

Raz's *Morality of Freedom*: Two Conceptions of Authority

(Draft: for discussion purposes only)

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Seventeenth century philosophers were pre-occupied with the justification for the use of coercion. Consequently, the nature and scope of the citizen's duty to obey the law was a central concern. The typical philosophical accounts which attempt to articulate the conditions under which a citizen has an obligation to obey the law tend to fall into two camps: those that ground the obligation to obey the law in consent, and those that ground it in benefits received (or possibly a combination of both).¹ More recently, however, questions about the obligation to obey the law have been eclipsed by questions about distributive justice. Political theorist John Dunn suggests that this shift of thinking is symptomatic of modern-day overconfidence that the question of protection has been solved.² Yet this problem has not been solved definitively in theory or practice. Joseph Raz is a current-day theorist who has recognized the importance of this question and the need for an answer that is not over-simplistic. His acclaimed book, *The Morality of Freedom*, is his most complete articulation of the nature and scope of law's authority. More recently, Raz has re-examined his account in "The Problem of Authority: Revisiting the Service Conception," making an exploration of his theory particularly timely.

The virtue of Raz's theory is that it provides a nuanced understanding of the nature and scope of law's authority. Raz argues that all governments claim morally legitimate authority, but not all of them actually possess it. His theory seeks to give us the tools by which to distinguish the legitimate claims from imposters. For Raz, it is highly

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¹ More will be said about this distinction below.

² John, Dunn, *The History of Political Theory* (Cambridge: Cambridge University Press, 1996), 69.

likely, if not guaranteed, that every legal authority will make claims of both kinds; that is, they will issue both legitimate and illegitimate directives. His test for morally justified legal norms, as we shall see, is highly individualistic: we look at the relationship between the individual and the authority in reference to discrete legal norms or groups of norms. The complexity and flexibility of Raz's understanding of the nature and scope of the individual's obligation to obey the law accounts for its appeal. Upon closer inspection, however, difficulties emerge.

I will argue that Raz's theory is plagued by a deep-seated tension between his two central theses: the pre-emption thesis and the normal justification thesis. While we will explore both theses in further depth, the gist of the pre-emption thesis is that it requires a pre-commitment to authority in order for the law's mediating role to be preformed. Conversely, as I will argue, the normal justification thesis invites a case by case assessment of the bindingness of norms. In short, the normal justification thesis is always in a position to undermine the pre-emptive status of legal norms. Furthermore, I will argue that whether or not the normal justification thesis undermines the pre-emption thesis in a given case hinges on the beliefs of participants, which is an unstable ground that Raz himself aims to avoid. Finally, I will demonstrate that this tension is ineradicable because the theses are connected to divergent models of law and incompatible methodologies.

More specifically, the argument will proceed as follows. Section one lays bare the conceptual pieces of Raz's concept of authority: the dependence thesis, the normal justification thesis and the pre-emption thesis. Section two looks to Raz's analogy with the arbitrator in order to demonstrate that the tension between the normal justification thesis and the pre-emption thesis is a product of the fact that these theses are linked to entirely different models of authority. I will argue that, unlike normal justification thesis, the pre-emption thesis is at home in a consent-based model of authority. Section three will illuminate the weaknesses in Raz's attempts to overcome this tension. I will argue that instead of arriving at a coherent concept of authority, Raz vacillates unstably between the two models of legal authority. Furthermore, his theory ultimately rests on the beliefs of citizens, which is problematic for a theory of practical authority. Finally,

section four will explore the possibility that the tension is produced by Raz's methodological shift. The pre-emption thesis is the product of Raz's morally bare descriptive methodology, while the normal justification thesis is the product of the morally robust focal case methodology. Implicit in my argument is the fact that one's concept of authority cannot be different in kind from one's concept of law. Moreover, even if one rejects the possibility of descriptive jurisprudence, a re-conceptualization of Raz's project fails to unify his account of authority. In sum, Raz offers us two conceptions of authority in the guise of one.

One might argue that I have, at this early stage, misunderstood Raz's concept of authority: Raz is able to combine a morally robust conception of authority with a descriptive account of law precisely because he argues that all law *claims* authority; he does not argue that all legal norms possess (morally) legitimate authority. It is tempting to view Raz's idea that all law claims authority as a bridge that unites his conception of justified authority and his positivist conception of law. Despite its initial plausibility, Raz's thesis that all law claims authority cannot ease the tension between the normal justification thesis and the pre-emption thesis. As we shall see, the tension arises at the precise moment one attempts to assess whether a given legal norm possesses the moral authority it claims to have. It is not helpful to appeal to the thesis already presupposed when difficulties emerge. This is likely why Raz offers a different, novel set of arguments to address this tension when it arises in *Morality of Freedom*. Before we can evaluate Raz's proposed solutions, we must first understand his theory in more detail.

1. Raz's Focal Concept of Authority

In *The Morality of Freedom*, Raz "denies the existence of a general obligation to obey the law even in a reasonably just society."³ This means that legitimacy is not a binary quality that authorities either possess or lack, rather he argues legitimacy is piecemeal in nature.⁴ At the centre of his concept of authority is the relationship between an individual and the state - more specifically between the individual and the state as mediated through a legal norm or set of legal norms. Consequently, for Raz "[i]t is not

³ Joseph Raz, *The Morality of Freedom* (Chicago: Clarendon Press, 1986), 70.

⁴ *Ibid*, 80.

good enough to say that an authoritative measure is justified because it serves the public interest. If it is binding on individuals it has to be justified by considerations which bind them.”⁵ In order to give content to this statement, Raz introduces the dependence thesis and the normal justification thesis. Together, these two theses capture Raz’s normative conception of morally justified authority. Let us consider each in turn.

