

Historical Origins of Raz's Legal Philosophy

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Abstract

Joseph Raz (1939-2022) was one of the most influential philosophers of law of the last half century. But the reception of his legal philosophy has been shaped by relatively narrow debates about the nature of authority and the commitments of Hartian legal positivism. A more comprehensive assessment of his achievements begins by considering the complex historical origins of his legal philosophy. I consider three distinct historical strands relevant to understanding many of the central features and the general framework of his philosophy of law: developments in the mid-twentieth century in moral, political, and legal philosophy regarding the concept of a reason for action, of the nature of political authority, and the systemic character of positive law, respectively. Raz's legal philosophy can profitably be viewed as a novel convergence and synthesis of these many developments and influences, as an ambitious attempt to develop a systemic theory of positive law in terms of the concept of authority which is in turn explained from the perspective of practical reason.

1. INTRODUCTION

Joseph Raz was one of the most important philosophers of law of the last half century, but the influence and reception of his ideas have so far taken a curious course. While his legal philosophy is one of the most extensive, systematic, and elaborate in the history of philosophy, nearly all of its influence so far has been due to a rather small part of it. For over the last fifty years, much of the discussion it has generated concerns only two of its many aspects.

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One line of scholarly discussion has been in response to Raz's account of practical (and thereby political and legal) authority, also one of the most systematic in the history of philosophy.² Raz argues that it is a necessary truth about law that it claims authority, and that its central aspects – what it is to legitimately have, exercise, and obey it – should be understood in relation to, and mostly in terms of, the concept of a reason for action.³ Many moral, legal, and political philosophers over the last several decades have offered a diverse set of objections, defenses, and modifications to his “service conception”, resulting in an enormous literature.⁴ While Raz presents this conception as important in understanding a range of problems across law and politics – his most substantive discussions of authority appear in collections of essays in *both* legal and political philosophy⁵ – a sizeable part of the scholarly reaction has nonetheless been both narrow and isolated. Such discussions have been narrow in considering what Raz says only about authority itself, without considering how these arguments fit into his broader account of the nature of law and political morality, with which it has deep and systematic connections.⁶ They have been isolated in assuming the intended purpose of the service conception is highly circumscribed. It is commonly taken as a solution to a philosophical puzzle about the

² See further Michael Sevel, “The Constitution of Authority,” *Jurisprudence* 5(2) (2014).

³ See *The Authority of Law*, 2nd ed. (Oxford University Press, 2009), 3-33.

⁴ See Kenneth Ehrenberg, “Critical Reception of Raz’s Theory of Authority,” *Philosophy Compass* 6/11 (2011): 777-785, which discusses a modest sample of only the Anglophone literature. Some studies beyond the English-speaking world include David Kuch, *Die Autorität des Rechts: Zur Rechtsphilosophie von Joseph Raz* (Mohr Siebeck Tübingen, 2016); Aldo Schiavello, “Autorità legittima e diritto nel pensiero di Joseph Raz,” in *Materiali per una Storia della Cultura Giuridica* 34(2) (2004): 363-384; Manuel Toscano, “Autoridad y razones para la acción: dos problemas,” *Revista de Estudios Políticos* 179 (2018): 43-67; María Cristina Redondo and Pablo Navarro, “Normas y razonamiento práctico: Una crítica a Joseph Raz,” *Doxa* 10 (1991): 91-100; Charles-Maxime Panaccio, “L’univers razien. Raison pratique, autorité, droit,” *Droit & Philosophie* 9-2 (2018): 13-20; and Igor de Carvalho Enríquez and Thomas Bustamante, “Direito, Estado e Autoridade em Kelsen, Schmitt e Raz,” *Revista Direito & Praxis* 6(10) (2015): 81-110.

⁵ See *The Authority of Law*, 2nd ed. (Oxford University Press, 2009), 3-33, and *The Morality of Freedom* (Clarendon Press, 1986), 21-105.

⁶ See again Sevel, above n2.

compatibility of authority and individual autonomy,⁷ despite Raz often characterizing authority in a more systematic way, as only one among many normative powers, i.e., capacities to intentionally create practical reasons.⁸

The other aspect of his legal philosophy that has received the most attention is as an extension of the legal positivist tradition. However, the way in which his ideas have been considered part of that tradition has been substantially shaped by debates independent of them, ones that arose in the reception of H.L.A. Hart's positivism, primarily as presented in his book *The Concept of Law*, published in 1961. These debates began with criticisms of Hart's theory by Ronald Dworkin, made initially around the time Raz was Hart's doctoral student at Oxford (1964-67).⁹ The hyper-partisan debates in Anglophone legal philosophy that developed over the next forty years, under the rubric of the so-called 'Hart-Dworkin debate', had two relevant effects, one salutary, the other not. The salutary effect was that the intense and sustained critical attention to the details of Hart's positivism, as well as to the challenges presented by anti-positivist and natural law theories, resulted in rapid clarification of and increased sophistication in the idea of law as social fact; Raz's own arguments were both part of these efforts and reflect the advances made by others. The unfortunate effect was that participants in these debates tended to situate any view brought into them as aligned with either Hartian positivism or Dworkinian anti-positivism, with little appreciation for the subtleties or innovations in views which were not easily understood in terms of the strict fault lines of disagreement in those

⁷ See eg Scott J. Shapiro, "Authority," in Jules L. Coleman, Kenneth Einar Himma and Scott J. Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, 2002). See also Stephen Darwall, "Authority and Reasons: Exclusionary and Second-Personal," *Ethics* 120(2) (2010): 257-278. The puzzle was most forcefully presented by Robert P. Wolff in his *In Defense of Anarchism* (Harper and Row, 1970).

⁸ *Practical Reason and Norms*, 100-101; *Between Authority and Interpretation*, 135

⁹ See Ronald Dworkin, "Judicial Discretion," *Journal of Philosophy* 60(21) (1963) and "The Model of Rules," *University of Chicago Law Review* 35 (1967).

debates.¹⁰ This dialectical rigidity extended even to debates had *among* positivists; starting in the early 1980s, such views were thereafter categorized as either ‘exclusive’ or ‘inclusive’, depending on whether they allowed moral norms to be among the positive criteria of validity of a legal system.¹¹

Over the last several decades, Raz’s legal philosophy has been understood primarily as a variant of legal positivism from the perspective of these bipolar debates. First, within the Hart-Dworkin debate, as a prolific student of Hart, he naturally was placed on the Hartian side of the partisan divide; as a result, the legacy of his positivism and broader legal philosophy has been considered through that singular lens. For example, in her well-received biography of Hart, Lacey imputed to Hart the view that Raz, and not Dworkin, was “his true intellectual successor,”¹² and yet nowhere in his writings does Raz embrace that role.¹³ This alleged philosophical association with Hart has led some to cast Raz’s entire legal philosophy as simply an elaborate, critical but sympathetic reaction to Hart’s views; on that assumption, it has been argued that Raz’s “departures from the benchmarks provided by Hart’s legal theory” are

¹⁰ This was especially true of theories of law outside the Anglosphere. Notably absent from these debates, particularly early on, were the views of Hans Kelsen, both then and now a towering presence in jurisprudence in Europe, Latin America, and beyond; Kelsen’s ideas were to have a profound influence on Raz’s legal philosophy. See section 3, below.

¹¹ Some writers have used the mostly interchangeable distinctions of ‘hard’ and ‘soft’ positivism, or ‘positive’ and ‘negative’ positivism. See Jules Coleman, “Negative and Positive Positivism”, *Journal of Legal Studies* (1983) 11(1): 139-164 and Eleni Mitrophanous, “Soft Positivism”, *Oxford Journal of Legal Studies* (1997) 17(4): 621-642. Wil Waluchow’s *Inclusive Legal Positivism* (Clarendon Press, 1994) is a comprehensive discussion of the ‘inclusive/exclusive’ debate among positivist writers through the mid-1990s.

¹² Nicola Lacey, *A Life of H.L.A. Hart: The Nightmare and the Noble Dream* (Oxford University Press, 2004), 325.

¹³ One may tempted to object that Raz does just this in the opening paragraphs of one of his most cited essays, “Authority, Law, and Morality” (in *Ethics in the Public Domain*, Rev. ed., Clarendon Press 1995, 210). There he refers to Hart as “the heir and torch-bearer of a great tradition in the philosophy of law,” namely the positivist one, and then proceeds to defend a core claim of that tradition, the ‘sources thesis’. However, the particular provenance of that essay should be kept in mind: as the lead article in an issue of *The Monist* (68(3), 1985) devoted to (Hart’s book) “The Concept of Law.” Similar references to Hart can be found in most of the other essays in the issue.

