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Dworkin, Ronald. 'Thirty Years On'. (2002) *Harvard Law Review* 115: 1655–87. (Senere også trykt i Ronald Dworkin, *Justice in Robes*, ss. 187–222. Belknap. Cambridge, Mass. 2006.)

Dworkins kritikk av Raz – kort analyse

Dworkin retter sin kritikk først og fremst mot Raz's argument fra autoritet. Han deler kritikken i tre:

> En kritikk av Raz's tese om «law's claim to legitimate authority»: se ss. 1666–67;
>
> En kritikk av Raz's tese om at en nødvendig betingelse for at noe skal være rett er at det er «capable of legitimate authority»: se ss. 1667–69;
>
> En kritikk av Raz's tese om at det nødvendigvis er slik at rettens innhold må kunne la seg identifisere uavhengig av moralske kriterier: se ss. 1669 flg., særlig 1671 flg.
>
> > «This is a coherent account of the point of authority. It presupposes, however, a degree of deference toward legal authority that almost no one shows in modern democracies (1672); «special and eccentric» (1675); «heroic artificiality» (1675).

Dworkins argumentasjon – nærmere analyse

Se S. Eng, *Rettspositivismedebatt*, hoveddelene B og C gjennomgående.

BOOK REVIEW

THIRTY YEARS ON

THE PRACTICE OF PRINCIPLE: IN DEFENSE OF A PRAGMATIST APPROACH TO LEGAL THEORY. By Jules Coleman. 2001. Oxford: Oxford University Press. Pp. xx, 226. £25.00.

*Reviewed by Ronald Dworkin**

I. INTRODUCTION

In *The Practice of Principle*, Professor Jules Coleman of the Yale Law School defends what he calls a version of legal positivism. A classic form of that theory of law holds that a community's law consists only of what its lawmaking officials have declared to be the law, so that it is a mistake to suppose that some nonpositive force or agency — objective moral truth or God or the spirit of an age or the diffuse will of the people or the tramp of history through time, for example — can be a source of law unless lawmaking officials have declared it to be.

Coleman sets his discussion in a narrow historical context. Over thirty years ago, I published a criticism of positivism.[1] I argued that it is not faithful to the actual practices of citizens, lawyers, and judges in complex political communities: in practice, I said, people who argue about the content of law draw on moral considerations in a way that positivism cannot explain. Coleman treats my article as an important catalyst to the further development of the position I criticized. He says that though my challenge was "in many ways, misguided" (p. 67), and though "no one nowadays considers this argument convincing" (p. 105),[2] it has nevertheless dominated recent jurisprudence because "two different and incompatible strategies of response [to it] have been articulated" (p. 67), and these strategies have produced two versions of positivism, and an exciting and illuminating contest between them.

The first of these is "exclusive" positivism, which insists on the traditional positivist thesis that what the law requires or prohibits can never depend on any moral test. Coleman names Professor Joseph

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1 Ronald Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967), *reprinted as* RONALD DWORKIN, *The Model of Rules I*, *in* TAKING RIGHTS SERIOUSLY 14 (1978).

2 Ouch.

Raz of Oxford as the leading contemporary proponent of exclusive positivism and discusses Raz's views at some length. The second form of positivism is "inclusive" positivism, which allows moral criteria to figure in tests for identifying valid law, but only if the legal community has adopted a convention that so stipulates. Coleman sponsors that second form, and he devotes much of his book to arguing that his version of inclusive positivism is superior to any form of exclusive positivism, and greatly superior to my alternative, nonpositivist interpretation of law.

