). Mackie proposed his error theory in J.L. MACKIE, *ETHICS: INVENTING RIGHT AND WRONG* ch. 1 (1977).

protected reasons. This conclusion will prove useful in assessing Raz's argument for the Sources Thesis.

## VI. Sources Thesis

For some time now, legal philosophers have been preoccupied with an increasingly baroque—some would say “scholastic”—debate about whether communities' ultimate criteria of legal validity can include some normative, nonfactual criteria. Hart took note that constitutions of countries like the United States explicitly incorporate moral standards.<sup>84</sup> But it is Dworkin who gave the debate its current contours by arguing that the nature of adjudication indicates that ultimate criteria of legal validity can include normative tests, and that legal positivism is erroneously committed to there being only purely factual criteria of legal validity.<sup>85</sup> The question of whether moral criteria can be parts of the ultimate criteria of legal validity thereby became the question of whether nonfactual criteria can be parts of the ultimate criteria of legal validity.

Some legal positivists took the “Oh yeah?” approach in reacting to Dworkin and argued that legal positivism can allow ultimate criteria of legal validity to include normative criteria.<sup>86</sup> Others have taken the “So what?” approach instead, and have argued that legal positivism is indeed committed to there being only factual criteria of legal validity, but that this is not a problem.<sup>87</sup> The two positions often go by the labels “inclusive legal positivism” and “exclusive legal positivism” respectively, and Raz has been the leader among exclusive legal positivists.

The particular version of exclusive legal positivism that Raz has defended over the years is called the “Sources Thesis.” A law has a “source,” and therefore is “source based,” if its existence and content can be determined by appeals to what Raz calls “social facts”—i.e., behavioral and

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84. HART, *supra* note 6, at 204.

85. See generally DWORKIN, *Hard Cases*, *supra* note 13, at 81; DWORKIN, *Rules I*, *supra* note 12, at 14; DWORKIN, *Rules II*, *supra* note 12, at 46. A plausible reading of these articles is to see Dworkin as arguing that the best explanation of the fact that judges often appeal to normative considerations in deciding cases, and the fact that when they do so judges do not see themselves as exercising discretion but instead as legally constrained (what I call “(F6)” in Part II *supra*), is provided by the hypothesis that criteria of legal validity can include normative tests.

86. E.g., JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE* 107 (2001); W.J. WALUCHOW, *INCLUSIVE LEGAL POSITIVISM* ch. 5 (1994); Jules L. Coleman & Brian Leiter, *Legal Positivism*, in *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 241, 243 (Dennis Patterson ed., 1996). It is not clear whether such philosophers are really entitled to say that the ultimate criteria of legal validity can be partly normative, for they believe that the inclusion of such normative criteria occurs, if it does, only if certain facts underwrite such inclusion. Because of this qualification, it is far from clear how the inclusive legal positivist answer provides an adequate reply to Dworkin's question.

87. In the text, I am taking advantage of the common lore among philosophers that all reactions to arguments could be divided into the “Oh yeah?” and “So what?” varieties. My first exposure to this lore was from Nicholas Sturgeon, *What Difference Does It Make Whether Moral Realism Is True?*, 24 S. J. PHIL. 115, 115 (1986).

psychological facts that constitute social practices, legislative enactments, judicial decisions, etc.—and without an appeal to any normative considerations.<sup>88</sup> The Sources Thesis is the view that all laws are source based. It is meant to tell us what legal reasoning *in the strict sense* is like. According to the Sources Thesis, legal reasoning, in the strict sense of reasoning aimed at determining the existence and content of existing laws, is a purely factual or nonnormative reasoning. The modifier *in the strict sense* is necessary because Raz does not think that legal reasoning *broadly conceived* is limited to that which is aimed at determining the existence and contents of existing laws. When the reasons not represented by or depended upon by legal rules call for it and outweigh the reasons represented by legal rules, judges and other officials must exercise discretion and reason contrary to what the existing laws say.<sup>89</sup> In some such cases, they create new laws that control future legal reasoning in the strict sense.

Raz has influentially argued that the authoritative nature of law provides very strong grounds for thinking that the Sources Thesis is true. A version of that authority-based argument is given in “On the Nature of Law,” but that version is quite incomplete.<sup>90</sup> What Raz seems to be relying on there, and elsewhere in *Between Authority and Interpretation*,<sup>91</sup> is what many consider the canonical version of the argument in the article *Authority, Law, and Morality*.<sup>92</sup> Given the importance of this argument for Raz’s overall thinking about the nature of law, let me first outline it in the personese that he favors. Throughout, authority means “legitimate authority.”

- (6.1) The law claims authority.
- (6.2) Since the law claims authority, it normally or typically is capable of possessing authority.
- (6.3) To be capable of possessing authority, the law must have at least the following two nonnormative features: (i) The law’s directives reflect someone’s views as to how the subjects ought

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88. RAZ, *supra* note 1, at 111, 114–16. In these pages, Raz does not use the term “the Sources Thesis” to refer to the view that he summarizes and endorses. He does at page 380, but there he is quoting from Gerald Postema’s formulation of the thesis. *Id.* at 380 (quoting Gerald J. Postema, *Law’s Autonomy and Public Practical Reason*, THE AUTONOMY OF LAW 79, 92 (Robert P. George ed., 1996)). For more canonical formulations of the Sources Thesis, where Raz also identifies the thesis by its name, see, for example, RAZ, *supra* note 2, at vi–vii; JOSEPH RAZ, *Legal Positivism and the Sources of Law*, in THE AUTHORITY OF LAW, *supra* note 2, at 37, 47–48; J. RAZ, *Legal Reasons, Sources and Gaps*, 11 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 197, 205 (1979) (F.R.G.), reprinted in THE AUTHORITY OF LAW, *supra* note 2, at 53, 63; and Raz, *Authority*, *supra* note 48, at 194.