“without obvious benefits.”¹⁴ Second, within the internecine positivist debates, Raz has been called “exclusive legal positivism’s leading advocate,”¹⁵ yet has expressed little interest in participating in the ‘inclusive/exclusive’ positivism debate. Indeed, Raz was of the view that what is at stake in that debate is of relatively minor importance in legal philosophy.¹⁶

I do not wish to criticize these two general lines of scholarly reaction to Raz’s legal philosophy; each have yielded fruitful results in their own right and, in fact, they prompted Raz in his later writings to clarify important aspects of both his account of authority and the positivist aspects of his theory of law.¹⁷ But they have nonetheless had the effect of missing the Razian forest for the (admittedly interesting) trees. The narrow reception of the service conception ignores how Raz’s account is a systematic response to a range of issues raised in broader debates about practical authority that had emerged in the post-war period across legal and political theory. And the narrow reception of his positivism obscures the way in which it lies at the intersection, and represents a convergence, of a novel set of themes and concepts in the history of philosophy, and thereby overlooks its connections to a broader and distinctive moral and political outlook.

¹⁴ Kevin Toh, “Some Moving Parts of Jurisprudence,” *Texas Law Review* 88 (2010), 1288 and 1321. Toh recommends that we “[t]ry to formulate Raz’s views and try to do so in a way that makes them reactive to and critical of H.L.A. Hart’s benchmark views, as Raz clearly intended them to be” (emphasis added, 1284). Beyond the few occasions on which Raz reacts explicitly to Hart’s views (see, e.g., *Practical Reason and Norms*, 50-58, and *The Concept of a Legal System*, 156-167), this alleged intention is far from clear in his jurisprudential writings.

¹⁵ Scott J. Shapiro, “The ‘Hart-Dworkin’ Debate: A Short Guide for the Perplexed,” in Arthur Ripstein (ed.), *Ronald Dworkin* (Cambridge University Press, 2007), 53 n33. Cf. Mark Murphy, *Philosophy of Law: The Fundamentals* (Wiley-Blackwell, 2006), 34 (“The most elaborate defense of hard positivism has come from Joseph Raz, who was himself a student of Hart’s.”).

¹⁶ “I have to confess that I do not see the debate between so-called inclusive and exclusive positivism as particularly important...I am inclined to think that as between these two options the so-called exclusive positivists have the better of the argument. But that does not mean that I take this to be an important point of legal theory.” (“Legal Philosophy through the Perspectives of Moral and Political Philosophy: A Dialogue with Joseph Raz,” *Philosophical Research* 2 & 3 (2010) (published in Chinese)).

¹⁷ See generally *Between Authority and Interpretation* (Oxford University Press, 2009).

One way to begin a fuller assessment is to trace out some of the historical origins of Raz's legal philosophy. This may seem a fool's errand; Anglophone analytic jurisprudence has long been criticized as 'unhistorical',¹⁸ and Raz has long been one of its most prominent practitioners.¹⁹ And given that Raz himself deals very little with historical sources explicitly, searching for any substantive and informative historical roots of his legal philosophy may seem misguided and, in any case, irrelevant to any sound interpretation of his thought. But this is to overlook the extent to which Raz was a student of the history of philosophy, and the history of moral and legal philosophy in particular, indeed to a far greater extent than Hart.²⁰ In an early publication, in response to the "relative lack of interest of analytic jurisprudence in the history of their discipline", Raz says:

This is one characteristic that analytical jurisprudence shares with general analytic philosophy. One can only express the hope that this trend will be reversed. In the absence of the historical dimension, analytical jurisprudence may become obsessed with a narrow range of problems, the discussion of which will eventually deteriorate to fruitless and indecisive controversies about minutiae. Awareness of the range of problems and points of view exhibited in the work of past philosophers is indispensable for the fruitful development of any philosophical discipline.²¹

Given Raz's avowed interest in and sensitivity to historical views, it behooves us to at least begin to consider the historical origins and context of his thought. The inquiry is complicated by the

¹⁸ Morton J. Horwitz, "Why is Anglo-American Jurisprudence Unhistorical?" *Oxford Journal of Legal Studies* 17 (1997).

¹⁹ See Dan Priel, "Analytic Jurisprudence in Time," in Thomas Bustamante and Thiago Lopes Decat (eds.), *Philosophy of Law as an Integral Part of Philosophy* (Bloomsbury, 2020).

²⁰ On Hart's scant knowledge of the history of philosophy, see John Mikhail, "'Plucking the Mask of Mystery from its Face': Jurisprudence and H.L.A. Hart," *Georgetown Law Journal* 95 (2007): 733-779.

²¹ Review of Robert S. Summers, *More Essays in Legal Philosophy: General Assessments of Legal Philosophies*, in *Journal of Philosophy* 69(16) (1972), 498. Here, Raz anticipates, with remarkable accuracy, criticisms that would emerge only decades later, to the effect that the mostly ahistorical positivist debates that had come to dominate jurisprudence were indeed needlessly esoteric and sterile. For example, at the turn of the twenty-first century, Jeremy Waldron lamented that "analytic discussions [in legal philosophy] tend to be flat and repetitive in consequence, revolving in smaller and smaller circles among a diminishing band of acolytes" ("Legal and Political Philosophy", in Jules Coleman and Scott Shapiro (eds.), *The Oxford Handbook of Jurisprudence & Philosophy of Law* (Oxford University Press, 2002), 381.

fact that Raz very rarely indicates, in footnotes or otherwise, the relevant history, a common feature of Oxford philosophy of the early and mid-twentieth century.²² However, if successful, such an investigation would provide useful context for a more comprehensive understanding and assessment of Raz's achievements in legal philosophy.

My discussion of these historical origins will be highly selective and incomplete, but is intended to indicate the general shape and character of a more exhaustive account. I focus on three distinct historical strands relevant to understanding several central aspects, and the general framework, of Raz's theory of law. The first concerns the origins of modern discourse among moral philosophers starting in the mid-twentieth century, in which the concept of a reason for action is used to explain a range of ethical phenomena. I outline the perceived regrettable state of Anglophone moral philosophy, particularly in Britain, in the early post-war period, and how a new approach was introduced according to which the concept of a reason for action was explanatorily primary, an approach Raz would greatly develop and bring to bear on questions in legal philosophy. Second, I discuss the similarly perceived moribund state of political philosophy in the early 1950s, and the revival soon after in philosophical discussions of practical and political authority. The way in which these discussions were applied to persistent questions in the philosophy of law in the 1960s provided Raz the opportunity to construct an explanation of authority in terms of reasons for action, in a way that helped address many of those questions, particularly regarding the relations between positive legal systems and standards by which to determine their moral legitimacy. Finally, with respect to questions more specific to legal philosophy, I discuss how the state of the field likely appeared to Raz, from his time as an

²² In his second book, and following in the style of Hart's *The Concept of Law*, Raz offered an informative set of discursive endnotes. See *Practical Reason and Norms*, 200-217. Unfortunately, the practice was discontinued in his books thereafter.

undergraduate at Hebrew University, during the period of his doctoral studies under Hart at Oxford in the 1960s, and through the 1970s, when he would develop most of the core aspects of his philosophy of law. This includes the ubiquity of Kelsen's ideas, across Europe and especially in Israel, the revival of Anglophone jurisprudence brought about by Hart's *The Concept of Law*, as well as the unlikely reemergence of Jeremy Bentham's legal thought, having been lost for over a century. Considering these three historical strands will allow us to begin to see how Raz's legal philosophy represents the novel convergence of a set of problems, concepts, and themes that each contribute to its originality and explanatory power.

2. MORAL PHILOSOPHY AND THE TURN TO REASONS

Explaining various moral phenomena by reference to the concept of a reason (for action, belief, intention, and feeling), and exploring the nature of reasons themselves, have arguably become dominant motifs in Anglophone moral philosophy over the last half century. Even a cursory survey of recent collections in philosophy reflects the trend.²³ However, there has been virtually no interest in understanding how, when, and why this came to be so. In the voluminous *Oxford Handbook of Reasons and Normativity*, for example, there is no substantive discussion of the history of its subject matter; its editor asserts the dubious claim that to a significant extent, philosophical discussion of reasons came to prominence because of a single essay written by Bernard Williams, published in 1979.²⁴ Tiffany extends the story back somewhat earlier, to the

²³ See Daniel Star (ed), *The Oxford Handbook of Reasons and Normativity* (Oxford University Press 2018); Errol Lord and Barry Maguire (eds), *Weighing Reasons* (Oxford University Press, 2016); Iwao Hirose and Andrew Reisner (eds), *Weighing and Reasoning* (Oxford University Press, 2015); R. Jay Wallace et al, *Reasoning and Recognition* (Oxford University Press, 2011); Simon Robertson (ed), *Spheres of Reason: New Essays in the Philosophy of Normativity* (Oxford University Press, 2009); Ruth Chang (ed), *Incommensurability, Incomparability, and Practical Reason* (Harvard University Press, 1998). A recent monograph representing the trend well, both in name and substance, is Mark Schroeder's *Reasons First* (Oxford University Press, 2021).

²⁴ Daniel Star, "Introduction", in Star (ed) (above note 23), 2. See Bernard Williams, "Internal and External Reasons," in *Moral Luck* (Cambridge University Press, 1981).

work of W.D. Falk in the 1940s.²⁵ John Broome has asserted that “the 1970s was the age of the discovery of reasons” and that “Joseph Raz was one of the first explorers,”²⁶ yet offers no explanation as to what may have moved Raz to embark upon the voyage.

