

A Critique of Raz on Law and Morality

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For a law to be valid is for it to be *systemically* valid – i.e., to exist, as part of some legal system.¹ A criterion of legal validity is a necessary or sufficient condition of legal validity in some system. Now for (Dworkin, 1978, 1986), there *must* be moral criteria of legal validity (‘**MMC**’).² Legal positivists³ deny MMC. For them, the rule of recognition (the social rule or practice which specifies other criteria of legal validity: Hart, 1961) need not specify moral criteria. But within positivism, inclusive legal positivism (‘**ILP**’) affirms and exclusive legal positivism (‘**ELP**’) denies the claim (which I call ‘**CMC**’) that there *can* be moral criteria of legal validity. So, moral criteria of legal validity are necessary (MMC), possible but not necessary (ILP), or impossible (ELP).

I argue for CMC. Now if Dworkin is right, then CMC, which is entailed by MMC, follows. So I set his view aside,⁴ focusing instead on defending ILP against ELP, with which alone⁵ CMC is inconsistent. And since I consider Raz’s the most provocative and compelling argument for ELP, I focus on it in **3** and **4**. But first I flesh out the two forms of positivism and discuss methodology (in **1**) before addressing some preliminary arguments for ELP (in **2**).

1.

¹ (Green, 2003) For (Raz, 2009: 149), not all rules that are legally valid in system *S* are members of *S*. Still, the Razian arguments examined below aim to deny the possibility of moral criteria of legal validity in my sense of ‘legal validity’.

² This is a slight distortion insofar as it implies that Dworkin considers general theories of law possible. Still, he denies that any theory of some legal systems could identify its law apart from moral criteria.

³ At least as I use the label here.

⁴ Arguments against aspects of Dworkin’s view incompatible with ILP: (Lyons, 1977) (Coleman, 1982)

⁵ Among the views considered here. Many believe that natural law theory affirms MMC; (Finnis, 1980: 26; 1996) denies this of his own (most prominent) contemporary natural law theory and even of Aquinas’s (see *Summa Theologica* I-II, q. 96, a. 4c), but he also endorses CMC (Finnis, 2007). Either way, natural law theory affirms CMC.

The United States Constitution provides that no law shall inflict ‘cruel and unusual punishment’.⁶ What does this mean?⁷ ILP allows that this provision incorporates into U.S. law a moral norm against cruel punishment as a necessary condition of legal validity in that system. So if the U.S. Congress approved (in a procedurally sound way) a bill requiring what is in fact cruel punishment, that bill would fail to be valid U.S. law, simply in virtue of violating a moral norm against cruel punishment. Still, ILP holds that any moral norm’s (indeed, any norm’s) membership of a legal system depends *ultimately* on social facts (i.e., that some relevant officials engaged with it in some relevant way) as specified by the rule(s) of recognition.

ELP rejects this account, holding instead that the provision in question legally empowers some U.S. official(s) to invalidate a law inflicting some punishment by *declaring* it cruel. So if the U.S. Congress approved (in a procedurally sound way) a bill requiring what is in fact cruel punishment, that bill would remain legally valid unless or until the relevant legal official *declared* it cruel.⁸ Thus, on ELP’s reading but not on ILP’s, this constitutional provision might (in fact, whether or not licitly) be used to invalidate a law even if the punishment it inflicts is not truly cruel; a law might remain valid even if the punishment that *it* inflicts *is* cruel; and the moral norm against cruel punishment is *referred to* but not *incorporated* by U.S. law.⁹

Now complete theories of law include views about the normative implications of some norm’s being legally valid.¹⁰ Perhaps, for example, courts are legally empowered to ‘take judicial notice’ of (i.e., consider in judicial deliberations) norms that are part of its system’s law, but legally required to demand evidence for norms that are not; perhaps they should apply all valid laws, perhaps not. In any case, views about these *normative* effects of validity are no part of legal

⁶ Hereafter simply ‘cruel punishment’.

⁷ The following accounts borrow heavily from (Gardner, 2001: 200-01).

⁸ Unless, of course, it were invalidated, voided, or repealed by other means.