89. RAZ, *supra* note 1, at 116, 333, 376–79.

90. *Id.* at 106–15. It is also marred by its reliance on a conception of laws as literally representing decisions of the community acting as an agent on behalf of its members. *Id.* at 101–04. In *Reasoning with Rules*, a chronologically later article, Raz explicitly repudiates this conception. *Id.* at 217–18.

91. *E.g.*, *id.* at 381.

92. Raz, *Authority*, *supra* note 48, at 194.

to behave; and (ii) both these directives' status as issues of the law and their contents can be ascertained without relying on or delving into the reasons on which the directives are meant to be based and that the directives are meant to exclude in the subjects' practical thinking.

- (6.4) It follows that the law normally or typically possesses the two nonnormative features.
- (6.5) If the Sources Thesis were true, then the law would have the two nonnormative features, whereas the truths of the competing leading theses about the nature of law would not ensure the law's having those features.
- (6.6) By inference to the best explanation, the Sources Thesis is probably true.

I believe that this argument can be translated without distortion into the following nonpersonalized form:

- (6.7) Necessarily, many members of a community governed by laws treat the laws of their community as authoritative.
- (6.8) Necessarily, if many people treat some rules as authoritative, then those rules must normally or typically be appropriate or fitting objects of being treated as authoritative.
- (6.9) Necessarily, if some rules are appropriate or fitting objects of being treated as authoritative, then those rules have at least the following two nonnormative features: (i) They reflect someone's views as to how the members ought to behave; and (ii) their existence and contents can be ascertained without relying on or delving into the reasons on which the rules are meant to be based and that the directives are meant to exclude in the members' practical thinking.
- (6.10) It follows that normally or typically the laws of a community have the two nonnormative features.
- (6.11) If the Sources Thesis were true, then the laws would have the two nonnormative features, whereas the truths of competing leading theses about the nature of law would not ensure the laws having those features.
- (6.12) By inference to the best explanation, the Sources Thesis is probably true.

I want to assess Raz's argument for the Sources Thesis in this last form. I am mindful that there are other versions of the argument, and also alternative arguments, for the Sources Thesis that Raz has relied on in various places.<sup>93</sup> But given the canonical status that the argument in *Authority, Law, and Morality* seems to enjoy, an assessment of it alone would be very much

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93. As a matter of fact, Raz quickly outlines an alternative argument for the thesis in *Authority, Law, and Morality* itself. *Id.* at 204.

worth our while. I will not speculate here as to how widely the considerations that I will be using to criticize that argument will be applicable to the various variations of and alternatives to this argument.

Clearly, (6.9) is the key move in the argument. But let me take up (6.8) first. Here, Raz is claiming that certain conceptual mistakes are normally impossible or at least extremely unlikely. Obviously, how strong or plausible a claim that Raz is making here depends on what he thinks is involved in thinking that certain rules are fitting objects of being treated as authoritative (or in the personalized version of the argument, what he thinks is involved in being capable of possessing authority)—in other words, on the specific non-normative features that (6.9) enumerates. But bracketing for the moment the specific content of (6.9), we may wonder why Raz would rule out *any* kind of conceptual mistake on the part of those who take their laws as authoritative. Raz explains as follows:

Since the claim [that the law possesses legitimate authority] is made by legal officials wherever a legal system is in force, the possibility that it is normally insincere or based on a conceptual mistake is ruled out. It may, of course, be sometimes insincere or based on conceptual mistakes. But at the very least in the normal case the fact that the law claims authority for itself shows that it is capable of having authority.

Why cannot legal officials and institutions be conceptually confused? One answer is that while they can be occasionally they cannot be systematically confused. For given the centrality of legal institutions in our structures of authority, their claims and conceptions are formed by and contribute to our concept of authority. It is what it is in part as a result of the claims and conceptions of legal institutions.<sup>94</sup>

In other words, according to Raz, our understanding of the nature of authority has been fundamentally shaped by and intertwined with our understanding of the nature of law. The law is paradigmatic of what can be authoritative. And for this reason, Raz seems to think, people are quite unlikely to make certain *elementary* mistakes, or at least to make such elementary mistakes systematically, in attributing authoritativeness to laws.

I am not sure what exactly to think about this hypothesis of conceptual safety net, so to speak, but if pressed I would be inclined to reject it. The development of anti-individualist semantics (which will be discussed in the next Part) indicates that people can be quite wrong (and systematically so) about what at one time was considered a paradigmatic or archetypal member of the extension of a concept. But putting this off-the-cuff skepticism to one side, let me make one other observation about Raz's argument here before moving on to a consideration of (6.9), which will enable us to get a real measure of (6.8). If, as Raz believes, our concept of authority has been

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94. *Id.* at 201.

shaped fundamentally by our understanding of law, then that would be an additional reason to reject Authorial Acceptance Autonomism, at least in its strong version. Customary laws traditionally have been a large and important part of our legal practice. Assuming Raz's safety-net hypothesis, if in fact our concept of authority has been fundamentally shaped by our understanding of the nature of law, then our laws cannot be authoritative only in the sense of requiring deliberate lawmakers.

