



FROM THE EDITOR

Edition in Tribute to Joseph Raz

Joseph Raz is professor at Columbia University Law School and research faculty at Oxford University. His writings influence generations of scholars and his many students are now among the leading scholars in philosophy of law.

For this edition of the *Newsletter* we invited leading political and legal philosophers to analyze some aspect of Professor Raz's ideas. Commentators include Brian Bix, Jules Coleman, Timothy Endicott, Kenneth Himma, Liam Murphy, and Stephen Perry. The quality of these outstanding contributions speak for themselves in the pages that follow.

The idea for this edition originated with co-editor John Arthur, who spent time with Joseph Raz as a visiting fellow at Balliol College in 2004. I report with great sadness that Professor Arthur died this past January after a year-long struggle with lung cancer. A respected philosopher of law in his own right, Professor Arthur published several books in this field and political philosophy generally, including *Race, Racism, and the Burdens of History* (forthcoming, Cambridge University Press). Professor Arthur lived the life of the mind and enjoyed discussion of others' philosophical ideas as much as his own. He certainly would have been pleased with the outcome of this forum on the writings of Joseph Raz.

The previous edition featured Joel Feinberg. The next edition will be a symposium on the writings of legal and political philosopher A. John Simmons.

I also welcome Christopher Griffin as a new co-editor for the *APA Newsletter on Philosophy and Law*. Professor Griffin specializes in democratic theory and is associate professor of philosophy at Northern Arizona University.

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ARTICLES

Joseph Raz and Conceptual Analysis

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Introduction

This article will focus on the long tradition of theorizing about the nature of law and contemporary methodological investigations

relating to such theories. In particular, I will look at the role of conceptual analysis in legal theory, focusing on some recent work by Joseph Raz.¹

I. Overview

It was a commonplace in the history of jurisprudence to focus on the inquiry, what is law? It is worth taking a few moments to consider the question more closely.

First and foremost, there is a potential confusion (heightened in English more than in other major languages²), as "law," even if focused on matters jurisprudential (and not speaking of physical laws, the laws of games, social conventions, etc.), can refer to a number of different, if related, matters: most prominently, the (legal or not) status of a system of norms, the (legal or not) status of individual norms, and the determination of whether a particular norm is a member of a certain legal system (the last two are related questions, but occasionally distinct).

Coleman and Simchen (2003, 5) list eight distinct questions within "current debates in the philosophy of law":

- (1) What is law?
- (2) What is a law?
- (3) What is the law?
- (4) What is the nature of law?
- (5) What is the meaning of law?
- (6) What is the concept of law?
- (7) What is the meaning of the concept of law?
- (8) What is the meaning of "law"?

The question, what is law? may be strange enough in itself, though certainly no stranger than many of the questions central to other forms of philosophical inquiry (e.g., what is art? what is knowledge? and what is democracy?). What strikes the modern and philosophically minded readers as particularly odd about earlier discussions of the question, what is law? is that the theorists discussing the matter were willing to go on at some length without feeling any need to ground the question or characterize the nature of the inquiry. Modern writers in this area have, fortunately, become much more conscious of the underlying methodological issues (e.g., Dickson 2001, Bix 2005b, Oberdiek & Patterson 2007).

For example, a foundational figure in modern analytical legal philosophy (and the approach to legal theory known as "legal positivism") is John Austin (1790-1859). Austin made numerous claims about legal systems and legal rules (sometimes under the rubric of what is "law properly so called" and sometimes under the rubric of what did or did not fall within "the province of jurisprudence") (Austin 1995, Lecture V). His famous "command theory" of law held that laws were commands promulgated by a sovereign to its subjects (he also offered detailed analyses of what was meant by "sovereign" and "command") (Austin 1995, Lectures I & V). Nonetheless, it remains hard to determine whether he is purporting to make

empirical claims or conceptual ones, and he rarely gives us any basis for judging (e.g., Cotterrell 2003, 81-83).

There is a strangeness at the core of the enterprise: as here we have theorists seeking an abstract and universal theory of a changing social practice. Theories of the nature of law are, after all, not like theories in the physical sciences, most of which are potentially falsifiable by experimentation or observation.³ Nor are theories of the nature of law even like claims in the social sciences, where supporting or undermining data might be found in either social science experiments or the “natural experiments” within historical or recent observation. As shall be discussed, the connection between legal theory and real-world data is simultaneously complex, uncertain, and highly controversial.

To ask the question, what is law? is to assume that there is a sensible answer, which in turn seems to assume that there is some object or category “law” one can discuss and describe (as well as assuming—perhaps less controversially—that there might be interesting things to say about that category or its contents).

If one were a Platonist, one might think that law referred to some Platonic Idea, for which the law of different countries and different times were merely imperfect instantiations or approximations. However, Platonists are not thick on the ground, and they seem particularly rare in the area of theorizing about social practices and institutions. In fact, the jurisprudential theorist most closely associated with metaphysical realism, Michael Moore (e.g., Moore 2000), stops well short of Platonism about “law,” concluding instead that law might be some sort of functional kind (Moore 2000, 294-332). Moore’s conclusion is that it is unlikely that all legal systems share a common underlying structure (as is true, roughly speaking, with natural kinds), but that one might be able to point to certain human goods that all legal systems uniquely or distinctively increase (Moore 2000, 318-24).

Natural kinds theory has been a popular middle ground for those who might be uncomfortable with full-blown Platonism but who want to ground the objectivity of discourse in some area. Traditional natural kinds theory, associated with the work of Hilary Putnam (1975), Saul Kripke (1980), and Tyler Burge (1979), is a view about the relationship of conventional belief, meaning and reference. It was grounded on the idea that there are categories where the language users collectively connected a word to a category, but “the way the world is,” not the language users’ beliefs, determined the outlines of the category (the extension of the naming term). Such an approach seems most persuasive for terms like “gold” and “water,” where a physical structure defines the category. It seems less persuasive for a category like “law,” where the term refers to a social institution and set of practices. Nicos Stavropoulos (1996) has offered interesting arguments for why something like a natural kinds argument might work for understanding and applying certain legal concepts. However, there seems little reason to believe that a natural kinds approach might work for law itself.

(One could understand “natural kinds analysis” more broadly as simply referring to a process of meaning and reference where, for certain terms, the general public defers to the judgments of “experts.” This view of natural kinds has the advantage of requiring fewer metaphysical assumptions or implications. Even at this broader reading there is little reason to think that “law” is the sort of term of which people do—or should—defer to “experts” to determine meaning and reference (Coleman and Simchen 2003, 14-28)—though, of course, they often do defer to experts to determine what a *particular legal rule*, or set of rules, means.)

Many of the prominent modern legal philosophers (Hart, e.g., 1961; Raz, e.g., 1996; and Coleman 2003) have argued instead that theories of law do or should focus on *the concept* of law. Conceptual analysis has been central to analytical philosophy (e.g., Jackson 1998, Beany 2003, Fodor 2004), as philosophers explored the “essential” or “necessary and sufficient” attributes of various concepts.

An initial question that may come to mind is: Why study the concept of law?; Why not just study law itself? After all, as Raz himself states: “Broadly speaking, the explanation of a concept is the explanation of that which it is a concept of” (Raz 1996b, 255). Is not focusing on the concept a poor substitute for the real thing or (to change the metaphor) a smoky glass through which to view our real object of interest?

Raz states (2005, 325) that concepts lie between words and meanings on one hand, and the object(s) the concepts pick out on the other (and in this assertion he seems to be following conventional thinking). One can “have a concept” without having detailed knowledge of the thing it is a concept of (Raz 1996b, 256; Peacocke 1992), and one should not confuse what goes into a conventional explanation of a concept with what is entailed in a philosophical explanation of the concept (Raz 1996b, 256).

If one says that concepts lie between words and meanings on one hand, and the thing itself on the other, one might need to focus on the problems associated with the second term, the thing itself. If the boundaries of “law” are not set by “the way the world is” (as would be asserted by Platonists about “law,” and also some versions of a “natural kinds” approach to “law”), then what does establish those boundaries? The obvious answer appears to be the concept of law itself. (Of course, by speaking of the concept, we mean indirectly the population(s) as a whole who developed the concept in question.) It is the concepts that set the boundaries.

II. Raz’s Theory

In three recent works, Raz has set out in some detail his views on theories of law, and conceptual analysis in the theory of law (Raz 1996, 2005, 2007). For Raz, general theories of law make universal claims, attempting to elucidate what is necessarily true about the nature of law (Raz 1996, 2). Such theories are universal in the sense that they purport to apply to all law—across countries, and over time. They are simultaneously parochial in that a concept of law is parochial to the society that developed it (Raz 1996, 2-3). (The concept of law determines whether something is “law” or not; a society can have a concept of law but not have law, or it can have law, under some particular concept of law, but not have that concept [1996, 3-4]).

Our legal theories are not (pace Hart 1961) theories of *the concept* of law, but theories of “*our concept*” of law (Raz 1996, 5). Concepts are part of a society’s self-understanding and different societies will have different collections of concepts (Raz 1996, 5). Theorists cannot simply select the concept they prefer based, say, on meta-theoretical virtues like simplicity or elegance, or based on pragmatic considerations like the likely fruitfulness for future research (Raz 2005, 331; Raz 1994, 221; see also Raz 2007⁴). Raz writes:

concepts like that of law... [are] used widely by people to understand their own and other people’s situation, especially their social situation. ... These concepts are not merely tools of understanding they are part of what shapes the social world we are trying to understand. They, the concepts themselves, are what we are trying to understand, and not tools of explanation. (Raz 2007)

To this view, contrast that of another prominent defender of conceptual analysis in analytical legal philosophy, Jules Coleman, who recently affirmed that “there is no reason to suppose that conceptual analysis is not responsive to practical considerations” (Coleman 2003, 210 (footnote omitted); see also Bulygin 2007). And a theorist as prominent and sophisticated as Eugenio Bulygin asserted that we “will prefer the concept of law that best captures its [the law’s] essential features over all available alternatives.” As earlier indicated, such a view mistakes the way our concept picks out what counts as law (instead assuming that there is some pre-existing category, and we are only looking for which concept best matches that category).

According to Raz, concepts of law can and do change (and having a mistaken theory about law might affect the direction of such change) (Raz 1996, 7). Theories of law change in part because part of the function of the theory is to show the relationship between our concept of law and other concepts (and those concepts, too, are changing) (Raz 2007). Additionally, “people’s interests, and their sense of puzzlement change over time” (Raz 2007), and the theories that prevail at a given time will be those that respond to the interests and puzzles of the time. Of course, the development of or a change in concepts—whether for the concept of “molecule,” “inflation,” or “law”—does not change the underlying reality the concept describes⁵ (Raz 2007).

Raz’s own theory of law is grounded on the claim that law necessarily claims authoritative status (Raz 1996, 199). What follows from this is that law must be the sort of thing that *can be* authoritative. This is then combined with Raz’s “service conception of authority,” under which it is appropriate to submit to a purported authority, when “the subject would better conform to reason that apply to him anyway...if he intends to be guided by the authority’s directives than if he does not”⁶ (Raz 2006, 1014). The result, Raz argues, is that for law to be the type of thing that *can be authoritative*, citizens must be in a position to determine what the law requires without consulting the underlying reasons—including the underlying moral reasons—for the ultimate choice (Raz 1996, 201-04). This grounds Raz’s “Sources Thesis”: that “the existence and content of every law is fully determined by social sources” (Raz 1979, 46; see Raz 1996, 202-4).

Raz does not assert that these are the *only* essential truths about law. To the contrary, Raz’s view hints at a long list of essential characteristics. He writes: “While the law has many essential features we are not aware of all of them. They come to light as we find reason to highlight them, in response to some puzzle, to some bad theory, or to some intellectual preoccupation of the time”⁷ (Raz 1996, 6).

While much of Raz’s recent work could be seen as endorsing (or at least assuming) that our society has a single concept of law, in recent comments Raz has denied making that assumption or conclusion (Bix 2005a, 314). The possibility of multiple concepts of law within a society raises further questions: When that is the case, should the legal theorist attempt to select among the concepts, and, if so, on what grounds? Raz has, to date, offered no guidance on those matters.

However, he has argued that the difference between minimal and complete command of concepts can explain how people can share a concept but disagree about the correct account of that concept—or even what the rules are for the minimal command of the concept (Raz 2007; see also Raz 2005). And there can be changing explanations of (theories of) the same concept as the theorists respond to the differing interests and concerns of different periods (Raz 1998b, 256-58).

III. Connections with Legal Practice

Those who discuss theories of the nature of law face regular queries regarding the connection between legal theory and legal practice. In considering such connections, two different sorts of concerns are raised: (a) the practical concern—the extent to which legal theories do or should affect the outcome of actual legal disputes; and (b) the hermeneutic concern—the extent to which legal theories should track participants’ perceptions of the practice, and their way of talking about the practice. I will consider each type of concern, briefly, in turn.

A. The Practical Concern

In the earliest discussions (e.g., in Aristotle, Augustine, and Aquinas), inquiries about the nature of law were tied into broader moral or political questions: How should government officials act, and how should citizens act in the face of (good or evil) government action?

Modern work in analytical legal philosophy often purports to be doing something altogether different: not so much investigating the nature of law to help another larger or more action-guiding inquiry but, rather, seeking that knowledge about the nature of law for its own sake.

What is the connection between a/the/our concept of law and ongoing legal practice—that is, how actual cases are, or should be, decided? One of the most important insights of Raz’s work has been to emphasize that the two questions are largely, and perhaps entirely, separate (e.g., Raz 1998a, 4-5, 2007). One can logically separate the question, when is a norm or norm system “legal,” and the question of how the judges should decide this case before them?

It is quite common to come across contrary views about the relationship of theories of law and legal practice, including (or especially) from other prominent legal theorists. For example, Robert Alexy (2002), incorporating a version of Gustav Radbruch’s work on unjust legal norms (Radbruch 2006), argues that extremely unjust laws lose their character as laws and, therefore, are not to be applied in legal disputes. This is offered not merely as advice to judges about what their legal duties or moral duties are when faced with evil laws but, rather, a prescription that purports to derive from a legal theory. A second example is Ronald Dworkin, who, as part of his interpretive approach to law, argued that any decision in a particular legal case implies a view on the nature of law (“Jurisprudence is the general part of adjudication, silent prologue to any decision at law”⁸ Dworkin 1986, 90).

If one *defines* law in terms of which norms judges have an obligation to apply to disputes (cf. Dworkin 1983, 262), and when, then it is not surprising that one’s theory will have a corollary that there is a direct connection between one’s choice of theory of law and outcomes in particular cases.

On the other hand, if one starts from the view that an exploration of the nature of law (or the concept of law) is not intrinsically a subset of how individual cases are to be decided, then there is (as Raz and others have argued) no reason to believe that legal theories will have implications for particular cases.

It is important to note the inclination, quite strong among American legal academics—less so among theorists from continental Europe (and perhaps also less strong among American academics who find their home in philosophy departments rather than law schools)—to want always to know the normative (“bottom line”) consequence for any theory they consider. They find analytical legal philosophy, at least as it is most commonly practiced, deeply frustrating because of its refusal to offer prescriptions based on its theoretical claims.

The response one often finds when presenting an analytical legal philosophy paper is something along the lines of, “If your

theory has no consequences for what we do, for how we practice law, what good is it, and what is the point of doing such work?" In general, I have little sympathy for the normative fixation of American legal scholars. Of course, critique and prescription are extremely important, but there is ample room for knowledge for its own sake—in legal history and the history of ideas, for example; and in metaphysics—even if no immediate pragmatic use of that knowledge is forthcoming.

Yet, I think we can grant that there is room to question the nature of the "knowledge for its own sake" that conceptual analysis has on offer: Is conceptual analysis of law, in the end, merely a quasi-sociological investigation into one's community's linguistic intuitions? A number of the significant debates within analytical legal philosophy have been around claims about intuitive uses of terms: Do we call evil state rules "law," or do we withhold the title? Does it make sense to deny the title of "law" to international law? Can a normative system be called "legal" if it does not make a claim to correctness? (Alexy 2002)

What do theorists think they are doing constructing their theories of law (and what do their readers think they are getting from those theories)? The way our concepts divide up the world, and the way in which they connect with one another, have some intrinsic interest—as a matter of showing our way of viewing the world, and the biases it may bring, if nothing else. However, it is difficult to escape the conclusions (1) that most people who do or read legal theory think that something more substantial is at stake, and (2) that perhaps something more substantial *should* be at stake to justify all the attention and strong feeling that debates about the nature of law seem to raise.

B. The Hermeneutic Concern

A standard question in social theory is the extent to which theories of social practices can and should be grounded in, or at least incorporate, the participants' perceptions of or understandings of the practice. This is the on-going debate between "behavioralist" or "positivist" approaches to explaining human behavior on one hand, and "hermeneutic" or "*Verstehen*" approaches on the other.

H.L.A. Hart was widely lauded for introducing a hermeneutic approach to legal theory by building his theory of law around an "internal point of view." Raz accepts Hart's internal point of view, but Raz's theory raises hermeneutic concerns at a different level: that his theory requires a characterization of official behavior sharply at odds with how the officials themselves, and lawyer and lay observers, characterize the actions. This is most obviously the case when he argues that when judges invalidate legislation based on constitutional provisions that include moral terms, the judges are not declaring the already-true invalidity of those statutes, but are instead exercising delegated authority to invalidate statutes that were entirely valid until the judges acted (see Dworkin 2002, 1669-71). As Coleman puts it, "[a]ll parties to the debate, including Dworkin and the proponents of both inclusive and exclusive legal positivism, agree that there is, as it were, a 'surface grammar' of moral language in law that needs to be explained" (Coleman 2001, 125). While there are weaknesses and discrepancies in each and every characterization of what legal officials are doing in these cases, Raz's view almost certainly carries the greatest discrepancy between theory on one side and conventional understanding on the other. Another example is where Raz argues that when the legal validity of contracts potentially turns on moral evaluation, then it is never legally conclusive that a contract is valid until a court rules on the matter (Endicott 2003).

As Raz might (and sometimes does) point out, one should not always make too much of participant perception: competent observers characterize the activities of legal officials differently; sometimes, there are conventions of presentation, which most

(if not all) competent observers know to be misleading; and where clear analysis conflicts with participant perception or presentation, sometimes it is the latter that must give way.

What might give one pause here, though, is the willingness Raz shows elsewhere in saying that the facts of practice have shown certain older theories to be false (Raz 1998b, 258, discussing Austin and Kelsen). He seems less willing in those cases than in his own to consider alternative characterizations of the legal "facts" that seem to conflict with the theories, and it is not clear why.

IV. Challenges to Raz's Conceptual Analysis Approach to Legal Theory

It is important to understand that Raz's theory is not merely his own distinctive approach to legal theory but (whether so intended by its author or not) also an attempted charitable interpretation and defense of the analytical legal philosophy tradition, which includes H.L.A. Hart and many later theorists consciously working generally within the Hartian legal tradition.

Raz's approach is subject to three distinct challenges: (1) that conceptual analysis is an improper approach to philosophy; (2) that whatever its merits elsewhere in philosophy, it cannot (or should not) be applied to the study of law; and (3) that conceptual analysis in law needs to be supplemented by moral evaluation.

Elements of the first two challenges can be found in the works of Brian Leiter (1998, 2003a, 2003b); the third challenge has been advocated by Stephen Perry (1995, 1998, 2000).⁹ I will consider Perry's challenge first.

A. Conceptual Analysis Supplemented by Moral Evaluation

Perry has argued that there are multiple concepts of law. By way of example, he points to contrasts among prominent theories: Hart's view that law's purpose is to guide conduct (Hart 1961) versus Dworkin's view that law's purpose is to constrain state coercion (Dworkin 1986); or between Hart's theory based on an internal point of view and Holmes's view (Holmes 1897) based on an external, "bad man's" view (Perry 1995, 2000). Given that there are multiple concepts, how are we to choose among them? Perry's argument is that such choices are made on normative (moral or political) grounds, and that we can in fact find such arguments expressed or implicit in the works of legal theorists who otherwise disclaim recourse to moral or political evaluation (the disclaimers being based on the way that a prominent school of analytical legal philosophy, legal positivism, purports to exclude moral and political evaluation from its theories of law¹⁰).

Raz has (to my knowledge) offered no detailed response to Perry's challenge, but Jules Coleman has defended descriptive or legal positivist conceptual analysis from Perry's critique. His argument is that the debates between different conceptions of law have not, in fact, been grounded in different moral and political views, and, in any event, there are sufficient resources within conceptual analysis to choose among competing theories (Coleman 2003, 207-10; see also Marmor 2006).

B. Naturalism

What is the connection between claims about concepts, linguistic practices, and shared intuitions? If a theorist like Raz states that it is of the essence of law that the system claims authoritative status for its norms, and another commentator denies this, how does one judge between the contrary claims? A growing number of prominent writers in philosophy have argued that conceptual analysis is a dead end, offering only insufficiently grounded and frequently false claims about shared intuitions (e.g., Harman 1999, 139-40; Fodor 2004).

In legal philosophy, Brian Leiter (2003a, 47-49) has offered a similar critique, aimed at conceptual analysis within legal philosophy generally, and theories of the nature of law in particular. Leiter argues instead that jurisprudence should become “naturalistic.” Here, it is first important to clarify terminology: “naturalism” here is not to be confused with “natural law theory,” a quite different approach to law (though some commentators do use “naturalist” as an adjective to summarize the natural law approach to some subject). Leiter’s “naturalism” derives from a view of that name within modern philosophy, which holds, roughly, that “acceptable methods of justification and explanation are commensurable, in some sense, with those in science” (Audi 1995, 517).

The philosophical naturalism Leiter advocates has a strong home in epistemology, where the argument is that our ideas about what knowledge is and how we should reason should be grounded in empirical data about how people in fact reason (Kornblith 1994). In particular, Leiter relies strongly on W.V.O. Quine’s famous argument in “Two Dogmas of Empiricism” (Quine 1951), where Quine both questioned the analytic-synthetic distinction and challenged the idea that sentences could be confirmed at an individual level, separate from other and related propositions (a view sometimes described as “confirmation holism”) (see also Quine 1969).

Other recent critiques of conceptual analysis have suggested that one can accept some of Quine’s epistemological points without having to agree with some of his more controversial views about verificationism and skepticism about language (e.g., Williamson 2006).

As Leiter has pointed out (in the context of discussions of American legal realism), an analogy can be drawn from naturalist epistemology to a possible naturalist approach to legal and judicial reasoning (e.g., Leiter 2003b). The argument is that some of the legal realists could be understood as naturalists in the sense that they encouraged commentators to switch their focus from highly abstract ideas of how judges can and should reason, to an empirical understanding of what actually occurs in judicial decision-making.

One might wonder what a comparably “naturalistic” (empirical) approach to a theory of (the nature of) law would look like. To look to actual behavior would offer only the linguist’s conclusion of how the words “law” and “legal” are used. And as both supporters and opponents of conventional analytical legal philosophy have asserted, analytical legal theory purports to be more than a guide to linguistic usage.

(Ronald Dworkin famously argued that many of the analytical legal theories of our time should be understood as semantic theories, theories about the meaning of the word “law” (Dworkin 1986, 41-46). However, no major theorist I know of has accepted that as either an accurate or a charitable description of his or her theory.)

Of course, it remains open to Leiter (or others) to argue that, should there be no adequate naturalist approach to theories of the nature of law, that fact would not make a conceptual approach legitimate. Instead, the argument would likely go, theories about the nature of law should simply be abandoned.

Some critics of Leiter’s approach have turned the critique around, stating that while empirical investigation of adjudication and other legal processes would be highly valuable, it would not (and could not) supplant analytical legal philosophy; to the contrary, it would be grounded on or assume a conceptual analysis of the boundaries of law/legality (Coleman 2003, 213-16; see also Oberdiek and Patterson 2007).

C. Dworkin’s Interpretative Approach

The possibility that we should not be seeking general, universal, and conceptual theories of law has also been argued by Ronald Dworkin, whose work represents a third challenge to Raz’s conceptual analysis of law. Dworkin has argued that the proper approach to legal theory is constructive interpretation (because this is the proper approach to understanding all social practices¹¹), with the proper focus on interpretation being a single legal system, not all current, past, or possible legal systems (Dworkin 1986). While he does not argue at length against a universal theory of law, his comments indicate that it is only at the level of interpreting particular legal systems (or particular parts of individual legal systems) that the interpretations will yield anything substantial and interesting.

The critique or defense of Ronald Dworkin’s theory is something of an industry unto itself, and there is little point in entering that fray in any detail here. Raz’s own view, reflecting a theme from many commentators, is that Dworkin’s theory mistakes a theory of adjudication for a theory of law (Raz 1994, 186-87).

Conclusion

Most of the influential theories about the nature of law are conceptual theories, but these theories are coming increasingly under challenge. It is important to determine whether conceptual analysis is appropriate for legal philosophy (or for any area of philosophy); whether, even if appropriate, it is sufficient (or needs supplementation by moral evaluation); and whether, even if appropriate and sufficient, its objectives and achievements are substantial.

