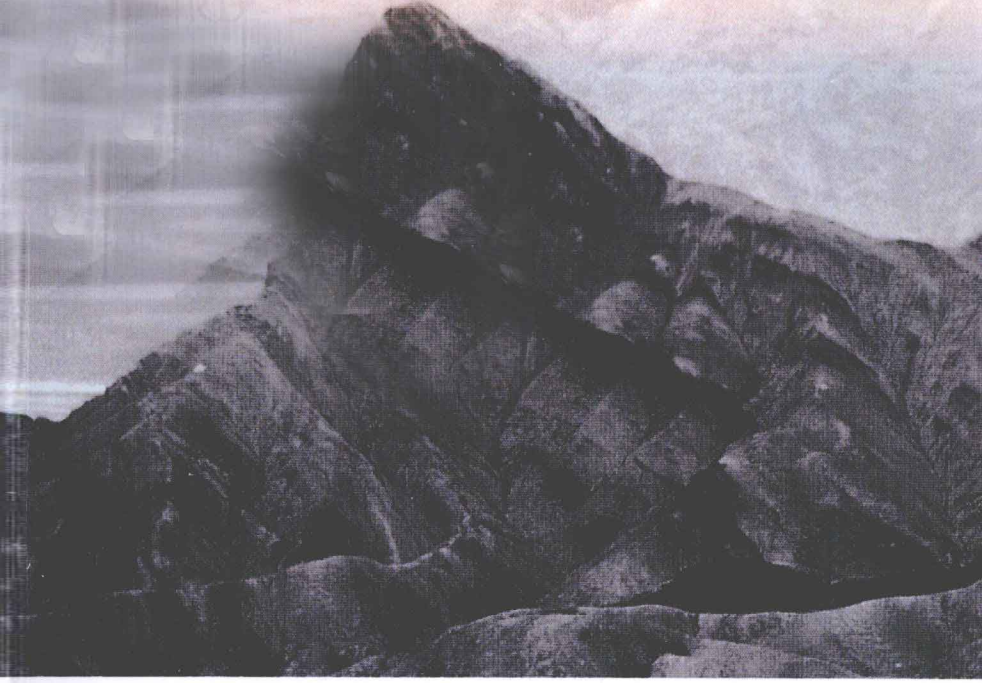

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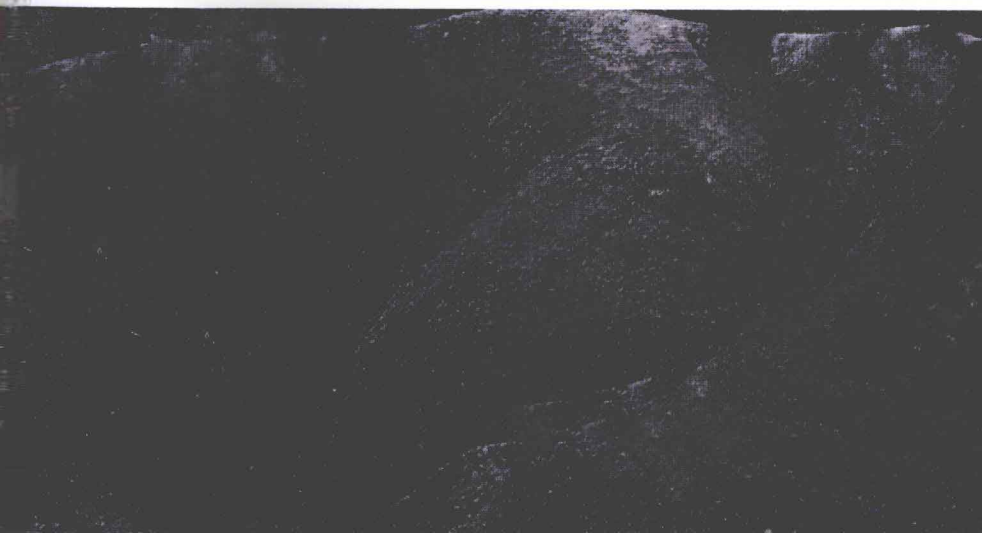

The Authority of Law

Essays on Law and Morality

Second Edition

by

JOSEPH RAZ

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Preface to the Second Edition

As I re-examine this book, in the year of its thirtieth birthday, my reaction is not unlike my feeling about my other books. They all feel like stages in a journey. They develop, and sometimes bring to completion, not the proper treatment of a subject, but my treatment of it, and they open out new topics, focus on new problems, new not to the world but in my work, which will be further explored in later work. There is never a terminus; there are merely temporary resting points along a never-ending route. With every step of the journey new destinations come into view, and the journey becomes more challenging and more interesting.