Coleman's book is clear, philosophically ambitious, and densely argued. It therefore provides a useful occasion to inspect the state of legal positivism three decades after the challenge he treats as catalytic. Have any of the subsequent formulations of legal positivism succeeded in reconciling that theory with actual legal practice? If so, which formulation is most successful? I shall argue that the arguments Coleman advances, and those he attributes to other positivists, are not successful. Exclusive positivism, at least in Raz's version, is Ptolemaic dogma: it deploys artificial conceptions of law and authority whose only point seems to be to keep positivism alive at any cost. Inclusive positivism is worse: it is not positivism at all, but only an attempt to keep the name "positivism" for a conception of law and legal practice that is entirely alien to positivism. If I am right in these harsh judgments, a further question arises. Why are legal positivists so anxious to defend positivism when they can find no successful arguments for it? I shall later offer what I believe to be at least part of the answer: positivists are drawn to their conception of law not for its inherent appeal, but because it allows them to treat legal philosophy as an autonomous, analytic, and self-contained discipline.

II. PICKWICKIAN POSITIVISM

Coleman claims that his version of inclusive legal positivism provides a better understanding of law than does my theory, and it is therefore puzzling that his actual account is so stunningly like my own. It is, in fact, hard to see any genuine difference.[3] I said that the content of the law is not settled by any uniform behavior or conviction of lawyers and judges, but is often understood to be controversial among them; that when lawyers disagree about the law they sometimes defend their different positions and try to resolve their disagreements by appealing to moral considerations; and that when the disagreement is particularly deep, these moral considerations may include claims about

[3] Coleman is sensitive to this difficulty. In two long footnotes (p. 4 n.3 and p. 10 n.13), he reports and attempts to rebut the view of unnamed readers that his methods and conclusions are very much like mine.

ing, "especially if they were asked to specify it in all its details, or to project it to cover a range of difficult hypothetical cases" (p. 81). What is important, he insists, is that the judges do in fact reach the same decisions when the difficult hypothetical cases actually arise, despite the differences in rule formulation: "if the same rule is being followed, then participants must share a grasp or understanding of the rule that is reflected . . . in convergent behavior" (p. 81). "They must tend to agree, in other words, on which future behavior will accord with the rule and which will not" (p. 80). These comments seem to concede what Coleman struggles later to reject: that sharing a rule requires, at a minimum, sharing an understanding of what the rule actually and concretely requires in fully specified factual situations.

To summarize: Coleman's version of legal positivism is best described as anti-positivism. He has wholly decamped from the philosophical heritage he undertakes to defend. He covers his retreat by claiming to remain true to the cardinal tenet of positivism, which is that law is always a matter of convention. But his use of convention pursues victory through surrender. His first strategy trivializes the idea of a convention and makes it practically and theoretically useless. His second strategy, which hopes to convert cooperation into convention, fails because cooperation need not depend on convention, and because a legal system need not, as a matter of conceptual necessity, depend on full cooperation. We have made no progress in understanding the persistence of positivism's acolytes — in understanding why Coleman, for example, is so anxious to fly the flag of positivism that he is willing to abandon every article of its faith to do so.

III. PTOLEMAIC POSITIVISM

My aim in this article is to evaluate the arguments legal positivists have made over the last thirty years to defend their position. I must therefore discuss the defense strategy that Coleman identifies as the principal rival to his own. He calls that strategy "exclusive" positivism, and he names Joseph Raz as its avatar. Exclusive positivism holds that moral tests or considerations cannot figure in the criteria for identifying true propositions of law. Raz's argument for that bold proposition is complex; I shall try to explain it in some detail, but it might be helpful to summarize the argument in advance. He declares, first, that it is part of the very concept of law that law claims legitimate authority over some group; second, that that claim presupposes that legal directives are capable of being authoritative; and third, that no directive can be authoritative unless the content of that directive — what it requires people to do — can be ascertained without making any moral judgment. The argument, even in that skeletal form, might strike you as odd. It is important, practically and politically, to determine what judges may and must do in the exercise of their responsibil-

ity to enforce the law, and to distinguish that from other judicial acts and decisions that must rely on a different and more controversial kind of justification. It would be bizarre for such a crucial practical distinction to turn on an abstract analysis of the concept of authority.

