Three Themes from Raz

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Three Themes from Raz†

Leslie Green*

The robust interest in analytic jurisprudence among legal philosophers is testament to the broad and deep influence of Joseph Raz. To find another legal theorist who has not only produced an indispensable body of work, but who taught and encouraged so many jurisprudents of the next generation, one has to go back to his forebear, H.L.A. Hart. But Raz’s influence is not just a matter of passing on the torch. Raz controverted so many of Hart’s central ideas that legal positivism, and in some respects even legal philosophy, will never be the same again. That rules are social practices, that every legal system has one rule of recognition, that the validity of law may depend on moral principles, that rights protect important choices, that there is a duty in fairness to obey the law—the hard times on which each of these Hartian ideas has fallen are due in no small part to the power of Raz’s criticisms, and Raz’s competing views are themselves now the subject of many discussions among lawyers, philosophers and political theorists.

The last substantial collection essaying Raz’s work appeared in 1989, in the wake of his important book, The Morality of Freedom.1 It treated the central themes of his writings to that point, and occasioned a reply to his critics, ‘Facing Up’, in which Raz offered some important clarifications and elaborations of his ideas. But since then there have been three major works—Ethics in the Public Domain,2 Engaging Reason,3 Value, Respect, and Attachment4—together with his Tanner Lectures on The Practice of Value5 and many more papers, so it is certainly not too early for a reassessment. Lukas Meyer, Stanley Paulson, and Thomas Pogge have assembled an engaging collection of original essays, but it does not really fill the bill. Although the papers are generally of high quality, most of them are still grappling with Raz’s earlier work, and, oddly, two of them do not discuss his ideas at all. It is understandable, then, that Raz’s reply to these commentators contains no surprises and only minor clarifications, though it does prominently display his commitment to legal philosophy as a subject independent of the concerns of the advocate and the ideologue, but which at the same time takes its place as only one aspect of a general theory of reason and value.
I cannot discuss all of these papers here, not even all the good ones, so I must leave for another occasion enlightening criticisms of Raz on equality, by Hillel Steiner and by Andrei Marmor. Nor will I treat Rudiger Bittner and Bruno Celano’s essays on aspects of Raz’s theory of practical reasoning, Robert Alexy’s reflections on methodology in jurisprudence, or Lukas Meyer’s ideas about harm and future generations. The other papers group conveniently around three themes, the nature of law, the justification of authority, and value pluralism—problems that remain at the centre of Raz’s work and on which his views have deepened in recent years.

1. Law and Discretion

Raz thinks that the existence and content of law depend on social facts, not on moral or evaluative considerations, and he regards legal systems as bounded institutions whose requirements are often incomplete or defeasible, leaving significant discretion to those who must apply their directives. In this, he follows in a long tradition of positivist writers who see the law as riddled with gaps. Bentham thought the whole common law is little more than an injunction that from the cases ‘a law is to be extracted by every man who can fancy that he is able: by each man, perhaps a different law’. Kelsen maintained that ‘every law-applying act is only partly determined by law and partly undetermined’. And Hart said that ‘In every legal system a large and important field is left open for the discretion of courts and other officials’. Is the discretion that these writers have in mind merely the logical reflex of the fact that things are ‘left open’ or ‘undetermined’ by law? Not entirely: discretion is a kind of decisional power, and there may be a gap that judges have no power fill (Bentham favoured such cases being referred to the legislature), or there may be a gap that no one has any power to fill. But supposing the fundamental rules of jurisdiction do give someone or other that power, what is the relationship between legal gaps and judicial discretion?

For Raz, they are intimately linked. The law begins and ends with the sources—the statutes, cases, and conventions, insofar as their existence and content can be ascertained by reference to matters of social fact (including complex facts about what people and institutions believed, wanted, and intended). Where legal questions turn on moral or other evaluative arguments, they are not fully controlled by law, and judges necessarily have discretion. When the law makes legal rules subject to non-source based considerations, such
as moral principles, the rules are then defeasible: to know what the law conclusively requires we will need to wait and see what the courts will say. Suppose, for example, that in law contracts were valid only if not immoral. According to Raz, it would follow that, “The proposition “It is legally conclusive that this contract is valid” is neither true nor false until a court authoritatively determines its validity. This is a consequence of the fact that by the sources thesis the courts have discretion when required to apply moral considerations”. In one of the richest papers in this volume (though unfortunately not one that attracts a reply from Raz), Timothy Endicott defends what he takes to be the sensible lawyer’s contrary view. Contract law is unsettled, but not that unsettled. Even when subject to requirements of morality or fairness or public policy, many contracts are nonetheless conclusively valid right up front, prior to the say-so of any court. They are conclusively legally valid whenever the moral standards to which the law refers are sufficiently clear to settle the matter.

Endicott’s paper explores various interpretations of Raz’s sources thesis, and makes a number of clarifying points on the way, but its central thrust can be seen in his suggestive analogy. If a parent tells a child to have something from the fridge for supper, the order limits the choices, but leaves room for the child’s discretion. ‘But suppose I tell you to eat what your babysitter tells you to eat. We might say, once more, that I haven’t told you what to eat. But that does not mean that you have any discretion. You have discretion only if your babysitter gives you a choice’ (111). If the babysitter tells you to eat the leftover pizza, the matter is settled. On the other hand, if the babysitter tells you ‘to have something from the fridge, but to be fair to your sister who also needs supper’ (111), you are left with a choice because in these circumstances ‘fair’ is pretty vague. Indeed, Endicott holds that only if ‘fair’ is vague have you been left with discretion: ‘when lawmakers appeal to moral considerations, they give discretion just insofar as moral considerations are vague’ (111), though he thinks that moral terms like ‘fair’, ‘reasonable’, or ‘unjust’ are indeed vague, and necessarily so. Endicott does not deny that there gaps in the law; he denies that such gaps always give rise to discretion on the part of the decision-maker. To turn gaps into discretion we need room for choice, and that is absent when the requirements of morality are clear.

That this cannot be intended as a general account of judicial discretion is clear from the fact that it explores only the nature of judges’ powers in applying the law, and not their powers to refrain from applying it. Everyone knows that American women now have a right to an abortion because the Supreme Court so decided.
in *Roe v Wade*. Everyone also knows that when an appropriate case presents itself the court has the power to revisit that decision, if they wish, and also the power to overrule it, even if its application would be uncontroversial. The power to overrule and the related but less dramatic power to distinguish cases are instances of judicial discretion that have little to do with the other sources of indeterminacy in the law.

