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SECOND-ORDER REASONS, UNCERTAINTY AND LEGAL THEORY

STEPHEN R. PERRY*

INTRODUCTION

It is an obvious and banal fact that reasons for action often conflict, which is simply to say that they often call for different and incompatible courses of action. Ordinarily we resolve such conflicts by assessing the relative weight or strength of all the relevant reasons and then deciding in favor of that action which has the greatest overall support. This process, which Professor Joseph Raz calls determining what ought to be done on the balance of reasons,¹ is clearly a fundamental and commonly employed mode of practical reasoning. The reasons which we take into account when relying on this mode are, in Raz's terminology, first-order reasons; they are reasons for action that have been drawn directly from considerations of interest, desire or morality.²

It is one of Raz's most important philosophical insights to have noticed that determining what ought to be done on the balance of first-order reasons is not the only mode of practical reasoning upon which people rely. Sometimes we decide what to do on the basis of what Raz calls second-order reasons, which he defines as "reason[s] to act on or refrain from acting on a reason."³ The most important category of second-order reasons recognized by Raz is that of exclusionary or peremptory reasons. These are reasons to refrain from acting on a reason. Exclusionary reasons give rise to the possibility of another type of conflict between reasons in addition to first-order conflicts, namely, conflicts between a first-order reason and an exclusionary reason for not acting on the first-order reason. When such a conflict occurs, according to Raz,

* Assistant Professor of Law, McGill University. I am indebted to Ken Kress and Joseph Raz for comments on earlier drafts. I would also like to thank Ronald Dworkin and Jeremy Waldron for helpful discussions on topics which are dealt with in this paper.

1. J. RAZ, PRACTICAL REASON AND NORMS 36 (1975).

2. *Id.* at 34.

3. *Id.* at 39; see also J. RAZ, THE AUTHORITY OF LAW 16-17 (1979).

the exclusionary reason always prevails just by virtue of being a reason of a higher order.⁴ The exclusionary reason does not override or outweigh the first-order reason but simply excludes it from consideration by the agent.

Raz's distinction between first- and second-order reasons is a major contribution to the philosophy of practical reason and the foundation upon which much of his work in legal and political as well as in practical philosophy is built. He has used it, for example, to analyze the concept of a rule in a more precise and fruitful manner than had previously been possible, namely as an exclusionary reason of general application which is also a first-order reason for action.⁵ This analysis has permitted him to show how rules are able to provide an intermediate level of practical reasoning which is capable of mediating between concrete decisions and ultimate reasons or values.⁶ The idea of rules as mediating devices in practical reasoning figures in turn as an important element in Raz's analysis of practical and political authority, an analysis which he then draws upon in his formulation and defense of legal positivism. The distinction between first- and second-order reasons is thus the heart of a comprehensive and powerful system of thought in which legal and political philosophy are shown to be deeply rooted in the soil of a subtle and carefully worked-out practical philosophy.

As Raz has correctly observed, "[p]hilosophers have tended too often to avoid facing the complexities of practical reasoning with its multi-level assessments Many . . . pessimistic conclusions are based upon a confusion between the epistemological difficulties in establishing the validity of ultimate values and the logical difficulties in explaining the considerations often found in practical reasoning."⁷ This Paper will attempt to show that Raz himself has underestimated the complexities of multi-level assessments in practical reasoning because he circumscribes the possible categories of second-order reasons too narrowly. Raz's own definition and theoretical utilization of second-order reasons emphasize the possibility of *isolating* a level of practical reasoning from the considerations and values which ultimately justify the decisions being taken. The notion of a second-order reason is in fact far richer than Raz allows,

4. J. RAZ, *supra* note 1, at 46.

5. *Id.* at 73; see also Raz, *Promises and Obligations*, in LAW, MORALITY AND SOCIETY 210, 221-22 (P.M.S. Hacker & J. Raz eds. 1977).

6. See, e.g., J. RAZ, THE MORALITY OF FREEDOM 58 (1986).

7. J. RAZ, *supra* note 1, at 94-95.

and there exist second-order reasons for action upon which people commonly rely, mainly in institutional contexts, that do not have the isolating effect he describes. Reliance on these reasons requires at least some familiarity, and often a great deal, with the ultimate values and other justifying reasons which figure in first-order practical reasoning. The most important context in which second-order reasons of this non-isolating type are to be found is legal reasoning. Their prominence in common law reasoning in particular casts doubt upon at least certain aspects of Raz's positivism and lends support to what is essentially a Dworkinian theory of law.

The Paper is divided into two main Parts. The first is concerned with certain aspects of practical philosophy generally, while the second focuses on the philosophy of law. The first Part begins with a brief overview of Raz's account of how exclusionary reasons figure in practical reasoning. This is followed by a discussion of the general nature of reasons and of the forms which practical reasoning can take when agents are uncertain about what right reason requires. While this may seem at first to constitute something of a detour away from the main concerns of the Paper, it will lead to the clarification of some basic notions and the formulation of certain distinctions which will facilitate the development of the argument to follow. A critical examination of Raz's account of the concept of authority is then undertaken. After it has first been shown that Raz's notion of an exclusionary reason is ambiguous, it is argued that reliance on the type of exclusionary reason that figures in his analysis of authority, which will be referred to as a *subjective* exclusionary reason, represents a rational strategy that agents can or should adopt in order to deal with uncertainty about what action right reason demands. Once this is understood, it becomes possible to define two new types of subjective second-order reasons that allow agents to formulate strategies for dealing with uncertainty which, unlike the exclusionary approach, enable them to continue to take the underlying first-order reasons into consideration.

The second Part of the Paper, which deals with the philosophy of law, begins by outlining how Raz makes use of the idea of a (subjective) exclusionary reason in order to defend a particularly powerful and probably definitive version of positivism. It is then shown that the two newly-defined categories of second-order reasons can be utilized to formulate an interpretation of the common law process of decisionmaking which is superior to Raz's own positivist interpretation. This offers strong support for the conclusion that positivism cannot provide a complete

account of the foundations of law, and that at the very least it has to be supplemented by a theory which in its most fundamental respects resembles that of Ronald Dworkin.

I. PRACTICAL PHILOSOPHY

A. RAZ ON EXCLUSIONARY REASONS IN PRACTICAL REASONING

It has already been mentioned that Raz defines a second-order reason as a reason to act for a reason or to refrain from acting for a reason. He pays very little attention, however, to *positive* second-order reasons, which are reasons to act for a reason. It is *negative* second-order reasons, which are reasons to refrain from acting for a reason, that figure most prominently in his theoretical work.⁸ He also calls negative second-order reasons exclusionary or peremptory reasons.⁹ Raz defends the thesis that determining what ought to be done on the basis of an exclusionary reason is a distinct mode of practical reasoning by pointing to the ways in which people actually do deliberate about what they ought to do. For example, a soldier who has been given an order to do an action which he thinks cannot be justified on the balance of reasons will ordinarily regard the order as a reason for him not to act on his view of the merits of the case rather than as simply another reason which is to be added to the balance of reasons. As Raz says, "we would be disregarding [the soldier's] own conception of the situation if we were to say that he regards the order as an overriding first-order reason."¹⁰ The soldier conceives of the order as an exclusionary reason which is also a first-order reason to do the action that he was ordered to perform. Suppose that the soldier nonetheless disregards the order and acts on his own, correct assessment of the balance of reasons. His superior officer will now, says Raz, "be torn between conflicting feelings," since he is faced with conduct which he concedes was right on the merits but which he nonetheless thinks was wrong in disregarding an exclusionary reason.¹¹ The conflict felt by the superior officer is an indication that he is aware that the soldier's action can be assessed in two different and incompatible ways. It is an indication, that is to say, that he recognizes that there are two distinct modes of practical reasoning, one of which demands that a person act on

8. Raz discusses negative and positive second-order reasons in J. RAZ, *supra* note 3, at 17.

9. For criticism of Raz's notion of an exclusionary reason see Gans, *Mandatory Rules and Exclusionary Reasons*, 15 *PHILOSOPHIA* 373 (1986).

10. J. RAZ, *supra* note 1, at 42; *cf. id.* at 74-75; J. RAZ, *supra* note 3, at 22-23.

11. J. RAZ, *supra* note 1, at 43.

his own assessment of the balance of reasons and the other of which demands that he disregard that assessment.

Raz argues that such practical phenomena as promising, complying with an order, acting on advice, taking a decision and following a rule must all be analyzed in terms of the acceptance of an exclusionary reason for action.¹² But his concern is not just with the phenomenology of practical reasoning. He wishes to establish more than that people do, in fact, sometimes determine what they ought to do by reasoning in an exclusionary manner. He also maintains that there can be *valid* exclusionary reasons, i.e., there can be exclusionary reasons upon which people are justified in acting. It has already been mentioned that Raz analyzes the notion of a rule as a general exclusionary reason which is also a first-order reason for some particular course of action. As he points out, it is quite plausible to suppose that individuals will sometimes be better off in their everyday lives if they follow rules of thumb which have this logical structure than they would be if they were to decide what to do in each relevant situation by assessing the balance of reasons on a case by case basis. Following a predetermined course of action could well reduce overall error when one has to act in circumstances of impaired rationality, for example.¹³ It is also obvious that following a rule which one has adopted in advance in order to deal with a particular type of situation that is expected to recur could in principle be justified by the time and effort which would be saved in not having to reassess the balance of reasons on every relevant occasion.¹⁴

Raz further argues that it can be rational not simply to follow an exclusionary reason which one has formulated for oneself, at a time before the relevant situation or series of situations has arisen, but also to treat the utterances of another person as exclusionary reasons for action. To treat another person (or an institution) as a practical authority, for example, means that one accepts the directives of that person (or institution) as exclusionary reasons applicable to oneself.¹⁵ When one person has authority over another the former possesses a type of normative power which enables him or her to change the latter's protected reasons, these being exclusionary reasons which are also first-order reasons.¹⁶

12. See *id.* at 49-84; see also J. RAZ, *supra* note 3, at 21-25, 30. On promises see Raz, *supra* note 5, at 210-28.

13. J. RAZ, *supra* note 1, at 37-38, 59-60.

14. *Id.* at 59-60; see also Raz, *supra* note 5, at 224.

15. J. RAZ, *supra* note 3, at 26.

16. *Id.* at 21; cf. J. RAZ, *supra* note 6, at 24. Raz defines protected reasons in J. RAZ, *supra* note 3, at 18.

Raz defends what he calls the "service conception" of authority, which regards authorities as "*mediating* between people and the right reasons which apply to them, so that the authority judges and pronounces what they ought to do according to right reason."¹⁷ The normal and primary way of justifying the legitimacy of an authority is to show that the person over whom authority is claimed "is likely better to comply with reasons which apply to him (other than the alleged directives) if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly."¹⁸ Raz refers to this claim as the *normal justification thesis*. According to the service conception, authorities should base their directives on reasons which apply to their subjects. (Raz calls both reasons which apply to the subjects and reasons which are meant to reflect such reasons *dependent* reasons.¹⁹) But a legitimate authority cannot carry out its mediating role unless its subjects treat its directives as reasons for action which *replace* some of the reasons which would otherwise be relevant in assessing what they ought to do and not simply as reasons that are to be added to those original reasons.²⁰ Subjects should, in other words, treat the authority's directives as exclusionary reasons for action.

Raz's analysis of the concept of legitimate authority effectively rebuts the anarchist claim that the concept is necessarily incompatible with rationality, since he shows that the directives of an authority could in principle be valid exclusionary reasons which it would be rational for a person to follow.²¹ He also outlines a number of ways in which the legitimacy of a practical authority, including a political authority such as the government of a state, could in fact be established.²² One way is to show the authority to be wiser than the individual in determining what ought to be done in a particular type of situation. Another requires a demonstration that the authority is in a better position than the individual to achieve what the latter has reason to achieve but cannot, such as solving coordination problems or changing the structure of prisoner's dilemma-type situations.²³ Raz is of the opinion that such considerations are in fact capable of justifying political authority, but only on a piecemeal basis and only up to a point. The extent of a government's authority is

17. Raz, *Authority, Law and Morality*, 68 THE MONIST 295, 299 (1985); see also J. RAZ, *supra* note 6, at 55-56.

18. J. RAZ, *supra* note 6, at 53; see also Raz, *supra* note 17, at 299.

19. J. RAZ, *supra* note 6, at 41.

20. *Id.* at 57-59.

21. J. RAZ, *supra* note 3, at 27; J. RAZ, *supra* note 6, at 57, 68.

22. J. RAZ, *supra* note 6, at 75; cf. J. RAZ, *supra* note 1, at 63-64.

23. J. RAZ, *supra* note 6, at 49-51.

likely to vary from individual to individual, and will in the case of most persons be more limited than the unrestricted authority which governments actually claim for themselves.²⁴

There are three other points about Raz's conception of an exclusionary second-order reason which are worth mentioning here. The first is that exclusionary reasons can differ in scope. This simply means that an exclusionary reason may exclude only some of the reasons which would otherwise be applicable in a given situation, and that the range of excluded reasons can vary.²⁵ Thus an authority, for example, can be limited not just by the kinds of *acts* which it is justified in regulating but also by the kinds of *reasons* upon which it may rely and which its decisions will preempt.²⁶ The second point is that Raz uses the notion of an exclusionary reason to explain the concept of an *obligation* or *duty*. This is accomplished in the following way: "An action is obligatory if it is required by a categorical rule, i.e. [an exclusionary] rule which applies to its subjects not merely because adherence to it facilitates achievement of their goals."²⁷ The third point is that being subject to the authority of another and therefore, according to Raz, possessing a duty to treat that other's directives as exclusionary reasons, does not entail that one is not permitted to form a judgment of what ought to be done on the balance of reasons. Authority does not require a "surrender of judgment" in this strong sense; the only thing which is necessarily excluded is *action* on one's judgment of what ought to be done.²⁸

B. PRACTICAL REASONING AND UNCERTAINTY

Section C undertakes a critical inquiry into the nature of exclusionary reasons as these figure in Raz's analysis of the concept of authority. This will enable us to see that there are in fact more types of second-order reasons than Raz acknowledges. First, however, it will be helpful to say something about the general nature of reasons for action, paying particular attention to the fact that practical reasoning must often take place under conditions of uncertainty. This will clarify certain matters

24. *Id.* at 80.

25. J. RAZ, *supra* note 1, at 40; J. RAZ, *supra* note 3, at 22.

26. J. RAZ, *supra* note 6, at 46-47.

27. Raz, *supra* note 5, at 223; cf. J. RAZ, *supra* note 3, at 234-35. See also J. RAZ, *supra* note 6, at 186, 195; J. RAZ, *supra* note 1, at 76 (moral duties are exclusionary in nature). Donald Regan argues persuasively that Raz's account of authority, while broadly correct, cannot sustain the conclusion that the subjects of even a legitimate authority have a *duty* to obey the authority's directives. See Regan, *Authority and Value: Reflecting on Raz's Morality of Freedom*, 62 S. CAL. L. REV. 995 (1989). This is not an issue which will be discussed in this Paper.

28. J. RAZ, *supra* note 6, at 29; J. RAZ, *supra* note 3, at 26 n.25.

and yield certain distinctions which will be of use in the discussion to follow.

1. *Raz on the Nature of Reasons*

In *Practical Reason and Norms* and other relatively early works Raz draws a distinction between two different ways that we commonly talk about reasons for action.²⁹ He notes that sometimes we speak of reasons as facts, while at other times we speak of them as beliefs. (The concept of a "fact" is to be understood here as including values and moral principles as well as events and processes.³⁰) Thus we refer both to the fact that it will rain and to a belief that it will rain as reasons for carrying an umbrella. Raz acknowledges that one could distinguish in this way between two distinct notions of reason, but he goes on to say this:

Only reasons understood as facts are normatively significant; only they determine what ought to be done. To decide what we should do we must find what the world is like, and not what our thoughts are like. The other notion of reasons is relevant exclusively for explanatory purposes and not at all for guiding purposes.³¹

In thus maintaining that only reasons understood as facts are normatively significant it would appear that Raz is not simply stating the obvious truth that it is only facts about the physical world, morality, and one's desires and interests that ultimately determine what ought to be done. He seems to be saying in addition that practical reasoning can be adequately characterized without reference to the beliefs which agents hold about their reasons, so that a theory of practical reasoning need only refer to the idea of reasons as facts. Agents are to be regarded as deliberating about what to do on the assumption that certain facts which could serve as reasons obtain (or that they do not obtain). Sometimes they will discover after they have acted that this assumption did not hold, and it is in this situation that the idea of reasons understood as beliefs serves its explanatory function: "It is mostly when we come to believe that the reason on which we relied does not obtain that we cite our belief in it as a reason."³² But for *ex ante* guiding purposes, as opposed to *ex post* explanatory purposes, the assumption is to be

29. J. RAZ, *supra* note 1, at 16-19; see also Raz, *Introduction*, in PRACTICAL REASONING 1, 2-4 (J. Raz ed. 1978).

30. J. RAZ, *supra* note 1, at 17-18.

31. *Id.* at 18.

32. *Id.* According to Raz, talk of reasons as beliefs could be replaced even in explanatory contexts by a mode of speaking which conformed with his own analysis if we were to say after the fact that we did not have a reason but that we had a reason for thinking we had a reason.

regarded as sound; practical reasoning is essentially just a matter of manipulating statements about states of affairs which, if they obtained, would be both facts and reasons, where the agent's belief in the truth of those statements is taken as given. Thus Raz defines an *atomic complete reason* as "the fact(s) stated by the premises of a sound practical inference with no redundant premises."³³ (Of the different reasons that can comprise a complete reason, those which state valid goals are *operative*; all others are referred to as *auxiliary*.³⁴) Raz then defines practical reasoning as "the transition (not necessarily conscious) from *belief* in the premises to acceptance of the putative conclusion of a practical inference."³⁵ (The conclusion of a practical inference is always, according to Raz, a deontic statement.³⁶)

That Raz holds a view of practical reasoning along the lines just sketched is confirmed by his discussion of a certain type of reason which he says does not fit easily into his basic analysis of reasons understood as facts. He has in mind such reasons as "the probability that p," "the prospect that p," "the danger that p," etc., all of which, he says, "combine assertion or presupposition of a reason for belief with the assertion of a reason for action."³⁷ For example, Raz analyzes the statement "The probability that it will rain is a reason for taking an umbrella" as asserting the following: "There is a reason to believe that it will rain and that it will rain is a reason for taking an umbrella."³⁸ This analysis seems to eliminate the need to refer to epistemic notions in the characterization of practical reasoning proper: the reasons upon which agents understand themselves to be acting are facts (in the example, the fact that it will rain), where the reasons for believing that the facts obtain fall outside the scope of practical (as opposed to theoretical) reason; as explained above, belief in the premises which state the relevant facts is assumed. Raz thus seems to be putting forward a view of practical reasoning which presupposes a pre-practical stage at which the agent determines, by means of theoretical reason, what beliefs about the world it is justifiable to maintain. The second stage is the stage of practical reasoning proper, where the agent decides what to do on the assumption that he or she holds true beliefs about which facts capable of serving as reasons for action do or do

33. Raz, *supra* note 29, at 5; see also J. RAZ, *supra* note 1, at 22-25 (discussing the concept of complete reasons).

34. Raz, *supra* note 29, at 15; see also J. RAZ, *supra* note 1, at 33-35 ("Most operative reasons are either values or desires or interests."). *Id.* at 34.

35. Raz, *supra* note 29, at 5 (emphasis added).

36. J. RAZ, *supra* note 1, at 28; see also Raz, *supra* note 29, at 5-8.

37. J. RAZ, *supra* note 1, at 21.

38. *Id.*

not obtain. At this second stage epistemic notions essentially drop out of the picture, since they are not taken into account by the agent in determining what to do.

2. *The Objective Balance of Reasons*

This picture of practical reasoning is at best a misleading and incomplete one. To see how and why this is so, it will be helpful to begin by adopting the following terminology. The balance of reasons understood as facts will be referred to as the *objective* balance of reasons. The objective balance of reasons consists of all practical inferences and weighing processes that would be carried out by an agent who, when deciding what ought to be done in a particular situation, possessed true information about all relevant facts and who in addition reasoned validly at every stage of his or her practical deliberations. (Raz sometimes uses the expression "right reason" to refer to what seems to be essentially the same idea.) A single complete reason which figures in the objective balance of reasons will be referred to as an *objective* reason, or a reason in the objective sense. Finally, a given person's process of reasoning about what ought to be done in a particular situation, where it is now possible that the person might not possess all relevant information and that he or she might make mistakes, will be referred to as that person's *subjective (practical) determination* of what ought to be done. The view of practical reasoning defended by Raz maintains, in effect, that an agent always assumes that his or her subjective practical determination coincides with the objective balance of reasons.³⁹ This assumption might be mistaken in a particular case, and the agent might come to discover that mistake after the fact, but the agent is nonetheless to be regarded as always relying on the assumption at the time of deliberation and action.

Consider the following example. Assume that it is going to rain today, and also that the only operative reason I have for carrying an umbrella is my desire to avoid getting wet. From the perspective of the objective balance of reasons I then have, in Raz's terminology, a complete reason to carry an umbrella which is made up of this operative reason together with an auxiliary reason, namely the fact that it will rain today. The weight of this complete reason, again from the perspective of the objective balance of reasons, is wholly determined by the strength of my desire not to get wet. Assume further that my only reason not to

39. For the moment I am assuming that only first-order reasons are in play. What happens when second-order reasons enter the picture will be discussed *infra* in text accompanying notes 44-51.

carry an umbrella is the inconvenience of doing so, but that my desires and interests are such that this reason is outweighed by the complete reason just described. According to the objective balance of reasons, then, I should carry an umbrella today. Now, on Raz's understanding of practical reasoning I will, in deciding what to do, either assume that it will rain today or I will assume that it will not. If I assume that it will rain, my subjective determination of what ought to be done will simply track the inferential steps and weighing processes of the objective balance of reasons (supposing, that is, that I make no mistakes, which in this case seems unlikely) and I will therefore reach the correct practical conclusion that I should carry an umbrella. If I assume that it will not rain today, then I will decide what to do on the basis of a belief that I have no reason to carry an umbrella, and the inconvenience of carrying an umbrella will prevail in my subjective practical determination. I will conclude (wrongly as it happens) that I should not carry an umbrella. Later in the day, when the skies open and I am drenched to the skin, I might cite my mistaken belief as the explanation for why I acted contrary to the objective balance of reasons.

3. *Subjective Practical Determinations and Uncertainty*

Let me now develop the example described in the preceding section further by supposing that the meteorology service has announced on the radio that there is a 20% chance that it will rain today. Notice first that the statement "The chance that it will rain today (which is 20%) is a reason to carry an umbrella" could well be true. It cannot, however, be analyzed in the same way that Raz analyzes the statement "The probability that it will rain is a reason to carry an umbrella," namely as asserting that there is a reason to believe that it will rain and that the fact that it will rain is a reason to carry an umbrella, since a 20% chance of rain is *not* a reason to believe that it will rain. It may, however, still be a reason to carry an umbrella. It is not part of the argument here that the statement "There is a 20% chance of rain today" cannot be unpacked into a complex factual statement which does not mention things like "chances." Nor is it part of the argument to claim that the complex fact associated with that unpacked statement, which will be referred to as fact A, cannot be regarded as a reason for carrying an umbrella. (Fact A would be something like the fact that it will rain on about 20 out of 100 days with weather conditions that are similar in certain specified respects to those prevailing today.) But nothing very important seems to turn on whether we refer to my belief that there is a 20% chance of rain, to the fact that there is a 20% chance of rain, or to fact A as my reason to carry

an umbrella. Consider that our meteorological theory might not have been capable of specifying a numerically precise probability of rain, but only that there is, say, a relatively low chance of rain. It would then be much more difficult to come up with an analogue to fact A, and in any event the reason which most people would naturally cite for carrying an umbrella would be their belief that there is a chance of rain, or the "fact" that it "might" rain.