Endnotes

1. I am grateful for the comments and suggestions of those present when an earlier version of this paper was presented at Macalester College.
2. In many other languages, there are separate words for law in general and particular legal rules (e.g., “*Recht*” and “*Gesetz*” in German).
3. I realize here that there are numerous complications and nuances that would need to be added to that brash generalization, from references to paradigms to the examples of abstract claims in modern physics (e.g., relating to string theory or certain other claims about subatomic particles) that seem unlikely ever to be either falsified or supported given limitations in current experimental apparatuses.
4. Raz (2007) is a piece responding to Alexy (2007) and Bulygin (2007), who were in turn commenting on Raz (2005).
5. Raz offers (2005, 2007) that there may be some social relations (perhaps including marriage) for which having a concept or not affects the underlying reality, but he does not think that this applies to law.
6. Raz adds that excluded are “matters...such that with respect to them it is better to decide for oneself, unaided by authority” than to conform to reason (Raz 2006, 1014).
7. The quotation continues: “The study of jurisprudence is never-ending, for the list of the essential properties of law is indefinite. There is neither point in nor possibility of listing them all. We explore them not just because they are true but because they answer to a current concern” (Raz 1996, 6).
8. It is helpful to have a fuller quotation: “General theories of law...must be abstract because they aim to interpret the main point and structure of legal practice, not some particular part or department of it. But for all their abstraction, they are constructive interpretations: they try to show legal practice as a whole in its best light, to achieve equilibrium between legal practice as they find it and the best justification of that practice. So no firm line divides jurisprudence from adjudication or any other aspect of legal practice. Legal philosophers debate about the general part,

the interpretive foundation any legal argument must have. We may turn that coin over: Any practical legal argument, no matter how detailed and limited, assumes the kind of abstract foundation jurisprudence offers, and when rival foundations compete, a legal argument assumes one and rejects others. So any judge's opinion is itself a piece of legal philosophy, even when the philosophy is hidden and the visible argument is dominated by citation and lists of facts. Jurisprudence is the general part of adjudication, silent prologue to any decision at law" (Dworkin 1986: 90).

9. Other advocates of the second critique include Murphy (2001) and Alexy (2002, 22-23, 40).
10. It is worth noting that though Joseph Raz is strongly associated with legal positivism in general, and a sub-division, "exclusive legal positivism," in particular, he has made it clear that he does not affirm the universal claim often associated with legal positivism that "there is no necessary connection between law and morality." Raz, to the contrary, believes that there are a number of such connections (but none that contradict his Sources Thesis) (Raz 2003).
11. Dworkin also believes that constructive interpretation is the proper approach for understanding art

Bibliography

Alexy, Robert. *The Argument from Injustice*. Oxford: Oxford University Press, 2002.

———. "On Two Juxtapositions: Concept and Nature, Law and Philosophy. Some Comments on Joseph Raz's 'Can There Be a Theory of Law?'" In *Una Discusión Sobre Teoría del Derecho* (translated into Spanish). Madrid: Marcial Pons, 2007.

Audi, Robert (ed.). *The Cambridge Dictionary of Philosophy*. Cambridge: Cambridge University Press, 1995.

Austin, John. *The Province of Jurisprudence Determined*, edited by Wilfrid E. Rumble. Cambridge: Cambridge University Press, 1995 (first published in 1832).

Beaney, Michael. "Analysis." In *The Stanford Encyclopedia of Philosophy*, edited by Edward N. Zalta. 2003. <http://plato.stanford.edu/entries/analysis/>.

Bix, Brian. "Raz, Authority, and Conceptual Analysis." *American Journal of Jurisprudence* 50 (2005): 311-16 [cited as Bix 2005a].

———. "Raz on Necessity." *Law and Philosophy* 22 (2003): 537-59.

———. "Some Reflections on Methodology in Jurisprudence." In *Problemas contemporáneos de la filosofía del derecho*, edited by Enrique Cáceres, Imer B. Flores, Javier Saldaña, and Enrique Villanueva. 67-96. Mexico City: UNAM [cited as Bix 2005b].

———. "Robert Alexy, Radbruch's Formula, and the Nature of Legal Theory." *Rechtstheorie* 37 (2006), 1-11.

Bulygin, Eugenio. "Raz on Legal Theory." In *Una Discusión Sobre Teoría del Derecho* (translated into Spanish). Madrid: Marcial Pons, 2007.

Burge, Tyler. "Individualism and the Mental." *Midwest Studies in Philosophy* 4 (1979): 73-122.

Coleman, Jules. *The Practice of Principle*. Oxford: Oxford University Press, 2003.

Coleman, Jules and Ori Simchen. "Law." *Legal Theory* 9 (2003): 1-41.

Cotterrell, Roger. *The Politics of Jurisprudence*, 2nd ed. London: LexisNexis UK, 2003.

Dickson, Julie. *Evaluation and Legal Theory*. Oxford: Hart Publishing, 2001.

Dworkin, Ronald. *Law's Empire*. Cambridge, MA: Harvard University Press, 1986.

———. "A Reply by Ronald Dworkin." In *Ronald Dworkin and Contemporary Jurisprudence*, edited by Marshall Cohen. 247-300. Totowa, NJ: Rowman & Allanheld, 1983.

———. "Thirty Years On." *Harvard Law Review* 115 (2002): 1655-87.

Endicott, Timothy A.O. "Raz on Gaps—the Surprising Part." In *Rights, Culture, and the Law*, edited by Lukas H. Meyer, Stanley L. Paulson, and Thomas W. Pogge. 99-115. Oxford: Oxford University Press, 2003.

Fodor, Jerry. "Water's Water Everywhere." *London Review of Books* 26 (October 21, 2004).

Fodor, Jerry and Ernest LePore. *The Compositionality Papers*. Oxford: Clarendon Press, 2002.

Harman, Gilbert. *Reasoning, Meaning, and Mind*. Oxford: Oxford University Press, 1999.

Hart, H.L.A. *The Concept of Law*. Oxford: Clarendon Press, 1961 (rev. ed., 1994).

Holmes, Oliver Wendell, Jr. "The Path of the Law." *Harvard Law Review* 10 (1894): 57-78.

Komblith, Hilary. *Naturalizing Epistemology*, 2nd ed. Cambridge, MA: MIT Press, 1994.

Jackson, Frank. *From Metaphysics to Ethics: A Defense of Conceptual Analysis*. Oxford: Oxford University Press, 1998.

Kripke, Saul. *Naming and Necessity*. Cambridge, MA: Harvard University Press, 1980.

Leiter, Brian. "Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence." *American Journal of Jurisprudence* 48 (2003): 17-51. [cited as Leiter 2003a].

———. "Naturalism in Legal Philosophy." In *The Stanford Encyclopedia of Philosophy*, edited by Edward N. Zalta. 2003. <http://plato.stanford.edu/entries/lawphil-naturalism/> [cited as Leiter 2003b].

———. "Realism, Hard Positivism, and Conceptual Analysis." *Legal Theory* 4 (1998): 533-47.

Marmor, Andrei. "Legal Positivism: Still Descriptive and Morally Neutral." *Oxford Journal of Legal Studies* 26 (2006): 683-704.

Moore, Michael. *Educating Oneself in Public*. Oxford: Oxford University Press, 2000.

Murphy, Liam. "The Political Question of the Concept of Law." In *Hart's Postscript*, edited by Jules Coleman. 371-409. Oxford: Oxford University Press, 2001.

Oberdiek, John and Dennis Patterson. "Moral Evaluation and Conceptual Analysis in Jurisprudential Methodology." In *Current Legal Issues: Law and Philosophy*, edited by Ross Harrison. Oxford: Oxford University Press, 2007 (forthcoming).

Peacocke, Christopher. *A Study of Concepts*. Cambridge, MA: MIT Press, 1992.

Perry, Stephen R. "Hart's Methodological Positivism." *Legal Theory* 4 (1998): 427-69.

———. "Interpretation and Methodology in Legal Theory." In *Law and Interpretation*, edited by Andrei Marmor. 97-135. Oxford: Clarendon Press, 1995.

———. "Holmes versus Hart: The Bad Man in Legal Theory." In *The Path of the Law and Its Influence*, edited by Steven J. Burton. 158-96. Cambridge: Cambridge University Press, 2000.

Putnam, Hilary. "The Meaning of 'Meaning'." In *Mind, Language, and Reality, Philosophical Papers, volume 2*. 215-71. Cambridge: Cambridge University Press, 1975.

Quine, W.V.O. "Epistemology Naturalized." In *Ontological Relativity and Other Essays*. 69-90. New York: Columbia University Press, 1969.

———. "Two Dogmas of Empiricism." *Philosophical Review* 60 (1951): 20-43.

Radbruch, Gustav. "Statutory Lawlessness and Supra-Statutory Law (1946)." *Oxford Journal of Legal Studies* 26 (2006): 1-11 (Stanley L. Paulson, trans.).

Raz, Joseph. "About Morality and the Nature of Law." *American Journal of Jurisprudence* 48 (2003): 1-15.

———. *The Authority of Law*. Oxford: Clarendon Press, 1979.

———. "Can There Be a Theory of Law?" In *The Blackwell Guide to the Philosophy of Law and Legal Theory*, edited by Martin P. Golding and William A. Edmundson. 324-42. Oxford: Blackwell Publishing, 2005.

———. *Ethics in the Public Domain*. Oxford: Clarendon Press, 1994.

———. "On the Nature of Law." *Archiv für Rechts- und Sozialphilosophie* 82 (1996): 1-25.

———. "Postema on Law's Autonomy and Public Practical Reasons: A Critical Comment." *Legal Theory* 4 (1998): 1-20 [cited as Raz 1998a].

———. "The Problem of Authority: Revisiting the Service Conception." *Minnesota Law Review* 90 (2006): 1003-44.

———. "Theory and Concepts: Responding to Alexy and Bulygin."

In *Una Discusión Sobre Teoría del Derecho* (translated into Spanish). Madrid: Marcial Pons, 2007.

———. “Two Views of the Nature of the Theory of Law: A Partial Comparison.” *Legal Theory* 4 (1998): 249–82 [cited as Raz 1998b].

Stavropoulos, Nicos. *Objectivity in Law*. Oxford: Clarendon Press, 1996.

Williamson, Timothy. “Conceptual Truth.” *Proceedings of the Aristotelian Society, Supplementary Volume* 80 (2006).

Law and Political Morality*

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I **

The conventional story of contemporary jurisprudence begins with Hart’s formulation of legal positivism in *The Concept of Law*. Both the work and Hart himself have been hugely influential, especially so on three of his students—Ronald Dworkin, John Finnis, and Joseph Raz—each of whom has emerged as the leading figure within different jurisprudential traditions.

Dworkin is the most important and influential critic of Hart and of legal positivism more generally. In addition, he has developed an alternative jurisprudential outlook—interpretivism—that is as insightful, influential, and controversial as are his many objections to legal positivism. Finnis has replaced Fuller as the leading contemporary practitioner of traditional natural law theory, though in his version of it, Hart’s influence looms large; indeed, Finnis’ own views draw inspiration in roughly equal measures from Hart and Aquinas. Still, he is more faithful than Fuller to the natural law tradition, and far more so than is Dworkin who, at least in some circles, is likewise identified with the natural law tradition (which only goes to show that you can’t control what kind of mess others will make of your views). Though his first book contains many important criticisms of *The Concept of Law*, Raz has emerged as the uncontested heir both to Hart’s positivism and to the positivist mantle more broadly.¹

Ironically, perhaps, Dworkin is more responsible than anyone else for the wide currency of Hart’s views as well as his continued influence, which is primarily a function of his sustained, if highly critical, engagement with it. For the most part, Hart has not responded to Dworkin’s many objections to his views. Other positivists have taken up Dworkin’s challenges both to Hart and to positivism more generally. Dworkin’s best known early objection to legal positivism was that it lacks the resources to explain the role of moral principles in legal argument; some moral principles can be binding on officials, that is, impose legal duties and confer legal rights, and legal positivism has no way of explaining how this could be so.

Raz correctly noted that not every standard that is binding on a judge in a particular jurisdiction is, for that reason alone, part of the law of that jurisdiction. So even if moral principles are sometimes legally binding on officials it does not follow that they are binding because they are law. All positivists accept this initial response to Dworkin but disagree as to how the response should proceed from there. Many positivists follow Raz in holding that moral principles cannot be authoritative legal texts. Others adopt a line of argument that I have championed: namely, that moral principles can be authoritative legal standards—provided their status as law depends not on their content but on their source.

Theorists of the first sort are often referred to as “exclusive” legal positivists, whereas those adopting the second line of response are typically called “inclusive” legal positivists. Both

versions of positivism have a claim to Hart’s legacy. Some might think that the claim of inclusive legal positivism to Hart’s legacy is strengthened by the fact that Hart himself came to embrace it as the best understanding of his view; others remain steadfast in insisting that Hart did himself no service by keeping such unsavory company.²

This is an incomplete and insufficiently nuanced picture of the jurisprudential landscape. It ignores legal realism, which every now and again finds a serious advocate among philosophers of law while remaining a constant favorite among law professors—whose insight into matters jurisprudential is suspect at best. Brian Leiter is currently the most serious philosophical defender of the realist tradition.³ Nor can one escape the seemingly infinite variety of so-called critical theories, many of which claim a legal realist lineage. This group includes Critical Legal Studies, Critical Race Theory, and Feminist Jurisprudence, to name the most well-known critical theories. Incomplete as it may be, the basic picture remains intact. The central figures dotting the jurisprudential landscape include the two faces of positivism, various forms of natural law theory, and Dworkinian interpretivism, and this picture suffices for our purposes.

Historically, the most important divide among jurisprudential theories is that between legal positivism and natural law. So powerful is the pressure to characterize jurisprudential views in terms of how they relate to legal positivism and natural law that some clearly distinctive views—such as legal realism and Dworkinian interpretivism—are often (and wrongly) pigeonholed into one or the other. Legal realists and legal formalists as well are said to be essentially legal positivists, and much ink has been spilt arguing that Dworkin is either a natural lawyer or a legal positivist—when in fact he is neither.

All this would be harmless were it not terribly misleading, distracting and, worse, altogether unhelpful. The root of the problem is that the distinction that allegedly marks the difference between legal positivism and natural law—the so-called “separability thesis”—cannot discharge this burden. The most narrow formulation of the separability thesis is given by Hart himself: “It is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so” (CL 185–186). The problem is that there is likely no plausible interpretation of the separability thesis that positivists endorse and natural lawyers reject.

On one interpretation, the separability thesis asserts that there are no necessary moral constraints on the content of law. So understood, it allows that a rule or norm could be a legal rule even were it immoral: for example, even were it to require conduct prohibited by morality or prohibit conduct required by it. The problem is it is hard to imagine a plausible version of natural law theory that would reject this claim.

On the other hand, some have taken the claim that there are no necessary moral constraints on the content of law to imply that there are no necessary connections between the concepts of law and morality, or that there are no necessary moral properties of law. Natural lawyers are said to reject this claim because they believe that law has necessary moral properties, though they disagree among themselves as to what those properties are and whether the claim that law possesses them is a conceptual truth or an essential feature of law that is not part of our concept of it. In any case, the claim that natural lawyers apparently endorse is that nothing could be law—understood as a form of regulating human conduct—that did not possess morally desirable or valuable properties. In endorsing the separability thesis, legal positivists are presumed to be rejecting this claim. But do they, and, more importantly, must they?

The problem here is twofold. First, it may well be a necessary truth about law that it possesses moral properties, and why would positivism want to find itself in the unenviable position of rejecting an important truth about law? The answer may well be that positivism's internal logic commits it to rejecting this important truth. But there is, in fact, nothing in legal positivism that would entail its denying that law necessarily has morally desirable features or properties.

Here is a simple argument whose premises are perfectly compatible with legal positivism and whose conclusion is that law has necessary moral properties. It is a necessary property of law that it claims a power to enforce its demands through the collective use of force. It is also a necessary truth about law that it addresses those to whom it issues its demands as agents, that is, as individuals having the capacity to act for reasons. It is by reason, not force, that law regulates our affairs with one another. On the other hand, it claims a power to employ force to compel agents to act on the reasons it provides. Arguably, given that the law is coercive and claims that the reasons it provides are legitimate ones, the fact that it addresses those over whom it claims coercive authority as agents capable of acting for reasons is a morally attractive feature of law, and a necessary one at that.

Nothing really hangs on whether this is a compelling argument. Many positivists, including Raz and myself, take the law to have necessary moral properties. And there is no reason at all why a positivist would want to insist that this could not be so. Positivists insist that there are no necessary moral constraints on the content of law, not that the law has no necessary moral properties. These are two very different kinds of claims. The problem is that no positivist need reject the latter and no natural law need reject the former. Not to put too fine a point on it, but the separability thesis is simply not up to the task that most jurists have assigned to it.

This is not to say that there are no interesting distinctions among jurisprudential views regarding the relationship between law and morality. The first pertains to the semantics of law; the second to the normative methodology of jurisprudence.

In criticizing the Austinian view of law as commands backed by threats, Hart notes that the language of law is the language of "rights," "duties," "obligations," and so on. How are we to interpret these terms and the sentences in which they appear? The law asserts that no matter what else we have reason to do, we are required to do what the law directs us to do. The law tells us what we morally ought to do. Of course, the law can be wrong about what we ought to do, but it "sees itself" as telling us what we ought to do: what we have compelling moral reasons to do. This suggests that the law calls for a "moral semantics." The language of the law is the language of morality. When the law directs or commands us to act, we should interpret it to be imposing moral duties and conferring moral rights.⁴

There may be a problem in claiming that legal statements call for a moral semantics. If a legislature passes a law to the effect that we have a duty to do X, then (on the moral semantics view) we are to understand that to mean that the law claims that we have a moral duty to do X. If, however, the legislature were to have passed a law to the effect that we have a duty not to do X, then we should interpret that to mean that we have a moral duty not to do X. Apparently, the duty the law imposes (if it succeeds in imposing the duty it seeks to impose) is both moral and independent of its content. And that seems at odds with our normal understanding of the grounds of moral duties and rights, which generally depend on their content, not their source.⁵

Hart himself had a rather complex account of the semantics of legal judgments. First, he was a noncognitivist. In his view, normative judgments were not apt for truth. The semantics of law is the semantics of morality but both are non-cognitivist. Legal statements are endorsements about what everyone ought to do. This would make them exactly like moral statements, but Hart held that the notion of "obligation" and "right" in law were nevertheless different from those at work in ordinary moral discourse. He drew that distinction in terms of the distinctive kinds of pressures of compliance that were brought to bear in order to encourage compliance with legal duties on the one hand and moral duties on the other. Thus, the semantics of law and morality were the same—noncognitivist—but the notion of an obligation at work in the law was unique to it and not reducible to the ordinary moral one.

These two features of Hart's account can be detached from one another. One can follow Hart and be a noncognitivist about both law and morality while rejecting the view that legal obligations are distinctive (beyond the obvious sense that they are obligations under the law); or one might agree with Hart that there is something distinctive about legal obligations while advancing a cognitivist interpretation of legal propositions. And so on. Raz and I (and many others) reject both features of Hart's account.

Arguably, the problem for positivists is to make intelligible the idea that the language of law calls for a moral semantics consistent with the claim that law itself is determined entirely by social—that is, non-moral—facts—grounded ultimately in morality. By my lights, one of Raz's most important and least fully appreciated contributions to jurisprudence is the simple but brilliant explanation of how legal sentences (whose identity and content is fixed entirely by social facts) can be understood as making moral claims, by which I mean to say that they make truth-apt claims about what we are morally required or permitted to do.⁶

II.

Many jurisprudential views take the law to be a kind of "code." I characterize this jurisprudential outlook as "law-through-laws." On this account, a legal system is a set of rules that stand in a certain kind of distinctive relationship to one another: that relationship constitutes a code (of conduct). Understood in this way, the important project of jurisprudence is to identify the membership conditions that must be satisfied for a norm or a rule to be part of a legal code. Certainly, this is one of the tasks Hart sets for the concept of law and for the *Concept of Law*.

Many of Hart's positivist predecessors focused on the same issue though they divided it into two parts. First, they sought to identify a non-relational property that is unique to legal rules. For many of these positivists, legal rules are distinguishable from other rules by the fact that sanctions or threats of sanctions are part of their content. With this account (or an alternative) of the uniqueness of legal rules in hand, these positivists then asked how legal rules come together to form a legal system.

Famously, Hart argued that: (1) legal rules are of at least two irreducible kinds, (2) sanctions are not essential to either of them, (3) there is no property intrinsic to legal rules that distinguishes them from other kinds of rules, and (4) the relevant law-making property is a relational one—validity under a rule of recognition. Membership in a legal code is determined by a rule of recognition.⁷

Though the Dworkin of the "Model of Rules"⁸ approaches the law from the point of view of identifying criteria for membership in a legal code, he ultimately abandons this familiar understanding of the project of jurisprudence. Recall that in the MOR his principal objection to legal positivism is

that it has a bad theory of membership conditions. On his accounting, positivists—and, of course, he has Hart primarily in mind—hold that to be a law is to be a rule, and to be a legal rule is to be picked out as such by a rule of recognition. This criterion precludes moral principles from having the status of law since such principles are not rules and are not part of the law in virtue of the relevant relational property. They are law in virtue of their content as moral principles. Thus, on the natural reading of the MOR, Dworkin is following the standard approach to jurisprudence adopted by his predecessors. He has the same view about what question to ask but a different answer to it.

In “Hard Cases,”⁹ Dworkin characterizes his position as the “rights thesis,” by which I take him to mean that the law is best understood as a set of coercively enforceable political rights—rights that particular litigants have to a decision in their favor—and not as a set of rules comprising a code. Within the “rights thesis,” the project of jurisprudence is to determine the sources of law—those materials that ground the relevant political rights. In *Law’s Empire*, his view is that the law is best understood in terms of a set of principles that illuminates a practice in its best light.¹⁰ So-called legal rules are relevant insofar as they guide one to the right set of underlying principles. Neither the rights nor the principles theses collapse into versions of the law-as-laws approach. It is a good question to ask what the relationship between the principles and the rights theses is, an answer to which is best left for another occasion.¹¹

Though he rejects the rule of recognition as setting out the test for membership within a legal community, Raz is himself committed to the Sources Thesis, according to which a rule’s status as law depends on its social source and not, for example, its content. In this regard at least, Raz, like Hart before him, can be understood as approaching the law as a kind of code consisting largely of authoritative directives. In part, the project of jurisprudence is to determine membership condition, and the Sources Thesis is part of Raz’s theory of legal membership.¹²

III.

In addition to distinguishing between understanding law as a code and as a set of political rights or principles, we can also distinguish between so-called “normative” and “descriptive” (approaches to) jurisprudence. If we allow some of the proponents of normative jurisprudence the privilege of characterizing the descriptivists (an unsavory group that apparently includes Hart and me, but not Raz) we might wonder whether descriptivists satisfy even the most minimal standards of philosophical competence.

To see the distinction, we might begin, as some normativists would have us, with a concept like liberty or justice, rather than law. According to the normativists, so-called descriptivists believe that in order to be acceptable, an account of either liberty or justice must be neutral with regard to the normative question of whether liberty or justice is valuable, and if so, why? The normativists smirk at this level of philosophical naivety. On their view, liberty and justice are valuable and any account of what they are will be in part an account of what it is that makes them valuable, or explains why they have the value that they do.

The normativist then invites us to transpose these characterizations to the analysis of law. As the normativists see it, the descriptivist apparently believes that an analysis of law should be neutral with regard to its value, whereas the normativist believes that an account of law must be an explanation of how it is that law has the value that it does.

There are several problems with this formulation of the difference between the descriptivists and the normativists. The first mistake is to treat all descriptivists alike. Suppose we begin instead by characterizing normative jurisprudence, and then see

if we can distinguish descriptive jurisprudence by contrast. The key features of normative jurisprudence are these: (1) law is valuable; (2) to explain what law is is to explain in part what is valuable about it; and (3) in order to explain what is valuable about law, one has to provide an account of what law is that is itself embedded in a political theory—one that begins by assigning a value to law.

Arguably, this line of argument draws on an analogy with justice or liberty, and so we might formulate it even more generally as an account of normative or evaluative concepts or, for convenience, as a way of thinking about morality itself. In that case, the argument might proceed as follows: (1) morality is valuable; (2) to explain what morality is requires that we explain what is valuable about it; and (3) to explain what is valuable about morality we have to embed it in an appropriate, substantive, and thus controversial theory of value.

We can now distinguish among various forms of descriptivism according to where they disagree with the above line of argument. One kind of descriptivist gets off the train before it leaves the station, for he rejects the first premise of the argument. This descriptivist thinks that it is an open question whether law is valuable. He may believe that there are circumstances under which governance by law is desirable, valuable, or important, but he does not think that it is part of our understanding of what law is that it have a distinctive value of any sort. He certainly rejects the idea that we will return to below that law has a distinctive value intrinsic to it, what we might think of as the value of legality.

This kind of descriptivist may or may not believe that liberty or equality are valuable or that they have a distinctive value intrinsic to them. We can assume that he believes that justice is valuable. So this kind of descriptivist might be characterized as resisting the analogy between justice on the one hand and law on the other.

Let’s consider another sort of descriptivist, and I put myself in this category. I am not convinced that law is intrinsically valuable, but my descriptivism does not depend on whether or not law is valuable. I am prepared to allow that law is intrinsically valuable. The form of descriptivism I associate myself with takes the inference from the second premise to the conclusion to be invalid. For even if law is something of value it hardly follows that in order to analyze the concept of law one must appeal to substantive political morality. Indeed, part of the problem is trying to understand how an account of the concept of law or the nature of law is supposed to figure in an explanation of its value. Let’s take up both of these points, beginning with the invalidity of the inference from the value of law to a commitment to political theory of the concept.