That aside, what should we think about Endicott’s particular claim that ‘when lawmakers appeal to moral considerations, they give discretion just insofar as moral considerations are vague’? It depends on what you take vagueness to be. Endicott has in mind problems of borderline cases, for example, where it is indeterminate whether a state of affairs is, or is not, fair. He reminds us that there are also absolutely clear cases of fairness. That is so; but such borderline cases are not the only indeterminacies we have to worry about. For example, there may be many possible distributions of the food that would be *clearly* fair to one’s sister.

The importance of this sort of problem is somewhat obscured by the example that motivates Endicott’s paper, since any of the legally relevant ways of being clearly ‘immoral’ can void a contract. But it is plain enough in his babysitter analogy, and often in the law, for instance, when a constitution empowers judges to give ‘such remedy as the court considers appropriate and just in the circumstances’. In addition to whatever latitude is allowed judges by doubtful cases of propriety and justice, there is here a substantial discretion resulting from the generality of those standards, for in a given case different remedies may be clearly appropriate and clearly just. That these should be distinguished from cases of ambiguity or borderline vagueness is illustrated by the following example. The United States Postal Service is required by law to provide a service that is ‘efficient’. That is certainly ambiguous: does it mean effective, or giving value for money, or satisfying the Kaldor-Hicks test, or pursuing Pareto optimality? Suppose Congress had disambiguated and (foolishly) required the agency to seek Pareto optimal outcomes. This criterion is vague. It requires that no redistribution of resources could leave anyone better off and no one worse off; but ‘better off’ and ‘worse off’ are vague because imperceptible changes can add up, Sorites-style, to worsenings. Now suppose we have a feasible change of policy that undeniably improves someone’s welfare while making no one worse off. Does the postal service therefore lack the discretion not to pursue it? Not if there is another such change incompatible with this one, and there generally will be, for Pareto superior outcomes are rarely unique. So a discretionary choice among efficient outcomes will still be needed. The general point, that discretion may flow from a plurality of
options any of which clearly satisfy a general standard, was known to Kelsen.12 A command, e.g. ‘Close the
doors!’ might be ambiguous (which door?) or vague (how far?) or might conflict with a contrary order, and
each of these leaves discretion to the norm-subject. But the command also leaves it up to the subject whether to
close it with his left hand or right, and so forth. Yet right-handed closings and left-handed closings are both
clear cases of door-closings. This sort of indeterminacy is perfectly general: ‘The higher norm cannot bind in
every direction the act by which it is applied’.16 We don’t always notice it because we don’t always care: most
of the options are as good as any other. But that does not make it trivial, for an option that is just as good as
any other today may not be so tomorrow, and when legal decisions lay down or give rise to general norms, the
ultimate direction of the law is significantly dependent on prior discretionary decisions that did not themselves
flow from any uncertainty about borderlines. So I don’t think we should say that vagueness is the only source
of discretion when judges need to apply moral principles, though we can certainly agree that there is
discretion at least when the relevant notions are vague, and that there is a lot of that in the law, on anyone’s
account.

Consider now a case where the referred-to moral judgment requires an outcome that is unique. Why does
Endicott here maintain that here the judge necessarily lacks discretion? Because discretion connotes choice and
morality may leave no choice: ‘To have a discretion is to be given power to make a decision, without being
bound to decide on a particular outcome’ (110). Endicott means this definition to be neutral on substantive
issues of general jurisprudence; but I am not so sure. For one thing, we need to construe it to allow that one
may have discretion even when one was not given it. After Marbury v Madison,12 the United States Supreme
Court had the discretion to strike down statutes that, in its opinion, violated certain moral principles to which
the Constitution refers. We should not deny the exercise of discretion in American judicial review merely on
the ground that (as some think) no one gave the court this review power. Even the court usurped it, what
matters is that the power exists. A more significant worry is this: one lacks discretion, on Endicott’s way of
thinking, whenever one is bound in any way to a determinate decision; the source of that duty is irrelevant.
Suppose then a faculty bylaw says, ‘The dean may at his discretion permit students to use the faculty common
room’. If the dean promised to allow Roe to use it, then the dean is bound to decide in a particular way. Does it
follow that the dean has no discretion? Perhaps this case seems fishy on account of the dean’s exercise of a
voluntary power: maybe we should say that she had discretion but fettered it through her promise. Yet matters are no different if the source of the duty is non-voluntary, as it would be if Roe needed access to the common room phone in order to call an ambulance. And on some moral theories there are no indifferent actions. Do sensible lawyers therefore need to study the philosophy of William Godwin (who thought there is nearly always something that it is our duty to do) before they can determine whether the dean has discretion? On the contrary, they will see straightaway that the bylaw grants a discretion, and that whether the dean is bound to exercise that discretion in one way or another is a separate question. Endicott may say that only shows there is a gap, which he freely concedes. But it also shows something else. Talk of discretion is implicitly relational. When Raz, Bentham or Kelsen say that judges have discretion, they mean discretion under law. This is sometimes obscured, including by Hart when he writes that discretion arises when ‘there is no possibility of treating the question raised . . . as if there were one uniquely correct answer to be found’. Formulations like that invite Dworkin’s reply that there usually are uniquely correct answers, or at least the possibility of proceeding as if there are. But there are good reasons to reject the question, for it also matters what determines the correct answer. So long as the law may be identified and applied without doing any first-order moral work, for example, without having to determine afresh what is really and truly immoral or unfair, we remain within the province of the sources. For remember that sources include not only prior enactments and decisions, but also social facts about customary meanings and about what is actually accepted as a matter of positive morality. To the extent that such non-evaluative considerations determine what a moral-mentioning norm requires there is no discretion. So it is not the mere presence of moral terms that signals judicial discretion, but the need to do moral work in applying them. There may be a uniquely correct outcome to this work; but if there is not yet any source-based authority to that effect, we may have something that should be the law, perhaps even something that is likely to become law, but not anything that already is the law. The tenses matter for, as Kelsen puts it, law is a dynamic system of norms.