According to clause (i) of (6.9), only those rules that are reflective of someone's normative judgments could be treated as authoritative. But my arguments in the preceding Part against both the strong and weak versions of Authorial Acceptance Autonomism show that this is not the case. People can treat some rules as content-independent protected reasons even when they do not view the rules as reflecting someone's normative judgments or views as to how people should behave. Turning now to clause (ii), clearly the central move in the argument for the Sources Thesis, we should ask: Does treating some rules as authoritative really necessarily involve thinking that whether they prevail and what they say can be determined without resorting to the underlying reasons on which the rules are supposed to be based? What is all-important here is the sense of "authoritative" that is in play. And that in turn depends on which among the various conceptions of the psychological attitude of rule-acceptance that we have enumerated and considered in the last Part is correct. If "authoritative" were defined by way of the simple Acceptance Protectionism, the one according to which people treat laws as furnishing protected but not necessarily content-independent reasons, then Raz's argument for the Sources Thesis would have a very unwelcome implication. Remember that there are moral rules that we also treat as authoritative in the simple sense of furnishing protected reasons to act as the rules say.<sup>95</sup> Some moral rules can be characterized as source based—e.g., those having to do with promises, agreements, and also perhaps individual volitional commitments such as decisions and intentions. But Raz would not want to characterize all moral rules, or even all deontic moral rules, as source based. Again and again, he has said that legal rules are distinct from moral rules (or given Raz's Acceptance Moralism, nonlegal moral rules) in being source based.<sup>96</sup> And rightly so.

What would enable Raz to steer clear of this unwanted implication is a conception of the attitude of rule-acceptance that is thicker or more inflated than Acceptance Protectionism, and more particularly one that recognizes the content-independent nature of the reasons that are putatively furnished by legal rules. Both versions of Authorial Acceptance Autonomism are unacceptable for the reasons that we have already discussed. Non-authorial Acceptance Autonomism is more promising, but here I have argued that the strong or unconstrained version, according to which laws are taken as gener-

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95. RAZ, *supra* note 1, at 382.

96. *Id.* at 115–16.

ating protected reasons that are ultimately completely or unlimitedly content independent, cannot be correct. Such a version is inconsistent with the Normal Justification Thesis. The only version of Non-authorial Acceptance Autonomism that was left standing at the end of the preceding Part is the weak version, according to which people see their laws as furnishing ultimately only limitedly content-independent protected reasons. But what is crucial here is that Raz could maintain clause (ii) of (6.9) only if the strong version of Non-authorial Acceptance Autonomism were true. If people were to see their laws as furnishing protected reasons that are only limitedly content independent, then that would mean that they could not appeal merely to social-factual considerations to determine the existence and contents of their laws; they would ultimately have to delve into the normative character or nature of the actions that are called for by their laws. Or at the least, even when they are not attending to such normative considerations, people would have to be disposed to react appropriately to any appearances of great or systematic discrepancies between what their laws demand of them and what the ground-level reasons call for in their behavior. The fact that the reasons are content independent (to some extent) would mean that the relevant normative considerations by themselves are not enough to determine the existence and contents of the laws. But the fact that the reasons are also content sensitive would mean that the social-factual considerations by themselves are also not enough for those purposes. In sum, if I am right in thinking that only the weak version of Non-authorial Acceptance Autonomism is plausible, then Raz's argument for the Sources Thesis hits a serious snag at clause (ii) of (6.9).

Let me try to mitigate the quite abstract and even scholastic appearance of the foregoing discussion. We can think of a scenario typical of those that Raz works with, in which a legal authority in a community enacts laws that are meant to govern the behavior of the community members. The officials and others of the community who accept their laws treat such laws as furnishing content-independent protected reasons to act as those laws say. The question has been whether the nature of such an attitude towards the laws makes it the case that the existence and contents of all laws of the relevant community can be determined by appealing only to the social-factual considerations completely divorced from the considerations having to do with the normative character or nature of the actions that the laws call for. My argument has been that the answer is "no." Given the Normal Justification Thesis, the members of the community cannot treat their laws as furnishing reasons that are content independent in the unlimited sense. And it follows that the nature of the attitude of acceptance—or to put things in terms that Raz himself favors, the nature of the law's claim of authority—does not warrant the conclusion that the existence and contents of all laws can be determined by consulting only social-factual considerations. To put the point slightly more concretely, the legal authority in our scenario may or may not be explicitly limited in its authority by the power-conferring laws that

confer the lawmaking authority on it. But even if the legal authority were not so explicitly limited, and even if the particular legal authority were the ultimate legal authority in the relevant community so that it—by itself or together with some other legal authorities—could change the legal limitations on its lawmaking powers, the community’s members cannot treat the enacted laws as furnishing unlimitedly content-independent reasons. For such an attitude towards the laws would imply their willingness to comply with the laws no matter how adversely they believe such compliance would affect their abilities to conform to the ground-level reasons that apply to them anyway. And that would go against the very purpose of treating any rules as authoritative—that is, as furnishing content-independent protected reasons. In effect, the sense of “authoritative,” in which we are warranted in thinking of the members of a community as treating their laws as authoritative, is one according to which the members treat the laws as furnishing only limitedly content-independent protected reasons. And if we insert this particular sense of “authoritative” in Raz’s argument for the Sources Thesis, then the argument does not go through. This is not to say that there could not be considerations other than the nature of the attitude of rule-acceptance that could be appealed to to argue for the Sources Thesis. But the canonical version of the argument for the Thesis in *Autonomy, Law, and Morality* seems to fail.<sup>97</sup>

