Law and Moral Obligation

Patricia D. White†


One of the major disputes between natural law theorists and legal positivists concerns the relationship between law and morality. Adherents of natural law have argued that there are necessary connections between the two,1 while positivists traditionally have denied that there is any such essential relationship, preferring instead to characterize law as an institution that is based on contingent facts about human beings and their societies.2 Although the contours of this dispute are impossible to draw precisely—largely because there are so many variants of both general types of theory—there has been something of a consensus that legal positivism and natural law theories are fundamentally irreconcilable. In The Authority of Law,3 Joseph Raz offers an analysis of the connection between law and morality that, although written from within a positivist framework, attempts to establish that, in this respect at least, there is room for compromise between the two dominant traditions in legal philosophy.

Raz describes his project somewhat differently. His stated aim is to examine the nature of the authority of law and, more broadly, of the relationship between law and morality.4 But throughout the book, as throughout his other work,5 Raz's skill as a sympathetic

† Assistant Professor of Law, Georgetown University Law Center.

1 E.g., ST. THOMAS AQUINAS, SUMMA THEOLOGIAE q. 95, arts. 1 & 2, at 99-107 (Blackfriars trans. 1963); Fuller, Positivism and Fidelity to Law—A Reply to Professor Hart, 71 HARV. L. REV. 630 (1958).


4 Id. at viii.

expositor of other people's work manifests the admirable intellectual instinct to search for conciliatory solutions.

The Authority of Law is presented as a series of fifteen discrete essays—eight of which have appeared elsewhere in one form or another—and is divided into four parts. The first part consists of a general analysis of the concept of legitimate authority and a discussion of how the claims of law would be characterized under the analysis. The last part returns to the task of applying the general analysis to the claims of law, concentrating in particular on the nature of the law's legitimate moral authority. The middle two parts examine a variety of issues ranging from the adequacy of traditional natural law arguments that there is a connection between law and morality sufficient to give law legitimate moral authority to the interaction of law and value in the English doctrine of precedent. Interspersed are essays on Kelsen's theory of the basic norm, on the sources of law, and on the nature and identity of legal systems. Although each of the essays is stimulating, interesting, and suggestive, the principal argument of the book suffers from the essay format. Many of the essays contribute little to, and distract the reader's attention from, the book's central thesis. In fact, Raz never makes in any straightforward sense what I take to be the main argument of his book.

Briefly and considerably simplified, his central contention is that there is no generally applicable moral obligation—not even a prima facie one—to obey the law, but that within any legal system people become morally obligated to obey the law if they have an attitude of "respect for the law." Raz arrives at this view after concluding that any individual or institution that has authority of any sort over others must at least be perceived by some of those

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* J. Raz, supra note 3, at 3-33.
* Id. at 233-89.
* Id. at 53-77.
* Id. at 180-209.
* Id. at 122-45.
* Id. at 37-77.
* Id. at 78-121.

Raz's claim actually is somewhat broader than this. He argues "that there is no obligation to obey the law," id. at 233, and does not restrict this claim to the moral one. Because it is almost certainly true that there is a legal obligation to obey the law, however, and because Raz himself says that "[t]he obligation to obey the law is generally thought of as a moral obligation," id. at 244, his claim apparently is about moral obligation. See also Mackie, Obligations to Obey the Law, 67 VA. L. REV. 143, 143-44 (1981).

* J. Raz, supra note 3, at 250.
others as having the authority legitimately.\textsuperscript{15} Under his analysis, having authority over someone is tantamount to having a kind of "normative power" over him: the instructions of the authoritative individual or institution provide "protected reasons" for acting according to the instructions.\textsuperscript{16} Raz distinguishes among reasons to act (for example, a parent telling the child to obey the babysitter, where it is the parent's instruction that gives the babysitter authority over the child), reasons to act for a reason (for example, a parent telling the child to obey the other parent, where the instructions of the other parent already are reasons to act), and reasons not to act for a reason (for example, a parent telling the child not to obey the other parent, where the instructions of the other parent already are reasons to act).\textsuperscript{17} "Protected reasons" are facts that serve simultaneously as reasons to act and as reasons not to act for a reason.\textsuperscript{18}