The point to be emphasized about this example is the following: although from the perspective of the objective balance of reasons it is only the fact that it will rain today which gives me a reason to carry an umbrella,⁴⁰ I do not decide what to do by first assuming that it will rain today or else first assuming that it will not. The fact of the matter is that *I do not know* whether it will rain today, and I take that uncertainty directly into account in determining what I ought to do. I treat some other fact or belief as a kind of surrogate reason, even though I know that fact A, say, could never figure in the objective balance of reasons. If I definitely knew, for example, that it is going to rain today, then the fact that it will rain would be my reason for carrying an umbrella, not fact A. If, on the other hand, I knew that it is not going to rain today then neither A nor any other fact would be a reason for me to carry an umbrella. As it happens, though, I do not know whether it will rain, although I have reason to believe that a dry day is more likely than a wet one. My strategy in the face of this uncertainty is to act as though I have a reason to carry an umbrella, although I will probably discount its weight to reflect the perceived likelihood that it will not rain. In other words, I will probably treat fact A as having a lower weight than I would assign to the fact that it is going to rain today, if I knew that it was indeed going to rain. The reason for carrying an umbrella which I shall in fact take into consideration will thus be more easily outweighed by the inconvenience of carrying an umbrella than would the fact that it will rain, were I in a position to treat that fact as a reason.

This rather laboriously developed example illustrates that under conditions of uncertainty, i.e., in circumstances where we have reason in advance to think that we do not know what the objective balance of reasons requires, we consciously depart in our practical reasoning from the way that we know we would reason if the objective balance of reasons were accessible. Our subjective determination of what ought to be done takes into direct account, and our practical conclusions are partially

40. I am assuming that the sentence "It will rain today" can never be neither true nor false. Either it is true on a given day, or the sentence "It will not rain today" is true.

determined by, the fact and extent of our uncertainty about the truth of propositions which state that the facts which could figure in the objective balance of reasons obtain (or do not obtain). This is exactly what Raz's conception of practical reasoning seems to deny. We reason about what ought to be done relative to a set of beliefs—in the example, a general meteorological theory—which we sometimes know, at the time that we are deliberating, to be incomplete or only partially accurate. It is the incompleteness or possible inaccuracy of our beliefs about meteorology that creates uncertainty about the truth of such propositions as "It will rain today." It is, moreover, only relative to this set of beliefs that I could be said in the example to treat fact A as a reason for action. If we held a more accurate or more complete set of beliefs about meteorology then I could not be regarded as treating fact A but only some other complex fact as my reason for action.⁴¹ The point here is not that I would necessarily come to think that this new fact obtains and A does not, since it is possible that both might obtain. The point is, rather, that it is only because we hold the beliefs that we do, and because we know that those beliefs are incomplete or only partially accurate, that I could be said to treat either of these facts as a reason at all, since I know that neither of them is a reason which could figure in the objective balance of reasons.

There is thus a sense in which, even for what Raz calls guiding purposes as opposed to explanatory purposes, beliefs have priority over facts in practical reasoning. This is so, moreover, even though Raz is undoubtedly correct when he says that the notion of a reason understood as a fact is more fundamental than the notion of a reason understood as a belief, since it is only reasons in the former sense which can provide the ultimate justification for any action. It is also the case, of course, that our subjective determination of what ought to be done always strives (or at least should strive) to reproduce the result, if not necessarily the supporting reasoning, of the objective balance of reasons. However, it does not follow from the premise that the idea of a reason understood as a fact is the most fundamental notion of a reason that only such reasons are "normatively significant," or that only they "determine what ought to be

41. A more accurate meteorological theory would tell us that on days with weather conditions similar to those prevailing today, where what constitutes "similar conditions" would now be determined differently from before, the chance of rain is something other than 20%; it would tell us that the chance of rain is higher if today is in fact a day when it will rain, or that it is lower if today will turn out to be rain-free. A different complex fact from A would be associated with this new statement of probability, and it is only that different fact and not A which I could be said to be treating as a reason for action. I would of course now weight my reason for carrying an umbrella differently from the way that I would have weighted A, in order to reflect the different view concerning the probability of rain.

done."⁴² Beliefs come to take on a certain life of their own in practical reasoning, since not only do we not always know what the objective balance of reasons requires, but often we know that we do not know this at the very time that we must decide what to do. An adequate theory of practical reasoning must therefore not suppose that agents always deliberate about what to do on the assumption that their reasoning is tracking the objective balance of reasons, but must also have something to say about those situations where agents know that this is not the case.

Raz's conception of practical reasoning, according to which reasons are to be understood only as facts and agents are to be regarded as reaching their practical conclusions on the basis of definite assumptions about whether those facts obtain, is thus inadequate. Contrary to what Raz's conception implies, agents often consider in their subjective practical determinations the fact and extent of their own uncertainty about the truth of propositions which state that facts of the type that could serve as objective reasons obtain (or do not obtain). Sometimes, as in the example discussed above, this involves acting as though one has a reason to do something even though on balance there are insufficient grounds to *believe* that one has a reason in the objective sense, since one is not certain that one does *not* have such a reason. Sometimes, by contrast, agents take account of the fact that they could be mistaken about the state of affairs in question even where they have sufficient grounds to believe that the fact that could serve as an objective reason does obtain. In a criminal trial, for example, the court only has reason, so far as the objective balance of reasons is concerned, to convict and punish the accused if the person in fact committed the offense with which he or she has been charged. A preponderance of evidence that falls short of proof beyond a reasonable doubt may well be enough to justify a belief that the accused is guilty, but because of the possibility of mistake, together with a moral judgment that it is better to acquit guilty persons than to convict innocent ones, the court will not convict unless the evidence proffered by the state meets the stricter standard. This higher burden of persuasion is one aspect of the presumption of innocence, and, as Raz himself notes, it is a feature of many presumptions that they serve to sever what he calls "the normal connection between belief and action."⁴³

It is obvious that there are many ways in which agents might take account in their practical reasoning of uncertainty about what the objective balance of reasons requires. It will not be possible to explore this

42. J. RAZ, *supra* note 1, at 18.

43. J. RAZ, *supra* note 6, at 10.

topic in its full generality here. Instead, Raz's analysis of the concept of legitimate authority will be examined. As the following discussion will establish, his explanation of why it could ever be rational to act on an authoritative directive is, in effect, an exposition of one possible strategy for dealing with the sort of uncertainty that has just been considered. This fact is somewhat obscured, however, by an ambiguity in his notion of an exclusionary reason.

C. PRACTICAL REASONING AND UNCERTAINTY: THE EXAMPLE OF AUTHORITY

1. *Two Conceptions of an Exclusionary Reason*

Raz maintains, as we have seen, that to follow an authoritative directive is to act on an exclusionary reason. If this is true, then the nature of the exclusionary reason involved is very different from that of some of the reasons he refers to as exclusionary in other contexts. To see how and why this is so, it will be helpful to contrast his analysis of the concept of promising with his analysis of legitimate authority. Raz says that any promising principle which looks upon a promise as an expression of an intention to undertake an obligation should be thought of as an exclusionary rule that is justified only if the creation of a certain kind of special relationship between persons is held to be valuable:

[Such] principles present promises as creating a relation between the promisor and promisee—which is taken out of the general competition of conflicting reasons. It creates a special bond, binding the promisor to be, in the matter of the promise, partial to the promisee. It obliges the promisor to regard the claim of the promisee as not just one of many claims that every person has for his respect and help but as having peremptory force. Hence [such] principles can only be justified if the creation of such special relationships between people is held to be valuable.⁴⁴

Raz thinks that this kind of promising rule, together with the fact of having made a promise, gives rise to a reason for not acting on one or more first-order reasons that the promisor does in fact have. What a promise does, in other words, is to preempt at least some of the reasons that figure in (or at least would otherwise figure in) the objective balance of reasons. The effect of an exclusionary reason of the sort exemplified by a promise is to alter the topography of one's objective reasons, so to speak. There will be at least some situations, therefore, in which one

44. Raz, *supra* note 5, at 227-28.

should behave differently from how one ought to have behaved if one had not made the promise.

Contrast this with Raz's analysis of authority, which says that a person who is subject to a directive issued by a legitimate authority ought not to act on his or her *judgment* of what the objective balance of reasons requires (or, as Raz sometimes puts it, on his or her judgment of what ought to be done according to right reason). This of course entails that the person does not in any direct sense act on the objective reasons themselves, but those "excluded" reasons nonetheless do not simply drop out of the practical picture in the way that supposedly happens in the promising case. Authoritative directives are meant to be based upon and to reflect dependent reasons, i.e., reasons which apply to the subject in the circumstances in question. According to Raz's normal justification thesis, a subject is justified in accepting directives from a legitimate authority precisely because the subject is "likely better to comply with" those reasons than if he or she tried to follow them "directly."⁴⁵ Thus a person who follows a directive which does successfully reflect dependent reasons is complying with the supposedly excluded reasons even though not "directly" acting upon them. Once one accepts a directive, one ought not in addition to attempt to take direct account of the underlying dependent reasons for the simple and obvious reason that that would be double-counting.⁴⁶ Those reasons have already been taken into consideration, albeit indirectly, just by virtue of the directive having been followed. (This is true even if the directive, which we are assuming was issued by a legitimate authority, does not in fact reflect the dependent reasons, so long as it was intended to do so.⁴⁷) Authoritative directives thus do not in any ultimate sense exclude acting upon reasons which figure in the objective balance of reasons, and indeed their very role is to try to bring about a greater degree of compliance with those reasons. The point of Raz's analysis of authority is simply to determine whose *judgment* about what the objective balance of reasons requires should prevail in a given type of situation.

Raz thus has two different conceptions of an exclusionary reason. The first, which will be referred to as the *objective* conception, is concerned with reasons not to act on a reason that figures (or at least would otherwise figure) in the objective balance of reasons.⁴⁸ The second,

45. J. RAZ, *supra* note 6, at 53.

46. *Id.* at 58.

47. *Id.* at 61.

48. Should we say that the "excluded" reason still figures in the objective balance of reasons, but that the agent is not to act upon it? Or should we say, rather, that the objective balance of

which will be referred to as the *subjective* conception, is concerned with reasons not to act on one's (present) judgment of what an objective reason requires (i.e., on one's judgment of what action the reason calls for and what weight it should be treated as having).⁴⁹ The first kind of reason has an effect on what one ought to do (that is to say, it has an effect on right reason itself), while the second simply affects how one ought to go about ensuring that one does what one ought to do. In the context of Raz's analysis of authority it only makes sense to rely on a subjective exclusionary reason if there exists another person (who might in fact be oneself at an earlier time) whose practical judgment is more dependable than one's own. Agents can thus only appreciate that they have this sort of reason if they know that their own judgment about what the objective balance of reasons requires is, compared to the judgment of that other person, relatively untrustworthy. They might be aware, for example, that the other is wiser than they are, that the other is less likely to be influenced by irrelevant considerations, or that the other's actions are capable of affecting the objective balance of reasons itself.⁵⁰ But whatever the basis of their knowledge might be, agents can only regard it as rational to follow another's directives if they realize that they themselves might not know what the objective balance of reasons requires in a particular type of situation. This phenomenon can be termed *practical uncertainty*. From the point of view of the agent, then, reliance on subjective exclusionary reasons can only be justified, at least so far as Raz's normal method of justifying authority is concerned, if it constitutes a sensible strategy for dealing with the agent's own practical uncertainty.

An agent who acts on an objective exclusionary reason can sensibly assume that his subjective practical determination is directly tracking the

reasons has been altered, in the sense that the supposedly excluded reason is now no longer an objective reason at all? The second formulation has the greater intuitive appeal, and indeed it is not obvious that the first even makes much sense. It is only if the first formulation is accepted, however, that it seems plausible to speak of moral duties as exclusionary reasons. (On the status of moral duties as reasons, see *infra* note 49.) Taken together, these points suggest that the objective conception of an exclusionary reason may not be coherent. Since, however, I shall be concerned almost exclusively in this Paper with subjective second-order reasons, I shall not pursue this line of argument further.

49. I shall not attempt to draw up an exhaustive classification which sorts all of the reasons that Raz labels as "exclusionary" into one or the other of those two categories. A few further examples may be helpful, however. Raz says that moral duties are exclusionary reasons, *supra* note 27, and if this is so then they clearly fall under the objective conception. Following advice and acting on a decision, on the other hand, must be understood in terms of the subjective conception. The latter example is an instance of a reason to act on one's *previous* assessment of the balance of reasons rather than on one's *present* assessment.

50. See *supra* notes 22, 23; see also *infra* note 51 and accompanying text (concerning the possibility that authorities can affect the objective balance of reasons).

objective balance of reasons, as that balance has been modified by the existence of the exclusionary reason itself. But an agent who acts on an authoritative directive, which is a subjective exclusionary reason, cannot make this assumption. He will no doubt hope that his conduct will comply with the objective balance of reasons, but he will be aware that he is following an indirect strategy to achieve that end. Now it is of course true that the issuing of an authoritative directive is a fact. Further, if the authority is legitimate then it is also a fact that agents are likely better to comply with the objective balance of reasons by acting on the directive instead of on their own judgment. But these are not facts which enter into the objective balance of reasons; neither are they facts which, in the manner of an objective exclusionary reason, affect it. An agent treats these facts as reasons, but does so in the way that the agent in our earlier example treated fact A as a reason to carry an umbrella; they are a kind of surrogate reason, only to be treated as reasons because the agent is in a situation of practical uncertainty.

Raz says that an authoritative directive is a first-order reason as well as an exclusionary reason, but because it is not a reason which figures in the objective balance of reasons this is somewhat misleading. It is preferable simply to speak of the agent as having a reason, arising out of practical uncertainty, to make his or her subjective determination of what to do by deferring to another's judgment about what the objective balance of reasons requires. It should also be noted that while subjective exclusionary reasons differ from objective exclusionary reasons in that they do not by their nature automatically affect the objective balance of reasons, it is sometimes the case that other features of an authoritative directive, or of the circumstances under which the directive is issued, can have this consequence. This is the case, for example, with respect to authoritative directives which resolve prisoner's dilemma-type situations.⁵¹

There is thus a certain tension between Raz's analysis of the concept of authority and the understanding of practical reasoning that he advanced in *Practical Reason and Norms*. This tension does not undermine his analysis of authority, which is essentially sound, although it does provide further evidence that the understanding of practical reasoning which he defended in his earlier work is inadequate, or at least incomplete. The main object in bringing this tension to light is not to

51. Raz discusses this and other examples of situations in which authorities affect what I have been calling the objective balance of reasons in J. RAZ, *supra* note 6, at 48-51. It is because such cases exist that he concludes that the *no difference thesis*, which asserts that "the exercise of authority should make no difference to what its subjects ought to do," is false. *Id.* at 48.

criticize Raz's analysis of authority, but rather to clarify it. Once it is realized that the analysis utilizes the *subjective* conception of an exclusionary reason and that at its heart lies a strategy for dealing with practical uncertainty, then several refinements to the analysis begin to suggest themselves. The nature of these refinements, which are concerned with certain ways in which even legitimate authority can be limited, is the subject of Sections 3-6 below.

2. *The Bounds of Authority: Jurisdictional and Scope Limitations*

Raz's analysis of authority builds upon one particular form of justification for the conclusion that one person or institution ought to defer to the judgment of another person or institution about what the former ought to do.⁵² It will hardly be disputed that deferring to the judgment of another person is at least sometimes the most rational course, and, as will be shown later, there is more than one way in which deference to the judgment of another can be justified. The difficult questions, to be dealt with initially in this and the immediately following sections, concern the determination of the limits of deference. For the time being attention will be focused mainly on deference that is taken to be justified in the manner indicated by Raz's normal justification thesis. Before considering the possible refinements on the ways that authority can be limited that were mentioned above, it will be helpful to outline briefly the two forms of limitation on legitimate authority which are unequivocally accepted by Raz.

Raz says correctly that the directives of legitimate authorities must at least sometimes be binding even when mistaken, since otherwise "the advantage gained by accepting the authority as a more reliable and successful guide to right reason would disappear."⁵³ But, as was noted earlier, Raz also accepts that authority can be limited in at least two ways.⁵⁴ First of all, an authority can be limited by the kinds of acts or situations which it can or cannot regulate. This is simply to say that its jurisdiction can be circumscribed. Secondly, authorities can be limited by the kinds of reasons upon which they may or may not rely and which their decisions will preempt. To put this point in the special terminology developed by Raz, exclusionary reasons may be limited in scope—they may exclude some reasons only. It is of course the subjective conception of an

52. For the sake of convenience I shall henceforth use the word "person" to refer to both persons and institutions.

53. J. RAZ., *supra* note 6, at 61; see also *id.* at 47-48.

54. See *supra* note 26.

exclusionary reason which concerns us here. Thus the point could be expressed more precisely by saying that an authoritative directive may provide a reason not to act on one's judgment of what is required by only some, and not necessarily all, of the reasons that figure in the objective balance of reasons.

3. *The Bounds of Authority: Reweighting Limitations*

There are at least two other ways in which deference to an authority could in principle be limited. These will be discussed in turn in this and the following section. The first is the possibility that I might take the judgment of the authority into account only to the extent of introducing an element of systematic bias into my practical reasoning; I would treat the case for the conclusion which is favored by the authority as being stronger to some specified degree than it actually appears to me to be. I would thus be deferring to the judgment of the authority only partially, in the sense that I would never permit my own judgment to be preempted completely by that of the authority. Raz discusses the possibility of this kind of partial deference but rejects it as not being compatible with the general thrust of the normal justification thesis: the reason for deferring to an authority is to increase the extent to which one complies with the reasons that apply to oneself, and one will always do better if one defers to the authority's judgment completely (within the bounds, of course, that are set by those other limitations on authority which Raz does accept).⁵⁵

It is not absolutely obvious that Raz's observation about this kind of partial deference is true, but for present purposes it will be assumed that he is right. It is nonetheless worth taking note of two further points. First, the idea of such partial deference implicitly presupposes a generalization of the subjective conception of an exclusionary reason. According to this generalization, a subjective second-order reason is a reason to treat a reason as having a greater or lesser weight than the agent would otherwise judge it to possess in his or her subjective determination of what the objective balance of reasons requires.⁵⁶ (An exclusionary reason is then just the special case of a reason to treat a reason as having zero weight.) Second-order reasons as thus defined will be referred to as *reweighting* reasons. Notice that the idea of a reweighting reason only

55. J. RAZ, *supra* note 6, at 67-69.

56. I discuss this generalized conception of a second-order reason in Perry, *Judicial Obligation, Precedent and the Common Law*, 7 OXFORD J. LEGAL STUD. 215, 222-23 (1987). I did not, however, distinguish there between subjective and objective second-order reasons.

seems to make sense if it is regarded as a possible strategy upon which agents might rely in their subjective practical determinations about what ought to be done. (Whether following such a strategy could ever be justified is, of course, another matter.) The idea that reweighting could take place at the level of the objective balance of reasons does not even seem to be coherent, so that a generalization of the sort being discussed is possible with respect only to the subjective and not the objective conception of an exclusionary reason.⁵⁷

The second point is that while Raz may be correct to say that the idea of reweighting has no possible application where deference to the practical judgment of another is to be justified by means of the normal justification thesis, the idea is nonetheless coherent in its own terms, at least if it is understood in the way just outlined. Quite possibly it could have an application in other contexts. It might well be of assistance, for example, in elucidating the role in practical reasoning of certain kinds of presumptions, such as the presumption of innocence and the presumption of death, which call for an increase (or decrease) in the strength of the evidence that will be deemed necessary (or sufficient) to justify certain actions. As mentioned earlier, reliance on this kind of presumption represents one possible strategy for dealing with uncertainty about what the objective balance of reasons requires, and it is conceivable that that strategy is most appropriately characterized by reference to the idea of reweighting.⁵⁸ The analysis of such presumptions will not be undertaken here. It will be suggested below, however, that reweighting reasons have a role to play in the explication of the common law doctrine of precedent, which is itself a judicial response to uncertainty about what the objective balance of reasons requires.

4. *The Bounds of Authority: Epistemic Limitations*

There is another way in which deference to the practical judgment of an authority can be limited in addition to the ways that have already been discussed. This kind of limitation is not completely distinct from jurisdictional limitations, since it provides what amounts to a means by which these can be implemented. But it is also capable of limiting deference to the judgment of an authority even where the latter has not

57. The objective conception of an exclusionary reason may not itself be coherent. See *supra* note 48.

58. There is a brief discussion of presumptions in J. RAZ, *supra* note 6, at 8-11. The analysis suggested in the text appears to be consistent with what Raz says there, as well with the account of presumptions advanced in Ullmann-Margalit, *On Presumption*, 80 J. PHIL. 143 (1983).

exceeded the constraints of jurisdiction or scope. The key to this particular variety of limitation is the fact that Raz's analysis of legitimate authority effectively treats the practice of following authoritative directives as a strategy for dealing with practical uncertainty. While it is true that an authority's directives must sometimes be binding even when wrong if the authority is effectively to serve its purpose, there will ordinarily be no reason, from the perspective of the strategy just described, to follow a directive in a particular case if one is certain beyond doubt that the authority has made a mistake. (This is not to say that there might not be other reasons to follow the directive, but a person who acted on any of those reasons would not be treating the directive as authoritative in Raz's sense.) Uncertainty is a matter of degree, however. If it is conceded that an authority's directive might not bind an individual who is certain beyond doubt that the authority is wrong, then the possibility emerges of drawing the epistemic line which is associated with this kind of limitation at a different point. For example, a person might defer to the judgment of an authority only where she was so uncertain about the practical question in hand that she had no opinion one way or the other on what the appropriate solution should be. Alternatively, she might defer no matter how strongly she felt that the authority had made a mistake. Between these two extremes lies a range of further possibilities which are defined by the strength of the person's conviction that she is right and the authority wrong.