The dependence thesis tells authorities how they ought to make decisions. Ideally, authorities should make laws based on reasons that already apply to the subjects:

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.⁶

Legal officials are not supposed to create new reasons for action. Raz communicates this idea via the analogy of the arbitrator: the arbitrator is supposed to sum up the reasons that apply to disputing parties and issue a verdict based on these reasons.⁷ Raz is aware that authorities do not always abide by this constraint on their power and thus argues that the “dependence thesis does not claim that authorities always act for dependent reasons, but merely that they should do so”.⁸ Not only does reality have “a way of falling short of the ideal,” Raz acknowledges that authorities may not even pursue this ideal.⁹ He nonetheless maintains his steadfast commitment to the dependence thesis:

It is nevertheless through their ideal functioning that they must be understood. For that is how they are supposed to function, that is how they publicly claim that they attempt to function, and, as we shall see below, that is the normal way to justify their authority.¹⁰

⁵ *Ibid*, 72.

⁶ *Ibid*, 47.

⁷ *Ibid*, 41. Raz admits that the example of the arbitrator is more readily applied to judges than it is to legislators. Raz attempts to extend the analogy to legislators by arguing that many legal duties are mere reproductions of what people believed to be pre-existing (moral) duties: conscription, tax law etc., *supra* n. 3 at 45. Raz is either underestimating or downplaying the constitutive role of law (to borrow a term from Charles Taylor) or he is implicitly invoking natural law (or both). See note 45 below.

⁸ *Ibid*, 47.

⁹ *Ibid*.

¹⁰ *Ibid*. For a critique of these claims, see Kenneth Himma “Revisiting Raz: Inclusive Legal Positivism and Our Concept of Authority| *American Philosophical Association Newsletter on Philosophy and Law*, Vol. 6, No. 2, Spring 2007.

Raz's reliance on a focal case methodology is clear: Raz is articulating an ideal of morally justified authority in order to understand the nature of authority more generally. More will be said on this point below.¹¹ For present purposes it is useful to turn our attention to "the normal way" to justify authority.

According to Raz, the normal way to justify authority is captured by his normal justification thesis. While the dependence thesis tells legal officials how they ought to make decisions, the normal justification thesis determines the scope of the citizen's obligation to obey the law. The normal justification thesis is defined by Raz as follows:

It claims that 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.¹²

An authoritative norm is binding on an individual if it better allows the individual to act in accordance with the reasons that apply to him independently of the law.¹³ Given that the normal justification thesis requires that officials make law in accordance with right reason, it requires the government to have some degree of expertise that allows them to hit this mark.

While Raz often assumes that authorities are better able to meet the demands of the normal justification thesis than individuals relying on their own judgment,¹⁴ he recognizes that sometimes individuals can claim expertise in a certain area and that this expertise can allow the individual to rely on his own judgment rather than the judgment of legal officials. For example, if an individual is an expert on the needs of children then he "may have no reason to acknowledge the government's authority over him regarding the conditions under which parents may leave their children unattended by adults."¹⁵ In

¹¹ See section four.

¹² *Ibid*, 53.

¹³ Raz also refers to the reasons that apply to the subjects as "right reason" or simply "reason". I will use these terms interchangeably.

¹⁴ *Ibid*, 61.

¹⁵ *Ibid*, 78.

other words, citizens can “opt out” of the authoritative domain of the government if they have the requisite expertise.¹⁶

Raz provides a test to capture this feature of his theory: “does following the authority's instructions improve conformity with reason?”¹⁷ He reminds us that “[f]or every person the question has to be asked afresh, and for every one it has to be asked in a manner which admits of various qualifications.”¹⁸ In short, this test for normal justification requires case by case assessments, which accords the normal justification thesis a degree of flexibility. The individualistic, flexible nature of this central thesis is further illustrated by additional examples. Raz argues that an “expert pharmacologist may not be subject to the authority of government in matters of the safety of drugs”, while “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”.¹⁹

The point of legal authority, from the perspective of the normal justification thesis, is to enable individuals to act in accordance with right reason. The obligation to obey the law pivots on law's point: when the law enables the individual to act in accordance with right reason, the citizen has a moral obligation to obey it; when it does not, this obligation dissolves. An individual's relationship to the law can continually change, both as the law changes and as his areas of expertise change. Thus, the question of one's obligation to obey the law must be continually asked if we hope to discover if a given norm is binding on an individual.²⁰

¹⁶ One may wonder what precisely “opt out” means in the context of Raz's theory. As we have seen, Raz is clear that directives that are not morally legitimate are not binding. That is, only legitimate directives give us reasons for action, *supra* n. 3 at 46. That is, they do not give us reasons for action. Raz does add that the fact that the norm is not binding on the individual does not definitively answer the question of how to act. We may have prudential reasons (i.e. avoiding sanctions) for acting in accordance with legal norms *supra* n. 3 at 103).

¹⁷ *Ibid.*, 74.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ This understanding of the normal justification thesis will be qualified below in reference to Raz's suggestion that we need not apply this thesis to every norm (i.e. we can allocate pre-emptive status to a group of norms). I will also question whether it really is individualistic as Raz claims above.

The normal justification thesis and the dependence thesis combine to form what I have termed Raz's focal concept of authority. Raz is not merely describing law as it is (a methodology that underpins his legal positivism); rather, he is articulating an understanding of the ideal of authority. That is, he is articulating the conditions under which authoritative directives are morally justified and thus legally binding. There is, however, a third piece to Raz's conceptual puzzle: the pre-emption thesis. Raz defines the pre-emption thesis as follows:

One thesis that I am arguing for claims that authoritative reasons are pre-emptive: *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 exclude and take the place of some of them.*²¹
[author's italics]

In other words, legal norms present subjects with exclusionary reasons for action. Those familiar with Raz's works will recognize this thesis as it is one of the defining claims of Raz's legal positivist position. The tension between the pre-emption thesis and the normal justification thesis is apparent when bear in mind that for Raz, only morally legitimate legal norms have pre-emptive force.²² Consequently, the very act of determining whether the norm meets the normal justification standard undermines the pre-emptive force of the norm(s) in question. As we shall see, this tension is not superficial. I will argue that Raz's two central theses are linked to incompatible models of authority.

2. The Analogy of the Arbitrator: from Consent to Normal Justification

In order to unravel the above argument, it is useful to examine the analogy Raz makes between the role of an arbitrator and the role of legal authorities in a little more detail. I will argue that the difficulties that plague this analogy also infect his theory as a whole. In this analogy we find implicit references to the pre-emption thesis and a direct reference to the dependence thesis. Raz does not, however, mention the normal justification thesis - an omission that is more significant than it may appear. Raz writes:

²¹ *Ibid*, 46.