In the present volume, discussions of the identity of legal systems and of the institutional nature of law continue reflections on what unifies legal systems, what makes them the law of a country or a state, or of some other institution or body. The problem was the focus of *The Concept of a Legal System*[1] which dealt with these matters primarily in reaction to the work of H. Kelsen and H. L. A. Hart. Of course, the systemic nature of law was also central in *Practical Reason and Norms*,[2] which marked a fundamental shift of perspective, beginning the attempt, which continues in my work to this day, to integrate the explanation of the law with explanation of normativity generally, taking the concept of a practical reason to be the key to such explanations. In the present volume the crucial step towards such an integrative approach is in the introduction of an analysis of practical authority based entirely on the nature of the reasons it provides. This analysis laid the foundation for the discussion of the topic in *The Morality of Freedom*,[3] and in subsequent writing, as well as for some of my writing in political philosophy both in this volume and elsewhere.

Because *The Authority of Law* is so intimately linked to both earlier and later work it seemed inappropriate to try and bring it up to date. What was published in 1979 is left untouched, only

[1] Oxford, 1970; 2nd edn 1980.
[2] London, 1975; current edition Oxford, 1999.
[3] Oxford, 1986.

technical aspects of its presentation have been brought up to contemporary standards. But the present volume includes two essays (printed as appendices at the end of the volume in order to keep its original pagination) which belong thematically with the material discussed here.

There are various ways in which there is progress in philosophy, and other ways in which it cannot occur. There is no room for it when either new philosophical questions arise, or more commonly when old problems take different shapes as they come to be related to other, and often new, aspects of science and culture. But granted this need, the need for philosophy to refresh itself, and address the ways different aspects of our understanding of the world are reshaped in light of scientific developments and cultural changes, a need which keeps philosophy forever young, there is still room for progress within it, and such progress is often a result of philosophical work, which seems promising, coming under closer scrutiny.

There is little evidence of much rhyme or reason in the willingness of many philosophers at a given time to take certain matters for granted, or their desire to probe and explore some concepts or doctrines more deeply. Much of this is a matter of passing fashion, responding to philosophically irrelevant factors. But sometimes writers do get dug into an issue and their contribution over a relatively short period of time deepens our understanding of concepts, problems, and doctrines, often leading to subtle transformations through successive refinements. It seems to me that the debate between so-called legal positivists and their opponents has undergone such a transformation by being subjected to intense scrutiny, and that legal philosophy has gained as a result. In Essay 3 of the present volume, and more indirectly in other parts of it, I contributed to this scrutiny by trying to distinguish between various theses, often associated with legal positivism, which seemed to me false, and one, similarly associated with legal positivism, which seemed cogent. It was natural to suggest that legal positivism should be identified by what is true in the tradition bearing the name, rather than by mistakes writers within the tradition often embraced. Needless to say, the debate did not stop there, and various additional suggestions and refinements, many of which

seem to me misguided, but some valuable, have since been offered by various writers.

The progress achieved through intense scrutiny often makes traditional divisions curiously off the mark. It is as odd and misleading to regard Dworkin as a natural lawyer, as he is often classified by theorists who have little sympathy with his work, as to regard writers, like myself, who deny many traditional legal positivist theses, as legal positivists. Doing so is not so much committing to a falsehood, as endorsing a classification which—given the progress made in the matter—serves to obscure difficult issues, rather than illuminate crucial divisions. The essay on how not to reply to legal positivism included in this edition aims to clarify some of these confusions, and advocate again that we move away from ways of classifying theories of law which serve to obscure rather than clarify.

Theories of law encounter a problem which is hardly ever discussed, perhaps because it appears so simple: how to distinguish between what the law is at any particular time, say now, and what it is at a later time, say tomorrow. It is a truism that the law changes over time. Indeed, a good deal of theoretical effort goes into explaining the mechanism by which it changes, the various ways of law-making. That suggests that there is a distinction between what is (part of) the law at any given time and what is not. There is not that much in the writings of theorists which clarifies the distinction. The lacuna is not due entirely to neglect. The answer is elusive, and attempts to find it tend to reflect major fissures in legal theory. One of the main reasons for the difficulty is that changes in the law are not always brought about from outside. The law has a way of directing its own development. But that makes it difficult to know what is already law and what is not, though if it becomes law that would be a development directed or guided by existing law.

