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A Critique of Joseph Raz's Theory of Authority*

Following Hobbes, early positivists such as Jeremy Bentham and John Austin developed the imperative, or command, model of law.¹ In the command model, law is conceived as “orders back by threats.”² For human law, this means a directive given by a political superior to a political inferior and enforced with coercive sanctions.³ That directive is authoritative by virtue of being given by a superior capable of imposing such sanctions. In Austin's words, “*command, duty, and sanction* are inseparably connected.”⁴ HLA Hart, in his seminal work, *The Concept of Law*, rejected the command model for insufficiently capturing the nature and scope of law. Hart argued that the command model could not account for the so-called internal perspective of law's subjects, who understand themselves to be acting for reasons other than coercion, nor could it account for the variety of laws, which come in both duty-imposing and power-conferring (*i.e.*, non-imperative) forms. Hart's observations revolutionized the modern positivist study of jurisprudence.

* Contrary to the implication of the originally announced title, in this chapter I do not get to the part where I make the direct case for an obligation to obey the law. In this part, I focus on the insufficiency of Raz's theory. Sorry.

¹ See, for example, Bentham's *Of Laws in General* and Austin's *The Province of Jurisprudence Determined*. Gerald Postema (“Law as Command: The Model of Command in Modern Jurisprudence”) raises an important question about differences between figures such as Bentham and Austin, but I leave those aside here.

² [?]

³ Austin 9, 14.

⁴ Austin 17. Emphasis in original in all cases unless otherwise noted.

If Hart represents the positivists' central descriptive critique of the command model, then the Joseph Raz represents the positivists' central normative challenge. Austin explains law's authority by writing, "whoever can *oblige* another to comply with his wishes, is the *superior* of that other."⁵ In the purely descriptive sense, this could very well be correct. Raz has no reason to deny that someone in a position to impose sanctions could compel the obedience of another. In Raz's view, however, such authority does not have legitimacy. It is plain to see why, for Raz, force does not legitimate authority. In an early work, Raz put it this way: "A person needs more than power (as influence) to have *de facto* authority. He must either claim that he has legitimate authority or be held by others to have legitimate authority. There is an important difference, for example, between the brute use of force to get one's way and the same done with a claim of right."⁶ Thus, even for the positivist, although law need not contain any particular moral content, law must meet a certain normative standard if it is to be authoritative at all.

As Raz makes clear, his chief concern about authority is not simply that it rest on more than force alone. Instead, Raz's main preoccupation is with the conflict between authority and autonomy. Raz opens his treatment of authority with this problem: "The paradoxes of authority can assume different forms, but all of them concern the alleged incompatibility of authority with reason or autonomy. To be subjected to authority, it is argued, is incompatible with reason, for reason requires that one should always act on the balance of reasons of which one is aware. It is the nature of authority that it requires submission even when one thinks that what is required is against reason. Therefore,

⁵ Austin 24-5.

⁶ Raz *The Authority of Law* (hereafter AL) 9.

submission to authority is irrational. Similarly the principle of autonomy entails action on one's own judgment on all moral questions. Since authority sometimes requires action against one's own judgment, it requires abandoning one's moral autonomy. Since all practical questions may involve moral considerations, all practical authority denies moral autonomy and is consequently immoral."⁷ In later works, Raz's theory of authority is framed largely as a response to the philosophical anarchists and especially Robert Wolff, whose work he addresses directly. In Wolff's view, "Taking responsibility for one's actions means making the final decisions about what one should do,"⁸ and further, "The moral condition demands that we acknowledge responsibility and achieve autonomy wherever and whenever possible."⁹ This sets up an intractable opposition between man and the state because the "defining mark of the state is authority, the right to rule" while the "primary obligation of man is autonomy, the refusal to be ruled."¹⁰ Therefore, according to Wolff, "anarchism is the only political doctrine consistent with the virtue of autonomy."¹¹

Raz's theory of authority is directed against this. Specifically, Raz refutes the philosophical anarchists by arguing that authority can be consistent with autonomy. This is how Raz chooses to introduce his edited volume on authority, which includes Wolff's essay. Raz wonders, "Can I not have absolute right to decide my own action while conceding an equal right to all? That is anarchy. But it may be that only anarchy avoids

⁷ Raz AL 3.

⁸ Wolff "The Conflict Between Authority and Autonomy" (Authority) 27.

⁹ Wolff 28.

¹⁰ Wolff 29.

¹¹ Wolff 29.

the problem of authority.”¹² Raz summarizes the problem as follows: “The duty to obey conveys an abdication of autonomy, that is, of the right and duty to be responsible for one’s action and to conduct oneself in the best light of reason. If there is an authority which is legitimate, then its subjects are duty bound to obey it whether they agree or not. Such a duty is inconsistent with autonomy, with the right and the duty to act responsibly, in the light of reason. Hence, Wolff’s denial of the moral possibility of legitimate authority. This is the challenge of philosophical anarchism.”¹³ The task, then, for Raz is to demonstrate that authority can be consistent with acting “in the best light of reason.”

Raz’s theory of authority comprises three main theses. First, there is the preemption thesis: “the fact that an authority requires performance of an action is a reason for its performance which is not added to all other relevant reasons when assessing what to do, but should exclude and take the place of some of them.”¹⁴ In other words, authoritative directives preempt the reasons to do or not do an action by excluding them from consideration. In this way, the authoritativeness of the directive is not weighed against the reasons for action but preempts them. In Raz’s locution, a reason for action is a first-order reason while a reason to act or not act for a reason is a second-order reason. More specifically, a reason not to act for a reason is a special kind of second-order reason called an exclusionary reason because it excludes at least some first-order reasons.¹⁵ This is generally how the law works.

¹² Raz “Introduction” (hereafter Intro) Authority 4.

¹³ Raz Intro 4. Raz often introduces the issue of the nature of law in terms of the challenge of the philosophical anarchists. See for example, Raz “Authority and Consent” (hereafter AC) 105; Raz, “The Obligation to Obey: Revision and Tradition” (hereafter TOTO) 139; Raz “About Morality and the Nature of Law” (hereafter AMNL) 1.