Limitations of the sort just described will be referred to as *epistemic* limitations on the deference which one person should show to the practical judgment of another. The point at which the former should (for whatever reason or combination of reasons) cease to defer to the judgment of the latter with respect to a given type of practical situation, where that point is to be defined by the strength of the former's conviction that the latter has made a mistake, will be termed the *epistemic threshold* for those persons and that type of situation. Raz recognizes the possibility of epistemic limitations when he says, in response to a possible objection to his account of authority, that even if legitimate authority is limited by the condition that its directives are not binding if clearly wrong, it will still be possible for it to play its mediating role because a demonstration that something is clearly wrong "does not require going through the underlying reasoning."⁵⁹

Now the central case of a clear mistake has two features: (1) its nature is such that it is relatively easy to discover that a mistake has

59. J. RAZ, *supra* note 6, at 62.

possibly been made; and (2) once that possibility has come to light the alleged mistake will be *known* to be a mistake with some degree of certainty. It is because of the second feature that the type of limitation which Raz is discussing is an epistemic limitation, or at least incorporates such a limitation. Raz declines to say whether he thinks legitimate authorities are in fact limited by the condition that their directives are not binding if clearly wrong, but he is nonetheless correct to conclude that an authority which was thus limited would in principle still be able to fulfill the mediating role which he assigns to authority in general. This is not because it would be unnecessary to go through the underlying reasoning *at all*, but because it would be unnecessary to go through it *in its entirety*. The identification of a clear mistake would seem to demand at least *some* familiarity with the underlying reasoning, but the fact that an agent is not completely ignorant of the relevant first-order reasons still leaves room for the normal justification thesis to operate.

Mistakes in practical reasoning can be clear mistakes to a greater or lesser degree, and there can be variations in degree with respect to each of the two features of a clear mistake mentioned above. Thus the possibility of a mistake might be relatively easy to detect, but one might still be rather uncertain about whether a mistake had in fact been committed. Conversely, the possibility of a mistake might be very hard to detect, but one might be absolutely certain, once that possibility had come to light, that a mistake had indeed been made. Epistemic limitations are defined solely in terms of the relative degree of certainty that a mistake has been made, and hence without reference to the relative ease of detecting the possibility of a mistake.

Conceivably, there could be situations where someone who was less familiar with the underlying reasoning than an alleged authority could find it relatively easy to discover the possibility of a mistake without in the majority of cases necessarily being convinced to any strong degree that a mistake had in fact been committed. Given that the person is assumed to be less familiar with the underlying reasoning than the authority, there is room for the normal justification thesis to operate. But there is no *a priori* reason to think that such a person will necessarily do better, in the sense of complying with right reason to the greatest possible extent, by ceasing to defer at a relatively high rather than at a relatively low epistemic threshold. It is theoretically possible that one might maximize compliance with right reason if one were to cease to defer to the judgment of the authority at the point at which one was, say, *fairly* sure that a mistake had been made, rather than at the point of

complete certainty. This might be true, for example, if one had reason to think that the authority was only moderately better than oneself at assessing the objective balance of reasons and if it sometimes displayed a certain erratic quality in its practical determinations. Raz's analysis of legitimate authority is thus compatible with the idea that the normal justification thesis itself could place variable limits (in addition to the limits of jurisdiction and scope) on the degree to which deference should be shown to the practical judgment of authorities. It could justify the acceptance of epistemic thresholds that differed from person to person, situation to situation, and authority to authority.

5. *Epistemic Limitations and Jurisdiction: The Example of Administrative Law*

As mentioned, epistemic limitations can apply to jurisdictional as well as to substantive mistakes. Reliance on an epistemic limitation can in fact tend to blur the distinction between these types of errors, or at least make it unnecessary to draw a sharp line between them. This fact could strengthen the case for using epistemic limitations if there are independent difficulties with drawing the substantive/jurisdictional distinction in a clear and nonarbitrary way. Courts have encountered such difficulties in the area of judicial review of administrative action, and it will be argued that the result has been a trend towards adopting epistemic limitations to define the character and extent of the deference which courts should show to the decisions of public tribunals. In considering this example, it will help to shed some light on the modifications to Raz's account of authority which the recognition of epistemic limitations requires if one bears in mind his claim that the cogency of that account depends on the existence of a relatively clear distinction between jurisdictional and nonjurisdictional errors.⁶⁰ As we shall see, the introduction of epistemic limitations calls that claim into question.

In the area of administrative law the basic justification which is usually given for setting up a specialized public tribunal is the opportunity this creates for the members of the tribunal to draw upon or to develop an expertise in a relatively limited field.⁶¹ The existence of such expertise will make it more likely that the tribunal can be shown, in accordance with Raz's normal justification thesis, to have legitimate authority over the individuals who appear before it. If the tribunal's expertise is greater than that of the court in certain matters, then that will be a reason for the

60. *Id.*

61. P. CRAIG, *ADMINISTRATIVE LAW* 337, 339, 343 (1983).

court to defer to the tribunal's judgment, at least where those matters are concerned, when the court is asked by an aggrieved individual to engage in judicial review. (Efficiency concerns might be a related, reinforcing consideration if the tribunal were able to render decisions more expeditiously than the court.) The question then is whether and how that deference should be limited. One plausible-sounding answer is to say that the court should not defer to the tribunal's judgment where the error is jurisdictional but should defer where the error is nonjurisdictional (i.e., substantive).

As students of administrative law are aware, drawing a distinction between those errors of a public tribunal which go to jurisdiction and those which go to the merits of matters falling within the tribunal's authority is no easy matter. Indeed it is a task that it may not even make a great deal of sense to undertake. Paul Craig has pointed out that grants of authority to tribunals can always be expressed as follows: if X exists then the tribunal may or shall do Y, where X can consist of a combination of legal, factual, or discretionary elements.⁶² The determination of whether or not X exists, which may well be the most important question facing the tribunal, has never been held by the courts to be entirely a matter of jurisdiction.⁶³ The collateral fact doctrine is one well-known effort to keep judicial review of administrative action from simply collapsing into appeal on the merits by attempting to distinguish between those elements within the X factor which condition jurisdiction and those which do not. It is an effort that has generally been discredited precisely because of the apparent impossibility of drawing this kind of distinction in a nonarbitrary way.⁶⁴ As Craig observes, the critical question in this area of administrative law, an answer to which will underlie any theory of jurisdictional limits, "is whose relative opinion on which matters should be held to be authoritative."⁶⁵ The collateral fact doctrine tries to answer this question in a way that will steer a middle course between overly broad and overly narrow review, but "[t]he median is attained by total control over some topics and no control over others, with an arbitrary line betwixt the two."⁶⁶

An alternative theory of judicial review that tries to steer a different kind of middle course has been gaining widespread acceptance in the

62. *Id.* at 299.

63. *Id.* at 302.

64. *Id.* at 301-04.

65. *Id.* at 315.

66. *Id.* at 335.

United States,⁶⁷ Canada,⁶⁸ and elsewhere, namely the reasonableness or rational basis test.⁶⁹ It rejects the attempt of the collateral fact doctrine to distinguish between jurisdictional and nonjurisdictional elements within the X factor. At the same time it also rejects that doctrine's all-or-nothing approach, according to which a perceived jurisdictional error automatically renders the tribunal's decision a nullity whereas, so long as there has been no breach of natural justice or other procedural mistake, a perceived nonjurisdictional error is nonreviewable. On the rational basis approach the reviewing court will defer to the tribunal's judgment with respect to matters within the X factor, even if it thinks that the tribunal decided wrongly, so long as its decision was reasonable. The range of what counts as reasonable will be determined by the court and will vary depending on the nature of the tribunal and the content of the enabling legislation.⁷⁰ Sometimes the court will apply a correctness test to a particular question and simply substitute its own view for that of the tribunal,⁷¹ but ordinarily it will only do this where it has concluded that the court is in a better position than the tribunal to deal with questions of that kind.⁷²

The experience of courts in this area of the law thus illustrates that it can be very difficult to distinguish in a clear and nonarbitrary way between jurisdictional and nonjurisdictional errors. Moreover, the alternative approach which has been widely advocated as a means of addressing this difficulty, namely the rational basis or reasonableness test, is most plausibly viewed as involving an epistemic limitation on the deference which one person should show to the practical judgment of another. A judge who allows the decision of a tribunal which she thinks was mistaken to stand so long as she is able to regard the decision as reasonable is deferring to the practical judgment of the tribunal, but only up to a point. That point is determined mainly by reference to the strength of the judge's conviction that the tribunal has erred. After all, what else

67. *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944).

68. *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227.

69. P. CRAIG, *supra* note 61, at 338-43.

70. *Id.* at 338.

71. A correctness test is simply one extreme of a continuum of possibilities permitted by a rational basis test. *Cf. id.* at 343. According to Craig,

[w]hether the diversity [which is possible in the extent of review] is reflected in the presence of two tests, rational basis and rightness, or whether we should simply work through the former is a matter of semantics If we work through the former alone the range of choice or the breadth of the spectrum will vary from area to area. Not only will it alter but the spectrum might be reduced to one

72. *Id.* at 343.

could it mean to say that a person regards a decision as wrong but reasonable than that she believes the decision is mistaken but recognizes that there is at least a nonnegligible possibility that *she* might be wrong and the tribunal right? An unreasonable decision, on the other hand, is one which she is convinced to some relatively strong degree of certainty could not be right. There may also be a social element involved in the designation of a mistake as an unreasonable one, in the sense that the judge may have to think that most other people (or most other people with a certain level of expertise) would agree with her judgment. However, this would be a condition that was ancillary to the basic requirement that she herself be fairly strongly convinced that an error had been committed. As a result, the rational basis or reasonableness test is clearly best characterized as an approach to judicial review whose effect is to place an epistemic limitation on the deference which a reviewing court should show to the decisions of public tribunals.

We have already seen that there is no unique epistemic threshold that is automatically determined by the character of a "clear mistake." Varying the threshold from situation to situation is compatible, moreover, with the normal justification thesis because such variation could help to maximize overall compliance with right reason (i.e., compliance with the requirements of the objective balance of reasons). As the above discussion of the reasonableness test has shown, the range of decisions of a given tribunal which are to count as reasonable with respect to a given type of subject matter is itself subject to variation by the courts. In theory, the possibilities range from complete deference to complete lack of deference (application of a correctness test), and while reviewing courts seldom adopt the former of these extreme approaches, they do sometimes adopt the latter. In light of the conclusion that the reasonableness test has the effect of placing an epistemic limitation on the deference which courts should show to tribunals, it seems clear that the best interpretation of the judicial practice of varying the range of what is to count as reasonable is that the courts are applying different epistemic thresholds to different situations.

The basic standards for determining the existence of a jurisdictional or substantive error will ordinarily be found, of course, in the tribunal's enabling legislation. Since those standards (and the moral standards needed to supplement them) can be controversial, the basic question becomes, to quote Craig once again, "whose relative opinion on which matters should be held to be authoritative."⁷³ Using a reasonableness

73. *Id.* at 315.

approach, the most important aspect of any answer to that question will be the point at which the epistemic threshold is set. There are a number of different factors that could influence this decision, including most obviously the desire to maximize compliance with right reason. Taking this factor into account would require an assessment of the relative degree of expertise in the relevant subject matter possessed by the court and the tribunal respectively, and it is clear enough that courts often do engage in such assessments. But other considerations could also enter into the court's calculations, such as the need for a certain degree of efficiency in decisionmaking or the fact that the tribunal might not be able to function as a legitimate and independent body if its decisions were quashed too frequently. These last two factors also demonstrate that the answer to the question of how much one person should defer to the practical judgment of another person is not necessarily determined by the normal justification thesis alone, even where the latter is a legitimate authority, in Raz's sense, for the former.

It is worth emphasizing that the use of epistemic limitations in institutional contexts is by no means limited to the judicial review of administrative action; it is in fact a common phenomenon. Thus an approach similar to the rational basis test is often used in many areas of the law besides administrative law to determine the boundaries between the authority of one person or body to make a decision and that of another person or body either to quash the decision of the first or to make the decision itself. It is, for example, a similar kind of reasonableness test, and one which is also best understood as giving effect to an epistemic limitation, that courts apply to determine which findings of fact are reviewable on appeal. Reliance on an epistemic limitation also seems to form part of the English doctrine that a court will not treat as conclusive a Minister of the Crown's objection to producing a document as evidence in civil litigation, but instead will balance the public interest in withholding the document against the public interest in ensuring the proper administration of justice.⁷⁴ On one understanding of this doctrine the court will defer, but only up to a point which is best regarded as being defined by an epistemic limitation, to the Minister's assessment of the strength of the case that can be made for withholding the document.⁷⁵ Finally, it is worth noting that an approach to jurisdictional questions

74. See, e.g., *Conway v. Rimmer*, [1968] A.C. 910.

75. *Id.* at 984. Lord Pearce stated:

It is difficult to lay down with precision how far the court should accept the view of the executive on what should be privileged while retaining its inherent power to reject it; and how far it should inspect and form its own views, while giving due weight to the Minister's objection.

which is best understood in terms of an epistemic limitation is often adopted in institutional contexts outside the law. For example, university tenure appeal committees sometimes consider whether the decision of an original tenure committee was one that could have been arrived at by reasonable and fair-minded people or whether it reflects some manifest error of judgment. If the appeal committee concludes that the original decision was wrong but not manifestly wrong, then it must allow the decision to stand.⁷⁶

6. *The Nature of Epistemic Limitations*

What effect does the recognition that a legitimate authority might be constrained by an epistemic limitation and, more particularly, that the epistemic threshold is not uniquely fixed, have on Raz's analysis of authority? Beyond the effect on his analysis of authority, how does the notion of an epistemic limitation fit into Raz's more general account of practical reasoning? The answer to the first of these questions is: very little. Even a relatively low epistemic threshold might theoretically be called for by the normal justification thesis itself, since it is at least conceivable that an agent might maximize compliance with right reason by not deferring to the authority's judgment past that particular point. In practice, though, it might be rational for an agent in this situation to comply with a somewhat higher threshold simply to avoid expending the increased costs in time and effort which, due to the need to scrutinize the underlying reasoning more often and more carefully, are likely to be the result of acting in accordance with a lower threshold.⁷⁷ Efficiency concerns, which might lead to a tradeoff with the goal of maximizing compliance with right reason, provide an example of a kind of reason that can play a part in justifying deference to the practical judgment of another while also remaining, at least to some extent, independent of the normal justification thesis. (Raz states that following authority on efficiency grounds "is a borderline case between normal and deviant justification."⁷⁸)

As will be discussed below, speaking in terms of "giving weight" to the practical judgment of another is a natural idiom to employ in referring to epistemic limitations.

76. I owe this example to Thomas Hurka.

77. Cf. J. RAZ, *supra* note 6, at 73 ("One also has to take notice of the disadvantages to one's life of too obsessive a preoccupation with questions of the precise limits of authority."). Raz is talking here of scope limitations, but the same is true of epistemic limitations as well.

78. *Id.* at 75.

The second and more important of the two questions posed above is how exactly does the notion of an epistemic limitation fit into Raz's general account of practical reasoning? Up to this point it has implicitly been assumed that such limitations are really just constraints on the applicability of exclusionary reasons. While this is one possible way to conceptualize epistemic limitations, it will be argued that the better approach is to regard them as giving rise to a special category of subjective second-order reasons which is to be contrasted with, not included within, the category of exclusionary reasons. A subjective second-order reason which always (within appropriate scope and jurisdictional limitations) requires deference to the practical judgment of another person, even when the agent is convinced beyond doubt that the other has made a mistake, may be termed a *pure* (subjective) exclusionary reason. A subjective second-order reason which requires a person to defer to another's practical judgment only up to some specified epistemic threshold may then be referred to as an *epistemically-bounded* reason.⁷⁹ The question which must now be addressed is whether pure exclusionary reasons and epistemically-bounded reasons should be regarded as two species of the single genus "exclusionary reason," or whether the concept of an exclusionary reason should be limited to pure exclusionary reasons. In the latter case, exclusionary and epistemically-bounded reasons would be mutually exclusive categories.

While Raz concedes that a "clear mistake"-type of limitation on authoritative directives is possible in principle, it is evident that he conceives of exclusionary reasons as pure exclusionary reasons only. The possibility nonetheless exists of extending the category of exclusionary reasons thus understood to include epistemically-bounded reasons. The notion of an exclusionary reason is technical in character, in the sense that it does not have any precise analogue in popular usage, so any answer to the question of whether such an extension should be effected will to some extent be a matter of linguistic stipulation. But it is sensible in such cases to let stipulation be guided by the most important or significant aspects of the technical notion in question. Epistemically-bounded reasons are similar to pure exclusionary reasons in that the agent's judgment is, on any one occasion, either completely preempted by the authority's judgment or it is not. In this respect they both differ from

79. The notion of an epistemically-bounded reason, like that of a reweighting reason, only makes sense if it is regarded as an instance of the subjective conception of an exclusionary reason. It operates at the level of an agent's subjective determinations of what to do as part of a strategy to deal with practical uncertainty. The idea of an epistemically-bounded *objective* exclusionary reason is incoherent.

reweighting reasons. But this feature of pure exclusionary reasons is not particularly significant. To discover what is fundamental about pure exclusionary reasons it is necessary to focus on their purpose.

In *Practical Reason and Norms* Raz argues that all mandatory norms, which is a category that is clearly to be understood as including rules and authoritative directives, are exclusionary reasons. He then proceeds to describe the purpose of such norms:

The presence of a norm does not automatically settle practical problems. There may be other conflicting reasons not excluded by the norm. There may be scope-affecting considerations, etc. But it must be admitted that for the most part the presence of a norm is decisive. The complicating factors apply only in a minority of cases. The whole purpose of having norms is to achieve this simplification. The fact that norms are exclusionary reasons enables them to achieve this purpose [N]orms have a relative independence from the reasons which justify them. In order to know that the norm is valid we must know that there are reasons which justify it. But we need not know what these reasons are in order to apply the norm correctly to the majority of cases.⁸⁰

The whole point of mandatory norms and exclusionary reasons generally is, therefore, to simplify practical reasoning by isolating the norm or reason from its justifying first-order reasons. Exclusionary reasoning enables agents to act without the necessity of going through the underlying reasoning themselves, or at least without having to go through it on each occasion that they act.

Raz recognizes that reliance on exclusionary reasons may occasionally require some familiarity with the underlying reasoning. This will be the case, for example, with respect to some applications of the scope distinction. Nevertheless, this kind of complication is supposed to be kept to a minimum. Perhaps Raz might want to say that a "clear mistake" limitation is a similar kind of minimal complication that does not call for recognition of a new category of second-order reasons, but there are at least two difficulties with this idea. The first is that there exists a *range* of epistemically-bounded reasons, not just a single kind of minimal limitation which, if applicable at all, applies in all circumstances in the same way. The second, related difficulty is that reliance on such reasons always requires at least *some* familiarity with the underlying reasoning

80. J. RAZ, *supra* note 1, at 79; see also *id.* at 80 ("It is only in exceptional circumstances that I must know the precise reasons for the rule in order to know what to do."); cf. J. RAZ, *supra* note 6, at 58 (rules mediate between deeper level considerations and concrete decisions).

and will often be compatible with, or even demand, a very extensive familiarity.

When a person defers to the practical judgment of another on the basis of the normal justification thesis, the extent of familiarity with the underlying reasoning which that person requires so as to be able to rely on an epistemic limitation will presumably be lower than the degree of familiarity possessed by the person being treated as an authority. This is, nonetheless, quite compatible with the former possessing a significant level of expertise in the relevant area himself. More importantly, deference to the judgment of another person can be justified on grounds other than the normal justification thesis, and, where this is so, a fairly extensive familiarity with the underlying reasoning may be crucial if the strategy calling for reliance on an epistemically-bounded reason is to be successful. It will be argued below that this is the case with respect to legal reasoning. Epistemically-bounded reasons as a class thus call for a familiarity with the underlying first-order reasoning which, because it can be quite extensive, is fundamentally at odds with what Raz views as the purpose of exclusionary reasons. That purpose is, to repeat, the isolation of the underlying reasoning from the agent's own practical deliberations. It is therefore preferable that epistemically-bounded reasons not be defined as a sub-class of exclusionary reasons, and henceforth the term "exclusionary reason" will be used to refer to pure exclusionary reasons only. (As has already been made clear, the exclusionary reasons in question here will always be subjective exclusionary reasons.)

Reweighting reasons and epistemically-bounded reasons are both categories of subjective second-order reasons which place limits on the deference that one person should show to the practical judgment of another. There are, however, several respects in which they differ. A reweighting reason introduces a systematic bias in favor of another person's judgment into the agent's own subjective practical determinations, and, in particular, into the agent's deliberations about how first-order reasons should be weighted. Although the bias is always operative, it still acts as a limitation on deference because the agent's judgment is never *completely* preempted by the judgment of the other person (except, of course, in the extreme case of an exclusionary reason, which can be regarded as a special case of a reweighting reason). By contrast, epistemically-bounded reasons constrain deference by limiting the occasions on which deference should be shown. When the agent does defer, however, his or her judgment will be preempted completely. Furthermore, reliance on epistemically-bounded reasons is at least sometimes compatible

with an authority's being legitimate in Raz's sense, i.e., with its being justified by the normal justification thesis, but, as was noted earlier, the same may not be true of reliance on reweighting reasons.

Although there are notable differences between reweighting reasons and epistemically-bounded reasons, there are also important similarities. Both can naturally be spoken of as giving rise to a "presumption" in favor of the practical solution that is being advanced by another person. Both types of reasons also seem capable of giving a more precise content, albeit in different ways, to the idiom of "attributing weight" to the practical judgment of another. Since the notions of "presumptiveness" and "attributing weight" often figure prominently in discussions of the legal doctrine of precedent, it is natural to ask whether either or both of these two types of second-order reasons have a part to play in the elucidation of that doctrine. Following a brief exposition of Raz's own positivist theory of law, which is itself built around the idea of a subjective exclusionary reason, it will be argued below that the answer to this question is "yes." The point of the discussion of reweighting reasons and epistemically-bounded reasons in this and preceding sections has essentially been just to clarify Raz's conception of a second-order reason and to propose several relatively minor refinements to his analysis of legitimate authority. But the suggestion that the doctrine of precedent should be understood in terms of such reasons amounts to more than an analogous recommendation that Raz's version of positivism be amended in one or two small respects. It is, rather, one aspect of a comprehensive conception of law and legal practice which offers an alternative to, and in many respects is incompatible with, the theory of law defended by Raz.

II. PHILOSOPHY OF LAW

A. RAZ'S DEFENSE OF LEGAL POSITIVISM

1. *Two Theses*

"Legal philosophy is nothing but practical philosophy applied to one social institution."⁸¹ In this sentence Raz makes explicit two of the most important general theses which underlie and inform his approach to the philosophy of law. The first is that law gives rise in a systematic way to reasons for action, so that legal philosophy must be regarded as a branch of the philosophy of practical reason. The second is that legal philosophy involves the study of a particular kind of social institution. In a sense both of these theses are obvious truisms, but because both have

81. J. RAZ, *supra* note 1, at 149.

sometimes been ignored by legal philosophers the prominence which Raz gives to them in his writings is salutary. Beyond that, it is by means of a particular view about the function of law, a view which ultimately derives from the second of the two theses and which gives a more concrete cast to the first, that Raz constructs his very powerful defense of legal positivism. The two theses thus play a more significant role in Raz's legal theory than merely drawing attention to a couple of vague and uncontroversial platitudes. The second is the cornerstone of his basic methodology in legal philosophy, and it will be discussed in sufficient detail in the following section to enable us to understand whether and how Raz's approach differs from the well known methodology of Ronald Dworkin. This will facilitate a critical comparison of Raz's version of positivism with what is essentially a Dworkinian theory of law. The first of the two theses, on the other hand, is a kind of highly abstract summary of the importance within Raz's legal theory of his analysis of authority and of his conception of an exclusionary reason. This thesis will be discussed later, when Raz's conception of the function of law is considered.