²² *Ibid*.

Consider the case of two people who refer a dispute to an arbitrator. He has authority to settle the dispute, for they agreed to abide by his decision. Two features stand out. First, the arbitrator's decision is for the disputants a reason for action. They ought to do as he says because he says so. But this reason is related to the other reasons which apply to the case. 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 arbitrator's decision is meant to be based on the other reasons, to sum them up and to reflect their outcome. For ease of reference I shall call both reasons of this character and the reasons they are meant to reflect dependent reasons.²³

The arbitrator presents the disputants with pre-emptive reasons for action. The parties are supposed to treat the judge's decision as a first-order reason to act for certain considerations and a second-order reason for not acting on one's own assessment of the balance of reasons.

In the above analogy, Raz communicates this thesis best when he says that the disputing parties who are faced with the decision of an arbitrator “ought to do as he says because he says so.”²⁴ To do otherwise would defeat the point of bringing their case to the arbitrator precisely because the disputing parties consented to be bound by the decision, regardless of its content. There are limits to the consent-based authority of the arbitrator. Raz argues that the authority of the ruling is undermined if, for instance, the arbitrator is drunk, or if new reasons emerge that were not part of the set of dependent reasons considered.²⁵ Notice, however, that such reasons are external to the dependent reasons that the ruling was intended to replace. The key to the pre-emptive status of norms is that we are not supposed to return to the reasons that the rule is meant to sum up and replace. In short, the pre-emption thesis requires a pre-commitment to act in accordance with the legal norms.²⁶

²³ *Ibid*, 41.

²⁴ *Ibid*.

²⁵ *Ibid*, 42.

²⁶ This becomes clear when we remember that the key feature of the pre-emptive status of legal norms is that they exclude competing reasons: legal norms, according to Raz, are not simply weighty reasons for actions that are to be balanced against other competing reasons, *supra* n 3, 41. Raz argues that we cannot treat the rule and the reasons behind it as a reason for action: in such cases, we would be guilty of “double counting”, *supra* n 3, 58. This particular argument should be viewed with suspicion given that this “crime”

At this point, one may wonder if there is potential tension between the dependence thesis and the pre-emption thesis: do rules that fail to reflect the reasons that apply to the citizens sacrifice their binding status? Raz's answer, at this point, is "no". Raz avoids any such difficulties by arguing that even mistaken directives are binding:

Remember also that the thesis is not that authoritative determinations are binding only if they correctly reflect the reasons on which they depend. On the contrary, there is no point in having authorities unless their determinations are binding even if mistaken (though some mistakes may disqualify them).²⁷

This argument preserves the pre-emptive character of norms: citizens are supposed to treat legal norms as reasons for action that exclude competing reasons. Raz underscores this point when he argues that the "whole point and purpose of authorities . . . is to pre-empt individual judgment on the merits of a case, and this will not be achieved if, in order to establish whether the authoritative determination is binding, individuals have to rely on their own judgments of the merits."²⁸ If we disobeyed directives every time they failed to reflect our own dependent reasons for action, then we would defeat the point of arbitration - we would defeat the purpose of law. These observations keep Raz's theory of authority in line with the analogy of the arbitrator. The ideal of how authorities should behave (represented by the dependence thesis) does not undermine Raz's theory of what law is. Here the pre-emption thesis acts as a trump card.

However, this message is not the only one delivered in *The Morality of Freedom*. Raz replaces the role that consent plays in the analogy of the arbitrator with his normal justification thesis. While he does not flag this move in *The Morality of Freedom*, he does in *Ethics in the Public Domain*.²⁹ This seemingly innocent move considerably alters the dynamic between the pre-emption thesis and Raz's ideal of authority. Significantly, it means that the normal justification thesis is *not* subordinate to the pre-emption thesis.

of practical reasoning does not appear to be justified by any other considerations – it simply lends credence to the pre-emption thesis.

²⁷ *Ibid*, 47.

²⁸ *Ibid*, 47-8.

²⁹ Joseph Raz, *Ethics in the Public Domain* (Oxford: Clarendon Press, 1994), 214.

Emran Mian pinpoints the manner in which the analogy of the arbitrator falters once the normal justification thesis replaces consent: each represents a different model of authority. Consent, which underpins the pre-emption thesis, indicates the presence of a deferral model.³⁰ Once an individual consents to obey the authority, he treats the authority's directives as pre-emptive reasons for action - he defers to authority. Conversely, the normal justification thesis offers us a dialogic model. When the normal justification thesis replaces consent, the individual is no longer required to make a pre-commitment to each authoritative directive; rather, he is instructed to determine whether the said norm is binding on him (he is asked to 'dialogue' with authority).³¹ The problem is as follows. A consent-based theory exhorts citizens to treat the law as providing content-independent reasons for action (as the pre-emption thesis demands), while the normal justification thesis makes the bindingness of norms a moral matter. A moral matter is a content-dependent matter. If we have to return to the reasons that underpin the rule in order to determine its bindingness, its pre-emptive status is undermined as content-dependence replaces content-independence.³² The incoherence of the analogy with the arbitrator (once consent is replaced by normal justification) is symptomatic of the problems Raz's account of authority encounters. Given that Raz's key theses represent different models of authority, we can wonder whether Raz can successfully unify his theory of authority.

3. Pre-emption vs. Normal Justification: Seeking Coherence

Once Raz admits that the pre-emption thesis does not trump the normal justification thesis, the tension between the two is clear: the pre-emption thesis requires a pre-commitment to authority while the normal justification thesis invites us to evaluate the reasons behind the rule on a case by case basis. Can this tension be over-come?

³⁰ It is true that Raz rejects consent-based theories in general. Nonetheless, when discussing the pre-emption thesis, consent plays a central role.

³¹ Emran Mian "The Curious Case of Exclusionary Reasons," (2002) 15 *Canadian Journal of Law and Jurisprudence* 113.