⁹ Another possibility is that, *pace* ILP and ELP, such provisions do not involve *moral* concepts and norms at all, but related *legal* ones: (Priel, 2005).

¹⁰ (Green, 2003): ‘No legal philosopher can be *only* a legal positivist’.

positivism. And like the fact of being legally valid or being part of a legal system, normative effects are not observable phenomena. You could know all the behaviour and beliefs of all U.S. officials and citizens and still not know which account of the above constitutional provision was sound, ELP's or ILP's. For the question separating ELP and ILP is *conceptual*, not empirical.

Nor is it the normative question of whether it is morally permissible or desirable to *view* moral norms as possible criteria of legal validity,¹¹ much less of whether there is a moral imperative to incorporate or exclude them.¹² The question is whether so incorporating them is conceptually possible. Though we want to illuminate the 'nature and limits of law' (Raz, 1994: 217), this is also not a lexicographical inquiry into the definition of the English word 'law'¹³ or an attempt to stipulate one.¹⁴ Our aim, rather, is to gain a clear and accurate (Green, 2008: 994) understanding of a *concept* in a way that enhances our *self*-understanding by explaining and making perspicuous our related social institutions and practices.¹⁵ This requires examining the *theoretical* advantages and disadvantages (in terms of coherence, explanatory power and consistency with related concepts) of various views about law – especially, in this case, as it relates to morality (Raz, 2004: 17).

2.

One common such theoretical defence of ELP is that by excluding all moral reasoning from reasoning about what the law *is*, it allows us to distinguish clearly between describing and evaluating law. But as (Raz, 1994) points out, such an argument presupposes ELP. In this context, it begs the question against ILP, which claims that sometimes we *cannot* identify or

¹¹ As discussed by (Fuller, 1957: 656).

¹² See (Campbell, 1986)'s 'ethical positivism'.

¹³ After all, as (Gardner, 2001: 226) points out, the English word conflates *lex* (*loi*, *Gesetz*, etc.) and *ius* (*droit*, *Recht*, etc.), the latter of which may have more normative content than 'law' in the legal positivist's sense. Moreover, we use 'law' in non-legal contexts too – as in the natural sciences.

¹⁴ (Raz, 2009: 41): 'We do not want to be slaves of words'.

¹⁵ (Raz, 2009: 41) This generally squares with the accounts in (Coleman, 1996) (Finnis, 1980: 279) (Bix, 2003: 543) (Waluchow, 1994: 104)

describe a law without moral reasoning. Doing so in such cases would lead to mistakes about what the law is. The same goes for the argument that ILP leads to investigator's bias, encouraging sociologists and legal historians to eschew value-neutral descriptions: if ILP is sound, then some value-neutral descriptions may be unsound. Moreover, as Raz (*ibid.*) grants, complete value-neutrality is impossible: 'any good theory... is based on evaluative considerations in that its success is in highlighting important social structures and processes, and every judgment of importance is evaluative' (320).¹⁶

Raz does seem to endorse the argument that ILP (though he does not use the label) is inconsistent with 'an institutionalized conception of law'. A consequence of this conception, for Raz, is that the law 'has limits'. He continues: 'Legal systems contain only those standards which are connected in certain ways with the operation of the relevant adjudicative institutions. This is what [the law's] institutionalized character means' (Raz 2009: 44-5). Thus, he argues, the law is not coextensive with all social rules or moral or other standards.

But ILP is compatible with all of this. For a moral norm to be part of a system's law, it must have the right connection with the relevant social institutions. In particular, again, its membership of the system depends *ultimately* on social facts: that relevant officials engaged with it in some way specified by the rule(s) of recognition. For the stronger claim that this 'institutionalized character' of the law requires that *all* (even non-ultimate) criteria of validity be social facts, we need a correspondingly stronger argument.

Raz provides one. He suggests that ELP 'explains and systematizes' distinctions we regularly make between (a) legal and moral acumen, (b) applying and developing the law, and (c) settled and unsettled law (*ibid.*, 48).

¹⁶ See also (Finnis, 1980: ch.1).

