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Razzle-Dazzle

RAZZLE-DAZZLE

Allan C. Hutchinson*

As their title suggests, ‘legal philosophers’ are more philosophers than lawyers; they are in the business of thinking generally about law rather than doing law in any practical way. While lawyers tend to be jurisdiction-specific in their affiliations and competence, legal philosophers are under no such restriction. They are not only free to roam broadly and deeply, but many feel a professional obligation to do so. At their most ambitious, legal philosophers claim dominion over a jurisprudential realm that is delineated by neither geography nor history. Indeed, presenting themselves as intellectual citizens of the whole legal world, their crafted contributions are not intended to be judged by the contingent standards of local usefulness, but by the pure canons of universal validity. As such, the professional commitment and authority of legal philosophers is based upon their capacity to deal with parochial matters of law, but in a way that rises above and is not reducible to their local circumstances. Accordingly, while these legal philosophers might talk about morality and politics as they relate to law, they do so only in the most theoretical and abstract terms. For them, philosophy inhabits the realm of ‘truth and necessity’ in which the contingent and the local holds little or no analytical sway.

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The contemporary champion of legal philosophy is undoubtedly Joseph Raz. His extensive and sophisticated work represents the highwater mark of analytical jurisprudence. With the recent publication of Between Authority and Interpretation, he has provided an accessible and stylish showcase of his philosophical theory of law that is as rigorous and demanding as it is provocative and controversial. Because this book builds on as it clarifies and develops the main themes of his work over the past four decades, it offers itself as a convenient focus for a more general assessment of Raz's whole oeuvre.¹ In traversing law's terrain, he is adamant that, whatever the purposes and methods of other disciplines (e.g., sociology, history, anthropology, etc.), any philosophical analysis worth its name must concern itself with delivering insights and understanding about law that are of universal significance. While general conclusions about local laws and systems are important and helpful, they will have no philosophical value unless they can say something general and enduring about law as an institutional phenomenon. A corollary of this is that legal philosophy must insulate itself from contingent moral and political influences that will compromise or contaminate its project of making statements about law's nature and operation that are not only universally valid, but also locally accurate. As Raz himself puts it, "where necessity reigns, considerations of moral and political desirability have no role to play" (265).

In this essay, I intend to challenge Raz's philosophical ambitions – and, therefore, much contemporary work in legal philosophy – by concentrating on his crucial methodological distinction between the local and contingent and the universal and necessary. It will be my contention that, as there are no places where 'moral and political desirability' do not play a role, 'necessity' has no reign. Accordingly, I will argue that legal philosophy cannot live up to its own methodological expectations and standards of validation. For all its impressive erudition and sophistication, therefore, Raz's work is a manifesto of 'local enthusiasms' that, while instructive and useful in themselves, can lay no claim to reveal the necessary features of law's existence. His work comprises some very contingent and localised generalisations that no amount of philosophical razzle-dazzle can elevate to universal and global truths about law.

¹ JOSEPH RAZ, BETWEEN AUTHORITY AND INTERPRETATION: ON THE THEORY OF LAW AND PRACTICAL REASON (2009) (hereinafter referred to by page numbers in the text).

Blinded by the philosophical light, there is more formal brilliance than substantive bottom-line to Raz's jurisprudence.

There are many different arguments that might be made against Raz's account of law, but I will only concentrate on three in particular.² After introducing the main themes in Raz's jurisprudence, I will devote my critical attention to the dubious philosophical status of his philosophical project, the elusive nature of his law/morality distinction, and the flawed depiction of legal interpretation's role. Throughout, I will suggest that, while there are many local enthusiasms that Raz exhibits and to which I can subscribe, none of these merit the universal authority that he claims for them. Finally, while there is much that is insightful and profound about Raz's ideas, there is also a tendency to opacity and oracularity. As such, I hope to offer a robust challenge to Raz's Between Authority and Interpretation without disrespecting it.

I. No Ordinary Joe

It can be safely reported that Joseph Raz is now considered the leading positivist and, arguably, the leading jurist of his time. Once a student of H.L.A. Hart's, he is now giving his former mentor a run for his money in the jurisprudential sweepstakes. As well, he is more than a match for Ronald Dworkin, also a student of Hart's, in persuading jurists of the pertinence of his own positivist account of law. In Between Authority and Interpretation, he offers further reflections on legal philosophy and provides some telling clarifications and defences of his own theory of law. While the book's 13 chapters have almost all been previously published, their compilation allows and invites a sustained re-appraisal of the basic ideas and arguments which he has been developing over the course of his long career. In this regard, it is a veritable *tour-de-*

² I have grappled extensively with positivist theories generally and Raz particularly in my *THE PROVINCE OF JURISPRUDENCE DEMOCRATIZED* (2008). As the title suggests, I have insisted that Raz's whole preferred account of law as authority is based on a series of non-democratic and partial assumptions about society and its social arrangements. *Id.* at 115-20, 233-39 and 350-57. I do not intend to pursue those important arguments here. However, there is nothing at all in these most recent essays that causes me to revise my earlier critique. Indeed, there is much there that confirms that, despite his claims to the contrary, Raz relies on controversial and contingent political assumptions about social organisations, states, governments, and rule-by-law, especially the preference for continuity, that confound his claims to being universal and descriptive in his analysis and conclusions. I fry different, if related, critical fish in this essay.

force. Although a demanding read that expects much of its readers,³ the book is a wonderful exemplar of Raz's style and oeuvre for better and for worse.

What defines and distinguishes positivists is their approach to the relationship between law and morality. For the most part, they fully accept and recognize that law and morality are inextricably connected as a historical matter of social fact and that morality features in a variety of ways in determining law's nature. However, they maintain that an analytical approach to law requires, as a matter of philosophical clarity, that the issue of law's validity be understood in terms of social sources, not moral merits: "legal positivism is normatively inert."⁴ Accordingly, while all law has an inevitable moral content and should be evaluated in terms of its moral worth, positivists maintain its existence and identity as law not only can, but must be determined without taking any kind of stand on its moral substance.

Raz's reputation and high standing rest on the distinctive and powerful contribution that he has made to jurisprudential efforts to develop, fine-tune and defend this basic positivist stance. His ideas are starkly positivist in ambition and realisation; there has been an enviable constancy of both purpose and performance in his writings. While his account of law as a body of authoritative rules holds much intuitive appeal, the genius (as well as the devil) is in the details of his exposition of the relationship between law and morality. Accordingly, it is important to explore his sophisticated elaborations of conceptual analysis, legal interpretation, and legal authority in order to grasp the appeal and force of Raz's theory of law and its special brand of legal positivism. In so doing, it is instructive to distinguish Raz's ideas of law from both those of other positivist theories and those of its non-positivist antagonists.⁵ It then

³ As with all such collections, there is considerable repetition, both literal as well as thematic. See, for example, pp. 40 and 95.

⁴ John Gardner, Legal Positivism: 5½ Myths, 46 AM. J. OF JURIS. 199 at 213 (2000). See, also, H.L.A. Hart, Legal Positivism in ENCYCLOPAEDIA OF PHILOSOPHY IV, 418 (1967); Jules Coleman and Brian Leiter, Legal Positivism in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY (D. Patterson ed. 1996); Leslie Green, Legal Positivism in STANFORD ENCYCLOPAEDIA OF PHILOSOPHY, <http://plato.stanford.edu/entries/legal-positivism/>; M. KRAMER, IN DEFENCE OF LEGAL POSITIVISM 1 (1999); and Andrei Marmor, Legal Positivism: Still Descriptive and Morally Neutral, 26 OXF. J. OF LEGAL STUDIES 683 (2006).