Whether there is already a right answer in law has seemed to some an excessively fussy question. Dworkin says that it is no good to hold that moral standards are binding on judges as matters of moral obligation only, for that would be arbitrary without an explanation why this sort of obligation differs from the obligations imposed by law. Of course, it need not be different in its obligatory quality: the dean who made the promise
to Roe has a duty in just the same sense of ‘duty’ as she would had it been imposed by the bylaw itself. The distinction amounts to a difference only if there are reasons to care about whether a duty can or cannot be imputed back to a given decision process. We might care about this because we have theoretical interests in the boundaries of law, or because we have practical interests in whether a right answer can be put down to the account of a given decision-maker or not, reasons to do with our assessments of responsibility and legitimacy. The distinction does seem fussy when those sort of interests are not at the forefront. Endicott wants to respect the robust common sense of the plain lawyer. Against Raz who has a fancy argument to the surprising conclusion that many contracts are not fully binding until determined by a court, ‘sensible English lawyers’ know that ‘many contracts are conclusively binding even when their enforceability turns on moral considerations’ (102). Endicott’s suggestion that we shift focus from the gap to the decision-maker makes sense if we want to capture a certain truth: if you consult your lawyer, he may know in advance what the court will say. But lawyers know, and need to know, much more than the law. If Doe J is a misogynist, a sensible lawyer will try to keep female clients out of his court, but will not be tempted by the conclusion that the law actually provides that women are to lose in Doe’s court. He will be good at predicting outcomes; his knowledge will be worth paying for; and it will track the real determinants of many of Doe’s decisions. But it won’t do to say that this shows us what the law is. It may also be true that it is certain that a given contract will not be enforced because, even though there is not yet any authority on the point, everyone knows full well what the judges are likely to think of its moral defects. Admittedly, if law has the Midas touch and everything to which it refers turns to law, then Endicott has another argument to deploy: he can say that at least explicit references to morality are part of the law, even when all the moral work in applying them remains to be done. That would require a defence of something like inclusive legal positivism and its incorporation thesis, and these are not matters in which Endicott here expresses any interest.

2. The Justification of Authority

According to Raz, one of law’s necessary features is its claim to legitimate authority. Among contemporary writers, his work is so closely identified with this idea that we tend to forget that most classical political
theorists endorsed it. But unlike some of them Raz does not think that the necessary claim is necessarily valid. It is so only when there are sound moral reasons to take it in the spirit in which it is made: as a binding reason to comply with the law, even in the face of certain valid reasons to the contrary. Why treat the law’s directives as giving rise to an ‘exclusionary reason’ of this sort? Raz holds that by and large the most important justifications are instrumental: by complying with authoritative directives we may be better able to track right reason than we would by following our own lights. That is not the only way to justify political authority, but it is, Raz says, the normal justification. And when we work through all its ramifications we are likely to find that even a decent legal system has less authority than it claims for itself, and thus that there is no general obligation to obey the law, not even in a reasonably just state. Law’s claims are broad, but the justifications for its authority are partial and patchy.

Raz’s ‘normal justification thesis’ is offered as part of a general theory of authority. In ‘Authority for Officials’, Jeremy Waldron explores to what extent it can help us understand not only authority relations between officials and their subjects, but also among the officials themselves. Can the normal justification thesis explain, for example, when a court should defer to a legislature? Waldron is inspired by some remarks in Henry Hart and Albert Sacks’ materials on the legal process—a 1950s American textbook that is still more influential than it deserves to be. Waldron tries to put a theory around their ‘principle of institutional settlement’ according to which, when there are ‘questions of common concern’ that need to be settled for a society, the ‘decisions which are the duly arrived at result of duly established procedures of this kind ought to be accepted as binding upon the whole society unless and until they are duly changed’ (46). His proposal is a sophisticated variant of a familiar argument. Sometimes it matters more that we have a common way of doing something than that we have a particular way of doing it, and yet we cannot arrive at a common way until something or someone settles it for us. Once it is settled, there are powerful reasons to conform to and support the existing settlement: to speak the same language, to drive on the same side of the road, to use the same weights and measures, to accept the same currency, and so forth. Think of law as the settler of last resort; think of relations among officials as among the things we need to settle.

Waldron is keen to emphasize that such coordination problems do not suppose that we are strictly indifferent among possible settlements. We rarely are: everyone wins when we can speak a common lingua franca, but
those whose native language it is win more. So there is typically a mixture of motives. In fact, Waldron considers that ‘for the purposes of normative analysis, partial-conflict coordination games capture the essence of politics’ (51, n 20). Does politics have an essence, and is this it? I have my doubts, but they are irrelevant here, for Waldron’s paper relies only on the more modest thesis that such games are good models for the reasons we have for respecting authority. He is well aware that many coordination problems about ‘matters of common concern’ are solved without authoritative direction, and well aware too that legal systems do, and need to do, many things apart from solving coordination problems. His point is only that, ‘For law to be the signaller of last resort (when informal conventions fail to establish themselves), people must adopt in advance a certain attitude to it. That attitude, we may say, is respect for the law as a source of signals of salience, which general respect is then related dispositionally to one’s respectful response to a particular signal designating an option as salient in coordinating a response to a question of common concern’ (54).

The idea that law is our ‘last resort’ signaller is compatible with the plain truth that we do not in fact rely on authoritative solutions over a huge range of matters of common concern: custom, convention, bargaining and many other formal and informal processes do quite a lot of work in our common life. The Hart-Sacks principle, however, is stringent. They must think not merely that law should be our signaller of last resort, but also in a way our signaller of first resort. And here they are on the law’s side, for it requires that we defer to it, not only faute de mieux, but whenever it purports to select a way of coordinating action and even in the face of a contrary informal settlement. But the very generality of that principle makes it hard to see how it can be supported by the sort of considerations that Waldron advances. After all, in strategic interaction it would be irrational to adopt any general attitude towards law in advance, for what I should do depends on what I expect others will do, whose reasons in turn depend on what they expect me to do, etc. There is no point in my deciding that I’ll accept whatever the law designates as legal tender for debts unless I have good reason to think that most others will do likewise, or I could end up with a wallet full of worthless paper. And if I have reason to think that others will not, then I have better reason to accept the informal settlement than I do the legal one. Could it be said that I had better accept legal tender anyway, in order to preserve or reinforce the disposition to accept legal settlements where they really are needed? Perhaps in some cases; for instance, where non-compliance is important, visible and contagious. But again these will not generalize to cover all
matters in which law claims authority. Moreover, if the sort of deference that is reasonable in these circumstances is to be understood as involving what Raz calls ‘exclusionary’ reasons for action, then we need to show that the fact that φ-ing is required by law is a reason to φ and a reason not act on some valid reasons against φ-ing. In strategic interaction, however, which reasons are valid in the first place depends on what the nested mutual expectations actually are. Law succeeds in establishing a settlement only if it focuses these expectations on the solution it identifies; but having done that there is no valid reason to act on the competing solutions, and they are not excluded from consideration. They are outweighed and the fact of partial conflict is neither here nor there.