2. *Methodology: The Institutional Approach*

In insisting that legal philosophy must begin with what he calls the institutional approach Raz explicitly rejects two other possible starting points, which he terms the linguistic approach and the lawyers' perspective.⁸² The second of these builds upon the idea that "[t]he law has to do with those considerations that it is appropriate for courts to rely upon in justifying their decisions."⁸³ This is clearly just a specific instance of the institutional approach, one which concentrates on a particular type of legal institution (i.e., courts). The other possibility Raz considers, namely the linguistic approach, holds that legal philosophy should concentrate on explicating the meaning of the word "law."⁸⁴ Raz is clearly correct to reject this approach, and in doing so he makes common cause with Ronald Dworkin in repudiating what the latter calls "semantic" theories of law.⁸⁵ Dworkin's own methodology begins with the premise that legal theorists (and judges) should offer interpretations of legal practice as a whole that best justify the practice, which is to say, show it in its

82. See Raz, *The Problem about the Nature of Law*, 21 U.W. ONTARIO L. REV. 203, 204-12 (1983).

83. *Id.* at 207.

84. *Id.* at 204-07; see also J. RAZ, *supra* note 3, at 41 ("[W]e do not want to be slaves of words."); J. RAZ, *THE CONCEPT OF A LEGAL SYSTEM* 209-10 (2d ed. 1980).

85. R. DWORKIN, *LAW'S EMPIRE* 31-33 (1986).

best light from the perspective of political morality.⁸⁶ This methodology has a dimension of fit, which is shaped by legal practice itself, and a normative or evaluative dimension, which is shaped by the theorist's understanding of political morality.⁸⁷ It is worth emphasizing that Raz's methodology bears a distinct resemblance to Dworkin's, since in taking up the institutional approach he is, like Dworkin, concentrating on the understanding of certain kinds of existing "social practices" (to use Dworkin's term).⁸⁸ Raz also acknowledges that legal theories, including his own, will involve evaluative judgments, although he denies that such judgments are necessarily moral in nature.⁸⁹

This is not to suggest that Raz and Dworkin have anything like identical approaches to doing philosophy of law, but their respective methodologies are at least sufficiently similar to permit a true joining of issue between them. Failure to appreciate how and why this is so has led to some confusion, however, and there are certain misconceptions which should be corrected. To begin, Dworkin seems to conflate two different ways in which Raz says that moral considerations do not enter into legal theory.⁹⁰ The first is Raz's claim, discussed above, that legal theory does not involve moral judgments at a methodological level. The second concerns what Raz calls the sources thesis, which says that individual laws must be identifiable on the basis of social facts alone and hence in value-neutral terms.⁹¹ Dworkin says that the sources thesis must be argued for, and that "any plausible argument must be an argument of political morality or wisdom."⁹² The clear implication is that Raz has not offered such an argument.

The sources thesis, which represents an important step in Raz's defense of positivism, will be discussed below. For present purposes it will suffice to point out that Raz does present an argument in support of the thesis, and that he frames this argument in terms of a conception of the "function" of law. The function he identifies is intended to make sense of the institutional aspects of law, and as such would seem to

86. See, e.g., *id.* at 90.

87. See, e.g., *id.* at 228-38.

88. *Id.* at 50 and *passim*.

89. Raz, *supra* note 17, at 320-22; Raz, *supra* note 82, at 217-18. It should be noted, however, that in *The Concept of a Legal System*, J. RAZ, *supra* note 84, at 221, Raz refers to his conception of law as "political." It is also worth mentioning that in *The Morality of Freedom*, J. RAZ, *supra* note 6, at 135-36, he gives the word "moral" a "very wide sense in which it is roughly equivalent to 'evaluative.'"

90. R. DWORKIN, *supra* note 85, at 429-30 n.3.

91. See, e.g., J. RAZ, *supra* note 3, at 39-40.

92. R. DWORKIN, *supra* note 85, at 430.

involve essentially the same idea that Dworkin has in mind when the latter says that any interpretation of a social practice must attribute some point or purpose to it.⁹³ Moreover, Raz acknowledges that the argument for the sources thesis involves *evaluative* judgments, denying only that those judgments are moral. In other words, Raz does have an argument of very much the sort which Dworkin says he must produce; it is just that Raz refuses to apply the label "moral" to it. The result is a theory of law which holds that the identification of individual laws must be value-free, but the theory itself is admittedly defended in evaluative terms.⁹⁴ Both Raz and Dworkin thus share the idea that legal theory involves an attempt to understand the point or function of certain kinds of social institutions (Raz's term) or social practices (Dworkin's), where the attempt will necessarily involve adopting an evaluative viewpoint. The substantive differences between their respective theories result from the fact that they view the function of legal institutions in very different ways. Their major methodological difference, which concerns whether or not the inevitable evaluative judgments can, as Dworkin claims, be further characterized as being drawn from political morality, is not a particularly important matter for present purposes.⁹⁵

A misconception which looks in the opposite direction is propounded by certain critics of *Law's Empire*, for example Steven Burton, who think that Dworkin's interpretive approach to legal theory may well presuppose something like Hart's or Raz's version of positivism.⁹⁶ Burton, after first pointing out that Dworkin's methodology requires a preinterpretive stage at which legal practice is identified, states that

93. *Id.* at 58-59. See also R. DWORKIN, A MATTER OF PRINCIPLE 160-62 (1985) [hereinafter R. DWORKIN, PRINCIPLE]. In *Taking Rights Seriously* Dworkin speaks expressly of the "function" of law, and contrasts his view of what that function is with what he takes to be the positivist view. R. DWORKIN, TAKING RIGHTS SERIOUSLY 347-48 (rev. ed. 1978) [hereinafter R. DWORKIN, RIGHTS] (discussed in Raz, *supra* note 17, at 320). On the disagreement between Raz and Dworkin over what the function of law should be understood to be, see *infra* note 108.

94. Cf. G. POSTEMA, BENTHAM AND THE COMMON LAW TRADITION 328-32 (1986) (there is no internal inconsistency in Bentham's insistence, on normative grounds, that criteria of legal validity be restricted to a canonical list of morally neutral social facts).

95. Although I shall not try to argue the point here, I think that Dworkin has the better of this dispute. Gerald Postema has recently offered an appealing account of methodology in legal philosophy which is consistent with this conclusion. See *id.* at 328-36. For an interesting critique of Dworkin's account of the interpretation of social practices see Postema, "Protestant" Interpretation and Social Practices, 7 LAW & PHIL. 283 (1987). For an excellent discussion of the general thesis that an adequate theory of the nature of law presupposes some political theory and hence cannot be value-neutral see Green, *The Political Content of Legal Theory*, 17 PHIL. SOC. SCI. 1 (1987).

96. Burton, *Ronald Dworkin and Legal Positivism*, 73 IOWA L. REV. 109 (1987); see also Hart, *Comment*, in ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY 34 (R. Gavison ed. 1987) (replying to Dworkin's summary of the argument of *Law's Empire*, *supra* note 85).

"Dworkin's brief description of the preinterpretive stage seems to presuppose a positivist criterion of identity"97 In making this claim Burton depends heavily on the fact that at one point Dworkin speaks of the preinterpretive stage in terms of the identification of "social rules,"98 and indeed Dworkin does sometimes seem to suggest that identifying the content of legal practice is a matter of discovering various "rules and standards."99 But the better interpretation of *Law's Empire* requires us to take seriously Dworkin's statement that theories of law "try to show legal practice as a whole in its best light,"100 a thesis which he proceeds to amplify by explaining that legal practices in our own culture include legislatures, courts, and administrative agencies.101 Dworkin is thus really saying no more and no less than Raz when the latter suggests that legal theory is a matter of trying to understand the nature of certain kinds of social institutions, where it is clear that what Raz has in mind are primarily legislative and adjudicative institutions.102 Whatever problems that the identification of such institutions presents for Dworkin, however, and it is certainly not being argued here that there are no such problems, exist for Raz as well.103 Dworkin's interpretive approach to legal theory does not presuppose a theory such as Raz's. Rather they both present competing interpretations of roughly the same social phenomena.104

97. Burton, *supra* note 96, at 118.

98. R. DWORKIN, *supra* note 85, at 66.

99. *Id.* at 65-66.

100. *Id.* at 90 (emphasis added).

101. *Id.* at 91. That Dworkin equivocates about the nature of preinterpretive data is noticed in Kress, *The Interpretive Turn* (Book Review), 97 ETHICS 834, 855 (1987).

102. J. RAZ, *supra* note 1, at 123f *passim*; J. RAZ, *supra* note 3, at 43, 87-88.

103. *Cf.* Green, *supra* note 95, at 10 (the determination within Raz's theory of which institutions are to be regarded as "courts" is a complex question, the answer to which depends on the moral status of the institutions and/or their explanatory role in understanding political behavior).

104. Steven Burton says that Raz and Hart are engaged in general jurisprudence, which he takes to be "the philosophical effort to understand law and legal systems as abstract concepts transcending any one contingent, culturally situated, practice." Burton, *supra* note 96, at 110. This "transcultural" approach is contrasted with Dworkin's "intracultural" approach to doing jurisprudence. See *id.* at 110-13. *Cf.* Kress, *supra* note 101, at 841-42. It is true that Raz says that "it is a criterion of adequacy of a legal theory that it is true of all the intuitively clear instances of municipal legal systems," J. RAZ, *supra* note 3, at 104, whereas Dworkin concentrates almost exclusively on Anglo-American legal institutions. This is not, however, indicative of a fundamental methodological difference of the sort described by Burton. While Raz is undoubtedly of the opinion that a legal theory should apply to a broader range of legal systems than those to be found in Britain and the United States, it is nonetheless clear that he thinks of his own theory, at least, as being formulated in culture-specific terms and as focusing in the first instance on our own culture's legal institutions. See *id.* at 50; *supra* note 17, at 321. (In speaking of "our" culture, Raz probably has in mind western societies generally rather than just those of Britain and the United States, but this hardly constitutes a major point of disagreement with Dworkin.) *Cf.* G. POSTEMA, *supra* note 94, at 335 n.49 ("general

3. *The Function of Law: The Guidance of Conduct*

Let us turn, then, to a consideration of the central element in Raz's defense of legal positivism, namely his conception of the point or function of law. Raz maintains that law's function, or at least its main function, is to provide "publicly ascertainable ways of guiding behaviour."¹⁰⁵ As he says at one point, "[i]t is of the essence of law to guide behaviour through rules and courts in charge of their application."¹⁰⁶ For Raz, this view of the function of law derives from a particular understanding of the role of legal institutions in social life. This becomes clear from such statements as the following: "[The] institutionalized aspects of law identify its character as a social type, as a kind of social institution. Put in a nutshell, it is a system of guidance and adjudication claiming supreme authority within a certain society . . ."¹⁰⁷ As has already been suggested, Raz can fairly be regarded as putting forward here a particular interpretation, in Dworkin's sense of that term, of what the latter calls legal practice.¹⁰⁸

As the last two quotes in the preceding paragraph illustrate, Raz thinks that adjudicative institutions are a necessary feature of law, and indeed he maintains that they are a more fundamental aspect of legal systems than are legislative institutions.¹⁰⁹ But it is important to bear in mind that the main role that Raz's theory ascribes to what he calls norm-

jurisprudential theory is inevitably *local*, at least in first approximation"). Postema goes on to say that "local" "may be understood to embrace an entire legal culture, not just a single jurisdiction." See also R. DWORKIN, *supra* note 85, at 102-03. It is difficult to see how legal theory could proceed in any other way than by focusing, at least initially, on a particular legal culture. Attempting to lay down necessary and sufficient conditions for what is to count as a legal system in a "transcultural" sense will inevitably be nothing more than an exercise in definitional stipulation. This is because there is no way of making a pretheoretical determination of which practices belonging to different cultures are to count as "legal" practices in any theoretically interesting sense of "legal."

105. J. RAZ, *supra* note 3, at 50-51.

106. *Id.* at 225 (emphasis added).

107. *Id.* at 43.

108. Notice, however, that the point or function which Raz attributes to law is quite different from that which is ascribed to it by conventionalism, Dworkin's reconstructed version of positivism. According to Dworkin the point of law is, from the conventionalist perspective, to give the citizen fair warning of when the state will apply coercion; he thus takes the heart of the conception to be "the ideal of protected expectations." R. DWORKIN, *supra* note 85, at 117. But Raz takes the point or function of law to be the exclusionary guidance of conduct, not the giving of fair warning. The goal of not taking people by surprise, which is one aspect of Raz's positivist conception of the rule of law, is not so much regarded as an end in itself—although Raz does acknowledge its value with respect to the protection of personal autonomy—as it is a means to ensure that conduct is guided *efficiently*. J. RAZ, *supra* note 3, at 210-29. This misconstrual of positivism on Dworkin's part is a consequence of his insisting on looking at all theories of law, and not just his own, through the lens of adjudication. R. DWORKIN, *supra* note 85, at 93, 400-01.

109. J. RAZ, *supra* note 1, at 129-31; J. RAZ, *supra* note 3, at 87-88, 105-11

applying institutions is the application of *pre-existing* (i.e., previously-adopted) norms whose purpose is to guide conduct. Adjudicative institutions simply evaluate behavior in accordance with the standards which were supposed to have antecedently guided it: "[Institutionalized systems] contain norms guiding behavior and institutions for evaluating and judging behaviour. The evaluation is based on the very same norms which guide behaviour."¹¹⁰ Raz is somewhat ambivalent about whether a legal system must necessarily make provision for the settlement of disputes that are not regulated by preexisting law,¹¹¹ but this issue need not concern us here. The point to be emphasized for present purposes is that the idea that the function of law is to guide conduct is a fundamental element in Raz's legal theory; to a large extent it determines the shape of the theory's other elements, including, most importantly, the role that the theory assigns to adjudicative institutions like courts.

The idea that the function of law is to guide behavior is a consequence of Raz's understanding of the institutionalized nature of law. It thus serves as a kind of bridge between the two general theses which were identified earlier as underlying Raz's approach to legal theory, namely, (1) that law gives rise in a systematic way to reasons for action, and (2) that legal philosophy involves the study of a particular kind of social institution. It is time now to focus more closely on the first of these two theses by examining in greater detail the way in which the law is said to provide guidance for conduct. Raz quite plausibly maintains that law guides conduct not simply by providing information about what is separately required by the balance of reasons,¹¹² but by giving rise to new reasons for action.¹¹³ What we must inquire into, then, is the nature of these new reasons which the law brings into being.

Since all legal systems impose sanctions for the breach of at least some legal rules, it is in a sense obvious that law gives rise to new reasons for action. But affecting a person's motivations through the provision of sanctions is not, according to Raz, the way that the law primarily intends

110. J. RAZ, *supra* note 1, at 139; *see also id.* at 142 (official evaluation of behavior must coincide with the guidance which the system gives to ordinary individuals); J. RAZ, *supra* note 3, at 108 ("Primary [norm-applying] organs [i.e., courts] are concerned with the authoritative determination of normative situations in accordance with pre-existing norms."); *cf. id.* at 112.

111. Compare J. RAZ, *supra* note 3, at 113, 172-75 (all legal systems make provision for the settlement of unregulated disputes) with *id.* at 96 (*most do*); *see also* Perry, *supra* note 56, at 231 n.56 (Raz does not relate his claim that the settlement of unregulated disputes is a primary function of law to his most central thesis that the essence of law is to guide behavior).

112. Raz calls this the *recognition* concept of authority. *See* J. RAZ, *supra* note 6, at 28-31.

113. *See* Raz, *supra* note 17, at 305 ("[T]he fact that an authority issued a directive changes the subjects' reasons.").

to guide behavior; it is only a reinforcing consideration.¹¹⁴ The fact that law is backed by a sanction is a first-order reason for action only,¹¹⁵ whereas the law intends to guide behavior by creating new *exclusionary* reasons for action.¹¹⁶ Through its organs such as the courts the law necessarily claims legitimate authority for itself,¹¹⁷ and according to Raz's service conception of authority this means that (the most important or basic) laws must be intended to be peremptory or exclusionary reasons for action which (all or some) ordinary citizens are intended to follow. In light of earlier discussion it is clearly *subjective* exclusionary reasons which are at issue here, since the essence of Raz's analysis of authority is that one should act on the authority's rather than on one's own *judgment* of what the objective balance of reasons requires. The most fundamental characteristic of the new reasons for action to which law gives rise is therefore that they stand in for, not that they modify, the objective balance of reasons (although it must be emphasized that in certain circumstances they can and indeed should do both).¹¹⁸ Laws are thus subjective second-order reasons on Raz's account, but it is clear enough that he does not allow for the possibility that they could be epistemically-bounded reasons.¹¹⁹ Raz regards laws as being what were earlier labelled *pure* exclusionary reasons, and it will be recalled that the use of the term "exclusionary reason" has been restricted here to pure exclusionary reasons.

4. *The Sources Thesis*

The sources thesis provides the core content of Raz's positivism. He characterizes the thesis in the following terms: "A jurisprudential theory is acceptable only if its tests for identifying the content of the law and determining its existence depend exclusively on facts of human behaviour

114. J. RAZ, *supra* note 84, at 232.

115. J. RAZ, *supra* note 1, at 161.

116. J. RAZ, *supra* note 3, at 30. Note that for Raz what the law "intends" is a matter of what the organs of government, and in particular the courts, intend. See *id.*; J. RAZ, *supra* note 84, at 230-32; J. RAZ, *supra* note 6, at 70; Raz, *Hart on Moral Rights and Duties*, 4 OXFORD J. LEGAL STUD. 123, 131 (1984).

117. J. RAZ, *supra* note 3, at 30 ("[I]t is an essential feature of law that it claims legitimate authority for itself."). See also *id.* at 237.

118. See *supra* note 51 and accompanying text.

119. In *The Morality of Freedom* Raz says that a "clear mistake"-type of limitation would be consistent with his account of authority, but he does not concede that legitimate authorities are ever in fact so limited. J. RAZ, *supra* note 6, at 62. In *The Authority of Law* he states that, apart from scope and jurisdictional limitations, one who accepts the legitimacy of an authority is committed to following it "blindly." J. RAZ, *supra* note 3, at 24-25. This is an implicit denial of the possibility of an epistemic limitation.

capable of being described in value-neutral terms, and applied without resort to moral argument."¹²⁰ The idea that the law claims legitimate authority for itself, and therefore intends to guide behavior in an exclusionary sense, is the ultimate basis of Raz's most important argument for the sources thesis. (He deploys other arguments as well, but they all either reduce to the upcoming argument or else can be dismissed as unpersuasive.¹²¹) The immediate premise of this argument is the claim of the service conception of authority that an authority should base its action-guiding directives on dependent reasons, i.e., on reasons which "apply to the subjects of those directives and which bear on the circumstances covered by the directives."¹²² It is then concluded that the sources thesis is justified because the subjects of an authority "can benefit by its decisions only if they can establish their existence and content in ways which do not depend on raising the very same issues which the authority is there to settle."¹²³

It is worth drawing attention to the connection which exists between this argument for the sources thesis and the purpose which Raz attributes to exclusionary norms generally. As was mentioned earlier, Raz's view is that the purpose of such norms is to simplify practical reasoning. This is achieved through the provision of an intermediate level of reasons on which agents will in the ordinary run of cases be able to act without having to refer to ultimate values or other justifying reasons. The sources thesis simply indicates the manner in which authoritative legal directives in particular are to be identified if this isolation from ultimate justifying reasons is to be successfully achieved. The rationale, so far as the law is concerned, for regarding such isolation as desirable is that the law claims legitimate authority for itself and therefore presupposes, for reasons we have already examined, that at least some of its subjects are to a greater or lesser degree uncertain about what the objective balance of reasons requires (i.e., they are uncertain about what action is demanded by the ultimate justifying reasons). The sources thesis is thus an important element in a strategy for dealing with practical uncertainty. This does *not* mean, as Raz himself has emphasized several times, that laws themselves cannot be uncertain or controversial. What it does mean is that "the law fails in [its mediating] role if it is not, in general, easier to establish and less controversial than the underlying considerations it

120. J. RAZ, *supra* note 3, at 39-40. For additional discussion of the sources thesis see J. RAZ, *supra* note 84, at 212-16; Raz, *supra* note 17, at 300-05, 315-20.

121. See Perry, *supra* note 56, at 227-30.

122. Raz, *supra* note 17, at 299.

123. *Id.* at 304.

reflects."¹²⁴

Raz states that the sources thesis is the most fundamental of the various theses which have historically been associated with positivism,¹²⁵ and there is good reason to think that he is right about this. The sources thesis highlights the traditional positivist idea that law is something which has been posited or created by human beings. Furthermore, its justification is grounded in a view of the point or function of law which has figured at least implicitly, and usually explicitly, in the work of all the great positivist thinkers, including Hobbes, Bentham, Austin, Holmes, Kelsen, and Hart. That view is that the primary point or function of law is to guide the conduct of ordinary citizens. In formulating the sources thesis and defending it in terms of this conception of the function of law, Raz has captured the essence of the positivist position, framed it in precise terms, and developed a powerful argument in its favor.

It is worth remarking that Raz's version of positivism is not committed to the truth of the historical positivist thesis that law and morals are separable. He takes the sources thesis, not the separability thesis, to be the essence of positivism, and then defines the latter in such a way that it does not simply follow from the former.¹²⁶ His definition of the separability thesis differs from that of many writers, since he maintains the following: "A necessary connection between law and morality does not require that truth as a moral principle be a condition of legal validity. All it requires is that the social features which identify something as a legal system entail that it possesses moral value."¹²⁷ Raz thinks that the version of the separability thesis which is associated with the second of these two views on what constitutes a necessary connection between law and morality could well be false:

The claim that what is law and what is not is purely a matter of social fact still leaves it an open question whether or not those social facts by which we identify the law or determine its existence do or do not endow it with moral merit. If they do, it has of necessity a moral character.¹²⁸

124. *Id.* at 319; see also Raz, *The Inner Logic of the Law*, 10 RECHTSTHEORIE 101, 112-13 (1986).

125. J. RAZ, *supra* note 3, at 38.

126. *Id.* at 38-39.

127. Raz, *supra* note 17, at 311.

128. J. RAZ, *supra* note 3, at 38-39; see also J. RAZ, *supra* note 1, at 165-70; Raz, *supra* note 17, at 311-12, 319-20.

Raz's version of positivism is thus compatible with at least certain types of natural law theory.¹²⁹

Raz is only able to define the separability thesis in the way that he does because he accepts the sources thesis, which not all contemporary legal theorists who call themselves positivists do. Legal theorists who do not accept it tend to defend a version of the separability thesis that is associated with the first of the two views described by Raz of what constitutes a necessary connection between law and morality. There is nonetheless a sense in which Raz's version of positivism is *stronger* in its insistence on the separation of law and morals than the theories of those same writers, since the sources thesis rules out the possibility that the identification of individual laws can even *sometimes* turn on moral arguments. David Lyons, Philip Soper, and Jules Coleman have all defended the view that this possibility is compatible with positivism.¹³⁰ Since the conception of law which results from this view ultimately seems to be more Dworkinian in character than anything else,¹³¹ there are strong grounds for concluding that Raz's approach and not theirs comes closer to capturing the essence of positivism.