First, Raz says that in evaluating judges and judicial decisions, (a.i.) we distinguish case knowledge and technical skills of interpretation and analysis from the moral sensitivity sometimes also necessary for deciding cases well. And (a.ii.) we tend to associate only the former with a decision's *legal* acceptability. But I think that (a.i.) is far more pre-theoretically pervasive and pronounced than (a.ii.). And (a.i.) is something that ILP can accommodate just as well as – if not more naturally than – ELP: it allows that not only deciding cases but even identifying laws can require moral judgment. So it seems that the apparent force of this objection rests mostly on the plausibility of (a.i.), when it is the plausibility of (a.ii.) alone that determines its force against ILP. It is not clear to me that when a judge is called on to determine whether a tax law is fair, say, we do not consider her moral sensitivity to be legally relevant.

A similar reply can be made to the other distinctions. For Raz, (b.i.) we distinguish interpreting and applying existing law from *developing* (new) law, and (b.ii.) we tend to associate moral reasoning only with the latter. Again, (b.i.) seems true, but it does not favour ELP over ILP. And (b.ii.), which *would* favour ELP, is much fuzzier. Raz himself admits that the moral and legal 'functions are extremely hard to disentangle in many cases' (*loc. cit.*). In fact, elsewhere he strongly questions both (b.ii.) *and* the distinction in (b.i.): '...legal expertise and moral understanding and sensitivity are thoroughly intermeshed in legal reasoning... Legal reasoning is an instance of moral reasoning. Legal doctrines are justified only if they are morally justified, and they should be followed only if it is morally right to follow them' (Raz, 2001: 335, 340). If legal reasoning is an instance of moral reasoning, then applying law often or always [not, as per (b.i.) and (b.ii.), *never*] involves moral reasoning.

Even so, grant (b.i.) for argument's sake. It is true that on ILP, *if* some valid law incorporates moral norms, then applying those norms constitutes applying law. But applying

unincorporated moral norms would still count as making new law. So ILP, too, affirms the common sense view that developing law can require moral reasoning. But Raz's argument requires something less obviously true: that we do *not* associate moral reasoning with, say, applying a law against unfair taxes. I doubt that our intuitions are refined and strong enough to support this argument. Since similar considerations deflate the differences between ILP's and ELP's accounts of (c) (which depends on (b) anyway), (a)-(c) do not significantly favour ELP.

There is, however, another argument. For Raz, only ELP is compatible with a crucial function of the law: 'to provide publicly ascertainable standards by which members of the society are held to be bound so that they cannot excuse non-conformity by challenging the justification of the standard' (Raz, 2009: 52). ELP is necessary if the law as we understand it is to clarify 'in an accessible way' what it claims to make binding on everyone, 'notwithstanding their disagreement with it' (*loc. cit.*).

I see three ways of understanding this argument. First, the mention of public ascertainability, combined with Raz's insistence that laws 'be determined in an objective and value-neutral way [so that] doubts and discussions about the validity of laws revolve on factual questions, on issues susceptible of objective determination to which one's moral or political views are essentially irrelevant' (Raz, 2009: 152), may suggest that Raz considers factual questions generally more certain and less controversial than moral questions. But Raz elsewhere says that this view 'has nothing to recommend it, and I in no way share it' (Raz, 2001: 231).

Still, let us explore it briefly. Like Raz, (Waluchow, 1994: 122) denies that moral norms are generally more controversial or harder to ascertain. But surely some – perhaps many – really are less certain and more controversial than matters of social fact. Does this undermine ILP?

To clarify, nothing about ILP requires that moral principles be *objectively* true¹⁷ – true, that is, independently of anyone’s beliefs, opinions, or desires about them. Even if cultural relativism were true, for example, at least some moral norms would have truth values, though these would vary across cultures. Even so, (Mitrophanous, 1997: 628-9) argues that ILP faces the challenge of providing a principled basis for distinguishing acceptably uncontroversial and certain moral principles, which it grants can serve as criteria of legal validity, from others, which the most plausible ILP excludes as possible criteria.