⁵ I am deliberately using the vague term of 'non-positivist' in preference to that of 'naturalist'. The term 'naturalist' conveys a certain orientation that not all opponents of positivism, including myself, respect or follow. Indeed, designating all non-positivist scholars as 'naturalist' can cause greater confusion than clarity in attempting to ascertain the challenges to a positivist account of law. For a more traditional natural law approach, see J. FINNIS,

becomes possible to get a more nuanced feel for his philosophically-dense thesis about the nature of law. Indeed, for Raz, those positivists and non-positivists share much more with each other than with his own legal theory.

A non-positivist account of law insists that a full conceptual account of legal validity demands close interpretive attention to its moral content and normative purposes. At their most generous, non-positivists contend that it is not so much that positivism is entirely wrong-headed in its analysis and recommendations, but that it is seriously incomplete by its failure to recognize and accept its broader evaluative dimensions; it ignores the vital appreciation that law's social facts have inescapable moral components. For instance, Dworkin's law-as-integrity model of law holds to the line that "propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice."⁶ As even positivists conceded, law (whether in the form of constitutional provisions, legislative enactments, or common law rules) is shot through with moral terms and evaluative standards -- reasonable care, fair dealing, honesty, good faith conduct, etc. Consequently, modern positivists were obliged to make a much better fist of explaining and defending their defining 'separation thesis'. In particular, the most pressing challenge was to demonstrate convincingly how these obvious moral occurrences in legal rules could be squared with the positivists' rigorous insistence on the split between law and morality.

There were two distinctive responses from positivists.⁷ One came from Hart and his followers. They took the softer line that, although law and morality must be kept analytically distinct, moral values can still be incorporated and feature in determining matters of legal validity; their inclusion does not require any independent judgment about their moral truth and does not ask jurists to take a stand on their controversial quality. As such, law's identity can be

⁶ R. DWORKIN, *LAW'S EMPIRE* 22 (1986). For this reason, Dworkin's jurisprudential contribution can most fairly be situated between the broader sweep of traditional natural lawyers and the narrower focus of legal positivists. See John Mackie, *The Third Theory of Law* in *RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE* (M. Cohen ed. 1983). However, Raz is completely persuasive in giving the lie to Dworkin's characterisation and criticism of positivists as offering a 'semantic' account of law (47-87).

⁷ There is a third possible response which argues that jurists should abandon any pretence that positivism demands an abdication of normative arguments. As such, they maintain that the benefits of keeping issues of legal validity and moral legitimacy separate are primarily ethical and political. See, for example, T. CAMPBELL, *THE LEGAL THEORY OF ETHICAL POSITIVISM* (1996).

still determined by its source-based pedigree, not its intrinsic moral merit. While this more ‘inclusive’ mode of positivism goes a long way to accommodating the non-positivist critique, it does so at the considerable cost of reducing the supposed differences between positivists and non-positivists almost to vanishing point. Indeed, there is much merit to Dworkin’s triumphalist claim that this version of positivism is “stunningly like my own” and that it is “hard to see any genuine difference.”⁸ Soft theorists maintained their positivist faith, but at the cost of their jurisprudential souls.

Raz was and is having none of this. He insists that legal norms must be capable of being identified strictly by their pedigree alone and without reference to moral criteria. In regard to his soft positivist cousins, he is adamant that to allow the incorporation of moral standards in any way as part and parcel of legal rules would severely and perhaps fatally compromise the separation thesis. For him, it is axiomatic that the identification of law and its content be achieved “without resort to moral considerations” (4) if positivism is to be secure against the non-positivists’ criticisms. As such, Raz holds steadfastly to the claim that law’s identity must be determined exclusively by reference to factual sources only. The law’s apparent incorporation of moral standards is nothing more than “an indication that certain considerations are not excluded” (198). It most certainly is not a recognition that those moral standards are part of law *qua* moral standards.

More precisely, Raz explains that it is not that law excludes morality, but that it “modifies ... the way moral considerations apply” (192). For instance, in the same way that conflicts-of-law rules give temporary legal effect to foreign laws in specified situations without making them part of the law itself, some constitutional rules give legal effect to certain moral norms without making them part of the law itself. In both cases, contrary to the claims of the inclusive, soft or incorporationist positivist, foreign law and morality are not incorporated into the law and thereby become part of the law. Moral standards are treated much the same as rules

⁸ RONALD DWORKIN, JUSTICE IN ROBES 188 (2006). Soft positivist approaches can be found in HART’S POSTSCRIPT; J. COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY (2001); W. WALUCHOW, INCLUSIVE LEGAL POSITIVISM (1994); Kenneth Himma, Inclusive Legal Positivism in THE OXFORD HANDBOOK OF JURISPRUDENCE AND LEGAL PHILOSOPHY 1235-36 (Jules Coleman and Scott Shapiro eds. 2002).; and Robin Bradley Kar, Hart’s Response to Exclusive Legal Positivism, 95 GEO. L.J. 393 (2007).

of financial accounting or actuarial tables; they are relied on and resorted to by judges and lawyers, but they do not become part of law and, therefore, count as law by that fact. As such, law “concretiz[es] moral principles” (347) and, having done so, turns them into social facts, not moral values. In this way, issues of legal validity and moral legitimacy are kept conceptually separate.

Accordingly, if soft positivists maintain that there are no necessary connections between law and morality, it might be thought that hard positivists would insist that there are necessarily no connections between law and morality. But this is not entirely accurate. Hard positivists argue that, while there are many connections between law and morality, law’s identity does not depend at all on it meeting any test of moral legitimacy; law is entirely source-based in its claims to validity and moral considerations have nothing to offer or role to play in such inquiries. As such, legal rules are held to be strictly social phenomena that can be identified in an entirely objective and factual way by reference to an uncontested source of authority; there is an analytically-unbridgeable chasm between formal pedigree and moral substance. In direct opposition to the soft positivists, Raz resists the moralist-inspired criticisms and stands firm in his defence of an uncompromising positivist account of law and legal systems.

From a Razian perspective, therefore, law exists and functions as both a fact and a norm. It is a social fact in that “its existence and content can be established ... without reliance on moral arguments” (344). This means that there can be good and bad laws as well as morally legitimate or illegitimate legal systems: inquiries into what the law is are separate from what the law ought to be. While law can by its nature be used to realise valuable ends and can be considered to have a variety of moral tasks to perform, law is not by its nature a morally valuable institution, even if it is morally significant (175-79). History has shown time and again that law has been used, in big and small ways, for immoral purposes. However, law is also normative in that “it aims to guide people’s conduct and it claims authority to do so” (344). Although it may fail to make good on its claim, its authority flows from its theoretical capacity to do so.

