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RAZ, AUTHORITY, AND CONCEPTUAL ANALYSIS

BRIAN H. BIX*

I. INTRODUCTION

In "Authority: Revisiting the Service Conception,"[1] Joseph Raz reflects on his work on the nature of authority, defending much of what he has written on the subject, while offering some additional clarifications and modifications. I must leave to others a more direct assessment of Raz's views on authority, and the revisions he has suggested in this most recent paper. I will instead focus on some of the methodological considerations he discusses in this paper; in particular, I will compare and contrast Raz's discussion here about conceptual analysis and the concept of authority with his recent analyses of the conceptual analysis of law.

II. THE CONCEPT OF AUTHORITY

Raz reaffirms roughly the same view of authority he has been advocating for over 25 years.[2] Raz argues (here I summarize a detailed argument in general terms) that we are justified in subjecting our will and judgment to another when (1) we are more likely to do the right thing by doing so than we are by deciding for ourselves; and (2) this is not a matter for which there are special reasons making it important that we decide for ourselves.[3]

I want to explore Raz's views about the concept of authority. Raz writes:

> I keep referring to 'our' concept of authority. But is there such a thing? Are there not several concepts, all of them descending from the very same ancestors? Most probably so. Each person when using the concept of authority uses his concept, and should allow for the possibility that there are several.[4]

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* I am grateful to Joseph Raz and Dennis Patterson for comments on an earlier draft.

1. Joseph Raz, "Authority: Revisiting the Service Conception" (unpublished manuscript), presented at the Conference, "Natural Law and Natural Rights in Contemporary Jurisprudence," Princeton University, September 2005. A version of that paper is forthcoming in the *Minnesota Law Review*.

2. See, *e.g.*, Joseph Raz, *The Authority of Law* (Oxford: Clarendon Press, 1979), 3-27; Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), 38-69; Joseph Raz, *Practical Reason and Norms* (Princeton: Princeton University Press, 1990), 62-65, 191-194; Joseph Raz, *Ethics in the Public Domain* (Oxford: Clarendon Press, 1994), 194-221.

3. Raz, supra, note 1.

4. Ibid.

He adds:

> Needless to say, if there are a number of concepts of authority prevalent in a single society they are likely to be competitors. The boundaries between them are fluid, and those who use each claim merit for it, and (when aware, if only dimly, of the existence of the others) find reason to prefer it to the others. This means that each explanation of a concept can also be used in the battle of concepts, where there is such a battle, that is it can be used to advocate the merits of one concept over its competitors.[5]

For Raz, the different conceptions of (legitimate[6]) authority are alternative answers to the normative question, "when (if ever) is it justified *not* to seek one's own best understanding of what should be done, but rather to act according to the direction of another?"[7]

At first, there may seem something strange about equating a concept with the answer to a moral question, but it may be that an equation, or close connection, between a concept and a normative inquiry is inevitable when the concept is an evaluative term, like "good," "just," or "authoritative."

In his paper, Raz allows that perhaps we once had a distinctly different concept of authority. The example Raz gives (legitimate governmental authority derives from divine authority)[8] describes a time when people gave a different answer to the normative question underlying "(legitimate) authority"–and one that most of us would now consider clearly wrong. The idea of competing concepts of authority may show that within Raz's analysis one might have a slightly loosened connection between the concept and the normative question, analogous to the general distinction between critical morality and conventional morality: there are competing concepts of authority, and changing concepts over time, as the conventional (but quite fallible) beliefs about the normative inquiry change.

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5. Ibid.

6. For Raz, "*de facto* authority" is parasitic on the concept of legitimate authority, for it involves an entity claiming, but claiming falsely, to be a legitimate authority.

7. This draws on Robert Paul Wolff's famous challenge, from *In Defense of Anarchism* (New York: Harper & Row, 1970).

The statement in the text may well be too simple, in at least one way. Central to Raz's view of authority (and one of the main grounds for criticism of it), and a point that goes beyond when a person or text is authoritative, is the role (for Raz, exclusionary and preemptive) that authorities do or should play in our practical reasoning.

8. Raz, supra, note 1.

III. CONCEPT(S) OF LAW

I think it is instructive to compare Raz's current discussion of the concept of authority with what he has written about the concept of law.