The best way to see the problem is to have a look at the concept of morality, in part because all but the most skeptical among us allow that morality has value. As Kenneth Himma has pointed out to me, William Frankena analyzed the concept of morality as picking out a set of norms that restrict our behavior as it pertains to other human beings. (He might have been wrong to restrict the scope of morality to humans, but that is not our concern here.) The norms are categorical in the sense that they apply to a person regardless of how she feels or what she believes. They are universalizable in that they apply in the same way to everyone in relevantly similar circumstances; and they are supreme in the sense that the obligations or duties they impose win out when in conflict with other kinds of obligations or normative claims. We can understand Frankena to be offering an account of the application conditions of the term “moral,”—the conditions that must be satisfied for a norm to count as a moral rule. Nothing in this account of the concept of morality commits one to endorsing the content of any of

the rules that satisfy the application-conditions of the concept. Nevertheless, no one seriously denies that morality is valuable. It is just that an account of what morality is does not require substantive claims about its value.

But it is exactly at this point that our normativist enters his protest: If there are no normative propositions anywhere to be found in the analysis of our concept of morality, then how are we to establish that morality is something of value? How can we draw the normative inference without normative premises? And that shows that the Frankena style analysis is inadequate. Rather than undermining normativism in jurisprudence, this line of argument establishes that it is inescapable.

Not really. The key is to understand exactly how an account of the concept of law or an account of what law is figures in an explanation of the value of law. Suppose that we take law to be valuable, by which we mean that governance by law is desirable. What is the connection between this fact about law and the concept of law or the nature of law? The right answer to this question—according to the descriptivist—is this: an explanation of why law is desirable must make reference to at least some of law's essential features. If it is true that law is desirable but we cannot make sense of this by reference to some list of its essential features, then that list is incomplete or we have an inadequate account of what law is. The key point for a descriptivist is that to understand why law is desirable under certain circumstances, we are going to have to know much more than what we can read off the concept or infer from law's nature. We are going to have to know more about human beings—their interests, the constitutive elements of their welfare, what they want to accomplish jointly and severally, and so on.

The problem with the normativist, then, is that she gives us the impression that we should be able to read the value or desirability of law off the concept itself or infer it from the nature of law itself. Once we realize that this is very implausible, we see that properly understood descriptivism provides all the normative insight into law that is appropriate. Moreover, it is a feature of descriptivism, so understood, that it can provide an explanation of the value or desirability of law that is compatible with a broad range of political moralities, and not just with the one that is presumed to be embedded within the concept or nature of law on any account that says that in order to analyze the concept we must begin by attributing a value to law.

The claim that normative jurisprudence is distinguishable from descriptive jurisprudence because only the former can explain the value of law is simply mistaken. Law may not be intrinsically valuable, but if it is, descriptivism cannot only explain how that might be, it does so in a way that is methodologically sound: something that cannot be said for normative jurisprudence so understood.

How else might we make out the alleged distinction between descriptive and normative jurisprudence? Some have argued that a theory of law presupposes an account of the proper function of law. A theory of law is in part a theory of its proper function. The idea of a proper function is at least with regard to law a moral one; and so an account of law is an account of the morality of law.

This line of argument is not likely to succeed. First, though a legal system is a social artifact designed by agents to secure certain ends, some more valuable than others, it does not follow that law has a function in the philosophically interesting sense. That is, law may possess no functional property that would explain its existence, persistence, and the shape it takes in its mature form. Secondly, even if law had a function, it need not be a proper function in the moral sense.¹³

My view is that there is an important sense in which Raz adopts a normative jurisprudence, but we haven't hit upon

that sense yet. For when it comes to the value of law, I am pretty confident that Raz does not believe that law has an intrinsic political value. I am also confident that he believes that the philosopher of law takes a detached point of view, and so in providing an account of what law is he is not taking a posture of endorsement. Instead, he is looking to uncover "application-conditions" of the concept or looking to uncover necessary truths about law. In what sense, then, is Raz a normative jurisprudent? In what sense is he closer to Dworkin than to Hart?

IV.

If we want to understand the ways in which Raz approaches law similarly to the way Dworkin does, perhaps we should begin by having a look at the way Dworkin does. On my reading of him, Dworkin's view is that law is an answer to a particular question in political morality, and that question is: Under what conditions is the collective use of force (of all against some) justified?

The problem of justifying the collective use of force is clearly a problem in political philosophy. We can imagine a range of possible answers to it. One answer might be that the collective use of force is justified if and only if it is required by justice. Another answer is that collective force is justified if it is authorized by law. So one might argue that essentially law is an answer to the question of when the collective use of force is justified. This means, of course, that not everything that purports to be an answer to the question, when is collective force justifiably imposed, law. Law is a distinctive kind of answer to that question and so one cannot derive a full account of what law is from this feature of it. I will not have much else to say in this essay about what law is on the Dworkinian picture beyond emphasizing this feature of it: namely, that it is an answer to a problem in political morality.

The particular answer that law gives is that collective force is justified when it is warranted by past political acts. (Not every political act is relevant, of course, but determining which are and which are not are parts of the theory that I am going to set aside in this essay.) Imagine that a case comes before a court and the question is which litigant has a right to a decision in her favor: That right is coercively enforceable and is based on past political acts (that is, authoritative decisions of one sort or another). Now we are to understand law as an answer to the question: When is collective force justifiably imposed? This implies that in determining which litigant has the relevant legal right in her favor, the judge is committed to making that determination in a way that would make her decision as close to a justification for using the coercive authority of that state as she could possibly make it. This means that she must interpret the relevant political texts in their best light—as providing the best justification that they can for the exercise of that force. And it is easy to see that what does the work for Dworkin is, at the basic level, the set of principles that provide the best possible interpretation of the relevant political acts and, thus, which provide the best available justification for the use of force.

Other features of Dworkin's jurisprudence are intertwined with this most basic feature of it. First, for Dworkin, the important relationship in political morality is coercion: the power collectively to enforce directives by force. Secondly, political morality is a distinctive domain of normative discourse that concerns itself with a distinctive set of questions and which is distinguished from other normative domains by certain institutions. Thirdly (and relatedly), political institutions are regulated by norms specific to them, and they embody or exhibit values distinctive of them. As I read him, Dworkin's view is that the political virtue of law is integrity.¹⁴

As I noted, most commentators (including Dworkin) treat Raz as the leading contemporary legal positivist and as the heir to Hart's positivism (as well as his throne). The main reason for labeling Raz a positivist is his commitment to the Sources Thesis. The Sources Thesis is the claim that the identity and content of law depends on social facts alone. Social facts are facts about human behavior and attitude. If we focus only on the Sources Thesis then it is natural to place Raz within the tradition that includes Austin and Bentham then runs through Kelsen and Hart. And this seems just right. With regard to his "substantive jurisprudence" Raz is a positivist—if anyone is.

On the other hand, one would miss a lot about Raz's views were one focused only on the Sources Thesis in isolation from its relationship to the problem of determining the conditions of legitimate authority.

Though Raz does not approach the law from the point of view of it providing an answer to the question, when is the collective use of force justified? he does approach the law from the vantage point of a problem in political morality. Raz believes that the law is a special instance of practical authority and that one can only understand law by understanding the nature of practical authority. More importantly, Raz draws an important distinction between *de facto* and *de jure* practical authority. A *de facto* authority is someone who issues directives that others treat as binding on them. A legitimate authority is one that, in fact, imposes obligations, one whose directives actually bind others.

The relationship between authority and legitimate authority is complex. The notion of an authority is itself explained in terms of the concept of legitimate authority. One who claims to be an authority claims to be a legitimate authority and not merely a *de facto* authority. In that sense, the notion of legitimate authority is more basic in the order of explanation. On the other hand, the notion of a legitimate authority is conceptually "constrained" by the possibility conditions for being an authority. By that I mean that nothing can be a legitimate authority unless it is the sort of thing that can stand in an authority relationship to others. An authority must be capable of contriving, formulating, and issuing directives. These are features of persons. The failure to notice these conceptual constraints on the idea of a legitimate authority has led to a good deal of confusion and to some implausible objections to Raz's views on legitimate authority.¹⁵

According to Raz, law necessarily claims to be a legitimate authority. The claim may be false, but it cannot be necessarily false. It is a claim that could be true of law. Raz's view is that the claim can only be true if the identity and content of law can be fully determined by social facts alone. If the identity or content of law is determined in part by moral facts, then law's claim to authority is vitiated: thus, the Sources Thesis. Whatever else law is, it must be (that is, it is essential to law) that it be capable of being a legitimate authority. So the capacity to be a legitimate authority imposes a substantive constraint on what law is. And thus the nature of law—or essential features of it—derives from a constraint of political morality: that is, the conditions of legitimate authority. This is the sense in which Raz is a normativist, and it is also one of the important and interesting ways in which his approach to jurisprudence is much closer to Dworkin's than it is to Hart's.

V

Claims of authority take the following form: X has (claims, exercises) authority over Y with regard to domain of activity Z. We can distinguish a Razian from a Hobbesian conception of authority. Hobbesian authority is the rightful power to issue directives. Those directives, in turn, can be justifiably enforced. Hobbesian authorities do not necessarily claim a power to

alter the normative status of agents with regard to the actions that are available to them, only a power to issue enforceable directives. This is not to say that the Sovereign does not change what moral reasons for acting those he governs have. If they have contracted with one another to create a Sovereign, then they may have under the contract moral duties to obey the Sovereign's directives; and in that sense, by issuing directives the Sovereign alters what they have moral reason to do. It is just not a part of the Hobbesian conception of authority that the authority claims the power to alter the moral reasons for acting his subjects have.

In contrast, according to the Razian account, an authority claims a power to create moral reasons for acting. And it is because the reasons for acting he creates are moral ones that the exercise of coercion to enforce them is justified.

Legal rules are authoritative directives. Authoritative directives have a certain structure. Authoritative directives are second order exclusionary reasons and first order reasons for acting. In saying that they are exclusionary reasons, Raz means that they preclude the agent from considering some set of first order reasons that would otherwise apply to him. In saying that they are first order reasons for acting, Raz means that they are to figure in an agent's deliberations about what the balance of first order reasons requires him to do—that is, the balance to be struck between the authoritative directive and the remaining first order reasons that apply to him that are not excluded by the authoritative directive.

This way of understanding the concept of an authoritative directive does not rest on empirical claims about how such directives actually figure in this or that person's deliberations. Instead, it purports to express something important about the nature of rational deliberation. What is the connection between authority, rational deliberation, and reason? Why might the very idea of rational deliberation entail an authoritative directive excluding at least some first-order reasons for acting that would otherwise apply?

One answer is that an authoritative directive is itself justified by those very reasons that it excludes. Someone issuing such a directive claims, in effect, to have balanced those reasons and determined what the balance of reasons requires. When someone claiming to be a legitimate authority issues such a directive, we must interpret her as asserting that she has balanced the reasons properly and determined accurately what reason demands. Thus, if it is rational to accept a directive as authoritative, then it is rational to exclude the reasons on which the directive is based. And those reasons—the dependent reasons—are at least some of the first order reasons that the agent would normally balance herself. To rationally accept an authority is for it to be rational to displace aspects of one's own practical reasoning with that of the authority.

Raz calls the reasons that justify an authoritative directive "dependent reasons," and he dubs the theory of legitimate authority the "service conception." Authoritative directives exclude the dependent reasons that justify them, and the claim of legitimate authority is true only if an agent will do better acting on the authoritative balancing of the reasons that apply to him than he would by acting on his own assessment of them.

Those who accept this view of legitimate authority and of the role authority plays in our practical reasoning believe that it has important implications for the law. As a general matter, if an individual must appeal to the dependent reasons that apply in order to determine either the identity of an authoritative directive or its content, then in doing so she vitiates the claim to authority that the directive makes. That is because the claim to authority is a claim to exclude such reasons in one's deliberations. And this means that the content and identity of

law must be determined by factors other than the moral or dependent reasons that would justify it.

The law necessarily claims to be a legitimate authority. The Razian view is that this claim may be false but it is not incoherent and could not therefore be false necessarily. Thus, law must be the sort of thing the claim could be true of (here is where the nature of law answers to an issue in political morality). Given the above argument, this means that the identity and content of legal directives has to be ascertainable without appealing to the moral principles that justify the directives. And it is this argument that gives rise to the Sources Thesis—the claim that the identity and content of law must be determined by social facts alone.

The emphasis on the authority relationship means that law implicates reasons for acting in two distinct ways: internal reason and external reason. Quite apart from authority, law will invariably implicate internal reasons for acting. For example, if we think of law as a coordinated activity or as involving planned or rationally structured activity, then it must conform to the norms governing planning, coordination, and rational structuring of collective action and decision. These are norms internal to legal activity—norms of consistency and coherent rational collective action.

The more important claim is that the authority relationship means that law engages reasons that are otherwise external to it. Whether or not a community has law, individuals are bound by the reasons that apply to them. The law's claim to authority just is a claim that individuals will do better acting on the balance of those reasons by acting on the reason the law provides than they will do by acting on their own assessment of what those reasons require. Legal reasons in this sense are in the mix with moral reasons—indeed, legal reasons claim often to displace such reasons. We might think of the law as being governed by or engaging external moral reasons and internal reasons of “integrity.”¹⁶

The claim that law requires a moral semantics is likewise connected to this train of thought. The law engages our moral reasons for acting that it claims often to displace. So the best way to understand what the law is saying is to understand it as giving moral reasons for acting. So if we are to understand the claims the law is making about what we ought to do, then this is how we ought to understand the law.

Relatedly, it is easy to see a connection between the centrality of the authority relationship for Raz and his liberal perfectionism. According to perfectionism the domain of the state's legitimate authority is determined by what matters to persons—what is valuable to them. What is valuable to them gives them reasons for acting. The law justifiably enters this domain and its claim to legitimate authority is in a way just the claim that you will better serve the reasons that apply to you and which you ought as a person to value. This is of a piece with the perfectionist outlook and again stands in contrast to the familiar liberal picture that both Hart and Dworkin, among others, embrace.

We may put the point in a rough and crude but nevertheless illuminating way, I think. The perfectionist is drawn to the authority relationship as fundamental to law in part because it engages individuals and the reasons that apply to them; and the law is properly concerned with what matters to agents. The traditional liberal (and in this case I have in mind Dworkin and the Hart of *Law, Liberty and Morality*) is drawn to the coercion relationship because the domain of law is restricted to the justified interferences with individual liberty.

I am not sure whether it is the perfectionist/liberal divide or the authority/coercion divide that is of fundamental importance, but it is also important to note that Raz and Dworkin take

somewhat different postures towards the political domain and to the set of institutions that are distinctive of the political sphere. As I read him, Raz does not deny that the political domain is in some sense distinctive. Still, the political domain engages human agents through the authority relationship and so it is best understood in terms of the role it plays in the lives of agents—that is, in affecting their ability to act on the reasons that apply to them. This seems to me the force of understanding authority in terms of “service.” It is all about persons and reasons. The state simply (but not uncomplicatedly) mediates between the two.

I take it that Raz is not committed to understanding political institutions as exhibiting distinctive political virtues that are in a sense intrinsic to them. And so he does not see it as a burden of his account to identify a distinctive political value (beyond service) intrinsic to law. After all, the value of serving the interests of agents in acting on the reasons that apply to them is not distinctive of law; indeed, it is not distinctive of authoritative institutions more generally.

In contrast, one of the distinctive and important features of law for Dworkin is that in answering the question, what is the use of collective force justified it does so by expressing or embodying a political value that is distinctive of it as an institution? and that is the value of integrity. If we understand jurisprudence as an account of law and of cognate concepts or properties like legality, then we can understand Dworkin as holding that an account of law is in the end an account of the value of *legality*. And that concept of legality is to be spelled out in terms of integrity.

VI.

To this point I have argued that from an important methodological point of view Raz has more in common with Dworkin than he has with Hart. To be sure, Raz does share with Hart the “law-as-laws” approach to jurisprudence with its emphasis on membership conditions and authoritative acts. In contrast, as I read him, Dworkin does not identify law with the idea of a code.

On the other hand, both Raz and Dworkin approach law from the point of view of a problem in political morality: the nature of legitimate authority in Raz's case, and the justification of collective force in Dworkin's. Raz turns out to be a positivist in my view because the answer he gives to the problem of political morality is the Sources Thesis. His positivism has a normative foundation. And this again distinguishes him from Hart. And it places him squarely with Dworkin in the normativist camp—given the common parlance—which, left to my own devices, I would eschew entirely.

Unlike Hart, both Raz and Dworkin take the law to have a moral semantics: the claims the law makes are best interpreted as moral assertions—as imposing moral duties, conferring moral rights, privileges, and powers. The problem is to explain how this is possible. There is no problem for Dworkin. After all, law offers an answer to what justifies the use of collective force, and so in each case that the law speaks we must understand what it is saying as providing reasons that it takes to be adequate to answering that question. Any answer to that question will take moral claims (or claims of political morality more broadly) as among its premises. The content of the law, for Dworkin (and others), is fixed by some complex function of interpretation in which a set of moral principles is applied to social facts.

The problem of explaining how it is that the law can make moral claims and purport to impose moral duties arises for the positivist like Raz, not for the interpretivist like Dworkin. The theory of authority entails the Sources Thesis. The Sources Thesis entails that the identity and the content of the law must

be determined by social facts alone. The question is, how do we square the claim that the identity and content of law must be fixed by social facts with law's requiring a moral semantics?

The answer is that we are to understand the law as "a point of view." That is, law is a perspective on the demands of morality. Legal judgments are statements about what morality requires from a particular point of view—namely, the point of view of the law. One aim of jurisprudence, then, is to characterize the notion of a point of view and, in particular, how to understand the idea of the law's point of view—that is, what it is to understand the law as a point of view. And the value of jurisprudential theory, then, is the light it sheds on the importance of such a point of view in our practical and social life, and in the contribution it makes to our self-understanding.

Two final points: the first is one of my favorites. Given Raz's views, the claim to legitimate authority entails that one cannot look behind authoritative directives or particular legal rules in order to determine the identity or content of those directives. Doing so would vitiate the claim to authority. Thus, the authority relationship creates a nearly impenetrable barrier between law and the dependent reasons on which the law is grounded. To accept the law as authoritative is in effect to shut oneself off from assessing or confronting the balance of those reasons.

In contrast, for Dworkin, particular legal acts or authoritative directives must be transparent (or at least translucent) to the set of principles that provide the best justification of them. That is because the law is, in effect, a brief on behalf of the use of collective force; and to know the law is to know what principles figure prominently in that brief. So from the same methodological point of departure we get two completely different accounts of the relationship of law to its justifying grounds.

The point with which I want to close is much more speculative and I mention it primarily to encourage discussion of it. It is also an ironic point that requires a little bit of table-setting.

In another paper, Ori Simchen and I drew a distinction among three different kinds of jurisprudential questions. These are:

- I. What is law (understood as a system of governance)?
- II. What is it to be a law?
- III. What is the law around here (indexed to a particular legal system)?

And we made much of the importance of these distinctions and the relationships among the different questions.

If we understand (as Dworkin does) law to be an answer to the first question, we should be struck by the fact that it almost never seems to give a persuasive answer to it. Here's what I mean. Take a different possible answer to the first question: collective force is justified if and only if it is required by justice. I don't mean to suggest that this answer will always be correct, but at least it seems to be in the right ballpark. If it weren't a good answer, we would have to explain why that would be so for; intuitively, the fact that justice requires that collective force be employed provides strong support for doing so. No one would be surprised were this one's opening gambit in providing an answer to the question.

In contrast, some might find the answer "the collective use of force is justified whenever the law says so," more puzzling for a number of reasons.

It strikes me as odd that it is in the nature of law to offer an answer that is almost always going to be inadequate to the task at hand. The law is an answer to the question, what justifies collective force? But the answer it gives, constrained by history, accident, and political pressures, is almost always going to fall

short. In fact, it is hard to imagine that the answer law given under any but the most ideal circumstances is going to be unpersuasive. All of these factors contribute to the answer the law gives and, at most, the best we can expect law to do is make a pretty good case for the use of collective force every now and again. I am having difficulty imagining being drawn to a theory of the nature of law that sees it as failing as a matter of course at its essential task. This is not a criticism, just an observation.

To be sure, Raz is not asking Dworkin's question, but the irony is that he has a more persuasive answer to a slightly different version of that question than Dworkin does—at least by my lights. To see this, let's shift attention from what law is to what the law around here is. Now ask Dworkin's question: When is collective force justified? Here is Raz's answer: The law around here is best understood as an answer to that question, and invariably a plausible one—even when it is mistaken. After all, the law is a perspective on what morality requires in various domains of activity. Because the law just is such a perspective on the demands of morality, it is plausible to understand the law (around here) as an answer to Dworkin's question. And this just is the difference between Raz and Dworkin on this point. In Dworkin's view, law is not a perspective on demands of morality. Rather, it is a distinctive kind of putative justification of the coercive authority of the state—one that relies especially on past political acts. The fact that on his view law is a perspective on the demands of morality provides Raz with a better—or more coherent—answer to Dworkin's question than Dworkin himself has on offer.

VII

I have argued for several distinct but related points. First, I have tried to shed some doubt on the value of the traditional distinctions among jurisprudential views, while taking a few shots at the conventional understandings of where everyone fits on the jurisprudential landscape. In particular, I have raised some doubts about thinking of Raz as the natural heir to the Hartian legacy.

I have introduced several distinctions that are more illuminating than the ones philosophers of law have typically focused on. In the course of the argument, I have suggested that the most important distinctions are methodological ones, and from that perspective Raz has more in common with Dworkin than with Hart. Most of the essay was devoted to making out this claim and then distinguishing Raz from Dworkin given their very similar methodological starting points.

I hope that in doing so I have provided a fresh look at Raz's work while highlighting some of the most important and compelling contributions he has made to jurisprudence. Despite our substantive disagreements—the least important of which is the one that other commentators have most closely focused on, namely, the dispute between inclusive and exclusive legal positivism—no contemporary legal philosopher has had greater influence on my own thinking. Along with Dworkin, Raz is the true giant of our field. I hope I have gone part of the way to explaining why that is so.

Endnotes

- * This essay is drawn from several sections of the 2006 H.L.A. Hart Lecture, "Rethinking Jurisprudence," to appear in the *Oxford Journal of Legal Studies* (forthcoming).
- ** I want to thank Scott Shapiro, Ben Zipursky, and especially Kenneth Himma for extremely helpful comments on this essay in earlier stages of its development.
1. Joseph Raz. *The Concept of a Legal System: An Introduction to the Theory of Legal System*, 2nd ed. (Oxford: Clarendon Press, 1980).
2. In the Postscript to *The Concept of Law*, Hart appears conflicted. On page 254, he suggests that inclusive legal

positivism is the correct view—provided that moral objectivism is true. Hart himself was a noncognitivist. This might lead one to think that he did not really embrace inclusive legal positivism; yet on page 250, he unambiguously and unconditionally embraces inclusive legal positivism.

3. Brian Leiter. "Legal Realism and Legal Positivism Reconsidered," *Ethics* 111 (2001): 278-301.
4. The claim here is not that every legal proposition asserts a moral proposition, only that legal reasons are best understood as expressing moral claims.
5. Some might think that this consequence is reason enough to reconsider whether we might have underappreciated the plausibility of the command view. According to the command theory, legal sentences are typically commands and do not assert facts about our duties or rights—moral or otherwise. "Shut the door!" makes no claims.
6. In other words, Raz holds both that the identity and content of law must be determined without regard to the moral principles or reasons that would justify the law and that the semantic content of the law is to be understood in terms of its making moral claims about what we have rights, powers, and privileges to do on the one hand, and duties and obligations to do on the other. We shall return to Raz's account of how this is possible below.
7. Arguably, the emphasis that Raz places on the so-called Sources Thesis suggests that he, like Hart before him, approaches law-through-laws and thus takes providing a theory of law's membership conditions to be an important task of jurisprudence. Many non-positivists, including natural lawyers, also understand the law as a kind of code, and so they too take one of the central tasks of jurisprudence to be determining membership conditions for legal codes; and so it would be a mistake to identify the law-through-laws approach to legal positivism.
8. Ronald Dworkin. "The Model of Rules," *The University of Chicago Law Review* 35 (1967): 14-46
9. Ronald Dworkin. "Hard Cases," *Harvard Law Review* 88 (1975): 1057-1109
10. Ronald Dworkin. *Law's Empire* (Cambridge: Harvard University Press, 1986).
11. Some have argued that because Dworkin's method requires a test for identifying the relevant set of "authoritative acts" it too is committed to the centrality of membership conditions, and thus (implicitly at least) to law as a code: that, in other words, the distinction between "law-through-laws" and "law-as-principles" is artificial. Tempting yes, persuasive no. Dworkin's view is that the law is the product of applying an interpretive theory to pre-interpretive data. That data is not determined by applying a test of membership but is constituted by convergence of paradigm instances that are themselves revisable in the light of the outcome of applying the interpretive method to them. Only once we interpret the relevant materials can one identify the underlying political principles. And once the principles are in hand, one can derive what counts as criteria of membership, and given those criteria, what the actual authoritative legal acts are. The actual authoritative acts are determined post-interpretively, a consequence of applying the interpretive method, not a product of a test for membership that precedes applying that method. On the other hand, the set of authoritative acts that are derived by applying the interpretive method are at the same time the pre-interpretive materials to which the interpretive method will be applied next time around. It is a consequence of Dworkin's approach that the set of binding legal acts is always subject to revision insofar as any case that comes before a court in principle provides it with the opportunity to revisit the question as to what the underlying principles are.