It is this idea of ‘authority’ that lies at the heart of Raz’s jurisprudence. For him, a legal system comprises those rules that seek to offer a rational and authoritative guide for human conduct. It is not so much whether that system and its rules have actual authority, but whether

they can make a plausible and practical claim to legitimate authority in a particular society. As such, law is an institutionally-backed set of reasons for people to do or not do things. Legal rules operate as place-markers for substantive reasons. It is Raz's contention that people comply with rules rather than determine for themselves what would be the right thing to do in particular circumstances: "the law is a special kind of reason for it displaces the reasons which it is meant to reflect" (7). These rules must be identifiable as social facts and, therefore, be capable of identification without resort to non-legal or evaluative moral criteria. If the rules cannot be identifiable and followed in this way, they are no longer serving their primary normative function and, therefore, cannot make the practical difference that they are intended to make and upon which their authority is based. As such, law is an authoritative system of norms that must be identifiable and serviceable on its own terms. If it is not, then its authority would be illusory and such norms would no longer qualify as legal rules, whatever their appeal and authority as moral, religious or other value-based directives.⁹

There is so much that is rewarding and insightful about Raz's work. There is a reassuring sharpness to the distinctions made, an unflinching commitment to analytical rigour, and a welcome confidence in demarcating law's nature and operation. However, there is also much that is off-putting and obfuscating. Raz tends to be philosophically extravagant in the claims that he makes for his analytical conclusions. None of this helped by the clotted nature of some of his prose.

II. From Universal to Parochial and Back

In recent years, legal theory has taken a decidedly 'methodological turn'. While the main focus of jurisprudential engagement largely remains the 'separation thesis', considerable attention has been given to the prior epistemological question of whether it is possible to intervene in the law/morality issue in a way that is itself untouched or uncontaminated by moral values or other evaluative criteria. It is no longer sufficient for jurists to support their theoretical claims about 'what law is', they must also defend the deeper status of those theoretical claims. It

⁹ J. RAZ, THE CONCEPT OF A LEGAL SYSTEM (2nd ed. 1980), THE AUTHORITY OF LAW (1979), THE MORALITY OF FREEDOM (1986). See also see ANDREI MARMOR, INTERPRETATION AND LEGAL

has become a matter of showing not only what propositions are true about law's nature, but also about what it means for those propositions to be true.¹⁰ The especial challenge for positivists is that, in defending the separation of law and morality, they must ensure that their jurisprudential explanation is itself not breached by ideological or partial values.

Raz has always made it plain that he is in the business of disclosing 'universal truths'. A great strength of his brand of legal positivism is considered to be that it makes and defends its central insights as truth-claims that apply wherever and whenever law is found. For him, therefore, first main task of legal philosophy is to establish "the kind of institution that law is" (11) by ascertaining "a set of systematically-related true propositions about the nature of law" (17) that can assert universal validity by virtue of their philosophically-necessary status. While a theory must be capable of applying to "all the legal systems which ever existed or that could exist" (33), he gladly concedes that there will be local variations and deviations about law's boundaries at particular times; it is the core or standard case that Raz maintains should engage the legal philosopher's attention and concerns. Accordingly, when it comes to the epistemological status of Raz's inquiry, it is resoundingly clear that he offers his conclusions as being universally true and that, "where necessity reigns, considerations of moral and political desirability have no role to play" (265). It is unapologetically presented as legal theory on a grand scale and in a grand style.

In the past decade, as part of the methodological turn in legal theory, critics of the analytical project have noted that the universal claims that legal theorists, like Raz, make for their theoretical observations are extravagant and indefensible. The basic thrust of the critique is that, despite the universal ambitions of positivists in elucidating the nature of law, their efforts are very much entrenched in the parochial conditions of late Twentieth-Century western industrialized societies. While these philosophical accounts of law have much to tell us about the nature of law in those societies, they do little to illuminate the nature of law in other societies.

THEORY (1992).

¹⁰ See also, for example, John Gardner, supra, note 4; Stephen Perry, Hart's Methodological Positivism in HART'S POSTSCRIPT 311 (J. Coleman ed. 2001); and Jeremy Waldron, Normative (or Ethical) Positivism in HART'S POSTSCRIPT 420 (J. Coleman ed. 2001). For a more complete account of this methodological turn, see John Oberdiek and Dennis Patterson, Moral Evaluation and Conceptual Analysis in Jurisprudential Methodology in

There are so many other legal arrangements – tribal, transnational, indigenous, customary, etc. – that do not comply with this centralized, top-down, and state-centred model of law and governance. As such, Raz commits the familiar philosophical error of mistaking one contested and contingent understanding of law as its unifying and universal essence. As Raz himself correctly sums up this objection, “it is a parochial study of an aspect of our culture rather than universal study of the nature of law” (32).

In Between Authority and Interpretation, Raz acknowledges this line of critique and attempts to deflect its debilitating effects.¹¹ He is insistent that these critical allegations are “misguided” (32) and do not unduly hamper or hobble the theoretical status of his jurisprudential project. However, he does introduce several important alterations and significant qualifications to his account of law. Although they are offered in the form of clarifications and suggest that there has been no substantial switch of position, it seems obvious that this is not the case. More importantly, these changes in his position are not only far from convincing, but they actually do serious damage to the cogency and strength of his theoretical claims. Rather than refute the ‘parochial’ concerns, Raz manages to confirm their critical bite. There is much intellectual razzamatazz, but it does little to advance our substantive understanding about legal theory that his critics or even Raz would demand.

In order to understand Raz’s response, it is necessary to provide a more thorough account of his own particular jurisprudential methodology. Building on Hart’s notion of an ‘internal attitude’,¹² Raz insists that any account of law’s nature must draw upon and accommodate the self-understanding of participants in the legal system: “it is part of the self-consciousness of our society to see certain institutions as legal” (31). This means that legal philosophy is not a detached exercise in academic taxonomy, but is devoted to “inquiring into the typology of social

CURRENT LEGAL ISSUES: LAW AND PHILOSOPHY (Ross Harrison ed. 2007) and Hutchinson, PROVINCE, supra, note 2 at 89-115.

¹¹ This is not Raz’s first cut at negotiating this problematic relation between parochial interests and universality claims. See, for example, Notes on Value and Objectivity in J. RAZ, ENGAGING REASON: ON THE THEORY OF VALUE AND ACTION 132-44 (2000). However, there is nothing in that dense discussion that seems to qualify or salvage his most recent account. Also, it is unfortunate that Raz provides no examples of specific theorists who raise these ‘parochial’ challenges to the project of legal philosophy. Good examples might be the late Richard Rorty and Roberto Unger. See R. RORTY AND P. ENGEL, WHAT’S THE USE OF TRUTH? (2007) and R. UNGER, THE SELF AWAKENED: PRAGMATISM UNBOUND (2007).

institutions, not into the semantic of terms” (29). By entering into such an inquiry, the purpose is to apprehend the ‘concept of law’ by, among other things, “explaining the conditions for minimal possession of the concept, that is those, essential or non-essential, properties of what the concept is a concept of, knowledge of which is necessary for the person to have the concept at all, however incomplete his or her mastery of it may be” (22).¹³ Consequently, the Razian-influenced jurist will be concerned to isolate and refine the concept of law which people hold and which will influence their society’s governance and exercise of authority. Importantly, there is no need for people to have a full appreciation of the concept of law in order for it to be of practical significance in their social practices and lives.

The difficulty, as Raz concedes, is that, if such concepts of law are embedded in societies and are for that reason culturally-specific, how is it possible to maintain the claim that the resulting conclusions about the nature of law are not themselves culturally-specific? It is at this point that the philosophical waters start to become very muddy. Raz states that “while *the concept of law is parochial, ie not all societies have it, our inquiry is universal in that it explores the nature of law, wherever it is to be found*” (32, italics in original). In explicating further why concepts of law might be parochial, but why legal theory is not and might still be considered to be universal, Raz goes on to say that:

“This means that in legal theory there is a tension between the parochial and the universal. It is both parochial and universal. On the one hand it is parochial, for it aims to explain an institution designated by a concept that is a local concept, a product of modern western civilisation. On the other hand it is universal theory for it applies to law whenever and wherever it can conceivably be, and its existence does not presuppose the existence of its concept, indeed it does not presuppose the existence of any legal concept.” (38)

¹² H.L.A. HART, *THE CONCEPT OF LAW* 89-91 and 242-43 (2nd ed. 1994).