¹⁴ Raz The Morality of Freedom (hereafter MF) 46.

¹⁵ Raz Practical Reason and Norms (hereafter PRN) 39.

Second, there is the dependence thesis. The dependence thesis states, “all authoritative directives should be based on reasons which already independently apply to the subjects of the directives and are relevant to their action in the circumstances covered by the directive.”¹⁶ Such reasons are called dependent reasons, a category that includes the reasons for action that apply to the subject and any decisions that “sum them up.”¹⁷ Because the dependence thesis is “a moral thesis about the way authorities should use power,”¹⁸ it “does not claim that authorities always act for dependent reasons, but merely that they should do so.” Therefore, adherence to the dependence thesis is one of the conditions for legitimate authority.

The other condition for legitimate authority is the third thesis, the normal justification thesis: “the normal way to establish that a person has authority over another person involves showing that the alleged subject is likely better to comply with reasons which 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, rather than by trying to follow the reasons which apply to him directly.” Authority that meets the terms of the dependence thesis and the normal justification thesis is legitimate because it does not require a sacrifice of autonomy. Since the directives are based on reasons that the subject already has to act, and since the subject will better fulfill his own purposes, as established by those reasons, the subject is not doing other than that which

¹⁶ Raz MF 47. Raz is quick to point out that the dependence thesis does not entail the no difference thesis that “the exercise of authority should make no difference to what its subjects ought to do,” which Raz rejects (Raz MF 48).

¹⁷ Raz MF 41.

¹⁸ Raz MF 53.

he ought to do. Thus, while the normal justification thesis is “not the only” justification for authority, it is, eponymously, “the normal one.”¹⁹

One critical feature to note about this justification of authority is that it can never produce an obligation to obey. The best that it can do is show when it would be legitimate to defer to authority but never that there would be an obligation to do so. The reason is clear from the setup of the question: If the problem is that authority jeopardizes autonomy, then the solution would be a case where autonomy is preserved. But all that would mean is that it would be permissible for the subject to defer to authority under those circumstances, not that it would be obligatory. Of course, Raz recognizes this perfectly well. In fact, the absence of even a prima facie obligation to obey the law is perhaps the most consistent theme in his work on authority. In no uncertain terms, Raz writes, “I shall argue that there is no obligation to obey the law. It is generally agreed that there is no absolute or conclusive obligation to obey the law. I shall suggest that there is not even a prima facie obligation to obey it. In other words, whatever one’s view of the nature of the good society or the desirable shape of the law it does not follow from those or indeed from any other reasonable moral principle that there is an obligation to obey the law.”²⁰

¹⁹ Raz MF 53.

²⁰ Raz AL 233. For further examples, see also: “My starting point is the assumption that there is no general obligation to obey the law, not even a prima facie obligation and not even in a just society” (Raz AC 103). “. . . [A] good deal of common ground seemed to have been established among many of the political and moral theorists who did and still do attend to the issue. It is summed up by the view that every citizen has a prima facie moral obligation to obey the law of a reasonably just state. . . . I have joined several theorists who challenge this consensus” (Raz TOTO 139). “The final section of the chapter . . . denies the existence of a general obligation to obey the law even in a reasonably just society, though it is argued that just governments may exist, and that in certain circumstances their existence is preferable to any alternative method of social

Essentially, the normal justification thesis, in combination with the dependence thesis, means that law's authority is based on expertise, broadly construed. Raz writes, "The main argument for the legitimacy of any authority is that in subjecting himself to it a person is more likely to act successfully for the reasons which apply to him than if he does not subject himself to authority,"²¹ or, simply put, "the normal justification of authority is that following it will enable its subjects better to conform with reason."²² This produces what Raz refers to as "the service conception of the function of authorities, that is, the view that their role and primary normal function is to serve the governed."²³ And by "serve the governed," Raz means, "The service conception establishes that the point of having authorities is that they are better at complying with the dependent reasons."²⁴

Authority can fulfill this function by virtue of its expertise, which is to say its ability to cause people to act more successfully act on the reasons that apply to them, anyway. In using the term "expertise," however a few caveats are in order. For one thing, Raz disfavors the term, arguing that it is a misunderstanding to say that "the legitimacy of an authority rests on its greater expertise" like a "big Daddy who knows best."²⁵ But taking the term in a broader sense, as indicated above, it is perfectly useful

organization" (Raz MF 70). "The fact that normative language is used to describe the law helped to perpetuate two of the great fallacies of the philosophy of law. One is the fallacious belief that laws are of necessity moral reasons (or that they are morally justified or that there are always moral reasons to obey each one of them) . . ." (Raz PRN 154-55).

²¹ Raz MF 71.

²² Raz MF 73.

²³ Raz MF 56.

²⁴ Raz MF 67

²⁵ Raz MF 74.

and appropriate for characterizing Raz's view. Raz identifies five main ways in which authority can produce better outcomes.²⁶ First, authority can just be "wiser." That is, the authority may have greater knowledge or expertise in the relevant area. This is the classic example of expertise. But authority can have other advantages as well. For example, second, authority has "a steadier will less likely to be tempted by bias, weakness or impetuosity," whether that is because the authority is not an interested party or because it is more insulated from countervailing pressures. Third, Raz suggests that individuals can often best "follow right reason" through "an indirect strategy," especially the indirect strategy of deferring to authority, whereby people can "guid[e] their action by one standard in order to better conform to another." Fourth, authority can aid an individual in avoiding the "anxiety, exhaustion, or . . . costs in time or resources" of deciding for oneself. Fifth and finally, the authority is sometimes "in a better position to achieve . . . what the individual has reason to but is in no position to achieve."²⁷ That "some of these reasons are currently out of fashion in discussions of political authority" does not bother Raz; he maintains that "they all have their role to play."²⁸ In all these cases, the role of authority is in exercising the distinct advantages it has in virtue of being an authority. In this most general sense, authority is located in "expertise," which is to say nothing more than that it is better at getting the individuals to act for their own reasons than those individuals are on their own.