A comprehensive history of how and why philosophers began to employ the concept of a reason, both as an explanans and explanandum, in the mid-twentieth century has yet to be written, but the following brief sketch will suffice. The general turn towards reasons was rooted in a broad, and intensely critical, reaction after the Second World War against both the assumptions and then-dominant trajectories of debates in Anglophone moral philosophy up to that point in the twentieth century. More precisely, by the late 1940s, there was a growing chorus of philosophers who objected not just to the substance of theories such as emotivism and intuitionism, but to the very conceptions of moral philosophy they presupposed. Many of the debates can be traced directly or indirectly to the work of G. E. Moore, whose *Principia Ethica*,²⁷ published at the turn of the twentieth century, set discussions in Anglophone moral philosophy upon a number of paths for decades.²⁸ Moore had sought a definition of ‘good’, but famously argued that any such definition failed. ‘Good’ was indefinable by reference to natural properties like pleasure or desire, because it was always an ‘open question’ as to whether any such philosophical claims really are true. As a result, Moore identified goodness as a kind of non-natural property known by way of intuition rather than empirical observation. Moral philosophers during the first half of the twentieth century were inspired by these claims in two

²⁵ Evan Tiffany, “The Rediscovery of Metanormativity: From Prichard to Raz by Way of Falk,” in Kelly Becker and Iain D. Thomson (eds), *The Cambridge History of Philosophy: 1945-2015* (Cambridge University Press, 2019).

²⁶ John Broome, “Reasons,” in R. Jay Wallace et al. (eds), *Reason and Value: Themes from the Moral Philosophy of Joseph Raz* (Oxford University Press, 2004), 28.

²⁷ Cambridge University Press, 1903.

²⁸ For a narrative account of Moore’s legacy, see Scott Soames, *Philosophical Analysis in the Twentieth Century*, Vol. 1 (Princeton University Press, 2003), 34-89 and 300-345.

different directions. One was to continue a longer British tradition of intuitionism: to further develop the idea that moral judgments are known by exercise of a faculty of intuition, such that their truth is virtually untethered to the factual circumstances of action; an action is right or obligatory only if one has an intuition, under the proper conditions, that it is right. Philosophers such as H. A. Prichard, W. D. Ross, and Moore himself, further developed these ideas through the 1930s and intuitionism, while increasingly unpopular thereafter, remained a critical target in moral philosophy for years to come.²⁹

A. J. Ayer in England and C. L. Stevenson in the United States lead a movement in the inter-war period against intuitionism, as both metaphysically extravagant and psychologically untenable, and were impressed in a different way by Moore's argument for the indefinability of good.³⁰ They agreed that 'good' was not a property of observable objects or their properties, but rather was to be identified as a property of *people*, despite appearances otherwise. The explanation of values was to be found in the subject rather than the object of moral judgment. These philosophers variously argued that moral judgment expressed a conative attitude towards its object, but that the judgment did not, strictly speaking, refer to or describe anything; consequently, such judgements could be neither true nor false. Moral properties – values – are not part of the fabric of the universe like natural, observable properties. Rather, the statements in which they are referenced are merely expressions of the states of minds of the speakers who invoke them. Various forms of 'noncognitivism' in ethics, inspired by the emotivism of Ayer and Stevenson, came to dominate debates in Anglophone ethics.³¹

²⁹ See Philip Stratton-Lake, "Intuitionism in Ethics," *Stanford Encyclopedia of Philosophy* (2020), <https://plato.stanford.edu/entries/intuitionism-ethics/>.

³⁰ See A. J. Ayer, *Language, Truth and Logic* (Victor Gollancz Ltd., 1936) and C. L. Stevenson, *Ethics and Language* (Yale University Press, 1944).

³¹ For a useful survey at mid-century, see Richard Brandt, "The Emotive Theory of Ethics", *Philosophical Review* 59(3): 305-318 (1950).

Nearly immediately after the Second World War, a generation of philosophers emerged who collectively thought that the entire research programs of both intuitionism and emotivism were dead ends in moral philosophy. They thought these views made the study of ethics “undiscussably *sui generis*” and “emptied moral theory of all content.”³² These views, in effect, changed its subject entirely, from which and how things have value and how we ought to live, to either merely reporting on the expression of attitudes (in the case of emotivism), or systematizing the outputs of the private exercise of an alleged special moral faculty (in the case of intuitionism). The post-war critics suggested that philosophers should discard any project rooted in third-person observation of moral judgement, and instead return to what they saw as the proper subject matter of ethics, reflecting a tradition extending back to Aristotle: to make systematic sense of the actual experience of agents reasoning about action and value, the practical conflicts that often result from that reasoning, and perhaps coming to some understanding of how to resolve them. The structured content of first-personal, ordinary experiences of reasoning and making decisions in the world should be the core subject of moral philosophical reflection.³³

An influential, early example of this renewed approach came from Oxford philosopher Stuart Hampshire, who argued in a critical essay appearing in the journal *Mind*, that both emotivists and intuitionists misconceived the relation between ordinary facts and value judgments, which in turn skewed their views about the nature of ethics itself.³⁴ Even if, as the emotivists maintained, an

³² G. J. Warnock, *Contemporary Moral Philosophy* (Macmillan, 1967), 2.

³³ The various employments in moral and political philosophy in the 1950s and -60s of ‘ordinary language’ methodology, for which mid-century Oxford philosophy is famous, is only one among several approaches falling within this much more general conceptual and methodological turn in ethics, and so should not be identified with it.

³⁴ “Fallacies of Moral Philosophy,” *Mind* 58 (1949), 466-482. This underappreciated article sounds many of the same themes, though less provocatively, as the much more discussed article by G.E.M. Anscombe appearing nearly a decade later, “Modern Moral Philosophy”, *Philosophy* 33:123 (1958), 1-19.

exceedingly wide variety of facts may be cited in support a moral judgment, such that there may be no immediately discernible patterns among those facts that would indicate an invariant connection with values, it is nonetheless the case that practical reasoning is a subject worthy of study in its own right. This much was clear as early as Aristotle's *Nicomachean Ethics*, Hampshire argued, in which the practical syllogism was put forth as a general model of reasoning, yet the content of its premises could be as variable as the practically wise person considered relevant under the circumstances of choice. Aristotle cites such examples as the practice of medicine or the art of maritime navigation as skills that require, at any given moment, the consideration of an unforeseeable and multifarious set of facts in order to reach the best decision. "...The spheres of action and what is good for us, like those of health, have nothing fixed about them...for they do not come under any skill or set of rules; agents must always look at what is appropriate in each case as it happens."³⁵ Hampshire argued that the structure and substance of the experience of an agent acting for reasons had been left virtually untouched by moral philosophers in the half century prior, and the need to examine and understand the nature of practical reasons, as a core task of moral philosophy, had been entirely obscured by the Moorean debates around intuitionism and emotivism. Returning to Aristotle's way of doing ethics, by taking up the first-person point of view of the deliberating agent, rather than that of a spectator to moral judgment, could break the apparent dialectical stalemate at mid-century. Those tired theories which completely ignored the complexity of the experience of recognizing and responding to good reasons in deliberation, decision and action, do not, as a result, make sense of it, and therefore pass over a large part of what moral philosophy should try to understand.

³⁵ *Nicomachean Ethics*, 1104a.

Stephen Toulmin's *An Examination of the Place of Reason in Ethics*, published a year after Hampshire's article, was another early and influential argument for this same general approach, though drawing on different arguments and historical influences.³⁶ Toulmin, who had attended Wittgenstein's lectures in Cambridge a few years prior, argued that Moorean debates about which property goodness was to be associated with, or whether and how seemingly incompatible ethical judgements could be simply the expression of opposing attitudes, had all proven to be in hopeless deadlock with equally plausible objectivist views. And yet, even in the face of that deadlock, it was still the case that "unless there can be a 'good reason' for an ethical judgment...there is nothing to account for its incompatibility with opposed ethical judgments."³⁷ Regardless of those deadlocked debates about properties, attitudes, and intuition, the notion of a good reason to do something was still intelligible, indeed employed as a matter of course in ordinary life, and much could be said in philosophy about how reasons worked, interacted, or failed to interact in practical deliberation and social discourse. Moral theory, Toulmin suggested, can profitably be done by examining the kinds of arguments there are in which reasons for action figure as either premises or conclusions. Discerning the logic and structure of practical arguments, of 'good reasons' for action, was both practically important and philosophically interesting.

The arguments of both Hampshire and Toulmin were soon recognized as recommending a "new approach in moral philosophy."³⁸ The research program into the nature of reasons for action was regarded as a "fresh wind blowing over the field of ethical theory."³⁹ By the end of the 1950s, it was acknowledged that the concept of a reason for action has

³⁶ Cambridge University Press, 1950.

³⁷ Ibid., 63.

³⁸ Henry Aiken, "Moral Reasoning," *Ethics* 64(1) (1953), 24.