³² Notice that the term "service conception" is itself ambiguous. Raz argues that it is the law's job to "serve the governed" and thereby act according to dependent reasons which aligns the idea of service with the normal justification thesis. However, the service conception of authority gives citizens pre-emptive reasons for action. This term only superficially bridges the two models and hence it glosses over the tension.

Raz anticipates this objection and attempts to address it:

[the objection] says that in every case authoritative directives can be overridden or disregarded if they deviate much from the reasons which they are meant to reflect. It would not do, the objection continues, to say that the legitimate power of every authority is limited, and that one of the limitations is that it may not err much. For such a limitation defeats the pre-emption thesis since it requires every person in every case to consider the merits of the case before he can decide to accept an authoritative instruction.³³

Raz remarks that this objection “does not formally challenge the pre-emptive thesis.”³⁴ What it does do is challenge the mediating role that Raz assigns to authoritative directives.³⁵ To repeat, the mediating role serves “to save them the need to refer to the very foundations of morality and practical reasoning generally in every case”.³⁶ The problem is as follows: “as the directives are binding only if they do not deviate much from right reason and as we should act on them only if they are binding, we always have to go back to fundamentals.”³⁷ A return to fundamentals would undermine the pre-emptive status of legal norms.

Raz's response to this challenge is as follows: some mistakes are clear, and when such mistakes are made there is no need to go back to the fundamentals to identify them. He uses an analogy with mathematics to illustrate his point:

Consider a long addition of, say, some thirty numbers. One can make a very small mistake which is a very clear one, as when the sum is an integer whereas one and only one of the added numbers is a decimal fraction. On the other hand, the sum may be out by several thousands without the mistake being detectable except by laboriously going over the addition step by step. Even if legitimate authority is limited by the conditions that its directives are not binding if clearly wrong, and I wish to express no opinion on whether it is so limited, it can play its mediating role. Establishing that something is clearly wrong does not require going through the underlying reasoning. It is not the case that legitimate power of authorities is

³³ *Ibid*, 61.

³⁴ *Ibid*.

³⁵ *Ibid*.

³⁶ *Ibid*.

³⁷ *Ibid*, 61-2.

generally limited by the condition that it is defeated by significant mistakes which are not clear.³⁸

Raz immediately applies this example to the legal domain. He argues that the “pre-emption thesis depends on a distinction between jurisdictional and other mistakes.”³⁹ He suggests that “[m]istakes which they make about factors which determine the limits of their jurisdiction render their decisions void.”⁴⁰ Directives outside the jurisdiction of the authority are not binding, while directives that are wrong but are inside the jurisdiction of the authority are binding:

The pre-emption thesis claims that the factors about which the authority was wrong, and which are not jurisdictional factors, are pre-empted by the directive. The thesis would be pointless if most mistakes or if in most cases it was particularly controversial and difficult to establish which are and which are not. But if this were so then most other accounts of authority would come to grief.⁴¹

In order to avoid returning to foundational reasons, Raz urges us to group moral/political reasons in the category of “significant mistakes which are not clear,” which are contrasted with jurisdictional mistakes that are “significant and clear.”⁴² He argues that “[i]t is not the case that legitimate power of authorities is generally limited by the condition that it is defeated by significant mistakes which are not clear.” Raz wants us to believe that the only relevant mistakes are jurisdictional mistakes. In other words, these are the only mistakes that are not binding.

Raz's appeal to the distinction between jurisdictional mistakes and non-jurisdictional mistakes serves as an attempt on his part to gloss over the serious tension adumbrated above. If Raz can make the connection in the reader's mind between clear and significant mistakes and jurisdictional mistakes, then the problem of revisiting the foundations of morality disappears: in order to determine if a directive is outside the jurisdiction of an authority, we do not have to revisit the foundations of morality, we only

³⁸ *Ibid*, 62.

³⁹ *Ibid*.

⁴⁰ *Ibid*.

⁴¹ *Ibid*.

⁴² *Ibid*.

have to revisit the rules that determine the boundaries of authority.⁴³ This move, if successful, will preserve the mediating role he assigns to authority while still addressing the worry about mistaken directive. Unfortunately for Raz, this argument is not convincing, given that it preserves the pre-emption thesis at the expense of the normal justification thesis.

The source of the problem can be identified once we recall that the normal justification thesis looks at legal norms with reference to their content. It seeks to determine if a norm is binding by figuring out if it is in accordance with right reason.⁴⁴ While Raz does not specify precisely what “right reason” means, we can be fairly certain that it is not an allusion to jurisdictional principles. After all, the normal justification thesis exists in order to determine the extent to which any regime enjoys moral legitimacy.⁴⁵ To determine if a directive is justified, we must return to moral and political issues, not jurisdictional rules. Conversely, in order to discover if a jurisdictional mistake has been made, we have to consult the secondary power-conferring rules of the system - we do not have to return to questions of political morality.

One might object that I have misinterpreted Raz’s use of the word “jurisdiction”. It may be the case that “jurisdiction” refers to expertise (i.e. in the sense of moral jurisdiction):⁴⁶ if an expert on children knows that the government is obviously wrong, he does not have to return to the reasons underpinning the rules to determine this. The idea seems to be that this expert will allocate pre-emptive status to legal norms when the error is not clear. Heidi Hurd aptly draws attention to the flaw in this line of argument. She argues that it is possible for a calculator to systematically make great mistakes that are unclear. If we apply this to governments, Hurd argues that “Raz could not think it rational

⁴³ Raz believes that such rules are part of every legal system. Joseph Raz, *The Authority of Law* (New York: Oxford University Press, 1979), 96. This may appear to be a naive understanding of jurisdictional mistakes. I address the worry below.

⁴⁴ *Ibid.*, 61.

⁴⁵ Christobal Orrego’s argues that Raz’s under-theorized conception of right reason places him in the natural law tradition. See “Joseph Raz’s Service Conception of Authority and Natural Law Theory”(2005) 50 *The American Journal of Jurisprudence* 317-323.