²⁶ "Better outcomes" will serve as a shorthand for what Raz means when he says "more likely to act successfully for the reasons which apply to him" and "better to conform with reason," as quoted just above.

²⁷ Raz MF 75.

²⁸ Raz MF 75.

A key feature of this account of authority is that it does not yield a general obligation to obey the law. Crudely put, if authority is based on expertise, then there is no obligation to obey when the subject knows better.²⁹ This is not a concession that Raz makes: it is very much the point of his theory. As he explains, the scope of authority “depends on the person over whom authority is supposed to be exercised: his knowledge, strength of will, his reliability in various aspects of life, and on the government in question. These factors are relevant at two levels. First they determine whether an individual is better likely to conform to reason by following an authority or by following his own judgment independently of any authority. Second they determine under what circumstances he is likely to answer the first question correctly.”³⁰

Raz makes this point concrete with some instructive examples. For instance, Raz writes, “An expert pharmacologist may not be subject to the authority of the government in matters of the safety of drugs, an inhabitant of a little village by a river may not be subject to its authority in matters of navigation and conservation of the river by the banks of which he has spent all his life.”³¹ Similarly: “One person has wide and reliable knowledge of cars, as well as an unimpeachable moral character. He may have no reason to acknowledge the authority of the government over him regarding the road worthiness of his car. Another person, though lacking any special expertise, knows local conditions well and has great insight into the needs of his children. He may have no reason to acknowledge the government’s authority over him regarding the conditions under which

²⁹ Another inevitable conclusion is that the government may have more authority over one person than over another” (Raz MF 74).

³⁰ Raz MF 73.

³¹ Raz MF 74.

parents may leave their children unattended by adults.”³² Raz is quick to point out that the laws in these situations are in no way unjust. Rather, where law’s authority rests in its ability to produce these so-called better outcomes, that authority is absent when the benefits conferred by the exercise of authority are absent. The law is just because it is “based in reasons which apply to its subjects.”³³ Yet those particular laws have no authority for those particular individuals who “are able to do better if they refuse to acknowledge the authority of this law.”³⁴

Moreover, to grasp the point in its full generality, it is important to see that the exemption, so to speak, from authority has nothing to do with any special knowledge, ability, or strength of character on the part of the subject. Instead, it has primarily to do with the law’s relationship to the subject’s dependent reasons. Therefore, even when the law requires something that the subject would ordinarily have a moral obligation to do (or not do), the subject is free to disregard the law when the independent moral obligation does not obtain. In a striking example concerning a hypothetical law against river pollution, Raz argues, “If a sufficiently large number of people refrain from polluting the rivers, they will be clean, and each person has a moral reason to contribute to keeping them clean. But if most people pollute them and they are badly polluted there is normally no reason why I should refrain from polluting them myself.”³⁵ In Raz’s analysis, “[i]t matters not at all to one’s moral reasoning whether the practice of keeping the rivers clean is sanctioned by law It is the existence of the practice that matters, not (except in special circumstances) its origin or surrounding circumstances. On the other hand,

³² Raz MF 78.

³³ Raz MF 78.

³⁴ Raz MF 78.

³⁵ Raz AL 248.

suppose that the law requires keeping the rivers clean but that nobody obeys and the rivers have turned into public sewers. The moral reasons for not throwing refuse into them that we have been considering do not exist in such circumstances notwithstanding the legal requirement not to do so.”³⁶ As such, because there is no moral obligation to refrain from polluting the river when everyone else is polluting it, the law itself cannot provide a reason for doing so. In that case, the law would not correspond to reasons that already apply to the subject.³⁷

Before proceeding to Raz’s other main justification for authority, one rooted in respect for one’s society, it is worth considering some shortcomings of this first leg. First, Raz deploys a particular understanding of autonomy that perhaps gives it insufficient weight in his calculations. The structure of Raz’s argument is that deferring to authority is not an improper sacrifice of autonomy when the authoritative directives conform to reasons that the subject has for action, anyway. But this assumes, crucially, that what is relevant about autonomy is the outcome that results from deciding according to the best light of reason—emphasis on the *best light of reason*. Raz provides no explanation, though, for what the emphasis should not be placed on the *deciding*. Perhaps true moral responsibility, and particularly the form of moral responsibility that concerns the philosophical anarchists, is found not in most successfully acting according to the reasons one has for action but in the independent decision-making. This is a strongly plausible interpretation of the philosophical anarchists’ problem with authority.

³⁶ Raz AL 249.

³⁷ It would be a different story, Raz acknowledges, if the government were off to a successful start in a campaign to change the current practice, in which case there could be a moral obligation to refrain from polluting because the subject’s actions might make a difference (Raz AL 248 fn13).

After all, if the main concern were for outcomes, then the anarchists' point would not be about the illegitimacy of all states but instead an empirical question about whether governments or individuals were more likely to "get it right." If that were the problem, then Raz and the anarchists would simply be on the two sides of that empirical question, but it does not appear that way.

Raz acknowledges this critical assumption of his once in passing, writing, "So long as this is done where improving the outcome is more important than deciding for oneself this acceptance of authority, far from being either irrational or an abdication of moral responsibility, is in fact the most rational course and the right way to discharge one's responsibilities."³⁸ But it may very well be that for the philosophical anarchists, it is precisely this choice not decide for oneself that is the abdication of moral responsibility. At the very least, Raz needs to explain why anyone should accept that autonomy is valuable because it enables individuals to more successfully act on the reasons that apply to them rather than because it consists in deciding for oneself even when that means getting things right less often than one would if one deferred to authority.

One possible response for Raz could be that choosing to decide for oneself though knowing that deferring to authority offers better outcomes is not best characterized as moral responsibility but as irrationality. That is, if Raz maintains that it would be not merely imprudent but even irrational to knowingly choose a course that produced worse outcomes, meaning a failure to conform to the reasons one has for action, then it would make sense for him to argue that there is no loss in deferring to authority in those cases.