But should ILP provide such a sharp distinction? Why not agree with (Hart, 1961: 252) that laws in different systems can be more or less controversial or certain, and that there is no reason (no theoretical imperative) for legal positivism to make certainty or non-controversy its ‘paramount and overriding’ concern? After all, if ELP need not offer a principled basis for distinguishing acceptably certain or non-controversial *social-factual* criteria of legal validity, neither must ILP provide such a principled standard for *moral* criteria.

Raz’s argument could mean that unless the law lacks moral criteria, it will not be *accessible enough* – its contents will not be readily enough understood – by its subjects. But why suppose that? Unless we assume what Raz rightly rejects (that moral claims are *necessarily* more controversial or less certain), why should a constitutional provision (say) excluding cruel punishment be less accessible than a technically worded law buried in a byzantine tax code? If the latter can be made suitably accessible, so can the former.

Finally, and most plausibly, Raz’s argument may be read as a primitive version of his argument that a directive is incapable of being authoritative unless its existence and content can be determined without recourse to moral arguments. To this argument from authority, which many (e.g., Soper, 1996: 1746) agree is the most powerful in favour of ELP, we now turn.

¹⁷ *Pace* (Mitrophanous, 1997)

3.

On Raz's view, for a practical¹⁸ authority to be legitimate – for our obedience to it to be not blind but reasonable – we must be more likely to act in accordance with the relevant reasons for action if we try to obey it than if we try to act on those reasons directly (Raz, 2001: 214). So its directives must express the authority's judgment of what we ought to do in view of those reasons. The directives thus provide pre-emptive reasons for action – not just another reason to do or refrain from doing something, but also a reason to refrain from acting on reasons that would have been relevant in the directives' absence (i.e., the reasons that the directives are meant to replace) (Raz, 1990: 40). But for a directive to give us pre-emptive reasons for action, we must be able to identify it without recourse to the reasons that it aims to replace (Raz, 2001: 218-19).

Now Raz thinks that necessarily, the law claims to have legitimate authority. So it must be at least capable of bearing such authority. This requires that its directives be presented as providing pre-emptive reasons for action, which means that they must be identifiable without appeal to the reasons that they purport to replace. In the case of the law, which purports to replace all other reasons for action besides those that are themselves legally recognized, this includes all unrecognized countervailing considerations – including all moral considerations.¹⁹

In other words, if a norm's legality depended on moral principles, we would have to appeal to moral reasons for action to determine what it required, in which case the law would be incapable of bearing legitimate authority: it could not perform the function of pre-empting those reasons. But law must be capable of bearing legitimate authority. So there cannot, contra ILP, be moral criteria of legal validity; this would be incompatible with a certain conceptual connection between law and authority.

¹⁸ His account also covers theoretical authority, which I set aside here.

¹⁹ For another summary, see (Coleman, 2000)

To defend ILP against this powerful argument, some have questioned whether law must claim legitimate authority (Kramer, 1999); whether it must be capable of legitimacy (Waluchow, 1994; Himma, 2001); and whether it could function merely by changing the relative weights of, rather than pre-empting, our reasons for action (Perry, 1989). I think that these objections fail, so I grant the premises that they deny. Instead, I contest the claim that for the law to replace reasons for action, it must be identifiable without recourse to them.

Consider Raz's example. An arbitrator has authority to settle two people's dispute. Her judgment is meant to reflect the balance of reasons applicable to the litigants before the arbitration, and indeed to replace some of those reasons with a reason simply to comply. Thus, unless the litigants reject the replaced reasons, 'they defeat the very point and purpose of the arbitration' (Raz, 2001: 213). If the arbitrator picks the one fair outcome but describes it to the litigants only *as* 'the one fair outcome', the arbitration's purpose would be defeated. The litigants would not benefit from it. After all, if they *knew* the fair outcome, they would have had no need for arbitration. A decision whose identification requires them to resolve their own dispute, far from replacing their reasons for action, merely directs them to consider and weigh these anew.

Suppose again, Raz says, that I need to be reminded of which insurance policy I had deemed best. If you tell me that I had settled on 'the best one' – if identifying my previous decision requires me to appeal to the very reasons on which it was based – your reminder is self-defeating. It cannot do what decisions (or reminders thereof) are supposed to do: reflect and *replace* their underlying considerations.