## VII. Theoretical Disagreements

Among the articles contained in *Between Authority and Interpretation*, the one titled *Two Views of the Nature of the Theory of Law: A Partial Comparison* seems to me to contain more of Raz’s new thinking about the nature of law than any other article in the collection.<sup>98</sup> The article consists in the main of an attempt to respond to Dworkin’s argument, made in the first chapter of *Law’s Empire*, that legal positivism, and more particularly Hart’s version of it, fails to account for what Dworkin calls “theoretical legal disagreements”—that is, for (F8) mentioned in Part II above.<sup>99</sup> I am afraid

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97. What about the apparently obvious counterexamples provided by the various moral standards embedded in, for example, the U.S. Constitution? Here, I believe, Raz has succeeded in blunting the force of such apparent counterexamples by likening them to the cases in which terms of private contracts or company regulations are given legal effect, or those in which foreign laws are given legal effect through domestic laws governing choice of laws. *Id.* at 193–94. I am not sure what exactly would be wrong in thinking that the relevant terms of private contracts, company regulations, and foreign laws are parts of the law of the land. And Raz also says that “the distinction between what is part of the law and what are standards binding according to law but not themselves part of the law is particularly vague,” and that “much of the time the practical implications of a standard are the same either way.” RAZ, *supra* note 1, at 195. But I also do not know of any considerations in favor of the more inclusive conception of the law of the land over Raz’s more exclusive conception.

98. *Id.* ch. 3.

99. DWORGIN, *LAW’S EMPIRE*, *supra* note 12, ch. 1. Dworkin’s argument is meant to apply to all traditional legal theories, not just legal positivist ones. But in order to simplify my discussion, I will concentrate mainly on his argument as it applies to legal positivist ones.

that quite a bit of stage setting is necessary before we can discuss and assess Raz's arguments in *Two Views*.<sup>100</sup>

What Dworkin calls "theoretical disagreements" are legal disagreements that persist despite discussants' agreement on all issues having to do with the so-called social facts—i.e., the behavioral and psychological facts that constitute social practices, legislative enactments, judicial decisions, etc. They are to be distinguished from on the one hand social-factual disagreements (which Dworkin calls "empirical disagreements") and on the other disagreements about what the law should be. Dworkin spends a large chunk of chapter 1 of *Law's Empire* characterizing the judicial opinions of some well-known American and British appellate cases as instancing such theoretical disagreements among judges (and commentators)<sup>101</sup> and argues that legal positivist theories, and more particularly Hart's theory, cannot explain occurrences and even prevalence of theoretical legal disagreements in actual legal settings.

Exactly what the relationship is between Dworkin's earlier arguments and this new argument based on the possibility of theoretical disagreements is a vexing issue that I cannot pursue here. In any case, in *Law's Empire*, Dworkin sought to offer a deeper diagnosis of legal positivism's ills than what he offered in his earlier articles. He argued, quite surprisingly to many, that legal positivist theories' inability to account for theoretical disagreements can be traced to their being a species of "semantic theories of law," according to which all competent speakers, or at least all competently trained lawyers, know and agree on the meaning or concept of "law," and that meaning or concept determines the ultimate criteria of legal validity in each legal system.<sup>102</sup> What is distinctive of the semantic legal theories that legal positivists espouse is that, according to them, the meaning or concept of "law" designates only factual criteria, and more specifically social-factual criteria, as the ultimate criteria of legal validity, the criteria that everyone who properly understands the meaning or concept of "law" accepts.<sup>103</sup> As replacements for semantic theories of law, Dworkin offered what he called "interpretive theories" of law, according to which people in legal disputes offer competing "constructive interpretations" of the existing societal standards and practices.<sup>104</sup> And given that each constructive interpretation is a normative conclusion inferred from a set of normative standards that best fit

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100. Recently, Scott Shapiro, *The 'Hart-Dworkin' Debate: A Short Guide for the Perplexed*, in RONALD DWORKIN 22 (Arthur Ripstein ed., 2007) and Brian Leiter, *Explaining Theoretical Disagreements*, 76 U. CHI. L. REV. 1215 (2009), have revived to some extent the interest in theoretical disagreements. While my disagreements with many aspects of these two discussions will be implicit in my subsequent discussion, I will not have space here to make my disagreements explicit.

101. DWORKIN, *LAW'S EMPIRE*, *supra* note 12, at 15–30.

102. *Id.* at 31–46.

103. *Id.* at 7, 32–35.

104. *Id.* ch. 2.

and morally justify some paradigms of the prevailing legal standards and of the existing societal practices, those who issue such interpretations are not constrained by any existing agreement among them as to what the ultimate criteria of legal validity are, whether such agreement is determined by their shared linguistic or conceptual understanding or anything else.

Many legal philosophers found Dworkin's characterization of legal positivist theories, and of Hart's theory in particular, as semantic theories of law puzzling and even perverse. But some have read in Dworkin's dissatisfaction with Hart's legal theory the same kind of dissatisfaction that philosophers like Hilary Putnam and Tyler Burge slightly earlier had with the traditional individualist semantics and philosophy of mind.<sup>105</sup> Nicos Stavropoulos, in particular, has argued that what Dworkin should have distinguished between are not semantic theories of law and interpretive theories, but instead legal theories based on the traditional criterial semantics and those based on the newer anti-individualistic semantics.<sup>106</sup> Apparently, Dworkin has come to accept Stavropoulos's revisionary reading of the argument in *Law's Empire*, and Raz's arguments in *Two Views* are aimed at responding to that revisionary reading of Dworkin's argument.<sup>107</sup>