The law, according to Raz, claims authority.\textsuperscript{19} Legal systems therefore claim that their laws provide protected reasons for action. The claim of any system is that each law of the system must, simply by virtue of its position as such, serve both as a reason to act in accordance with its terms and as a basis for disregarding (a reason not to act for) reasons to act that are counter to its terms. Raz emphasizes that one of the prerequisites for the existence of any legal system is that it be in force in some society.\textsuperscript{20} One of the consequences of a legal system being in force seems to be that it has the authority it claims.\textsuperscript{21} Indeed, borrowing from and modifying Kelsen,\textsuperscript{22} Raz argues that a legally valid rule is a legally bind-

\textsuperscript{15} Id. at 28-29.
\textsuperscript{16} Id. at 18-19.
\textsuperscript{17} Id. at 16-17.
\textsuperscript{18} Id. at 17-18.
\textsuperscript{19} Id. at 33.
\textsuperscript{20} "We identify the question of whether or not the system is in force with the question of its existence. A legal system exists if and only if it is in force." Id. at 104.
\textsuperscript{21} Raz never fully defines "in force." He does say that "whatever it is, it concerns the attitudes and responses of all or certain sections in the society to the legal system: Do they know it, do they respect it, obey it?, etc." Id. at 103. He also says that "all agree that a legal system is not the law in force in a certain community unless it is generally adhered to and is accepted or internalized by at least certain sections of the population," id. at 43, and that a legal system "is in force if it is effectively followed, observed, and enforced within the community," id. at 151. Given the importance of the notion to his account of the character of the law's authority, his comment that "[i]t is not pertinent to our purpose here to work out a test for determining when a legal system is in force," id. at 151, is rather puzzling. See text at notes 23-24 infra.
ing rule. Specifically, his claim is that a law is valid as a law within a legal system only if it has the normative consequences it purports to have, and it has those consequences because it belongs to a legal system that is in force. Thus, a valid law gives its constituents a protected reason for acting according to its terms. Raz's task then becomes to examine this normative force of law.

How do laws come to serve as protected reasons for action? One possible source of normative power is, of course, the existence of an independent general moral obligation to obey the law. Raz addresses effectively many of the popular arguments that have been made in support of this view and concludes that although "no master argument can prove the nonexistence of such a moral obligation," it is safe to proceed on the assumption that there is no such general obligation.

If the law's authority is not rooted in a general moral obligation, what is its source? Raz's solution is ingenious, if unconvincing. He suggests that the law's normative power exists only for those who have "respect for the law." He regards respect for the law as an attitude that, although almost always morally permissible, is never of itself obligatory. However, respect for the law does, of itself, place those who have it under a moral obligation to obey the laws of the legal system they respect. A legal system only has authority when its laws are protected reasons for action, and its laws serve as protected reasons for action only for those who have the obligation-creating attitude of respect for the legal system.

The conciliatory character of Raz's account of the relationship between law and morality can now be seen. He is not prepared to say, as many natural law theorists have, that there are any necessary moral constraints on the content of legal systems. Instead, as is typical among legal positivists, he contends that each system's moral value can be judged independently, and its content may be based wholly on contingent facts about human beings and their

23 The law, recall, claims authority. See text at note 19 supra.
24 J. Raz, supra note 3, at 153.
25 Id. at 237-42.
26 Id. at 242.
27 Id. at 250.
28 Id. at 253.
29 Id.
30 See note 1 supra.
31 Nor, however, is Raz prepared to insist that there are no ways in which the law is necessarily good. J. Raz, supra note 3, at 240.
societies.\textsuperscript{32} For Raz, however, the very existence of any legal system depends on its having the authority it claims.\textsuperscript{33} Because, on his account, a legal system does not have authority unless it includes among its constituency some who are morally obligated to obey its laws by virtue of their respect for the law,\textsuperscript{34} there is a necessary connection between law and moral obligation. The existence of any particular moral obligation, however, is itself contingent upon both the existence of a legal system and the individual's possession of the attitude of respect for the law of that system.

The foregoing picture of Raz's book does not emerge straightforwardly from a careful reading. This is due in part to the book's essay format. As a general rule, I think, complex arguments require a substantial amount of interconnective tissue to link the various parts. Raz requires the reader to supply too many of the connections. His demands are particularly unfortunate given that at least some of his audience can be expected to be lawyers and legal scholars unaccustomed to slogging through book-length philosophical arguments.