At an earlier stage of debate around this issue, Raz pointed out that both sides had missed what is perhaps the most important contribution of authority to solving coordination problems: we may need it in order to identify them in the first place. We may be mistaken as to whether we are in a coordination problem. If the authorities have greater expertise on this sort of thing, and if they are reliable and trustworthy, then we have a coordination-related reason to defer to their judgments. The usual game-theoretical treatments miss this possibility because they take the description of the situation from the point of view of the parties’ actual preferences, and not from the point of view of right reason. Waldron acknowledges that there may be a matter of common concern even though nobody knows it. But he cautions, ‘Which questions actually are questions of common concern in this sense is not something which a theory of authority should try to settle’ (50). That makes a second difficulty for the Hart-Sacks principle. If the law says that we must all have, say, an official language, and purports to settle it as a matter of common concern then, on their principle, we should defer to this until the law is duly changed. Waldron seems to reject that way of thinking but in doing so leaves behind what many consider to be the distinctive (though not necessarily attractive) conservatism of Hart and Sacks’ ‘principle of institutional settlement’. The most we are going to get out of Waldron’s argument is a conditional, limited reason to defer to the law when but only when it really does regulate a matter of common concern as independently identified.

Or maybe there is more to it than that. What seems to lie back of Waldron’s outlook is the idea that even if a certain institution does have a better grasp of some matter, that does not show that it already has authority, nor
that it should even begin to make a bid for authority, or attempt to figure out whether it should try. So maybe
the appropriate deference is a heftier than his coordination argument suggests on its own. He says,

I suspect the U.S. Congress would do better in almost every case to rely on directives issued
by the Conference of Catholic Bishops than to rely on its own fatuous “deliberations”. But
still that doesn’t make the Conference of Catholic Bishops into a standing authority in the
relevant sense (65).

Indeed not. Even allowing the dubious suspicion, however, there are plenty of resources within the normal
justification thesis to avoid the theocratic nightmare. Waldron himself mentions one of them: there is the
important matter of efficacy, which is a necessary condition for the justifiability of any political authority. No
one has justified authority who cannot actually secure general compliance. Fortunately for us, the Catholic
bishops do not issue general directives nor would they secure general compliance if they tried. (In sexual
morality they cannot even get the compliance of their parishioners, to say nothing of the clergy). Moreover, as
Raz points out in his reply, there is also the obstacle of the constitution, which affects what government organs
are able to do. Even the tattered First Amendment is enough to bar Congress from submitting to the authority
of the Church. Between them, these considerations go some way to explain why the bishops neither have nor
deserve legal authority in the United States. But Raz allows there may be more to it than that. For all we know,
some person or group might meet all of the other conditions for having justified authority and yet we might not
even know of their existence. How then could we plausibly regard them as actually having authority over us?
Raz now adds: ‘people over whom it has authority should have reason to find out, and should be able to find
out whether it has such authority (at a cost not disproportionate to the benefit in tracking the reason its
supposed authority can bring)’, and that they should also ‘have reason to find out whether it exists and can find
out its content’ (264). To this extent he moves somewhat closer to Waldron’s idea that there is something
inherently public in the nature of political authority.

I doubt that concession will satisfy Waldron. For I think what really worries him is that there may be
something wrong with even starting down that path, with turning our minds to whether the bishops might
merit deference, with beginning to review the constitutional doctrine, the higher-order assessments of value,
the complex empirical questions and all the rest on which application of the normal justification thesis rests.
To wonder whether the bishops might have a claim is already to have one thought too many. It is to think that we do not, after all, really have a settlement. It suggests that the fundamental church-state arrangement remains up for grabs, that we would do well to keep checking on the merits of candidate authorities like the bishops. And wouldn’t that already upset a whole variety of institutional settlements, beginning with 1689? So perhaps we should always pause before we upset any existing distribution of authority; because the relevant moral considerations play out subtle and complex ways, and there are few reliable generalizations, except perhaps for David Hume’s—never mess with what is settled. Something like that is surely what underlies the Hart-Sacks principle, and some of it seeps into Waldron’s view. If we retreat at all from their idea that we should always obey duly-enacted rules unless and until they are duly changed, we will be forced to reflect on a whole variety of questions about the scope, purpose, and legitimacy of such settlements, and that process of reflection may sometimes (though not always or necessarily) undermine even decent or tolerable settlements. But I wonder how far we can avoid that risk in a normative theory of authority? Of course, we shouldn’t exaggerate it: it is not as if we need engage in compulsive checking and re-checking; here as elsewhere we are entitled to take into account the economics of information, the value of rules of thumb, and so on. And remember that what the law requires of us is in any case is deference in action, not in judgment. Finally, since we know that the stringent requirements of the Hart-Sacks principle are not met in existing legal systems, we may also take comfort in the knowledge that those systems can tolerate a fair amount of individual reflection and even some unilateral action on the part of their subjects and authorities while remaining broadly efficacious. We know that is possible, because we know it is actual.