In fact, every step in the argument I summarized is highly problematic. The trouble begins with the initial personification: "I will assume," Raz says, "that necessarily law, every legal system which is in force anywhere, has de facto authority. That entails that the law either claims that it possesses legitimate authority or is held to possess it, or both."[11] What can it mean to say that "the law" claims legitimate authority? This type of personification is often used in philosophy as a shorthand way of stating the meaning or content of a class of propositions. A philosopher might say, for example, that morality claims to impose categorical requirements, or that physics claims to reveal the deep structure of the physical universe. He means that no proposition is a true proposition of morality unless it accurately reports categorical (rather than only hypothetical) requirements or that no proposition is a true proposition of physics unless it correctly reports physical structure. If we read Raz's personification in this familiar way, we take him to mean that no proposition of law is true unless it successfully reports an exercise of legitimate authority. But that would imply not that morality cannot be a test for law, as Raz claims, but that it *must* be a test for law, because, as he recognizes, no exercise of authority is legitimate "if the moral or normative conditions for one's directives being authoritative are absent."[12]

It is difficult to find a sensible alternative reading of Raz's personification. He sometimes suggests that when he says that "law" claims legitimate authority he means that legal officials claim that authority; legal officials do this when they insist that they have a "right" to impose obligations on citizens and that these citizens "owe them allegiance" and "ought to obey the law."[13] It is one thing to suppose that legal officials often make such claims; it is quite another to suppose that unless they make such claims there is necessarily no law. In fact, many officials do not. Oliver Wendell Holmes, for example, thought the very idea of moral obligation a confusion. He did not suppose that legal enactments replace the ordinary reasons people have for acting with some overriding obligation-imposing directive, but rather that these enactments add new reasons to the ordinary ones by making the cost of acting in certain ways more expensive. Whether a community has law does not depend on how many of its legal officials share

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[11] JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS 199 (1994).

[12] *Id.* at 199–200.

[13] *Id.* at 201.

Holmes's views. So we cannot make sense of Raz's crucial personification by supposing it to refer to the actual beliefs or attitudes of officials. True, he offers an alternative: it is enough, he says in the passage I quoted earlier, that the law "is held to possess" legitimate authority. He means, presumably, that it is enough if almost all the citizens think their law possesses that authority. But that does not seem necessary either. Suppose the citizens, like the officials, subscribe to Holmes's view. Does law then cease, only to spring up again when a different and better jurisprudence takes hold? Is it not more sensible to say that Holmes was wrong, and that if he had converted everyone to his view then everyone would have been wrong? That American law does, in general, impose moral obligations of obedience on its citizens whether or not they think it does?

So it remains mysterious how we should deconstruct Raz's figure of speech. But suppose we assume, for the sake of argument, that he means to make the empirical assertion that every legal official believes that the laws he enacts create moral obligations, and let us further assume that this assertion is true. Now consider Raz's second step. He points out that the officials' claims would not be sensible unless the laws they created were capable of legitimate authority, and he concludes that nothing is law unless it is capable of legitimate authority. There are at least two flaws in that conclusion. First, it does not follow from the fact that some laws have legitimate authority — which is all we must assume to suppose that the officials' claims are sensible — that nothing is a law unless it is capable of such authority. Legislators who insist that all of the laws they make impose moral obligations may not believe that all laws do, or even that all laws everywhere are capable of doing so. They may think that, just as a conceptual matter, they would make law if they enacted a statute declaring that the tides must cease to ebb and flow, though this would be a silly law that of course could not create any moral obligations.

Second, even if all officials do believe that laws must necessarily be capable of imposing moral obligations and therefore capable of legitimate authority, this opinion may show simply that they are mistaken about the concept they employ. People often make sincere claims that rest on conceptual misunderstandings. Many people believe, for example, that even justified taxation necessarily compromises the liberty of taxpayers. In my view, such people are making a conceptual mistake: they do not understand the nature of their claims because they misunderstand liberty.[14] Even if practically everyone made that claim,