¹³ It is worth noting that, in explaining the nature of conceptual analysis, Raz uses tangible things in the world, such as water, tables, snakes and triangles (21-24 and 67), to illustrate his point. For instance, he argues that, “if being made of H²O is of the nature of water then this is so whether or not people believe that it is so, and whether or not they believe that water has essential properties” (27). See also Dworkin, *supra*, note 8 at 154-55 (2006). This may be so, but Raz fails to make the case for why water and law should be considered as fungible or even similar entities. Indeed, as socially-created entities, laws are ontologically very different to tangible objects and, as such, require a very different approach in matters of conceptual analysis. For a sustained challenge to this mode of analysis, see Hutchinson, *supra*, note 2 at 89-115.

Insofar as I understand this claim, Raz seems to be suggesting that all legal theorising begins with the concept of law in our own societies. Having fixed its terms (e.g., an authoritative system of rules that can be fixed without resort to moral considerations), we then survey all societies across time and over geography and determine whether their social practices can be said to instantiate such a concept. If they do, they have law and, if they do not, they do not have law, at least according to our own concept of law. It is not decisive that those people in other cultures do not share our concept of law. If their social practices gel with the essential conditions of our concept of law, they will have a legal system: “legal theory is merely the study of the necessary features of law, given ‘our’ concept of law” (98).

While this explanation has a veneer of plausibility, it surely does not bear close scrutiny. Contrary to the original universalistic claims of much analytical philosophy generally and legal philosophy particularly, Raz’s clarifications manage to pull the universal rug from under his own feet and reveal him to be standing squarely on very parochial ground. And if his feet are firmly planted on the local soil of contingent cultural practices, it is impossible to grasp how his philosophical peregrinations can escape those confines and continue to lay claim to universal validity. The most that his modified parochial-universal approach can do is to clarify which other societies in the world have legal systems like our own and which do not. This does not so much deflect the criticism that he is merely theorizing about the nature of law in the parochial conditions of late Twentieth-Century Western industrialized societies, but confirm it. As importantly, he privileges that particular account of law’s essential nature by foisting it upon the world across both territory and history.

A presumable corollary of Raz’s efforts to negotiate the tension between the parochial and the universal is that each society might well develop its own legal theory *à la Raz* in line with its own concept of law. This would mean that there would be as many legal theories as there were concepts of law. Moreover, on Raz’s account, each would be able to argue that they were involved in a truly philosophical enterprise in that conclusions about the nature of law would also be able to claim a universal legitimacy. In such circumstances, the best that we can note is that there would many different concepts of law, as many different theories of law, and many incommensurable, yet universal conclusions about the nature of law. Such a world would

not only be baffling to the uncommitted observer, but also defy any notion that legal philosophers had anything special, let alone 'necessarily true' to say about law's nature.

Raz's response to this is blunt, but not to the point and entirely unconvincing: "the objectivity and universality of the theory of law is not affected by the fact that the concept of law (which is our concept of law) is parochial and not shared by all the people nor by all the cultures, which live or lived under the law" (46). This response is hardly reassuring for the jurisprudential adept, but it will be warmly received by those pragmatic theorists who challenge the universalistic claims of analytical theorists. The Razian study of law and legal systems may be universal, but its parameters and the conclusions reached are surely not. Whatever Raz claims to be doing, he is no longer, if he ever was, in the game of explaining law's nature as "a set of systematically-related true propositions about the nature of law" (17). Or, if he is, the whole nature of what counts as truth and necessity have been radically transformed to such an extent that the philosophical space between the parochial and universal has been almost totally elided.

Raz places much faith on the existence of 'our' concept of law. But there are so many difficulties with fleshing out what is referenced by this 'our'. While there might well be a reasonably settled and homogenous sense of 'our' in some societies, it is far from clear that this is so in many other societies. Indeed, it is in those late Twentieth-Century Western industrialized societies that the appreciation of 'our' is becoming highly contested and relatively thin in scope and substance. While there will obviously be a degree of uncertainty and indeterminacy about any concept's precise ambit, there may well be competing and occasionally contradictory concepts in play at the same time in some societies. Moreover, it is not obvious at what level of generality the concept of law as a snapshot of people's self-understandings needs to be made. Although there may be certain similarities between the societies of the United Kingdom, the United States of America or Canada and their concepts of law, there are also crucial dissimilarities. At what point do those dissimilarities become so significant that they take precedence over the similarities? Without some independent conceptual metric by which to gauge this set-off, there is a risk that every society will have its own concept of law. Even if there was considerable congruence among different societies' concept of law, any conclusions

drawn would remain parochial and contingent. All of this would surely defy any sensible way to talk about a theory of law in Raz's sense.

In short, contrary to Raz's intentions, philosophical necessity has itself been parochialised and thereby robbed of its vaunted qualities of theoretical authority. When Raz states that "where necessity reigns, considerations of moral and political desirability have no role to play" (265), he has simply made a rod for his own back. By his own account, all analyses of the concept of law originate in and are limited by the practical details of their parochial setting. This being the case, 'political and moral' considerations are inevitably in play in comprising and informing those local conditions; they will switch and change as society itself shifts and alters. Consequently, if necessity only reigns where such considerations have no role, then necessity has no reign and, therefore, no importance. Rather than take flight into some abstract realm where the normal rules of earthly locomotion seemingly no longer apply, Raz has clipped legal philosophers' wings. More precisely, he has revealed what critics thought all along, namely that legal theorists have feet of clay. So, when Raz claims that "a claim to necessity is in the nature of the enterprise [of legal theory]" (92), he has not only failed to save legal philosophy from a timely demise at the hands of his 'parochial' critics, but he has also effectively contributed to writing analytical jurisprudence's and his own philosophical obituary.

III. Law, Bad Law and No Law

Although Raz's efforts to negotiate the tension between the parochial and the universal undermine the philosophical status of his overall jurisprudential project, they also create equally devastating problems for the positivist aspirations of his theory of law. This is particularly evident in his account of what it means for a legal system or law to exist as something distinct from other normative schemes of moral or other evaluative modes of regulation. In charting the crucial separation of law and morality, Raz's parochialism (or faux-universalism) becomes even more apparent. Indeed, if further proof was needed, his arguments to explicate the law/morality connection confirm still further that his theory of law, insofar as it is based upon *our* concept of

law, is a theory of law about mid-to-late Twentieth-Century western industrialized societies.¹⁴ Its capacity to provide informative and fruitful insights about other societies and their ‘law’ is not only limited, but unhelpful. As Between Authority and Interpretation amply shows, the crucial boundaries drawn by Raz between law, bad law, and non-law become fraught with both conceptual and practical difficulty.

As Raz is at pains to point out, the essential characteristics of law (i.e., an authoritative set of rules which exists and is identifiable without regard to moral considerations) are those that make it what is and are “found in law wherever and whenever it exists” (25). Being universal, the theory must be capable of applying to “all the legal systems which ever existed or that could exist” (33). While law can change over time and across the world, he maintains that the nature of law does not; it remains universal in its application and relevance. However, as importantly, the essential characteristics of law are also those without which it would no longer be law. Consequently, if “the institutions and practices of a country which constitute its law ... lose the properties which are essential to the law, ... the result is not that the law changes its nature, but that the country no longer has a legal system” (25). For Raz, therefore, whatever else it may have, any society that relies on a system of governance that does not exhibit the features of a state-backed series of authoritative rules has no legal system.¹⁵ None of this, of course, means that such a society will not have a legal system that accords with its own concept of law; it will simply not have a system of governance that merits being described as ‘law’ in terms of our own concept of law. Furthermore, in keeping with his positivist commitments, whether a legal system exists will be a matter of factual inquiry; assessments as to whether it is a good or bad legal system will depend on the moral content of its rules.