⁴⁶ Or one might object that I am operating with a naive understanding of jurisdiction. The careful lawyer will correctly point out that determinations of jurisdiction often involve moral and political argumentation.

to judge a government's authoritative legitimacy by its failure to make clear mistakes.”⁴⁷
Hurd is correct to conclude that such a government is not a legitimate authority.⁴⁸

Further evidence that Raz's response is flawed can be adduced once we recollect certain features of the normal justification thesis. Recall that the normal justification thesis provides us with an individual-based test for justification: “[f]or every person the question has to be asked afresh, and for everyone it has to be asked in a manner which admits of various qualifications.”⁴⁹ If the mistakes that are relevant are simply jurisdictional errors, the requisite test would reveal the same results for everyone: the individual-based assessments that the normal justification thesis allows for would be unnecessary, as the subjective characteristics of the individual would not influence the question of whether a given directive is outside of the jurisdiction of the official who rendered it or not. This is so even if the normal justification thesis is applied to group of norms. A jurisdictional test has to do with the powers of officials, not characteristics of individuals. Raz's appeal to jurisdictional mistakes merely glosses over the serious tension in his theory.

Raz has another response at his disposal. It may be the case that I do not know much about roads for instance, so defer to the government in reference to all norms that apply to roads. Put more generally, the idea is that individuals can apply the normal justification thesis to certain groups of norms and they can allocate pre-emptive force to other groups. This approach does not eliminate the tension between the two theses, but it does (if successful) reserve a place for each. In order to achieve this end, Raz must account for the reasons why citizens would assign a given norm or set of norms pre-emptive force. Raz gives us two central reasons why people would allocate law pre-emptive force and refrain from applying the normal justification thesis. First, he argues that committing to norms in advance has the advantage of simplifying our reasoning. Secondly, he argues that officials get it right more often than we do so it makes sense to abide by their judgment, rather than our own. Let us consider each in turn.

⁴⁷ Heidi Hurd, *Moral Combat* (Cambridge: Cambridge University Press, 1999), 86.

⁴⁸ *Ibid.* Also see Jeffrey Goldsworthy, “The Self-Destruction of Legal Positivism”(1990) 10 *Oxford Journal of Legal Studies* 466

⁴⁹ *Ibid.*, 74.

Raz argues that allocating law pre-emptive force enables it to play its mediating role (this is the central feature of his “service conception of authority”).⁵⁰ One of the benefits of this mediating role is that it simplifies our reasoning:

[law] provide[s] an intermediate level of reason to which one appeals in normal cases where a need for decision arises . . . The advantage of normally proceeding through the mediation of rules is enormous. It enables a person to consider and form an opinion on the general aspects of recurrent situations in advance of their occurrence. It enables a person to achieve results which can be achieved only through an advance commitment to a whole series of actions, rather than case to case examination.⁵¹

Here Raz allows the pre-emption thesis, and its ability to simplify reasoning, to take priority over the normal justification thesis (which invites case by case assessments). This raises the question: should we refrain from determining if our actions accord with right reason given that it is important that our reasoning process is simplified? In other words, does the desire or need for simplification outweigh the requirements of the normal justification thesis?

Raz explains in more detail the kind of advantages that a simplified reasoning process will yield: he argues that the mediating role of legal norms enables the “creation of pluralistic societies.”⁵² Raz contends that the allocation of pre-emptive force to legal norms “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.”⁵³ The law cuts through subjective preference and produces an orderly, cooperative society by unifying judgment:

. . . an orderly community can exist only if it shares many practices, and that in all modern pluralistic societies a great measure of toleration of vastly different

⁵⁰ Notice that the term “service conception” is itself ambiguous. Raz argues that it is the law’s job to “serve the governed” and thereby act according to dependent reasons which aligns the idea of service with the normal justification thesis. However, the service conception of authority gives citizens pre-emptive reasons for action. This term only superficially bridges the two models and hence it allows Raz to gloss over the tension.

⁵¹ *Ibid*, 58.

⁵² *Ibid*.

⁵³ *Ibid*.

outlooks is made possible by the fact that many of them enable the vast majority of the population to accept common standards of conduct.⁵⁴

This is the liberal twist on an old story. Law unifies judgment by offering a mid-level set of rules that citizens defer to.⁵⁵ Without legal rules, individuals will pursue their subjective preferences and order will be compromised. Ultimately, Raz's argument regarding the creation of pluralistic societies is grounded in law's order-engendering function (notice that the value of simplicity has been overtaken by the more foundational values of order and toleration). Implicit in Raz's argument is the claim that a pluralistic community cannot persist unless all members consent to obey the law regardless of whether or not the directives meet the normal justification standard. We consent to treat legal norms as pre-emptive reasons for action because we understand that if judgments about how to act are not unified, individuals will pursue their subjective preferences and disorder may ensue.⁵⁶

In this particular argument Raz is relying on the consent-based model of authority, which signals a clear priority of the pre-emption thesis over the normal justification thesis. In fact, if we accept his arguments pertaining to the need for simplification, it becomes particularly difficult to find a role for the normal justification thesis. If we choose to "opt out" as a result of our personal expertise, we will place ourselves over and above the needs of a pluralistic community. As we have seen, the normal justification thesis allows, if not encourages, individuals to opt out of law's domain if the norm(s) in question do(es) not reproduce the pre-existing reasons binding on the subject. This point is underscored when Raz argues that a subject is not bound to commit to a scheme that will benefit the community if it does not benefit him directly.⁵⁷ Recall that he states that it "is not good enough to say that an authoritative measure is justified because it serves the public interest. If it is binding on individuals, it has to be

⁵⁴ *Ibid.*

⁵⁵ See Hobbes's *Leviathan* (1651).

⁵⁶ Postema wonders if law can perform this particular function. He points out that when the unifying function of law is needed most, it is least effective: when the disagreements between groups are profound, they are less likely to agree to grant mid-level principles pre-emptive force. See Gerald Postema "Law's Autonomy and Public Practical Reason" Robert George, *The Autonomy of Law* (Oxford: Clarendon Press 1996), 108-9.

⁵⁷ *Supra* n 3 at 72.

justified by considerations which bind them.”⁵⁸ Unlike the pre-emption thesis, the normal justification thesis does not facilitate agreement between people on any level; rather, it focuses on the relationship between the law and the individual. In his attempt to combine the two theses in his appeal to the liberal state, Raz ends up, once again, prioritizing the pre-emption thesis at the expense of the normal justification thesis.