[14] In my view, liberty means the freedom to use what is properly or morally your property as you wish provided you respect the rights of others. So liberty is not infringed by just taxation. *See* RONALD DWORKIN, SOVEREIGN VIRTUE 120–83 (2000). But of course others think it is I who misunderstand the concept of liberty. My present point is that the correct understanding of

it would not follow that taxes necessarily or inherently compromise liberty. Raz says, optimistically, that officials cannot be "systematically" confused about the concept of authority because "given the centrality of legal institutions in our structures of authority, their claims and conceptions are formed by and contribute to our concept of authority."[15] But there may not be any conception of authority that counts as "our" conception. Just as different people even within a single community may hold different conceptions of liberty, so they may hold different conceptions of authority. Even large groups of them may hold mistaken ones.[16] As we will soon see, Raz's own conception of authority is eccentric. Even if he is right that it is the best conception, or the one that lawyers ought to adopt, it does not follow (and it is plainly not true) that it is the one they all have adopted already.

Suppose we do grant, however, once again only for the sake of argument, that Raz is right that law must necessarily be "capable" of constituting legitimate authority. That would seem to mean, at least at first blush, that nothing is a law unless it meets all the necessary conditions of having legitimate authority. Raz believes that there are several such conditions. Some of these are moral conditions: if a legal system "lacks the moral attributes required to endow it with legitimate authority then it has none."[17] Raz would presumably agree, then, that a putative law has no legitimate authority if it commands what is morally wicked, or if it issues from an illegitimate power like a usurping dictator. Other conditions of legitimate authority are non-moral. Nothing can exercise legitimate authority, Raz reminds us, if, like a tree, it cannot communicate with others. Raz believes that it is another non-moral condition of a law's achieving legitimate authority that its content can be identified without moral reasoning or judgment. (That is the crucial third step of the argument I summarized earlier, and we shall soon turn to it.) The moral conditions Raz recognizes pose a serious problem for him. If he accepted what seems to follow from his prior assumptions — that a genuine law must meet all the necessary conditions of legitimate authority, including moral ones — he could not be an exclusive positivist. Whether a law is too wicked to be legitimate is a moral question, and an exclusive positivist cannot al-

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certain concepts we share is often controversial. We agree that there is a correct understanding or conception of that concept, but disagree about what that correct understanding or conception is. *See* DWORKIN, *supra* note 4, at 45–86. So even if the officials of some community all adopted one understanding of the concept of law, that would not show that their understanding was correct.

15 RAZ, *supra* note 11, at 201.

16 *See supra* note 14.

17 RAZ, *supra* note 11, at 199.

low the existence of law to turn on the right answer to a moral question.

Raz understands this difficulty, because he is careful to declare that being "capable" of legitimate authority requires meeting all of the non-moral conditions of that status but does not require meeting any of the moral ones. He says that this distinction is "natural," though he does not explain why.[18] It would save his argument from collapse into natural law, but it seems to have no independent merit. How can we say that a law is "capable" of achieving legitimate authority if it lacks even a single necessary condition of legitimate authority — if it could not possibly have legitimate authority no matter what other conditions were met or no matter what other circumstances held? Nor does it help to say that the non-moral conditions are conceptual in some way that the moral conditions are not. That distinction is both mistaken and irrelevant. It is mistaken because it makes perfect sense to frame an answer to the pertinent moral question as a conceptual claim: we can sensibly say that it follows from the very concept of legitimate authority that a wicked law cannot have legitimate authority. The distinction is in any case irrelevant because Raz's crucial claim at this stage of his argument is about capacity, not concept. He supposes that it is a conceptual truth that law must be capable of legitimate authority, and the question now is only what is necessary to that capability. We can divide this into two questions: What is necessary for authority? What is necessary for legitimacy? Raz argues that we must use our own concept of authority to determine the necessary conditions of authority.[19] But then why should we not use our own ideas about legitimacy to decide what the necessary conditions of legitimacy are? If we accept Raz's claim that law must necessarily be capable of legitimate authority, and we believe that law can never achieve legitimate authority if it is intrinsically wicked, then we must conclude that law cannot be inherently wicked, which means that positivism is false.