Now, what is criterial semantics? The basic idea of criterial semantics is that for each subject matter, there are certain truths about it that are *criterial* in the following sense: (i) they are true purely in virtue of meaning or are conceptual truths, which are a species of truths by convention or stipulation; (ii) an understanding necessary for any genuine talking or thinking about the subject matter requires grasping these truths; and (iii) the necessary understanding also requires an understanding that these are conventional or stipulative truths, and hence both impossible and pointless to doubt. An example of this type of allegedly criterial truths is the following: "Sofas are pieces of furniture made or meant for sitting." According to criterial semantics, we would not credit someone as genuinely talking or thinking

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105. See generally NICOS STAVROPOULOS, OBJECTIVITY IN LAW (1996); David O. Brink, *Legal Theory, Legal Interpretation, and Judicial Review*, 17 PHIL. & PUB. AFF. 105 (1988).

106. David Sosa has pointed out in a conversation with me that philosophers of language and of mind use the terms "criterial semantics," "anti-criterial semantics," "individualism," and "anti-individualism" in a wide variety of ways. So some philosophers may complain that, as they understand these terms, criterial semantics and individualist semantics are not necessarily the same, and that there is even a possibility of being a criterialist anti-individualist. I should point out that I am using the terms "criterial semantics" and "anti-individualist semantics" in the senses that Stavropoulos uses them, and that he in turn intends to use these terms to refer to what Burge calls individualism and anti-individualism, respectively. STAVROPOULOS, *supra* note 105, at 34–37; Tyler Burge, *Intellectual Norms and Foundations of Mind*, 83 J. PHIL. 697 (1986). The bottom line is that I use the relevant terms only to mean the views that I am about to specify in the text, while recognizing that there have been in the philosophical literature somewhat different usages of the terms. No matter how representative or unrepresentative my uses of these labels are, if my descriptions of the two views allow us to get at the Dworkinian argument that Stavropoulos has constructed for us, then that should be good enough for my purposes.

107. RAZ, *supra* note 1, at 53 & n.16, 59.

about sofas unless he grasped this truth, and that in turn means that no one could coherently question this truth.

Why would anyone think that Hart was guilty of criterial semantics? The thinking goes as follows.<sup>108</sup> According to Hart, whether a legal statement or judgment is true or correct depends ultimately on whether there exists or prevails among the officials of the relevant community a convergent practice of adhering to some rules of validity that validate the statement or judgment. This is meant to be a criterial truth in the sense that no competent lawyer could fail to know it, and no competent lawyer would question it. And it could be further said that this truth follows from the meaning or concept of “law.” It follows from this characterization of Hart’s legal theory that two competent lawyers could have empirical disagreements, disagreements about how the law should be changed, or merely apparent disagreements in which they talk at cross purposes. But they could not have theoretical disagreements.

Anti-individualist semantics attempt to provide a more accurate characterization of our cognitive practices than do criterial semantics. According to it, the understanding that is necessary for being credited with genuine talk or thought about some subject matters is not the grasping of some conventional or stipulative truths. Instead, what is necessary is recognition of a set of some examples as paradigms of the relevant subject matter (the membership in which set could be revised upon further inquiry), and a certain degree of susceptibility to regulation by the norms of intellectual inquiry. (“After you showed me those chairs bolted to the lunch counter, I stand corrected, and I no longer believe that chairs must have four legs.”) An implication is that a person may have wildly unorthodox and incorrect beliefs about a subject matter and still count as genuinely talking and thinking about it. These features of our cognitive practices reflect our recognition that what is true or correct about many subject matters is not ultimately a matter of convention or stipulation, or even a matter of expert consensus achieved through reflective equilibrium, but instead a matter of the nature of the subject matter, to which we gain access through our investigation of the paradigms. What we hold ourselves and each other responsible to in our intellectual inquiry about many a subject matter is not some convention or consensus opinion about it, but instead the norms of intellectual inquiry and ultimately the nature of our subject matter.

It is not a huge stretch to think that Dworkin’s criticism of legal positivism, especially of Hart’s legal theory, and his advocacy of interpretive theories of law were born out of his implicit anti-individualism. A person

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108. I will eventually be questioning whether what follows is a proper understanding of Hart’s legal theory. But that is not to say that there are not passages in *The Concept of Law* that invite (or at least do not exclude) such understanding. Kevin Toh, *An Argument Against the Social Fact Thesis (And Some Additional Preliminary Steps Towards a New Conception of Legal Positivism)*, 27 LAW & PHIL. 445, 482–86 (2008).

who offers a constructive interpretation, according to Dworkin, offers a legal opinion that is meant to be a part of the best moral justification of the paradigms of valid laws and legally valid practices in his community, and such an opinion can be quite at odds with the legal consensus that prevails among the officials of the person's community. Legal truths or correctness, according to Dworkin, are ultimately not a matter of convention or even expert consensus, or at least not of them alone. What is the law in a community can transcend or outstrip the practices that prevail in that community. This is why, according to Dworkin, two lawyers can agree on all the relevant social facts but still disagree about what the law is.