¹⁴ I say ‘mid-to-late Twentieth-Century’ because in the first decade of the Twenty-First Century Raz’s model of the essential features of a legal system as a state-based body of authoritative rules is already being transformed. See Hutchinson, supra, note 2 at 78-80. See MARTIN VAN CREVELD, THE RISE AND DECLINE OF THE STATE (1999); GLOBAL LAW WITHOUT A STATE (Gunther Teubner ed. 1997); and Roger Cotterrell, Transnational Communities and The Concept of Law, 21 RATIO JURIS 1 (2008).

¹⁵ Raz is not on his own in taking such a line. For instance, Les Green states that “neither a regime of ‘stark imperatives’ that simply bosses people around nor a price system that structures people’s incentives while leaving them free to act as they please would be a system of law.” Leslie Green, Positivism and the Inseparability of Law and Morals, 83 N.Y.U. L. REV. 1035 at 1049 (2008). For a contrary positivist stance, see Kramer, supra, note 4 at 84-89.

However, while there is a certain conceptual symmetry and neatness to all this, it renders his whole notion of legal theory to be even more recherche and precious than many already consider it to be. If legal theorists are not trying to do more than describe the essential features of one or a few legal systems that presently exist in our own societies, then it is unclear in what sense they are engaged in a philosophical endeavour by their own intellectual lights. It becomes an exercise in mere labelling more than conceptual analysis. Moreover, even by the terms of our own concept of law, it is unclear why a legal system that lacks certain features that Raz considers essential to law's existence should be treated as not being law as opposed to being a poor or bad system of law; it will be law, but not a complete or adequate one. Rather than there be law or no-law, it is surely better to say that some legal systems are of lesser value as legal systems, regardless of the substantive content of their rules. There are, of course, important implications in such an assessment for Raz's 'hard' positivist stance about the necessary separation of law and morality.

Imagine a present-day society very similar to that of late Twentieth-Century Western industrialized societies, like the United Kingdom, the United States of America or Canada. After an unanticipated and sudden series of economic crises as well as natural disasters, a *coup d'état* overthrows the government and a theocracy is installed. Rule is brutally maintained and based upon strict Old Testament-based religious dogma. Opposition is forbidden and non-conformists are executed by the state. All power is entrusted to local clerics who rely entirely on the Bible for guidance and whose decisions are final in all disputes. Furthermore, decisions about culpability and punishment in individual cases are made entirely *in camera* and with no judgment or explanation given. 'Clarifications' of biblical interpretation are circulated secretly to local clerics by the supreme religious leader. Let us call this society 'Gileban'.¹⁶

An attempted application of Raz's legal theory to this social development is illuminating. While it is difficult to state categorically exactly how Raz would respond, his most up-to-date ideas in Between Authority and Interpretation point in certain clear directions. Indeed, there are several conclusions that the critic might draw – law's validity can depend on moral criteria; bad

law is not always equivalent to no law; and the extent of law is as much a moral as factual inquiry. Each seems to be less than helpful individually and especially collectively to his overall project to lay out and defend an uncompromising positivist account of law's nature.

First, Gilebanian society seems to contradict Raz's insistence that law exists as something separate from other modes of value-based governance. By recommending a sharp separation between law's validity and its moral legitimacy, his account of law strongly suggests that no legal system can or could exist which made law's validity depend entirely and exclusively on its moral legitimacy. The existence of such a legal system would confound the underlying universal structure and claims to authority of Raz's schema by fusing rather than keeping separate law's validity and moral legitimacy. After all, it is an important feature of law's nature that people follow its rules as law and not as moral imperatives. However, that is what many theological systems of law, like Gileban, do. The force and validity of the systems' orders are both directly and indirectly based upon the society's religious commitments; there is simply no law that can be immoral or whose content can be something other than its biblical source. What makes a rule into a legal rule is its status as religious ordinance and what gives it its legitimacy is its claims to religious authority.¹⁷ In a society like Gileban, it is not so much that law overlaps with morality and religion as that they become fused into one and the same thing. Consequently, contrary to Raz's hard positivist claims, legal validity can sometimes not only be determined by reference to its content or in terms of its larger moral legitimacy, but has to be.

Secondly, Gileban raises some pressing problems for Raz's conclusion that, despite appearances to the contrary, sometimes law does not exist. One response by Raz to the first critical observation is that a system like Gileban, whatever else it is, is simply not a legal system; law does not exist in such a society. Indeed, it seems apparent that the theocratic regime of Gileban would not count as a legal system in Raz's reckoning because it is not in accord with his rendition of what 'our' concept of law would demand. Among other things, Raz is of the opinion that "it is the essence of law that it expects people to be aware of its existence and, when

¹⁶ This is not such a far-fetched scenario and is based on the dystopian vision of a future Taliban-esque society, known as Gilead, as imaginatively realised by Margaret Atwood. See MARGARET ATWOOD, *HANDMAID'S TALE* (1985).

appropriate, to be guided by it” (93). Accordingly, for Raz, there will be no legal system unless there exists directives or norms that are capable of identification without direct resort to (religious) moral considerations and that these are presented and operate as someone else’s, not your own view about how you ought to behave.

Raz’s basic conditions for a legal system’s existence only barely apply to the Gileban regime, if at all. People will be aware that the Old Testament is the only authoritative source of all instruction in all things; its religious say-so trumps all other possible sources of direction. However, there will be no public or formal guidance available as to how to interpret its particular or competing demands in contentious circumstances. Gilebanians will simply have to hope (and pray?) that their actions comply with the Bible’s directives as interpreted by themselves. They will have no reliable *ex-ante* (or even *ex-post*) means of informing themselves of how to behave in any circumstances, let alone where there is uncertainty or doubt. Official caprice or revelation, not authoritative rules, will be very much the civic order of the day. Moreover, law’s essential Razian role as a mediating structure of authoritative guidance in people’s practical reasoning will be fatally compromised.

However, if Raz is too quick and too wide-ranging in declaring that states like Gileban have only a pseudo-system of law, he will have undercut even further not only the universalistic claims of his legal theory, but also its practical plausibility. Raz states that a concept of law “is not a concept introduced by academics to help with explaining some social phenomena,” but “is a concept entrenched in our society’s self-understanding” of what it is “to see certain institutions as legal” (31). Mindful also that he observes that “we know that the regulations of a golf club are not a legal system, and that independent states have legal systems” (28), it is puzzling as to why Gileban would not be considered to have a legal system even when viewed through the lens of our own concept of law: it is an independent state and claims authority over its members. It would surely be more sensible and convincing to report that our society’s self-understanding would more likely than not see Gileban society as possessing a legal system, but a tyrannical or rudimentary one. To conclude otherwise would run the real risk that Raz had fallen into the

¹⁷ For an extended development of this general line of argument, see Brian Tamanaha, The Contemporary Relevance of Legal Positivism, 32 AUST. J. OF LEGAL PHIL. 1 at 14-23 (2007).

same trap which he highlights of treating the concept of law as “a concept introduced by academics to help with explaining some social phenomena” (31). As such, Raz’s consignment of Gileban to the realm of non-law seems hasty and self-defeating at best. Put more generally, it is more reasonably the case that legal systems tend to fade into non-law than become such in one fell swoop.