Everything is in the mix (so to speak) all the time, always in principle subject to revision. What counts as a central or a peripheral issue—a core or penumbra case—is itself a theoretical, not a factual, question, as is a function of applying

the interpretive method. In that sense, the set of authoritative legal acts is in a sense epiphenomenal. This gives "rules" a very different status than they have within the "law-through-laws" approach.

12. So while Hart, Raz, myself, and most other legal positivists as well as many natural lawyers fall squarely within the law-through-laws camp, Dworkin, Greenberg, and Stavropoulos clearly do not. Dworkin himself has pursued at various times at least two different approaches to law: "law-as-enforceable-political rights" and "law-as-principles."
13. It does not help those pursuing this line of argument that neither Hart nor Raz, Dworkin nor I believe that law has an essential function (proper or otherwise). Many readers mistakenly think that Dworkin believes that the essential function of law is to justify the coercive authority of the state. Dworkin, in fact, analyzes law in terms having to do with the exercise of coercion, but he does not claim that justifying coercion is the function of law. I take this up in detail below.
14. Thus, his view: law-as-integrity.
15. So some have argued that Delphic Oracles and inanimate objects can satisfy the normal justification thesis—that is, one might do better acting on their directives than one might do acting on one's own assessment of the balance of reasons. In that case, inanimate objects can be legitimate authorities, which would be a counter-intuitive result. But these aren't plausible objections for the reasons given in the text. Inanimate objects lack the capacities that are necessary for being an authority. And in this (conceptual) sense, the notion of an authority is more basic in the order of explanation than is that of a legitimate authority.
16. This difference between internal and external is analytically sound of course, but one way of understanding some jurisprudential theories, say, Dworkin's, is that he denies that the internal reasons—especially those of the kind of consistency that constitutes integrity—are "purely" internal to law. Their status as reasons in law depends on considerations of political morality more generally.

Interpretation, Jurisdiction, and the Authority of Law

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Can people be autonomous if they are subject to authority? In particular, can they be autonomous if they are subject to the authority of law?

In a series of works that have revolutionized legal philosophy since the 1970s,¹ Joseph Raz has argued that authority includes the capacity to direct people's conduct to the exclusion of considerations that would otherwise be good reasons for action. A tension or conflict between authority and autonomy may seem to result because an autonomous person makes his or her own response to reasons for action. Various critics have concluded that Raz treats people as if they ought to obey authorities blindly when they oughtn't, and as if they generally deferred to the authority of law in particular when they don't.²

In fact, as I understand it, Raz's answer to the general question is that authority can serve autonomy. I will not summarize it; I will point out (in section 1) that the answer is convincing partly because autonomous judgment is needed to determine the jurisdiction of an authority and to determine the exclusionary scope of its directives.

As for the particular question of the authority of law, Raz has said that law claims unlimited authority. I will argue (in section 2) that although law may not acknowledge limits to

its authority, it need not claim unlimited authority either. It claims an unspecified jurisdiction, and its directives may have unspecified exclusionary scope. In combination, the points in section 1 and section 2 answer the specific question—whether people can be autonomous if they are subject to the authority of law. The answer (section 3) is “yes”: laws often violate autonomy, but there is nothing in the nature of law that violates autonomy. But its artificial, systematic nature creates a standing risk that the law of a particular system will do so.

1. Claims to authority do not necessarily violate autonomy

You are twelve years old and you are thirsty, and there is a jug of lemonade in the fridge. Your sister wants it to feed her lilies. It is delicious. We can picture your practical reasoning as a balancing act in which you put considerations that count in favor of drinking the lemonade into one pan of the Balance, and considerations that count against drinking it into the other pan, to see which side swings down:

The Balance of Reasons

<p>Left-hand side [considerations in favor of drinking the lemonade]:</p> <ul style="list-style-type: none"> - it will quench your thirst. - it is delicious. 	<p>Right-hand side [considerations against drinking the lemonade]:</p> <ul style="list-style-type: none"> - it will do the lilies good, and they are beautiful. - drinking it will distress your sister, who has her hopes pinned on using the lemonade for the lilies.³
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As a general model of practical reason, the Balance would have catastrophic flaws:

- (1) the binary nature of the model is oversimplified because there are often more than two possibilities. Decisions about, e.g., what to do when you grow up, or what to do after lunch, seldom present a binary choice.
- (2) Practical decisions are often made in conditions of more or less uncertainty (as to the likelihood of future contingencies, or as to availability of alternatives), so that the decision maker may not know what weights to put into each side.
- (3) The metaphor of weights and a balance misrepresents the considerations relevant to many decisions because there is often no metric. The beauty of the lilies, for example, is incommensurable (there is no precise answer to the question, how beautiful are the lilies?). And considerations that do lend themselves to measurement (e.g., the salary and the working hours of two available jobs) may be incommensurable with each other.

So the Balance is not a general model of practical reason. It is actually *because* of its artificial structure that the Balance is useful as a model for the artificial, simplifying role of authorities in practical reasoning. Consider the effect of a directive from the paradigm case of an authority: a parent.

Suppose that your mother comes into the kitchen and says, “leave the lemonade for your sister.” What effect should that have on your practical reasoning? Consider two possibilities:

Your mother has given you new weights to put into the right-hand side of the Balance. For example, if you drink the lemonade, her feelings will be hurt, and she may do something unpleasant to you. After your mother’s command, there is more weight on the right than there was before.

–or–

Your mother’s command goes into the right-hand side of the Balance and gives you a reason to take weights out of the left-hand side (that is, a reason not to count the undoubted weight that they would have if you put them in the Balance). The scale swings down on the right.

If you treat your mother’s command in the second way, you treat it as what Raz calls a “protected reason”⁴: a complex that includes a reason not to drink the lemonade, and a second-order, “exclusionary” reason not to act on other reasons. In Raz’s view, an authority has the capacity to give the subject protected reasons for action, and not just the opportunity to add reasons that are to be weighed in the Balance.

Suppose that you reason as follows: “On the one hand it would be nice to drink the lemonade, but on the other hand mom’s feelings matter, and since the lemonade is not so delicious that it outweighs that consideration in combination with the other considerations against drinking the lemonade, I’ll do what she said to do.” You would not be obeying your mother—you would be humoring her. If you explained your reasoning to her, the humoring would defeat itself and you would merely provoke her. Of course, your mother might say, “humor me and don’t drink the lemonade,” or “consider my feelings.” But that is not what she says when she just says, “leave the lemonade for your sister.” When she says *that*, she is claiming your obedience. She is presenting a course

of action to you as a conclusion for your practical reasoning, without regard to the weight of reasons that might (otherwise) go into the left-hand side. The implicature of what she says is that you are to remove weights from the left-hand side of the Balance. For you cannot act in a way that responds to their weight if you accept her capacity to direct you not to drink the lemonade.

Is authority, understood in this way, compatible with autonomy? You may say that the parent-child relationship in the paradigm example of authority shows that authority and autonomy are incompatible. The child is not fully autonomous because of two interconnected aspects of the authority relationship, which I will call the mother’s “jurisdiction,” and the “scope” of her directive.

Jurisdiction: The mother’s capacity to exclude considerations that would otherwise be genuinely relevant is a standing negation of autonomy.

Scope: A particular directive specifically detracts from autonomy by excluding relevant considerations.

The jurisdiction of an authority determines not only whom it can address and what actions it can direct, but also what considerations it can exclude. The scope of a directive is the set of considerations that a particular directive excludes. If an authority had unlimited jurisdiction, and if the scope of its directives were unlimited, then a person subject to the authority would have no autonomy (except what the authority chooses to leave to him or her). If a directive excluded all considerations, then it would deny the subject’s autonomy within the directive’s range of application.

In fact, neither an authority’s jurisdiction nor the scope of a directive need be universal in these ways. I believe that it only seems that authority necessarily violates autonomy if we exaggerate the generality of one feature, or of both.

Scope and interpretation

Suppose that your mother tells you to stay in the house while she goes to the grocery store. Just as she disappears down the road, the house bursts into flames. If her directive excludes other considerations, does that mean that you must stay in the house, in order to recognize your mother as an authority? Not necessarily, according to Raz: "It should be remembered that exclusionary reasons may vary in scope; they may exclude all or only some of the reasons which apply to certain practical problems."⁵

How can you tell what her directive excludes? Since she is the authority, it seems that she gets to decide what considerations to exclude. She could have said, "don't go out to play with Steve," or "don't go out just because your sister tells you to," and then she would be telling you what considerations she is excluding. But she simply told you, "stay in the house."

Why not say this: by telling you to stay in the house, she purported to present a conclusion for your practical reasoning; so her directive excludes whatever must be excluded in order to necessitate that conclusion. Therefore it excludes *all* considerations in favor of leaving the house. For you cannot be responsive to considerations in favor of leaving the house if you must reach the conclusion that you are not to leave the house. She purported to give you a conclusive reason.

The house-on-fire situation reduces that view to absurdity. It is absurd to treat the directive in a way would turn the authority's directive against her. Instead of treating her directive as a way of accomplishing the purposes for which she has authority, it would make her authoritative act into a potential disaster. Treating authorities generally in that way would involve a commitment to radical misinterpretation of your mother's directives—an interpretation that is actually repugnant to her authority over you.

When the house is on fire, how should you interpret your mother's directive? The interpretative question is not what she said, or what she intended (she most likely had no intention of the issue you face in the burning house). The interpretative question is what to make of the fact that she directed you to stay in the house. You need to work out the effect of what she did. Of course, what she did was to exercise authority over you; so the interpretation needed to answer more specific questions (including your specific question of what considerations she excluded) is to be answered in a way that does not frustrate the purposes for which she exercises authority over you.⁶ If you can presume that her purpose was to exercise authority for the reasons that justify it, then you will misinterpret her communicative act if you treat her directive as excluding the consideration that you will perish in the fire if you do what she said to do. So that consideration is *not excluded*; you ought to put it in the side of the Balance in favor of fleeing from the house, and it is heavy enough that the Balance will presumably swing down in that direction.

This interpretative approach supports your mother's authority. She cannot perform the service that authorities provide if she cannot exclude considerations from the Balance; she cannot perform it effectively if she cannot generalize without running the risk that you will treat her directives as excluding all considerations. The approach potentially gives rise to very difficult borderline cases in various situations: you cannot depart from what she said to do merely because you can see that if she hadn't told you to stay in, there would be good reason to go out. You need to defer to her view as to what counts as good reason to go out if you are to treat her as an authority; but that does not mean that her directive requires you to stay in the house when you can see—in spite of the fact that you are not the authority—that it would be contrary to the

purposes of the authority to view the emergency consideration as an excluded reason.

If you treated her directives as conclusive guides to your practical reasoning, rather than exclusionary guides, then in order to issue any directive responsibly your mother would need to codify your obligations under a set of contingencies that she cannot catalogue (in fact, under the set of all relevant contingencies including those that are unforeseeable).⁷

Jurisdiction

Now suppose that your mother deliberately excluded the emergency consideration. Suppose that she said, "stay in the house even if you burn to death."⁸ She has acted outside her jurisdiction. She has claimed authority to exclude a consideration that she has no authority to exclude.

What considerations can your mother authoritatively exclude? It is a question of the justification of authority. So Raz's "normal justification thesis" offers a criterion for jurisdiction: it is that the subject can "better conform to reasons that apply to him anyway" by using the authority's directives as a guide.⁹ This formulation makes room for mistakes by authorities: justifiable deference to authority does not require that the subject can see that the authority has used its power well. But if the subject—with awareness of the decision-making advantages of the authority that call for deference—can see that a directive is an abuse of power, then the subject can see that it is made without jurisdiction.

A mother's jurisdiction over her children is typically very broad. She can validly direct a wide range of conduct, and her directives can exclude a wide range of considerations that would otherwise be relevant to the child's decisions. Extremely general jurisdictions really do reduce the subject's autonomy. You may better conform to reasons that apply to you if you do as your mother says, even if it seems that she is telling you the wrong thing. Yet it is possible to imagine circumstances in which a twelve-year-old can see that obedience to a particular directive is not justified by the normal justification thesis, or in any way.

But it is dangerous to generalize about the jurisdiction of authorities. We cannot even say generally that an authority cannot exclude emergency considerations. An authority has good reason to take such considerations out of the hands of subjects if the subjects will conform to reason better if they do not act on such considerations.¹⁰

Yet I think we can say generally that an authority has the widest jurisdiction for which the normal justification thesis is satisfied. If the normal justification thesis is *only* satisfied, as regards your mother's authority toward you, in respect of the household chores, then that is the extent of her jurisdiction. But if you would more closely conform to the reasons you have by treating her as having a wider jurisdiction, then you had better do so.

There is, of course, a relation between the interpretation of a particular directive and the authority's jurisdiction. A limit on jurisdiction is a ground of interpretation of an unspecific directive. Your mother would not have authority to tell you to stay inside the burning house; so her directive to stay in the house is best interpreted as not applying in that case. The principle that authorities are to be presumed to act within their jurisdiction is a standard legal technique *because* it is a generally sound maxim of interpretation of authorities.

A summary on authority in general

There is a sense in which if one accepts the legitimacy of an authority one is committed to following it blindly. One can be very watchful that it shall not

overstep its authority and be sensitive to the presence of non-excluded considerations. But barring these possibilities, one is to follow the authority regardless of one's views of the merits of the case (that is, blindly). (AL 24)

The mediating role of authority cannot be carried out if its subjects do not guide their actions by its instructions instead of by the reasons on which they are supposed to depend. No blind obedience to authority is here implied. Acceptance of authority has to be justified, and this normally means meeting the conditions set in the justification thesis. ("Authority, Law, and Morality," in *Ethics in the Public Domain*, 1994 at 199).

Which is it? Both, in a sense. The lemonade is delicious, and if you treat that consideration as excluded by your mother's directive, then you are acting as if you were blind to that consideration. But you need not be acting as if you were blind to reason. You may be using the service that the authority purports to offer in order to conform to reason. So subjection to authority need not, on Raz's account, amount to abandoning your autonomy. The subjects of an authoritative directive may (and must, too, if they are to justify action in compliance with a directive) assess:

1. whether the source of the directive has legitimate authority
2. the authority's jurisdiction (and of whether the directive is within that jurisdiction)
3. the scope of the directive (i.e., the range of reasons excluded by the directive)
4. the import of any unexcluded reasons (and how to resolve any conflict between them and the directive)
5. whether an exclusionary reason is defeated by another second-order reason.

It may take a complex exercise in evaluative and normative reasoning to justify obedience to a claim of authority. And if you conclude that a consideration is validly excluded by authority, you can keep on *thinking* about it. Your mother's command is not a reason not to think about how delicious lemonade is; it is a reason not to act on that consideration.¹¹

These features of Raz's theory are only background to understanding the relation between authority and autonomy. They help to see how obedience to an authority can be compatible with human autonomy. But a full understanding of that compatibility needs more: it needs the insight that "autonomy is valuable only if exercised in pursuit of the good."¹² And it needs the crucial feature of the service conception: that a person can use a service provided by an authority in his or her own pursuit of the good.¹³ Accepting authority can diminish autonomy; it can also be an exercise of autonomy.

Children (even twelve-year-olds) are not fully autonomous. It would be a mistake to think that people suddenly become fully autonomous at the age of majority, or ever. But twelve-year-olds do generally lack aspects of autonomy that thirty-year-olds generally have. This relative lack of autonomy is not a consequence of the mere fact that they are subject to authority. Instead, it reflects and is reflected in the breadth of their parents' jurisdiction over them. Neither children nor adults lack autonomy merely in virtue of subjection to authority. Insofar as an authority provides the service that Raz describes, deference to the authority can be an exercise of autonomy. It is so if the subject exercises judgment as to the authority's jurisdiction, and as to the scope of the directive, and as to the effect of unexcluded considerations.

But does *law* claim an authority that is incompatible with autonomy?

2 Law does not necessarily claim unlimited authority

The law is not your mom, and it may have far less concern for your autonomy than she does. It is impersonal, general, systematic, and violent. Does law necessarily violate autonomy? What is *law* claiming when it claims authority? It may seem that it claims not simply exclusionary force but a form of supremacy over our lives that is incompatible with our autonomy.

"Every legal system claims authority," Raz says.¹⁴ It is a figurative statement. I think it is a mistake (made more than once by leading writers¹⁵) to think that the figure is a personification. The figure is a metonymy (because it is legal authorities, not the law that claim authority) for an implicature (legal authorities do not generally state the claim; their conduct presupposes the soundness of the claim). How does the implicature arise? *Not* merely because law controls society, or because it requires this or that form of behavior: Anyone capable of threatening you is capable of directing you to do this or that, and capable of threatening this or that response to non-compliance with its directives. H.L.A. Hart pointed out the importance of distinguishing (in a way that he thought Bentham could not do) between directing behavior by threats of pain, and directing behavior by making rules that impose obligations.¹⁶ Both the gunman and the lawmaker purport to direct your behavior by giving you reasons; only the lawmaker purports to impose obligations. In Raz's terms, the gunman only purports to give you an extremely weighty reason that you had better put into one side of the Balance; the lawmaker purports to give you protected reasons.

All legal systems purport not only to require or to prohibit conduct but to regulate the life of a community—to impose a normative order. They characterize some forms of behavior that they prohibit as *offences*, and they characterize requirements as *obligations*, and imposes as *taxes*, and their responses to prohibited conduct as *penalties or remedies*. Those normative characterizations are good if and only if the prohibitions and requirements and imposts and responses to conduct are prescribed as offences and obligations and taxes and penalties and remedies by a legitimate authority acting within its jurisdiction. So it seems to me to be an important insight that law claims authority; it is not a truism but an interpretation of a nearly universal technique for the ordering of complex societies.

According to Raz, law's claim to authority includes an answer to the questions of jurisdiction and scope: law claims unlimited jurisdiction,¹⁷ and its directives exclude all reasons that it does not recognize.¹⁸ I will argue that these two propositions generalize too far. Law *is* like your mother in this respect: it claims an unspecified jurisdiction, and legal directives often have an unspecific exclusionary force.

The jurisdiction of a legal system

It may seem absurd to speak of the jurisdiction of a legal system when, in the legal sense, "jurisdiction" is something conferred by law—so that it seems, as Raz claims, that law claims unlimited authority. It is true that legal systems do not generally set limits to their own jurisdiction. Yet a legal system need not claim that there are *or* that there are not any limits to its authority.¹⁹

I say that the jurisdiction that law claims is unspecific because law implicitly claims the jurisdiction needed for its purposes, and it does not give a general statement of its purposes. Its claim to jurisdiction is, of course, universal within the class of mandatory norms purportedly created by the authorities of the system acting within their particular lawful

jurisdictions. And it is needless to say that the making of laws in any system suggests a claim to a wider jurisdiction than just to make those laws. But legal authorities do not typically say that they have unlimited authority, or do anything that implies such a claim.

Why does Raz say that law claims unlimited authority? He rightly points out that legal systems

do not acknowledge any limitation of the spheres of behaviour which they claim authority to regulate. If legal systems are established for a definite purpose it is a purpose which does not entail a limitation over their claimed scope of competence.²⁰

But these truths do not mean that legal systems claim that there is no limitation on the spheres of behavior they claim to regulate. The purposes for which legal systems are established entail neither that there is a limitation to their claimed scope of competence nor that there is no limitation.

Or again, Raz points out that “the law provides ways of changing the law and of adopting any law whatsoever, and it always claims authority for itself.”²¹ Granted that every legal system provides ways of changing the law, and claims authority for itself, that does not entail that it claims to have unlimited authority.

Compare mothers. They characteristically claim authority over their children. Do they claim unlimited jurisdiction? They claim much more far-reaching jurisdiction to regulate their children’s lives than any legal system claims. Unlike the rule of law, the rule of a mother does not generally involve rule-governed techniques for adoption of new norms. But mothers certainly have a technique for creating new norms, and they do not necessarily admit or deny that any other authority (including legal authorities) has jurisdiction over them. They do not necessarily acknowledge any limitation of the spheres of behavior that they claim authority to regulate. A mother’s authority is for the good of the child—and for various other goods, such as the good of their relationship, and the good of the rest of the family, and doubtless the protection of others. None of the values that ground her authority would justify her in claiming unlimited jurisdiction. She may make unjustifiable claims, of course. But in order to carry out her role in your life *as* a mother, she need only claim the authority that is needed for the purposes of a mother:

There need be nothing in the behavior of a mother that implies a claim to unlimited authority, and in this respect legal systems are similar. They do not (at least, they do not necessarily) acknowledge any limit on their jurisdiction, but that does not mean that they claim that there is no limit to it. The law of England does not generally regulate thoughts, or table manners, or the rules of *Parcheesi*. It has not renounced authority to do so, but it does not claim authority to do so, either.

This view is compatible with Raz’s insight that “the law presents itself as a body of authoritative standards and requires all those to whom they apply to acknowledge their authority” (AL 33). And it is compatible with his view that political authorities tend to have far less authority than they claim. A legal system presents all its mandatory norms as protected reasons, but it does not claim the authority to give just any directive, or (I will argue) to exclude every consideration that it does not recognize.

Interpretation, and the scope of legal directives

Legal rules do not exclude all considerations. As Raz points out, they often state the considerations they do or do not exclude. But I do not think that they exclude every consideration that is not legally recognized.

Suppose that the law imposes a curfew, requiring you to stay in your house at night. During the night, your house bursts into flames. You run outside and you are prosecuted for the offense of breaking the curfew. The regulation creating the offense says nothing of any defense, and the tribunals that apply the regulation have never faced such a case before. There is no legal source for any defense. You may say that you have committed an offense, but a good court will change the law by creating a new defense (recognizing the sort of emergency you faced as a consideration that is not excluded), and apply the new law retrospectively in your case. It is true that a good court will sometimes retroactively change the law,²³ but in this situation the court may have no reason to conclude that you have committed an offense.

The conclusion that you committed an offense might involve a misinterpretation of the law.²⁴ The court may need to change the law only by acting on a good interpretation of the curfew law that had not been authoritatively given before. The interpretative question is what to make of the fact that the authorities directed you to stay in the house. The court needs to work out the effect of that authoritative act. The question of the effect of the directive is to be answered in a way that does not frustrate the purposes for which the institution that made the curfew exercises authority over you. The law empowers the court to decide those purposes; there is no general reason to think that, when it prohibits a form of conduct without qualification, the law’s purposes exclude all considerations that have not been legally recognized as non-excluded. And a recent remark by Raz suggests that he takes that view: “authoritative directives preempt...conflicting reasons, not all conflicting reasons, but those that the lawmaker was meant to consider before issuing the directive.”²⁵ Just as a limit on your mother’s jurisdiction is a ground of interpretation of an unspecific directive from her, a lawmaker’s jurisdiction provides a guide to what it is that a legal directive excludes.

Legal directives do not generally purport to exclude all considerations that are not legally recognized any more than your mother’s directive to you to stay in the house excludes all considerations that she has not recognized. What law necessarily does is to empower institutions to determine the jurisdiction of its institutions and the scope of its own norms.

3 Laws do not necessarily violate autonomy

To carry out the functions that make it what it is, law needn’t regulate thoughts, or table manners, or the rules of *Parcheesi*. And, therefore, it needn’t claim jurisdiction to regulate them. Legal authorities are political authorities and need claim no more than political authority.

In section 1, I argued that one aspect of the compatibility of authority and autonomy is that it is, in a sense, the responsibility of the subject of an authority to decide the extent of an authority’s jurisdiction and the scope of a particular directive. As Raz has recently put it, “in following authority...one’s ultimate self-reliance is preserved, for it is one’s own judgment which directs one to recognize the authority of another.”²⁶ The subject may have to exercise such judgment concerning the problems of jurisdiction and of scope that I have addressed. But what then? Both issues can be controversial and the power to determine an answer to them can be very significant, and authorities need to be able to respond to wayward or rebellious or mistaken decisions.

Like your mother, law must exert control over its own jurisdiction and the scope of its own directives if it is to fulfill its functions. But unlike your mother, it must regulate the ways in which it carries out that responsibility. Your mother only needs wisdom and self-control; she has the opportunity to respond

to you with unregulated compassion. By the same token, her position gives her the opportunity to act arbitrarily.

In a legal system, the analogous forms of arbitrariness would be intolerable: they would violate the requirements of the rule of law. The law needs rule-governed techniques for controlling its own jurisdiction and the scope of its directives. And the artificiality of those techniques creates a risk to autonomy. If the community is to be ruled by law, jurisdiction and scope cannot merely be left to subjects, of course. They cannot be left to the unfettered discretion of tribunals, either: The resultant cumbersome separation of legislative and adjudicative functions²⁷ means that legal institutions cannot be as sprightly as your mother can in distinguishing a departure from a directive that reflects a rejection of authority from a departure from a directive that supports the authority. The system cannot trust the tribunal with complete freedom to identify the considerations that are not excluded by a legal norm. That feature of the rule of law tends (but it is only a tendency) to make it difficult for a court to apply the law faithfully in disputed matters.

Questioning authority is compatible with acknowledging authority. Raz's theory of authority does not lead to the conclusion that authority necessarily violates autonomy (though authorities often do so). It does not lead to the conclusion that the authority of law necessarily violates autonomy, either; to make that clear, I think it is important to see that law does not claim unlimited jurisdiction and does not claim unlimited scope for its directives. But the requirements of the rule of law create a standing risk that the law will not adequately recognize the autonomy of its subjects because of its artificial techniques for controlling its own jurisdiction and for controlling the scope of its directives.²⁸

Ironically, the risk arises from requirements that are calculated to protect the autonomy of persons from arbitrary use of power.