³⁹ D.B. Terrell, "A Remark on Good Reasons," *Philosophical Studies* 4(4) (1953), 58.

played a central role in [the] discussion of value judgments...But it can, of course, give rise to a very great deal of puzzled and puzzling discussion. Indeed, not a few of the many traditional problems of moral philosophy...turn on how we may decide to interpret this notion.⁴⁰

The two broadly similar lines of argument from Toulmin and Hampshire, united in their belief that the Moorean debates were dead ends, offered, however, alternative visions of how to proceed in the study of practical reason, reasons, and reasoning. Toulmin's approach bore an affinity to Kant's, in looking for a universal structure in, and the invariant forms of, practical reasoning, whereas Hampshire's approach, inspired by Aristotle, emphasized the phenomenology of moral reasoning, its relation to qualities of character, and the inherent dependence of what reasons for action there are in any choice situation on the complex circumstances of each case.⁴¹ For years to come, each of these approaches would attract many of the leading moral philosophers across the English-speaking world, who would develop them considerably, and in diverse ways, over the 1950s and 60s. Following Toulmin was, among many others, R. M. Hare, who would have considerable influence in revitalizing Kantian approaches to practical reason.⁴² Toulmin's doctoral student Kurt Baier also carried the project forward; his much-discussed book, *The Moral Point of View*,⁴³ addressed the relation between

⁴⁰ Alan Montefiore, *A Modern Introduction to Moral Philosophy* (Routledge & Kegan Paul, 1958), 170-171. By the time Raz's *Practical Reasons and Norms* was reviewed, it was observed that "a number of studies of practical reasoning and reasons for action have recently appeared, and all the signs are that an industry of sorts is developing in the area." See R.G. Frey's review of *Practical Reason and Norms* in *Philosophical Books* 17(3) (1976), 135.

⁴¹ For a discussion of how the approaches were viewed as distinct, see Everett W. Hall, "Practical Reason(s) and the Deadlock in Ethics," *Mind* 64 (1955), 319-332.

⁴² See Roy Edgley, *Reason in Theory and Practice* (Hutchinson, 1969), 11 ("Like most English-speaking philosophers writing on practical reason I am also indebted...to R.M. Hare: in the revival of the topic since the last war he has been a major figure..."). Edgley's book is among those cited by Raz as "manifesting this trend" of "the unity of practical philosophy". See *Practical Reason and Norms*, 200 n1. See also note 57, below. Hare's is a complex case: his early ethical theory was influenced by the renewed Kantian approach to reasons and reasoning, yet was also heavily influenced by the emotivism of Ayer, and especially Stevenson. He is thus a transitional figure in the emergence of the broad reason-centred approach in ethics under discussion.

⁴³ *The Moral Point of View: A Rational Basis of Ethics* (Cornell University Press, 1958).

reasons for action and the causes of action, and argued that morality should be understood as a theoretically significant, indeed fundamental, category of reasons.⁴⁴ Also following in this vein was a young John Rawls, who had positively reviewed Toulmin's book,⁴⁵ and would go on to theorize the significance of 'public' reasons in a theory of justice.⁴⁶ Thomas Nagel, a student of Rawls, would carry the Kantian reasons-based approach further in *The Possibility of Altruism*⁴⁷ and later writings.

Following Stuart Hampshire's call to return to Aristotle's practical perspective were generations of philosophers, primarily though not exclusively at Oxford, some of whom were also under the influence of Wittgenstein's later views, who gave different interpretations to Aristotle's model of practical reasoning and mostly implicit picture of the nature of reasons for action. These included Georg Henrik von Wright, pioneer of deontic logic,⁴⁸ and Elizabeth Anscombe, whose book *Intention*⁴⁹ reinvigorated philosophical questions about the nature of intentional action and its relation to reasons for action. Others at Oxford who would develop this general approach, in distinctive directions and on a variety of questions, included Philippa

⁴⁴ Baier was an Austrian who fled Europe after the Anschluss of 1938, received a DPhil from Oxford in 1952, and then spent most of his academic career in Australia and the United States. His work reflects this, as it straddles the somewhat different approaches taken by philosophers in Britain and North America in the new study of reasons, the latter of which were far more concerned with the concept of a reason as a cause, and so as an essential part of the explanation of action. See, e.g., Donald Davidson, "Actions, Reasons, and Causes," *The Journal of Philosophy* 60(23) (1963), 685-700. One aim of Raz's work in the 1990s was to argue against both the idea of a reason as necessarily a cause of action, as well as Baier's claim that 'moral' reasons constitute a semi-autonomous point of view in practical deliberations. See Raz, *Engaging Reason* (Oxford University Press, 1999), 247-272.

⁴⁵ *Philosophical Review* 60(4) (1951), 572-580.

⁴⁶ *Political Liberalism* (Columbia University Press, 1996).

⁴⁷ Princeton University Press, 1970. Other examples of this broad Kantian approach include David Gauthier, *Practical Reasoning* (Clarendon Press, 1963) and D.A.J. Richards, *A Theory of Reasons for Action* (Clarendon Press, 1971), both of which Raz cites as exemplifying "awareness of the unity of practical philosophy" (*Practical Reason and Norms*, p. 200 n1).

⁴⁸ See e.g. *Norm and Action* (Humanities Press, 1963). In the mid-1970s, Raz called Von Wright's *The Varieties of Goodness* (Humanities Press, 1963) "among the more important recent works in value theory" (*Practical Reason and Norms*, p. 200 n2).

⁴⁹ Blackwell, 1957.

Foot,⁵⁰ Derek Parfit,⁵¹ David Wiggins,⁵² Bernard Williams,⁵³ and John McDowell,⁵⁴ among others.

Raz arrived in Oxford as a D. Phil student in the mid-1960s when this reasons-oriented approach to moral problems was quickly coming to dominance in moral philosophy, particularly in Britain. By the time he wrote *Practical Reason and Norms*, first published in 1975, it was an entrenched approach to ethics in the analytic tradition, especially in Oxford. But there was work yet to be done, and over six decades, Raz, perhaps more than any other philosopher, attempted to show how fruitful this approach can be when applied to a range of problems related to the normative aspects of human experience, and most prominently to the law of a political community. He introduced many new distinctions among reasons into the philosophical lexicon, as well as the general idea that there can be orders of reasons, i.e., ‘ordinary’ first-order reasons that are facts about one’s situation that count in favor or against a given action, as well as second-order reasons about those reasons, i.e., reasons to act (or not to act) for a given first-order reason, or range of reasons. Among second-order reasons, Raz famously introduced the idea of an exclusionary reason, a reason to exclude certain reasons among those for which one might act. Such reasons are central to his explanations of a range of phenomena, including promises, decisions, duties, and practical authority, which in turn is a pillar of his theory of law.⁵⁵

⁵⁰ *Virtue and Vices and Other Essays in Moral Philosophy* (Clarendon Press, 1978).

⁵¹ *Reasons and Persons* (Clarendon Press, 1984).

⁵² “Deliberation and Practical Reason,” *Proceedings of the Aristotelian Society* 76(1) (1976), 29-52.

⁵³ *Moral Luck* (Cambridge University Press, 1981).

⁵⁴ “Virtue and Reason,” *The Monist* 62(3) (1979), 331-350.

⁵⁵ At the end of the 1960s, moral philosophers began exploring the general concept of higher-order practical states. Most influential among them was Harry Frankfurt in his now-classic essay “Freedom of the Will and the Concept of a Person” (*Journal of Philosophy* 68(1): 5-20) which introduces the idea of a second-order desire. Richard Jeffrey credits Frankfurt as “the first to have deployed what is essentially the notion of high-order preference” (“Preferences about Preferences”, *Journal of Philosophy* 71(13) (1974), 377). In *Practical Reason and Norms* (1975), where the concept of a second-order, exclusionary reason is first introduced, Raz thanks Frankfurt, “who did much to clear both my thoughts and my language of many obscurities” (p. 5). But see also Stephan Körner’s essay “Rational Choice” (*Proc. of the Arist. Soc. Supp. Vol.* 47 (1973), 1-17), which is one of the first

Perhaps an equally influential contribution Raz makes to the reasons-based approach is to clearly articulate the explanatory priority of the concept of a reason as a general principle of philosophical methodology. “The normativity of all that is normative consists in the way it is, or provides, or is otherwise related to reasons.”⁵⁶ The interpretation of this complex principle, both on its own terms and with respect to the extent to which Raz himself adheres to it in his writings, must be left for another occasion. The principle, however, makes more precise a certain methodological commitment that was only implicit in earlier views, thereby laying the foundation for future work which explicitly has regarded it, or a closely related variant, as a foundational guiding principle in the study of normativity.⁵⁷

As between the Kantian and Aristotelian approaches to the theory of reasons inaugurated by Toulmin and Hampshire, Raz incorporates elements of each. On the one hand, his theory has a broadly Kantian orientation in seeking to explain how reasons for action necessarily structure our practical experiences of deliberation and decision.⁵⁸ On the other, Raz embraces what he calls an “essentially Aristotelian conception” of action, according to which the capacity to act is the capacity to act for reasons.⁵⁹ He further characterizes his core notion of a reason for action at the

attempts to use the idea of higher-order practical attitudes to understand conflicts among them, an enduring preoccupation of Raz’s thought across many moral, legal, and political questions. Körner was the philosophy editor at Hutchinson Press who commissioned the first edition of *Practical Reason and Norms* (Hutchinson & Co Ltd, 1975).