Coordination-type arguments are not the only instrumental justifications for legal authority. James Penner’s essay ‘Legal Reasoning and the Authority of Law’ provides an interesting, even startling, counterpoint to Waldron’s. If Penner is right, quite apart from any positive settlements distributing authority there is a general reason for everyone to defer to the courts: judges are experts on morality. It has been a long time since anyone has tried to push this line, and Penner’s new version of it merits scrutiny. Some years ago I sketched doubts about the argument from expertise. Since Penner offers this paper partly in answer to my objections (74), let me briefly restate them. (A) Legal systems claim wide-ranging authority, and in some areas within their jurisdiction no one has any expertise at all. (B) Even where relevant expertise exists, the legal authorities do
not always have more of it than other people. (C) Where expertise is both available and concentrated in the authorities, there remain reasons for rejecting a society run by experts: self-government has independent value, even if we thereby track right reason less well than we otherwise might. These worries are of two different sorts: (A) and (B) are in the spirit of the normal justification thesis and ask whether its requirements are generally satisfied in this case; (C) is motivated by an exception to it.

Now, (A) might be derived from a general scepticism about moral expertise (and I can now see that the way I first put it might have suggested that). If no one knows any more about morality than the next person, then neither do the courts. But that wasn’t (and isn’t) my concern. It is obvious that some people are terribly bad at moral reasoning—they are unprincipled, selfish, bigoted, superstitious etc.—and they would do better simply to follow the advice of others. But there are milder forms of scepticism to contend with, and one popular version has it that courts are actually not as good at moral reasoning as some jurisprudents would have you believe. So far from establishing a forum of principle, they tend to make a mess of grand ideas about rights, justice, or equality and therefore wisely avoid them where they can. They do and should simply decide one case at a time, eschew philosophical pronouncements, and stick close by the facts. This is the point at which Penner intervenes. Not all moral expertise involves thin concepts like ‘justice’; some of it is about thick moral concepts like ‘cruelty’ or ‘consent’ or ‘malice’. Maybe it isn’t plausible to think of judges as Herculean experts on the right and the good, but at a more concrete level they have or can develop expertise on such questions as what punishments are ‘cruel’—not, it is important to stress, merely on the doctrinal question of what counts as cruel punishment in, say, American law, but on the moral question of what is really and truly cruel. The courts do, after all, work with these problems with some regularity; they consider different possible solutions to them; their solutions face the test of experience within a real social context, and so on. Thus, argues Penner, there is at least the possibility of moral expertise. In doing so, he draws fruitfully on Raz’s recent work exploring the ways thick values are elaborated and related to thin values. One of the difficulties Penner faces on the way is that Raz contends that the thick and the thin stand in a complex relation of interdependence. But if grasp of the thick concepts ever depends on grasp of the thin ones, then scepticism about courts’ expertise with the latter is going to leak back in. So Penner tries to detach the intelligibility of the thick by arguing for the universality of concepts like ‘courage’ or ‘brutality’. Raz dissents in his reply, pointing
out that while thick concepts are logically universal—they can be applied without reference to any singular
terms—they are not necessarily available to anyone who has the relevant general capacities for knowledge;
they are universal but also ‘parochial’ (258). Values have a history, and parochial values generate new
instantiations of general values, which general values in turn lend intelligibility to the new instantiations. So
there is no getting away from the thin. Perhaps Penner can accommodate this by cabining his scepticism about
the courts’ expertise in thin concepts, so that it applies only to certain thin concepts, or to thin concepts when
detached from thick ones. Unfortunately, even that won’t save the thesis from its combination of claims that
are unhelpfully cautious and over-adventurous. Its caution can be seen in Penner’s remark that it ‘seems to
permit the claim that judges and lawyers can have (not always, nor necessarily) the moral expertise which
would entitle them to make law’ (86). This amounts to a frank admission that an argument from expertise does
not establish anything like the general authority that courts claim—it shows only that it is possible for them to
have some authority on this basis. Admittedly, this does refute (A)-type objections that depend on general
scepticism, since it shows how some moral expertise is possible some of the time; and in sketching some of its
possibility conditions it also suggests how some of the (B)-type objections could be met. But how far they can
be met is the crux of the matter, and that takes us well beyond the considerations that Penner advances here.
For one thing, he will need to confront weighty contrary evidence, from feminists among others, showing that
judges have sometimes done very poorly with thick ethical concepts such as ‘consent’ or ‘privacy’. And
Penner will also have to confront a further problem. Which thick moral concepts are in play in the court room
is a contingent matter, and the ones that come to dominate a certain area of law may well be morally deficient.
(That is why arguments to the effect that moral principles are inevitably part of the law have no tendency to
prove that the law is morally sound.) To make any headway here, Penner will need to show that the law is
porous enough that the correct thick concepts not only enter, but dominate ordinary legal reasoning. Offhand, I
can think of no reason why that should be so, and the evidence seems to me to point the other way. All of that
suggests that the moral expertise of judges may be very modest indeed, and too modest to establish anything
like the authority they claim. But in another way Penner’s argument is surprisingly adventurous. In the passage
quoted above (86), and elsewhere (87, 93, 96), Penner claims that his argument shows that ‘judges and
lawyers can have . . . the sort of moral expertise which would entitle them to make law’ (86, my emphasis). I
say this is adventurous because most of us don’t think that lawyers as such have any authority to make new law,²² and we would regard any argument that entails that they do as suspect. There are stark differences between the virtues needed for advocacy and those needed for adjudication, and that familiar fact that good lawyers can make bad judges suggests that there is more to it than skill in the casuistic deployment of thick moral concepts. If we are to build a case for the moral expertise of judges it seems likely that we will want to rely on special features of their role, including the duty to hear both sides, to be impartial, and so on. I suspect that it is in this neighbourhood rather than in any facility with thick concepts that we might find such moral expertise as judges have. Finally, and quite apart from any of that, Penner’s case has no bearing at all on what I’ve called the (C)-type objections to an argument from expertise. With Raz, he seems to assume that self-government is something of more value in personal conduct than in political life. What is in our political tradition the normal justification for political authority—the consent of the governed—has little role to play in the ‘normal justification thesis’ in either Raz’s coordination-based version or in Penner’s expertise-based one.

3. Value Pluralism and Cultural Pluralism

Outside analytical jurisprudence, one of Raz’s most influential contributions is his writings on the nature of liberalism and multiculturalism. When one considers that this is a fairly small part of his work—some pages in The Morality of Freedom and a few essays—it is striking how influential they have become, for they are among the leading models for thinking about a world of many viable social groups, whose ways are valuable but incompatible, but who often must try to cohabit in common political institutions. Raz’s deploys his value pluralism in defence of a view that not only tolerates such groups, but offers them room to flourish and requires that we make our public institutions as hospitable to them as we can. In a special subset of cases, it also supports certain group rights including, in some historical circumstances, a right to national self-determination.