But the picture I have attributed to Raz is obscured for another, more curious, reason as well. He never says directly that for a legal system to exist, some of its constituents must be morally obligated to obey the law. Instead, he refers repeatedly to his conclusion that there is no general moral obligation to obey the law, without spelling out the full consequences of his argument. It is almost as though Raz does not want to acknowledge that he is committed to the view that whether any legal system is in force in a society, and thus whether a legal system exists, depends upon the existence of widespread respect for the law among those subject to it. But this is exactly the position that he is committed to, and it is at the core of his answer to the central question he poses: What is the nature of the law's authority?

Although the notion of respect for the law is crucial to Raz's analysis of the authority of law, it remains an elusive concept. Raz describes it as an attitude having two components, "each being a complex attitude in its own right": primarily cognitive respect and primarily practical respect.\textsuperscript{35} Primarily cognitive respect consists of

\begin{footnotes}
\item[32] Id. at 43-45, 157-59.
\item[33] See text and notes at notes 10-12 supra.
\item[34] Raz never indicates what proportion of a legal system's constituency must have respect for the law for it to have authority, but it is clear that he has something less than the entire constituency in mind. J. Raz, supra note 3, at 251-53, 260-61.
\item[35] Id. at 251.
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the "appropriate cognitions concerning the moral value of law" along with the "affective and practical inclinations and dispositions appropriate to them." Primarily practical respect consists of the disposition to obey the law as a matter of moral principle along with "a variety of affective and cognitive as well as further practical dispositions appropriate to it." Raz regards having the primarily cognitive attitude of respect for the law as fully consistent with the view that there is no general moral obligation to obey the law, for the particular legal system in question may be morally good. On the other hand, he argues, the possession of the primarily practical attitude of respect for the law can be reconciled with the absence of a general moral obligation to obey the law only if adopting the attitude of respect itself creates a moral obligation to obey the law for those who have the attitude.

Raz recognizes that his claim is unorthodox: an attitude that is not obligatory can nevertheless create moral obligations for those who have adopted it. He lays its foundation earlier in the book, however, by distinguishing among three types of normative statements: "external statements," or detached statements about people's normative practices, attitudes, and beliefs; "internal statements," or statements about one's own normative attitudes and beliefs; and "statements from a point of view," or statements about the normative practices, attitudes, and beliefs appropriate to people operating within a particular normative context that may or may not be that of the speaker. Raz finds the distinction between statements from a point of view and statements of the first two kinds a good deal clearer than I do. I am not at all persuaded that statements from a point of view do not fall sometimes within the class of internal statements and sometimes within that of external statements, depending upon whether the speaker actually em-

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36 Id.
37 Id.
38 Id. at 252-53.
39 Id. at 253.
40 Id. at 250-51.
41 Id. at 153-57. An example of an external statement is: "Some Eskimo tribes believe that grown children have a moral obligation to kill their elderly fathers."
42 Id. An example of an internal statement is: "I believe that I have a moral obligation to keep my promises."
43 Id. An example of a statement from a point of view is: "[Within the context of your religion, Roman Catholicism,] you have a moral obligation not to have an abortion." The normative context within which such a statement is made need not and often would not be explicitly stated—hence, the use of the brackets in my example.
brates the normative context within which the statement is made. Raz, however, thinks that this distinction provides a crucial key to understanding the relationship between law and morality, for it is by employing the distinction that he concludes that nonobligatory attitudes can themselves become obligation-imposing.44

Raz relies on an analogy to friendship to defend his view that those who have respect for the law are thereby morally obligated to obey it.45 Friendship, on his analysis, is a relationship that in and of itself imposes obligations on those who are friends.46 No one, Raz argues, is morally obligated to be friends with any particular person or to have any friends at all.47 Within the context of friendship, however, certain moral obligations arise. Indeed, the argument seems to go, the very notion of friendship in our society entails that certain normative standards apply48—just as being a Roman Catholic entails that certain normative standards apply. On Raz’s account, it appears that given certain facts about the nature of friendship in our society, the reason I can legitimately say to you, “You are morally obligated to your friend John not to exclude him from our party,” without committing myself either to including or excluding him, is that normative statements can be made from a point of view.