Raz's reaction to this recasting of Dworkin's argument is to stick to criterial semantics while incorporating what he considers the insights of anti-individualism.<sup>109</sup> Raz has (mostly)<sup>110</sup> adhered to the view, which he attributes to Hart, that whether a legal statement or judgment is true or correct depends ultimately on whether there exists or prevails among the officials of the relevant community a convergent practice of adhering to some rules of validity that validate the statement or judgment. In the important article *Legal Validity*, for example, he offered the following as a slight variation and improvement on what Hart was getting at:

The legal validity of a rule is established not by arguments concerning its value and justification but rather by showing that it conforms to tests of validity laid down by some other rules of the system which can be called rules of recognition. These tests normally concern the way the rule was enacted or laid down by a judicial authority. The legal validity of rules of recognition is determined in a similar way except for the validity of the ultimate rules of recognition which is a matter of social fact, namely those ultimate rules of recognition are binding which are actually practised and followed by the courts.<sup>111</sup>

I assume that the "validity" that Raz is talking about in the emphasized portion of this passage is legal validity. What Raz and like-minded legal philosophers believe is that this view of what ultimately determines the legal validity of rules is something that Hart has come to discover through his

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109. I should warn that in the course of his discussion in *Two Views* Raz offers somewhat different characterizations of the dialectic between criterial semantics and anti-individualism, and of their relevance for Dworkin's argument than what I have offered above. As I said above, *supra* note 106, the characterizations I offered were meant to duplicate what I believe are Burge's understanding of the two semantic views, and Stavropoulos's (and presumably also Dworkin's) understanding of their relevance for legal philosophy. Raz offers somewhat different characterizations. But in my subsequent discussion I shall ignore most of the differences as I do not think that they have any repercussions for the central issues at stake; I will mention only the ones that I think do matter.

110. The significance of this qualification will be clarified in due course.

111. RAZ, *Legal Validity*, *supra* note 52, at 150–51 (emphasis added); *see also* RAZ, *supra* note 1, at 77–78. Raz's talk in the quoted passage of multiple rules of recognition and a hierarchy among them is explained by his view that Hart was wrong to assume that a legal system can have only one rule of recognition. JOSEPH RAZ, *The Identity of Legal Systems*, in *THE AUTHORITY OF LAW*, *supra* note 2, at 78, 95–96.

philosophical investigation of the concept of law. Raz's Sources Thesis and his authority-based argument for it were a further elaboration of this allegedly criterial truth.

For all I have said so far in the last paragraph, Hart's legal theory, as Raz conceives it, and Raz's own theory could be consistent with the characterization of criterial semantics that I offered above. In *Two Views*, Raz explicitly departs from that characterization when he denies that all competent lawyers or speakers grasp this criterial truth, and when he grants that competent lawyers or speakers could coherently doubt this truth. Raz says: "Having a concept . . . is compatible with a shallow and defective understanding of its essential features, and of the nature of what it is a concept of."<sup>112</sup> This he takes to be a core insight of anti-individualism, and one that criterial semantics can incorporate without much ado. Raz says:

Where the individualistic approach goes wrong is in thinking that the criteria set by each person's personal rule for the correct use of terms and concepts are fully specified. In fact, their personal rules are not specified. Each person takes his use of terms and concepts to be governed by the common criteria for their use. That is all their personal rule says. . . . It is part of each person's rule for the use of the term or concept that mistakes can occur, for the rule refers to the criteria as they are, rather than to what that person thinks they are. What they are, however, does depend on what people think they are. The correct criteria are those that people who think they understand the concept or term generally share, i[.]e[.] those that are generally believed to be the correct criteria are the correct criteria.<sup>113</sup>

It is important to keep apart two kinds of criteria that are in play here. One has to do with the criterial truth that Hart is taken to have discovered, according to which the truth or correctness of legal statements or judgments is ultimately a matter of social facts concerning which rules of legal validity a community or its officials converge upon in their practices. The other kind of criteria are those ultimate rules of legal validity that a community or its officials converge upon in their practices. The point that Raz is making in the above passage is about conceptual criteria in the first sense. Two competent people can differ on the criteria for application of a single concept—in this case the concept of law—but still deploy that concept in their disagreement with each other. The important implication for Raz is that such criterial disagreement can produce legal criterial disagreements of the second kind, which are not empirical disagreements, disagreements about what the law should be, or merely apparent disagreements. They could be genuine disagreements even about the ultimate criteria of legal validity. Could not these be the kind of disagreements that Dworkin was gesturing at by "theoretical disagreements"?

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112. RAZ, *supra* note 1, at 55.

113. *Id.* at 64.

Not quite. What Raz adopts is not anti-individualism (at least as Stavropoulos and Dworkin seem to understand that view and its implications for legal philosophy);<sup>114</sup> it is at best only a halfway house to anti-individualism. In a way, the term “anti-individualism” is a bit of a misnomer. For the view not only denies that the crucial sort of understanding necessary for genuine talk and thought about a subject matter is an understanding of truths of meaning (or conceptual truths) that are stipulated in an individual’s idiolect, but it also denies that the relevant kind of understanding is an understanding of truths of meaning (or conceptual truths) that are conventionally established among a community’s members. In accepting what he deems anti-individualism, Raz rejects the idiolectical version of individualism, but he adheres to the communal version. As I explained above, what anti-individualism says is that for the relevant subject matters, we hold ourselves responsible to the norms of intellectual inquiry and ultimately to the nature of those subject matters, and not to the consensus, even expert consensus, prevailing in our community. According to the position that Raz adopts, in legal matters, what we hold ourselves responsible to ultimately is the community consensus, or at least expert consensus. Of course, we know why he opts for this halfway measure. He cannot be a thoroughgoing anti-individualist without abandoning his Sources Thesis.