For reasons that are sometimes hard to grasp, the idea of group rights tends to elicit unusually strong reactions. Some think it the solution to a wide range of problems in political morality; others see it as a step down the road to serfdom. Two papers here, by James Griffin and Yael Tamir, exemplify more and less moderate
versions of the latter reaction. Griffin’s ‘Group Rights’ warns us against using ‘rights’ to demarcate the whole of morality or even the whole realm of obligation. Raz’s theory certainly respects that constraint. But Griffin also favours a view that understands human rights as austere minimum supports for agency and personhood, limited by certain practicalities of application and enforcement. Moreover, he wants every use of the term to pass what he calls the ‘redundancy’ test: ‘The word “rights” should not just provide another way of talking about what we can already talk about perfectly adequately’ (178–79). Raz doubts that Griffin can be seriously proposing such ‘terminological hygiene’:

If ‘rights’ meaning does not make its domain of application coincide with the whole domain of moral obligation then clearly it is a mistake to use it as if it does, the mistake being not redundancy but incorrect use of the term. If, however, its meaning does make it redundant, in the sense that we can say whatever we say using the term equally easily without it (true of many terms), what sort of a fault is it? Griffin does not claim that there are concepts or thoughts one cannot express except by using ‘rights’ in a meaning it does not have (268–69).

What Griffin has to do is explain the correct meaning of ‘rights’ and then show that, on that meaning, there are no collective ones. Interpreted substantively, some of his arguments seem over-reaching. When he criticizes justice-based accounts of group rights (such as Will Kymlicka’s suggestion that some minority cultures deserve special protections as a necessary but fragile contexts of choice) his points are sound but miss their target. Griffin urges that no general right to cultural survival can be derived from such considerations (175), and certainly no right that ‘overrides all but the most pressing competing ethical concerns’ (177). That is so. But those who believe there are collective rights do not typically believe that there is a general right to cultural survival—they maintain that it depends on the value of the culture in question and on a number of contingent social circumstances. Nor need they think that moral rights have the overriding, trump-like character that used to be popular in the literature a generation ago. At any rate, Raz notoriously does not accept those views; his own general theory of rights is in many respects quite deflationary.

One of Griffin’s arguments is independent of his assumptions about the nature of rights. Raz suggests human well-being may be bound up with availability of certain collective goods that are essentially shared and that in
some cases can justify duties, not for the sake of individuals taken one-by-one, but for the sake of the group taken together. Griffin argues again that there is no general reason for thinking that goods of this sort ground collective rights. For example, from the truth that fraternity is a communal good, we cannot without more infer that a community has a right to fraternity (166). Well, why not? Because it ‘it is thoroughly counter-intuitive’ (166). But which conclusion, exactly, is counter-intuitive? That every community has a right to fraternity? No doubt; but that is not presupposed or entailed by the view Griffin rejects. That any community has a right to everything that is necessary or useful in sustaining fraternal relations? According to Raz’s general account of rights, someone has a right only if an aspect of his well-being is sufficient reason to warrant holding someone else to be under a duty. It does not require that the interest justify every duty that would support it. Suppose that conviviality is a collective good of a party in sensu composito; does that show that every party has a right to conviviality? Perhaps not, if ‘a right to conviviality’ means that someone or other has a duty to provide them with conviviality. There is indeed a difficulty in this thought, and it is not moral but conceptual. We can no more make a party convivial than we can make another person happy. At best we can provide conditions under which a convivial party is likely to emerge or flourish; sometimes all we can do is remove obstacles to its emergence. Is it then really so crazy to suppose that this fact about a group, that it can realize the essentially shared good of conviviality, is a consideration that is able to ground some duties, such as a duty to allow them the space or time where things like parties can go on? If we are inclined to think that nothing of this order could ever get off the ground, then that may after all be a consequence of what Griffin acknowledges is the lightweight nature of his example. If instead we take the sort of cases in which people actually defend group rights of various kinds—rights to cultural integrity, to linguistic security, to a tolerant society etc.—the conclusion may be less clear. The requirement, after all, is to show that the relevant interests justify some duties or other on some people or other. This is not empty: there are other ways of arguing for duties, and some interests don’t ground any duties at all. Why then is it counterintuitive to suppose that these sorts of communal goods might ground duties towards a group? Here, I think Griffin needs to rely on his second claim, one that challenges the whole concept of shared goods. He allows that we cannot properly describe things like conviviality, solidarity, fraternity, or tolerance without reference to the mutual activities of people; but he says that does not show that the value of the good is not individuated. If we look harder we will find nothing but
axiologically individual, though conceptually relational, goods: ‘The value of conviviality resides in the enjoyment that each individual experiences singly. The specialness in these goods is something conceptual’ (167). Raz replies that this is not how the members of such communities see matters—they do not see the relation between the collective character and individual value as causal, but constitutive (272). What is of value to individuals valueis (in part) the essentially shared character of the good; the shared character is not merely a route to a state of affairs that might in principle be achieved some other way. Neither Griffin nor Raz says enough about this issue here to be fully persuasive, and we probably have a weaker grasp than we need of what it means to assert or deny that something can be ‘reduced’ to individual values. Griffin is correct to notice that some traditional liberal rights, including autonomy, also have an essentially relational component (as readers of Gerald McCallum may remember). Yet we might draw a different lesson from this than the one Griffin intends. It may be that fully individuated interests cannot do quite as much work as classical liberals supposed in explaining even ‘first generation’ rights. Does my individual interest in being able to say whatever I want really justify holding everyone else under a duty to tolerate false or offensive speech? Why am I so important? Perhaps the argument for some familiar rights also needs elements from the communal view, or perhaps the whole the contrast between individual rights and group rights is exaggerated and misleading. I think the issue remains open.