Endnotes

1. Joseph Raz. *The Authority of Law* (1979) ['AL']; *Practical Reason and Norms*, 2nd ed. (1990) ['PRN']; *The Morality of Freedom* (1986) ['MF']; "Authority, Law, and Morality," in *Ethics in the Public Domain* (1994) ['EPD']; "Reasoning with Rules," *Current Legal Problems* 54 (2001): 1-18; "The Problem of Authority: Revisiting the Service Conception," *Minnesota Law Review* 90 (2006): 1003 ["Revisiting the Service Conception"].
2. So, for example, Ronald Dworkin has concluded that Raz's account of authority presupposes "a degree of deference toward legal authority that almost no one shows in modern democracies." Dworkin, *Justice in Robes* (Harvard University Press, 2006), 206; twenty years earlier, he had written in response to Raz's work, "...why must law be blind authority rather than authoritative in the more relaxed way other conceptions assume?" *Law's Empire* (Harvard University Press, 1986), 429.
3. I am actually abstracting from complex considerations that can give you a reason not to distress someone; but then I am even abstracting from the simpler considerations that can give you a reason to quench your thirst.
4. See, e.g., "Reasoning with Rules," above n.2, at 14.
5. PRN 40.
6. I think that this follows from the general conversational maxim that a person who communicates with you is not to be taken to frustrate the point of doing so.
7. You might say that the scope of a directive is not unlimited because of a counterfactual: if you had her with you, your mother would say that it is o.k. to run out of the house. That is true, but the point does not need to be put in counterfactual terms: the counterfactual is true for a combination of (1) the same reason that a good interpretation of her actual directive yields the conclusion that the emergency consideration is

not excluded, and (2) the fact that your mother is (at least somewhat) reasonable.

8. It would not actually be enough that she said it; you would need reason to take her as meaning what she says.
9. "Revisiting the Service Conception" at 1014.
10. Above, I presupposed that there is no such reason for a mother to require a twelve-year-old not to act on the consideration that the house is on fire. Heroes in war movies are commonly subject to directives that purport to exclude emergency considerations. It may be a special feature of war movies that it is appropriate for the subject to disregard directives that do so; it is not a general feature of practical reason.
11. Raz points this out at MF 42 and elsewhere.
12. MF 381.
13. Incidentally, associated with that feature, it needs what Raz calls the "independence condition": it is a condition for the normal justification thesis being satisfied that "it is better to conform to reason than to decide for oneself, unaided by authority." "Revisiting the Service Conception" at 1014.
14. AL v.
15. E.g., by Ronald Dworkin, *Justice in Robes* (Harvard University Press, 2006), 206. In "Law's Aim in Law's Empire" (in *Exploring Law's Empire*, edited by Scott Hershovitz, 2006), John Gardner suggests a way of understanding Raz's view about what law claims, which is similar to the view that I offer below.
16. But Hart rejected the idea that law claims authority in Raz's sense, viewing laws as rules validated—in an obscure sense—by the propensities and attitudes of a community. See, e.g., *Essays on Bentham* (1982) at 158-60.
17. Every legal system claims "authority to regulate any type of behaviour" (AL 116; PRN 150-1); and law "...claims unlimited authority...it claims that there is an obligation to obey it whatever its content may be," MF 77.
18. AL 33 "what is excluded by a rule of law is not all other reasons, but merely all those other reasons which are themselves not legally recognized."
19. The limits that many decent legal systems set on the authority of their institutions (including executive, judicial, and legislative agencies) are not limits on the authority that the law claims for itself because they are themselves set by law (as Raz points out: MF 76).
20. PRN 150-51.
21. MF 77.
22. An analogous question arises in the debate over the nature of the sovereignty accorded in English law to acts of Parliament at Westminster: Does the rule give Parliament unlimited jurisdiction? Many textbook writers have said that Parliament can make any law. But there is no authority in English law for that interpretation of the rule. There *is* authority for the rule that Parliament can make law, and the law confers no power on any institution to override an act of Parliament.
23. See Endicott, "Adjudication and the Law" [Forthcoming *Oxford Journal of Legal Studies*, 2007].
24. We can't say that it *would* do so; it will depend on the facts of legal practice and doctrine in your legal system.
25. "Revisiting the Service Conception" at 1022.
26. "The Problem of Authority," above, n.2, at 1018.
27. Between different institutions, or even in common law courts that make law, between different panels of the same tribunal across time.
28. The risk of official viciousness is much worse; but the risk arising from artificial techniques one reflects the systematic nature of law, whereas the risk of viciousness only reflects common traits of political authorities.

Revisiting Raz: Inclusive Positivism and the Concept of Authority

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All positivists accept the Separability Thesis and hence deny there are any necessary moral criteria of legality, but they disagree on whether a legal system *can* contain moral criteria of legality—i.e., moral principles that directly determine whether some norm counts as law (rather than, say, someone's subjective authoritative determination of whether the norm satisfies the relevant moral principles). Inclusive positivists hold that moral criteria of legality are conceptually possible; exclusive positivists deny this.

On the face of it, exclusive positivism might seem counterintuitive. As Ronald Dworkin famously observed, moral principles play a conspicuous role in nearly every legal system with which we are familiar—and these principles *seem* partly to determine what counts as law in these systems. The U.S. Constitution contains language that seems to incorporate moral content as constraints on what counts as law. While it might be true that the concept of a right is not an exclusively moral notion, the concept of reasonableness in the Fourth Amendment is; reasonableness in this context has something to do with moral standards of fairness—which distinguishes this notion from the notion of rational. It is natural to think the Constitution directly defines criteria of legality and that the Fourth Amendment prohibition on “unreasonable” searches and seizures is a moral criterion of legality (e.g., no statute permitting a search on a mere hunch could count as law in virtue of being *morally* unreasonable).

But even if some given legal system doesn't contain moral criteria of legality, surely such systems are, one might think, conceptually *possible*. Intuitively, it is far from clear that moral criteria of legality are *logically* precluded by the content of the *concept* of law or related concepts.

Exclusive positivism seems even less intuitively plausible when one considers how it accounts for features of our legal system that *seem* to incorporate moral principles as criteria for determining what counts as law. When judges decide cases by reasoning with moral principles, they are not, according to the exclusive positivist, identifying the content of existing law; they are creating new legal content. Recourse by a judge to moral reasoning signals a gap in the law that must be filled by the judge's decision. Although we might intuitively think the content of the law is seamless, the exclusive positivist denies this.

Joseph Raz has made the kind of mark on philosophy that few philosophers can hope to make—and the best of his work will doubtless be read hundreds of years from now. One of his most influential contributions to the theory of law has been his defense of the claim that the very *possibility* of moral criteria of legality is precluded by a proper understanding of *our* concept of authority—a concept that figures prominently in our understanding of law and the concepts that figure into legal practices. Given the way we understand the notion of authority, he argues, there *cannot* be a legal system with moral criteria of legality. The existence of moral criteria of legality is, on his view, as problematic as the existence of a married bachelor—and, ultimately, for the same reason: both are logically precluded by the content of the relevant concepts.¹

In this essay, I wish to explain and evaluate Raz's argument for this idea, an argument that depends on claims about our concepts of both law and authority. His argument is grounded, most immediately, in two claims. First, he argues it

is conceptually true that law claims morally legitimate authority. Second, he argues the content of an authoritative directive must be identifiable without reflecting on the dependent reasons that justify the directive. I argue both claims are mistaken.

1. The Razian Analysis of the Concept of Authority

As a conceptual matter, this much seems uncontroversial about the nature of practical authority: a practical authority is the source of directives that create *requirements* that subjects act (or refrain from acting) in certain ways. States, a paradigmatic example of a practical authority, enact laws backed by coercive enforcement mechanisms; these enforcement mechanisms help to make sense of the idea that the relevant behaviors are required. Parents, another paradigmatic example of a practical authority, issue directives to their children, usually backed by the threat of a time-out or some other punishment, that they are fairly characterized as “required” to obey.

It seems also uncontroversial that authorities have some rational expectation their directives will be obeyed, but it is not clear why. One might think it is because people have a moral obligation to obey authority, but this is problematic for two reasons. First, it confuses the notion of legitimate authority with the notion of authority; a morally legitimate authority might be fairly characterized as creating moral reasons to obey, but an illegitimate authority is not. I doubt Nazi law created even weak *prima facie* moral reasons to obey it, but if Nazis were genuinely authorities they had a rational expectation that subjects would obey the law. It might be a sufficient condition for an authority to rationally expect obedience if its directives give rise to moral reasons to obey, but it is surely not a necessary condition.

Second, it is doubtful that morally legitimate authorities *necessarily* create moral reasons to obey. There are a number of well-known reasons for this; for example, a morally legitimate authority might issue a directive that exceeds the scope of its justified authority. But one rarely noticed reason is that some legitimate authorities apply to subjects to whom moral reasons just don't apply: parents have practical authority over very young children, but very young children are not morally accountable for their behavior and, hence, are subject neither to moral obligations nor moral reasons. While parents might have some moral right to guide the behavior of their children, this right applies against third parties and not to the children. Such a right obligates third parties to refrain from coercively interfering with the parents' authority over their children. This might create a rational expectation on the part of the parents that third parties not interfere, but there is nothing in such a right that would generate a rational (or, for that reason, morally reasonable) expectation of the children that they obey. Making sense of why this expectation is rational in all contexts involving practical authority is something an analysis of the concept of authority is supposed to do.

The Razian analysis of authority begins with an idea that is capable of explaining these two features of authority. On Raz's view, the conceptual function of authority is to issue directives that “mediat[e] between people and the right reasons that apply to them” (*ALM* 214). Authorities make decisions that resolve issues about what ought to be done in a way that makes it unnecessary for subjects to figure this out for themselves.

To discharge this function, a normative system, like a legal system, must satisfy two conditions. First, the authority's decision is contrived to replace (or preempt) the reasons that would otherwise be considered by the subject. As Raz puts it:

The [authority's] decision is...a reason for action. They ought to do as he says because he says so. ... [But] it is not just another reason to be added to the others, a reason to stand alongside the others when one

reckons which way is better supported by reason.
...The decision is also meant to replace the reasons
on which it depends. (ALM 212-13)

According to the Preemption Thesis, “the fact that an authority requires performance of an action is a reason for its performance which is not to be added to all other relevant reasons when assessing what to do, but should replace some of them” (ALM 214).²

The Preemption Thesis helps to explain the idea that directives state *requirements*. If the authority’s directive is supposed to function *in my thinking* as replacing the first-order reasons I would otherwise consider, then it is supposed to function as a second-order reason not to act on my own assessment of the reasons. In essence, then, a preemptive authoritative directive tells me to perform (or refrain from performing) some act *A*—regardless of how I think or feel about it. I am *required* to do what the directive describes because I ought to do it no matter what my judgment about it might be; my thoughts and feelings simply don’t matter once the directive is issued and won’t excuse non-performance (in most cases). While there might be more to be said about what an authoritative *requirement* amounts to, the Preemption Thesis is one intuitively helpful way to explicate that difficult idea.

Second, an authoritative directive, as a conceptual matter, ought to reflect the balance of right reason with respect to what subjects should or should not do.³ Thus, according to the Dependence Thesis, “authoritative directives should be based, among other factors, on reasons which apply to the subjects of those directives and which bear on the circumstances covered by the directives” (ALM 214).

While the Dependence Thesis does not, by itself, explain why authorities have rational expectations of obedience, it is a plausible gesture in that direction. If an authoritative directive is based on the reasons that, as an objective matter, apply to the subjects, then the directive is, at the very least, contrived to require people to do what right reason demands of them. This might not entail that authorities have a justified expectation of obedience, but it is hard to see how any putative authority’s expectation of obedience could be rational (or morally reasonable) if it systematically failed to satisfy the Dependence Thesis (and a system of directives that systematically failed to satisfy the Dependence Thesis would, presumably, not count as “authoritative.”⁴) At the very least, then, this much seems intuitively correct: the Dependence Thesis is a necessary, though not sufficient, condition for an authority’s expectation of obedience to be “rational.”

The “service conception” of authority suggests a thesis regarding the justification of authority. According to the Normal Justification Thesis (NJT), authority is justified to the extent that the subject is more likely to do what right reason requires by following authoritative directives than by following her own judgment:

The normal and primary way to establish that a person should be acknowledged to have authority over another person involves showing that the alleged subject is likely better to comply with reasons which [objectively] apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding, and tries to follow them, than if he tries to follow the reasons which apply to him directly. (ALM 214)

Given the mediating function of authority, it is natural to suppose that authority is justified only insofar as it does a better job than its subjects of deciding what right reason requires.

To see the motivation for NJT, it is helpful to compare the justification for taking someone’s advice. Consider a case in which one person *A* will be hurt if her friend *B* does not accept *A*’s advice. The desire to spare *A*’s feelings might, depending on the circumstances, be a reason for accepting *A*’s advice; if the matter were sufficiently inconsequential and the advice was harmless, *B* might be justified in accepting *A*’s advice to avoid hurting her feelings. But, as Raz points out, that is not the normal reason for accepting advice: “The normal reason for accepting a piece of advice is that it is likely to be sound advice.”⁵ Likewise, it seems natural to accept and follow a practical authority’s directives because they are likely to require subjects to do what, as a matter of objectively right reason, ought to be done.⁶ If so, NJT states, at the very least, considerations that are clearly relevant with respect to justifying authority.

2 Law’s Claim to Legitimate Authority

At the foundation of the Razian critique of inclusive positivism is the view that law necessarily claims *morally* legitimate authority (the Authority Thesis). Raz concedes that law’s claim of morally legitimate authority is often false (the claim to *legal* authority could not be false if made by a system of *law*), but he insists this claim is “part of the nature of law”: “though a legal system may not have legitimate authority, or though its legitimate authority may not be as extensive as it claims, every legal system claims that it possesses legitimate authority” (ALM 215). The Authority Thesis expresses a conceptual truth about law: it is part of the very concept of law that law claims such authority.

It is important to understand what exactly a legal system is “claiming” when it asserts “it possesses legitimate authority.” Raz, like most theorists, regards the notion of legitimacy as a moral notion associated with the existence of a *moral* obligation to obey law:

[The claims made by law do not show] legal authorities have a right to rule, which implies an obligation to obey. But it reminds us of the familiar fact that they claim such a right, that is, they are *de facto* authorities because they claim a right to rule and because they succeed in establishing and maintaining their rule. They have legitimate authority only if and to the extent that their claim is justified and they are owed a duty of obedience. (AJ 5)⁷

Thus, Raz concludes, “No system is a system of law unless it includes a claim of legitimacy, or *moral* authority. That means that it claims that legal requirements are *morally* binding, that is, that legal obligations are real (moral) obligations arising out of the law.”⁸

On Raz’s view, the Authority Thesis implies that, as a conceptual matter, law must be *capable* of possessing legitimate authority: “If the claim to authority is part of the nature of law, then whatever else the law is it must be capable of possessing authority” (ALM 215). A normative system that is not the kind of thing capable of possessing authority is conceptually disqualified from being a legal system; that is to say, a normative system not *capable* of producing norms that generate moral obligations cannot be a legal system.

To be capable of possessing authority, the law must be able to perform authority’s conceptual function of “mediat[ing] between people and the right reasons that apply to them” (ALM 214) by providing preemptive reasons for action. But law is capable of performing this conceptual function only if it is possible to identify the existence and content of law without recourse to the dependent reasons that justify that law.

The reason for this is easy to see, according to Raz’s service conception of authority. If subjects cannot identify the content

of the law without reflecting on the balance of right reasons that the law is supposed to reflect, then it simply *cannot* preempt the subject's judgments about the balance of reasons. In effect, the subject who identifies the content of a norm by reflecting upon what right reason tells her about the merits of the rule (or about how she should behave) is *necessarily* following her own judgment about what the balance of right reasons tell her about how she should behave—and not following the authority. Indeed, if it is not possible for the subject to identify the content of the law without reflecting on the balance of reasons, then it is not possible for her to follow the authority because she will be following her own judgment and, hence, it will not be possible for law to perform its conceptual function *qua* authority by mediating between subjects and the reasons that apply to them.

3 The Conceptual Impossibility of Moral Criteria of Legality

The foregoing, however, logically precludes the possibility of moral criteria of legality. If it is the nature of law that law claims morally legitimate authority and, hence, that law must be capable of performing authority's mediating function, then it follows that moral criteria of legality are impossible because the subject will not be able to identify the content of the law under an inclusive rule of recognition without considering what the balance of right reason requires—and will hence necessarily be following her own judgment about what right reason requires (assuming she behaves in a manner she deems proper) rather than the law.

Consider, for example, the simple rule of recognition that all and only moral norms are legal norms. A subject cannot figure out how to behave without reflecting on her judgment about what morality requires. Hence, she will have to rely on her own judgment in identifying the content of what purports to be "law" rather than the judgment of the authority who is supposed to be telling her what to do through the promulgation of the relevant legal content. Inclusive legal positivism, then, is logically inconsistent with the service conception of authority, which Raz takes to be *our* concept of authority.

It is important to understand the position that is ultimately being defended here. Raz's argument is fully conceptual in character; it is the contents of our concepts of law and authority that, taken together, are logically inconsistent with the existence in any possible legal system of moral criteria of legality. Moral criteria of legality are impossible for the same reason that married bachelors are impossible: the ideas are conceptually incoherent. As is evident, this is a very strong and powerful claim that forces us to explain elements of our legal practices that might seem to involve moral criteria of legality in exactly the ways that the exclusive positivist explains them. What might initially seem counterintuitive appears the only viable explanation for the role of moral principles in judicial reasoning once we fully understand the nature of law and authority.

4 Difficulties with the Razian Argument against Inclusive Positivism

A. Does Law Necessarily Claim Morally Legitimate Authority?

As far as I can tell, the claim that law necessarily claims morally legitimate authority is as widely accepted as any philosophical claim contested at all in the literature.⁹ I have seen this claim asserted (without defense) in a very large number of papers covering a wide range of philosophical topics in law. In consequence, it has come to seem to me that the vast majority of theorists working in just about every area of legal philosophy accept this as an article of faith.

At the outset, it should be noted that this claim, though very natural, raises difficult metaphysical issues.¹⁰ A legal system,

strictly speaking, appears to be an abstract object (indeed, an extremely complex one) and, hence, by definition, incapable of causally interacting with material beings like us. Of course, certain abstract objects can express propositions and we can glean propositions from sentences by reading and interpreting them; but the sort of abstract object a legal system is looks nothing like a sentence or even a set of sentences. I don't have any sort of developed theory about what sort of abstract object a legal system is; but it surely includes propositional objects, like a rule of recognition; certain kinds of institutions (which include composite entities like courts and legislatures that are themselves comprised of abstract and material entities); officials; and many other items related to one another in various ways. If this is correct, then Raz's claim, literally interpreted, involves a category mistake: a legal system, construed as an abstract object, is no more the kind of thing that *can* make a claim than a banana is. The category mistake in asserting legal systems can make claims is much more subtle than the one in asserting bananas can do it, but it is a category mistake all the same.

Of course, Raz doesn't hold that law (construed as a legal system and hence as an abstract object) claims anything at all. What he argues is that officials make claims about law as representatives of the legal system in a number of ways:

The claims the law makes for itself are evident from the language it adopts and from the opinions expressed by its spokesmen, i.e., by the institutions of the law. The law's claim to authority is manifested by the fact that legal institutions are officially designated as "authorities," by the fact that they regard themselves as having the right to impose obligations on their subjects, by their claims that their subjects owe them allegiance, and that their subjects ought to obey the law as it requires to be obeyed (i.e., in all cases except those in which some legal doctrine justifies breach of duty). Even a bad law, as the inevitable official doctrine, should be obeyed for as long as it is in force, while lawful action is taken to try and bring about its amendment or repeal. (*ALM* 215-6)

Accordingly, on Raz's view, it is not the legal system *itself* making the claim to authority; rather, he is attributing claims reasonably inferred from the behavior of officials in their activities as officials to law as a whole.

It is one thing to think that, as a contingent empirical matter, legal systems frequently claim legitimate authority; it is another to think this is a conceptual truth. Ronald Dworkin points out that it is surely possible, as a conceptual matter, for officials to doubt that their legal system is morally legitimate without implying that the system of which they are officials is not one of law:

It is one thing to suppose that legal officials often make such claims; it is quite another to suppose that unless they make such claims there is necessarily no law. In fact, many officials do not. Oliver Wendell Holmes, for example, thought the very idea of moral obligation a confusion. He did not suppose that legal enactments replace the ordinary reasons people have for acting with some overriding obligation-imposing directive, but rather that these enactments add new reasons to the ordinary ones by making the cost of acting in certain ways more expensive. Whether a community has law does not depend on how many of its legal officials share Holmes's views.¹¹

As far as ordinary intuitions are concerned, this certainly seems correct: the institutional system in the U.S. is clearly a legal

system regardless of whether officials have or express certain beliefs about the legitimacy of law.

While I think this gestures in the direction of what is wrong with the Authority Thesis, it falls short because Raz does not rest his position on just the claim that officials *believe* they have legitimate authority. As is evident from Raz's remarks above, he believes that each of the following practices is needed to signal a claim of morally legitimate authority: (1) the enforcement of law as exclusionary; (2) the use in the law of such terms as "right" and "duty"; (3) the official designation of legal institutions as "authorities"¹²; (4) the claims of officials that subjects "owe" allegiance and "ought to obey the law"; and (5) the beliefs of officials that they have legitimate authority. Dworkin's example fails to refute the Authority Thesis because it concerns only a system that lacks (5); while (5) might be sufficient to express a claim of legitimacy, it is not obviously necessary.

Here is an example that goes sufficiently further than Dworkin's to fully engage the Authority Thesis. I *know*, according to *our* concept of law, that North Korea has a legal system; it might not be a legitimate legal system, but it is surely a legal system if anything is because they have all the major institutional pieces in place and the norms promulgated as law are generally obeyed. Yet I have no idea (a) whether any official genuinely believes it is morally legitimate; (b) whether the law is stated in terms of some Korean equivalents of "duty" and "right"; (c) whether the institutions are officially designated as something we would regard as the Korean equivalent of "authority"; and (d) whether North Korean officials speak of being owed allegiance or obedience.¹³

It is true, of course, that I know North Korean law is enforced as exclusionary, but this does little work. The claim that the law is enforced as exclusionary might be necessarily true of legal systems, but it doesn't entail, imply, or even insinuate a claim that law is morally legitimate. Mandatory norms, like those that are a necessary feature of law, are, by definition, enforced as exclusionary; that is what makes them mandatory. And it should be clear that the mere existence of some mandatory rule enforced within a social group says, implies, or insinuates nothing that amounts to a claim of moral legitimacy. Even crime gangs operate by mandatory rules enforced as exclusionary and I doubt there is, in most cases, even a pretense of moral legitimacy. So the claim that legal norms are exclusionary, by itself, cannot express or even insinuate a claim of morally legitimate authority.

But if I am correct in thinking that I *know* that North Korea has law, then Raz is incorrect in thinking it is part of the very nature of law that it claims legitimate authority. By hypothesis, it is true that North Korea has a legal system since I *know* it does (and only true statements can be known). Moreover, this is true even if it is missing four of the five features that Raz believes expresses a claim to legitimate authority. Since I know North Korea has a system of law without having a clue about the other features, the other features cannot be necessary for the existence of law (otherwise, I would need to know North Korea had these features before I could be justified in thinking and, hence, in knowing North Korea has a legal system). Since the idea that the norms are enforced as exclusionary does not, by itself, express a claim to moral legitimacy, it follows that the Authority Thesis is false.

It is important to be careful here. It does not follow from the above that North Korea *is* a legal system that does not express a claim to morally legitimate authority; we cannot infer that from the above example because the premises assert the weaker claim that I don't know whether North Korea instantiates properties (2) through (5) above, which *are* surely necessary (but not clearly, on my view, sufficient) to express such a claim. But if it is true that I can know North Korea has

a legal system without knowing that it instantiates (2) through (5), then it follows that whether or not an institutional system *S* of norms is, as a conceptual matter, a legal system does not depend on whether it instantiates (2) through (5). That is, it is not a necessary condition for being a legal system that *S* instantiates (2) through (5). Since the instantiation of (1), by itself, does not express a claim to moral legitimacy and the instantiation of (2) through (5) is a necessary condition for expressing a claim of moral legitimacy, it follows that it is not a necessary condition for *S* to constitute a legal system that it expresses a claim to moral legitimacy. So while I haven't a clue about whether North Korea expresses a claim to moral legitimacy, the fact that I know (if this is a fact) it is a legal system shows that there can be legal systems that make no such claim. In other words, the Authority Thesis is false.

Here is another way to make the point. Suppose there is a society *S* resembling ours as closely as is consistent with the following properties: lawmakers and law-subjects in *S*, being quite sophisticated philosophically, are all skeptical that law can ever give rise to a content-independent moral obligation to obey law. In consequence, citizens and officials never use potentially misleading terms such as "authority," "duty," "obligation," and "right." Instead, they rely on terms that are understood to be morally agnostic, like "official," "required," "mandatory," "non-optional," and "permitted" (as opposed to "permissible"). There is no official designation of the institutions as "authorities." In *S*, officials might sometimes claim—albeit rarely—that citizens must obey the law, but they make it clear that all they mean by this is that citizens who do not obey will have certain coercive mechanisms mobilized against them—i.e., that the law will be enforced as exclusionary.