Now we must turn to the third — and most important — step that I identified in my initial summary of Raz's argument. Once again, we should grant his prior claims to test this third step independently, so we now assume, as a conceptual truth, that law claims and must be capable of legitimate authority, and that this means only that it must satisfy the non-moral conditions of legitimate authority. Raz summarizes what he takes to be the two most important of these non-moral conditions in the following statement:

> First, a directive can be authoritatively binding only if it is, or is at least presented as, someone's view of how its subjects ought to bebave. Second,

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[18] *See id.* at 202.

[19] *Id.* at 204.

> it must be possible to identify the directive as being issued by the alleged authority without relying on reasons or considerations on which [the] directive purports to adjudicate.[20]

The first of these two conditions is puzzling. If we take it literally, it means that very little of the legislation or common law of the United States can be authoritative. An ordinary statute is a compromise of the views of many different legislators and other influential actors in the political process, such as industries, lobbyists, and citizens' groups. It rarely represents, or is even presented as, the views of any single legislator as to how citizens "ought to behave." A common law doctrine is an accretion of many precedent decisions. It is unlikely to represent, and is rarely presented as, any single judge's view of what citizens should do. Raz must mean that nothing is binding as statutory or common law unless it can be presented as the view of the legislature or the common law as institutions rather than as collections of individuals. But neither Congress nor the common law has a mind or views, so we have another troublesome personification on our hands. We might try to unpack the personification in an innocuous way, by taking it to mean only that we must be able to summarize the content of any particular congressional enactment or common law doctrine in language of the form: "It is the view of Congress (or the common law) that people must behave in the following way: . . . ." Nothing is easier; we simply stick that introduction before our favored interpretation of the statute or favored reading of the common law. But that innocuous reading of Raz's personification would not capture his meaning. He roundly declares that my own account of law violates his first condition.[21] He explains that in my view identifying law is often a matter of finding the best justification for past legislative decisions, and then adds that "[t]he best justification, or some aspects of it, may never have been thought of, let alone endorsed, by anyone."[22] But I can certainly claim that the statute endorses a principle that none of the individual legislators had in mind if I mean only that we can sensibly attribute that principle, by way of justification, to the statute itself. So Raz must have in mind something less trivial in setting out bis first non-moral condition. But it remains mysterious what that could be. Lawyers sometimes talk as if a legislature, as an institution, had a collective mind composed of the mental states of the actual legislators, combined in some never-specified way. But Raz does not hold such a naïve view. Of course, if exclusive positivism were right, then I would be wrong to suppose that moral judgment is sometimes pertinent in

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[20] *Id.* at 202.
[21] *Id.* at 208.
[22] *Id.*

deciding what a statute really says or what the common law's "view" really is.[23] But Raz offers the first non-moral condition of legitimate authority as part of his argument for exclusive positivism, not as a ukase that presupposes that doctrine's truth.

The second of Raz's non-moral conditions of authority — that the content of an authoritative directive must be identifiable without recourse to moral judgment — is, of course, the heart of his exclusive positivism. This condition encapsulates his distinctive view of the point of authority: Authority, he says, occupies "a mediating role between the precepts of morality and their application by people in their behaviour."[24] Before the exercise of some authority's authority, people are in direct touch, as it were, with a variety of moral and other reasons for and against actions they might consider. Authority interposes itself between people and their reasons by weighing and balancing those reasons itself and then issuing a new, consolidating directive that *replaces* those multitudinous moral and other reasons with a single, exclusionary instruction. Those who accept the authority will henceforth exclude the reasons the authority has weighed for them from their own calculations as reasons for action and will rely only on the new, authoritative, direction.[25] Before any law is adopted regulating the matter, for instance, people may have a variety of reasons for and against parading a lion in Piccadilly. When an authority enacts a law forbidding the practice, the authority has ruled that the reasons anyone has against the practice are stronger, in combination, than the reasons anyone has for it. Accepting the ruling as authoritative means not reassessing these various reasons or balancing the supposedly authoritative directive against those reasons, but simply taking the directive as *the* reason not to parade a lion in Piccadilly. The ruling would not be authoritative if people still had to weigh the reasons they always had for or against parading lions in order to decide what the statute said or meant. The law would not have replaced those reasons, but left them alive and kicking.