⁵⁶ *Engaging Reason*, 67.

⁵⁷ See, e.g., T.M. Scanlon, *Being Realistic about Reasons* (Oxford University Press, 2014), and Mark Schroeder, *Reasons First*, above n23.

⁵⁸ Another important independent influence on Raz’s early intellectual development, which cannot be explored further here, was a broad, post-war revival in the study of Kant in the English-speaking world and beyond. By the mid-1960s, Stephan Körner writes of “A New Neo-Kantianism” (*Times Literary Supplement*, No. 3405 (June 1, 1967)) including writers such as R.P. Wolff, Jonathan Bennett, and Peter Strawson. Of particular note is Strawson, a close colleague of H.L.A. Hart, and whose lectures impressed Raz as a doctoral student. Raz recalls the excitement of reading and discussing Strawson’s influential monograph on Kant, *The Bounds of Sense*, while still in draft. See Juan Ruiz Manero, “Entrevista con Joseph Raz,” *Doxa* 9 (1991) (in Spanish), 323. This renewed interest in Kant, particularly at Oxford, would have been a natural continuation of Raz’s exposure to Kantian ideas in both the philosophy and law faculties at Hebrew University as an undergraduate (see also notes 81-82, below).

⁵⁹ *Engaging Reason*, 47 n3.

foundations of his moral, legal, and political philosophy, as distinctly “un-Kantian”⁶⁰ in requiring, as a general matter, only that a person perform an action for which a reason is a reason, without having to act for that reason, in order to satisfy and properly respond to that reason. This concept of a reason, one which requires of agents mere conformity rather than strict compliance, allows Raz to formulate one of his most influential ideas, the “normal justification thesis”,⁶¹ the core principle of his account of the legitimacy of practical authority, a topic to which we now turn.

3. POLITICAL PHILOSOPHY AND THE TURN TO AUTHORITY

The last fifty years of Anglophone political philosophy has been so dominated and shaped by discussions of John Rawls’ liberalism, as first set out in his *A Theory of Justice*,⁶² that the debates of the immediately preceding quarter century, from the end of the Second World War until the appearance of Rawls’ book in 1971, have even now been largely neglected.⁶³ This neglect was perhaps encouraged by observations during that period of the moribund state of the field. For example, it was famously declared in 1956 that “for the moment, anyway, political philosophy is dead.”⁶⁴ And yet, nearly immediately, a resurrection began. The catastrophic rise of the Nazis and other authoritarian regimes around the world prompted philosophers to re-examine the nature of authority and related social phenomena with new eyes, and with new questions.⁶⁵ This involved not only employing the emerging doctrines and methods of

⁶⁰ *Practical Reason and Norms*, rev. ed., 182.

⁶¹ See *The Morality of Freedom* (Clarendon Press, 1986), 53.

⁶² Harvard University Press, 1971.

⁶³ Cf. Philip Pettit’s discussion of the ‘long silence’ in Anglophone political philosophy up to mid-century, prior to the work of Rawls and a few others, in “Analytical Philosophy,” in Robert E. Goodin, Philip Pettit, and Thomas Pogge (eds), *A Companion to Contemporary Political Philosophy*, 2nd ed. (Blackwell, 2007).

⁶⁴ Peter Laslett, in the introduction to *Philosophy, Politics, and Society* (First Series) (Blackwell, 1956), vii.

⁶⁵ See Jonathan Glover, *Humanity: A Moral History of the Twentieth Century* (Yale University Press, 1999), Chapter 34. The breadth of philosophical interest in authority at this time is well represented by the diverse set of essays in

conceptual analysis, but also revisiting views of authority in the history of philosophy as both sources of inspiration and objects of critique. In contrast to the debates about authority earlier in the century, heavily influenced by Max Weber's sociological taxonomy of its legitimate forms,⁶⁶ post-war philosophical discussions focused on clarification of authority-related concepts with a view to a range of practical, indeed moral, problems. The calls from Hampshire and Toulmin to reorient moral philosophy around the perspective of the deliberating agent facing a complex field of reasons seems to also have been heard by those most interested in social and political questions. By the early 1960s, Oxford philosopher Isaiah Berlin called for a systematic re-examination of the relations between practical authority and morality:

When we ask, what is perhaps the most fundamental of all political questions – ‘Why should anyone obey anyone else?’, we ask not ‘Why do men obey’ – something that empirical psychology, anthropology and sociology might be able to answer; nor yet ‘Who obeys whom, when and where, and determined by what causes?’ which could perhaps be answered on the basis of evidence drawn from these and similar fields. When we ask why a man should obey, we are asking for the explanation of what is normative in such notions as authority, sovereignty, liberty, and the justification of their validity in political arguments. These are words in the name of which orders are issued, men are coerced, wars are fought, new societies are created and old ones destroyed – expressions which play as great a part as any in our lives to-day...There are sharp differences on what constitute valid reasons for actions in these fields[.]⁶⁷

Among these philosophical, ‘normative’ debates, the one perhaps best remembered emerged in the context of the radical politics and social movements of the 1960s, which prompted a turn by philosophers to various forms of anarchism, united by a general skepticism about the possibility of legitimate authority.⁶⁸ As noted earlier, Raz's service conception of authority is often

Carl J. Friedrich (ed), *Authority* (Harvard University Press, 1958). Friedrich was instrumental in reviving philosophical interest in the nature of practical authority; see below note 73 and accompanying text.

⁶⁶ Max Weber, *The Theory of Social and Economic Organization*, translated by A.M. Henderson and Talcott Parsons (Free Press, 1947).

⁶⁷ “Does Political Theory Still Exist?”, in Peter Laslett and W.G. Runciman, *Philosophy, Politics, and Society*, Second Series (Basil Blackwell, 1962), 7.

⁶⁸ For example, R.P. Wolff's *In Defense of Anarchism* (Harper and Row, 1970) generated an enormous number of critical replies throughout the 1970s. See also Richard Tuck, “Why is Authority such a Problem?” in Peter Laslett, WG Runciman and Quentin Skinner (eds), *Philosophy, Politics, and Society* (Fourth Series) (Basil Blackwell, 1972).

regarded as in part a solution to an anarchist puzzle about the alleged incompatibility between authority and individual autonomy, that is, how obedience to authority can be rational despite it involving a *prima facie* problematic ‘surrendering’ of an alleged subject’s judgment.⁶⁹

However, just prior to this anarchist turn, theorists addressed the issues raised by Berlin in a more positive spirit, by exploring the relationship between genuine reasons for action and instances of (presumed) legitimate authority, whether political or merely social. Benn and Peters sketched the outlines of that relationship by the late 1950s, in their well-received study of the principles underlying the modern democratic state:

Of course, there are plenty of good reasons for accepting authority in general...We are often in situations where it is more important to accept an umpire’s judgment than to insist on our own...Again, there are plenty of good reasons for accepting leadership. An army will usually do better even with bad generals, than with no generals at all. We accept authority because most social enterprises would be hopeless without it. Nevertheless, it is the enterprise that counts; the authority is conditional on the way it promotes or preserves it.⁷⁰

Oxford philosopher John Lucas had further argued that authorities, whether legitimate or not, nonetheless implied, by the very issuing of practical directives, that the addressees of those directives had reason to do as directed.⁷¹

The general issue of the scope and stringency of any ‘good reasons’ for accepting putative political authorities as legitimate was recognized as most acute in the context of the law. This problem was of course not new; it had been supposed for centuries that sorting out the precise nature of that connection would have profound consequences for any systematic explanation of the nature of law. For example, in the British tradition, defenders of the common law had long objected to accounts of authority according to which law, in the form of legislative

⁶⁹ See above, note 7.

⁷⁰ S.I. Benn and R.S. Peters, *Social Principles and the Democratic State* (George Allen & Unwin Ltd., 1959), 329.

⁷¹ J.R. Lucas, *Principles of Politics* (Clarendon Press, 1966), 16f. Raz cites Lucas’s claim as of the right sort for explaining the nature of legitimate authority in *The Authority of Law*, 11 n11.

enactment, could legitimately be made merely by fiat. They, along with many writers in the natural law tradition, argued that reasons independent of the authority, grounded in custom or objective morality, provided the bounds of legitimacy for any claimed lawmaking power.⁷²

Indeed, in the post-war revival in discussions of authority, it came to be thought that the legal positivist tradition had for too long given an objectionably perfunctory treatment of the nature of practical authority and its relation to both law and morality. Carl Friedrich of Harvard, the leading political theorist of his generation, led the call for positivists to fill this long-standing gap in their views. Friedrich argued the case in stark terms in 1963, a year before Raz would begin his doctoral studies at Oxford with H.L.A. Hart, who had recently reinvigorated the positivist tradition and yet also had said very little about the authority of law:

The rational aspect of the problem of authority has frequently been overlooked, particularly among positivists, and consequently positivism has entertained the view that it is possible to base the law upon an act of will alone. The results of this outlook have proved themselves to be thoroughly disastrous. The trend of thought in part goes back to Hobbes, in part to Rousseau, both of whom see the decision, the act of will of the sovereign, as the essential and basic legal act...The reason for this set of notions is that authority has been confused with legitimacy by these writers and their following.⁷³

Friedrich suggested, echoing Benn and Peters, that the authority of law was to be explained, not by the social fact that law had been posited, but rather by reference to a legitimate authority's ability to engage in "reasoned elaboration" in support of their directives:

Authority cannot be based upon the positive law, because this law itself needs authority. The authority of law is subject to considerable oscillation, as is the authority of all communications. Briefly stated, the authority of a communication, be it a command, a counsel, or a thought, rests upon the communicator's capacity for reasoned elaboration. All genuine authority is based upon such rationality of the utterances which are said to be authoritative.⁷⁴

⁷² See Gerald Postema, *Bentham and the Common Law Tradition*, 2nd ed. (Oxford University Press, 2019), 59ff.