5. *Legal Reasoning and Precedent*

In addition to playing an important role in the justification of the sources thesis, the idea that the basic function of law is to guide conduct also serves as the foundation of a distinctive positivist conception of legal reasoning and judicial lawmaking. The most fundamental type of law, according to Raz, is a duty-imposing rule which provides exclusionary guidance for the population at large, or at least for a segment of the population. The significance of other types of laws, for example, power-conferring laws, is explained by their logical relations to duty-imposing laws.¹³² The basic obligation of a court is to evaluate the behavior of citizens by means of the same pre-existing legal rules which are supposed

129. Cf. J. RAZ, *supra* note 3, at 39, 44-45, 157-59.

130. See Coleman, *Negative and Positive Positivism*, 11 J. LEGAL STUD. 139, 148 (1982); Lyons, *Principles, Positivism, and Legal Theory*, 87 YALE L.J. 415, 425-26 (1977); Soper, *Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute*, 75 MICH. L. REV. 473, 511-12 (1977). Raz criticizes the Soper-Lyons-Coleman position in Raz, *supra* note 17, at 311-15; see also J. RAZ, *supra* note 3, at 47 n.8.

131. R. DWORKIN, *RIGHTS*, *supra* note 93, at 345-50; R. DWORKIN, *supra* note 85, at 124-29. Dworkin calls the Soper-Lyons-Coleman position "soft conventionalism."

132. J. RAZ, *supra* note 3, at 176; J. RAZ, *supra* note 6, at 44. Raz does say, however, that power-conferring rules also guide behavior (namely the behavior of the power-holder), although the nature of the guidance which they provide is "indeterminate" rather than exclusionary. See J. RAZ, *supra* note 84, at 228-29.

to have antecedently guided their conduct. In most legal systems courts also have the authority to settle disputes to which the positive law does not provide a clear solution.¹³³ Courts which have assumed this role resemble legislatures, since they are acting at what Raz calls the deliberative rather than the executive stage of public decisionmaking.¹³⁴ Courts acting at this stage look to sourceless considerations such as moral principles and values, and when they do so "they are not relying on legally binding considerations but exercising their own discretion."¹³⁵ Such discretion can be limited by source-based principles which themselves have legal status, but discretion-guiding principles "will not eliminate the element of personal judgment of the merits."¹³⁶

In some legal systems, for example those of common law jurisdictions, courts do not simply settle unregulated disputes but treat their own decisions as giving rise to new law. Raz states that within the practical limits on such courts' lawmaking powers which inevitably result from their being able to revise the law only incrementally, "[they] act and should act just as legislators do, namely, they should adopt those rules which they judge best."¹³⁷ Precedent-based legal rules are, like the rules which derive from other social sources such as legislation, exclusionary in character. Raz recognizes that the common law in particular possesses what he calls a "special revisability" in the hands of judges, but he nonetheless insists that while judge-made law can be said to be "metaphorically" less binding than enacted law, "[s]trictly speaking judge-made law is binding and valid, just as much as enacted law."¹³⁸ Common law rules "are binding in their essential rationale and as applied to their context."¹³⁹ Since the common law binds courts as well as citizens, a court cannot "repeal" a common law rule by overruling a previous decision simply because it considers that that would be the best thing to do on the balance of reasons; courts can only reject binding common law rules for certain reasons, among which are included injustice, iniquitous discrimination, and being out of touch with the court's conception of the

133. See *supra* note 111.

134. J. RAZ, *supra* note 84, at 213-14; Raz, *supra* note 82, at 214-16.

135. J. RAZ, *supra* note 3, at 59. Raz sometimes suggests that courts have a *legal* duty not to make decisions arbitrarily, but in the light of his own positivist understanding of legal reasoning and adjudication this seems to be an unwarranted conclusion. See Perry, *supra* note 56, at 230 n.54, 231 n.56 & 233 n.65.

136. J. RAZ, *supra* note 3, at 113. On discretion-guiding principles generally, see *id.* at 96-97, and Raz, *Legal Principles and the Limits of Law*, 81 YALE L.J. 823 (1972).

137. J. RAZ, *supra* note 3, at 197.

138. *Id.* at 195.

139. *Id.* at 189.

relevant area of law.¹⁴⁰ The doctrine of precedent itself is regarded by Raz as a Hartian customary rule of recognition.¹⁴¹ Like all rules of recognition it is duty-imposing.¹⁴² This means that the doctrine of precedent is, for Raz, an exclusionary rule that requires courts to treat precedents as giving rise to exclusionary rules. The list of reasons just enumerated on which courts are permitted to rely in rejecting a common law rule is therefore the category of nonexcluded reasons which fall outside the scope of the exclusionary rule that constitutes the doctrine of precedent.

B. AN ALTERNATIVE APPROACH TO LEGAL THEORY

Raz's positivist conception of both law and legal reasoning is founded on the idea that the basic function of law is to provide guidance for the conduct of ordinary citizens, where "guidance" is to be understood as exclusionary guidance. The focus of the theory is thus upon the reasons for action that the law provides for the population as a whole; those reasons, which Raz maintains are (subjective) exclusionary reasons, then define the basic legal obligations of the courts in evaluating citizens' actual conduct. One can summarize Raz's positivism, and indeed much of the positivist tradition, in an overly crude and somewhat inaccurate way by saying that it begins with a theory of legislation, where legislated enactments are understood as being, for the most part, directed to the general population, and then uses that theory as the basis of an account of adjudication.¹⁴³ This is somewhat inaccurate so far as Raz's version of positivism is concerned because, like Hart, he emphasizes the theoretical priority of norm-applying over norm-creating institutions, and in fact does not even insist that a legal system must contain a distinct norm-creating institution like a legislature.¹⁴⁴ The reasons that he gives to justify this priority are not a matter of present concern.¹⁴⁵ The important point for our purposes is that Raz takes the central case of a law to

140. *Id.* at 114-15, 189-90; J. RAZ, *supra* note 1, at 140-41.

141. J. RAZ, *supra* note 3, at 95-96, 184 n.8.

142. *Id.* at 92-93, 179.

143. Ernest Weinrib discusses the general theoretical emphasis which positivism places on legislation in Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 955-56 (1988). He notes that "[p]ositivists consider even adjudication to be a species of legislative activity." *Id.* at 956.

144. J. RAZ, *supra* note 1, at 129-31.

145. See *supra* note 109. Essentially, Raz regards norm-applying institutions as theoretically important because of their role in the identification of laws. Laws of a particular legal system are identified, according to Raz, by Hartian rules of recognition, i.e., by customary judicial rules. See generally J. RAZ, *supra* note 3, at 90-97. Raz accepts, to begin with, the Hartian thesis that "the test by which we determine whether a norm belongs to the system is, roughly speaking, that it is a norm

be an exclusionary rule which has been deliberately adopted by a political authority, that is to say, a rule which has been created by a deliberate legislative act.¹⁴⁶ It is in this sense that Raz's version of positivism begins with a theory of legislation. That theory is then used to offer a partial account of adjudication by means of a related thesis which states that courts have a legal obligation to evaluate the behavior of citizens in accordance with the same exclusionary rules that were supposed to have guided their conduct beforehand. A theory of adjudication that tells courts how to decide unregulated cases—these being cases in which the law does not provide a clear answer or where the courts have a power to change the rules¹⁴⁷—is a moral theory only, not a theory of law.¹⁴⁸

There is, however, an alternative conception of law and legal reasoning, which will be referred to here as adjudicativism.¹⁴⁹ It begins with the premise that the basic function of law is not the guidance of citizens' conduct as such but rather the institutionalized adjudication and social resolution of disputes in accordance with appropriate principles of personal and political morality. These latter principles could be principles of individual justice, or they could be standards that promote a particular conception of the public good, or they could be a combination of both. They could in fact be constitutive of any tenable moral vision of personal interaction and/or social life that a particular theorist or judge regarded as an appropriate basis for adjudication: different moral visions will simply produce different versions of adjudicativism. The general point to be emphasized is that adjudicativist theories, like positivist theories, begin with a theory of reasons for action. The difference between the two approaches is that for an adjudicativist the reasons for action that are theoretically most significant are those which are and should be acted upon by courts. Adjudicativism is by no means necessarily committed to the position that courts should be concerned solely with the rights and interests of the parties before them and so should ignore the more general

which the [courts] ought to apply . . ." J. RAZ, *supra* note 1, at 139; see also J. RAZ, *supra* note 3, at 90-91. In light of Raz's own conclusive criticisms of Hart's theory of social rules, J. RAZ, *supra* note 1, at 53-58, and hence of Hart's claim that that theory can explain the normativity of law, it is somewhat puzzling that Raz would continue to accept the further Hartian thesis that the norms which courts *ought* to apply are determined by a customary judicial rule. This issue cannot be considered here.

146. See, e.g., Raz, *supra* note 17, at 303 ("a directive can be authoritatively binding only if it is, or at least is presented as, someone's view of how its subjects ought to behave"). This does not mean that Raz is committed to the view that every law has a single author. See *id.* at 318.

147. J. RAZ, *supra* note 3, at 96.

148. Cf. Raz, *supra* note 82, at 217.

149. See Perry, *supra* note 56, at 215-18. In my earlier paper I referred to adjudicativism as the "adjudicative" approach to legal theory.

social impact of their decisions. But it nonetheless remains true that adjudicativists, unlike positivists such as Raz, take the essence of a theory of law to be, not a theory of legislation, but a theory of adjudication (although it is of course also true that an adjudicativist theory must specify how legislation is to figure in the disposition of cases). The starting point of adjudicativism is thus very similar to what Raz refers to as the lawyers' perspective. In commenting on the lawyers' perspective, Raz states that it is "arbitrary as an ultimate starting point."¹⁵⁰ In fact it simply adopts a different evaluative understanding from positivism of the essential function of legal institutions.

An adjudicativist conception of law and legal reasoning has always underlain Professor Dworkin's approach to legal theory, as evidenced by the following passage from *Law's Empire*: "Our concept of law ties law to the present justification of coercive force and so ties law to adjudication; law is a matter of rights tenable in court."¹⁵¹ Dworkin in fact maintains that the view expressed in this quotation applies not just to his own conception of law but to the general *concept* of law, which means that he looks at all possible theories of law and not just his own from an adjudicativist perspective. This is a mistake, and when Dworkin attempts to reshape positivism in particular so that it will fit into an adjudicativist mold—the reformed version is referred to as conventionalism—positivism emerges severely distorted.¹⁵² There is no denying, however, that in Dworkin's own theory of law, which he calls "law as integrity," he makes use of the adjudicativist conception to fashion a very compelling interpretation of modern legal institutions.¹⁵³ Michael Moore¹⁵⁴ and Ernest Weinrib¹⁵⁵ are two other outstanding examples of contemporary

150. Raz, *supra* note 82, at 212.

151. R. DWORKIN, *supra* note 85, at 400-01; see also R. DWORKIN, RIGHTS, *supra* note 93, at 338, 347-48 (function of law is principled adjudication, not the provision of standards for private and official conduct). An early indication that Dworkin was adopting an adjudicativist approach can be found in Dworkin, *Does Law Have a Function? A Comment on the Two-Level Theory of Decision*, 74 YALE L.J. 640, 640 (1965) ("What, in general, is a good reason for decision by a court of law? This is the question of jurisprudence; it has been asked in an amazing number of forms, of which the classic 'What is Law?' is only the briefest.").

152. See *supra* note 108.

153. R. DWORKIN, *supra* note 85, especially chs. 6, 7.

154. See Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277 (1985) [hereinafter Moore, *Natural Law*]; Moore, *Precedent, Induction, and Ethical Generalization*, in PRECEDENT IN LAW 183 (L. Goldstein ed. 1987) [hereinafter Moore, *Precedent*]; Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151 (1981).

155. See Weinrib, *The Insurance Justification and Private Law*, 14 J. LEGAL STUD. 681 (1985) [hereinafter Weinrib, *Insurance Justification*]; Weinrib, *The Intelligibility of the Rule of Law*, in THE RULE OF LAW: IDEAL OR IDEOLOGY 59 (A. Hutchinson & P. Monahan eds. 1987) [hereinafter Weinrib, *Intelligibility*]; Weinrib, *Law as a Kantian Idea of Reason*, 87 COLUM. L. REV. 472 (1987);

legal theorists who are probably best regarded as having adopted an adjudicativist approach. The respective theories of Dworkin, Moore, and Weinrib are very different from one another in many respects, but there is a fundamental similarity in that all three can be understood as taking the essence of a theory of law to be a theory of adjudication. A theory of adjudication, as well as being a theory of reasons for action, is also of course a moral theory. There is, therefore, a sense in which the adjudicativist approach discerns a necessary connection between law and morality. It is thus unsurprising that Moore and Weinrib both explicitly identify themselves as natural law theorists, and that Dworkin has from time to time flirted with this label as well.¹⁵⁶

It might seem that the difference between the positivist and the adjudicativist approaches to legal theory is not a fundamental one but ultimately comes down to nothing more than slight nuances in perspective, or even to semantics. Positivism, or at least the kind of positivism defended by Raz, begins with a theory of legislation, i.e., with a theory of reasons for action that apply to the population at large, and then characterizes adjudication as the activity of evaluating citizens' conduct on the basis of whether or not they have complied with those reasons. It is obvious, the argument will then go, that an adjudicativist theory must specify how legislation is to be taken into consideration by courts in deciding cases. The most defensible such account will run something along these lines: a well-ordered society requires some person or body to provide (exclusionary) guidance for citizens with respect to at least certain matters, and a democratically-elected legislature that enjoys effective de facto authority is, morally speaking, the most appropriate such body. A court will then have good moral reasons to evaluate the conduct of citizens in accordance with whatever legislated rules apply to their activities, so that where legislation is concerned there will be no practical differences between the positivist and the adjudicativist approaches. As for unregulated disputes, the argument will conclude, the adjudicativist is free to apply the label "law" to the sorts of moral considerations that everyone will agree should be relied upon by courts in deciding such

Weinrib, *Liberty, Community and Corrective Justice*, 1 CAN. J. L. & JURIS. 3 (1988); Weinrib, *Toward a Moral Theory of Negligence Law*, 2 LAW & PHIL. 37 (1983) [hereinafter Weinrib, *Moral Theory*]; Weinrib, *supra* note 143.

156. Dworkin, "Natural" Law Revisited, 34 U. FLA. L. REV. 165 (1982). Adjudicativist natural law theories must be distinguished from what might be called traditional natural law theories, which claim that there is a systematic connection of some sort between valid positive law and moral value. For a recent example of the latter sort of theory see J. FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980).

cases, but this will simply lead to a difference of semantics, not substance, and one that is again of no practical significance.

There is a grain of good sense to this argument, but it goes too far in downplaying the possible differences between positivist and adjudicativist theories. To begin with, there are other possible accounts, not all of them completely implausible, of the ways in which courts should take legislation into consideration in deciding cases. The adjudicativist theory which Dworkin refers to in *Law's Empire* as pragmatism, and which he acknowledges to be in some respects a very powerful conception of law, proposes that judges should adopt what amounts to a rather cavalier attitude towards statutory enactments.¹⁵⁷ In Dworkin's own early writings he himself seemed inclined to say no more than that courts should "pay a qualified deference to the acts of the legislature."¹⁵⁸ Such views are not common, however, since most adjudicativist theorists seem to regard legislation in very much the same way that Raz conceives of law generally. They thus look upon courts as being bound, in a sense which it would not be unfair to characterize as exclusionary, to apply statutes according to their terms. This would seem to be true of Moore,¹⁵⁹ for example, and, since "Hard Cases," of Dworkin as well.¹⁶⁰ Important differences remain, of course. For instance, Moore and Dworkin both view rules of statutory construction in a very different way from Raz.¹⁶¹ Still, on the whole it can be said that so far as the treatment and understanding of legislation is concerned, the similarities among the approaches taken by these three theorists far outweigh the differences. The argument under consideration is therefore correct in its conclusion that adjudicativist and positivist theories can and often do converge upon interpretations of the judicial practice of applying statutes which are, for the most part, mutually compatible. Each looks at the phenomenon from a slightly different

157. R. DWORKIN, *supra* note 85, at 147, 154, 158.

158. R. DWORKIN, *RIGHTS*, *supra* note 93, at 37.

159. Moore describes reasoning from statutes as a "textbound enterprise." Moore, *Natural Law*, *supra* note 154, at 282-83. This he contrasts with common law reasoning, which does not depend on the interpretation of a text. Moore, *Precedent*, *supra* note 154, at 184. I am assuming that the constraints imposed by a text are analyzable in exclusionary terms.

160. See, e.g., R. DWORKIN, *RIGHTS*, *supra* note 93, at 107-10. Dworkin does not specifically describe statutes as exclusionarily binding, but this would seem to be implicit in the idea that Hercules, Dworkin's ideal judge, must take statutes as a given part of the settled law for which he has to construct the best justification. See also R. DWORKIN, *supra* note 85, at 401 (if a judge is satisfied that a statute admits of only one interpretation then he must enforce this as law).

161. For both Moore and Dworkin the interpretation of a statute necessarily involves moral argument. See R. DWORKIN, *supra* note 85, at 337-43 and *passim*; Moore, *Natural Law*, *supra* note 154, at 381-93. For Raz, on the other hand, rules of statutory interpretation involve the imputation of actual intentions to law-makers, so that their character "is a matter of fact and not a moral issue." Raz, *supra* note 17, at 318.

perspective, but the pictures they draw of it are generally consistent with one another.

The argument nonetheless goes too far in its claim that there are no substantial differences between adjudicativist and positivist theories of law. It completely overlooks another dimension of the legal world which any adequate theory of law will satisfactorily have to account for, namely, judicial decisionmaking of the sort associated with the common law. It is in fact on the common law, and on private common law in particular, that adjudicativist theorists tend to focus their attention: Dworkin acknowledges that "ordinary civil cases at law" are the principal subject of his famous essay "Hard Cases,"¹⁶² and Weinrib's theory of corrective justice is precisely a theory of private common law.¹⁶³ Raz offers an interpretation of the common law process according to which the standards of the common law are exclusionary rules, binding for citizens and courts alike, that in all essential respects are no different from legislated enactments. Adjudicativist theorists tend to reject any such interpretation of judicial lawmaking,¹⁶⁴ however, which suggests that the common law might prove to be fruitful territory for discovering significant substantive differences between the adjudicativist and the positivist approaches to legal theory. The remainder of this Paper will consist of a preliminary scouting of this territory with a view to showing that Raz's positivist conception of the common law is an inadequate one, and that what is called for instead is an adjudicativist interpretation. The ultimate conclusion will be that Raz's positivism does not provide a satisfactory account of the foundations of law, or at least that it does not provide a complete account.

Raz's interpretation of the common law, like the general theory of law of which it forms a part, is based on his analysis of legitimate authority and his conception of a subjective exclusionary reason. His interpretation is thus grounded in a clear and rigorously developed account of

162. R. DWORKIN, *RIGHTS*, *supra* note 93, at 94 n.1; *see also id.* at 84, 100; *cf.* R. DWORKIN, *supra* note 85, at 143 (*Law's Empire* is to a large extent concerned with private law).

163. *See supra* note 155.

164. *See* R. DWORKIN, *supra* note 85, at 24-25 ("relaxed" doctrine of precedent demands only that a judge give some weight to past decisions on the same issue, where the initial presumption in their favor can be outweighed if they are thought sufficiently wrong); R. DWORKIN, *RIGHTS*, *supra* note 93, at 38 (doctrine of precedent is not a rule but a principle and can therefore be outweighed by other principles); MOORE, *Precedent*, *supra* note 154, at 184 (common law reasoning, not being textbound, resembles ethical reasoning); *id.* at 187 (courts are to decide disputes, not issue canonical statements or edicts like a little legislature); *id.* at 202 (doctrine of precedent does not give rise to practice rules in Rawls' sense); Weinrib, *Moral Theory*, *supra* note 155, at 42 (common law of torts is constituted almost entirely by its specific instances of dispute resolution, which assume a systematic aspect only because like cases ought to be decided alike).

practical reasoning which permits law to be explicated within the context of a strategy for dealing with uncertainty about what the objective balance of reasons requires. One problematic aspect of adjudicativist theories of law is that while they reject anything resembling a Razian understanding of the common law, they do not offer an alternative understanding in which the character and role of the relevant processes of practical reasoning are worked out in similarly clear and precise terms. It will be argued in what follows that the notions of a reweighting reason and an epistemically-bounded reason that were defined earlier provide the basis for such an understanding. These types of reasons are simply variations on Raz's general theme of a second-order reason for action. Their recognition as distinct types of reasons does not, therefore, lead to any radical modifications of Raz's analysis either of practical reasoning generally or of legitimate authority in particular. However, their utilization within an adjudicativist theory of law facilitates the formulation of an interpretation of the common law which is descriptively and evaluatively superior to Raz's positivist interpretation. There is thus a sense in which Raz himself provides the means, in the form of his notion of a second-order reason, for demonstrating that his own positivist theory of law is in certain respects deficient.

C. THE COMMON LAW AND LEGAL THEORY

The inquiry into the proper theoretical understanding of the common law will begin by showing how the officials of a certain kind of institutionalized normative system that could only be adequately described in adjudicativist terms might introduce a doctrine of precedent into the system without thereby depriving it of its adjudicativist character. A brief summary will then be offered of arguments presented elsewhere which support the conclusion that the picture of judicial lawmaking that emerges from this thought-experiment better captures the essence of the common law than does the positivist conception defended by Raz. Finally, certain objections which Raz might make to the conclusion that an adjudicativist interpretation of the common law is superior to his own positivist interpretation will be considered.

1. *Systems of Absolute Discretion*

Raz describes a certain kind of normative system which he says must be distinguished from a legal system.¹⁶⁵ A system of absolute discretion, as he calls it, consists of one or more tribunals to which members

165. J. RAZ, *supra* note 1, at 137-41; J. RAZ, *supra* note 3, at 111-14, 173-75.

of the relevant society can refer their disputes for resolution. Tribunals have the authority to settle disputes and determine the rights and duties of individuals conclusively, but there are no legislated or customary standards which they have to apply, nor are they obligated to follow their own precedents. Yet they cannot decide cases arbitrarily: "they are always to make that decision which they think to be best on the basis of all the valid reasons."¹⁶⁶ A tribunal must have reasons for its actions, but the determination of which reasons are applicable in a particular case and of what decision they support is always a matter that is within its absolute discretion. Raz says that some regularity in the decisions of these tribunals could be expected, but because individual judges will sometimes change their minds from one case to another, and because they will in any event differ among themselves about what right reason requires, the degree of regularity is not likely to be very high. The system will not provide individuals with very much guidance concerning how they ought to conduct themselves so as to be entitled to a decision in their favor should they ever become involved in a dispute. But legal systems do provide such guidance, and that is why Raz says that systems of absolute discretion are not legal systems.