This account of the nature and point of authority insists on a certain attitude toward authority. People must decide whether they accept a particular institution as authoritative. They might make that decision by asking themselves whether, in general, the institution is

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[23] In one passage Raz notes that a community may have adopted, as a matter of law consistent with exclusive positivism, a purely factual test for determining the legislature's "view" on some matter. *Id.* at 217. In fact, however, almost no standards of statutory or constitutional interpretation command the general acceptance in the United States that an exclusive positivist would require to regard these as law. It would apparently follow, for Raz, that American legislatures have no "view" at all as to how citizens should behave.

[24] *Id.* at 209–10.

[25] *Id.* at 196–97.

better positioned to weigh reasons on their behalf than they are to weigh those reasons for themselves. If they think it is better positioned, then they should accept the institution as an exclusionary authority. Of course, they cannot ask that question and make that decision retrospectively, by asking in a particular case whether the authority's actual decision shows that it is better at weighing reasons for and against that very decision than they are. Doing that would subvert the point of authority altogether, because people would have to consider and weigh the background moral reasons to decide whether they should accept a particular decision as a replacement for those same background reasons. They must decide in general and in advance. So the option to accept an institution's directives as authoritative would not even be open, Raz supposes, if the institution did not accept his second non-moral condition — that the content of an authoritative directive must be identifiable without recourse to moral judgment.

This is a coherent account of the point of authority. It presupposes, however, a degree of deference toward legal authority that almost no one shows in modern democracies. We do not treat even those laws we regard as perfectly valid and legitimate as excluding and replacing the background reasons the framers of that law rightly considered in adopting it. We rather regard those laws as creating rights and duties that normally trump those other reasons. The reasons remain, and we sometimes need to consult them to decide whether, in particular circumstances, they are so extraordinarily powerful or important that the law's trump should not prevail. The American Constitution (at least in most scholars' opinion) allows only Congress, not the President acting alone, to suspend the writ of habeas corpus, and the framers of that clause plainly took into account the reasons a president might have for suspending the writ on his own. Most of us treat the Constitution as both legitimate and authoritative. But many commentators nevertheless think both that Abraham Lincoln was morally right to suspend habeas corpus during the Civil War and that he acted illegally. Raz says that people who accept authority may nevertheless ignore it "if new evidence of great importance unexpectedly comes up."[26] But the urgent requirements of war were hardly new evidence: the Framers, after all, fought a war themselves. Lincoln did not deny the Constitution's authority in making his decision; he simply weighed that authority against competing reasons of the kind the Framers had also taken into account which retained their vitality. Lincoln found that the latter were, under the circumstances, strong enough to outweigh the former.

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[26] *Id.* at 197.

We must now inspect Raz's account of authority in a different way, however, because he presents that account, not as a recommendation of deference to constituted authority that people are free to accept or reject, but as conceptual truth. It is part of the very concept or essence of authority, he insists, that nothing can count as an authority if those putatively subject to it must engage in moral reflection to decide whether to obey it or what it has said. It follows from that conceptual truth, given the conclusions of the earlier steps of Raz's argument, that nothing can count as law if citizens must use moral judgment to identify its content. Consider the following extreme example. Suppose a nation's legislature adopts a law declaring that henceforth, on pain of severe criminal punishment, subjects must never act immorally in any aspect of their lives. That is an exceptionally silly statute, and life in that nation will thereafter be repulsive as well as dangerous. According to Raz, however, it would be a conceptual mistake to describe the statute as law at all. Even in this extreme example, his claim seems too strong. The statute, after all, has normative consequences for those disposed to accept its authority. They now have an additional reason to reflect carefully on the moral quality of everything they do and to act punctiliously, not only because they are now subject to official sanction, but also because their community has declared, through its criminal law, the cardinal importance of moral diligence. They would not be making a conceptual mistake if they said they were behaving differently out of deference to the authority of the new law. They would not say, however, that the statute had merely empowered officials to judge their conduct according to the officials' own moral standards. If they were jailed for an act they thought scrupulously moral, they would insist they had been jailed contrary to law.