⁷³ Carl J. Friedrich, *The Philosophy of Law in Historical Perspective* (University of Chicago Press, 1963), 201.

⁷⁴ *Ibid.*, 203.

The general problem of the relation between legitimate authority and genuine reasons for action, and the relative silence within the legal positivist tradition as to a solution, was thus expressed with unprecedented clarity by the mid-1960s, and by some of the leading political philosophers of the day.

Raz took up the challenge, and, to a greater extent than anyone in the positivist tradition had before, offered a systematic explanation of how putative practical authorities and their demands figure in the practical reasoning of those faced with the question of whether to obey them, and proposed a reasons-centered principle of legitimacy based on that explanation. Consistent with the general reasons-based approach to moral questions first suggested by Toulmin and Hampshire, Raz appealed to the everyday experience of being subject to authorities, eg, being the addressee of a practical directive such as an order, to argue for the existence of ‘exclusionary reasons’: a reason not to act for certain other, contrary reasons.⁷⁵ Such ‘second-order’ reasons also figured into an explanation of some conflicts of reasons, in which a person cannot act on all the reasons that apply to her under the circumstances. Raz’s principle of legitimate authority, the much-discussed ‘normal justification thesis’, followed the general tenor of the suggestions from Benn and Peters, as well as from Lucas and Friedrich, in greatly clarifying and refining the idea that authorities are justified when their dictates help us do better in conforming to the reasons we have anyway, independent of those dictates. Authorities do this by ensuring that their directives reflect those independent reasons.⁷⁶ Raz employs this account of authority to explain not only the authority that law has when legitimate, but to express a necessary truth about the nature of law, that it at least claims authority of this sort over its

⁷⁵ *Practical Reason and Norms*, 35-48.

⁷⁶ *Morality of Freedom* (Clarendon Press, 1986), 42-53.

subjects, whether or not it succeeds in achieving it.⁷⁷ I now turn to consider some of the historical context for his legal philosophy more specifically, a sub-discipline which, like the moral and political philosophy during the mid-twentieth century, was also undergoing rapid transformation and development.

4. LEGAL PHILOSOPHY AND THE TURN TO SYSTEM

Raz's legal philosophy has been so closely associated with Hart's, and for so long, that it may seem obviously mistaken to suggest otherwise. An orthodoxy seems to have arisen, relatively early in the development of Raz's ideas, that he "carried a torch for Hartian positivism" and was Hart's "true intellectual successor", having been his doctoral student (1964-1967) and eventually appointed as Professor of the Philosophy of Law (1985-2006) in which he assumed Hart's earlier, full-time leadership role of supervising students and facilitating research in Jurisprudence at Oxford.⁷⁸ Their close personal relationship, in which there was enormous mutual respect, may have also encouraged an inference of a close *philosophical* relationship between their ideas.

There are many reasons to doubt that Raz "adopted the foundations of Hart's positivism"⁷⁹ and simply built his own theory upon them.⁸⁰ I will mention three. First, Raz's substantive introduction to legal philosophy occurred years before becoming Hart's student, as a law and philosophy student at Hebrew University. There, he was subject to two distinct but

⁷⁷ See Raz, *The Authority of Law*, 2nd ed., ix.

⁷⁸ See Lacey, above note 12. While Ronald Dworkin succeeded Hart as Professor of Jurisprudence (1969-1998), from 1975 he spent one semester each year at New York University as Sommer Professor of Law and Philosophy, which provided less time to organize and lead the Jurisprudence activities in Oxford. See Stephen Guest, *Ronald Dworkin*, 3rd ed. (Stanford University Press, 2013), 12.

⁷⁹ Kristin Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon Fuller* (Bloomsbury, 2012), 147.

⁸⁰ Again see Toh, above note 11.

complementary influences. The philosophy department of the time had several professors of a broadly Kantian orientation, who often employed formal methods being developed by logicians at the time.⁸¹ And in the law school, Raz was exposed to Hans Kelsen's legal thought at several points and at an early stage of his intellectual development, and was impressed by it.⁸² The influence of Kelsen is evident in the earliest articulations of core commitments of his legal philosophy, especially in his first two books, *The Concept of Legal System* and *Practical Reason and Norms*. Kelsen's influence on Raz's legal philosophy and early philosophical orientation was likely reinforced by the fact that Hart himself was keenly interested in Kelsen's ideas during Raz's time at Oxford, having given lectures on his general theory of norms in the mid- and late-1960s. Second, once Raz came under Hart's supervision starting in 1964 as his doctoral student, it is doubtful that Hart's influence was of an ideological sort, in the sense of Hart attempting to convince Raz and his other students that his particular form of legal positivism was the correct one. The truth appears to be just the opposite. Hart was widely known to take a "fundamentally generous approach to supervision" and was "intellectually tolerant and non-directive."⁸³ In short, Hart permitted, indeed encouraged, his students to pursue their own ideas, subject to his

⁸¹ Raz once remarked that Professor Yehoshua Bar-Hillel in particular, "an old disciple and friend of Carnap, was the philosophy professor who most influenced me." See Manero (above n58, 322). It is also worth noting that Raz's first publication, as an undergraduate in the Israeli journal *Iyyun* (in Hebrew), was an extensive comparison of the philosophies of language of Wittgenstein and Cassirer, construing the former as engaged in a kind of transcendental project in the Kantian style.

⁸² Raz says of his time before arriving in Oxford, "I knew something of Kelsen, as two of his old disciples taught in the Faculty of Law. I was cocky enough to question, on one of my exams, the use of Kelsen's basic norm by one of my other law professors" (Manero, above n58, 322). The two 'disciples' to which Raz refers were Benjamin Akzin, who was Dean of the law faculty at the time, and Yitzhak Hans Klinghoffer, who preceded Akzin as Dean. See Benjamin Akzin, "Hans Kelsen - *In Memoriam*," *Israel Law Review* 8:3 (1973), 322-329. Raz was Klinghoffer's undergraduate teaching assistant during the 1963-64 academic year at Hebrew (papers from the Hebrew University archive, on file with the author).

⁸³ See Lacey (above n9), 160-161. Cf. Robert Summers' experience of Hart as a visiting student at Oxford in 1964-65: "We sometimes discussed his own views, and he invited criticism. Understanding was his aim, never discipleship" ("H.L.A. Hart's 'The Concept of Law': Estimations, Reflections, and a Personal Memorial", *Journal of Legal Education* 45(4) (1995), 596).

withering criticism and demands for clarification.⁸⁴ Finally, it should be kept in mind that when Raz arrived in Oxford in 1964, Hart's *Concept of Law*, published in 1961, had virtually just appeared and its significance was only beginning to be appreciated. While the book was recognized from the start as likely to transform the field of legal philosophy, its (and Hart's) legacy as carrying on the legal positivist tradition was just starting to take shape. Raz thus began forming his own views at a time before "Hartian positivism" was itself well-understood, and in particular before the partisan lines of the 'Hart-Dworkin debate' were drawn. This made it easier to look further afield in time and place, both to figures like Kelsen outside the British tradition, as well as to look further back into that tradition and the broader Anglophone corpus of jurisprudence of the nineteenth and early twentieth centuries, for inspiration and guidance. All of these factors provided the conditions for Raz to effect a "fundamental shift of perspective" away from Hart's legal positivism, as Raz himself characterized it.⁸⁵

Along with the dramatic developments in moral and political philosophy already discussed, legal philosophy in the 1960s was also in a phrenetic state of change. Hart's *Concept of Law* was of course beginning to cast its long shadow, in presenting a form of positivism of unprecedented philosophical sophistication. Kelsen's second, and greatly revised, edition of his already classic *Reine Rechtslehre* had appeared the year before Hart's book, in 1960; an English translation appeared the year Raz concluded his doctoral studies in 1967.⁸⁶ Traditional natural law theory was also enjoying a revival and reconsideration.⁸⁷ Despite this broad renaissance in

⁸⁴ Perhaps the best evidence of this is the diversity of work his students would go on to do as mature philosophers, including that of natural lawyer John Finnis, whom Hart urged to write a monograph developing views diametrically opposed to his own, Finnis's now-classic *Natural Law and Natural Rights* (Clarendon Press, 1980).

⁸⁵ *The Authority of Law*, 2nd ed., v.