The system of absolute discretion described by Raz is an institutionalized regime of adjudication that clearly falls within the purview of an adjudicativist understanding of law. The reasons in accordance with which the judges of the system are expected to settle disputes will always be moral reasons. (Morality is to be understood here in a broad sense, so that it could include such matters as a concern for economic efficiency.) The questions that judges will sometimes disagree or change their minds about are questions pertaining to the determination of what decision is called for in particular cases by the objective balance of morally relevant reasons. It is only because there is to some degree or another a general lack of certainty (or at least consensus) about what the objective balance of reasons requires that the system will fail to produce the regularity in decisionmaking that could guide individuals' conduct. If judges (and people generally) were all so strongly convinced that they knew what right reason required that they seldom changed their minds, and if everyone shared the same convictions (say because each person generally got the answer right), then regularity in decisionmaking would be quite high. But the system would still not be a legal system in Raz's sense, since neither judges nor citizens would be relying on subjective exclusionary reasons that had issued from an authoritative source.

166. J. RAZ, *supra* note 1, at 138.

In fact, of course, there is very often individual uncertainty or a lack of consensus (i.e., *general* uncertainty) among human beings about what the objective balance of reasons requires. Neither judges nor anyone else possess a formal decision procedure which will permit a mechanical and error free determination of which reasons are morally relevant to which sorts of disputes and of what results they entail in the aggregate. Let us refer to the awareness that human agents sometimes possess of the possibility that they might not know what morality requires in a particular type of situation as *moral uncertainty*. (This is just a special instance of the practical uncertainty that was defined earlier.) Given the existence of individual moral uncertainty and/or lack of consensus about moral matters, Raz is undoubtedly correct to predict that in a system of absolute discretion the degree of regularity in decisionmaking will be relatively low. If the decisions of tribunals were too unpredictable then the result might be a serious interference with individual autonomy, since a lack of stability in the "legal" environment could impair a person's ability to plan his or her life on anything other than a short-term basis. Let us suppose that the system of absolute discretion contains only one judge. She is aware of the potential problem of interference with individual autonomy and has to decide what, if anything, should be done about it.

2. *Dealing with Moral Uncertainty: The Development of a Doctrine of Precedent*

One possible strategy which might occur to the judge would be to take directly into account in the balance of reasons the actual expectations about the manner in which particular kinds of disputes were likely to be resolved that had been held, either by litigants themselves or by a majority of community members, during the time before a given dispute actually arose. But this would be problematic for a number of reasons. First, while there would always be an abstract expectation that the judge would settle the dispute in accordance with her best present understanding of what right reason required, there might not be any *concrete* expectations about what she would do in a particular type of case. This situation would be especially likely to occur if the judge had not previously exhibited any marked regularity in decisionmaking. Second, it might be very difficult to ascertain what people's concrete expectations had been, supposing that they existed. The litigants themselves might be something less than truthful after the event, and determining community opinion is never an easy matter. Finally, the moral status of such expectations would itself be problematic. Since the judge has not committed

herself in any way to following her own precedents, those concrete expectations that did exist would be mere predictions, not expectations that were legitimate or justified in a normative sense. It is very far from clear, however, that mere predictions about how a judge would be likely to resolve a dispute are in general morally relevant to its actual resolution.¹⁶⁷

Seeing that following the avenue of actual expectations held little prospect of success, the judge might try a different route. She might think that she should introduce some stability into the legal environment by committing herself to following her own precedents. She would then be *inducing* expectations, which would in consequence become justified expectations. The question that then arises is this: what kind of expectations should she induce? This is the same as asking what kind of doctrine of precedent should be adopted. Since the judge would be proposing, in effect, to defer to her own previous practical judgments, the issue can be more accurately described in the following way: what kind of subjective second-order reason should she act upon? She might consider, for example, that she should defer completely to her own previous opinions, which would amount to a decision to treat them as exclusionarily binding. While this approach would undoubtedly solve the predictability problem, the judge would likely consider that it went too far in the opposite direction. It would sometimes require her to settle disputes in ways which she was quite certain were wrong, since she would on at least some occasions be quite strongly convinced that she had previously made a mistake.

The obvious alternative is that the judge should defer to her own previous practical judgments by regarding them as giving rise to reweighting reasons, epistemically-bounded reasons, or both. Suppose she adopted the former approach. She would first decide whether the facts of the present case fell within the scope of the reasoning that she had enunciated in some earlier case. If so, she could only rely on a modified (or completely different) formulation of reasons, representing her current opinion on the issue in question, if their aggregate weight appeared to her to exceed a threshold of strength which was higher to some specified degree than what she would ordinarily look upon as sufficient to tip the balance of reasons. Otherwise she would regard herself as bound to make the decision that was indicated by the reasoning of the

167. See, e.g., Postema, *Coordination and Convention at the Foundations of Law*, 11 J. LEGAL STUD. 165, 180 (1982); R. DWORKIN, *supra* note 85, at 141. *But see infra* note 174.

precedent. In this way she would be introducing a deliberate and systematic bias into her practical reasoning in favor of her own previous opinions about what the objective balance of reasons requires. Suppose, on the other hand, that the judge opted for the epistemically-bounded approach. Then, if the facts of the present case fell within the scope of her reasoning in an earlier case, she would be bound to decide in the way indicated by her prior reasoning unless her conviction that she had been wrong rose above a certain epistemic threshold. In that event she would be free and indeed obligated to decide in accordance with her present assessment of what the objective balance of reasons requires. In the case of both types of reasons the point would be to introduce a certain stability into the general legal environment without at the same time sacrificing completely the judge's ability to decide cases according to her own best present judgment.

The effect of raising either the threshold that will tip one's subjective assessment of the balance of reasons (on the reweighting approach) or the epistemic threshold (on the epistemically-bounded approach) will in each case be roughly the same. The probability will be increased that a decision made on the basis of the raised threshold will be correct (i.e., will comply with the objective balance of reasons). In the former case this is because the stronger that the substantive arguments in favor of a particular result appear to be, the more likely it is that that result is the correct one. Similarly, in the case of epistemically-bounded reasons, the more strongly one is convinced that a particular decision is right, the greater the likelihood that it is right. (These are empirical generalizations, not conceptual truths.) The two approaches are in fact very closely related to one another, and it might in practice be very difficult to draw a clear distinction between them. As has just been indicated, both function in roughly the same way. Each also gives rise to a variable threshold which can naturally be spoken of as attributing a certain weight to the practical judgment of another person, or, as in our present example, to the practical judgment of oneself at an earlier time. Each can be said to give rise to a presumption of varying strength in favor of the practical judgment of another. In the context of a doctrine of precedent both sorts of reasons would probably be found together, and, because they both operate in essentially the same way, there would ordinarily be no particular point in distinguishing between them. I shall therefore speak from now on of the "non-exclusionary" conception of precedent (to be contrasted with Raz's exclusionary conception) without generally bothering to specify whether epistemically-bounded reasons, reweighting reasons,

or both are involved.¹⁶⁸ The threshold associated with each type of reason will also be referred to indifferently as the weighting threshold.

3. *The Non-Exclusionary Conception of Precedent: Justification and Refinement*

In adopting a non-exclusionary conception of precedent the judge in the single-judge system would be trying to achieve an acceptable degree of predictability in her decisions while at the same time trying to ensure that the overall level of correctness in her decisionmaking did not suffer too much as a result. There is no reason to think that any one weighting threshold would provide the optimal solution to this problem for all times, places, and types of dispute. A certain amount of trial and error on the part of the judge, and some give and take between judge and population over time, would probably be required in order to find an effective working solution or set of solutions.¹⁶⁹ This flexibility in fact seems to guarantee the superiority of the non-exclusionary over the exclusionary conception of precedent, since the latter is really just a special case of the former: if for some reason an exclusionary approach turned out to be the preferable solution in a given set of circumstances, then it would presumably be adopted.¹⁷⁰

During this trial and error period people could legitimately expect that *some* weight, although not necessarily a very clearly specified degree of weight, would be attributed to the reasoning in previous cases. As long as this was done they could not claim that their legitimate expectations had been defeated just because a previous decision was not followed. Over time, however, a number of more precisely delineated

168. In *Judicial Obligation, Precedent, and the Common Law* I referred to the non-exclusionary conception of precedent as the strong Burkean conception. Perry, *supra* note 56, at 239. I did not, however, expressly distinguish in that paper between epistemically-bounded reasons and reweighting reasons, having wrongly made the implicit assumption that the former were just a sub-category of the latter. This was not, in light of the similar role that the two types of reasons play in legal reasoning, a serious error. It did not in any way undermine the main arguments of the paper.

169. Cf. R. DWORKIN, *supra* note 85, at 148-50 (discussing the conception of law that he calls pragmatism). The interpretation of legal reasoning which I defend in this Paper bears some resemblance to the pragmatist approach to common law decisionmaking. (*But see infra* note 176.) Nothing I have to say supports the pragmatist understanding of statutory interpretation, however.

170. Cf. R. DWORKIN, *supra* note 85, at 149-50. Notice that, in the context of the discussion in the text, the exclusionary special case of a reweighting reason is a reason for the judge to give no weight to her present judgment of what the objective balance of reasons requires, and hence to give 100% weight to her earlier judgment. The exclusionary special case of an epistemically-bounded reason is a reason for the judge always to defer completely to her earlier judgment no matter how strongly she is convinced that on the previous occasion she was wrong. These two sorts of special cases are co-extensive.

weighting thresholds, each applicable to a different situation, would no doubt begin to crystallize. For example, the judge might conclude that predictability was more important, and hence that a higher threshold was called for, where a line of reasoning was represented by a series of cases that had endured unchallenged for some time than where the reasoning in question was associated with a single recent case.¹⁷¹ Similarly, she might conclude that the threshold should vary depending on the nature of the dispute. The relative importance of predictability would seem to be much greater for voluntary interactions of the sort exemplified by contractual relations, for example, than for involuntary interactions of the sort exemplified by negligently caused accidents.¹⁷² As the degree of weight that would be attributed under various circumstances to the reasoning in previous decisions became clearer, the legitimate expectations of the population concerning the manner in which cases would be decided would become more focused.¹⁷³ But such expectations would continue to be concerned with the process of decisionmaking as such, so that, as before, the mere fact that the judge decided a current case differently from how she had decided an earlier similar one would not necessarily mean that anyone's legitimate expectations had been frustrated.¹⁷⁴

The judge in our example, in constructing a doctrine of precedent along the lines sketched above, would be responding to certain difficulties created by the fact that she was morally fallible. She would be developing a strategy to deal with her own moral uncertainty that called for her to defer, at least up to a point, to those of her previous practical judgments that she had made in her official capacity as a judge. There is thus a formal similarity to Raz's analysis of authority, which outlines a

171. Cf. *Jones v. Secretary of State for Social Servs.*, [1972] A.C. 944, 993 (it is easier to conclude that a recently decided case should not be followed than a long standing case).

172. Cf. *British Transp. Comm'n v. Gourley* [1956] A.C. 185, 211-12.

173. As this occurred it would become correspondingly harder to modify the weighting thresholds that had been selected. In order not to upset legitimate expectations change might have to be accomplished outside the context of particular litigation, for example, by issuing a practice statement. This is what was done by the English House of Lords when it decided that it should no longer be absolutely bound by its previous decisions. See *Practice Statement* [1966] 3 All E.R. 77.

174. There are of course situations where it is more important that there be *a* way of doing things, whatever it is, than that things be done in a particular way. In such circumstances, the fact that there existed general expectations in the community about how things would be done could affect the objective balance of reasons itself. This would be true whether these expectations had been induced by the legal system or had come about in some other way. In such cases it is the context in which the expectations arise, rather than the fact that they have been deliberately induced and so are in that sense legitimate, that is important. The analysis of conventions as solutions to coordination problems sheds much light on this issue. See generally D. LEWIS, *CONVENTION: A PHILOSOPHICAL STUDY* (1969). For relevant discussions in the legal and political contexts, see Green, *Authority and Convention*, 35 PHIL. Q. 329 (1985), and Postema, *supra* note 167, at 172-86.

rational strategy instructing agents faced with practical uncertainty to defer under certain circumstances to the practical judgments of another person. (The fact that in the former case one defers to the judgments of oneself at an earlier time while in the latter case one defers to the judgments of someone else is not a significant difference.) The justification for deference is quite different in the two situations, however. In the case of legitimate authority, an agent should defer because it is reasonable for him to think that this will increase the extent to which he complies with right reason. But in the case of precedent the judge presumably has no particular grounds for believing that she will do better by deferring to her own prior opinions. Her justification for deference is that her moral fallibility and the concomitant potential for unpredictability in her decision-making might create certain difficulties for other persons, in the form of uncertainty about how they should plan their lives, that can be at least partially rectified by instituting a practice of following precedent.

The judge's general strategy is not just to achieve a degree of predictability in her decisionmaking but also to ensure that the overall level of correctness of her decisions does not suffer, or at least does not suffer too much. She is most likely to make a success of this second aspect of her strategy if on every occasion of dispute settlement, and hence in cases falling within the scope of a precedent as well as in cases of first instance, she is as familiar with the relevant first-order reasoning as possible. In giving effect to a non-exclusionary doctrine of precedent she is simply attributing, in the ways that have been explained, a certain presumptive weight to the reasoning of her own prior decisions. In order to implement this doctrine effectively she must still reassess the first-order arguments themselves, and the better she is at doing this the more successful her overall strategy is likely to be. This is an instance in which reliance on subjective second-order reasons, and on epistemically-bounded reasons in particular, seems to call for as extensive a familiarity with the underlying first-order reasoning as possible.

4. *Multi-Tribunal Systems*

So far this discussion has assumed that the normative system under consideration has never contained more than one judge. Suppose now that the original judge retires and another one takes her place. It should be apparent that this makes no difference to the analysis; the new judge has exactly the same reasons for deferring (up to a point) to previous judgments, whoever rendered them, as did the retired judge. The only difference is that the implementation of a non-exclusionary conception of

precedent must now be regarded as a strategy for dealing with moral uncertainty on the part of two persons and not just one.

Suppose next that the simplifying assumption that there is only one judge in the system at any one time is dropped. The introduction of a non-exclusionary doctrine of precedent into a system of absolute discretion that consists of several tribunals can still be justified in the way indicated above, but only if certain further conditions are met. If each tribunal simply treated the previous judgments of both itself and all the other tribunals as giving rise to reweighting or epistemically-bounded reasons, then there would obviously be a possibility that lack of general moral consensus could lead to inconsistent decisions. This would not only pose a potential threat to predictability; it would also be a bad thing in itself. If Dworkin is correct in his contention that the state is under a special obligation to act towards its citizens in conformity with a principle of consistency or integrity,¹⁷⁵ then it cannot permit different tribunals within a single system of dispute settlement to decide similar cases in normatively inconsistent ways. It is therefore incumbent upon the various tribunals to be prepared at any given time to apply impartially a single, comprehensive, and normatively consistent moral scheme to whatever disputes might arise in the community. (This does not mean that the scheme cannot change over time; government must speak with one voice, but there is nothing objectionable in principle if it changes its mind about what it is saying.)¹⁷⁶

The best method for achieving the goal of systemic normative consistency would be the creation of a judicial hierarchy. A single highest tribunal would conform to a non-exclusionary conception of precedent in very much the same way that the single judge did in the hypothetical adjudicative regime described earlier. Lower tribunals would generally follow a non-exclusionary doctrine as well, but one that was increasingly more restrictive as one moved down the hierarchy: the lower the tribunal, the higher the weighting thresholds that would apply to it. (It would

175. See R. DWORKIN, *supra* note 85, especially chs. 6, 7. For a succinct statement of the integrity principle, see *id.* at 165-66.

176. In *supra* note 169, I draw attention to the fact that the interpretation of common law reasoning that is defended in this Paper is similar in certain respects to the conception of law which Dworkin labels pragmatism. The recognition of a principle of consistency or integrity distinguishes my version of adjudicativism from pragmatism, however. The interpretation of the common law which I advance in this Paper is, I believe, consonant in all essential respects with the theoretical characterization that the common law should receive under Dworkin's preferred conception of law, which he calls law as integrity. But I shall not argue in support of that conclusion here, since it would require a rather involved discussion of the importance which Dworkin ascribes to consistency with the *past*, as opposed to consistency of the sort described in the text.

also be true, however, that the less drastic the proposed changes, the lower the *relative* threshold.) Lower tribunals would be bound in an exclusionary sense not to introduce normative inconsistencies into the general moral scheme, and they would be similarly bound not to overrule the decisions of tribunals higher than themselves in the hierarchy. (An overruling is simply a restatement of the moral principles applicable to a particular type of dispute which is sufficiently drastic as necessarily to imply that an earlier case would now be decided differently.) In certain very limited respects, therefore, the doctrine of precedent would, for reasons of systemic consistency, place exclusionary constraints on lower courts. There would always be a standing possibility, however, that any given case could go on appeal, so it is the character of the judicial reasoning in the highest court, where the non-exclusionary doctrine of precedent would have unfettered effect, that is of greatest significance in assessing the theoretical nature of the system.

5. *The Nature of Non-Exclusionary Systems*

The hierarchical system of tribunals that was described in the previous section will be referred to as a non-exclusionary system, and the tribunals themselves will henceforth be called courts. Does a non-exclusionary system retain the adjudicativist character of a system of absolute discretion? There are a number of reasons for concluding that the answer to this question is yes.

First, the system continues to settle disputes on the basis of exactly the same sorts of moral considerations as before:¹⁷⁷ it simply gives a certain presumptive weight to the reasoning of previous decisions. Second, the courts constantly stay in touch, so to speak, with the ultimate first-order reasoning which is the subject of the presumptive weighting process. In the single-judge system discussed above it was a distinct advantage that the judge possess as thorough an understanding of the first-order considerations as possible, and the same is obviously true of the highest court in the non-exclusionary system. But even those courts which are exclusionarily bound in certain respects by the decisions of courts higher than themselves in the judicial hierarchy will constantly be engaged in qualifying and modifying the reasoning that was relied upon in previous similar cases, although their room for maneuver is much less than that of the highest court. Here too the system as a whole will benefit if the lower court judges are as familiar as possible with the lines of first-order reasoning that have been relied upon as rationales for previous

177. More will be said about this point *infra*, in the text accompanying notes 201-35.

decisions (as well as with those, it should be added, which they think should have been relied upon but were not).

A third point, which is related to the first two, is that it is possible to maintain a degree of overall predictability in the decisionmaking of the non-exclusionary system, as well as to achieve general normative consistency among the dispute settling standards that the courts are prepared to apply at any given time, without insisting that there must be a clear distinction between the identification and the assessment of the reasoning in earlier cases. The non-exclusionary conception of precedent attributes a certain presumptive weight to the reasoning of previous decisions, but it does not presuppose that the identification of that reasoning will itself be value free. Often it will be necessary to reconstruct the arguments of a previous decision, relying unavoidably on one's own moral sensibilities in the process, in order just to arrive at a clear understanding of them. Thus even though it is true that the rendering of a judicial decision and the giving of reasons in support of it are social facts, there is no warrant for the assumption that the courts of the non-exclusionary system must comply with anything like the sources thesis when they identify the reasoning of earlier similar cases.

The above considerations provide strong support for the conclusion that the non-exclusionary system is best understood in adjudicativist rather than in positivist terms. Perhaps it might be objected, however, that the concern for stability or predictability that would justify the adoption of a non-exclusionary doctrine of precedent is a forward looking consideration that has no moral bearing on the resolution of any dispute arising prior to the doctrine's implementation. While the general need for predictability would obviously have antedated this event, there would have been no mechanism for legitimizing and focusing expectations in a way that would make them morally relevant to the resolution of existing disputes. The point of introducing a doctrine of precedent is to provide some kind of *future* guidance for ordinary citizens, and that seems to be more of a positivist than an adjudicativist notion.

This objection is really two related objections that have been rolled into one. The first is that the introduction of any doctrine of precedent, even a non-exclusionary one, is inconsistent with adjudicativism. The second is that the introduction of even a non-exclusionary doctrine of precedent can only be explained in positivist terms. These will be considered in turn.

The basic premise of the first of the two sub-objections is that the justification for complying with a doctrine of precedent does not itself

figure among the reasons that are morally relevant to the resolution of existing disputes. It is then inferred that the courts, in implementing a doctrine of precedent in a system of absolute discretion, would at least initially—and perhaps subsequently—be deciding cases inconsistently with adjudicativism. This argument's premise is true, but the argument itself is unsound. Consider again the system with a single judge. In choosing to treat her earlier opinions as giving rise to reweighting or epistemically-bounded reasons, the judge is not deciding against resolving the present case in accordance with an assessment of what is required by the objective balance of reasons; she is simply deciding to resolve it on the basis of her *previous* assessment rather than her present one. By the very nature of epistemically-bounded and reweighting reasons, however, the judge is not *strongly* convinced that her present opinion is correct, or at least she does not feel that the substantive arguments as she now perceives them amount to an overwhelming case.¹⁷⁸ When moral disagreement either with oneself at an earlier time or with another person is of this relatively mild sort, however, there does not seem to be any good reason for thinking that one will do particularly better overall (i.e., make more correct judgments) by always acting on one's present opinion.¹⁷⁹ Hence there is no tension between the function of the judge as understood in adjudicativist terms and the implementation of a non-exclusionary doctrine of precedent. Since taking the latter step would bring significant moral benefits of its own, that is what the judges of a system of absolute discretion should do.

178. Cf. *Fitzleet Estates Ltd. v. Cherry*, [1977] 3 All E.R. 996, 999 (according to Lord Wilberforce, the majority and minority opinion in a previous case represented "two eminently possible views," and it required "much more than doubts" about the correctness of the earlier decision to justify departing from it).

179. If there are a *number* of previous judicial opinions which all come to a conclusion different from the one that the present judge is inclined to favor, then an analogy with a result in the theory of majority rule will support a strengthened version of this point. This is so, at least, if the earlier opinions were arrived at independently of one another, and if the individual judges are in general more likely to be right than wrong about a given issue. As Arthur Kuflik points out, probability theory yields the following result:

If a randomly selected voter is more likely to be right than wrong in his judgment about a matter which is up for a vote, then the probability that a judgment which is independently arrived at by a majority of such voters is the correct judgment is greater than the probability that the judgment of a randomly selected voter is correct. Thus voters who find themselves in the minority in such circumstances have, in virtue of that, some reason to regard their own opinion as less probably correct than the majority opinion.

Kuflik, *Majority Rule Procedure*, in *DUE PROCESS (NOMOS XVIII)* 296, 305 (J.R. Pennock & J.W. Chapman eds. 1977). By way of illustration Kuflik states that if an average voter is only slightly more likely to be correct than not, say 51 percent likely, then the probability that a 51 percent majority is correct in its judgment is 51.99 percent when 100 persons are voting, 59.8 percent when 500 persons are voting, and 69 percent when 1,000 persons are voting.

The second sub-objection is that the introduction of even a non-exclusionary doctrine of precedent provides guidance for the general population, and this is a phenomenon that can only be understood in positivist terms. If, however, the guidance provided were only of an indeterminate, non-exclusionary sort—if, in other words, the system only gave citizens first-order reasons for action—then the objection seems to come to nothing, especially in light of the considerations discussed in the preceding paragraph. A positivism that tried to build upon such a foundation would be appropriating the label without the substance; certainly it would bear no resemblance to Raz's version of positivism. But perhaps Raz might wish to argue that even if an adjudicativist interpretation of the non-exclusionary system is preferable as far as the courts' own internal reasoning processes are concerned, the system must nonetheless be understood as generating standards which are exclusionarily binding on *citizens* if not on courts. This is a more robust version of the second objection, and the response to it will be deferred until later.