As Coleman recognizes — it is the nerve of his "inclusive" positivism — nothing in the ordinary concept of authority prevents us from treating as authoritative a rule or principle that incorporates a moral standard. Suppose that a businessman in a trade where "caveat emptor" prevails converts to a religion whose sacred text enjoins its adherents to deal "honestly and fairly" in commerce. He will behave differently, and he will sensibly say that in doing so, he is deferring to the authority of his new religion — even though he must ponder the same reasons he always had to decide what that authority commands. Suppose he wonders one day whether it would be unfair not to disclose an evident defect to a buyer who has not noticed it. If he decides that it would be unfair and discloses the defect, he can sensibly say that he has deferred to religious authority. Sacred text forbids what is unfair; non-disclosure is unfair; therefore sacred text requires disclosure. It would be inaccurate to say that the sacred text has not directed him to disclose, but only to consider whether non-disclosure is unfair. His religion tells him to avoid what is unfair, not to avoid what he judges to be unfair. If he decides after careful reflection that non-disclosure is

perfectly fair but years later changes his mind, he will then think that he once disobeyed a religious command.

We should not dwell on these extreme cases in which a directive simply incorporates some thin moral concept by reference, however, because the use that contemporary legal practice actually makes of morality is much more complex and selective. A statute may stipulate that no contract that "unreasonably" restrains trade is enforceable, for example, or a constitution may rule out any process of criminal law that denies "due" process. Citizens, lawyers, and officials deciding what these provisions require in practice must indeed reflect on some of the same issues that they would consider if they were concerned only to act morally — but only some of them and in a different way. They must ask what force should be assigned to these moral considerations in the context of the regulation at issue, and against the general background of other laws and regulations. They must, in short, take up what I have called the constructive interpretation of discrete regulations in a discrete context. Though (as critics of positivism have long insisted) that constructive interpretation does have a moral dimension, it does not recapitulate any process of reasoning that would be required but for the statute in question and its legal context.[27]

Morality plays the same complex and subtle role in common law adjudication. Consider a judge who must decide as a matter of first impression whether a patient who has been damaged by taking a negligently manufactured drug over many years, but who cannot show which of the several manufacturers of the drug made the pills she took, is entitled to recover compensation from all the manufacturers in proportion to their market shares in the years in question.[28] The judge will naturally consider and balance two questions of fairness: whether it is fair to a patient in that position to deny recovery altogether, and whether it is fair to hold a manufacturer liable for damages for an injury it has not been shown to have caused. Nevertheless, the judge will defer to the authority of settled law in several ways in his overall judgment, and his judgment might well differ from the one he would make if called upon to vote, as a legislator, for a law settling the issue one way or another. He might think, for example, that given various precedents and other aspects of the legal background, he should not consider the impact of market share liability on the economic health of the pharmaceutical industry or on medical research. I do not mean that he would necessarily be right to exclude such considerations in deciding what the law requires, or that a legislator writing on a clean slate would necessarily be right to include them. I mean only that the

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[27] For an account of constructive interpretation in law, see DWORKIN, *supra* note 4, at 62–86.

[28] *See, e.g.*, Sindell v. Abbott Labs., 607 P.2d 924, 936–38 (Cal. 1980).

example confirms the authority of law over judicial decisions in spite of the role that morality plays in deciding exactly what law, as an authority, requires or permits.