Thirdly (and this follows closely from the second observation), Raz’s probable treatment of Gileban as non-law raises some further and telling concerns about the extent to which his positivist theory of law-as-a-social-fact is entirely insulated from moral considerations as he maintains. When I suggested that ‘our’ people would treat Gileban as a bad legal system (i.e., as a tyrannical or minimal one), there was obviously an explicit evaluative appraisal involved; those legal systems that have open courts are more deserving and defensible than those that deploy a decidedly Star-Chamber approach to the resolution of disputes. However, if this was simply offered as an external judgement about the substantive content of particular legal rules, then it would obviously present no challenge to Raz’s positivist account. He would rightly point out that the value-based evaluation of legal rules was entirely in line with his insistence that there is to be preserved a strict separation of law’s validity and its moral legitimacy. Unfortunately, in the case of Gileban’s ‘legal’ system, this Razian-style riposte is not so readily available.

My challenge to Raz’s account is not so much about the content of any particular rule, but the lack of any legal rules *per se* that people can know and be guided by in their daily social lives. The apparently arbitrary definition of particular wrongdoing and the unpredictable imposition of specific punishment, at least as experienced by the Gileban laity as opposed to its clerical elite, offends what many think of as the Rule of Law. While this failure to live up to such expectations is not automatically considered to deprive the system of its status as law, it is generally accepted that promulgated rules, due process, etc. are vital components in any legal system that warrants support and approval. So, for instance, the continued existence of the detention centre at Guantanamo Bay might well be considered as an affront to many lawyers’ and citizens’ notions of what counts as a civilised and defensible process of governance, but few

would go so far as to say that there is no legal system in operation there at all.¹⁸ In such matters, a more pragmatic dimmer-switch is to be preferred to the simply positivistic on-off device.

This notion of the ‘Rule of Law’ is familiar to legal theorists and lawyers – should it be ‘our’ legal theorists and lawyers? – as an important feature of valued legal systems, but not the *sine qua non* of their validity. Ironically though, Raz appears to have built exactly this kind of evaluative element into his supposedly positivist account of law; he has smuggled in a value-laden criterion, but passed it off as an exclusive legal virtue. In this regard, in allowing for the fact that there might be better or worse legal systems regardless of the substantive content of their authoritative norms, Raz seems to find himself in the distinctly uncomfortable company of the unabashed naturalist Lon Fuller who famously insisted that, if law did not live up to its own ‘inner morality’, it would not simply be “a bad system of law, [but] ... something that is not properly called a legal system at all.”¹⁹ This conclusion seems to be so similar to Raz’s as to be indistinguishable. Although Raz would still likely insist that the Rule of Law is more aptly thought about in terms of efficacy than morality, there is a significant difference between whether tools are suited to their chosen function and whether law is sufficiently knowable to guide people’s conduct.²⁰ To use Raz’s example, it is one thing to criticise knives as being insufficiently sharp to accomplish their cutting tasks, but it is another thing entirely to condemn law for punishing people when they have no idea why and for what they are being punished.

¹⁸ There is, of course, much that can be said about Guantanamo Bay. See, for example, M. RATNER AND E. RAY, *GUANTANAMO: WHAT THE WORLD SHOULD KNOW* (2004). However, suffice it to say that many legal theorists tend to ignore its institutional and jurisprudential implications. If it is considered to be non-law (as Raz might be tempted to conclude), such a judgement represents less a verdict on the validity of the whole American legal system than upon one corner of it.

¹⁹ LON FULLER, *THE MORALITY OF LAW* 39 (1969). Gileban would seem to fail to meet at least half of Fuller’s “eight distinct routes to disaster.” *Id.* See also BRIAN TAMANAHA, *ON THE RULE OF LAW* (2004).

²⁰ See Raz, *The Rule of Law and Its Virtue*, 93 L.Q.R. 195 at 205-08 (1977) (“the rule of law is an inherent virtue of the law, but not a moral virtue as such”). See also, Hart, *The Morality of Law (Book Review)*, 78 HARV. L. REV. 1281 (1965). Whatever the other failings of Fuller’s position, his response to Hart and others on this particular claim seems decisive. Fuller, *supra*, note 19 at 200-24. See also ANDREI MARMOR, *LAW IN THE AGE OF PLURALISM* 34-40 (2007) and Mark Bennett, *The Rule of Law Means Literally What it Says: The Rule of the Law: Fuller and Raz on Formal Legality and the Concept of Law*, 32 AUSTRALIAN JOURNAL OF LEGAL PHILOSOPHY 90 (2007). It is worth noting also that there is more than a passing resemblance between Raz’s account of legal authority and Finnis’s naturalist account; both appear to be teleological accounts which emphasize the moral purpose of legal authority. See J. FINNIS, *AQUINAS: POLITICAL, MORAL, AND LEGAL THEORY* (1998). For a positivist account that does not incorporate such elements and would more than likely treat Gileban as a legal system, see H. KELSEN, *THE GENERAL THEORY OF LAW AND STATE* (1945).

While conformity with the Rule of Law will obviously not itself guarantee a 'good' legal system, its complete flouting will itself be a moral failing and contribute to the goodness or badness of the legal system, regardless of the substantive cut of its normative content.

Under the guise of factual inquiry, therefore, Raz has imposed a qualitative dimension to law's existence and, in the process, undermined the positivist foundations of his jurisprudence. It is not so much that Gileban's particular rules are good or bad. After all, while some citizens of Gileban might object to its fundamentalist orientation, many citizens may well find its strict adherence to biblical morality to be exemplary. The problem is that the failure to make those rules knowable to the public so that, when in doubt as to how to act, they might be practically and authoritatively guided by them (and not their own unmediated reasoning and interpretation) renders Gileban's legal system a less appealing legal system *qua* legal system. Contrary to Raz's protestations, legal systems can be better or worse along a sliding evaluative scale rather than simply being law or non-law. Moreover, the fact that Fuller, unlike Raz, tends to utilize conformity with this 'inner morality' more as a grounding for the moral obligation to obey or apply the law does not in itself change the fact that Raz's reliance on these value-based criterion undercuts his social-fact thesis for law's existence. In Gileban, there is simply no fact-of-the-matter when it comes to law: there is no normal situation in which the law does a reasonable job at guiding conduct and thereby functioning as a viable mediating authoritative structure for practical reasoning. People will have no choice other than to resort to their own reasons for action based on their own efforts to interpret biblical texts to determine the content of Gileban's rules; there will be no possibility to rely only on law's authoritative directives as they only exist after the fact.

Accordingly, while Raz recognizes that there are many connections between law and morality and some necessary ones at that, he wants to hang on tenaciously to his definitive claim there are some disconnections which must be appreciated and preserved if a positivist theory is to retain its intellectual credibility and analytical force. Yet, his authority-based account of law seems to flout that claim in significant ways. Of course, too much law can be as problematic as too little law; legalism can be as enfeebling for social justice as anarchy or totalitarianism. Nevertheless, although Raz claims to be indifferent to the moral qualities of law, he has managed

to put in place an evaluative threshold to law's existence. By allowing evaluative considerations to infiltrate his positivist account of law, he has softened his self-imposed hard stance on the need to keep questions of legal validity separate from those of moral legitimacy. None of this challenges the basic and salutary positivist precept that law can be a vehicle for immorality as much as it can be a bulwark against it.²¹ However, what it does suggest is that, if Raz is considered to be the most die-hard of positivists in his adherence to a strict law/morality divide, then both Raz and other positivists are left very exposed and in need of much greater defence than is presently on offer in Between Authority and Interpretation.