Yael Tamir is even more anxious about collective rights. In her paper, ‘Against Collective Rights’, she says that they are most often invoked as obstacles to social reform, in order to protect collapsing traditional cultures from the efforts of their own members to flee or outsiders to improve them. She warns, ‘The more one inquires into actual case studies, the more one comes to the conclusion that the category of collective rights which are harmless to individual members, is (for all practical purposes) an empty one’ (189). Tamir is right that there are alarming cases but, as far as I can tell, neither Raz nor those influenced by his theory defend the rights of non-viable or malignant cultures. Of course, it requires both factual information and moral sensitivity to know which these are. For example, Tamir wrongly asserts that in ‘In the [French] Canadian case . . . the term survival refers not to the actual survival of the community or its members but to the survival of the traditional way of life’ (188). The truth is more or less the opposite. Quebec is modern, dynamic, pluralist society, in many ways more liberal than the rest of Canada; but it is also one which wants to go on doing its
business in the language of the regional majority. It is not the survival of the traditional Quebecois ‘way of life’ that people care about—that is now virtually extinct—it is the survival of their linguistic community. Tamir’s other examples include the West Bank settlers (194–95). The moral position here is starkly different from that of Quebec, and the notion that anything Raz has to say about collective rights might give solace to the occupation is implausible. Indeed, if one wanted to understand the rights that are being violated in Palestine, a good place to begin would be with Raz’s essay with Avishai Margalit, ‘National Self-Determination’. In any case, it is hard to see why the Israeli settlers need to abuse the somewhat arcane concept of ‘collective rights’ when the pliable and infinitely more popular notions of ‘the people’ and ‘the nation’ have served them so well.

On one point Tamir’s challenge to Raz is not rhetorical but philosophical. She detects a ‘disturbing inconsistency’ between his view of rights in general and his discussion of collective rights to self-determination (197). Raz’s argument for the latter turns on the claim that the prosperity of social groups may be vital to the prosperity of their members, and Tamir thinks that this commits him to a kind of instrumentalism that is irreconcilable with his declared view that an individual can be a rights-bearer if and only if either its well-being is of ultimate value, or it is an artificial person. Organic social groups like societies and nations are not artificial persons, so Tamir concludes that they must be instruments to the prosperity of their members and thus incapable of bearing rights. In fact, Tamir combines two objections here, and they are at war with each other. One is that Raz leaves the precise character of the justificatory relation unspecified. How exactly do we know whether a certain interest warrants holding someone duty-bound? Raz’s general account of rights does not say. Is that a mistake? Perhaps a general theory of rights ought to leave that open, for there are different sorts of justificatory relations in different sorts of moral theory, and we might have use for a general account of rights than can explain, for a given theory, what rights it is committed to. That does mean, of course, that we are not going to be able to ‘apply’ Raz’s general theory of rights straight out of the box, but most general theories in jurisprudence are like that. Tamir’s second worry takes the opposite tack. It imputes to Raz a determinate answer: justification must be some instrumental form of ‘cost-benefit analysis’. On that footing, she fears that Raz’s theory makes rights liable to ‘vanish’ if we put enough costly facts on the ground, for example, enough people who resist doing their duties. She offers the example of the West Bank
settlers whose ambitions and outlook make them very resistant to fulfilling any of their moral duties towards Palestinians. If the settlers’ numbers increase, she says, Raz is committed to holding that Palestinian rights may eventually disappear (195). She imagines him trying to avoid this repugnant conclusion by invoking some kind of *ceteris paribus* clause against the moral hazard. She sees that this won’t work but misses the simpler answer: Raz is no utilitarian, and his whole theory of the nature and incommensurability of values undercuts the sorts of cost-benefit analysis that Tamir properly rejects. Moreover, unlike Tamir, Raz does not suppose that duties are always burdensome; on his view this is a mistake derived from a false opposition between the individual and the common good. 34

Griffin and Tamir’s essays both give a feeling of *déjà vu*: although the names and places have changed, the story reverberates with Maurice Cranston’s cold-war railing against the new human rights; then it was rights to public education and paid holidays, now it is rights to culture and language that are said to court conceptual confusion and political disaster. At points, it seems that Tamir almost thinks the political risk is so dire that, even if there were collective rights, we ought not to admit it in case fundamentalists, crackpots, and colonizers all start claiming them. I am not sure what legal philosophy can do to prevent this, but with Raz I think that we ought not to trim in anticipation. It is not only that this turns philosophy into an ideological game. It is also a game we cannot win, for there is no way to know in advance what prophylaxis we will need: the list of political concepts that cannot be abused in any circumstances is a very short one.

Both Griffin and Tamir acknowledge that collective rights are in the air, that they have become a familiar part of our moral world. That raises an interesting question for jurisprudence. Neither of them denies that there are collective legal rights. Griffin is opposed to the idea of a right to non-intervention in the affairs of states unless it is conditional on the democratic character of the state, i.e. on whether it represents the interests of its individual members. But he concedes that, ‘One can, of course, create a legal right—say, in international law—to be understood like that’ (181). If we can create legal rights like that, then there can be group rights not reducible to individual rights, and we will need an account of them. Since they cannot, on Griffin’s view, be created in order to protect collective moral rights, then it must be possible to develop a theory of legal rights independently. Griffin does not think that we were wise to create the right he mentions, but that raises the
intriguing possibility that there may be other cases: perhaps there are collective legal rights that it would indeed be good to create, and perhaps Raz’s argument, or one like it, suggests which they are.

On one matter, Tamir is right on target: she says that our attitude towards collective rights is coloured by what we take the paradigm cases to be. Talk of minority cultural rights has a very different cast if one is thinking about large, viable minorities who are endangered by earlier or continuing oppressive practices of dominant groups (French Canadians or Spanish speakers in the United States, for example), about small, fragile, groups like the aboriginal communities in America or Australia, or about expanding, illiberal refusals like the Wahabis or ultra-orthodox Jews. On many dimensions, these cases simply defy intelligent comparison.

Bernhard Peters’ paper ‘Communal Groups and Cultural Conflict’ is admirably sensitive to these matters. He offers a valuable caution to all of us who have been attracted to value pluralism as a tool for understanding cultural pluralism. Peters distinguishes three types of situation that we find in cultural conflicts: struggles between groups that want to impose their values on each other; endangered cultures who feel under threat from a dominant culture, and the identity politics of blood and belonging. He shows that it is a mistake to assimilate these, to assume that cultural pluralism necessarily leads to any of these forms of conflict, or to suppose that there is typically a deep incompatibility among the values of different cultures in the first place. He also reminds us that there is no reason to think that even when genuinely conflicting values are at stake they are always non-negotiable, as if members of minority cultures never turn their minds to what they might be willing to give up in order to get other things they also value. The warning is welcome. We should add to it at least two more. First, real cultural wrongs are not always important wrongs, and some attempts to right them can backfire. As Fran Liebowitz says, ‘if you think it is wrong to have a crèche in the town square, and you were wondering what would make it worse, then by all means insist that a menorah be installed alongside it’. Second, we need to resist the spreading tendency, prevalent where the political vocabulary is constricted, to try to get ‘culture’ to do too much work. Hatred of blacks or gays is not a failure to respect cultural differences, and multiculturalism is not any sort of solution to racism or homophobia.