Raz must have in mind, therefore, a special and eccentric conception of authority when he insists that law could have no authority if moral issues entered into fixing what the law requires even in this diffuse way. He calls his conception of authority a "service" conception, and recognizes that other, perhaps more familiar, conceptions have no such implication.[29] Why, then, does he insist that only his "service" conception can elucidate the nature or concept of law? It would, of course, be a different matter if there were some other compelling reason to prefer exclusive positivism to any other theory of law. But the argument is supposed to go the other way around; we are supposed to be persuaded of exclusive positivism because we already accept the service conception. We need an independent case for that conception, and I find none in Raz's arguments.

The heroic artificiality of Raz's view of authority is underscored, moreover, when we notice how much it contradicts common sense. We saw earlier, in discussing Coleman's inclusive positivism, that the abstract provisions of the American Constitution, like the Equal Protection and Due Process Clauses and the provisions that protect free speech and freedom of religion, present evident problems for positivism in any form. Coleman supposes, as we saw, that these clauses incorporate moral standards and therefore make the validity of any other law depend on the right answer to a moral question. But because Raz is an exclusive positivist who denies that moral judgment is ever relevant to the identification of law, he cannot take that view. What view then can he take of the legal force of these abstract constitutional clauses? Coleman reports it as Raz's opinion that these clauses do not themselves invalidate any other law, but only direct judges to determine whether particular statutes ought not be enforced in spite of the fact that they are perfectly valid (p. 110). That thesis stands ordinary opinion on its head: most lawyers and laymen think not that school segregation laws were perfectly valid until the Supreme Court decided they should not be enforced, but rather that the Court struck these laws down because it rightly found them constitutionally invalid. When the Court does strike down a statute on constitutional grounds, moreover, it almost always treats that statute as if it were already invalid. It denies that the statute had any legal force even before the Court acted. So if Coleman correctly represents Raz's account of the abstract constitutional clauses, it would indeed be counterintuitive.

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[29] RAZ, *supra* note 11, at 204.

It is not clear, however, that Raz can consistently hold the view Coleman attributes to him. Raz says that no reading of the constitutional clauses is valid as a matter of law unless that reading is authorized by a legal rule of interpretation that is itself valid on exclusive positivist grounds — that is, an interpretation itself settled by some near-uniform legal practice.[30] But as we saw earlier, no pertinent rule of constitutional interpretation has been settled in the United States in that way. Some lawyers read the abstract clauses as outlawing legislation that contradicts certain moral principles; other lawyers read those clauses as outlawing legislation that contradicts the Framers' understanding of what those principles forbid. Raz says that given such disagreement, the legal force of the abstract clauses must be considered "unsettled."[31] Presumably he thinks that the words of the Equal Protection Clause, for example, are part of our law because everyone agrees that they are. But supposing that those words authorized the Supreme Court to strike down some particular legislation would require accepting one controversial reading of the Clause and rejecting others. So presumably Raz sides with the most savage critics who say that for almost two centuries the Supreme Court has been exercising a power that no legal authority has given it.

That conclusion seems troubling, but no alternative open to him is less so. Suppose he argues, for example, that even though the Supreme Court's early exercises of judicial review were not authorized by law because no settled rule of constitutional interpretation justified reading the Constitution as bestowing such a power, the Court's own powers of creating law through precedent mean that those first few exercises gave it the legal authority it now claims. But what then are the limits of that authority? When would the Court make a legal mistake in overruling a statute? Does the law now authorize the Court, if for some reason it thinks it wise, to treat the traffic laws of some state as if they were not valid laws? It might seem natural to say at least this: the Due Process and Equal Protection Clauses give the Court no power to strike down statutes that no reasonable person could think deeply unjust. But Raz cannot accept even that limitation on the Court's authority to declare legislation invalid once he has recognized that authority at all, because it is a moral question whether anarchists who think that traffic laws are subversive of a fundamental liberty are reasonable, even if the answer to that question seems clear. Raz must therefore choose between effectively denying that the Constitution is law and denying that anything but the Constitution is law. Why does he hold to a theory of law that bas such a distressing consequence?

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[30] *See id.* at 214–17.

[31] *Id.* at 217.