If we assume that each of Hart's minimum conditions for the existence of a legal system are satisfied in *S*, there is no plausible, non-question-begging reason to deny that *S* has a legal system. All the important pieces are there: a social rule of recognition, along with a system of judicial, legislative, and executive institutions it brings into existence that looks very much like ours; and a class of citizens that, like us, generally obey the norms enacted by officials. Given these observations, it makes sense to characterize *S* as having a legal system because it has all of the pieces necessary to create efficacious regulations for governing behavior—even though there is nothing that could be construed as an institutional claim to legitimate authority. Conditions (2) through (5) are false of *S*. While condition (1) is true (i.e., the first-order laws in *S* are mandatory and enforced as exclusionary), this cannot, by itself, state, imply, or even insinuate any sort of claim to moral legitimacy. *S* might be an improbable society, but it is surely conceptually possible and it surely has a legal system. If so, the Authority Thesis is false.

B. Does Our Concept of Authority Imply Authoritative Directives Must be Identifiable without Recourse to Moral Reasoning?

It is important to realize that Raz is defending a view about *our* conceptual practices—and, hence, one grounded in contingent social practices regarding both the use of the relevant terms and the institutions those terms describe. This shouldn't be taken to entail that the content of our concepts are exhausted by our shared linguistic practices regarding the terms; a lexicographer who defines law as, say, "norms enforced by the state" has obviously fallen far short of giving even the beginning of a philosophical analysis of the concept of law. But it does entail that the content of concepts describing socially constructed reality (as opposed, I suppose, to natural-kind terms, like "water") must cohere with the core content of our shared linguistic practices—unless those practices are either incoherent or are incapable, in principle, of enabling us

to make sense of some feature the relevant concept must help us to understand.¹⁴

This should not be taken to imply that conceptual analysis is continuous with empirical science or that there is no philosophical methodology that is distinct from that of science.¹⁵ The fact that the content of our concepts is partly, but not wholly, determined by core features of our contingent linguistic practices does not imply that the entire content of a concept can be identified by the sorts of methodology employed by physicists or sociologists. Much more argument is needed (and proffered by theorists like Brian Leiter¹⁶) for the very strong claim that conceptual analysis should be “naturalized.”

But it does imply that the analysis of *our* concepts has an undeniably empirical element: I cannot come to understand the concept of *our* concept of law without knowing something about what other people do with—and believe about—the associated concept terms. This doesn’t make them infallible, of course. A good piece of conceptual analysis might result in a prescription for revising the core content of these practices and, hence, the content of the concept itself; however, to repeat a point, there must a good reason for doing so (again, perhaps the practices are incoherent or unable to explain something they have to be able to explain).

Taking this methodological constraint seriously, however, helps us to see a problem with Raz’s view that, as a conceptual matter, it must always be possible to identify the content of an authoritative directive without recourse to the dependent features that justify that directive.¹⁷ I would hypothesize (and this *is* a hypothesis about the empirical world that cannot be justified by considerations that are either a priori or conceptual in character) that exclusive positivism is a minority view among any theoretically relevant class of competent speakers. The hypothesis here is that the majority of ordinary citizens, legal practitioners, legal theorists, and legal philosophers specializing in conceptual issues believe (or would believe if they thought about it) that it is possible for a legal system to have moral tests for what counts as law. That is, my hypothesis is that the majority of persons in any relevant class of competent speakers do not believe that the concepts of law and authority logically preclude the possibility of moral criteria of legality—and do not use these concepts as if they do. If I am correct, then the core elements of our shared linguistic practices do not preclude the possibility of moral criteria of legality.

I cannot do any genuine sociology here, but the following empirical claims all seem plausible from the vantage point of the armchair from which we philosophers just love to practice amateur sociology. Consider, first, ordinary speakers. University students are not representative of the population as a whole, but, in my experience, the vast majority resist the idea that moral tests for legality are conceptually impossible—even after they read and understand (with much help) not only Raz’s influential arguments for exclusive positivism, but Scott Shapiro’s brilliant recent contributions to the debate.¹⁸ Although most of these students cannot begin to articulate a plausible criticism of these nuanced and challenging arguments, they continue firmly in the belief that it is at least possible for a legal system to incorporate moral constraints on the content of law into the ultimate rules that constitute norms as being law. Indeed, many remain convinced (incorrectly, on my view¹⁹) that the U.S. Constitution accomplishes exactly that.

Legal practitioners, I would hypothesize, would have an analogous response. Lawyers are trained in the common law tradition and are accustomed to a tradition that, at least at one point, described the content of the common law as being *determined* by the dictates of reason. While this might or might not entail, if correct, a content-based test for legality, I would

hypothesize that lawyers and judges steeped in this tradition would find very puzzling the exclusive positivist’s suggestion that this proposition could not truly express a content-based criterion of legality. The same, I would hypothesize, is true of the law professors who teach substantive areas of law but do not specialize in the abstruse debates about the concept of law—especially those between exclusive and inclusive positivists.

Certainly, legal theorists who specialize in these issues are divided on the issue; and, again, I would hypothesize that exclusive legal positivists are in the minority. There are a variety of other conceptual traditions that deny the exclusivist thesis: neo-classical natural law theory defended, among others, by John Finnis, Robert George, and Mark Murphy; Dworkin’s third theory defended by Dworkin and, most recently, Mark Greenberg (I believe Jeremy Waldron and Stephen Perry are also quite sympathetic to various elements of Dworkin’s methodological and substantive views about law); and inclusive legal positivism defended by H.L.A. Hart, Jules Coleman, Matthew Kramer, and Wil Waluchow. There are a number of other very prominent theorists whose views about the possibility of moral criteria of legality I am not sure of (e.g., Leslie Green, Brian Bix, and John Gardner), but the number of avowed exclusive legal positivists seems to me a rather small minority, consisting of Joseph Raz, Scott Shapiro, Andrei Marmor, Julie Dickson (I believe), and Brian Leiter. These latter comprise, of course, an immensely gifted contingent with lots of philosophical firepower, but they seem to be in a small minority on this issue.

Of course, Raz could respond that the rest of us simply have not fully grasped the implications of what is uncontroversial about our concept of authority, but he does not provide much that would support this conclusion. To my knowledge, he has only two arguments that would support this conclusion. The first is wholly contained in the following passage:

Suppose that an arbitrator, asked to decide what is fair in a situation, has given a correct decision. . . . Suppose that the parties to the dispute are told only that about his decision, i.e., that he gave the only correct decision. They will feel that they know little more of what the decision is than they did before. They were given a uniquely identifying description of the decision and yet it is an entirely unhelpful description. (*ALM* 219)

All this is surely true, but it is not obvious that this entails that it is a conceptual truth that the content of an authoritative directive can be identified without recourse to the dependent reasons justifying the directive. One might reasonably hypothesize that many people would have a different reaction to a case where a legislature is ordered by a court to revise a piece of legislation so that it does not impinge upon a moral right to free speech. While this might not be the most helpful order because it leaves so much work to the legislature, I am not convinced that most people would reject its authority in virtue of its requiring consideration of the dependent reasons to fully identify the content of what the court is requiring. There is simply too much logical distance between the situation described in Raz’s example and the conclusion he wants to draw from this.

The second is the argument that the Preemption Thesis implies this constraint on authority; as noted above, if authoritative directives must, as a conceptual matter, be capable of preempting a subject’s judgment on the underlying reasons, then the subject must be able to identify the content of the directive without having to reflect on these reasons. If the subject cannot identify the content of the directive without reflecting on the dependent reasons justifying it, then she is necessarily following her own

judgment—and not the directive. Such a directive, then, cannot do what authority must, as a conceptual matter, be able to do.

The problem here is that it is not at all obvious that there is anything in our core practices regarding use of the concept-term “authority” that entails a commitment to the Preemption Thesis. As Stephen Perry has observed, an authoritative directive need not function as a second-order reason not to act on other reasons to do the conceptual work authority is thought to do; if sufficient weight is assigned to the directives of authority, it might simply outweigh all the other applicable reasons in the balance in the vast majority of cases—which would be enough for authority to be fairly characterized as capable of performing its conceptual function of telling people what to do by issuing directives making certain behaviors mandatory.²⁰

It is certainly not clear that legal officials necessarily intend their directives to function as preemptive reasons. I would imagine that most officials are blithely unaware of the distinction between first- and second-order reasons and wouldn't care much about the distinction if they were made aware of it. While the point of legal authority is surely to issue directives that make certain behaviors mandatory, it is sufficient to accomplish this that those directives are backed with the police power of the state. Nor is it clear that they should, from the standpoint of morality or practical rationality, intend them to function this way. What authority does, and ought to do, can be done without any claims to the effect that authorities do or should intend their directives to function as preemptive reasons.

Nor is it clear that subjects regard those directives as preemptive reasons. Even if we assume that subjects are aware of the distinction, it is unlikely to think that they do, or even should, regard legal directives as preemptive. People frequently jaywalk when there is no one around in the middle of the night and, hence, violate authoritative directives in such circumstances—presumably because the balance of first-order reasons dictates doing so. It is not clear that there is anything irrational or morally unreasonable about making such decisions. As far as I can tell, there are no directives of any other kind than *moral* principles that should, as a matter of practical rationality, function this way in the thinking of subjects. If the idea that authority is preemptive plays no necessary role in the intentions of authorities or in the thinking of subjects, there is little reason to think there is anything in the core elements of our shared linguistic practices that entails a commitment to the Preemption Thesis. This thesis does not seem to play any necessary explanatory role in understanding authority or what it does.

Even worse, it makes little sense to think of a young child as being *able* to process a parent's directive as a second-order reason not to act on certain first-order reasons. Young children have a hard enough time with first-order reasons; it is doubtful that they have cognitive access to second-order reasons and couldn't process them even if they did. But if this is true and parental authority is an example of practical authority, then the Preemption Thesis is not a conceptual truth about practical authority. Since very young children fairly characterized as “subject to parental authority” cannot produce a deliberation in which an authoritative directive functions in the way the Preemption Thesis suggests, the idea that such directives are preemptive reasons tells us nothing about how parental authority functions (or should function) in these cases. It is simply false that parents necessarily intend, or should intend, that their directives function this way; and it is false that such directives function, or should function, this way in the deliberations of young children.

There is a sense in which young children behave the same way that someone would who considered a directive as a second-order reason. Children do what their parents tell them,

at least initially, to escape punishment—and this is what they would do if they were capable of considering the directive as a preemptive reason and did so. The problem is that neither claim entails a commitment to the Preemption Thesis. Young children do what their parents tell them because those directives are enforced against them and *frequently* disobey, without anything resembling a general challenge to parental authority, when they think they can get away with it. Unfortunately, this latter feature is inconsistent with a child's considering the directive as a preemptive reason—on the assumption she is capable of doing so. A young child's deliberation, such as it is, is confined to consideration of first-order reasons; very young children just don't have the intellectual wherewithal to formulate second-order reasons—and wouldn't normally be inclined to consider them as decisive if they could.

Of course, the claim about children is a claim about *their* ability and not about the content of an authoritative directive: an authoritative directive might be capable of preempting judgment even though a child isn't capable of using it that way. But, given the paradigmatic character of parental authority as a practical authority, it seems arbitrary to insist that authoritative directives be *capable* of preempting judgment. Certainly, the core elements of our social linguistic practices do not *obviously* entail a commitment to the Preemption Thesis. Both arguments fail to establish the claim that is central to the Razian critique of inclusive positivism—namely, that the subject must always be capable of identifying the content of the law without recourse to the underlying reasons.

If all this is correct (including the empirical hypotheses I describe but do not attempt to defend with any genuine sociology), then Raz's analysis of our concept of authority does not seem to cohere with core features of our shared linguistic practices regarding the associated concept-term. We have no reason to think that so many dissenters are confused about the core elements of our shared linguistic practices regarding the concept-terms “law” and “authority.”

On the contrary, we have every reason to doubt that so many competent speakers in these various classes could, as a conceptual matter, be confused about core elements of shared linguistic practices; that they are presumed competent seems to preclude widespread and systematic confusion of a sort that would have to occur if the Razian analysis were correct. The beliefs and practices of *competent* speakers of a language regarding the core content of some concept-term *C* determine the core content of that term (assuming *C* is not a natural-kind term); our language picks out concepts in virtue of our social linguistic practices. For this reason, we should reject the Razian analysis unless Raz can provide some compelling reason to think our practices are confused, incoherent, or incapable of explaining some important feature of legal practice.

5 A Thin Concept of Authority

Some brief concluding remarks about the concept of authority are in order here. My suspicion is that our concept of authority is much thinner than Raz makes it out to be. What I think is uncontroversial about the concept of authority and central to the core of our shared linguistic practices are the claims I described at the beginning of the paper: (1) authority issues directives that, in some sense, require behavior; and (2) authorities have a rational expectation that their directives will be generally obeyed.

Raz fleshes out the content of these theses with claims that I think are not clearly correct. One way, for example, of fleshing out the notion of a behavioral requirement is the Preemption Thesis, but this is surely not the only plausible way to do so. One can require an act by being in a position to enforce a general

standard that makes non-performance of that act subject to some sort of coercive sanction-like mechanism. As noted above, an authoritative directive need not function as a second-order reason not to act on other reasons to do the conceptual work authority is thought to do; if sufficient weight is assigned to the directives of authority, it might simply outweigh all the other applicable reasons in the balance in the vast majority of cases—which would be enough for authority to be fairly characterized as capable of performing its conceptual function of telling people what to do.

Indeed, philosophical laypersons are, I think, far more likely than legal philosophers to take what Holmes characterized as the bad man's view of authority and hold that coercive enforcement of valid norms is a central feature of law. On this intuitive view, authorities can provide a self-interested reason for behaviors that are *already* required by the balance of moral reasons: failure to do what is required by the balance of moral reasons is subject to criminal or civil liability, which will be enforced by the state's police power. And there is nothing incoherent with the notion of an authoritative directive that seeks to provide an enforcement mechanism for moral requirements. Indeed, such a conception can also provide an important guidance function: it tells the subject that the norms backed by the state's police power are the ones that belong to morality.

As I noted above, I do think the Dependence Thesis will figure into an explanation as to why authorities (legitimate or otherwise) have a rational expectation that their directives will be justified, but it does not fully explain this expectation. As Raz points out, subjects must accept some personal being as authoritative to be a practical authority. Acceptance of an authority might not be enough to make it legitimate or to give rise to even a *prima facie* moral reason to obey it, but it surely helps to explain why authorities have an expectation of obedience that is *prima facie* rational. If I know you have accepted me as a source of authoritative guidance, it is not *prima facie* irrational (or unreasonable) for me to expect you to do what I say. It might turn out that what is *prima facie* rational is not rational all things considered; my orders might be so unjust that it is simply not rational to expect compliance regardless of whether you consent. But the idea that it is *prima facie* rational for an authority to expect compliance is not logically incompatible with the idea that its directives do not give rise to even *prima facie* moral reasons to obey. What I have reason to expect and what you have reason to do are two different matters.

In any event, I think that our concept of authority is considerably thinner than Raz believes it will be in the sense that I think not much more can be said about it than (1) and (2) above—though, again, I think the Dependence Thesis is somewhat more plausible as an explication and specification of (2) than the Preemption Thesis is of (1).

Part of the problem here is that we have very few examples of practical authorities, and they differ from each other in some theoretically important ways. Legal systems and parents are two instances of practical authority that differ in a variety of theoretically significant ways: to repeat one, a legal system might be legitimate insofar as its directives create content-independent moral obligations to obey, but that simply cannot be true of parental authority because parents frequently have authority over children who are too young and undeveloped to be subject to the requirements of morality or to consider preemptive reasons.

One can, of course, respond that parental authority is different from legal authority—and it is undoubtedly different in many ways. But it seems *ad hoc* to insist that the concept of authority Raz seeks to explain is a different concept than the one

that applies to parents. Just as it seems plausible to think that moral obligations and legal obligations are two different species of obligation, so too it seems plausible to think that legal and parental authority are two different species of practical authority. Given the significant differences among the few examples of practical authority that we have to work with, I am tempted to think it is just not possible to develop a conceptual theory of practical authority with as much content as is contained in Raz's theory.

Much has been made of Hart's famous remark about law's guidance function, but it has been more often misunderstood than properly understood. Although frequently interpreted as claiming law has a conceptual function, it is clear from Hart's remarks that he was, in fact, quite skeptical about this very idea:

Like other forms of positivism *my theory makes no claim to identify the point or purpose of law and legal practices as such*; so there is nothing in my theory to support Dworkin's view, which I certainly do not share, that the purpose of law is to justify the use of coercion. In fact, *I think it quite vain to seek any more specific purpose which law as such serves beyond providing guides to human conduct and standards of criticism of such conduct. This will not of course serve to distinguish laws from other rules or principles with the same general aims....* (CL 248-9, emphasis added)

I think Hart's skepticism about our ability to be more specific about a conceptual function that would distinguish law from other rules (and a conceptual function of any X will distinguish Xs from non-Xs) is applicable with respect to the concept of authority. At the risk of appearing to simply surrender on a theoretically important issue, I think it quite vain to seek any more specific claims about authority than (1) and (2) above (and what little I have said above about (2)); but I think this is true because the notion of practical authority applies to instances that differ in very important ways from one another.

If this is correct, then it would also seem plausible to conclude that *our* concept of authority is too thin to do the work that Raz thinks it does in establishing exclusive legal positivism. If the Preemption Thesis is not a conceptual truth, then there is little reason to think that our concept of authority precludes even a legality criterion, inadvisable for so many reasons, that says nothing more than "all and only moral norms are legal norms." While it is true that subjects trying to identify the content of the law must rely on their own judgments about the dependent reasons that justify the law and, hence, would wind up following their own judgments in trying to obey the law, there is nothing in our concept of authority that would logically preclude this—if, as seems quite sensible, our concept of authority is too thin to include anything like the Preemption Thesis.

The function of authority in such cases would be to use its claimed monopoly on force to ensure compliance with moral standards. In essence, the authority would be telling subjects, "we are not leaving it up to your conscience whether to comply with morality; we will make you do so." Of course, this is a recipe for a lot of confusion among officials and subjects, but probably not enough to preclude claiming the existence of a legal system with something that functions as a legal (as opposed to morally legitimate) authority. As long as such a system contains the major institutions and is reasonably efficacious in guiding the behavior of citizens, there is little reason to think that such a system is conceptually disqualified from being a system of *law*.

Endnotes

1. Joseph Raz. "Authority, Law, and Morality." In *Ethics in the Public Domain* (Oxford: Clarendon Press, 1994). Hereinafter identified as *ALM*.
2. Something like the Preemption Thesis is thought to distinguish authority from other forms of normativity. Many normative propositions function as first-order reasons. For example, conditional normative statements, such as, "you should eat your broccoli to stay healthy," function as a first-order reason that may compete with other first-order reasons, such as that expressed by the statement, "you should eat chocolate because it tastes good."
3. Right reasons, for Raz, are those reasons that *objectively* apply to a person regardless of whether she is subjectively aware of them. Likewise, the balance of right reasons should also be construed as an objective notion: what the balance of right reasons requires does not depend on how the subject perceives that balance.
4. This is presumably why the head of a crime gang is not properly characterized as an authority despite having the ability to tell members what to do and make them do what he demands.
5. Joseph Raz. "Authority and Justification," *Philosophy and Public Affairs* 14 (Winter 1985): 19. Hereinafter referred to as *AJ*.
6. For a critical discussion of NJT, see Kenneth Einar Himma, "Just 'Cause You're Smarter Than Me Doesn't Give You a Right to Tell Me What to Do: Legitimate Authority and the Normal Justification Thesis," forthcoming in *Oxford Journal of Legal Studies*. Draft version available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=788746
7. Insofar as Raz believes that "a legal system may not have legitimate authority" (*ALM* 215), the relevant notion of obligation must be *moral*. The idea that citizens are *legally* obligated by laws is a tautology; hence, if all Raz meant by a legal system's claim to authority is that laws give rise to legal obligations, a legal system's claim to authority could not possibly be false.
8. Joseph Raz. "Hart on Moral Rights and Legal Duties," *Oxford Journal of Legal Studies* 4 (Spring 1984): 131 (emphasis added).
9. There are a number of theorists who have contested it. See, e.g., Jules Coleman, *The Practice of Principle* (Oxford University Press, 2001), 133 "I am not convinced that it is a conceptual feature of law that it necessarily claims *morally* legitimate authority. The fact that law can serve a variety of legitimate human interests may ground the claim that law must be the sort of thing that can possess a normative power to create genuine duties and responsibilities or confer genuine rights and privileges. From this it hardly follows that the normative power represents a moral authority." See also Philip Soper, "Law's Normative Claims," in *The Autonomy of Law*, edited by Robert P. George (Oxford: Clarendon Press, 1996), 233 "Nothing in the practice of law as we now know it would change if the state, convinced by arguments that there is no duty to obey law *qua* law, openly announced that it was abandoning any such claim." As will be noted below, Ronald Dworkin and I have also contested it. There are presumably others, but, as far as I can tell, most everyone else accepts the Authority Thesis.
10. For a much more thorough discussion of these and other difficulties with the Authority Thesis, see Kenneth Einar Himma, "Law's Claim of Legitimate Authority," in *Hart's Postscript: Essays on the Postscript to the Concept of Law*, edited by Jules L. Coleman (Oxford: Oxford University Press, 2001).
11. Ronald Dworkin. "Thirty Years On," *Harvard Law Review* 115 (April 2002): 1655, 1667.
12. Strictly speaking this is a very peculiar claim and certainly not true of legal systems like the U.S. I would be very surprised if there were anything in statutes or caselaw that "officially designated" legal institutions as "authorities." In fact, it would be an extremely odd thing for a court or a legislature to do. I imagine the reaction to a congressional enactment signed by President Bush designating legal systems as properly being referred to as "authorities" would generate a great deal of ridicule and criticism.
13. I could make a similar argument of just about any legal system other than that of the UK, U.S., and Canada. I haven't a clue, for example, whether (2) through (5) are satisfied by the system of institutional norms in France because, well, I simply don't pay that much attention to what the law in France says or what officials claim. But I think I know that France has a legal system because France is a nation recognized as exercising sovereignty within its own geographical boundaries, something that could not be true of something that lacks a legal system. It is, I think, a conceptual truth that nations/states are partly constituted by legal systems, so I know that France has one. I assume, in contrast to North Korea's, that it is legitimate; but because I do not know which theory of state legitimacy is correct, I am not terribly confident in any assessments of state legitimacy.
14. Law couldn't be adequately defined as "commands of a sovereign" because, as Hart famously argued, we cannot make sense on that definition of how law obligates. (Hart, of course, did not make this point in connection with a "definition" of law, but the argument is equally applicable with respect to definitions).
15. For a much more detailed discussion of conceptual methodology and a defense of the traditional view against the attacks of Quine, Leiter, and others, see Kenneth Einar Himma, "Reconsidering a Dogma: Conceptual Analysis, the Naturalistic Turn, and Legal Philosophy," forthcoming in *Current Legal Issues*, edited by Ross Harrison (Oxford: Oxford University Press); preprint draft version available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=727445
16. See, e.g., Brian Leiter, "Naturalism and Naturalized Jurisprudence," in *Analyzing Law*, edited by Brian Bix (Oxford University Press, 1999).
17. For a more detailed articulation of this argument, see Kenneth Einar Himma, "The Instantiation Thesis and Raz's Critique of Inclusive Positivism," *Law and Philosophy* 20 (January 2001): 61-79.
18. See, e.g., Scott J. Shapiro, "On Hart's Way Out," *Legal Theory* 4 (December 1998): 469-508.
19. See Kenneth Einar Himma, "Final Authority to Bind with Moral Mistakes: On the Explanatory Potential of Inclusive Legal Positivism," *Law and Philosophy* 24 (January 2005): 1-45. For an incisive response, see Matthew H. Kramer, "Of Final Things: Morality as One of the Ultimate Determinants of Legal Validity," *Law and Philosophy* 24 (January 2005).
20. See Stephen Perry, "Second Order Reasons, Uncertainty, and Legal Theory," *Southern California Law Review* 62 (1989): 913.

Razian Concepts

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In much of his work in political and legal philosophy, Joseph Raz has been concerned to explain certain concepts—such as those of law, authority, and rights. He has always insisted that these explanations are not investigations into the meanings of the words used to express the concepts. But they also seem to be distinct from classical substantive political theorizing. *The Morality of Freedom* is about freedom, but not, I think, about the concept of freedom—at least not in the same way in which its second and third chapters are about the concept of authority and its seventh is about the concept of rights.