Even saying what I have just said is problematic and obscure. The present volume began to explore that complex aspect of the law. The doctrine of authority is the foundation of what I called changes brought about from outside. The three essays in Part III on internal legal values took a few steps towards understanding the way the law guides its own development. I have dealt with the matter further in *Ethics in the Public*

Domain,[4] especially in the essays on the inner logic of the law, legal rights, and the autonomy of legal reasoning. Most of all, these issues are the central topic in *Between Authority and Interpretation*.[5] Yet again, given the extensive discussion of these issues elsewhere, and given that I am not altogether unhappy with the contribution made here towards their resolution, it seemed best to leave the present volume as it is and hope that readers who wish to get a more comprehensive view of my position will also examine my other relevant writings.

[4] Oxford, 1994.
[5] Oxford, 2009.

Preface to the First Edition

The law claims our allegiance and obedience. Every legal system claims authority. But what authority has the law over us? What authority should we acknowledge as due to the law? This is the main question this book attempts to answer. What kind of an answer can philosophy provide? Unrealistic expectations at the outset are bound to lead to unjustified disappointment. The question is of great practical importance in so many aspects of daily life. Its importance is growing as the law penetrates more and more into every corner of social and individual activity. But the deeper the law's penetration into various aspects of life the more complex the problem of the authority of law becomes and the more one despairs of the possibility of a general philosophical answer to it.

Consider any man in any of a large number of rather common situations. Consider, for example, a headmaster objecting to the routing of a bypass near his school. How should he behave? Should he confine himself to presenting his case in the local public inquiry? Or should he try to disrupt the inquiry since he knows that it is, by law, weighted against his cause? Should he organize a massive local sit-in? Or choose some other course of action? Since so many considerations have to be taken into account, their combination may well make the case unique. The nature of the harm the implementation of the proposed plan will cause, the benefits it will bring, the chances of having it changed by the various possible courses of action open to him, the danger that it will be replaced by a worse plan, the cost of his action to the school in terms of reputation, affecting, for example, possibilities of raising money from old members, its impact on his standing in the eyes of his students, its consequences to his personal and family life—do philosophers really examine or need to examine all these considerations?

The answer must be both yes and no. The difficulty of each individual case arises because of the particular way in which general considerations combine in it. Philosophical deliberation helps to determine which general considerations are relevant to practical decisions and it improves our understanding of their value and importance. This understanding is most

valuable for making informed decisions in concrete cases, but it is insufficient. The actual decision must be based on complex judgments about the way these general considerations manifest themselves in the case at hand, and about the right way to resolve conflicts between them. Philosophy can provide guidance, but it is helpless to spare us any of the agony of the actual decision.

Legal philosophy provides only one part of the philosophical answer to practical questions. Clearly each concrete problem involves many other aspects as well. These may be discussed by other departments of the philosophy of practical reason. Legal philosophy itself is concerned only with the legal angle of all practical problems, namely with the way in which the fact that a certain action has some legal consequences should affect practical deliberation generally and moral considerations in particular. This is the question of the authority of law.

The book is divided into four parts. The second and third primarily criticize various attempts to establish a conceptual connection between law and morality which ensures an inescapable moral authority to the law. The last part provides a constructive argument establishing the character of the law's moral authority and contributing (though only too little) to the perennial question of the conditions the law must satisfy to be deserving of moral respect.

The first part provides an introduction to the argument of the book by supplying a philosophical analysis of the concept of legitimate authority. This analysis is presupposed in the last constructive part, especially in the essays entitled 'The Obligation to Obey the Law' and 'Respect for Law'. This is followed by several essays refuting, directly and by implication, a variety of traditional natural law arguments. Some of these arguments attempt to show that our criteria for identifying what is law and what is not assure the law of moral content. Essay 3 ('Legal Positivism and the Sources of Law') explains the reasons for rejecting any approach to the law which assumes that the determination of the legal validity of any standard of conduct involves a moral argument. Essay 4 ('Legal Reasons, Sources, and Gaps') explores some of the consequences of the alternative approach, generally known as 'legal positivism', which regards law as created by social sources so that the existence

and content of legal systems can be determined on the basis of social fact without resort to moral argument. This essay defends the source-based conception of law from accusations of incoherence and explains why and in what sense all legal systems contain gaps calling for the exercise of discretion and for reliance on extra-legal considerations by courts in certain cases. The source-based conception of law is then described in greater detail in the fifth and sixth essays on 'The Identity of Legal Systems' and 'The Institutional Nature of Law'. Since the primary aim of the book is to examine arguments for the moral authority of laws, the discussion of the picture of law which emerges from the pursuit of legal positivism has not been carried very far. For a more completely articulated and defended explanation the reader is referred to the last two chapters of my *Practical Reason and Norms* (London, 1975).