Raz has argued that legal theories are theories of our concept of law.[9] One might first ask: why should we study *the concept* if we can study *the thing itself* (the practice, the type of institution) instead? Raz's answer is to deny that the two can be separated;[10] He argues that explaining the concept of law is close to, but not identical with explaining the nature of law, but it is the latter which is the primary task of legal theory.[11] And *the concept* of law is relevant primarily as it reflects the way people perceive the law.[12]

Raz rejects the notion that we (as theorists) can choose a concept of law based, say, on its fruitfulness in further research,[13] or even according to its simplicity or elegance;[14] rather, it is a concept already present, already part of our self-understanding.[15]

Some might argue that the proper study of law—a social institution—is through social theory. However, how can one have a (*purely*) "sociological" or "empirical" theory of law if one does not have at least a rough prior notion of what is or is not "law"?[16] There is a sense in which conceptual work *must* be prior to empirical work. The focus of conceptual analysis is on the boundaries of the category—here, what makes something "law" or "not law." And this is not an empirical question in the same way as, say, investigating patterns of judicial decision-making is an empirical question.[17]

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9. See Joseph Raz, "Two Views of the Nature of the Theory of Law: A Partial Comparison," *Legal Theory* 4 (1998) 249, 276; see also Joseph Raz, "On the Nature of Law," *Archiv für Rechts- und Sozialphilosophie* 82 (1996) 1; Joseph Raz, "Can There Be a Theory of Law?," in *The Blackwell Guide to the Philosophy of Law and Legal Theory,* ed. Martin P. Golding and William A. Edmundson (Oxford: Blackwell, 2005), 324-342.

10. See, *e.g.*, Raz, "Can There Be a Theory of Law?," 326, 331.

11. Ibid., 326-28.

12. Ibid., 328, 331.

13. Raz, *Ethics in the Public Domain*, 221.

14. Raz, "Can There Be a Theory of Law?," 331.

15. While Raz asserts that the concept of law "exists independently" of the legal philosophy which attempts to explain it, Raz, "Two Views of the Nature of the Theory of Law," 280-81, he also argues that since the concept(s) of law are in flux, our theories of law, even mistaken theories, could influence the concept of law future generations have. Raz, "On the Nature of Law," 7.

16. Cf. Frank Jackson, *From Metaphysics to Ethics: A Defence of Conceptual Analysis* (Oxford: Oxford University Press, 2000).

17. Though it is open to someone to argue that the category lines are in fact based on empirically testable data: *e.g.*, linguistic usage tendencies within a community.

While Raz's recent writings seemed to imply or assume a view that we all share a single concept of law,[18] at the Conference, in response to an earlier version of this Comment, Raz denied that he held that view. He stated that he is not committed to there being only one concept of law in a country, though "given the centrality of legal institution[s] in our societies it seems likely that most articulate people share a concept of law."[19]

A classical Platonist would likely assert that there is only a single Idea of "law," of which our various legal systems are imperfect manifestations. However, Platonism is a metaphysical position that many people find unlikely, at least when applied to social practices and institutions. It is not hard to find theorists who seem to support view that there are multiple, competing concepts of law.[20] How should we determine whether there is one or many concepts of law?

Raz is correct that the mere fact of divergence in beliefs about law or in the application of the term/concept is insufficient to prove that there are multiple concepts. As Raz states, such divergence *may* be explicable by mistake, partial knowledge, vagueness in the concept itself, etc.[21] And the fact that we can talk about "law" without all of us always talking past one another indicates that there is at least an overlap in the concepts (if there are more than one), but this fact by itself certainly does not make the case for a single concept conclusive.

It is tempting to say that concepts of law would be kept from multiplying in a way that concepts of authority would not, by the fact that a concept of law must fit institutional practices, while there seems no comparable constraint on a concept of authority. This initially promising line of argument does not seem likely to hold up,[22] however, in that, for both law and authority, the

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18. Raz refers repeatedly to "*the* concept of law," *e.g.*, Raz, "Two Views of the Nature of the Theory of Law," 280-81 (emphasis added), and also note the singular "*the* concept" and "our *concept*" throughout the relevant writings. *E.g.*, Raz, "On the Nature of Law," 4 (emphasis added).

19. This language is from a subsequent e-mail to me from Joseph Raz, Sept. 27, 2005, confirming the position he took at the Conference.