Raz writes that “moral and political philosophy has for long embraced the literary device (not always clearly recognized as such) of presenting substantive arguments in the guise of conceptual explorations.”¹ If that device is employed, any political theory can be cast as an account of one or more concepts, and *The Morality of Freedom* can be said to be about the concept of freedom after all—as Raz himself notes.²

There is thus a vexing ambiguity in the meaning of “concept.” H.L.A. Hart called his book *The Concept of Law* despite the fact that very little of it was—in what seems to me to be the current ordinary sense—about the content of a concept at all. The three key questions he associates with interest in the nature of law are: “How does law differ from and how is it related to orders backed by threats? How does legal obligation differ from, and how is it related to, moral obligation? What are rules and to what extent is law an affair of rules?”³ The second of these questions involves conceptual issues, but the others, especially the third, do not. The question of whether law is an affair of rules is one that can be answered by looking, once you know where to look, and most of *The Concept of Law* is about this question; its answer constitutes Hart’s “improved analysis of the distinctive structure of a municipal legal system.”⁴ Though it proceeds on the assumption of a positivist conceptual view about the boundary between law and morality, most of that analysis is descriptive in the sense that Hart claims for his enterprise.⁵ We can call this descriptive core of the book an account of the concept of law only if we embrace a wide sense of “concept” close to Raz’s “literary device.” It is now more typical to understand conceptual questions as ones of sense and categorization; only about five pages of *The Concept of Law* were devoted to such questions.⁶

But more has changed since 1961 than literary conventions. Moral and political philosophy is today also less concerned with issues of sense and categorization than it once was. Perhaps this is due to the publication of *A Theory of Justice* in 1971—which makes it all the more interesting to be reminded that, as late as 1964, Rawls continued to insist that he was providing an analysis of the concept of justice.

What such an argument might show is that, if certain natural conditions are taken as specifying the concept of justice, then the two principles of justice are the principles logically associated with the concept when the subject is the basic structure of the social system. The argument might prove, if it is correct, that the principles of justice are incompatible with the principle of utility. The argument might establish that our intuitive notions of justice must sometimes conflict with the principle of utility. But it leaves unsettled what the more general notion of right requires when this conflict occurs. To prove that the concept of justice should have an absolute weight with respect to that of utility would require a deeper argument based on an analysis of the concept of right, at least insofar as it relates to the concepts of justice and utility.⁷

From the perspective of students of *A Theory of Justice*, there is an other-worldly quality to this passage. The position of *A Theory of Justice* seems roughly to be this. Let’s take for granted that we all want our social institutions to be just; we all also have some rough sense of the subject matter of justice—of the political and moral questions to which a theory of justice is expected to offer answers. Where we disagree is in the content of our substantive theories of what justice requires. Two theories of justice are particularly significant—justice as fairness, drawn out of the social contract tradition, and utilitarianism. A big part of the argument of the book is then devoted to showing the superiority of the former. But that superiority is not grounded

in its better match with the alleged content of our existing concept of justice.

In the opening pages of *A Theory of Justice*, Rawls writes: “The concept of justice I take to be defined, then, by the role of its principles in assigning rights and duties and in defining the appropriate division of social advantages. A conception of justice is an interpretation of this role.”⁸ This is Rawls’s expanded version of Hart’s idea that all accounts of justice tell us to treat like cases alike, while different accounts of justice vary in their criteria for likeness.⁹ Rawls and Hart held that so much is fixed by the very concept of justice. But neither took that to be controversial or in need of sophisticated philosophical defense. The important point, for both, is that theories of justice offering very different criteria of distribution are equally compatible with the concept of justice and that what *is* fixed by the concept is, as Hart put it, “incomplete” and cannot “afford any determinate guide to conduct.”¹⁰ As Rawls writes: “Clearly this distinction between the concept and the various conceptions of justice settles no important questions. It simply helps to identify the role of the principles of social justice.”¹¹

So we get a book that its author later abbreviated as *Theory*, rather than *Concept*; and this difference from the earlier articles is not just a matter of terminology.¹² It is *partly* that, I think, because much of the argument in the earlier papers to the effect that the concept of justice is best analyzed in terms of the two principles of justice does look very much like substantive political theorizing. But if Rawls were merely employing the literary device, presenting a theory of justice under the name of an account of the concept, it is not at all obvious that he would need a *further* argument to show the priority of justice (as fairness) to utility.

I have raised this issue about the development of Rawls’s views because it will help illuminate, I believe, the question I want to raise about Raz’s political theorizing. In his most recent methodological writings, Raz appears to embrace the wide sense of “concept” he once described as a literary device. He is happy to follow Hart and see account of the concept of law as an account of the nature of law.¹³ And an account of the concept of authority will evidently answer the obviously substantive question of the “possible justification of subjecting one’s will to that of another.”¹⁴ But then Raz also believes that his accounts of the concepts of law and authority are *explanatory*, in the sense that they bring out something we already all have in common. For example, he writes that it is “a major task of legal theory to advance our understanding of society by helping us to understand how people understand themselves.”¹⁵ Since there is clearly widespread disagreement about the nature of law and of rights, and about when subjecting one’s will to that of another is justified, there would seem to be a puzzle here. But then Raz has long signaled this feature of his approach to the analysis of concepts by giving it the label “normative-explanatory.”¹⁶ His accounts are not just explanatory, capturing common ground; the normative dimension takes a stand on matters in dispute—such as the “precise connections” between various concepts¹⁷ and also, I assume, such matters as the exact conditions for justified subjection of one will to that of another.

Raz has recently characterized his approach in a somewhat different way. He distinguishes between the conditions for “minimal possession” of a concept—“those essential or nonessential properties of what the concept is a concept of, knowledge of which is necessary for the person to have the concept at all”—and the conditions for the “knowledge involved in complete mastery of the concept, which is the knowledge of all the essential features of the thing it is a concept of.”¹⁸ It seems to me that the right way to read this is to match “minimal mastery” with what I have said is the current, ordinary sense of

“concept”—as a shared practice of fundamental categorization. But in defining complete mastery of a concept as he does, Raz suggests that he has in mind, as basic, the wide, “literary device” sense of “concept.” One interesting aspect of this way of looking at things is that it admits no clear distinction between concept and theory. Some believe it is one thing to fix concepts (in the narrow sense having to do with sense and categorization), and another to offer a theory (descriptive or normative) of the thing or subject in moral or political theory that the concept picks out. This way of looking at things runs into familiar philosophical objections. In response, many have followed Quine in holding, in effect, that “it’s all theory.” One might say that Raz agrees with this but, like Hart, simply uses “concept” to mean what others mean by “theory.”

But this will still leave the question of how to understand the explanatory parts of Razian conceptual accounts and how to assess the role such claims may play in his legal and political theory. To keep things terminologically tractable, let me now just stipulate that a conceptual question is a question of basic categorization.¹⁹ The most natural way to approach the question of the content of a concept is by addressing the meanings of the words typically used to express it.²⁰ This also brings out most clearly that the conceptual, on this usage, is not a matter of substantive theory. It is not a conceptual question whether Rawls’s two principles of justice are the proper moral principles to guide institutional design. It is not even a conceptual question whether they provide the best account of what justice requires when applied to the basic structure of society. Since, like all concepts, the concept of justice is indeterminate, the most it can do is specify the rough subject matter of theories of justice. This narrow sense of the conceptual thus matches the later rather than the earlier Rawlsian view.

However, the very idea of the conceptual, in this narrow sense, does not commit us to any philosophically significant distinction between analytic and synthetic claims. Though claims about proper categorization do feel like claims about the proper use of words, there seems to be no reason why we could not understand them as just the most fundamental descriptive or normative commitments we have, the shared background that is required for disagreement to be possible. The label “conceptual” could be understood just to mark out positions on the nature of law or authority or rights that are beyond the pale, not worth considering, at least for the time being. Since such commitments are not the subject of reasoned argument but, rather, taken for granted, they would be revealed in the same way truths of meaning have traditionally been thought to be revealed—by intuitive responses to cases. And there would be no reason to insist that such commitments are immune to revision in light of further experience.

My understanding, then, is that the explanatory aspect of a Razian account sets out (at least) what he calls the conditions of minimal possession of the concept and that all this is equivalent to a conceptual analysis understood along the lines I have just given.

I doubt that conceptual analysis, thus understood as the attempt to uncover shared practices of basic categorization, can play any significant role in political or legal theory. But I also think that it plays very little role in Raz’s political philosophy. Here, I just want to raise doubts about its role in one famous argument in Raz’s philosophy of law.

Raz obviously does not believe that his accounts of authority or rights are conceptual in my narrow sense. That sense of the conceptual seems to correspond to what Raz calls the “purely linguistic.” He writes:

A purely linguistic account of authority claims to yield a simple explanation of what people believe who believe

that someone has legitimate authority. Had the above account been a linguistic account, an explanation of the meaning of “legitimate authority,” it would have followed that anyone who believes of a person that he has legitimate authority believes that that person satisfies the condition set by the justification thesis. This implication does not hold for a normative-explanatory account. In being normative it avows that it does not necessarily conform to everyone’s notion of authority in all detail.²¹

In other words, it is clearly not common ground among competent users of the concept of authority that Raz’s normal justification thesis sets out the (normal) conditions under which the subjection of one person’s will to another is justified.

All this seems as clear as can be, yet it makes Raz’s celebrated argument for the “sources thesis”—the idea that moral considerations cannot be among the grounds of law—in “Authority, Law, and Morality” rather puzzling. It is clear enough, and too familiar to need reviewing here, that a system of governance in which moral considerations in part determine what the rules of conduct are cannot meet the conditions of Raz’s theory of authority. We can also simply grant Raz’s assumption that “necessarily law...either claims that it possesses legitimate authority or is held to possess it, or both.”²² The tricky part is to know how to understand Raz’s inference to the conclusion that, therefore, the sources thesis is an essential feature of law:

A legal system may lack legitimate authority. If it lacks the moral attributes required to endow it with legitimate authority then it has none. But it must possess all the other features of authority, or else it would be odd to say that it claims authority.²³

What is puzzling is that insofar as Raz’s service conception of authority is normative, it does not seem in the least bit odd to say that law claims something that it could not, as it turns out, have. Raz considers this worry:

Can it not be objected that my argument presupposes that people know the normal justification thesis, and the others which go with it? To be sure such an assumption would not be justified. Nor is it made. All I am assuming is that the service conception of authority is sound, i.e., that it correctly represents our concept of authority. It is not assumed that people believe that it does.²⁴

But we know that, for Raz, “our concept of authority” is not something that we all share *fully*, even implicitly. It is not a shared practice of categorization that can be discovered by people’s intuitive reactions to questions about particular cases. For Raz, “our concept” is something we partly share and partly disagree about. But since there is no agreement about the normative part of Raz’s account of authority, and it is the normative part that does the work in the argument for the sources thesis, I am at a loss to understand why we should expect that claims to authority will be consistent with that account. It would be odd to see a universal claim to authority that was inconsistent with a practice of categorization that we all share. That would amount to what is commonly called a “performative contradiction” in contemporary German philosophy; but Raz is not making this kind of argument.

Raz also notes that the claim to authority is made by legal officials, and so it is appropriate to rule out the possibility that it is normally based on a “conceptual mistake.”²⁵ But by “conceptual mistake” Raz clearly does not mean here a failure to appreciate the truth of the service conception of authority, since that is

presumably almost the universal condition of legal officials. He must rather mean something like failure in the minimal conditions for possession of the concept, and minimal possession of the concept is not enough for the argument to go through.

All this suggests misunderstanding on my part. Perhaps, like the early Rawls, Raz has in mind a sense of “concept” that is more complex than the simple combination of category and theory I have attributed to him.

Raz writes that “there is an interdependence between conceptual and normative argument.”²⁶ Perhaps it is significant that we can say the following: though we don’t necessarily already share, even implicitly, the correct account of “our concept of authority,” the account, as an account of *our concept* nonetheless is an account of something we all share. When Rawls offered justice as fairness as an account of the concept of justice, he was not claiming that everybody already implicitly knew the content of the two principles. But he did believe that those principles were an attractive development of some normatively significant features of what we did share by way of a practice of categorization, and that this mattered. It mattered that he was offering a theory of justice, rather than something else—such as the political morality relevant to the design of social institutions. Similarly, perhaps it is important that Raz is offering a theory of authority, and not, say, of the conditions under which one person or group can impose obligations on others. As he often writes, accounts of concepts are important because they are accounts of how we understand ourselves (in terms of such concepts). Perhaps we here can understand the contrast with his account of freedom, which is not presented as a theory about any particular concept of freedom. He writes that if *The Morality of Freedom* is to be characterized as defending a concept of freedom, it is “only important to remember that that concept is a product of a theory or a doctrine consisting of moral principles for the guidance of and evaluation of political actions and institutions.”²⁷ The whole theme of self-understanding seems to be missing here.

I agree with Raz that self and social understanding is important and that we cannot approach that without reflecting on our conceptual practices. But I am doubtful about the connection between this project and the kind of positive normative theorizing Raz offers with his accounts of authority and rights. I don’t think it is important to link our political and legal theory closely to particular concepts. So long as we share enough, conceptually, to understand what we are arguing about, there seems to be no particular reason to offer political theory category by category—fixing each component in this way before turning to consider how they are related within the category of the right. If it is important that *these* are the concepts we have employed to understand our social world, the factors that make it so will not be lost in any adequate paraphrasing of our political and legal discourse. Reflection on concepts is extremely important if we are to understand what we and others have been saying and to be in a position to subject our political discourse to critique. But there is no philosophical reason why what is uncovered through critique and the search for self-understanding should be preserved.

In any case—returning now to Raz’s argument for the sources thesis—even if a theory of authority is a theory of a concept we all in a sense share, it still won’t be odd to claim something about law and authority that makes no sense if seeing that it makes no sense requires us also to share the correct full account of the concept of authority, which we do not. Absent some claim of implicit knowledge of the correct full account of authority, this step in Raz’s argument remains puzzling to me. A comparison case may be helpful. Suppose that on the correct accounts of the concepts of justice and authority, there

is a “precise connection” between them: the issue of justice cannot arise other than in a social setting where a *de facto* coercive power claims legitimate authority. It is an implication of this view that, as our world is currently set up, there cannot be a question of global justice. Would there be anything odd about people making claims about global injustice?

Insofar as my remarks here are critical, they apply to Raz’s theory of law only. His accounts of authority and rights remain foundational contributions to political philosophy whether one thinks of them as all theory or all concept (not to mention the accounts of the rule of law, reason, well being, freedom, and so on). But unlike debates about these issues in moral and political theory, I believe that the debate about the eligibility of moral considerations in determinations of the content of the law in force is, in the end, just a conceptual question in the narrow sense I have outlined. As such, I believe it has no resolution since the concept of law is simply indeterminate on the issue; there are, among us, several different fundamental understandings of law as a category.²⁸ If this is right, it is no surprise that Raz’s broader and more sophisticated understanding of what it is to offer an account of a concept cannot move an argument for positivism forward.

Endnotes

1. Joseph Raz. *The Morality of Freedom* (Oxford: Oxford University Press, 1986), 16
2. *Id.*
3. H.L.A. Hart. *The Concept of Law*, 2nd ed. (Oxford: Clarendon Press, 1994), 13
4. *Id.*, 17.
5. For further discussion of this point, see Liam Murphy, “The Political Question of the Concept of Law” in *Hart’s Postscript*, edited by Jules Coleman (Oxford: Oxford University Press, 2001), 371-409
6. Specifically, pp. 207-12.
7. John Rawls. “Legal Obligation and the Duty of Fair Play” (1964). In *Collected Papers*, edited by Samuel Freeman (Cambridge, MA: Harvard University Press, 1999), 125
8. Rev. ed. (Cambridge, MA: Harvard University Press, 1999), 9
9. See *The Concept of Law*, 159-60.
10. *Id.*, 159.
11. *A Theory of Justice*, 5
12. In “Justice as Fairness” (1958), Rawls is at pains to note that he has “been dealing with the concept of justice” (*Collected Papers*, 71).
13. “Two Views of the Nature of the Theory of Law,” in Coleman, 8
14. “The Problem of Authority,” *Minnesota Law Review* 90 (2006): 1003
15. “Authority, Law, and Morality,” in *Ethics in the Public Domain*, 221.
16. See *The Morality of Freedom*, 63-6.
17. *Id.*, 63
18. “Can There Be a Theory of Law?” In *Philosophy of Law and Legal Theory*, edited by Martin P. Golding and William A. Edmundson (Blackwell, 2005), 326
19. I follow Frank Jackson, *From Ethics to Metaphysics* (Oxford: Oxford University Press, 1998).
20. Raz rejects the relevance of an inquiry into the meaning of the word “law” to the study of the concept of law on the ground that “law” is used in a variety of contexts that have nothing to do with legal systems (see, e.g., “Two Views,” 7). I don’t understand this point, since it would seem to apply equally to the concept of law. In any event, though Raz insists that “law” is not ambiguous, in fact it seems to be. Hence the joke in the following lines from a song by Billy Bragg

The laws of gravity are very very strict

And you're just bending them for your own benefit

Perhaps there is a common meaning to "law" in all contexts where it is appropriately used. But, in the first place, Raz's account of what that is seems wrong: "The word is used in all these contexts [legal, religious, mathematical, etc.] to refer to rules of some permanence and generality, giving rise to one kind of necessity or another" ("Can There Be a Theory of Law?" 325). For classical natural lawyers, the natural law was at least in part a matter of following natural inclinations in the right way; it is hard to understand this in terms of rules. And when Dworkin rejects the model of rules for law—essentially arguing that the law is the outcome of a certain weighing of values as applied to a particular case—his position doesn't seem to run afoul of the meaning of "law." Last, many of us don't recognize necessity of any kind in the mere existence of a legal rule. But even if this definition were correct, I can't see why it would be incompatible with the view that there are (say) four different senses of the word "law," appropriate for different contexts. In particular, there seems to be all the difference in the world between a law of physics, which is not in any sense practical, and the rest. That's why it's funny to say that the laws of gravity are strict.

Raz also notes that we need not use "law" to make use of the concept of law (*id.*). That seems right, but since the way we usually make use of the concept of law is by using the word "law" or some translation of it, the place to look if we are trying to figure out what kind of categorization the concept of law recommends is by looking at the usage of the words that express it.

21. *The Morality of Freedom*, 65; see also, "The Problem of Authority," 1006-7.
22. "Authority, Law, and Morality," 199.
23. *Id.*
24. *Id.*, 203-4.
25. *Id.*, 201.
26. *The Morality of Freedom*, 63.
27. P. 16.
28. I defend this position in an unpublished manuscript. Some first thoughts appear in "Concepts of Law," *Australian Journal of Legal Philosophy* 30 (2005): 1-19.

Two Problems of Political Authority

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Legitimate political authority, it is generally agreed, involves a right to rule. A political regime has a right to rule only if it has, among other things, a fairly extensive power to change its subjects' normative situation by, for example, imposing obligations or conferring rights on them. No doubt a right to rule involves much more than this. Perhaps it involves not just a power to impose obligations but also a right to compel compliance with those obligations by means of force or the threat of force. For present purposes, however, it will be sufficient to focus on the point that legitimate political authority requires possession of extensive normative powers. Joseph Raz calls political regimes which have effective control over a population and which also claim legitimate authority for themselves, meaning they claim extensive powers to change the normative situation of their subjects, *de facto* authorities. Raz argues, in my view rightly, that a political regime can only have law and a legal system if it is a *de facto* authority in this sense. For present purposes it will be convenient to focus on the case of *de facto* authorities, which we can think of loosely as the governments of states with legal systems. Because such governments can, in the exercise of

the extensive authority that they claim for themselves,¹ affect their subjects' lives in very significant ways and often against their will, the authority they claim to possess is moral in nature.² Although legal systems claim to be able to change the normative situation of their subjects in almost any conceivable way—for example, by granting permissions, conferring rights, or creating powers—I will focus on the most fundamental power that legal systems claim for themselves, which is the power to impose obligations. Let me refer to the product of the exercise of a claimed power to impose obligations as a directive. If a directive was issued by an organ of a government that not only claims but also possesses legitimate authority, then those persons who fall within the scope of the directive have an obligation to obey it. Because legitimate authority is moral authority, this obligation is a moral obligation.

The notion of political authority gives rise to a number of different philosophical problems, but two are particularly salient. The first concerns whether or not and under what circumstances political authority can ever be morally legitimate. The concern, in other words, is with the question of whether or not and to what extent the claim of *de facto* authorities to be legitimate can ever be a justified one. Let me call this the problem of justification. Since the claim to possess legitimate political authority is moral in nature, the problem of justification is a moral problem, and attempts to address it must have recourse to substantive moral argument. For example, the traditional Thomist response to the problem of justification is the thesis that, in John Finnis's words, "the sheer fact that virtually everybody will acquiesce in somebody's say-so is the presumptively necessary and defeasibly sufficient condition for the normative judgment that that person has (i.e., is justified in exercising) authority in that community."³ As Finnis recognizes, this is a substantive moral claim and must be defended as such. The second problem of political authority concerns the question of whether or not an individual can ever be justified in subjecting his or her will to that of another person. Let me call this the subjection problem. This, too, is a moral problem, at least insofar as the issue is taken to be one of maintaining moral autonomy⁴ and making moral decisions in accordance with one's own independent judgment.

The two problems of political authority that I have identified are clearly related, since a response to the justification problem that purports to show that political authority can under some circumstances be legitimate must show that, at least under those circumstances, it is justified to subject one's will to that of another. But the two problems are nonetheless distinct. A demonstration that one is justified, in appropriate circumstances, in subjecting one's will to that of another is a necessary condition of the legitimacy of political authority, but there is no reason to think that it is, in general, a sufficient condition. Beyond that, the problem of subjection arises in many contexts besides that of political authority. According to one understanding, the problem of subjection arises whenever one is faced with a demand or request by another person that one behave in a certain way. Not only are demands that one do such-and-such often made in contexts besides that of political authority, they are not always even intended to be exercises of a normative power; sometimes a demand is just a demand. According to another, still broader understanding of the subjection problem, it arises whenever one is faced with the possibility of relinquishing control over some aspect of one's life by acting not according to one's own judgment about what one ought to do in a given type of circumstance but, rather, according to someone else's view. On this broader understanding the subjection problem arises, for example, for a person who more or less automatically relies on the advice of a friend, or on the general recommendations of a self-help

book, about what to do in a particular kind of situation, rather than on his or her own judgment.

Raz's well-known service conception of authority appears to have been offered, at least in its early formulations, as a response to both the justification problem and the subjection problem. In this article, I will argue that while the service conception does indeed offer an important insight about when one is justified in subjecting one's will to that of another, and to that extent addresses an important dimension of the justification problem, it nonetheless does not succeed as a general account of the conditions that a *de facto* political authority must meet in order to possess the legitimate moral authority that it claims for itself. The difficulty, in brief, is that even if the service conception correctly identifies (many of) the situations in which one is justified in subjecting one's will to that of another, it does so in a way that does not depend on whether or not the other person has exercised or purported to exercise a normative power to impose a binding obligation. But the possession of a moral power to change the normative situation of another is, by Raz's own lights, the heart of legitimate authority. If the service conception does not directly address the question of whether or not the possession of such a power is justified, then it has not truly come to grips with the problem of justifying authority.

The heart of the service conception is the normal justification thesis (the NJT), which in Raz's early formulations asserted that "the normal way to establish that one person has authority over another person," and hence the normal way to show that the latter "should acknowledge the authoritative force of [the former's] directives," is to show that the second person will in general do better in complying with the reasons that apply to him "if he accepts [the first person's] directives as authoritatively binding and tries to follow them, rather than trying to follow the reasons that apply to him directly."⁵ Notice that the NJT is explicitly offered here as a full-fledged response to the justification problem: To "establish" that one person has authority over another person can only mean to offer a substantive justification for the conclusion—explicitly acknowledged by Raz to be moral in nature—that the one has legitimate authority over the other.⁶ Of course, Raz also offers the NJT as a response to the subjection problem.⁷ Roughly speaking, the general idea is that if one will better comply with right reason in a specified type of circumstance by allowing oneself to be guided by the judgment of another rather than by trying to act according to one's own judgment about what ought to be done, then one is justified in subjecting one's will to that of the other. For the moment, however, my concern is with the NJT understood as a full-fledged response to the justification problem.

The difficulty that the NJT faces in justifying legitimate authority can be brought out by considering one of the two main types of case to which Raz says that the NJT has application, namely, cases in which the person issuing the directive has greater expertise than the person to whom the directive is issued. (The other type of case, which involves situations in which the person issuing directives is in a position to achieve valuable coordination among the activities of several people, will be discussed later.) To avoid unnecessary complications, I will focus on a case in which the "background reasons" that apply to the person to whom directives have been issued are both moral in character and constitute categorical reasons, where a categorical reason is one that applies to the person independently of his or her particular goals and aspirations. Suppose, for example, that the issue is how safely to transport a certain dangerous substance, where transporting the substance poses potentially serious risks of harm to other persons. The relevant background reasons that apply to transporters of

the substance are reasons to avoid creating such risks for others, and are therefore categorical in nature. Suppose that a given governmental agency in fact knows much more about the transportation of this substance than I do, and that I will therefore do much better in complying with the background reasons of safety that apply to me if I obey the agency's directives than if I try to decide for myself how the substance ought to be transported. The general idea of the NJT is that this fact gives me reason to comply with the directives the agency has issued, and that since it would be "double-counting" if I were also to try to take account of the background reasons directly, I should treat the directives as "preempting" those background reasons.⁸ The fact that the background reasons are preempted is supposed to explain the mandatory nature of my reason to follow the directives.⁹ Furthermore, by preempting the background reasons, the directives are supposed to replace those reasons for me. Since the background reasons are categorical in nature, it is very plausible to think that a reason that replaces them is likewise categorical. If whenever I engage in the activity of transporting the dangerous substance I have a reason to follow the agency's directives that is both mandatory and categorical, that would appear to be sufficient to establish that I have a moral *obligation* to follow the directives. If I have a moral obligation to comply with the directives, that would appear to be sufficient to establish that the agency has the legitimate authority to issue the directives, which is simply to say that it possesses the normative power that it claims for itself and that it purports to be exercising in issuing the directives.