Perhaps it may be thought that Raz gets law right, even if he gets anti-individualism wrong. There are some subject matters about which we do actually think that the community consensus or expert consensus is the final arbiter, and perhaps law or legal validity is one such subject matter. Anti-individualism was never meant to be a global semantic theory. This is a large and complicated issue, and I cannot do justice to it, especially near the end of an already very long review essay. But in closing, I want to offer two admittedly inconclusive considerations against viewing law that way, just to indicate that Raz is not clearly right.

First, think of what Justice Scalia takes himself to be doing when he makes his originalist pitch. He takes himself to be making a claim about what the law is, not a claim about what the law should be. However, presumably he fully realizes that the prevailing current practice or consensus among legal experts and officials does not support originalism. At least Justice Scalia and many like him—not just originalists but many who make fairly unorthodox fundamental legal claims—do not view themselves as taking part in a cognitive practice in which the final arbiter of correctness is community or expert consensus. No amount of sociological, psychological, and historical evidence indicating actual judicial deviance from originalism is likely to persuade Justice Scalia that he is wrong. Nor can it plausibly be said that Justice Scalia’s “intransigence” is due to conceptual ignorance or confusion. We could have him study *The Concept of Law* thoroughly and

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114. On the need for this parenthetical, see *supra* note 106.

have him spend weeks on end with Raz himself explaining the book to him, and with Frank Jackson explaining to him the virtues of conceptual analysis.<sup>115</sup> Raz may be able to convince him that conceptual investigations clearly show that whether a legal statement or judgment is true or correct depends ultimately on whether there exists or prevails among the officials of the relevant community a convergent practice of adhering to some rules of validity that validate the statement or judgment. I suspect that Justice Scalia's reaction then would resemble many philosophers' reaction to R.M. Hare's argument in *Moral Thinking* that our moral concepts or the meanings of our moral terms commit us to a form of act-utilitarianism.<sup>116</sup> Many philosophers reacted by saying that if that really were what our moral concepts or meanings commit us to, then henceforth we take ourselves to be deploying different concepts and meanings when we engage in what seem like moral thinking and talking.<sup>117</sup> Any protests, on Hare's behalf, that such reactions are irrational, incoherent, or downright immoral are apt to seem superficial and question begging. I believe that analogous protests to what I presume will be Justice Scalia's reactions would be similarly superficial and question begging.

I doubt, for another reason, that *The Concept of Law* could be used to persuade Justice Scalia. And here I come to the second of the two considerations. I do not think that legal philosophers like Raz and Dworkin have been right in thinking the following: according to Hart it is a criterial truth, which can be discerned in the meaning or concept of "law," that whether a legal statement or judgment is true or correct depends ultimately on whether there exists or prevails among the officials of the relevant community a convergent practice of adhering to some rules of validity that validate the statement or judgment. To be contrasted with that characterization of Hart's position, which can be found in the above-quoted passage from Raz's *Legal Validity*,<sup>118</sup> is the following characterization that Raz gives in his response to Gerald Postema:

[Postema] alleges that Hart regarded the validity of rules of recognition as resting solely on their social acceptance. But as you

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115. At least in North America, philosophers have for many years thought that conceptual analysis as a philosophical method had been thoroughly discredited by the criticisms of W.V. Quine and others. Jackson has been one of the main instigators of the revitalization (or at least reconsideration) of conceptual analysis as a viable philosophical method in recent years. See generally FRANK JACKSON, *FROM METAPHYSICS TO ETHICS* (1998). To the extent that my argument in this Part questions the supposed indubitability of certain legal claims based on their conceptual or semantic (or criterial) nature, my argument is Quinean in spirit. For wide-ranging Quinean reflections on the use of conceptual analysis in legal philosophy, see generally the articles collected in BRIAN LEITER, *NATURALIZING JURISPRUDENCE* (2007).

116. R.M. HARE, *MORAL THINKING* 35–43 (1981).

117. E.g., Thomas Nagel, *The Foundations of Impartiality*, in HARE AND CRITICS: *ESSAYS ON MORAL THINKING* 101 (Douglas Seanor & N. Fotion eds., 1988); Bernard Williams, *The Structure of Hare's Theory*, in HARE AND CRITICS, *supra*, at 185.

118. See *supra* note 111 and accompanying text.

will know Hart denied that it is right to talk of the validity of rules of recognition. They merely exist, and to say that they do is no more than to say that they are accepted. In *The Concept of Law* he never said that the fact that they were accepted gives anyone reason to follow them. That they are accepted entails, of course, that those who accept them think that they are binding, and take themselves to have reason to follow them. But it does not follow that that reason is the fact of their acceptance.<sup>119</sup>

I think we can assume here that the “validity” Raz is talking about in the first part of the quote is legal validity, and that in talking of “reasons to follow” rules in the latter half he is again speaking of legal validity. In this passage, unlike in the passage from *Legal Validity*, Raz does not say that the legal validity of rules of recognition is a matter of social facts. Here, Raz seems to say, the truth or correctness of a legal statement or judgment is not ultimately a matter of certain convergent practices and the attendant attitudes of acceptance on the part of the community members existing. I think this is right and more accurate of Hart’s commitments, whereas the position that Raz (most of the time), Dworkin, and others have attributed to Hart, the one that gave initial impetus to the characterization of his theory as committed to criterial semantics, is not really Hart’s.