6. *The Nature of the Common Law*

I have presented arguments elsewhere which show that Raz's positivist interpretation of the common law is an inadequate one and that the best theoretical understanding of modern common law systems regards them as being, in effect, non-exclusionary systems of the sort described above.¹⁸⁰ These arguments will not be repeated here. Instead, four related conclusions concerning the common law doctrine of precedent which are supported by those arguments will be set out, together with a few further observations about the theoretical character of the common law.

First, the non-exclusionary conception of precedent is better able to explain the nature and extent of what Raz calls the special revisability of the common law than is the exclusionary conception; Raz's idea that common law precedents give rise to rules which are exclusionarily binding "in their essential rationale"¹⁸¹ fails to correspond very closely to the facts. Second, Raz's explanation of the practice in common law courts concerning overruling is also descriptively inaccurate. Raz says that there is a "permissible list" of reasons to overrule which fall outside the scope of an exclusionary rule requiring courts to treat precedents as

180. See Perry, *supra* note 56, at 239-55; see also *supra* note 168 concerning a slight difference between the understanding of the non-exclusionary conception of precedent that I advanced in the earlier paper and the one that I am putting forward here.

181. J. RAZ, *supra* note 3, at 189.

exclusionarily binding.¹⁸² But the English House of Lords, for example, tends to require that a decision being reconsidered be "clearly wrong"¹⁸³ before it can be overruled, or that there be "a very good reason"¹⁸⁴ to overrule, rather than that the reasons which led to the reconsideration be of one or another sort.¹⁸⁵ The first of these phrases suggests an epistemically-bounded reason, while the second suggests a reweighting reason; neither is very plausibly understood as presupposing the existence of an exclusionary reason.

The third point is that the non-exclusionary conception of precedent, because it allows for a range of possible weighting thresholds, is able to account for the fact that common law "rules" are generally spoken of as being settled or established to a greater or lesser degree rather than as being valid or invalid in the all-or-nothing, positivist sense. Similarly, the non-exclusionary conception can make sense of the way in which judges and lawyers refer to precedents as possessing "weight" or "authority," these being, again, variable rather than all-or-nothing concepts. The exclusionary interpretation of precedent is incapable of accounting for either of these facts. The fourth point is that the non-exclusionary approach, unlike the exclusionary understanding, can offer a unified theory of the general common law practice of following precedent. At the same time it can explain why some jurisdictions, for example England, are said to have a relatively "strict" doctrine of precedent while others, such as those in the United States, are said to have less strict versions.¹⁸⁶ As before, these differences are explained by the fact

182. *Id.* at 114.

183. *Fitzleet*, [1977] 3 All E.R. at 1000; *O'Brien v. Robinson*, [1973] A.C. 912, 930; *Jones v. Secretary of State for Social Servs.*, [1972] A.C. 944, 993.

184. *Kneller Ltd. v. Director of Public Prosecutions*, [1973] A.C. 435, 455.

185. In *Judicial Obligation, Precedent, and the Common Law* I discuss the official position of the House of Lords, during the period 1898-1966, that it could not overrule its own previous decisions. *Perry*, *supra* note 56, at 244-47. As is made clear in A. PATERSON, *THE LAW LORDS* 122-53 (1982), the members of the House of Lords eventually came to think that this practice was a mistaken one. In *Devlin, Judges and Lawmakers*, 39 MOD. L. REV. 1, 13 (1976), Lord Devlin wrote that the rule was "utterly antagonistic to the spirit of the common law." In its 1966 Practice Statement, *supra* note 173, the court gave notice that henceforth it would "depart from a former decision when it appears right to do so." For a good discussion of the nineteenth century transition in the English judicial system from what was clearly a non-exclusionary conception of precedent (according to which, in the words of one judge writing in 1833, earlier decisions need not be followed "if plainly unreasonable and inconvenient") to a much stricter and more rigid conception, see *Evans, Change in the Doctrine of Precedent During the Nineteenth Century*, in *PRECEDENT IN LAW* 35 (L. Goldstein ed. 1987).

186. See, e.g., P.S. ATIYAH & R.S. SUMMERS, *FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW* ch. 5 (1987), especially at 119 (the version of *stare decisis* which prevails in England today is very strict by modern American standards), and 126-27 (the overall authoritative force or weight of a precedent is generally not so great in America as in England); Goodhart, *Case Law in England and*

that the non-exclusionary conception allows for a range of possible weighting thresholds.

A couple of further observations are in order here. First, it is not open to Raz to say that the "clearly wrong" language which common law courts sometimes employ to describe their criterion for overruling simply represents a minimal epistemic limitation which is consistent with even the highest courts being exclusionarily bound by their own previous decisions. It is true that common law courts, especially in England, often apply a relatively high weighting threshold to overruling, but this is because overruling ordinarily involves a fairly drastic restatement of common law principles. The higher courts are constantly engaged in modifying and restating the common law in ways that are much more modest in effect, however, and this practice is best understood by reference to the idea of lower weighting thresholds that have been adopted within the framework of a non-exclusionary conception of precedent. The activities of lower courts must often be understood in similar terms. A non-exclusionary conception of precedent can provide a unified account of all the various ways in which the common law is judicially revised and qualified. As a result, there is little to be said for isolating the practice of overruling in particular and then trying to reconcile it with an exclusionary conception of precedent.

A second observation is related to the first. Common law courts describe their main criterion for overruling in language which sometimes suggests an epistemically-bounded reason, sometimes a reweighting reason, and sometimes both. Examples of the first two categories of expressions have already been given from the House of Lords. An example of the third category from the same court is this: a long established line of decisions will be overruled "only in *plain* cases where *serious* inconvenience or injustice would follow" from not overruling.¹⁸⁷ This apparent indifference on the part of the courts to which of the two types of reasons is in play is at one level undoubtedly due to their not being aware that there is a technical distinction to be drawn here. But in light of our

America, 15 CORNELL L.Q. 173, 179-86 (1930); Hardisty, *The Effect of Future Orientation on the American Reformulation of English Judicial Method*, 30 HASTINGS L.J. 523, 532 (1979) (American courts give less weight to precedent than English courts). It should be noted that Atiyah and Summers argue that the different judicial treatment accorded to precedents in England and the United States is illustrative of a more general thesis according to which "formal" reasoning is relied upon more widely than "substantive" reasoning in the English legal system, whereas in the American system the reverse is true. P.S. ATIYAH & R.S. SUMMERS, *supra*, at 1, 32. The distinction which Atiyah and Summers draw between substantive and formal reasons is very similar to Raz's distinction between first-order and exclusionary reasons. *Id.* at 1-2.

187. *Admiralty Comm'rs v. Valverde*, [1938] A.C. 173, 194 (emphasis added).

earlier conclusion that each of these types of reason serves roughly the same purpose and functions in much the same way, the judicial practice of relying on both of them and sometimes combining the two is in any event an understandable and probably a sensible one. If common law courts employ reweighting as well as epistemically-bounded reasons, however, then that further weakens any case there might be for explicating overruling from the perspective of an exclusionary conception of precedent. Reweighting reasons, unlike epistemically-bounded reasons, cannot be understood as a special case of exclusionary reasons: rather the reverse is the case.

If modern common law regimes are best understood as non-exclusionary systems, then in light of the comments about such systems that were made in the preceding section the best theoretical interpretation of the common law is an adjudicativist one. Common law judges do not decide cases on the basis of—or at least are not themselves bound by—positive, pre-existing exclusionary rules, but rather look to whatever moral principles are properly applicable to resolve disputes of the kind in question. Deciding cases in accordance with such principles is their most fundamental obligation. In order to ensure a certain measure of predictability in the legal environment courts attribute a varying presumptive weight to the reasoning of past decisions, thereby maintaining a kind of systematic continuity with the past, but not in such a way that they ever lose touch with the relevant first-order reasons.

It is true that at any given time there is associated with the common law process a relatively stable body of dispute settling standards or "rules." (The term "rules" is here to be understood in a broad, generic sense that includes, but is not limited to, Raz's notion of an exclusionary rule.) If the adjudicativist interpretation of the common law process is correct, however, then these standards are not exclusionary rules, as Raz maintains; rather they are presumptions about how particular types of disputes should be settled, where the notion of a "presumption" is to be explained in terms of reweighting and/or epistemically-bounded reasons. The term "common law" is sometimes used to refer to this body of standards as it exists at any particular moment, but in a more fundamental sense it is understood as denoting the dynamic, institutionalized process of rational dispute settlement itself. The adjudicativist interpretation of the common law, which takes its basic point or function to be the settlement of disputes in accordance with appropriate requirements of morality, is simply an attempt to capture this general understanding within a theoretical framework.

I have argued elsewhere that an adjudicativist interpretation of the common law which incorporates the non-exclusionary conception of precedent both clarifies and partially vindicates the theory of law that underlay Dworkin's early papers "The Model of Rules I" and "The Model of Rules II."¹⁸⁸ It not only permits a more precise formulation of Dworkin's notion of institutional support, but also clarifies his rejection of a picture of "existing law" according to which "the law of a community is a distinct collection of particular rules and principles . . . such that it is a sensible question to ask whether, at any given moment, a particular rule or principle belongs to that collection."¹⁸⁹ I shall not further elaborate on these claims here.¹⁹⁰ Instead, I shall briefly draw attention to the fact that the modern debate over the nature of the common law between positivist and adjudicativist theorists is no more than the contemporary version of a much older controversy.

Gerald Postema has shown in an important recent book that the common law tradition which flourished in the late sixteenth and early seventeenth centuries constituted a theory of law which was, in the terminology of this Paper, essentially adjudicativist in nature.¹⁹¹ Coke, for example, wrote that "Reason is the life of the law, nay the Common Law itself is nothing else but Reason,"¹⁹² and Hale said that judicial decisions "do not make a Law properly so called . . . yet they have a great Weight and Authority in Expounding, Declaring, and Publishing what the Law of this Kingdom is . . ."¹⁹³ Hobbes, writing in the positivist tradition, replied to Coke that the common law was not law at all because "[i]t is not Wisdom, but Authority that makes a Law,"¹⁹⁴ adding that "Statutes are not philosophy as is Common Law and other disputable Arts, but are Commands or Prohibitions . . ."¹⁹⁵ Bentham later followed Hobbes in

188. R. DWORKIN, *RIGHTS*, *supra* note 93, at 14-80; see Perry, *supra* note 56, at 223-26, 254-55.

189. R. DWORKIN, *RIGHTS*, *supra* note 93, at 343; see also *id.* at 76, 292 (criticizing the characterization of law as a set of fixed standards).

190. I shall simply note that Dworkin's essay *Hard Cases*, in R. DWORKIN, *RIGHTS*, *supra* note 93, at 81-130, represents something of an aberration in his work, since he seems to accept there an exclusionary conception of precedent. See Perry, *supra* note 56, at 255 n.133.

191. G. POSTEMA, *supra* note 94.

192. E. COKE, *I INSTITUTES*, § 21, *quoted in* G. POSTEMA, *supra* note 94, at 7. "Reason" here does not mean individual reason, since the early common law tradition largely accepted what Postema calls "the tradition-shaped sense of reasonableness." *Id.* at 10. This is a distinctive element in what is nonetheless a recognizably adjudicativist approach.

193. M. HALE, *THE HISTORY OF THE COMMON LAW OF ENGLAND* 45 (C.M. Gray 3rd ed. 1971), *quoted in* G. POSTEMA, *supra* note 94, at 9.

194. T. HOBBS, *A DIALOGUE BETWEEN A PHILOSOPHER AND A STUDENT OF THE COMMON LAWS* 55 (J. Cropsey ed. 1971), *quoted in* G. POSTEMA, *supra* note 94, at 47.

195. T. HOBBS, *supra* note 194, at 69.

refusing to accord the status of law to the common law.¹⁹⁶ As Postema and H.L.A. Hart have both recently pointed out, the guiding thought behind Hobbes' claim that all laws are commands is the notion of "an authoritative, peremptory directive to action."¹⁹⁷ One of the great merits of Raz's conception of a second-order exclusionary reason is that it makes it possible to analyze in clear and precise terms the related concepts of authority and of a peremptory directive, both of which have figured so prominently in the positivist tradition.¹⁹⁸

Raz, like Hart, represents something of a break with the older positivist tradition in that both he and Hart try to make sense of the common law in positivist terms rather than simply rejecting it, as Hobbes and Bentham did, as not being law at all. Raz's attempt in this regard is unsuccessful, and a similar conclusion would apply to Hart's more abbreviated discussion of the common law.¹⁹⁹ It is, moreover, Raz's own conception of a (subjective) second-order reason, once it has been refined to yield the categories of reweighting and epistemically-bounded reasons, that makes it possible to offer a similarly precise analysis of the idea that previous judicial decisions "carry weight and authority" and that they give rise to "presumptions" rather than to strict rules. These notions, which figured prominently in the older common law tradition and which are still frequently relied upon in expositions of the doctrine of precedent,²⁰⁰ can be explicated within the non-exclusionary conception of precedent in such a way as to make an adjudicativist interpretation of the common law quite plausible.

196. See, e.g., J. BENTHAM, *Papers Relative to Codification and Public Instruction*, in 4 THE WORKS OF JEREMY BENTHAM 451 (J. Bowring ed. 1843). Bentham's claim that the common law is not law is discussed in G. POSTEMA, *supra* note 94, at 286-301, and in Simpson, *The Common Law and Legal Theory*, in OXFORD ESSAYS IN JURISPRUDENCE 77, 88-91 (A. Simpson ed. 1973).

197. Postema, *Some Roots of our Notion of Precedent*, in PRECEDENT IN LAW 9, 13 (L. Goldstein ed. 1987) (emphasis deleted); see also H. HART, *ESSAYS ON BENTHAM* 253-54 (1982) (explaining Hobbes' view of the peremptory character of commands).

198. Bentham would seem to be the great exception to the general positivist tradition of placing peremptory directives at the heart of the concept of law. According to Postema, Bentham wished to subject practical reasoning to a rational reconstruction which would purge it of all exclusionary or peremptory "discontinuities," so that officials and individuals alike would engage in direct-utilitarian reasoning only (and therefore, in Razian terms, in first-order reasoning only). See G. POSTEMA, *supra* note 94, at 319; see generally *id.* at 317-28. Postema states that Bentham was thus led "to adopt a conception of legal rules quite different from what we have come to expect from positivist legal theory." *Id.* at 318. He goes on to say that "Bentham might be said to have erected a conception of law which rejects the notion of authority . . ." *Id.* at 327.

199. See H. HART, *THE CONCEPT OF LAW* 131-32 (1961) (common law rules are essentially similar in nature to other kinds of legal rules).

200. See, e.g., *supra* note 186. See also R. DWORKIN, *supra* note 85, at 24-26; Moore, *Precedent*, *supra* note 154, at 189-90. After first developing a holistic account of the common law, Moore makes the intriguing claim that ultimately it is only in a psychological sense that precedents can be

7. *Morally Relevant Reasons and Forward-Looking Exclusionary Rules*

It was mentioned earlier that Raz might argue that even if the judges who make and apply the common law are not themselves exclusionarily bound by it, common law standards nonetheless provide exclusionary guidance for *citizens*. The result would simply be an asymmetry between the manner in which the common law binds citizens and the manner in which it binds courts. On this view judges, or at least the judges of the highest courts of appeal, have powers to modify the standards of the common law which are sufficiently broad that they cannot be said to be exclusionarily bound by those standards, while citizens are so bound until such time as the standards are judicially modified. The response to this objection will concentrate on the example of private common law, which is not only the heart of the common law but also the subject matter upon which most adjudicativist theories focus. This section is concerned with certain conceptual preliminaries, and it is only in the following section that the objection proper will be considered.

It was assumed earlier that in the transformation of a system of absolute discretion into a non-exclusionary system the courts would continue to settle disputes on the basis of exactly the same sorts of moral considerations as before. These considerations, which will henceforth be referred to as *morally relevant reasons*, are supposed to be the reasons that would figure in the objective balance of reasons so as to yield the correct moral solution to the dispute before the court. Opinions as to what these considerations are will of course differ, but plausible candidates include any relevant moral rights and duties of the litigants, for example, rights of reparation in tort cases, and perhaps the moral rights and duties of certain third parties as well. But morally relevant reasons need not in theory be limited to what Dworkin calls arguments of principle (although particular versions of adjudicativism, such as Dworkin's

said to have a holding to which a certain weight is attached. *Id.* at 211-12. It will not be possible to discuss that claim here. It should be noted that it is not just adjudicativists who conceive of precedents in terms of weight and/or presumptions. Neil MacCormick, for example, who identifies himself as a positivist, nonetheless says that "precedents are best treated as more or less highly persuasive rather than absolutely binding," by which he means that they should be regarded as giving rise to strong presumptions in favor of what has already been decided. See MacCormick, *Why Cases Have Rationes and What These Are*, in *PRECEDENT IN LAW*, *supra* note 197, at 155, 158, 167. This view of precedent undermines MacCormick's claim to be a positivist, however, at least so far as the common law is concerned, and, together with his emphasis on the role of courts as dispute-resolving agencies, see *id.* at 167-69, brings him perilously close to an adjudicativist conception of law.

rights thesis, will make this claim).²⁰¹ At least certain sorts of policy arguments, such as loss-spreading and deep-pocket arguments in tort cases, could be regarded, depending on the moral and political theory which one held, as morally relevant reasons as well: action on the basis of such reasons is an attempt to make a moral difference for the better, in consequentialist terms, with respect to the facts of the very case before the court.²⁰²

Morally relevant reasons can be "forward-looking" as well as "backward-looking." A court might have reason to conclude, for example, that deciding a certain case in a certain way would lead people to expect similar decisions in the future; if such expectations could foreseeably lead to undesirable behavior, then the court would have a reason (although not necessarily a conclusive one) to decide the case the other way. This could be true even in a system of absolute discretion,²⁰³ and the effect would be amplified where a doctrine of precedent had been adopted. Even if an *exclusionary* doctrine of precedent were in place the court would not, if it decided the case with a view to discouraging the undesirable behavior, be laying down an exclusionary rule to be followed by the persons whose possible future conduct was giving rise to concern. It would simply be taking account of the possible harmful consequences of deciding the present case one way rather than another, where the existence or extent of those consequences could be affected by the general knowledge that subsequent similar cases would probably be decided in a similar way. It is quite conceivable that those persons whose potentially objectionable conduct posed concern in the first place might not even be the subjects of whatever exclusionary rule was to emerge from the court's decision.²⁰⁴

Contrast the kind of forward-looking consideration just discussed with the laying down of what will be referred to as *forward-looking exclusionary rules*. A forward-looking exclusionary rule is a standard

201. R. DWORKIN, *RIGHTS*, *supra* note 93, at 82-84.

202. See G. CALABRESI, *THE COSTS OF ACCIDENTS* 39-45 (1970).

203. Taking account of such arguments in a system of absolute discretion would not amount to treating bare expectations themselves as being morally relevant to the resolution of the dispute, in the way I said *supra* in the text accompanying note 167 would be problematic. It would be a case of taking account of the morally undesirable consequences which would be likely to flow from people having the bare expectations that they did.

204. See, e.g., *Rondel v. Worsley*, [1969] 1 A.C. 191, in which the House of Lords held that a barrister could not be held liable to his client in negligence, primarily on the ground that allowing such actions against barristers might have the effect of inhibiting them in the performance of their duties to the court. Even if one thinks that House of Lords cases give rise to exclusionary rules, the only possible subjects of such a rule here are the clients of barristers, not the barristers themselves.

intended to provide exclusionary guidance for citizens but which at the same time does not bear in any direct way on the moral resolution of existing disputes. The primary justification for its adoption lies, rather, in the fact that it creates a new exclusionary reason for action which, while it reflects what Raz calls dependent reasons, does so because people would not otherwise be in a position to act on those reasons in the absence of a publicly-adopted rule.²⁰⁵

For example, suppose that people's *moral* rights in cases of accidentally caused loss are determined by a standard of care that defines unacceptable risks without reference to the cost of avoiding the risk, so that where harm is reasonably foreseeable a substantial risk simply ought not to be imposed on another person. This understanding of the negligence standard was advanced by Lord Reid in the English case of *Bolton v. Stone*.²⁰⁶ An alternative formulation of the standard of care is based on the Learned Hand test, which balances the expected risks to the plaintiff against the cost to the defendant of taking precautions to avoid the risk.²⁰⁷ Suppose it is true, as Richard Posner has argued,²⁰⁸ that the Hand test would, if complied with by the bulk of the population, lead to the socially optimal level of accident occurrence, i.e., to an optimal balance between accident costs and costs of accident avoidance. A court which applied the Lord Reid formulation of the standard of care in a case of first instance would be basing its decision on morally relevant reasons, since it would be deciding the case on the basis of the moral rights and duties of the litigants. But a court which accepted the Learned Hand test in a case of first instance, saying that people would be held liable in negligence if and only if they failed to take the economically desirable precautions,²⁰⁹ would be adopting a forward-looking exclusionary rule. The rule would reflect reasons which people already had, namely reasons to make society economically efficient, but prior to its adoption they would not have been in a position, due either to ignorance or to the pointlessness of action by one individual alone, to act upon

205. Forward-looking exclusionary rules will often affect the objective balance of reasons itself. See *supra* note 51 and accompanying text.

206. *Bolton* [1951] A.C. 850, 867. This is the understanding of the standard of care in negligence law which is generally accepted in England and the Commonwealth.

207. In *U.S. v. Carroll Towing Co.*, 159 F.2d 169 (1947) Judge Hand held that a person is negligent if the cost of taking adequate precautions is less than what the cost of the injury would be, were it to occur, discounted by the probability of its occurrence. I discuss the Lord Reid and Learned Hand formulations of the standard of care in Perry, *The Impossibility of General Strict Liability*, 1 CAN. J. L. & JURIS. 147, 169-71 (1988).

208. See, e.g., Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972).

209. For simplicity's sake I am ignoring the complications that are created by contributory negligence, since these are not relevant to the example.

those reasons.²¹⁰

It is the contention of this Paper that private law cases characteristically are and should be decided by common law courts on the basis of morally relevant reasons alone. This is, in a sense, a generalization of Dworkin's rights thesis.²¹¹ Raz, on the other hand, is committed by his positivist interpretation of the common law to the position that common law courts do and should decide at least some cases by adopting forward-looking exclusionary rules. This follows from his claim that courts confronted by unregulated cases "act and should act just as legislators do, namely, they should adopt those rules which they judge best,"²¹² since it is obviously within the prerogative of a legislature to enact forward-looking exclusionary rules. This dispute is in part an empirical one, but it will not be possible to resolve satisfactorily that aspect of the issue here. The following section will therefore come to grips with the question of whether the common law gives rise to exclusionary rules for citizens by considering, in turn, first the possibility that the contention advanced above is correct, and then the possibility that Raz's position is correct.