³⁸ Raz MF 69.

There is no loss because the exercise of autonomy in such a case could not be seen as valuable. But if this is Raz's response, it is questionable. To illustrate what it means for authority to produce better outcomes, Raz occasionally uses the example of a stockbroker whose success rate is twenty percent better than his client's. In that case, if the client wishes to maximize his profits, he ought to defer to the broker's advice one hundred percent of the time.³⁹ Any substituting of his own judgment for the stockbroker's would, on average, result in lower returns. Nevertheless, this holds only if it is assumed that the client's only aim is to maximize profits. But it is hardly a stretch to imagine an investor who wishes to win or lose on his own terms, as it were. He might value the actual decision-making and not only because he thinks he will learn better from his own trial-and-error investments or because of the added thrill he gets from picking a winner but also because he finds intrinsic value in making decisions for himself, or, to be a bit melodramatic, in being the master of his own destiny.

Nevertheless, it would not be wholly unreasonable for Raz to maintain that consciously choosing a path that yields worse outcomes is irrational to the point of being reckless and, accordingly, forfeits any moral value that might otherwise be found in free choice. Other theorists have argued that choosing freely is not valuable in itself but is an added value of sorts for god choices freely made. Bad choices, however, are not less bad because they are freely made.⁴⁰ But this position hints at a second problem with Raz's theory of authority: the possible absence of authority altogether. If the source of law's authority is the irrationality in certain situations of the alternative, namely autonomy, then

³⁹ The analogy is not meant to suggest that laws carry the same authoritativeness as advice.

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the driving force behind one's compliance with the reasons one has for action is not authority but rationality. The subject here is doing what he is compelled to do by reason. Of course, authority plays a role in identifying what is to be done in order to comply with one's own reasons, but in that case the law really no more than a glorified stockbroker, an adviser who knows better.

It appears, then, that on Raz's view, the driving force is not authority but reason. Raz himself identifies this problem in what he refer to as the "paradox of the just law."⁴¹ Raz explains the paradox as follows: "The more just and valuable the law is, it says, the more reason one has *to conform to it*, and the less *to obey it*. Since it is just, those considerations which establish its justice should be one's reasons for conforming with it, i.e., for acting as it requires. But in acting for these reasons one would not be obeying the law, one would not be conforming because that is what the law requires. Rather one would be acting on the doctrine of justice to which the law itself confirms."⁴² Raz makes this is particularly clear in the river-pollution example where "the moral reasons affecting such cases derive entirely from the factual existence of the social practice of co-operation and not at all from the fact that the law is instrumental in its institution or maintenance."⁴³ Of course, the law plays a role in the creation of the moral reasons insofar as it fosters the social practice from which the moral obligation stems. But the moral obligation exists with or without the corresponding law, and the existence of the law makes no difference for the moral obligation.

⁴¹ Raz TOTO 141.

⁴² Raz TOTO 141-42. To be sure, Raz believes the paradox is "overstated" because "sometimes the law makes a moral difference." There are some cases where "it is morally obligatory to act as the law requires because it so requires," but "in some fairly central cases there is no such obligation." (Raz TOTO 142.)

⁴³ Raz AL 249.

This leads to a puzzling situation in which there are two categories of people who obey the law (in the sense that their actions conform to what the law requires but not in the sense that their purpose is to fulfill what the law requires because the law requires it). The first category is people who recognize the moral obligation and act upon it. Those people cannot meaningfully be said to be under authority or deferring to it because they are doing that which they understand themselves to have reason to do, anyway. The second category is people who do not recognize the moral obligation but follow the law because the authority forces them to. In Raz's view, authority is justified in enforcing moral obligations.⁴⁴ This is of a piece with his claim that authority is justified when it enables its subjects to better act on the reasons that apply to them because, in such a case, the moral obligations are those reasons.⁴⁵ Surprisingly, though, for Raz this has nothing to do with authority, either.

This is highlighted by what Raz says about law's function in another respect: law as insurance. Although it is not the full story of authority, simply speaking, "law's direct function is to motivate those who fail to be sufficiently moved by sound moral considerations" because "[i]t forces them to act as they should by threatening sanctions if they fail to do so."⁴⁶ This aspect of Raz's theory could be called, again, only in the loosest sense, law as insurance⁴⁷ because the law "reassures the moral conscientious[,] . . . assures him that he will not be taken advantage of, will not be exploited by the

⁴⁴ In the case of the river pollution, this assumes that the well-observed social practice of not polluting the river creates a moral obligation where none existed before (namely when everyone did pollute the river), but this assumption is not at issue here.

⁴⁵ As in some of the earlier examples, though, the reasons need not be duties.

⁴⁶ Raz TOTO 143.

⁴⁷ Perhaps it would be better termed law as assurance. Thoughts?

unscrupulous.”⁴⁸ Importantly, though, Raz presents this “oversimplified picture” as a depiction of “the good a government *without authority* can do.”⁴⁹ This is government without authority because the justification for the enforcement against would-be lawbreakers is not found in their obligation to obey the law but in their obligation to adhere to moral obligations. For these purposes, it is irrelevant whether government has authority over them.⁵⁰

For one thing, it is hard to account for Raz’s description of this situation. What exactly does he mean by authority? Common sense would dictate that either the government has authority and can enforce sanctions for noncompliance, or the government does not have authority and cannot. In what sense does Raz want to argue that government can justifiably coerce those subject to its authority? Surely Raz does not want to argue that the government functions like any third party that enforces moral obligations just because anyone can enforce moral obligations against another (even if that were true about the enforcement of moral obligations). If he did argue that, then it

⁴⁸ Raz TOTO 143.

⁴⁹ Raz TOTO 143. Emphasis added.