⁸⁶ Hans Kelsen, *The Pure Theory of Law*, trans. Max Knight (University of California Press, 1967). In his doctoral thesis and *The Concept of a Legal System* (2nd ed., 240), Raz consistently referred to the French translation, published in 1962.

⁸⁷ One of the leading natural law texts in this period was still Alexander Passerin D'Entreves, *Natural Law: An Introduction to Legal Philosophy* (Hutchinson, 1951). D'Entreves developed several critical responses to Hart and

jurisprudence in the Anglophone world and beyond, at the end of the 1960s, Hart thought there was still much work to be done:

There is a good deal of unfinished business for analytical jurisprudence still to tackle, and this unfinished business includes a still much needed clarification of the meaning of the common assertion that laws belong to or constitute a system of laws.⁸⁸

In his doctoral thesis and first two books, Raz took up the task, and developed a complex account of the systemic nature of law in which questions about legal systems were prioritized over questions about the nature of individual laws: “the nature of law is explained primarily by explaining what are legal systems.”⁸⁹ Raz’s theory of the nature of law is notoriously complex, and expressed in terminology that evolved over a period of roughly forty years. Though engaged in ‘conceptual analysis’ in some sense,⁹⁰ he explicitly distances himself from the method of some philosophers in Oxford who searched for philosophical definitions of concepts based on the ordinary usage of words.⁹¹ He more often writes instead of “elucidating” the concept of law and legal system.⁹² As such, the theory does not admit of easy encapsulation in a pithy definition or slogan, as is the case with his positivist predecessors.⁹³ Nonetheless, as a point of reference, we may start with the following working formulation of Raz’s concept of law:

the British positivist tradition based on these earlier views. See “The Case for Natural Law Re-Examined,” *Natural Law Forum* (1956). I thank Jonathan Crowe and George Duke for discussion of the state of natural law theory at this time.

⁸⁸ H.L.A. Hart, “Kelsen’s Doctrine of the Unity of Law”, in *Essays in Jurisprudence and Philosophy* (Clarendon Press, 1983), 310, first published in 1968.

⁸⁹ *The Authority of Law*, 148. See also Eugene Bulygin and Carlos Alchourrón, *Normative Systems* (Springer, 1971), which also renewed interest in the structure of legal systems, and continues to influence legal philosophers in Europe, South America, and beyond.

⁹⁰ Cf. *Practical Reason and Norms*, 10 (“The present study is primarily an essay in conceptual analysis”). Raz’s general philosophical methodology is a complex matter that cannot be addressed here.

⁹¹ See e.g. *The Authority of Law*, 78-79.

⁹² See e.g. *The Concept of a Legal System*, 142, and *The Authority of Law*, 82-83 and 123-124. See further Jerome Hall, “Analytic Philosophy and Jurisprudence,” *Ethics* 77(1) (1966): 14-28, and A.W.B. Simpson, “The Analysis of Legal Concepts,” *Law Quarterly Review* 80 (1964): 535.

⁹³ Cf. Hart’s “Law is a union of primary and secondary rules”, and Austin’s “Law is the command of a sovereign backed by threat of sanction upon noncompliance”.

Law is a system of norms which claims to provide authoritative reasons for action to members of a political community, some norms of which constitute norm-applying institutions, which direct its officials to apply the sources of law, all of which are identifiable without resort to moral argument.⁹⁴

This formulation reflects several aspects of the originality of Raz's legal philosophy and some of its primary historical roots. It represents the first, or among the first,⁹⁵ attempts to bring the earlier discussed reasons-centered approach in ethics to bear on the core problems in legal philosophy.⁹⁶ More precisely, it represents the integration of a reasons-centered conception of legal authority into a theory which attempts to preserve a core tenet of legal positivism: law as a matter of social fact. As mentioned at the outset, the historical survey of this essay must necessarily be selective and incomplete. But I will conclude by focusing on two of the most formative influences on Raz's theory of law: the ideas of Hans Kelsen and Jeremy Bentham.

⁹⁴ The closest Raz comes to offering this sort of comprehensive characterization of law is in the Postscript to *The Concept of a Legal System* (2nd ed, Clarendon Press, 1980, 212): "Law is a system of reasons recognized and enforced by authoritative law-applying institutions...Legal reasons are such that their existence and content can be established on the basis of social facts alone, without recourse to moral argument."

⁹⁵ One possible exception is the curious case of Samuel I. Shuman, an American law professor who published a now-obscure book, *Legal Positivism: Its Scope and Limitations* (Wayne State University Press, 1963), one of the only books of the twentieth century devoted explicitly to assessing the theory of legal positivism. Shuman was a visitor at Harvard Law School in the academic year 1956-1957, what turned out to be one of the most memorable in the history of jurisprudence at Harvard, and perhaps of any law school in the United States. See Shuman, *Harvard's Jurisprudence Year*, Harvard Law School Bulletin, April 1957. During that year, H.L.A. Hart was also a visitor, and his encounters with Lon Fuller would crystalize into what is now known as the "Hart-Fuller debate" about the nature of law. In his book, Shuman claims his arguments were inspired by discussions with Hart, Fuller, and Julius Stone, then Professor of Jurisprudence at the University of Sydney, who was also a visiting fellow at Harvard that year. See *id.*, 1. Shuman's book was widely reviewed, often negatively, but in its latter chapters Shuman suggests that the leading forms of legal positivism (namely Hart's and Kelsen's) would profit greatly from integrating its doctrines with insights from the reasons-centered approach in ethics first suggested by Toulmin and Hampshire, as discussed above in Section 1. See esp. *id.*, 121-153. Shuman also thanked political theorist Carl Friedrich who read and commented on Shuman's book in draft (*id.*, 1); as discussed (in Section 2, above), Friedrich was one of those leading the call for positivists to develop a theory of authority which emphasizes its connection to the concept of a reason for action. A copy of Shuman's book was part of Hart's personal library (which was bequeathed to the library of Hebrew University upon Hart's death in 1992), though it is uncertain whether and when Raz may have become aware of it.

⁹⁶ Cf. Gerald Postema's remark that "There is, I believe, no more rationalistic philosopher of law in the second half of the twentieth century than Joseph Raz" (*Legal Philosophy in the Twentieth Century: The Common Law World* (Springer, 2011), 385-386).

We have already noted Raz's early exposure to Kelsen's voluminous and complex corpus as an undergraduate at Hebrew University, where (as elsewhere, particularly across Europe) his ideas were treated as orthodoxy, especially by academic lawyers. After meeting Kelsen in Berkeley around this time, Hart concluded that he was "the most stimulating writer on analytic jurisprudence of our day."⁹⁷ In the early 1980s, Raz, who had by then written most of the texts setting out his own theory of law, offered a far more extensive estimation of the importance of Kelsen's ideas, and their importance to his own thought:

I myself have not escaped the occasional feeling of despair in struggling to fathom the meaning of some of his theses. But I have always had the sense that he was a philosopher grappling with some of the more difficult problems of legal philosophy, problems the complexity of which he often understood better than anyone. All too often I have discovered that my sense of puzzlement at some of his doctrines was due to my failure to grasp the difficulties which Kelsen tackled and was striving to solve. His central doctrines have acquired for me a somewhat haunting character. Every time I return to them I discover new depths and new insights which had escaped me before.⁹⁸

This passage is all the more striking given how sparse is Raz's praise for other philosophers.⁹⁹ But it is easy to see the great extent to which Raz relies on Kelsen's ideas and arguments in shaping his general approach, and some of his more specific views, in explaining fundamental aspects of law. It was Kelsen, more than any other theorist before him, who argued that the concept of a legal system is explanatorily prior to that of an individual law. "It is impossible to grasp the nature of law if we limit our attention to the single isolated rule."¹⁰⁰ Raz agrees, but departs from Kelsen's views regarding the internal normative structure of legal systems, as well regarding the nature of norms. Whereas Kelsen tended to see the norms that made up legal systems as coercive sanctions, addressed to either ordinary citizens or officials like judges

⁹⁷ H.L.A. Hart, "Kelsen Visited," *UCLA Law Review* 10 (1963): 728.

⁹⁸ "The Purity of the Pure Theory," *Revue Internationale de Philosophie* 138 (1981), 441

⁹⁹ The only other philosophers explicitly praised for their insights (albeit far more briefly) in Raz's voluminous writings include Jeremy Bentham, H.L.A. Hart, Elizabeth Anscombe, and Anthony Kenny.

¹⁰⁰ Hans Kelsen, *General Theory of Law and State*, trans. Anders Wedberg (Harvard University Press, 1945), 3.

applying the other norms of the system, Raz follows Hart in dispensing with the element of sanction, which Raz considered a remnant of the older command model of law going back to Hobbes, and problematic on a number of grounds.¹⁰¹ Raz also regarded Kelsen as having developed the idea of a detached legal judgment, which Raz regarded as the key to overcoming a traditional objection to positivism posed by natural law theorists, that we have reason to think there is a necessary connection between law and morality since in both domains we use the (seemingly identical) language of rights, duties, ‘ought’, obligations, and so on. Kelsen suggested a way to understand legal judgments as non-reductive ‘detached’ statements about the content of a legal system.¹⁰² While most scholarly discussions of Raz’s reception of Kelsen have been critical of Raz’s interpretations,¹⁰³ the full extent of Kelsen’s influence on Raz’s legal philosophy would require a much longer, independent discussion which cannot be undertaken here, and indeed has yet to be undertaken.