What Hart argued was that the existence of law in a community requires the existence in that community of a system of rules with some very specific kind of secondary rules and that the existence of such a system of rules requires the existence of convergent practice and the attendant attitudes of acceptance among the members of that community. Analogous things could have been said about the existence of a set of mores in a community or about the existence of numerous other kinds of norms such as those meant to regulate intellectual inquiries, artistic endeavors, etiquette, games, and rituals, etc. As far as I can see, what Hart said about the existence of law, and what analogous things that could be said about the existence of mores or some other kinds of norms, does not have any implication that the truth or correctness of the relevant normative statements is ultimately a matter of certain convergent practices and attitudes existing. In order to draw that inference, we would have to presuppose a normative bridge principle that says something like: “Do what your fellows do!” or “Do what the experts among your fellows do!” And I believe it is very difficult to see in *The Concept of Law* an argument, let alone a conceptual argument, for such a bridge principle. I want to be quite upfront here. There are a handful of passages in *The Concept of Law* that invite, or at least do not exclude, interpretations like Raz’s and Dworkin’s. But as I have argued elsewhere,<sup>120</sup> they fail to sustain those interpretations when read in the context of other relevant passages.

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119. RAZ, *supra* note 1, at 381.

120. Toh, *supra* note 108, at 482–90.

As for theoretical legal disagreements, we should remember from Part II that Hart conceived of *internal legal statements*, the statements that participants in legal systems use to enunciate and interpret laws, as normative statements. If we had remembered this feature of Hart's legal theory, we would not have anticipated any problem for Hart in accounting for post-social-factual disagreements of the sort that Dworkin had in mind. What I suspect has caused much of the confusion is the failure to keep apart internal and external legal statements, as Hart urged us to do.<sup>121</sup> According to Hart, "what the law is" could be considered from two different points of view—from the point of view of a theorist, and from the point of view of a participant. Or better yet, there are two distinct concepts of what the law is, which play different explanatory roles. What the law is from the point of view of a theorist is ultimately a matter of what convergent practices prevail in a community. What the law is from the point of view of a participant, on the other hand, may exceed or transcend the prevailing convergent practices. In case that appears puzzling, think of how things are in morality. What is morally right from the point of view of a theorist (who is trying to determine the mores of a community) is ultimately a matter of what practices exist in a community, whereas what is morally right from the point of view of a participant can exceed or transcend prevailing convergent practices. If we keep in mind that there are two distinct concepts of "what is morally right" that play different explanatory roles, then we see that nothing is puzzling here. That is the case in law as well. In the case of morality, we have the terminological distinction between "mores" and "morality." Unfortunately, we do not have such a terminological distinction in law. That may be a reflection of a deep fact about law, and that would be the case if Raz were right. But I do not think that that is the case. Notice also that the distinction between internal and external legal statements enables us to make good sense of Justice Scalia's (projected) conception of what he is doing in advocating originalism.

What is undeniable is that in many cases, though not all, facts of the sort that a theorist of law observes from the external point of view in reaching his theoretical conclusions, what Raz calls "social facts," constitute the grounds in virtue of which participants' internal legal statements or judgments are true or correct. This is something that a legal theory should try to explain. Hart's legal theory, as I have interpreted it, does not offer such an explanation, whereas Raz's theory (and also Hart's theory as Raz interprets it) does. But Raz's is not the only explanation that we have available. Dworkin also has offered us an explanation of this fact. According to him,

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121. HART, *supra* note 6, at 102–03; Eugenio Bulygin, *Norms, Normative Propositions, and Legal Statements*, in 3 CONTEMPORARY PHILOSOPHY: A NEW SURVEY 127, 136–48 (Guttorm Fløistad ed., 1982). Raz has in the past displayed some skepticism about Hart's distinction. RAZ, *Legal Validity*, *supra* note 52; RAZ, *Purity*, *supra* note 34. I have argued elsewhere that Raz did not have good reasons for his skepticism. Toh, *supra* note 37, at 407–14.

legal judgments are constructive interpretations, which are roughly inferences from the best moral justifications of the existing societal standards and practices. I am not completely won over by Dworkin's explanation, partly because of its commitment to Acceptance Moralism. But in many ways, I believe, it is more accurate than Raz's explanation, and I suspect that it or something very much like it can be readily combined with Hart's theory about when a legal system exists or prevails among a community of people. Dworkin's explanation, unlike Raz's, can also explain the existence of genuine theoretical legal disagreements, and part of this latter explanation indicates that social facts cannot be the sole grounds in virtue of which internal legal statements or judgments are taken to be true or correct. And that is what we would have expected from Hart's conception of internal legal statements and judgments as normative statements and judgments.<sup>122</sup>

### VIII. Conclusion

I am told by those who are more knowledgeable than I about these matters that the durability and the resulting popularity of products like the old Volkswagen Beetle, Kalashnikov rifles, and CD players manufactured in the 1980s stem mainly from the simplicity of their design and the small number of moving mechanical parts within them. I have a similar take on Hart's legal theory. It explains a lot with a small number of relatively durable philosophical components—which is not to say that such components could not be improved upon or supplemented. In the preceding pages, I have been somewhat skeptical of some of the different and additional moving parts that Raz has employed in his own theorizing about the nature of law. I have found many of these new parts less than well made and without obvious benefits. It is not clear to me how much of my skepticism has been driven by my desire to keep legal theorizing simple and uncluttered. Come to think of it, I have never cared for those CD players with five-CD changers.

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122. Thanks to David Enoch for urging me to address the issues discussed in this paragraph. I have elsewhere tried to take some first steps in devising a conception of internal legal judgments that offers an explanation of why social facts play such an important role as the grounds of such judgments. Kevin Toh, *Legal Judgments as Plural Acceptances of Norms*, 1 OXFORD STUD. PHIL. L. (forthcoming 2010). My conception is intended to be very much Hartian in its foundations.