⁵⁰ Raz makes the same point elsewhere using the example of legal enforcement of anti-defamation laws. His formulation, denying the need for authority, is unambiguous: “It is worth pausing here momentarily to observe that such legally provided remedies can be morally justified even when applied to people who are not subject to the authority of the government and its laws. . . . One need not invoke the authority of the law over the defamer to justify such action. The law may not have authority over him. It makes no difference. The importance of the law in such matters is in creating a centre of power which makes it possible to enforce moral duties. It does so through the authority it exercises over government officials, and because the population at large is willing to see morality enforced, even in matters in which they are not subject to the authority of the government” (Raz MF 103). Even more straightforwardly, Raz writes, “It is important to remember that a government’s power can and normally does quite properly extend to people who do not accept its authority. They are subject to its power partly because those who accept its authority are willing to obey its instructions, even when they affect people who do not accept its authority” (Raz MF 102).

would have nothing to do with law and everything to do with the government's superior force. Even if that were a tenable description of the law, it is not Raz's.

Let it be granted, though, that it makes sense for Raz to speak of law's enforcement of moral obligations without authority. Raz explains it this way: "The upshot of the discussion in this section is that the law is good if it provides prudential reasons for action where and when this is advisable and if it marks out certain standards as socially required where it is appropriate to do so. If the law does so properly then it reinforces protection of morally valuable possibilities and interests and encourages and supports worthwhile forms of social co-operation. But neither of these legal techniques even when admirably used gives rise to an obligation to obey the law. It makes sense to judge the law as a useful and important social institution and to judge a legal system good or even perfect while denying that there is an obligation to obey its laws."⁵¹ Two closely related problems emerge. First, the case of the polluted rivers warrants closer consideration. Again, the situation is one in which everyone pollutes the river, and therefore there is no moral obligation, and certainly not a legal obligation, to do so, regardless of what the law says. When one person's actions can make a difference, though, such as when people do generally refrain from polluting the river or when the government has successfully begun reforms such that one's cooperation with the reforms may influence others and contribute to a general change in public behavior, then there is a moral obligation to refrain from polluting. Without that underlying moral obligation, though, an anti-pollution law would have no justified authority. Whence could such an obligation arise? If enough people spontaneously changed their behavior (whether as

⁵¹ Raz AL 249.

individuals or as a group), the project might get off the ground. But that says nothing about authority. If everyone polluted the river and no one had an obligation to do otherwise, the reform could only begin by forcing people to comply. This cannot be justified on Raz's terms, though, because even government without authority is only justified in enforcing moral obligations that people already have. The situation forms something of a vicious circle whereby, for lack of a certain social practice, there is no moral obligation, and, for lack of the moral obligation, the authority cannot justifiably coerce the behavior that would create the social practice. There are no dependent reasons to which the authority can appeal because, as Raz clearly states, there is no reason to refrain from polluting the river when polluting the river is the norm.

Another consideration, or perhaps just another way to put the same problem, is whether the law can reasonably be expected to be efficacious if there is no obligation to obey the law. Presumably, the reforms, such as the law banning pollution of the river, only work if people believe there is an obligation to obey the law.⁵² The success of the law, then, would depend upon people understanding themselves to have a moral obligation to contribute to the creation of a new social practice that would be beneficial, and indeed morally obligatory, if it existed. If there actually were such a moral obligation (and not just a belief in one), then the law would have authority to enforce it, too. That would only be true, however, if there were a reasonable chance that most people thought they had a moral obligation to start creating the social practice and were likely to act on it. If it were the case that everyone always had a moral obligation to start

⁵² Of course, a belief in the obligation to obey the law need not entail an actual obligation to obey the law. But there is no indication that Raz favors widespread deception about the obligation to obey the law in order to get a social practice off the ground.

creating the social practice, then there would always be an obligation to refrain from polluting the river, but Raz explicitly says this is not so. In any event, there is something strange, if not incoherent, about proposing the existence of a moral obligation to act in such a way as to contribute to an as-yet nonexistent social practice which, if it existed, would confer a moral obligation to conform to it. There are lots of things that would be good if everyone did them, but that does not seem to confer an obligation on everyone to start doing them, perhaps even when it is reasonable to expect that others would go along.

The second major problem, and this may be the central one, is that Raz never actually demonstrates how one might ever arrive at an obligation to obey the law. Up until this point, it has not been necessary to focus on a distinction that Raz frequently elides in his discussion of authority. In answering the challenge of the philosophical anarchists, Raz defends the legitimacy of authority, which is to say, the circumstances under which it would be morally permissible to substitute the judgment of the authority for one's own. Absent certain conditions, it would be an abdication of one's moral responsibility to act autonomously. Parsed carefully, neither the problem nor the solution has anything to do with obligation, strictly speaking. Raz's normal justification thesis specifies the conditions under which it would be morally permissible to defer to authority, but it in no way follows from there that there is any such obligation.⁵³ Indeed, one might say that the question of the permissibility of deferring to authority is conceptually prior to the obligation to obey, in which case it is perfectly logical for Raz

⁵³ That is true unless, of course, Raz believes there is a moral obligation to choose better outcomes over autonomous decision-making (and that having made a decision autonomously is not itself possibly constitutive of a better outcome). It may be rational to decline expert advice, and it is even more likely to be morally permissible even if it is irrational.

to address that first. But it leaves the question of obligation unanswered. Moreover, Raz's occasionally ambiguous use of "legitimate authority" and related terms to mean either "authority that it is permissible to obey" or "authority that it is obligatory to obey" is a potential source of confusion in his theory. He seems to jump back and forth, without notice, between speaking of legitimate authority in these two senses.