Perhaps Raz does not have to appeal to the simplifying benefits that accompany the pre-emption thesis in order to hope to strike a balance between his two central claims. One can simply argue as follows: there are some things I know about and some things I do not, and in the latter instances it is reasonable to defer to authority. In other words, the pre-emption thesis can be relied on when individual’s do not have the requisite expertise to evaluate the status of a given norm or group of norms. Consider an example Raz offers us in “The Problem of Authority: Revisiting the Service Conception”: laws that ensure safe driving meet the requirements of both the pre-emption thesis and the normal justification thesis.⁵⁹ This example works because it is clear that individuals could not, by themselves, create systems that facilitate safe driving, thus it makes sense to defer to authority in such cases. Furthermore, it seems unreasonable not to. In other words, in such cases it is *immediately* clear that it is reasonable to defer to authority. We do not have to return to the reasons behind the rule in order to make this determination and hence the pre-emptive status of norms is not violated by the normal justification thesis.

Upon further examination, however, we can wonder whether co-ordination problems are the best example of directives where normal justification thesis applies. J.E. Penner correctly observes that co-ordination problems are distinct from questions of normal justification.⁶⁰ The quintessential coordination problem (driving on the right side vs. the left) has certain features: the choice between the two options is arbitrary (neither is more reasonable than the other); once the decision is made, we all have good reasons for abiding by the decision. The law creates a reason for action in these cases and hence there

⁵⁸ *Ibid.*

⁵⁹ Joseph Raz, “The Problem of Authority: Revisiting the Service Conception” (2005-6) 90 *Minnesota Law Review*, 1018.

⁶⁰ Penner, J.E. “Legal Reasoning and the Authority of Law” *Rights Culture and the Law: Themes from the Legal and Political Philosophy of Joseph Raz* (Oxford: Oxford University Press, 2003) 72.

was no morally correct reason for action prior to the choice being made between options (either through custom or law). The same cannot be said for laws that are underpinned by moral and political decisions (laws banning headscarves, for instance), or by laws that are underpinned by technical or scientific expertise (i.e. pharmaceutical laws). The question can now be sharpened: can Raz balance the requirements of his two main theses by appealing to the idea of expertise as it relates to moral or scientific laws?

The assumption that the government is more likely to get it right should be made with caution. Gerald Postema cites Leslie Green's point that we have authorities on whales but no authorities on whether we should save them.⁶¹ Mian is also skeptical about the possibility of possessing this kind of expertise:

Of course, we may want to be extremely skeptical about the moral expertise of the rule-givers. Is their expertise reliable? Can it be rigorously evaluated? After all, in a pluralist context, from the point of view of an individual citizen, it may not be so simple to distinguish an opposing opinion from an inexperienced opinion. Where is the line between moral expertise and ideology? What interests does the rule manifest? Was the rule formulated genuinely so as to enable individuals to better conform with the reasons that apply to them, or was it the product of machinations of lobbyists and sectional interests? There are some very good reasons for being skeptical of the moral expertise of modern legal authorities, or for casting aspersions on their claim that it is the moral expertise available to them that they primarily rely upon.⁶²

Furthermore, even if it is possible for authorities to be experts on such matters, why should a given individual *assume* that the authority gets it right more often than she does?

Consider the example of the safety of pharmaceutical products—an example that relies on both scientific knowledge and moral judgment. Raz argues that “[d]ecisions about the safety of pharmaceutical products are not the sort of personal decisions regarding which I should decide for myself rather than follow authority.”⁶³ Because I lack the requisite knowledge, Raz is suggesting that I should defer to the authority (thereby preserving the pre-emptive status of norms). The decision to defer assumes the authority

⁶¹ *Supra* n 56 at 107.

⁶² *Supra* n 31 at 105

⁶³ *Supra* n 59 at 1015.

has it right or, at the very least, is more likely to have it right than I am (I don't know anything about such things). Is this assumption justified? Just because I do not have the answer, should I assume that the government does? If my neighbor, who is a doctor, has the requisite expertise and opts out of laws domain, does it follow that my ignorance means that I am bound by the law?

The answer has to be “no”. Raz does acknowledge that the “law may reflect the interests of pharmaceutical companies, and not those of consumers.”⁶⁴ In such cases, the assumption that we are better off deferring to the government is misplaced. If we are not knowledgeable, we are better off consulting someone who is.⁶⁵ Raz's articulation of the normal justification thesis supports this claim: if the directive in question does not meet the requirements of the normal justification thesis it does not have authority over the agent in question. We may, at times, treat a given norm *as if* it has authority, but it only has such binding authority if it is justified. In sum, we have no reason to assume that the authoritative norm is binding simply because we are not experts. Thus, when it comes to technical or scientific laws, whether or not they are binding will be a product of the correctness of the norm; it is unlikely to not hinge on the relationship between the individual and the state.⁶⁶

Notice that there is a more serious problem that has been lurking in the background of this discussion: who gets to decide if a given norm meets the requirements of the normal justification thesis? The answer appears to be “the citizen”. As discussed above, the normal justification thesis allows the citizen to opt out of law's domain if he or she has the requisite expertise. The problem with the expertise-based exemptions is that they do not simply apply to those who do possess the requisite expertise; they also apply

⁶⁴ *Ibid*, 1014.

⁶⁵ *Ibid*, 1014-15.

⁶⁶ Philip Soper, in reference to the co-ordination example, explains how legal norms can apply to different people different without relying on expertise: my need to get somewhere quickly combined with my safety record and the lack of traffic are all factors that can impact my decision about how to act. See Philip Soper, *The Ethics of Deference* (Cambridge: Cambridge University Press, 2002), 42. In reference to pharmaceutical laws, one's health may be so dire that the risk that accompanies a treatment may be worth taking.

to those who simply *believe* that they do, given that it is not possible for the individual who is evaluating the norm to simultaneously hold to both of the following beliefs:

- a) that they are an expert in a certain area and that they know what is best; and
- b) that they are more likely to act in accordance with right reason if they blindly comply with the government's directives in that area.