Let me call the argument of the preceding paragraph the justificatory argument. The difficulty with the argument, which comes in the last step, is that it proves too much.¹⁰ Suppose that everything about the example remains the same, with the sole exception that the governmental agency issues advisory recommendations about how the dangerous substance ought to be transported, rather than directives that are meant to be obligatory. In other words, the agency does not purport to exercise a power to impose an obligation on me; it simply offers me advice, and then leaves it up to me to make a decision about what precautions to take if I decide to transport the substance in question. To ensure that no other aspect of the hypothetical is modified, we have to assume that the background reasons of safety, at least insofar as they apply to me, are not affected by the possibility that fewer persons overall will comply with the agency's views about how to transport the substance if those views are issued not as obligatory directives but simply as advisory recommendations. Let me therefore assume that the case is one in which my reason to follow the agency's directives depends *solely* on its expertise.¹¹ The assumption, then, is that I will do better in complying with the safety reasons that apply to me in transporting the dangerous substance if I follow the agency's views about what ought to be done, regardless of how many other people do likewise. On that assumption, the justificatory argument appears to go through, right up to the last step. Given that the background reasons are categorical, and given that I will do better in complying with those reasons if I treat the agency's recommendations as preemptive and hence as mandatory, it is difficult to see how to avoid the conclusion that I have a moral obligation to follow the agency's views even though they are only issued as recommendations and not as directives. In other words, I have a moral obligation regardless of whether the agency purported to exercise a normative power to impose an obligation on me. But if I have the obligation regardless of whether or not the agency claimed to possess and purported to exercise a power to obligate me, it is difficult to see how the argument can justify the conclusion that the agency possesses such a power.

Perhaps it might be suggested that even though I have the obligation in both cases, that is not a reason to deny that, if the agency does happen to claim and to purport to exercise a power to impose obligations, the justificatory argument is sufficient to justify the conclusion that it possesses this power it claims for itself. But this suggestion would lead to some strange results. Suppose that no governmental agency exists to regulate the transportation of dangerous substances, but that I have a friend who has exactly the same level of expertise that we have been attributing to the agency. My friend gives me advice about how to transport the substance that is identical in content to the directives or recommendations that we were supposing would have been issued by the governmental agency. So long as I have reason to know that I will do better in conforming with the background categorical reasons that apply to me by following my friend's advice than if I were to try to follow my own judgment, it is once again difficult to avoid the conclusion that the justificatory argument establishes that I have a moral obligation to follow my friend's advice. But now suppose that, instead of simply advising me, my friend claims to exercise a power to obligate me to do as she says. In accordance with this claimed power she does not simply advise me but *commands* me, or issues a *directive* to me, to do such-and-such if and when I transport the dangerous substance. Does the justificatory argument establish that she does, in fact, possess the moral power to obligate me that she claims for herself? It seems very odd that the mere possession of a certain kind of expertise, coupled with nothing more than a claim that one possesses a normative power to obligate others, should be sufficient to establish that one does, in fact, possess such a power. Raz himself draws attention to the similarity, from the point of view of the NJT, between obligatory directives and advice when he writes that, in pure expertise cases, "the law is like a knowledgeable friend."¹² But this similarity, far from lending support to the justificatory argument, actually undermines it. If, in cases of pure expertise, the justificatory argument is sufficient to justify the existence of a moral obligation to follow the views of another person about what to do, it does so whether the other person simply offers advice or claims to issue binding directives. And if the suggestion is made that whenever the justificatory argument justifies an obligation on the part of *B* to do as *A* says, then it also justifies any claim that *A* might happen to make to have the *power* to obligate *B*, then we will be led to find normative powers in some rather odd places.

To come at the difficulty from a slightly different direction, consider what it means to say that one person possesses a normative power over another. Raz defends a very plausible view that takes something like the following form: One person *A* has a power to effect a certain kind of change in the normative situation of another person *B* if there is sufficient reason for regarding actions which *A* takes with the intention of effecting a change of the relevant kind as in fact effecting such a change, where the justification for so regarding *A*'s actions is the desirability of enabling *A* to make this kind of normative change by means of this kind of act.¹³ The difficulty that I am arguing the justificatory argument faces is that, in trying to justify the conclusion that one person possesses authority over another, it makes no essential reference to the desirability of the first person being able *intentionally* to change the normative situation of the other. The NJT looks out at the world, so to speak, from the perspective of an individual who is seeking assistance wherever he can find it in helping him to conform to right reason. From this point of view, leaving aside for the moment problems of coordinating activity, there is no particular reason to distinguish advice from directives claiming to be authoritative. For that matter, it does not particularly matter whether the "advice" comes from a person or from a black box,

which, for all I know, might not even be subject to the control of another person. So long as I know or can readily come to know, on whatever basis, that if I follow the "recommendations" that appear on the screen of the black box then I will do better in complying with the background reasons that apply to me, the justificatory argument seems to go through. Notice that it is not sufficient to distinguish advisory recommendations from obligatory directives to say that, in the former case, the recommendations give me reasons for belief but not reasons for action, or that the advisor is a mere theoretical authority for me but not a practical authority. In the case of the governmental agency, for example, the justificatory argument appears to go through whether the agency issues advisory recommendations or obligatory directives. Furthermore, in the case of both recommendations and directives, the argument only goes through if I have a basis for knowing *as a general matter*, that I will do better by complying with the agency's views than if I try to act on my own judgment.¹⁴ It may or may not be true that, on any particular occasion when I transport the dangerous substance, I have a reason to believe that I will do better on that occasion by following the agency's views, and this is so whether those views take the form of advisory recommendations or authoritative directives. What matters in both cases is, to repeat, that I must have good reason to believe that I will *in general* better comply with the reasons of safety that apply to me if I follow the views of the agency.

In light of the above considerations, it is noteworthy that, in his most recent work on authority, it is no longer clear that Raz means to offer the service conception as a full-fledged response to what I have been calling the justification problem, i.e., the problem of how to justify legitimate political authority. In a recent article, Raz states that the service conception is driven by a theoretical problem and by a moral problem.¹⁵ The theoretical problem concerns the issue of "how to understand the [normative] standing of an authoritative directive." The moral problem is, "how can it ever be that one has a duty to subject one's will and judgment to those of another?" The moral problem is, clearly, just another name for the subjection problem that I identified earlier. The theoretical problem, however, is *not* the same as the justification problem. In response to the theoretical problem, Raz observes that "[a] person can have authority over another only if there are sufficient reasons for the latter to be subject to duties at the say-so of the former." He adds that this observation does not tell us when anyone has authority over another or even that anyone ever can have such authority. It only states what has to be the case for one person to have authority over another; and "[t]hat is all that one can ask of a general account of authority." The theoretical problem thus apparently raises no more than a bare conceptual issue, which is answered, in essence, by pointing out that one person can have authority over another only if there are sufficient reasons to justify the possession by the former of a normative power to impose obligations on the latter. Not only is the service conception not explicitly advanced as a general response to the justification problem, the justification problem is not even formulated as a distinct problem in its own right. The task of determining who has authority over whom and with regard to what "is a matter of evaluating individual cases."

Raz then goes on, in the same article, to offer the service conception as a specific response to the *moral* problem, which, as already noted, is what I have been calling the subjection problem. It is worth quoting Raz's restatement of the service conception in full:

The suggestion of the service conception is that the moral question is answered when two conditions are met, and regarding matters with respect to which they

are met: First, that the subject would better conform to reasons that apply to him anyway (that is, to reasons other than the directives of the authority) if he intends to be guided by the authority's directives than if he does not (I will refer to it as the normal justification thesis or condition). Second, that the matters regarding which the first condition is met are such that with respect to them it is better to conform to reason than to decide for oneself, unaided by authority (I will refer to it as the independence condition).¹⁶

Raz anticipates the objection that the two conditions do not solve the moral problem because the second condition merely restates it. He responds that the independence condition "merely frames the question," and that part of the answer to the moral problem is to be found in the first condition, namely, the NJT.¹⁷ Raz argues that "the key to the justification of authority" is that, far from hindering our rational capacity, i.e., our capacity to guide our conduct in accordance with our own judgment, authority actually facilitates this capacity. We value our rational capacity not just because we value the freedom to use it, but also because "its purpose...by its very nature, [is] to secure conformity with right reason." When the conditions of the NJT are met, we are better able to achieve this purpose by acting in accordance with the relevant authority's directives than if we try to exercise our rational capacity directly. In such cases, the importance of conforming our actions to right reason outweighs the importance of self-reliance and acting on our own independent judgment. Raz goes on to point out that, because we are hardwired to respond instinctively to certain dangers, sometimes we do better in achieving the purpose of our rational capacity by acting on our emotions. More generally, authority is just one technique among others that is capable of helping us to achieve this purpose: The primary value of our general ability to act by our own judgment can also be met by "making vows, taking advice, binding oneself to others long before the time for action with a promise to act in certain ways, or relying on technical devices to 'take decisions for us', as when setting alarm clocks, speed limiters, etc." To understand authority properly we must therefore see it "not [as] a denial of people's capacity for rational action, but rather [as] simply one device, one method, through the use of which people can achieve the goal (*telos*) of their capacity for rational action, albeit not through its direct use."

This discussion of our rational capacity is illuminating and insightful. It shows that the two conditions of the service conception, namely, the NJT and the independence condition, together offer a response to a very broad understanding of the subjection problem. In doing so it makes clear why we are justified, in appropriate circumstances, in subjecting our will not just to certain demands or requests by other persons that we behave in a certain way, but also to advice that others give us and even to mechanical devices such as speed limiters. (Recall the earlier discussion of a black box that dispenses "advice," but which may not be under the control of, or even have ever been programmed by, a human being.) However, in drawing attention to the fact that authority is just one device or technique among others that can enable us better to comply with right reason, this response to the subjection problem simply underscores my earlier point that the NJT makes no essential reference to the claim of *de facto* authorities to be exercising a moral power to impose obligations when they issue their directives. As I noted earlier, the NJT looks out at the world from the perspective of an individual who is seeking assistance wherever he can find it in helping him to conform to right reason. So long as I have reason to know that I will in general do better in complying with the reasons that apply to me in a given type of case by following

the views of another person rather than by acting on my own judgment, it does not matter whether those views are offered in the form of advice or in the form of directives. Thus, although it may well be a necessary condition of one person's possessing legitimate authority over another that the NJT or some similar condition be met, the service conception cannot, certainly as a general matter, offer a full-fledged response to the problem of justifying legitimate authority. The service conception is not in the end best viewed as a conception of authority as such but, rather, as a general response to a very broad understanding of the subjection problem.

In light of the preceding discussion, it is misleading to say, as Raz does in his recent article, that "[t]he function of authorities is to improve our conformity with...background reasons by making us try to follow their instructions rather than the background reasons."¹⁸ In the case of political authority, the function of governments is not to improve our conformity with right reason for its own sake but, rather, to accomplish important moral goals that governments are uniquely suited, or at least particularly well suited, to achieve on behalf of their subjects by means of the normative instrument of a power to impose obligations. Background reasons will figure in the justification of the power, but that is not the same as saying that the power is justified because it improves conformity with background reason. For example, Raz has always regarded appeal to the ability of governments to achieve coordination, understood in a broad sense and not just as a solution to a narrowly-conceived, Lewis-style coordination problem, as one of the two main ways that the service conception can justify political authority.¹⁹ (The other main way, which I have already discussed, is grounded in the possession of greater expertise.) Although any response to the justification problem that is based on securing coordination must contend with a number of difficult questions,²⁰ it nonetheless seems clear that, one way or another, the ability of governments to coordinate complex activity will inevitably play a prominent role in the justification of most political authorities, to the extent that they can be justified. It also seems clear that any justification of political authority that rests on the ability of governments to coordinate activity must at some point appeal to an interest that people generally have in the successful achievement of coordination. There is no harm in saying that, because people have such an interest, they have a background reason "to wish for a convention,"²¹ as Raz has put it, or something along those lines.

We nonetheless overlook an important dimension of what is valuable about coordination if we limit ourselves to saying that the power to issue coordination-securing directives is justified because the possession and exercise of this power will enable people better to conform their own actions with the requirements of right reason. Even if "a reason to wish for" coordination is sometimes a background reason for me to act in such a way that my own activities are coordinated with those of others, I have an interest in the existence of general social coordination, meaning coordination in many different aspects of public life, which goes far beyond ensuring that *my own actions* conform to this kind of background reason. I will benefit, for example, in countless different ways because other people's activities have successfully been coordinated so as to ensure that the highways are adequately maintained and the air traffic control system operates efficiently. The achievement of coordination is a valuable moral goal in its own right, quite apart from the extent to which particular individuals might in their own actions better conform with reasons that apply to them. The fact that many people will benefit from a set of directives that successfully coordinates the air traffic control system will inevitably figure in any argument that is sufficient to establish that the government is justified in issuing these directives, and

this is so even though the directives do not directly engage the background reasons for action of many of the people who benefit in this way.

As Raz has observed, his general view of authority entails the substantive moral thesis that all political reasons are subordinated to ordinary individual morality.²² But even if this thesis is true, which is not a self-evident matter, it is important to make clear that the relevant background reasons of individual morality are often very general and only indirectly related to the actions the government is empowered to take. As Raz says, the fact that everyone has reason to improve their own economic situation does not mean that everyone has a reason to raise taxes: “[T]hose helping us may have good grounds for pursuing the goals set by reasons that apply to us in ways that are not open to us,” and, indeed, “they may be assigned the task of helping us precisely because of that.”²³ While this is certainly correct, it nonetheless seems strained to say that the government’s role in such a case is to help every individual to act in ways that better conform with the reason they have to improve their own economic situation, as opposed to saying that the government’s role is, quite simply, to achieve the moral goal of improving everyone’s economic situation.

To see the general point more clearly, consider the following example. Suppose that a society has good reasons of security to have a standing army of a certain size, but that it would be wasteful of resources to have an army of any larger size. Assume that the government is justified in achieving this goal by conscripting the required number of soldiers from the pool of citizens who are generally fit to serve in the army, and that it is also justified in determining who is to be drafted by instituting a fair lottery. It is no doubt true, in such a case, that each citizen has a background moral duty to contribute where necessary to maintaining the security of the society, so that it is true of each citizen who is drafted that she is complying with a background reason that applies to her. But does it follow that she is *better* complying with that reason by obeying the directive to serve in the army? After all, she only has the duty to serve because her name happened to come up in the lottery. Similarly, is it sensible to say that the *function* the government is fulfilling in instituting the draft-by-lottery is to enable each citizen who has been drafted to conform better with a background reason that applies to her? If that were the government’s function, why is it only helping Susan by drafting her, and not helping John by drafting him as well? Are we to say instead that the government is somehow serving the goal of helping each citizen who *might* have been drafted to better conform with a background reason? Surely we make the best sense of such a case by saying quite simply, that the government’s function is to take steps to achieve the general moral goal of providing for the society’s security by means of the exercise of a power to impose duties on (some) citizens. No doubt there is a background reason at work in any argument that might plausibly be offered to show that the government does, in fact, possess this power; but we nonetheless mis-describe the situation if we say that the possession of the power is justified because its exercise ensures that those whose normative situation is affected will better comply with that background reason than would otherwise be the case. That is why I said earlier that it may well be a necessary condition of a government’s possessing legitimate authority over any particular person in regard to any particular matter that the NJT, or some condition similar to the NJT, be satisfied. What is necessary is that the justification of the power invoke some background reason that applies to any person whose normative situation is affected by its exercise. But it does not follow that the exercise of the power enables any such person to *better* comply with that reason. Still less does it follow that this was the purpose of exercising the power.

There is another, related difficulty to which the service conception gives rise, insofar as it holds that the function of authority is, quite simply, to improve conformity with right reason. Raz has observed, in connection with earlier formulations of the service conception, that the NJT “invites a piecemeal approach to the question of the authority of governments, which yields the conclusion that the extent of governmental authority varies from individual to individual, and is more limited than the authority most governments claim for themselves in the case of most people.”²⁴ Thus if, to revert to an earlier example, I happen to know much more about how safely to transport a dangerous substance than does the governmental agency that has been charged with regulating such matters, the piecemeal approach suggests that the agency does not have the authority over me that it claims and that I am not morally bound by its directives. If we say that the function of authority is, quite simply, to enable me better to conform with background reasons, then it becomes difficult to make sense of the fact that legal systems claim virtually unlimited power to regulate any activity or aspect of life,²⁵ and that they do not acknowledge any exceptions to that authority that are not explicitly recognized by the law itself. No doubt Raz is correct to say that it is not a condition of adequacy of an explanation of the concept of authority that those who have authority accept, even implicitly, that the explanation is correct.²⁶ Even so, one would nonetheless expect any adequate explanation to make sense of, in the minimal sense of being consistent with, the behavior of those who claim authority. If the function of authority really were to enable persons better to conform with right reason, then one would expect there to be many cases in which the claim of authority could be justified by appeal to pure expertise. One would nonetheless also expect in such cases that the law would act, as Raz has put it, “like a knowledgeable friend,”²⁷ acquiescing gracefully when a subject either knows more than it does or succeeds in finding some third party who knows more.²⁸ Regarded as a general response to the subjection problem, the NJT counsels me to seek assistance in conforming to right reason wherever I can find it, so that if I have good grounds for believing that I will generally do better in safely transporting a dangerous substance by following the law of California than by following the law of Pennsylvania, then I should follow the law of California. But the law of Pennsylvania does not see the matter this way. It insists that, insofar as I fall within its jurisdiction, I have an obligation to follow its directives except to the extent that the law itself makes room for some exception. Far from encouraging me to seek assistance in conforming to right reason wherever I might find it, the law tells me that I am obligated to follow its directives, and that is the end of the matter. This suggests that there is an almost unavoidable tension in regarding the NJT as a full-fledged response to *both* the subjection problem *and* the justification problem.

Insofar as he has, at least in the past, treated the service conception as a full-fledged response to the justification problem, Raz has tended to view the analysis of authority as beginning with the one-to-one relation between an authority and a single person subject to the authority, so that authority over a group of persons is to be accounted for by reference to authority relations between individuals.²⁹ This aspect of the service conception goes hand-in-hand with the piecemeal approach to political authority, which suggests, in turn, that the paradigm of an authority relation is a case of pure expertise. If, however, we adopt the view that the principal function of political authority is not to enable individuals taken one by one to better conform with right reason but that it has the function, rather, of accomplishing important moral goals by means of a power to impose obligations, then we are likely to see the paradigmatic instances of authority as those in which

the government's actions can be understood, to borrow a term from Finnis, as intended to advance the common good. As Finnis recognizes, large-scale coordination of complex activity is perhaps the best example of how the common good can be advanced.³⁰ Once we reject the idea that the function of political authority is to enable individuals to better conform with right reason one by one, then we are also naturally led to the view that an exercise of political authority can probably only rarely be justified by appealing solely to greater expertise. One way or another, the justification of a power to issue directives about, say, the proper manner of transporting a dangerous substance will almost always have some coordinating aspect, such as the value of ensuring that persons generally, and not just those who are engaged in the activity of transporting the substance, are able to form reliable expectations about how this activity will be carried on.³¹ If we understand such cases as almost always resting on more than just a claim of greater expertise, then the task of justifying political authority becomes a much less formidable task than it would otherwise be, and the authority of governments is far less likely to be piecemeal. By the same token, however, we do not succeed in justifying political authority simply by showing that the persons over whom authority is claimed will better comply with a background reason that applies to them than if they were to try to act according to their own judgment. To say this much is to say no more than that those persons may well be justified in subjecting their will to that of the authority. But solving the subjection problem does not mean that we have solved the justification problem. The NJT, and the service conception generally, must be understood as contributing primarily to the solution of the subjection problem. Although a response to the subjection problem will almost invariably figure in any attempt to justify a claim of legitimate political authority, we have no reason to assume that, as a general matter, this will be sufficient by itself to establish that a given claim to authority can be justified.

Endnotes

1. Raz argues that because legal systems, unlike other normative systems such as commercial companies and sports organizations, acknowledge no limitations on the spheres of behavior which they have the power to regulate, their claim of authority is "comprehensive." Joseph Raz, *The Authority of Law* (Oxford: Clarendon Press, 1979), 116-17. Elsewhere he makes a similar point by observing that even in states in which the power of the legislature to legislate is constitutionally limited, "the law" nonetheless claims unlimited authority for itself "because the law provides ways of changing the law and of adopting any law whatsoever..." Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), 76-77.
2. See, e.g., Joseph Raz, "Hart on Moral Rights and Legal Duties," *Oxford Journal of Legal Studies* 4 (1984): 123-31.
3. John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press), 250.
4. Robert Paul Wolff, *In Defense of Anarchism* (New York: Harper & Row, 1970), 1-19.
5. Raz, *The Morality of Freedom*, 53.
6. Cf. *ibid.*, 63 "The service conception is a normative doctrine about the conditions under which authority is legitimate and the manner in which authorities should conduct themselves."
7. Cf. *ibid.*, 38-42, where Raz discusses the problem of "surrendering one's judgment."
8. *Ibid.*, 41-42, 57-59. It is worth noting that, in Raz's early formulations of the service conception, binding directives were apparently supposed to exclude acting on *all* the background reasons (or dependent reasons, as Raz sometimes calls them) because that would be double-counting. See, e.g., *ibid.*, 42 "[R]easons that could have been relied upon to justify [an arbitrator's] decision before his

decision cannot be relied upon once the decision is given." However, in a recent article, Raz appears to have weakened the double-counting prohibition to some extent. Binding authoritative directives are now said to exclude acting only on those background reasons which the lawmaker was meant to consider and which conflict with the directive. Raz observes, quite sensibly, that the preemptive or exclusionary nature of a binding directive does not exclude relying on reasons for behaving in the same way as the directive requires, but only those reasons "on the losing side of the argument." "The Problem of Authority: Revisiting the Service Conception," *Minnesota Law Review* 90 (2006): 1003-44, 1022. Sensible as this is, it clearly permits double-counting since there is nothing to prevent me from acting on both the directive *and* the winning background reasons. Furthermore, since it is difficult to see how I can act on the winning reasons without knowing and taking account of the fact that they outweigh the losing ones, it seems to follow that, even though I cannot act on the losing reasons *alone*, I can nonetheless act on the *totality* or *balance* of background reasons, and, indeed, I must do so whenever I act on the basis of the winning reasons. In light of these considerations, it is no longer clear exactly what, on Raz's general account of practical reasoning, a preemptive or exclusionary reason is supposed to exclude.

9. Raz, *The Morality of Freedom*, 60.
10. Cf. Stephen Perry, "Law and Obligation," *The American Journal of Jurisprudence* 50 (2005): 263-95, 280-81.
11. This means, among other things, that we are not dealing with a certain kind of case that Raz has discussed elsewhere, in which it would be futile for me to follow a given standard of conduct unless many other people also follow it. See Raz, *The Authority of Law*, 247-48. Raz gives the following example. If a sufficiently large number of people refrain from polluting a river, then the river will be clean. Any given person has a reason not to pollute only if a sufficiently large number of others do likewise, since otherwise the action of a single individual in refraining from polluting will be futile. Notice that this is a case where any given individual's reasons are affected by the existence or non-existence of a general social practice, but where the practice does not amount to a Lewis-style solution to a coordination problem.
12. Joseph Raz, *Ethics in the Public Domain* (Oxford: Clarendon Press, 1994), 332.
13. Raz, *The Authority of Law*, 18.
14. Raz explicitly acknowledges the epistemic basis of his account of legitimate authority when he writes that "[i]f one cannot have trustworthy beliefs that a certain body meets the conditions of legitimacy [i.e., the NJT and an 'independence condition' which holds that it is more important, in the relevant type of case, to conform to reason than to decide for oneself], then one's belief in its authority is haphazard and cannot... be trusted. Therefore, to fulfill its function, the legitimacy of an authority must be knowable to its subjects." Raz, "The Problem of Authority: Revisiting the Service Conception," 1025. It is worth noting in this regard that Raz further acknowledges that, in the case of both authority and advice, it is ultimately up to each individual to decide for himself whether or not the conditions of legitimacy are met: "[I]n following authority, just as in following advice... one's ultimate self-reliance is preserved, for it is one's own judgment which directs one to recognize the authority of another, just as it directs one to keep one's promises [and] follow advice..." *Ibid.*, 1018.
15. *Ibid.*, 1012-13.
16. *Ibid.*, 1014.
17. *Ibid.*, 1017-18.
18. *Ibid.*, 1019 (emphasis added).
19. See, e.g., Raz, *The Morality of Freedom*, 49-50.
20. Cf. Leslie Green, *The Authority of the State* (Oxford: Clarendon Press, 1988), 89-121.
21. Raz, *The Morality of Freedom*, 50.

22. *Ibid.*, 72
23. Raz, "The Problem of Authority: Revisiting the Service Conception," 1030
24. Raz, *The Morality of Freedom*, 80
25. See note 1 above.
26. Raz, "The Problem of Authority: Revisiting the Service Conception," 1006
27. Raz, *Ethics in the Public Domain*, 332
28. Cf. Perry, "Law and Obligation," 283-84
29. Raz, *The Morality of Freedom*, 71.
30. Finnis, *Natural Law and Natural Rights*, 153
31. Raz acknowledges that expertise and coordination are, in the case of political authority, usually "inextricably mixed," and that because of the resulting importance of achieving coordination, generally speaking only *de facto* authorities, meaning bodies that are effectively able to ensure that people will do what those bodies say, can be legitimate. Raz, "The Problem of Authority: Revisiting the Service Conception," 1031, 1036