Before these two possibilities are examined, however, there is one dimension of the empirical question which deserves to be briefly discussed. Behavior-guiding considerations are very strongly emphasized in modern American tort law and tort scholarship, especially in the area of product liability.²¹³ Tort law in the United States is very different in this respect from tort law in the rest of the common law world, which places much greater emphasis on fairness considerations.²¹⁴ It was mentioned above that morally relevant reasons can sometimes be forward-looking in nature, but American courts deciding product liability cases are often concerned with more than just the future ramifications of present decisions. Sometimes the main intention of a decision appears to be to produce an effect on the future conduct of potential defendants. Perhaps it is possible, therefore, that modern American tort law, or at least product liability law, constitutes an exception to the general contention that common law courts do and should decide cases on the basis of morally relevant reasons alone. If so, then the fact that retroactive overruling continues to represent the general practice in tort cases in the United

210. Cf. J. RAZ, *supra* note 3, at 247-48.

211. R. DWORKIN, *RIGHTS*, *supra* note 93, at 82-84.

212. J. RAZ, *supra* note 3, at 197.

213. See, e.g., Schwartz, *New Products, Old Products, Evolving Law, Retroactive Law*, 58 N.Y.U.L. REV. 796, 823 (1983).

214. See, e.g., Weinrib, *Insurance Justification*, *supra* note 155.

States²¹⁵ seems problematic. It is pointed out below that the chief difficulty with the view that common law courts sometimes decide cases in accordance with forward-looking exclusionary rules is that the courts would have to be regarded as applying those rules retroactively. As Gary Schwartz says, "when the goal of tort law is to influence defendant behavior, it is a dubious practice to apply a novel rule retroactively; the less foreseeable the rule at the time the defendant acted, the more dubious the practice."²¹⁶

There is, however, another interpretation of the behavior-guiding aspect of modern American tort law which is consistent with the general contention stated above. Schwartz points out that if there is a foreseeable continuity in the way that the settled law is judicially modified over time, then the conduct of potential defendants can at least sometimes be influenced in a desirable way through the knowledge that any new doctrine will be applied retroactively.²¹⁷ This observation is interesting because it suggests that in a behavior-oriented regime of tort law it is the overall process of common law adjudication which does and should guide conduct, not the individual "rules" as they happen to be formulated at any one time. This suggests in turn that even where the common law emphasizes behavior-guiding considerations, the reasons for action to which the law gives rise are first-order rather than exclusionary in nature. Existing common law doctrine gives citizens some idea of the antecedent likelihood that particular kinds of disputes will be settled in particular ways, and citizens can also be expected to try to anticipate possible changes in the settled law which could affect their present assessment of how future litigation is likely to turn out.²¹⁸ This does not involve exclusionary guidance because at issue is an assessment of probabilities rather than compliance with previously promulgated norms. If this is how modern tort law in the United States should be understood, then a novel judicial decision which relies primarily on behavior-guiding considerations will nonetheless be based on morally relevant reasons: it is necessary to apply the new doctrine retroactively in order to maintain the general incentives in the system which encourage people to anticipate future doctrinal changes. Of course if such a system is to work it will also be necessary to ensure that the general direction of the law is more or less foreseeable.

215. Schwartz, *supra* note 213, at 816.

216. *Id.* at 828. Schwartz goes on to say that "[b]y contrast, retroactive application is quite coherent when the new rule originates in notions of fairness . . ." *Id.* This is consistent with what is said *infra* about retroactivity and the common law in the text accompanying notes 236-39.

217. *Id.* at 826-27.

218. This is consistent with what is said *infra* in the text accompanying notes 240-43 about the nature of the reasons to which the common law gives rise.

The degree of foreseeability that would be optimal is an open question, but there is no reason to think that people would need to have anything like certain foreknowledge of how the law will change.

3. *Does the Common Law Provide Exclusionary Guidance for Citizens?*

Suppose that common law courts characteristically decide private law cases on the basis of morally relevant reasons alone. Also assume, on the basis of previous arguments, that they adhere to a non-exclusionary conception of precedent. Given these assumptions, can the claim that the courts are laying down exclusionary rules for the general population be defended? Since by hypothesis the courts are not deciding cases by adopting forward-looking exclusionary rules, it is impossible to maintain that they are providing exclusionary guidance for citizens with respect to behavior that occurs *before* a dispute takes place.²¹⁹ Might it then be argued that the legal system gives rise to exclusionary rules which take hold *after* a dispute has arisen and which state, for example, that A must pay B damages where the facts are such and such? This claim is also problematic, for two reasons. First, the common law does not force disputants to accept its solutions; not only do they not have to take their dispute to court if neither insists on doing so, but the law condones and even encourages settlement, which is generally recognized to involve extra-legal, strategic considerations such as the relative bargaining power of the parties. The second and more important point is that the currently accepted dispute settling standards of the common law are always subject to retroactive modification which could possibly be, and sometimes is, quite radical in character.

Raz says that the action-guiding nature of legal standards is determined by the intentions of the courts.²²⁰ But in light of the two points just mentioned, it does not seem sensible to suppose that courts regard the settled law as consisting of exclusionary rules which are intended to govern post-dispute conduct. The better view is that the system of courts which exercises jurisdiction over private law matters constitutes a kind of public resource of which citizens may avail themselves in order to have their disputes resolved if at least one of the parties requests this. The settled law consists of presumptions about how particular kinds of disputes will be dealt with should they ever reach court. While the court

219. Many standards of the common law could not in any event be construed as providing pre-dispute exclusionary guidance. Consider, for example, doctrines of strict liability.

220. J. RAZ, *supra* note 84, at 228-32.

will by means of such presumptions give weight to the reasoning of prior similar cases, it is possible that a given dispute will in the end be resolved in some other way. So far as citizens are concerned, the fact that these presumptions exist gives rise to first-order reasons which they can take into account in determining what they ought to do, both before and after a dispute arises; they are not, however, bound by those presumptions in an exclusionary sense.

Assume now that Raz is correct in maintaining that common law courts decide at least some unregulated disputes by adopting forward-looking exclusionary rules for citizens. Continue to assume as well that the courts adhere to a non-exclusionary conception of precedent.²²¹ If the first of these assumptions is true, then Raz is immediately in trouble on the normative side of his thesis that "courts act and should act just as legislators do"²²² The difficulty is that the forward-looking rules, which by hypothesis reflect reasons that people were not in a position to act upon before the rule was adopted, will be applied retroactively to the case at hand.²²³ They will be applied, that is to say, to evaluate the conduct of individuals who at the time that they acted did not have reason to behave or refrain from behaving in the way indicated by the rule.²²⁴ Raz is aware of this implication of his theory and gives the impression of being uncomfortable about it, but at the same time he also downplays the unpalatable aspects of retroactive judicial lawmaking. He states that the only objection to retroactivity in this context "is based on the frustration of justified expectations," and that this is an objection that "has no force at all when unregulated disputes or any hard or controversial legal case is

221. This means that from the point of view of the courts almost every dispute is unregulated in Raz's sense. It follows that the number of potential cases in which forward-looking exclusionary rules can be adopted is very large.

222. J. RAZ, *supra* note 3, at 197.

223. I am using the term "retroactive" to describe the settlement of disputes arising out of past conduct in which the court relies on considerations that had not, at the time that the conduct took place, received explicit judicial recognition as standards appropriate for resolving disputes of the kind in question. This characterization of retroactivity is different from, but compatible with, that of Stephen Munzer, who says that a law is retroactive "if it alters the legal status of acts that were performed before it came into existence." Munzer, *Retroactive Law*, 6 J. LEGAL STUD. 373, 373 (1977). It should be noted that Munzer further develops this idea within the framework of an essentially positivist theory of validity.

224. It is true that in some American jurisdictions prospective law-making is an accepted judicial technique. This is not necessarily incompatible with adjudicativism, although I shall not try to argue in support of that conclusion here. The points that I wish to press for present purposes are twofold. First, retroactive decisionmaking is still the norm in most common law jurisdictions, and so it is on that practice that a theory of the common law must concentrate. Second, as I shall argue below, retroactivity is not necessarily a bad thing when it is viewed from an adjudicativist rather than a positivist perspective.

concerned since no justifiable expectations can arise in such cases."²²⁵ Raz concedes that justified expectations will be frustrated in clear instances of distinguishing and in cases of overruling, but asserts that the objection to retroactivity extends no further.²²⁶

Even apart from the serious nature of the unfairness which Raz acknowledges to occur when justified expectations are frustrated, it is wrong to say that this is the only objection to retroactive judicial law-making of the sort which his positivist interpretation of the common law countenances. Consider that it would ordinarily be *pointless* to apply a forward-looking exclusionary rule retroactively, since the purpose of the rule is precisely to guide people's *future* conduct and in the circumstances we are speaking about this would not be possible.²²⁷ Consider also that a forward-looking exclusionary rule is capable of displacing people's moral rights, and while it might be perfectly acceptable for a legislature to do this on a prospective basis, at a time when the expected benefits of doing so were sufficiently great that it would be in everyone's antecedent interest to have their rights so superseded, matters stand differently when the rule is introduced retroactively. Suppose that the assumptions made earlier about the Learned Hand and Lord Reid formulations of the negligence standard are true, and that in a case of first instance, where there are no general expectations (justified or otherwise) about what the court might do, it decides the case on the basis of the Learned Hand test. On an appropriate set of facts this could mean that a moral right of reparation on the part of the plaintiff was overridden. Even though this might be perfectly acceptable if done on a prospective basis, it seems completely unjustified to take such action in a particular

225. J. RAZ, *supra* note 3, at 198.

226. *Id.*

227. If there *were* a point to the retroactive application of a novel doctrine, then it is not likely that that doctrine would be embodied in a forward-looking exclusionary rule. Recall that the primary justification for adopting such a rule is that, while it reflects reasons that people independently have, it does so in circumstances where they would not be in a position to act on those reasons in the absence of a publicly-adopted rule. See *supra* text accompanying note 205. If the new doctrine was justified primarily by behavior-guiding considerations, then the legal system would presumably take the form described *supra* in the text accompanying notes 217-18. The reasons for action that would be generated for ordinary citizens would be first-order and not exclusionary reasons. The pragmatist legal system which is described by Dworkin in *Law's Empire* and which, according to him, would embrace retroactivity, is probably best understood in these terms. See R. DWORKIN, *supra* note 85, at 155-57. Dworkin does mention one argument in favor of retroactivity, based upon the incentives it creates for people to bring novel actions to court, which is admittedly compatible with the retroactive application of forward-looking exclusionary rules. *Id.* at 56. But this argument is almost certainly outweighed by the various disadvantages of applying such rules retroactively that are described in the text.

person's case after the fact, at a time when it is clearly *not* in that person's interest that this be done.²²⁸

The most serious objection to the retroactive judicial application of forward-looking exclusionary rules arises from the fact that it contravenes Raz's own positivist conception of the rule of law. According to this conception, the rule of law is an instrumental virtue that a legal system possesses in proportion to its degree of efficiency in performing its function, where that function is taken to be the exclusionary guidance of conduct: "[I]n the final analysis the doctrine rests on its basic idea that the law should be capable of providing effective guidance."²²⁹ Retroactive lawmaking will generally amount to a violation of this conception of the rule of law because, as Raz himself notes, "[o]ne cannot be guided by a retroactive law."²³⁰ (Retroactivity is, of course, only one of the ways in which the rule of law as thus conceived can be violated.) Raz states that the rule of law is a "morally neutral" virtue in the sense that it is "neutral as to the end to which the instrument [*i.e.*, law] is put."²³¹ He nonetheless acknowledges that its violation can "insult human dignity, give free rein to arbitrary power, frustrate one's expectations, and undermine one's ability to plan."²³²

Raz says that not every violation of the rule of law will give rise to all of these evils. Yet there is no reason to think that in the context of retroactive lawmaking by courts the only one that will be manifested is the frustration of justified expectations. It should be clear that any of the other evils Raz enumerates could appear here as well. Retroactive judicial lawmaking of the sort permitted by Raz's positivist theory of law would not only defeat the expectations of particular individuals but could also lead to a general uncertainty among people who were afraid that the same thing might happen to them.²³³ This would interfere with their autonomy by impeding their ability to plan for the future. The retroactive implementation by judges of forward-looking exclusionary rules would also seem to entail a lack of *respect* for people's autonomy, in that the individuals directly affected would not be treated "as persons capable of planning and plotting their future."²³⁴

228. Cf. R. DWORKIN, *PRINCIPLE*, *supra* note 93, at 283-89 (unfairness of adjudicating existing cases by applying novel principles the adoption of which on a forward-looking basis would be in everyone's antecedent interest).

229. J. RAZ, *supra* note 3, at 218.

230. *Id.* at 214.

231. *Id.* at 226.

232. *Id.* at 222.

233. Cf. *id.*

234. *Id.* at 221.

Retroactive judicial lawmaking of the sort under scrutiny is thus a much more serious matter, from the perspective of Raz's own conception of the rule of law, than he acknowledges. There are also implications for his general theory of law because the conceptual connection that he perceives between the function of law, which is to guide behavior by means of exclusionary rules, and the role of the courts, which is to evaluate conduct on the basis of those same rules, is severed if the courts fail to apply existing law; given our earlier conclusion that the courts adhere to a non-exclusionary conception of precedent, retroactivity will often entail just such failure. As Raz himself says, "it is obvious that it is futile to guide one's action on the basis of the law if when the matter comes to adjudication the courts will not apply the law and will act for some other reasons."²³⁵ It has already been contended that, as an empirical matter, common law courts do not decide cases by implementing forward-looking exclusionary rules and then applying them retroactively. If this is wrong, and courts often do adopt such rules while at the same time reserving the ability to reject or revise them in accordance with a non-exclusionary conception of precedent, then Raz would be correct to conclude that the common law process generates standards that are (intended to be) exclusionarily binding for citizens but not for judges. This would be a hollow victory, however, since by his own lights there would be something very wrong with the common law.

9. *The Adjudicativist Conception of the Common Law: Final Observations*

There is clearly a great deal more to be said about both adjudicativism generally and about the adjudicativist conception of the common law in particular. It will only be possible here to consider very briefly some of the more obvious objections that might be made to that conception, and to add a few final observations about its theoretical character.

First, could Raz claim that the adjudicativist conception of the common law is in no better state than the positivist conception because it too condones retroactive lawmaking? So long as it is true that common law courts characteristically decide private law cases on the basis of morally relevant reasons, the answer to this question is no. If that contention holds then courts settle disputes on the basis of moral considerations that are applicable to those very disputes, even if the judicial articulation of those considerations sometimes necessarily takes place after the events in

question occurred.²³⁶ The positivist conception of the rule of law is not generally applicable, moreover, to civil disputes, at least so far as retroactivity is concerned.²³⁷ The most important domain in which the positivist conception holds sway (and, it should be emphasized, quite properly holds sway) is the criminal law. In a criminal case the only "dispute" is about whether or not the accused really did fall below some specified standard of conduct at a time when he possessed the requisite mental state; if it cannot be shown beyond a reasonable doubt that he is guilty, then neither he nor anyone else will be punished. Under these circumstances a general requirement of fair notice seems completely unproblematic. Compare this with the usual torts case, in which there already exists a loss that cannot be made to disappear and which must be absorbed by someone. Government decisions are inevitable in civil disputes, even if they are made only by default; accident losses must be allocated, and determinations must be made about who is entitled to own or possess disputed property. In light of these facts the position that the defendant is always entitled to fair notice, so that the plaintiff has a right to win only if there is a clear legal rule which demands that result but

236. One of Dworkin's *prima facie* arguments in favor of the rights thesis was that objections to judicial originality based on the retroactivity of judicial decisions had less force against arguments of principle than arguments of policy. See R. DWORKIN, *supra* note 85, at 84-86. It is a somewhat similar argument that I am making here, except that I regard the point as extending beyond arguments of principle to morally relevant reasons generally. The claim thus covers some arguments of policy, though by no means all. There is also one other significant difference between my argument and Dworkin's. The law, as Dworkin describes it in "Hard Cases," consists of settled institutional history, including common law decisions, together with the propositions which are entailed by the soundest rights-based moral justification of that history. *Id.* at 105-23. He suggests that where the law is thus understood judicial decisions will not be retroactive at all, since the court will always be enforcing a pre-existing right or duty. *Id.* at 84-86. This claim presupposes a different understanding of retroactivity from that outlined *supra* in note 223. More importantly, Ken Kress has shown that even given this definition of law retroactivity cannot be avoided, since the rights that exist at the time of the events in question can, due to subsequent developments in the settled law, differ from those that exist at the time of adjudication. See Kress, *Legal Reasoning and Coherence Theories: Dworkin's Rights Thesis, Retroactivity, and the Linear Order of Decisions*, 72 CAL. L. REV. 369, 377-88 (1984). Kress calls this the "ripple effect" argument. The formal preconditions of Kress's argument do not seem to apply to the version of adjudicativism put forward in this Paper, since the settled law is not regarded as an unalterable given but only as a set of presumptions. Nonetheless, as a practical matter, the ripple effect will almost certainly occur here as well. The difference between my argument from retroactivity and Dworkin's derives from the fact that for the reasons given in the text I regard retroactivity in the sense defined *supra* in note 223 as unavoidable in civil disputes. The argument then simply is that retroactive judicial decisions made on the basis of morally relevant reasons are justifiable, whereas the retroactive judicial application of forward-looking exclusionary rules is not.

237. It is not surprising that adjudicativists often reject the positivist conception of the rule of law in favor of a more substantively-oriented conception. See R. DWORKIN, *PRINCIPLE*, *supra* note 93, at 9-32; Weinrib, *Intelligibility*, *supra* note 155.

that otherwise the defendant must win,²³⁸ is a manifestly unsatisfactory one.²³⁹ There is no morally acceptable analogue in civil law of the criminal law principle *nulla poena sine lege*.

It should also be recalled that where a non-exclusionary doctrine of precedent has been implemented it does not necessarily follow that someone's legitimate expectations have been defeated simply because a prior case is overruled or distinguished. Legitimate expectations focus on the process, not on individual standards of the common law.²⁴⁰ It would of course be preferable if the legal system always gave fair notice and never took anyone by surprise in any way, but in a world of moral uncertainty that is impossible. Sometimes considerations of justice which favor one of the parties to a dispute must outweigh those interests of the other party which depend on his having relied on the probability that the process of dispute resolution would have a different outcome.

What then is the nature of the dispute settling standards of the common law, so far as ordinary citizens are concerned? They are, essentially, first-order reasons which are capable of guiding citizens' conduct in an indeterminate rather than in an exclusionary sense by giving them some idea of the antecedent likelihood that a certain kind of dispute will be settled one way rather than another. Such standards introduce a degree of stability into the dispute settling process. Unlike exclusionary rules they do not restrict choice but rather enhance it, since this stability curtails the interference with personal autonomy which the process would otherwise create. It is of course true that some standards of the common law, such as those involving intentional torts like battery, are capable of guiding behavior in a way not dissimilar to the criminal law. But that is simply a consequence of the nature of the moral wrongs with which those particular standards are concerned and of the fact that moral duties

238. Dworkin labels this position "unilateral conventionalism" or "unilateralism." See R. DWORGIN, *supra* note 85, at 142-43.

239. Cf. Schwartz, *supra* note 213, at 822:

[I]f a new cause of action [in tort] is derived by the judiciary from the criterion of fairness, then the defendant's opportunity for fair notice comes into conflict with the plaintiff's opportunity to receive fair treatment as fairness is understood at the time of his trial; and it is hardly clear why the defendant's opportunity should be granted priority over the plaintiff's.

240. Cf. *id.* at 817: "As long as the general rules of the game make clear in advance that the specific rules of the game are subject to change, the player cannot complain about per se unfairness merely because such a change is in fact effected." Schwartz goes on to say that "obviously an emphasis on continuity lies near the core of the common law. First-order common law rules may gradually come and go, but the second-order rules of the common law process seem (relatively) constant." *Id.* at 818. Schwartz does not say what he means by "second-order rules of the common law process," but I would suggest that they are simply the weighting principles of the non-exclusionary conception of precedent.

themselves are, if Raz is right, objective exclusionary reasons;²⁴¹ it is not a characteristic shared by standards of the common law as a class.²⁴²

Could this be said to be a return to Holmes' "bad man" theory of law, which holds that the only reasons for action to which the law gives rise are incentives to avoid unpleasantness?²⁴³ This question must be answered negatively because there is no general reductivist claim being made about the nature of legal obligation. It is thus not denied that some areas of the law are best analyzed in exclusionary terms. There is also no basis for insisting that the first-order reasons which the common law yields must be regarded with a cynical Holmesian eye. It is completely consistent with the view defended here that citizens be expected to try to anticipate how the common law will change, relying in the process not merely on social facts about the judicial system but also on their own judgments and opinions about the moral questions in issue. This leads to the further conclusion, it should be noted, that the sources thesis has no more application to ordinary citizens, so far as their interaction with the common law is concerned, than it does to judges.

One final observation is in order, and that is that the interpretation of the common law process that has been outlined in this Paper is perfectly compatible with the conclusion that courts are legitimate authorities in Raz's sense. Courts issue what amount to exclusionary directives to the immediate parties to an action, and so can be regarded as claiming authority over persons to that extent. This is in no way inconsistent with the idea that they neither issue nor intend to issue general exclusionary directives to the population as a whole.

CONCLUSION

Joseph Raz is one of our most important contemporary philosophers and legal theorists. He has written with great insight about the

241. See *supra* notes 48, 49.

242. It is not true, for example, of doctrines of strict liability in tort, nor is it true of the standard of care in negligence law, which for substantive reasons of fairness is objective in nature and therefore incapable of guiding at least some conduct on the part of at least some persons. See N. MACCORMICK, *The Obligation of Reparation*, in *LEGAL RIGHT AND SOCIAL DEMOCRACY* 212, 218-19 (1982); Weinrib, *Moral Theory*, *supra* note 155, at 51-52. It is of course true that objective standards occasionally figure in the criminal law, but I think it is generally accepted that "a 'subjective test' of criminal liability should be adhered to as far as possible . . ." H. HART, *PUNISHMENT AND RESPONSIBILITY* 63 (rev. ed. 1970). Such arguments as are made for relying on objective tests in the criminal sphere are pragmatic in nature, looking, for example, to difficulties of proof, and hence are very different from the arguments put forward in the civil sphere. See *id.* at 32-33, 152-57.

243. O. W. HOLMES, *The Path of the Law*, in *COLLECTED LEGAL PAPERS* 167, 170-75 (1920).

nature of practical reasoning, and he has clarified much that was previously obscure about the relationship between legal and political philosophy on the one hand and practical philosophy on the other. Throughout this Paper I have been building on Raz's fundamental insight that a distinction must be drawn between first- and second-order reasons for action, and the discussion of practical reasoning in the first half of the Paper is, in essence, little more than a refinement of Raz's account. Our disagreement in the area of legal philosophy clearly runs deeper, but it is worth stressing that I do not maintain that Raz's positivist theory of law is completely to be rejected. His analysis is a compelling one so far as certain areas of the law are concerned, and this is particularly true of criminal law and statutory law generally.²⁴⁴ The arguments about the common law presented here are, therefore, not so much a call for the rejection of positivism as they are a claim that positivism offers an incomplete account of the theoretical basis of law and so must be supplemented in certain respects by adjudicativism. Moreover it should again be emphasized that those arguments have been constructed on the foundation of Raz's notion of a second-order reason for action. It is only by relying on Raz's own philosophical insights that I have been able to criticize his theory of law and offer an alternative analysis of certain legal phenomena.

244. See Perry, *supra* note 56, at 255-57.