20. Consider, *e.g.*, the view of Stephen Perry, who argues that there is more than one tenable theory of the nature of law, grounded on different tenable theories about the purpose of law. See Stephen R. Perry, "Interpretation and Methodology," in *Law and Interpretation*, ed. Andrei Marmor (Oxford: Oxford University Press, 1995), 97-135; Stephen R. Perry, "The Varieties of Legal Positivism," *Canadian Journal of Law and Jurisprudence* 9 (1996) 361. One could easily re-characterize those claims as asserting that there are alternative *concepts* of law.

21. See Raz, "Authority: Revisiting the Service Conception"; Raz, "Can There Be a Theory of Law?," 326-327.

22. At the Conference, Raz disagreed, commenting that the connection between the concept of law and actual legal practices was in fact a reason for believing that it is somewhat more

question is one of category boundaries: how can we tell whether something is law or not, or whether something is authoritative or not? In each case, we have guidance from practice and linguistic usage, but conceptual analysis involves the philosophical prerogative to clarify and modify existing practices.

If there are multiple tenable concepts of law, (a) on what basis do or should individuals choose among them?; and (b) on what basis should legal theorists choose in constructing their theories of law? In the jurisprudential literature, there is discussion of the second question (whether such selections must be made on robustly normative grounds, or can be made on meta-theoretical grounds and on related considerations that are evaluative, but not moral or political),[23] but little if anything on the first inquiry. I think the possibility and implications of competing concepts of law requires further consideration.

IV. THE CHALLENGE FOR CONCEPTUAL ANALYSIS

There are tensions surrounding all conceptual claims within analytical legal (*and* moral *and* political) theory. Any such claim, whether applied to "authority" or to "law" or to some other subject, can be met by criticism from one side, that it should be supplanted by empirical or sociological investigation, and criticism from another side, that it needs to be supplemented by moral or political selection and argument.[24]

If we are trying to discover what "our concept" is—of authority, law, or (say) honor—why would we consult a philosopher rather than, say, a pollster, a linguist, or a sociologist?[25]

A concept is a category of thought by which we divide up the world. The question is, why should we care about the nature of *these* categories, of this way of dividing up the world, if they do not correspond to some ultimate

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likely for law than for authority that we have only a single concept rather than competing concepts.

23. For arguments that meta-theoretical grounds would suffice, see, *e.g.*, Raz, *Ethics in the Public Domain*, 219-21; Jules Coleman, *The Practice of Principle* (Oxford: Oxford University Press, 2001), 197-210; Andrei Marmor, "Legal Positivism: Still Descriptive and Morally Neutral," USC Legal Studies Research Paper No. 05-16, http://ssrn.com/abstract=763844; for contrary views, see, *e.g.*, the Perry articles cited in note 20.

24. For the latter critique, see, *e.g.*, John Finnis, "Law and What I Should Truly Decide," *American Journal of Jurisprudence* 48 (2003) 107, 125-126.

25. See Brian Leiter, "Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence," *American Journal of Jurisprudence* 48 (2003) 17, 40-51. For other, more general skeptical discussions of conceptual analysis, see, *e.g.*, Gilbert Harman, "Doubts About Conceptual Analysis," in *Philosophy in Mind: The Place of Philosophy in the Study of Mind*, ed. Michael Michaelis and John O'Leary-Hawthorne (Dordrecht: Kluwer, 1994), 43-48; Jerry Fodor, "Water's Water Everywhere," *London Review of Books*, vol. 26, no. 20, Oct. 21, 2004.

reality? With the concept of authority, one can respond that the interest of the inquiry (and the value of *this* way of dividing up the world) is that it involves a particular, and important, normative question (when should we defer?), that would be worth investigating even if there were no conventional concept that corresponded to it. With law, the matter is different; one could reasonably ask why we should care about the current conventional way of distinguishing "law" and "non-law." The criticism would continue: the conventional distinction may have some interest for sociologists and linguists, but it may not have significant philosophical interest. Further analysis is needed on the question of why we should build theories about this conceptual boundary.

V. CONCLUSION

Those of us who think that the task of constructing theories of law is valuable must give due attention to the project's methodological underpinnings. Joseph Raz has articulated the likely structure–that we are investigating our concept of law–but there is still much work to be done in analyzing whether there are multiple concepts, how one chooses among the concepts if there are, and when and why our concepts are worthy of philosophical investigation.