While prioritizing the concept of legal system over that of individual laws, Raz nonetheless acknowledged that an account of the individuation of laws was essential to understanding the structure of, and more specifically the interrelations between, the laws of a given system. One formative influence on Raz’s thinking regarding the individuation of laws should be noted here. An important aspect of how Raz himself saw the state of legal philosophy, particularly as reflected in his writings up through the 1970s, was in part due to an historical accident.

¹⁰¹ *The Concept of a Legal System*, 109-114.

¹⁰² See *The Concept of a Legal System*, 48-49 and 137, and *The Authority of Law*, 10-11, 137-145, and 153-157.

¹⁰³ Some (albeit brief) discussions of Raz’s reception of Kelsen’s thought include Stanley L. Paulson, “Kelsen without Kant,” in *Öffentliche oder private Moral? Festschrift für Ernesto Garzón Valdès*, Werner Krawietz and Georg Henrik Von Wright (eds.) (Berlin, 1992), Uta Bindreiter, *Why Grundnorm? A Treatise on the Implications of Kelsen’s Doctrine* (Springer, 2002), and Paul Gragl, “In Defense of Kelsenian Monism: Countering Hart and Raz,” *Jurisprudence* 8(2) (2017): 287-318.

Jeremy Bentham (1748-1832) was a pivotal figure in both moral and legal philosophy of the late-eighteenth and early-nineteenth centuries, having developed the moral theory of utilitarianism, as well as trenchant criticisms of classical common law theory. He was a famously prolific writer, yet upon his death many of his manuscripts were unfinished, and at various stages of completion. The archive of these materials at University College London would not begin to be explored by scholars until over a century later. One such manuscript was discovered in 1939, which contained in it one of the most elaborate and sophisticated theories of law in the history of philosophy. It was first published in 1945,¹⁰⁴ but during Raz's time as a doctoral student at Oxford, Hart undertook to re-edit the text to better represent Bentham's original intentions. The revised manuscript appeared in 1970 as *Of Laws in General*, shortly before Raz would return to Oxford from Hebrew University as a fellow of Nuffield College.¹⁰⁵ Hart's assessment of the merits of this work is striking:

Its originality and power certainly make it the greatest of Bentham's contributions to analytical jurisprudence, and I think it is clear that, had it been published in his lifetime, it, rather than John Austin's later and obviously derivative work, would have dominated English jurisprudence, and that analytical jurisprudence, not only in England, would have advanced far more rapidly and branched out in more fertile ways than it has since Bentham's days.¹⁰⁶

Raz would have surely been impressed by his supervisor's estimation of Bentham's lost work.

In Raz's doctoral thesis, which was published virtually unchanged as *The Concept of Legal System*,¹⁰⁷ Raz treats Bentham, alongside Kelsen and others, as virtual contemporaries, bringing insights from each of them to bear on a range of problems related to the systemic character of law.

¹⁰⁴ Jeremy Bentham, *The Limits of Jurisprudence Defined*, ed. by Charles Everett (Columbia University Press, 1945)

¹⁰⁵ Jeremy Bentham, *Of Laws in General*, ed. by H.L.A. Hart (Athlone Press, 1970).

¹⁰⁶ H.L.A. Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Clarendon Press, 1982), 108, originally published in *Rechtstheorie* ii(1) (1971).

¹⁰⁷ Clarendon Press, 1970 (2nd ed. 1980).

One such problem is the individuation of laws. Any legal system consists of an apparent variety of discrete items: statutes, regulations, court decisions and executive orders, among many others. While ordinary citizens may harmlessly suppose that each of them represents separate laws, a trained lawyer will likely have a different, more complex view, particularly in cases in which, eg, a statute updates an existing legal regime by explicit reference to it, by changing certain of its legal definitions or their scope of application. In those cases, a lawyer would take the view, while perhaps a lay person would not, that the first statute is not itself an independent law, but rather a legislative act the purpose of which is to modify an existing one.

Raz thinks a fundamental insight from Bentham's lost treatise is that the philosopher's conception of a "complete law" may be closer to the lawyer's, and yet may depart substantially from it, depending on which principles of individuation are best supported by substantive philosophical argument. "The discovery that a law is not identical with a statute or a section in a statute, etc., that many statutes from all the branches of the law, including civil as well as penal law, contribute to the content of every law, was the most important turning-point in Bentham's thinking on legal philosophy."¹⁰⁸ Individuating laws is not an academic exercise, but a thoroughly practical one, the purpose of which is "to create simple small units to facilitate discourse about and reference to various part of the legal system, as well as to promote the analysis of law."¹⁰⁹ Discerning the proper principles of individuation is the province of the philosopher, rather than the lawyer or ordinary citizen.¹¹⁰ Raz spends considerable time comparing Kelsen's and Bentham's principles of individuation along a number of criteria that

¹⁰⁸ *The Concept of a Legal System*, 71.

¹⁰⁹ *Ibid.*, 2nd ed., 143.

¹¹⁰ *Ibid.*, 2nd ed., 223.

deserve a longer discussion that cannot be undertaken here, though he mostly sides with Bentham as having the better of the argument.¹¹¹

The more interesting point for present purposes relates to the consequences of that early discussion of individuation for the general shape of much of Raz's later philosophy. Despite Raz's later claim that moral philosophy does not have much to learn from jurisprudence,¹¹² Bentham's notion of a complete law, and the motivations behind it, appear refashioned in his work on the nature and structure of reasons. For just as in Bentham's legal philosophy, the same concerns about individuation recur in Raz's philosophical account of reasons and the entire realm of 'normativity'. Raz's concept of a complete reason parallels Bentham's notion of a complete law in a number of respects. Just as the legal philosopher's principles of individuation of laws may not track the way ordinary citizens, or even trained lawyers, talk about the law and its constituent parts, and yet may be useful in facilitating (by making intelligible) discourse about it, so too the principles of individuation of reasons for action (based in the law or otherwise) may not track the ways that people in everyday discourse individuate the reasons they or others have for action, and yet those principles may be useful in elucidating the structure of practical reason in a general, abstract sense, in a way that clarifies that everyday discourse. Raz introduces the notion of a *complete reason* as the basic unit of content of practical reason, and argues that it serves similar clarifying purposes for which Bentham put to use the notion of a complete law.¹¹³ The surprising consequence – perhaps less so in the case of law – is that most of our everyday discourse about our (and each other's) reasons for action is misleading, because often expressed

¹¹¹ Ibid., 2nd ed., 70-120.

¹¹² "Joseph Raz in Conversation," a 2001 interview by Peter Momtchiloff for Oxford University Press, originally (but no longer) at <http://www.oup.co.uk/academic/humanities/philosophy/viewpoint/raz/>, on file with the author.

¹¹³ See Raz, *Practical Reason and Norms*, rev. ed. (Oxford University Press, 1990), 22-25, where the notion of a complete reason is introduced. A more extensive application and discussion can be found in his review essay, "The Trouble with Particularism (Dancy's Version)," *Mind* 115 (2006), 99-120.

incompletely. What makes a reason complete is including in its explanation why doing as it recommends is actually good or worthwhile. This last element is essential to making the reason, as a reason, intelligible to us.¹¹⁴ Thus, “because it’s raining” is not, on Raz’s view, a complete reason for taking an umbrella, because it fails to make evident the good of taking the umbrella to protect one from the rain, eg, to maintain one’s good health, which facilitates projects that contribute to one’s well-being. The notion of a complete reason therefore pervades much of Raz’s work that explains the nature of reasons and reason-related phenomena like authority and law.

5. CONCLUSION

I have offered a very selective and incomplete account of the historical origins of Raz’s legal philosophy. A more comprehensive account would encompass a far greater number of historical sources, including the influence of deontic logic and the ‘logic of imperatives’ literature on Raz’s early use of logical formalization to express conceptual claims and arguments about law; the state of natural law theory up to the mid-1970s, which Raz explicitly takes as his critical target in *The Authority of Law*; as noted, the complex relationship to Kelsen’s ideas, which serve more often as sources of inspiration than occasions for agreement; and the influence of critical reactions to his own work, from legal positivists and others beginning in the 1980s, which led to further developments in his legal philosophy starting in the early 2000s, particularly in articulating more explicitly his methodological commitments and developing a complex theory of interpretation.

¹¹⁴ Raz, *Engaging Reason* (Oxford University Press, 1999), 219-220

Rather than an exhaustive account, I have suggested the broad outlines of three distinct currents in mid-twentieth century Anglophone moral, political, and legal philosophy, of which Raz's legal philosophy represents a novel and complex convergence. It is hoped that a greater understanding of the historical context and significance of Raz's legal thought will allow for a greater appreciation of its achievements, beyond the relatively narrow lens through which philosophers and lawyers have viewed it in the early decades of its reception.