The implications of this fact are fairly serious. For instance, whether or not Raz can balance the requirements of pre-emption and normal justification hinges on the contingent beliefs of citizens. Raz cannot guarantee, on a conceptual level, that a place can be secured for each of his key theses.

Raz is aware of the precarious foundation that participants' beliefs proffer. He explicitly seeks to avoid placing too much weight on the beliefs of citizens. For instance, he opts of the maximalist version of the "surrender of judgment metaphor" instead of its minimalist counter-part for this reason. The metaphor of "surrender of judgment" is referred to by Raz to communicate his understanding of the pre-emptive nature of legal norms. Raz distances himself from Hart, who suggests that surrendering one's judgment involves a refusal to deliberate about the merits of directives or norms. Instead, he aligns himself with Richard Friedman's views:

Unlike Hart's, Friedman's explanation shifts the emphasis from the subjects' deliberations to their action. The subjects accept that someone has authority over them only if their willingness to do his bidding is not conditional on their agreement on the merits of performing the actions required by the authority.⁶⁷

Raz argues that there are two possible interpretations of this metaphor: a minimalist and a maximalist one. The minimalist interpretation "maintains that they are willing to obey if they have no judgment of their own on the merits of performing the required action".⁶⁸ Raz argues the "minimalist interpretation is too weak since it assumes that people are never bound by authority regarding issues on which they have firm views."⁶⁹ Raz opts instead for the maximalist interpretation, which states that "the subjects accept that they

⁶⁷*Supra* n 3 at 40.

⁶⁸*Ibid*, 40.

⁶⁹*Ibid*, 40.

should obey even if their personal belief is that the balance of reason on the merits is against performing the required act.”⁷⁰ Contrary to Raz’s own views, the fact that he allows the normal justification thesis to determine when a norm has pre-emptive force means that he is in fact committed to the minimalist interpretation.

There is good reason to avoid a this kind of participant-centered understanding of legal authority. As Alan Brudner argues, this move is fatal to Raz’s vision of legal authority as practical authority. Brudner explains why this is so when he answers the question, “who gets to decide if a given norm meets the requirements of the normal justification thesis?”:

It cannot be left to the authority, since the normal justification must limit its scope as well, and we would then have to ask who decides whether its reason applies and so on *ad infinitum*. So it is left for the subject to judge whether in any particular case the authority will have authority over it, which is to say there is no practical authority and no obligation to obey.⁷¹

This is a difficulty that Raz spies when he explores the relationship between the pre-emption thesis and the dependence thesis. Recall that Raz argues that “there is no point in having authorities unless their determinations are binding even if mistaken”.⁷² Once we as participants get to decide if a norm provides us with a morally binding reason for action, the law’s practical force dissolves. When Raz grants primacy to the normal justification thesis he undermines the pre-emption thesis and law’s role as a practical authority more generally. The normal justification thesis faces this obstacle, in addition to its incompatibility with the pre-emption thesis. I will now explore the possibility that the tension between these two theses can be traced back to methodological commitments.

5. Methodology and Morality: the Source of the Tension?

The assumption underpinning the descriptive methodology is articulated in *The Authority of Law*. Here Raz explicitly states that the positivist method he employs looks

⁷⁰ *Ibid*, 40.

⁷¹ Alan Brudner, *Constitutional Goods* (Oxford: Oxford University Press, 2004), 46.

⁷² *Supra* n 3 at 47.

to existing legal systems in order to identify the universal and necessary features of legality. According to Raz, this approach is definitive of legal philosophy. This point becomes clear when Raz lays bare the two assumptions that underpin his theory:

The first is the assumption of universality according to which it is a criterion of adequacy of a legal theory that it is true of all the intuitively clear instances of municipal legal systems. Since a legal theory must be true of all legal systems the identifying features by which it characterizes them must of necessity be very general and abstract. It must disregard those functions which some legal systems fulfil in some societies because of the special social, economic, or cultural conditions of those societies. It must fasten only on those features of legal systems which they must possess regardless of the special circumstances of the societies in which they are in force. This is the difference between legal philosophy and sociology of law. The latter is concerned with the contingent and with the particular, the former with the necessary and the universal. Sociology of law proves a wealth of detailed information and analysis of the functions of law in some particular societies. Legal philosophy has to be content with those few features which all legal systems necessarily possess.⁷³

In order to do legal philosophy, we must look at all the existing (intuitively clear) instances of legality and identify the features that these systems all share. This is the characteristic approach to understanding law that positivists rely on. It involves a clear separation between what law is and what it ought to be. Positivists are only concerned with the “is”. The moral evaluation of the law is a separate project altogether.⁷⁴

In *The Morality of Freedom*, Raz takes a different approach to concept formation. Interestingly, it is an Aristotelian approach focusing on ideal instances of authority in order to come to grips with the nature of authority (and law) in general. Raz states, “[o]urs is an attempt to explain the notion of legitimate authority through describing what one might call an ideal exercise of authority.”⁷⁵ The ideal of justified authority is the focal case - it serves as a lens through which to see authority (and hence law). This lens organizes the data: it distinguishes between “normal” and “deviant” instances of a kind. Raz explains by using an analogy between authority and advice:

⁷³ Joseph Raz, *The Authority of Law* (New York: Oxford University Press, 1979), 104-5.

⁷⁴ See H.L.A. *The Concept of Law*, 2nd edition (Oxford: Oxford University Press, 1994), 240.

⁷⁵ *Supra* n 3 at 47.