I think that these examples appear to support Raz's point only because each makes the disputed question (which resolution is fairest, which insurance policy is best) and the description identifying the decision (the fairest resolution, the best insurance policy) substantively the same.

In both cases, that is, identifying the decision or directive requires the subjects to identify which option is favoured by *the balance* of relevant reasons. This is why neither directive is informative or capable of replacing reasons. But I propose that *only* directives whose identification requires determining what the subject considers the *balance* of relevant reasons have this feature. Directives that require more limited moral judgments do not.

Imagine that under circumstances *C*, our litigants face options A and B, which they know to be the more selfless and the more humane courses of action, respectively. Their dispute is over which option is favoured by the *balance* of reasons under *C*. A directive telling them to choose under *C* the *most selfless* option could (1) represent its author's judgment of what the balance of reasons requires under *C*, and hence (2) be genuinely informative, and hence (3) obviate their deliberations about what the balance of reasons requires, even though (4) identifying its content would require moral judgment: the determination of which option is most selfless.

Or say that you remind me of which insurance plan I had deemed best by saying that it was the most affordable one. This, too, can be informative and actionable even though to understand its content I must resort to one of the reasons relevant to my action: affordability.

Likewise, it is conceptually possible for it to be *U.S. law* that, say, no cruel punishment may ever be inflicted. It can be the law's judgment that the balance of reasons always excludes inflicting such punishment. Even if citizens and officials wish only to comply with the balance of reasons, this law can help. For in order to identify and understand it, they need not determine for themselves or already know whether (much less agree that) the balance of reasons always excludes cruel punishment; they need only determine or know what counts as cruel (and reasonably believe themselves more likely to follow the balance of reasons if they comply with U.S. law). Thus, Raz's argument does not tell against ILP (or, therefore, CMC).

4.

I address four possible replies to my objection to Raz's argument. First, it may be objected that the scenario that I allow still requires the subjects of the relevant directive or decision to know facts relevant to their decision – about what is most selfless, most affordable, or cruel. But what if the litigants disagreed about what was most selfless, whether because this moral category was vague or indeterminate, or for some other reason? What if there are many non-cruel punishments among which we must choose? Would more specific or social-fact-based description of what to do be more effective or helpful in resolving what to do?

The answer to the last question is: only sometimes – but even then, so what? First, even Raz rejects (see 2.) that moral considerations are as a rule more certain or less controversial than social facts, which can also be vague, indeterminate, or so complex that equally informed and competent judges reach different conclusions. But even if laws with purely non-moral criteria would generally be more helpful or effective *qua* authoritative directives, less effective or helpful directives can still *be* authoritative. It is a virtue of Raz's argument that it claims to identify a *conceptual* impossibility (as per our methodological desiderata – see 1.). It is not impossible – indeed, it is certain – that some laws are more effective, helpful, and specific than other genuine *laws*. Indeed, perhaps we have good reasons to make identification of the law independent of moral reasoning so far as possible (Coleman, 2000: 81). But granting that helpfulness, effectiveness, and specificity are legal *ideals* or even features that all law instantiates to *some* degree, it does not follow that moral principles cannot be part of the law. As Raz affirms, 'the general traits which mark a system as a legal one are several and each of them admits, in principle, of various degrees' (Raz, 1990: 150).

Second, it may be objected that my examples run afoul of another of Raz's (plausible) requirements for legitimate authority: that its subjects be more likely to act in accordance with the balance of reasons if they obey it than if they try to act on those reasons directly (Raz, 2001: 214). For if the law has some moral criteria, then unless it makes reference (like Raz's examples, and unlike mine) to what the *balance* of reasons requires, how can citizens be sure that they are *all-things-considered* better off complying?

Notice, however, that we could raise the same objection against ELP, even more forcefully: If the law has *no* moral criteria, how can we be sure that by following it we act according to right reason? Where the authority is legitimate, the answers for ELP and ILP alike will be of the same sort: The lawmaking authority may be in a better epistemic position to judge complex issues (e.g., by collecting testimony from economists and health experts); and its ability to coordinate behaviour among the vast majority of citizens may give us reasons for compliance based on fairness and reliability (Raz, 2004: 9). Plainly, the law can use these advantages to help us better follow right reason even if its identification sometimes requires moral reasoning.