The criticism here, however, is not one of sloppiness but a much more fundamental point about Raz's failure to offer a proper account of legal obligation. While it is true, of course, that Raz's main conclusion is that there is no general obligation to obey the law (and, therefore, one might be unsurprised to find no account of obligation), he does in fact hold that there is an obligation to obey the law under the right circumstances. Raz states, "Those who do not voluntarily or semi-voluntarily place themselves under the authority of relatively just governments are under a partial and qualified obligation to recognize the authority of such a government in their country. In particular its authority should be recognized to the extent necessary to enable it to secure goals, which individuals have reason to secure, for which co-ordination is necessary or helpful, and where this is the most promising way of achieving them."⁵⁴ This must refer to obligation. Other quotations are more ambiguous. For example: "We are forced to conclude that while the main argument does confer qualified and partial authority on just governments it invariably fails to justify the claims to authority which these governments make for themselves."⁵⁵ Nevertheless, further examination shows that Raz means obligation and not permission here, as well. After all, the "claims to authority which these governments make" are claims about an obligation to obey the law. No

⁵⁴ Raz MF 100.

⁵⁵ Raz MF 78.

government claims merely that it is morally permissible to comply with its laws. By extension, if the failed claims to authority in that sentence are claims of obligation, then it stands to reason that the qualified and partial authority earlier in the sentence refers to the same thing. In that context, the question is about the scope of authority, not the nature of authority, and Raz's point is that the obligation to obey the law, while extant, is not as general as governments claim.

Once again, the absence of any obligation to obey the law would not mean that authority would make no difference for one's practical reasoning. But it would mean that Raz would not be speaking of authority in a meaningful way. This is one example of how authority can make a difference: "The intrusion of the bureaucratic considerations is likely to lead to solutions which differ in many cases from those an individual should have adopted if left to himself. Reliance on such considerations is justified if and to the extent that they enable authorities to reach decisions which, when taken as a whole, better reflect the reasons which apply to the subjects. That is, an authority may rely on considerations which do not apply to its subjects when doing so reliably leads to decisions which approximate better than any which would have been reached by any other procedure, to those decisions best supported by reasons which apply to the subjects."⁵⁶ Raz later explains, "This, to repeat a point made earlier, does not mean that their sole role must be to further the interest of each or of all their subjects. It is to help them act on reasons which bind them."⁵⁷ Hence it is the preexisting reasons and not the law that binds the subjects. As an ordinary matter, one can freely choose whether to fulfill or disregard one's moral obligations. Where the authority of the law comes in—

⁵⁶ Raz MF 52.

⁵⁷ Raz MF 56.

and what makes it obligatory—is the law’s ability to compel obedience through force. And while this form of de facto authority may be a necessary condition for de jure (legitimate) authority on Raz’s view, it is certainly not a sufficient one. Therefore, Raz cannot speak meaningfully here of legitimate authority, either because the law merely provides advice,⁵⁸ in which case it is not really authority, or because law’s authority is based on coercion, in which case it is not really legitimate.

The second leg of Raz’s theory of authority is an argument about obligation to obey the law rooted in respect. Raz first develops this argument through an extensive analogy to friendship, where the friendship itself provides reasons for action, where the correct actions derive from their suitability to such a relationship.⁵⁹ Raz refers to these reasons as expressive reasons “because the actions they require express the relationship or attitude involved.”⁶⁰ Regarding authority, respect for the law or consent to its requirements can be expressive of a relationship of loyalty to or identification with one’s society, what Raz calls “an attitude of belonging and of sharing in its collective life.”⁶¹ Respect for the law follows naturally from this attitude because “[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

⁵⁸ This is true even if it is very sophisticated advice about reasons that do not apply to the subject that leads to decisions that are best supported by reasons that do apply to the subject, as per Raz’s assertion above.

⁵⁹ Raz AL 253-58.

⁶⁰ Raz AL 255.

⁶¹ Raz MF 91.

community.”⁶² Nevertheless, Raz is quick to point out that “even if loyalty to one’s community is obligatory, respect for law is not.”⁶³

It is important to understand precisely what Raz means by respect for the law. While consent to the laws can also be expressive of an attitude of loyalty or identification, respect, Raz insists, “is not consent. It is probably not something initiated by any specific act or at any specific time. It is likely to be the product of a gradual process as lengthy as the process of acquiring a sense of belonging to a community and identifying with it.”⁶⁴ Yet even though it not a concrete action like consent can be, it “is up to the individual.”⁶⁵ In introducing his argument about respect, Raz explains “that there is an attitude to law, generally known as respect for it, such that those who have it have a general reason to obey the law, that their reason is their attitude, the fact that they so respect the law, and that it is morally permissible to respect the law in this way (unless it is a generally wicked legal system).”⁶⁶ In other words, “respect is itself a reason for action.”⁶⁷

In these passages, Raz’s language suffers from the same ambiguity discussed earlier. In another treatment of the topic, Raz speaks of acceptance of an authority: “Identification is a common and often proper ground for accepting authority. . . . Acceptance of an authority can be an act of identification with a group because it can be naturally regarded as expressing trust in the person or institution in authority and a willingness to share the fortunes of the group which are to a large extent determined by

⁶² Raz AL 259.

⁶³ Raz AL 260.

⁶⁴ Raz MF 98.

⁶⁵ Raz AL 258.

⁶⁶ Raz AL 250.

⁶⁷ Raz AL 259.

the authority.”⁶⁸ This remains unclear, though, because acceptance of authority can be expressive of such trust much as acceptance of another person’s guidance can be an expression of trust without any implication of obligation. It is noteworthy, therefore, that in at least one instance, Raz speaks very directly of respect for the law producing an obligation to obey it: “Yet those who respect the law have a reason to obey, indeed are under an obligation to obey. Their attitude of respect is their reason—the source of their obligation. The claim is not merely that they recognize such an obligation, not merely that they think that they are bound by an obligation. It is that they really are under an obligation; they are really bound to obey.”⁶⁹ Even though Raz does not mean here a general obligation to obey the law, he does need to account for how respect creates even what he might call a partial and qualified obligation.