To Raz, respect for the law is like friendship in that having the attitude entails that certain normative standards apply. One who has respect for the law has both the disposition to obey it as a matter of moral principle (primarily practical respect) and the “cognitions concerning the moral value of the law” that are appropriate to that disposition (primarily cognitive respect).49 To have respect for a society’s law therefore involves identification with and loyalty to the society.50 On Raz’s account then, within the context

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44 Id. at 157-59.
45 Id. at 258.
46 Id. at 257.
47 Id. at 256.
48 See id. at 253-58.
49 Id. at 251.
50 Respect for law is an aspect of identification with society (the reverse of alienation). Here we come to the root of our analogy. A person identifying himself with his society, feeling that it is his and that he belongs to it, is loyal to his society. His loyalty may express itself, among other ways, in respect for the law of the community.
51 Id. at 259.

Raz appears to undercut himself on this point in a recent essay in which he agrees with J.L. Mackie’s comment that respect for the law often falls short of the “identification with society’ of which Raz speaks.” Mackie, supra note 13, at 154 (quoting J. Raz, supra note 3, at 259). Raz now says that “respect for law can express not identification but some other
of having respect for the law, there is a moral obligation to obey the law. Given this fact, we can make a normative statement from a point of view and say that certain people (those who have respect for the law) always have a moral obligation to obey the law, while denying that there is a general moral obligation to obey the law.

One problem with this view is, of course, that it presupposes that moral obligations can be founded within contexts. Despite the truth of Raz's observation that we do make normative statements from a point of view—and accepting for the moment his claim that such statements are different in kind from what he labels "external" and "internal" normative statements—it is by no means clear that normative statements from a point of view are thereby statements about moral obligation at all. Questions about the nature of morality are at least as fundamental and difficult as questions about the foundations of law. Raz makes the serious mistake of either overlooking this fact or of assuming, without discussion, a highly controversial view about the relationship between statements reflecting people's beliefs about morality and statements about morality itself. Either way, he is a long way from making his case.

attitudes, such as acknowledgement on the part of tourists that each country is entitled to regulate its own affairs in its own way." Raz, Authority and Consent, 67 VA. L. REV. 103, 129 n.13 (1981).

Raz would do better to argue that a tourist who adheres to a moral principle that demands obedience of a tourist to the laws of the countries he visits could be morally obligated within the context of that belief to obey the laws of his host country. The tourist's feelings about the host's laws need have nothing to do with his "cognitions concerning the moral value of the law" (primarily cognitive respect) and thus need have nothing to do with respect for the law as Raz has developed the notion. See Marshall, Inventing the Obligations to Obey the Law, 67 VA. L. REV. 159, 165 (1981).

I suspect that Raz simply assumes that there is a close connection between morality and what members of a society believe about morality. In the only extended comment on the subject in the book, he writes:

It is not pertinent to our purpose here to work out a test for determining when a legal system is in force in a certain community. Suffice it that all agree that its being in force is a matter of the efficacy of the law in that society. But so far as this consideration goes, the same is true of moral rules. They may be observed, followed, and enforced by a certain community (and I do not mean enforced by law), or they may be disregarded and violated more often than not. The precise test for the law being in force differs from that by which we judge whether a certain moral code is the moral code of a community. For one thing morality, unlike the law, does not rest on legislative and adjudicative institutions. But in essence, just as we can talk of the laws of England or Germany, so we can talk of the morality of the English or the Germans and the tests in either case are tests of the social efficacy of the rules.

J. Raz, supra note 3,' at 151.

Since Plato, philosophers have struggled with the question of whether there are objec-
Nevertheless, Raz has given us an exceedingly interesting and worthwhile book. I have only barely hinted at the richness of its detail, because that very richness often obscures the main line of his argument. That argument, although nearly inaccessible, is at worst original, suggestive, and worth serious attention. That is why I have taken pains to extract it and lay it out. This is a book that repays and should get careful study.

tive moral truths independent of people's actual beliefs about morality. See, e.g., PLATO, THEAETETUS 174b-179b; PLATO, PHARDO 67b-69e; ST. AUGUSTINE, ON FREE CHOICE OF THE WILL, bk. 2, pts. XII-XIX; I. KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 3-10 (L. Beck trans. 1969); H. SIDGWICK, THE METHODS OF ETHICS 31-35 (7th ed. 1907); B. RUSSELL, THE ELEMENTS OF ETHICS, in PHILOSOPHICAL ESSAYS 16-25 (1910). To ignore the issue, as Raz does, simply is not appropriate.