The normal reason for accepting a piece of advice is that it is likely to be sound advice. The normal reason to offer advice is the same. It will be clear that these judgments of normality are normative. But the very nature of advice can only be understood if we understand in what spirit it is meant to be offered and for what reason it is meant to be taken. The explanation must leave room for deviant cases, for their existence is undeniable. But it must also draw the distinction between the deviant and the normal, for otherwise the very reason why the ‘institution’ exists and why deviant cases take the special form they do remains inexplicable.⁷⁶

This method identifies central cases of a given phenomenon (i.e. friendship, citizenship, etc) in order to grasp the meaning of the concept. Once central cases are identified, so ipso facto are deviant cases: cases that resemble the central case in some ways but not others. Also notice that the “is” and the “ought” are no longer separate: the “ought” allows us to understand the “is.”⁷⁷ This fusion is necessary if we are to gain an accurate understanding of the phenomena being studied, “for otherwise the very reason why the ‘institution’ exists and why deviant cases take the special form they do remains inexplicable.” Raz underscores this point in “The Problem of Authority: Revisiting the Service Conception” when he disavows the possibility of treating authority as a normatively neutral concept.⁷⁸

The incompatibility of the two methods can be seen with greater clarity when we apply the both to the concept of friendship. For instance, Aristotle identifies the focal case of friendship as existing between two individuals “who are good, and alike in virtue” and who wish each other well for the other’s sake.⁷⁹ Other types of friendship identified by Aristotle include utility-based and pleasure-based. Such friendships exist as means to different ends, and thus these types of friendships are terminated when the end sought (utility, pleasure) ceases.⁸⁰ Friendships based on utility or pleasure are secondary kinds of friendship—they can only be understood as such once we identify the focal case and

⁷⁶ *Ibid*, 54.

⁷⁷ Deriving an “ought” from an “is” is often referred to as a naturalistic fallacy. Orrego points out that this is only a fallacy if there is no normative premise in the argument, *supra* n 44 at 322. See also, John Finnis *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), chapter II.

⁷⁸ *Ibid*, 1007. For detailed discussion of this point, See Brian Bix, “Raz, Authority, and Conceptual Analysis,” (2006) 50 *American Journal of Jurisprudence*.

⁷⁹ Aristotle, *Nicomachean Ethics* (Oxford: Oxford World Classics, 1998), 196.

⁸⁰ *Ibid*, 195.

compare these other cases with it. When we employ the positivist's descriptive method to arrive at an understanding of friendship we must pick out the common features shared by all intuitively clear instances of friendship. We would likely identify the fact that two people like each other and spend time together as a common feature of what we generally refer to as "friendship". Regardless of any other qualities that might make this list, it is clear that any other value underpinning the relationship in question should not be selected: pleasure, utility and like-mindedness would be viewed as contingent features that some friendships exhibit, not necessary features shared by all intuitively clear instances of friendship.

Likewise, if we build a concept of law on the assumptions in *The Morality of Freedom*, we would end up with a different theory than the one Raz offers us: we would not look to the common ground of all intuitively clear instances of legality; instead we would study only the healthiest systems in order to come to grips with what is "normal" and what is "deviant". These healthiest systems would no doubt be morally healthy systems (just as the ideal of authority is morally justified authority).

Herein lies the key difference between the two methodologies: different features are picked out as "significant" by each method. If focal concepts can shed light on the nature of various phenomena (such as friendship), the descriptive method obscures the true nature of these phenomena and *vice versa*. These methods are inherently incompatible rather than complementary. Recall that Raz makes this point about the concept of 'advice' (and analogously with the concept of authority). He argues that our understanding of advice is obscured unless we understand the focal instance and compare it to deviant cases, which are themselves identified in reference to the focal instance.⁸¹

Raz may respond that he is able to combine the two approaches by focusing on law's claim to authority. He identifies this claim as clear common ground that all intuitively clear instances of legal systems share. The difference between the gunman who says "your money or your life," and thereby exercises brute force, on the one hand, and the wicked state that enforces wicked laws, on the other, is that the wicked state only

⁸¹ *Supra* n 3 at 54.

claims authority to enforce its laws. Raz thinks that this claim to authority is what separates de facto authority from brute force, whereas the normal justification thesis lets us distinguish legitimate authority from merely de facto authority. In other words, we look to the normal justification thesis to determine if the law's claim is morally legitimate.

As previously mentioned, Raz does not make the mistake of suggesting that all legal systems validly claim legitimate authority. Thus, the shared quality (all law claims authority) is value-neutral and hence it (potentially) serves to bridge his morally laden concept of authority with his morally bare positivist concept of law. Further, the claim to authority simply requires that a legal norm is capable of being authoritative. Capable, that is, of serving as a pre-emptive reason for action. The thesis that all law claims authority does not require that any given norm be allocated the authority it claims. At first glance, Raz seems to have the requisite conceptual tools to overcome the above critique. When pressed, however, it is clear that his argument about law's claim to authority is unable to keep the internal tension at bay. The fact that only morally justified legal norms have pre-emptive force means we have to check to see if each norm meets the requirements of the normal justification thesis. This, as we have already seen, is a fatal move.

But one may wonder if the descriptive method is, in fact, an option. Is it possible to make choices about what is and is not significant in the process of concept construction without relying on values?⁸² This leaves open the possibility that Raz's legal positivist position is grounded in implicit value judgments, which also leaves open the possibility that his methodological commitments are not antagonistic in the way that the above argument claims. It is possible to combine the two models – the “consent-based” model and “benefits gained” model – into a single coherent concept of law. In Hobbes's *Leviathan*, for instance, individuals consent to be governed by the sovereign *because* the sovereign can provide the protection needed for individuals to pursue their autonomous projects. That is, they consent to allocate law pre-emptive force because of the benefits they will receive. Likewise, in Raz's discussion of pluralistic societies canvassed above,

⁸² *Supra* n. 77, chapter 1. Raz concedes that value judgments are required, but denies that they must be moral. See *supra* n. 29 at 235.

we consent to treat legal norms as pre-emptive reasons for action because of the law's ability to unify judgment and simplify our reasoning. These are the benefits promised to those who adhere to the pre-emption thesis. These are not, however, the benefits sought by the normal justification thesis.

The normal justification calculation is done in the hopes of determining whether the authoritative directive is morally justified and hence binding. Reasonable action, not cooperation, is the goal. This model of authority is incompatible with one that requires the individuals to make a pre-commitment to legal norms. Thus, it is clear that there are competing concepts of authority underpinning the pre-emption thesis and the normal justification thesis respectively. Instead of offering us a unified theory of the nature of legal authority, Raz vacillates unstably between two models of authority.