The closest thing to an explanation that Raz offers is his comparison of an attitude of respect for the law to consent, even though it is not the same thing as consent. Raz writes, “But in a reasonably just society this belief in an obligation to obey the law, this attitude of respect for law, is as valid as an obligation acquired through consent and for precisely the same reasons. . . . Therefore, people who share it have an obligation to obey the law that they acquire through their conduct of their own lives, as part authors of their own moral world.”⁷⁰ It is not clear why Raz equates belief in an obligation to obey the law with respect for law. Regardless, Raz thinks that such an attitude generates an obligation to obey, and it is not because respect entails consent. In fact, consent is not necessary. Because the legitimacy of authority depends upon its ability to enable subject

⁶⁸ Raz MF 55.

⁶⁹ Raz AL 253.

⁷⁰ Raz MF 98.

to better according to the reasons that apply to them, “a just government can exist even if its subjects are not bound by a general obligation to obey it. Therefore, consent cannot be justified as a necessary means to establish a just government. Moreover, to the extent that in order to establish or preserve a just government a qualified recognition of authority is necessary, such recognition in itself, independently of consent, is sufficient to establish a suitably qualified obligation to obey.”⁷¹ Presumably, the recognition and the obligation are qualified since one’s respect may be qualified and since the law itself may be respectable only in certain aspects.

The same is true along a separate but related track, the “duty to support just institutions,” which “leads to a requirement of support in words and deeds, most commonly in a certain degree of political participation.”⁷² Like respect, this duty need not yield a wholesale obligation. “In spite of its importance,” Raz says, “the duty to support and maintain just institutions fails to establish a general reason to obey even laws which the government is justified in making.”⁷³ The obligation to obey does not extend, for example, to laws upon which the maintenance of those just institutions depends. It would be, in Raz’s opinion, “a melodramatic exaggeration to suppose that every breach of law endangers, by however small a degree, the survival of the government, or of law and order.”⁷⁴ He continues, “Many acts of trespass, breaches of contract, violations of copyright, and so on, regrettable as some of them may be on other grounds, have no implications one way or another for the stability of the government and the law.”⁷⁵

⁷¹ Raz MF 89.

⁷² Raz MF 102.

⁷³ Raz MF 102.

⁷⁴ Raz MF 102.

⁷⁵ Raz MF 102.

Elsewhere, Raz considers that minor lawbreaking might undermine just institutions by setting a bad example. But one can easily imagine situations where that need not be the case. Therefore, the obligation would only cover situations where one endangered just institutions, directly or indirectly. As Raz puts it, “If so then one has reason to obey those laws (which does not depend on their being legally valid, but derives from their moral content) but no reason to obey other laws, except insofar as not doing so is setting a bad example leading to offences against the good laws. . . . For similar reasons the duty to support and uphold good institutions, the existence of which need not be denied, is insufficient to establish an obligation to obey.”⁷⁶

This account of the obligation to obey the law raises several questions. First, similarly with Raz’s view of law as expertise, it seems that respect for the law could be a reason to obey the law, but can it create an obligation to obey? For one thing, Raz is very clear that no one need respect the law. In explaining the “proper attitude to the law,” Raz asserts, “There is no general moral obligation to obey it, not even in a good society. It is permissible to have no general moral attitude to the law, to reserve one’s judgment and examine each situation as it arises. But in all but iniquitous societies it is equally permissible to have ‘practical’ respect for the law. For one who thus respects the law his respect itself is a reason for obeying the law.”⁷⁷ Thus, not only is there no obligation to respect the law, respecting the law is a reason for obeying, but that is different from being a reason for having an obligation. At first, Raz seems to acknowledge this difference when he writes, “A person who respects the law expresses in this way his attitude to society, his identification with and loyalty to it. Such a person may find it appropriate to

⁷⁶ Raz AL 241.

⁷⁷ Raz AL 260.

express these attitudes to society, among other ways, through his attitude to the law. He may feel it is a fitting expression of his loyalty to acknowledge the authority of the law. He will then obey the law as it claims to be obeyed.”⁷⁸ But then Raz continues, “In any case, for the person who respects the law, there is an obligation to obey. His respect is the source of this obligation.”⁷⁹ This is puzzling because an attitude of respect would explain why it makes sense for the subject to act *as if* he had an obligation to obey the law, but it would not account for the existence of an actual obligation. This follows closely from the analogy to friendship, which shows that these types of reasons are expressive reasons. As with friendship, the relationship (and one’s attitude toward it) would give one reasons, perhaps strong reasons, to act a certain way, but it would not confer an obligation. Again, in a different way, the same held for law as expertise: law’s expertise provides a reason to defer to it but not an obligation.⁸⁰

A second problem, concerning recognition of and respect for legitimate authority, trades on the same kind of confusion. Really there are two questions here. First, there is the question of whether recognition is not in fact the same thing as consent, despite Raz’s

⁷⁸ Raz AL 260.

⁷⁹ Raz AL 260.

⁸⁰ It is instructive to see the way Raz elides this difference between having a reason to do something and having an obligation to do it. In one case, Raz first writes, “It is not difficult to see why practical respect might be thought of as a proper expression of loyalty to the society. It is a manifestation of trust. A man who is confident that the law is just and good believes that he has reason to do as the law requires” (Raz AL 261). This is plausible because one who trusts the judgment of the law would do well to follow it, no less because he believes it requires the rights things of him than because it is one way expressing his trust. In nearly the same breath, though, Raz adds, “If a person places absolute trust in the law then he will acknowledge the authority of the law. It is natural therefore that loyalty to one’s society can be expressed by behaving as one would if one trusted the law implicitly. Hence the attitude of respect is a manifestation of loyalty since it gives rise to such an obligation to obey, to such an acknowledgment of authority” (Raz AL 261).

protestations to the contrary. Second, there is the question of whether recognition and respect are in fact obligatory. On the first point, Raz writes, “Identification with one’s community is, though not morally obligatory, a desirable state, at least if that community is reasonably just. Of course consent to obey the law is not a necessary condition of such an attitude.”⁸¹ At the same time, as shown above, respect for the law, which may follow from identification with the society, constitutes a “reason to obey” or, alternatively” a “source of obligation.” Yet how could respect function in this role? If it were less than consent, then it would be back to the recurring question about the failure of respect to create an obligation. This is why Raz falls back on the language of consent when he describes the connection between identification with one’s society and an obligation to obey the law: “Undertaking an obligation to obey the law is an appropriate means of expressing identification with society, because it is a form of supporting social institutions, because it conveys a willingness to share in the common ways established in that society as expressed by its institutions, and because it expresses confidence in the reasonableness and good judgment of the government through one’s willingness to take it on trust, as it were, that the law is just and that it should be complied with.”⁸²

“Undertaking an obligation” must refer to some form of consent.