IV. Of Objects and Objections

Raz places great weight on the distinction between law-making, law and law-application. In the Razian scheme of things, it is only law that is autonomous from moral considerations, not its making or its interpretive application: "the distinction between identifying the law and changing it is basic to the law, and central to any coherent understanding of judicial decision-making" (239). For Raz, there is a sharp and crucial distinction between reasoning to fix the content of law at any point in time "without resort to evaluative considerations" (378) and reasoning to apply that law to particular circumstances and situations: one is reasoning *to* law's premises, whereas the other is reasoning *from* law's premises. This is a crucial distinction and goes some of the way towards vindicating his central positivist claim that law can be identified as a social fact. However, even if law-application is interpretive and, therefore, fraught with values, Raz reminds us that, once interpretation is complete in a particular case, the resulting interpretation is absorbed into the law which can again be identified and fixed as a fact-of-the-matter. Therefore, while moral considerations feature in the adjudicative application of legal rules, they do not become law until they are incorporated by way of a legal decision.

Understood in this way, it is obvious that Raz must be able to demonstrate that law can be identified independently of interpretation. He does this by drawing a comparison between art interpretation and legal interpretation. To begin with, he acknowledges that "*there is meaning in*

²¹ See Green, supra, note 16 at 1058.

the world only where it was invested with meaning by human beings” (230, italics in original).²² Nevertheless, its human quality means that it is value-laden, but does not render it into an ‘anything goes’ free-for-all. There may well be a no one fixed interpretive meaning available, but “there is no conflict or tension between pluralism and objectivity as such” (228). In interpreting art, music or literature, he maintains that “a good interpretation is one that explains the meaning of its object” (301). Most importantly, Raz insist that “interpretations explain and do not change their objects; what they affect is the meaning, not the object which it has” (303). Consequently, all interpretation is a value-infused engagement with the original which gravitates inevitably between fidelity and fecundity. Innovative interpretations are still explanations of meaning, but “they show the object in a new light” (321).²³

As regards legal interpretation, Raz maintains a similar line by proposing that “the decisions of legal authorities are the primary objects, and through interpreting them we gain understanding of the content of the law, which they create” (239). However, Raz is no formalist. He offers a powerful critique of those who maintain that legal interpretation is necessarily and legitimately an exercise in retrieval (241-64); there is an unavoidable back-and-forth between innovation and preservation which allows the law to negotiate the competing demands of continuity and creativity. For Raz, therefore, legal interpretation is about the inevitably human and value-infused activity of giving meaning to those original legal resources of “constitutions, statutes, precedents, the texts in which they were formulated, legal rules and doctrines, and the law itself” (273). Moreover, when it comes to law, interpretation must be object-focused because of “the moral respect for the law, and for its sources” (235).

²² Raz gives the example that “we can correctly say that ‘sister’ means female sibling, and add that everyone understands ‘sister’ to mean female sibling” (229) to show a certain interpretive certainty. But this underestimates the socially dynamic character of language. It seems an accepted practice that ‘sister’ can refer to a much broader group than siblings and refer to those females who share solidarity in a particular social struggle. Also, it is now trite learning in law that references to ‘sister’ also include brother’ unless the context dictates otherwise. See A. HUTCHINSON, *DWELLING ON THE THRESHOLD* 3-10 (1988) and A. HUTCHINSON, *IT’S ALL IN THE GAME* 54-85 (2000).

²³ As examples of “great interpreters”, Raz references Peter Sellars’ interpretation of *The Magic Flute* and Jonathan Miller’s *Rigoletto* (233). While I do not agree with Raz’s depiction of artistic interpretation, I will only deal with its implications for his account of legal interpretation. It is revealing that he concludes his introduction to artistic interpretation by observing that “there is no analogy for [personalised interpretation] in law. In legal interpretation we value – other things being equal – continuity” (233). As I will show, this entirely begs the interpretive question in both art and law.

By maintaining a strict distinction between the legal object to be interpreted and the act of legal interpretation, Raz claims to be able to preserve the vital positivist quality of law as something that can be identified as a matter of fact rather than by resort to moral evaluation. This means that he carries a heavy onus to demonstrate that the identification of law and its resources can be effectively distinguished from their legal interpretation as practical matters. If he is unable to do that, his central claim about law's existence as a social fact will be severely compromised. I contend that such a sharp distinction cannot be maintained. The problem is that the value-infused interpretation of law bleeds into the factual identification of law to such an extent as to render the distinction unworkable; there is no available method or means to identify law as a pre-interpretive matter. It is not so much that law does not exist (it does as a body of resources) nor that its likely development is entirely unpredictable (it is not as result of the general political leanings of the judiciary). Legal history and practice strongly suggest that it is interpretation all the way down; law is a thoroughly human activity that envelops and infiltrates the legal resources to be interpreted.²⁴

It is true that, in law, there is a constant toing-and-froing between fact and value. However, in contrast to Raz, I contend that this back-and-forth is so integral to law as to be constitutive of it; it is law. Law is not something that exists before or after interpretive work, but is constituted by that interpretive activity. Whatever the case is in art and literature, legal object and legal interpretation merge so that one is not separable from the other in any sensible or persuasive way. While this is most evident in matters of common law adjudication, it is also apparent in constitutional law which is really only a stylized mode of common law decision-making generally.²⁵ A marked feature of common law adjudication is not so much that a rule is fixed beforehand and then applied to the facts of the case, but that a rule is fixed in light of the

²⁴ If I may be excused a small tantrum, I find it hard to believe that Raz has simply forgotten about the whole law-and-literary-theory debate of the 1980s and 90s. Except for one cursory footnote, he proceeds as though it simply never occurred. See especially S. FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* (1989) and R. POSNER, *LAW AND LITERATURE* (rev. ed. 1998). Although Raz need not agree with any of this debate, he must surely recognise it, take into account its criticisms, and not write as if it never occurred.

²⁵ In this regard at least, I completely agree with Dworkin that law is a thoroughly morally-drenched activity which engages the law's resources as it creates and re-creates them over and across time. Dworkin, *supra*, note 6.

outcome that it will bring about in the particular case. There is a constant mediation between rule-fixing and rule-application in the judicial decision-making process such that it becomes illusory to talk about there being two distinct stages as a practical matter. Of course, the fact that the final judgment rendered in the case might not reveal this process or that it might work to actively conceal this dynamic process hardly counts against this explanation.

All this is by way of stating that law is always in the process of becoming rather than being – the law never simply is. In Raz’s preferred artistic terms, it is not simply the interpretation of the painting that changes or that the painting is shown by interpretation in a new light. The painting itself changes. For example, the painting of American constitutional law in 2009 is not the same as it was in 1809 or 1909. It is not only that its interpretations have changed; the constitution is much more than the constitutional document. It comprises doctrines, decisions and principles that develop and change over time.²⁶ Moreover, there is never a finished painting; it is always a work-in-progress. In the process of establishing what it is, the judicial artists and legal commentators are always repainting it. The very act of interpreting law changes it and, on important occasion, redraws it substantially; there is a whole new painting to be interpreted. It is only sensible to talk about interpretations being ‘conserving’ or ‘innovatory’ in terms of their political salience and moral effects.