A third objection has been raised against a similar reply (Waluchow, 1994: 133) to Raz's argument. Of an arbitration whose litigants are directed to do what most respects equality, about which (by hypothesis) they are in agreement and correct, (Dare, 1997: 359-60) says:

...The parties *do not have* a consensus on equality which settles their dispute. Such consensus as there is leaves unsettled how equality is to be ranked with other possible principles and... that is the crucial factor. A directive the understanding and interpretation of which required appeal to equality to settle their dispute about ranking would take them no further ahead—they stand before

the arbitrator because they fail to agree upon the relevant implications of the principle of equality for their dispute.

But this objection either misses the point or presupposes controversial and undefended moral views (which are, as it happens, at odds with Raz's). In short, what a reason requires (better: what it *favours*, or what it *would require* if it alone were operative and relevant) and how it ranks against other reasons are two distinct matters. The directive in this example (*qua* authoritative legal directive) purports to settle for the litigants what is required by the *balance* of reasons, equality included. Directing them to do what most respects a certain reason is uninformative and futile *only if* what it favours and what the *balance* of *all* relevant principles requires coincide: e.g., if different reasons always favour the same actions; or if there is only ever one relevant reason, such that what it requires is (*a fortiori*) what the *balance* of moral reasons required.

But this response is unavailable to Raz, who believes, plausibly, in incommensurable options for choice (Raz, 1997), a pluralism of values (Raz, 1986), irreducibly distinct *prima facie* reasons that can override and thus conflict with each other (Raz, 1990: 23-26),²⁰ and some non-moral reasons relevant to action (so that a directive referring to all relevant moral principles could still fail to specify what the balance of reasons required, at least where more than one option is morally permitted) (Raz, 2001: 329-30).

Moreover, even if, say, *r* was the only reason relevant to my choice and I knew that *r* favoured option *x*, a directive instructing me to act according to *r* would be useless *only if* I furthermore knew that *r* was the only relevant value. Otherwise, the directive *would* inform me of what did not follow from my knowledge that *r* favoured *x*: namely, that *x* was what the *balance* of reasons required; in this way it would, contra (Shapiro, 1998)'s similar worries about ILP (which I lack space to rehearse here), make a 'practical difference' to my deliberations. In

²⁰ More on how reasons can be *prima facie* and exception-less but not always decisive: (Green, 1988: 39).

short, Dare's reply (and hence Raz's argument) holds up only if what the balance of reasons required and what any one moral reason favoured were always the same and this were always known to citizens. Dare gives no argument for this view, and Raz denies it.

Finally, (Leiter, 2007: 127) answers that on Raz's argument, ILP fails 'if there exists *any* case in which the dependent reasons are the same as the moral reasons which are required to identify what the law is; that there remain some cases where these reasons "may" be different is irrelevant'. But as I have argued, this is so only if the balance of the dependent reasons, and the moral considerations for identifying the law, are the same and known to be so. In other words, rather than an argument against ILP, I take this as an argument against the possibility that *consistency with the balance of reasons* can be a criterion of legal validity. Only in this case would the law fail to direct its subjects, so it would be conceptually confused to allow the possibility of laws of that sort. So a defence of CMC (by way of ILP) requires us to show only that not every moral criterion amounts to *that* criterion; and this we have done.

Conclusion

That there can be moral criteria of legal validity is a conceptual claim to be assessed according to its coherence, explanatory power, and fit with related concepts. Since alternatives to legal positivism do not deny CMC, and since its more *natural* account of the phenomena (e.g., of the U.S. provision against cruel punishments) creates, I think, a presumption for it, CMC can be defended by showing that there are no sound objections to the form of positivism that affirms it (ILP). Thus, whether or not legal positivism holds, CMC would. Arguments against ILP from pre-theoretic intuitions about law and morality are question-begging or indecisive; Raz's more powerful argument based on the nature of authority shows that *consistency with the balance of reasons* cannot be a criterion of legal validity; since other moral norms can be, CMC holds.

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