So, too, when Raz says that “to the extent that in order to establish or preserve a just government a qualified recognition of authority is necessary, such recognition in itself, independently of consent, is sufficient to establish a suitably qualified obligation to obey,” what else can he mean by recognition? How does one recognize authority without consenting in a way that legitimates that (qualified) authority? If it is merely to say that

⁸¹ Raz MF 93.

⁸² Raz MF 92.

one recognizes the legitimacy of the authority, then the argument is circular because the legitimacy rests on the recognition. If, on the other hand, it means that the subject recognizes the authority's satisfaction of the terms of the normal justification thesis, then all the questions about law as expertise return, and it turns out that the argument for authority from respect is not a separate argument at all. Finally, Raz cannot escape the problem by arguing that true identification with one's society and then respect for its law necessarily entail having an actual obligation rather than merely obeying because if the attitude of respect is freely chosen (which it is because, for Raz, there is no obligation to respect the law even in a good society), then the obligation to obey the law is also freely chosen, in which case it collapses back into consent.

On the second point, the obligation to respect the law, Raz clearly denies that there is one. Raz argues that "there is no general obligation to respect the law. No one does any wrong in not respecting the law even in a good state. One may always avoid having any general moral attitude to the law. This may be more or less admirable than respecting the law but it is equally permissible."⁸³ At the same time, Raz believes that, while it may be morally permissible to not respect the law, it may also be morally preferable to respect it. He writes, "It is never wrong not to respect the law in this practical sense. But it does not follow that where it is permissible both to respect and not to respect, it is also morally indifferent whether one does or not."⁸⁴ Furthermore, "Whether or not one respects the law is, given information about the law and the society, revealing of one's character. . . . It may also speak, on occasion, of one's moral

⁸³ Raz AL 258.

⁸⁴ Raz AL 260.

character.”⁸⁵ Although strictly speaking this does not amount to an obligation to obey the law since the respect that is the source of that obligation is not itself obligatory, Raz greatly narrows the set of cases in which there is no obligation. Between the fact that it is morally preferable to respect the law of a just society and that most people will have independent reasons (aside from such preferability) to respect the law of the same, it turns out that most people will have an obligation to obey the law most of the time (though maybe just most of the law). This does not make Raz’s argument wrong, but it does make it weak and therefore much less interesting.

A third problem that arises from the role of respect for the law in generating obligation is that it highlights Raz’s inability to construct a theory of authority that is neutral on the question of the good. In a more general comment about authority, Raz suggests that a society of laws enables pluralism: “The advantage of normally proceeding through the mediation of rules is enormous. . . . More importantly, the practice allows the creation of a pluralistic culture. For it enables people to unite in support of some ‘low or medium level’ generalizations despite profound disagreements concerning their ultimate foundations, which some seek in religion, others in Marxism or in Liberalism, etc.”⁸⁶ In the broadest sense, this argument fails because it already assumes a commitment to pluralism and other basic values that make the system possible.⁸⁷ More specifically, though, the respect for the rules that creates the obligation to obey directly depends upon value judgments about the good. For instance, Raz contends that “there is an asymmetry between respect and its absence. While it is never

⁸⁵ Raz AL 258.

⁸⁶ Raz MF 58.

⁸⁷ It might very well be that Raz even has in mind a kind of Rawlsian pluralism where all kinds of comprehensive doctrines are excluded from the public square.

wrong not to respect the law it is morally wrong to respect it in South Africa or other fundamentally iniquitous regions.”⁸⁸ Similarly, Raz writes, “Noninstrumental validations of consent are, therefore, limited to consent to the authority of a reasonably just government.”⁸⁹ As he properly concludes, “[t]he question as to when the one or the other attitude is appropriate is no longer a question about the proper attitude to law; it is a question about the nature of the good society and the good law.”⁹⁰ Therefore, judgments about the legitimacy of authority directly depend upon judgments of the good (and the good society).

This leads to a more general criticism of Raz’s theory of authority, building on the claim that the obligation to obey the law ultimately is not rooted in authority but in reason. Just as respect for the law depends upon independent judgments about the justice of the law in general and about the importance of individuals laws for upholding just institutions, so, too, law’s authority in expertise depends on independent judgments about when the law is in fact expert. (Those might not be moral judgments, but they certainly are evaluative.) Even if Raz is right that the law can function as rules of thumb that provide great efficiencies in decision-making, there is still a whole set of background assumptions about when to have rules of thumb as well as a standing invitation to exempt oneself when one knows better since there is no obligation in such cases. Nor can Raz concede that the theory of authority depends upon there being some theory of the good since he is clearly willing to identify just and unjust regimes. Indeed, the very idea of identifying with a society and respecting the law presupposes the making of moral

⁸⁸ Raz AL 258-59.

⁸⁹ Raz MF 92.

⁹⁰ Raz AL 261.

judgments since Raz insists that people can only appropriately identify with societies that are worthy of such.

Thus, Raz's theory does not provide a sufficient account of authority. To the extent that law does have an authority, it is only in the sense of giving people a reason to obey but not an obligation to do so. Therefore, one possible conclusion is that there is less of an obligation to obey the law than even Raz imagines and perhaps none at all. Another possible conclusion, though, is that Raz's theory is incomplete and that Raz fails to consider all the possible sources of authority. The challenge, though, is to identify a justification for authority that neither evacuates authority of all meaningful content by reducing it to the independent judgments of its subjects nor strips it of its legitimacy by attributing it entirely to coercion. This is what I propose to do in a subsequent chapter.