In ‘Liberal Theories of Multiculturalism’, Will Kymlicka tells us about his own recent thinking on the subject and speculates about the ways in which it might diverge from Raz’s. He sees three moments in liberal theories of multiculturalism, beginning with the now defunct ‘liberal/communitarian debate’. We owe it to Kymlicka’s
early work for having shown that that was not a debate and that it did not cast much light on cultural pluralism. The second stage comprised justice-based arguments, of which his own work was very influential. Now, as the philosophical three-step requires, this too is displaced and completed in what he calls the ‘nation-building’ model. On this view, political communities may permissibly go about nation-building only if they compensate the losers on the way, in particular, members of minority cultural groups: ‘The burden of proof falls on the state to show that minority rights are not required to remedy or counteract injustices which arise from state nation-building’ (240). Minority cultural rights, he now thinks, should be seen as proper compensation for the inevitable non-neutrality of nation-building. He wonders whether this could be endorsed by Raz, who at one point urged us to stop thinking about the issue of multiculturalism as one of minorities versus majorities, but to try to transcend that distinction and see ourselves as sharing the public space with other groups. 

Raz speculates that Kymlicka’s emphasis on nation-building is appropriate only to newer societies. He thinks that in the old world ethnic nationalism generally predates the state: ‘Italy was created for Italians, Germany for Germans, Serbia for Serbs, etc. In these cases there is no nation-building to be undertaken. Rather, there is nationalism, and chauvinistic exclusion of minorities to be overcome’ (267). On the facts, Kymlicka gets the better of this argument. Neither Italy nor Germany was created for the Italians or the Germans—those nationalities as we now have them are also the outcome of the reorganization and suppression of other local nationalities in the 19th century; Italy is as much a product of nation building as is Australia. To the extent there is a difference in their outlooks it may be put down to two things. First, Kymlicka is here more concerned with actual policy and less with ideas that are not reflected in any group’s current demands; Raz is interested in the prior question of what, if anything, could justify such demands if they arise. They are both aware of that difference. But there is a further one that is, I think, at least as significant. Kymlicka’s earlier arguments for cultural rights were partly egalitarian: equality of cultural resources is what grounds special rights. Raz would have been unmoved by this approach, for he does not think that egalitarian principles have any foundational role in political morality: it might be a matter of concern if cultural minorities have inadequate resources, but not that they merely have fewer resources than the majority. It may be that Kymlicka’s new compensation argument is meant to replace or qualify his old one. All the same, the new version is also justice-based, though now it is compensatory rather than distributive justice that grounds special rights. Kymlicka the political
theorist is thus in some ways a more legalistic philosopher than is Raz the lawyer: equality, justice, and now compensatory remedies and ‘burdens of proof’ play central roles in Kymlicka’s arguments about cultural pluralism. The contrasting character of Raz’s work sometimes catches commentators unaware. In the seventies and eighties, moral and political philosophy took a legalistic turn, and its central concepts where thought to be rights, justice and equality, often interpreted in ways congenial to the constitutional lawyers who had begun to swell the field. Although he is no utilitarian, Raz does carry forward the Benthamite tradition of thinking that these concepts play a different and more modest role. Legal philosophy falls into place as a chapter of political philosophy, which is in turn merely practical philosophy in the public domain, and its fundamental concepts are reason and value, not rights or equality.

I was struck by how many of these first-rate theorists admit that, in the end, they simply aren’t sure whether or to what degree Raz’s theory can accommodate their points. This is not a matter of the obtuse confronting the obscure. At this stage in the development of his thought, there are dense connections among all parts of Raz’s system. One cannot understand the nature of law unless one understands that it claims authority; one cannot understand authority unless one understands the way it serves reason; one cannot understand reason unless one understands the complexities of action and value, and so on. Approaching Raz’s philosophy is like diving into a pool that has no shallow end and undercurrents everywhere. A fuller evaluation of that work is eagerly awaited.

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End Notes

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12 Endicott does not want us to say, as Raz sometimes does of such cases, that it is ‘neither true nor false’ that it is fair. I will not address his argument on this point.
13 Canadian Charter of Rights and Freedoms, s 24 (1).
14 39 USC s 403 (2002).
15 Kelsen, Pure Theory of Law, 349–51.
18 Ibid at 349.

17 5 US 137 (1803) (Cranch).

18 As Ronald Dworkin puts it, ‘Discretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction. It is therefore a relative concept. It always makes sense to ask, “Discretion under which standards?”’ Taking Rights Seriously (Harvard University Press, 1979), 31.

19 Concept of Law, 132.

20 Dworkin, Taking Rights Seriously, 35.

21 Raz, Morality of Freedom, ch 3; Ethics in the Public Domain, ch 10.


23 In Law and Disagreement (Oxford: Clarendon Press, 1999), 104, to which he here refers, Waldron says more cautiously: ‘I believe that PC [the partial conflict coordination problem] suggests a lot that is important about law in the circumstances of politics’.


28 Setting aside minor exceptions, such when acting as officers of the court they help create individual legal norms by subpoenaing witness and so forth. I do not think that this authority depends on their moral expertise.

29 Morality of Freedom, 208.


41 Endicott: ‘It is unclear to me whether, in saying these things, I am disagreeing with Raz in any significant way’ (113). Penner: ‘It is not clear to me the extent to which Raz would disagree with this characterization of thick and thin evaluative concepts in legal and moral reasoning’ (97). Waldron: ‘I wonder whether in the end all that I have said might not be accommodated perfectly well within the four walls of Raz’s conception’ (69). Kymlic: ‘I’m not sure whether Raz really disagrees with any of this’ (247).