But to say more would be to take Raz’s artistic analogies too seriously and perpetuate a misleading depiction of law. He draws a false distinction between those who believe that there is objectivity and that interpretation is about retrieval and those who believe that there is only subjectivity and that interpretation is about creation; it is neither one nor the other. In the legal world, the judge is as much the artist as the critic or interpreter. Law/art is not simply created in the interaction between the materials, the artist and interpreter, but is found in the interplay itself; it is the process of painting as much as the resources and the product that counts as law. Indeed, law cannot be broken down into its constituent parts without losing the essential part of the dynamic interaction itself. Because the materials change, the artists change, and the interpreters

However, I also completely disagree with Dworkin that this interpretive activity can be done in any constrained, apolitical or distinctively legal way. See Hutchinson, PROVINCE, *supra*, note 2 at 117-35.

²⁶ LAURENCE TRIBE, THE INVISIBLE CONSTITUTION (2008). As Tribe insists, it is not so much “what’s invisible ‘around’ the Constitution [but]... what is invisible *within* it.” *Id.* at 10.

change, the whole of law is greater than the sum of its individual parts. As such, law is less a thing and more an activity. And, as Raz himself would concede, if that is the case, then law is a human activity and inextricably bound up with the values and commitments of society.

Raz is alert to the criticism that, without an interpretation-independent identification of the law's content, it will be incoherent to talk about fidelity or innovation. I would also add that, without such an identification, the mainstay of his positivist jurisprudence – namely, that law can be determined exclusively as a social fact and not as a moral evaluation – will be in great jeopardy. However, his response that such a critical 'merging' claim is false is typically opaque and enigmatic. It deserves stating in full:

“It overlooks the fact that the reason fidelity and innovation are often mixed is that we often have reasons to interpret in ways that mix them. But this is not always the case. Sometimes we have reason to interpret the constitution in ways that simply elucidate its content at the moment, warts and all. Such an interpretation, I call is 'conserving interpretation', will be successful if it is true to the existing meaning of the constitution. It will include no mixing of conflicting elements. It will display no dialectical tension, and it will establish the benchmark by which we can measure other interpretations to see whether they are more or less innovatory” (358)

This response is baffling as well as unconvincing. First, it is riddled with question-begging elements, the most telling of which is that it assumes that we can distinguish a mixing from a non-mixing. In other words, Raz posits that there is an 'existing meaning of the constitution' against which a conserving, innovatory or mixing interpretation can be measured. Yet it is the very availability of this 'benchmark' which is at issue. There is nothing here in Raz's response that successfully deflects the critical claim that the law-as-it-is can be identified and fixed as an object without some interpretation. It assumes that which is in contention.

Secondly, Raz's elliptical aside that a demonstration that the law is “vague and indeterminate” (359) still counts as a statement of what the law is only adds fuel to the fire. If by this, he means that some rules will be 'vague and indeterminate', there is no cause for critical concern: it would be wrong-headed to dispense with any theory of law simply because it was unable to identify and fix all legal rules with complete precision and absolute determinacy at any point in time. However, it is another thing entirely if Raz is claiming that widespread or

structural indeterminacy is compatible with his positivist account of law. At a minimum, it would seem that there would need to be some significantly substantial degree of operational determinacy to law if he was to make good on his crucial and fast distinction between law and its interpretation. I maintain that such a threshold cannot be reached and that Raz's claims founder on the dangerous rocks of (in)determinacy.²⁷

Law is much more than a collection of rules that individually and inevitably possess a degree of fuzziness and penumbral uncertainty. Taken as a whole, legal doctrine is structurally indeterminate and defies efforts to fix its necessary and precise meaning in particular cases at particular times. Adjudication is better understood as an interpretive activity in which the possibilities of determinacy and indeterminacy are constantly in play and available. It is not that fields of law appear as indeterminate or determinate all the time, but that even the most apparently settled areas of law are always vulnerable to being stabilised or destabilized and thereby reconfigured with sufficient effort by particular jurists at particular times and with varying degrees of success. The law is not simply there in its object-like presence, but is always waiting to be apprehended and fixed by the active crafting of its interpreters and artisans. Most importantly, determinacy and indeterminacy are not pre-interpretive features of the law, but products of legal interpretation.²⁸ Law's meaning is always parenthetical and can never be grounded outside the contingent work of legal interpretation. As such, it is not only unhelpful, but also impossible to talk of law's meaning, whether determinate or indeterminate, as object-ive in the sense of being something that is realisable without legal interpretation.

Accordingly, in the process of trying to salvage his claim that there is available an interpretation-independent identification of the law's content as a matter of fact, Raz has only

²⁷ Raz runs a familiar Hartian line on this matter. See Hart, supra, note 12 at 251-52. For the purposes of my criticism of Raz's position, it is not necessary that I make the claim that law is so indeterminate that it cannot meet any jurisprudential standard of operational plausibility. It is enough if I simply show that there is insufficient determinacy to support Raz's extravagant claims. Nevertheless, I do believe that a defence can be made of the more general claim that law is so thoroughly indeterminate as to defeat almost all claims to distinguish law and politics. See Hutchinson, GAME, supra, note 22 at 54-86 and 151-79 and A. HUTCHINSON, EVOLUTION AND THE COMMON LAW 125-63 (2005).

²⁸ See Duncan Kennedy, Thoughts on Coherence, Social Values and National Tradition in Private Law in THE POLITICS OF A EUROPEAN CIVIL CODE 9-31 (M. Hesselink ed. 2006) and A Left Phenomenological Alternative to the Hart/Kelsen Theory of Legal Interpretation in D. KENNEDY, LEGAL REASONING, COLLECTED ESSAYS 154-73 (2008).

succeeded in undermining further his positivist insistence law's factual existence. If a conclusion that the law is structurally indeterminate (as opposed to concessions about the penumbral openness of individual rules) is counted by Raz as a valid and acceptable statement of what the law is, then he has given unwitting support to the withering assessment that "pure positivism comes close to pure emptiness."²⁹ By making the price of analytical accuracy to be the cost of practical worth, he has set the threshold of describing what "the law itself" (273) is in an interpretation-independent way so low as to be virtually non-existent: what the law factually is can be whatever we morally want it to be. This is hardly a defence of legal positivism; it is more of a caricature and even contradiction of it.

V. Conclusion

Raz is an acquired taste. There is little doubt that Between Authority and Interpretation will be meat and drink to Razian enthusiasts. But his most recent publication will likely do nothing to convert those who are sceptical about the worth of the analytical project of legal philosophy generally or the merits of a hard/exclusive rendering of legal positivism. Ironically, both kinds of readers will be persuaded in their stances by exactly the same qualities in Raz's writings and arguments. The jacket of the book's hardcover version encapsulates those contested features. It is a monochromatic photograph (by Raz himself) of what appears to be an austere landscape reminiscent of 'badlands' topography; it offers an aerial view of a bare landscape of dry and erosion-sculpted valleys. In the same way that this spare and stripped-down depiction of philosophy will appeal to the converted, its barren and bleak portrayal will also disenchant the more critical. As one of those who is not persuaded by Raz's methodological approach or its positivist product, I would simply point out that law is a much richer, complex, and fecund territory than Raz's philosophical and photographic imagery can capture; the ravages and revitalisations of time and chance are inescapable. Law's full appreciation and understanding warrants a much more colourful, sympathetic and organic mode of representation and analysis than Raz encourages or allows.

²⁹ James Boyle, Thomas Hobbes and the Invented Tradition of Positivism: Reflections on Language, Power, and Essentialist, 135 U. PA. L. REV. 383 at 400 (1987).

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