One of the main stumbling blocks for legal positivists has been the use of normative language, i.e. the very same terminology which is used in moral discourse, in legal discourse. The fact that the law is described and analysed in terms of duties, obligations, rights and wrongs, etc., has long been regarded by many as supporting the claim of the natural lawyer that law is inescapably moral. The best positivist explanation of the use of normative language in law was suggested by Kelsen and is discussed in the seventh essay. The eighth ('Legal Validity') offers an outline of an account of legal discourse largely derived from Kelsen but free, I hope, from many of his obscurities, and dissociated from other essentially unrelated Kelsenian doctrines.

The second part of the book does not advance us far towards showing that law has moral authority. It rejects one kind of argument to that effect and in the process it defends a view of the nature of law and of legal discourse. The third part is similar in nature though less unified round a central theme. It is concerned with the refutation of three popular arguments. First, that an understanding of law inevitably involves an understanding of its functions and those cannot be described except in a morally loaded way. From this various consequences about the morality of law are often alleged to follow. Essay 9 offers an indirect refutation by showing how legal functions can be analysed in value-neutral terms. Second is the argument that

since legal adjudication does and should invoke moral argument, law cannot be separated from morality. This argument has already been refuted in the essay on 'Legal Reasons, Sources, and Gaps', which establishes the possibility of conceptually separating in a general way law and value in adjudication. Essay 10 ('Law and Value in Adjudication') examines the adjudicative process more closely and explores the theme of the separability and connectedness of law and value in the courtroom. Finally, the argument (most closely connected with Lon Fuller) that there are certain procedural values inseparable from the law which form its internal morality is examined in the eleventh essay on 'The Rule of Law and its Virtue' and is seen to guarantee no inherent moral value to the law.

The second and third parts of the book are devoted to a refutation of some natural law arguments for the authority of law. It remains to the last part to develop a view of the authority of law consistent with legal positivism. Though some natural law arguments are consistent with legal positivism (see *Practical Reason and Norms*, ch. 5), I have tried to explain in Essay 12 that even they fail to establish the moral authority of law. The result is that one cannot explain why law has moral authority. It may have none. If a certain legal system has moral authority this cannot be just a result of its status as law or of features entailed by its legal aspect. It must base its moral claim on substantive features which it has, but which it is possible for a legal system to lack. Hence the real question is what should a legal system be like to have a justified claim to authority? This sounds very much like the question, what is a good legal system?—which obviously cannot be discussed here. Instead the implications and presuppositions of various moral attitudes to the law are examined (the essays on 'The Obligation to Obey the Law' and on 'Respect for Law') and I point rather dogmatically to a few moral features a law must possess to have authority, namely to be such that its authority will be consistent with individual autonomy (the essays on 'Conscientious Objection' and 'Civil Disobedience').

A word of explanation about the structure. The book is composed of independent essays for two reasons. The central problem of the book, the question of the authority of law and more broadly that of law and its relation to morality, touches on

almost every aspect of our understanding of the law. I wanted to be free to explore some incidental questions (such as the nature of authority or of legal gaps) at greater length than would have been appropriate in a more closely woven book on law and morality. Furthermore, the many aspects of my central theme compel me to range widely over disparate issues (Essays 1, 11–15 belong essentially to political philosophy, Essays 2–10 to analytical legal philosophy) and to employ various styles of argument (Essays 1 and 4 in particular are very technical and many readers may prefer to skip them). I therefore thought it advisable to opt for a looser organization in which each essay is completely independent of the rest, so that readers can read any number and in any order.

The essay form also enabled me to incorporate in the book four articles not specifically written for it (Essays 5, 6, 7, 9) but which seemed to provide additional ingredients to its general argument. All the other essays were written with this book in mind, though several of them have been published before (Essays 4, 5, 7, 9, 11 appear here in a revised form and I have introduced minor changes in all essays). I wish to thank the following for permission to reprint the articles indicated:

The organizers of the World Congress of Legal and Social Philosophy 1977 (Essay 4); the editors of the *California Law Review* (Essay 5); the editor of the *Modern Law Review* (Essay 6); the editor of *The American Journal of Jurisprudence* (Essay 7); the editor of *Archiv für Rechts- and Sozialphilosophie* (Essay 8); Prof. A. W. B. Simpson and the Oxford University Press (Essay 9); The Liberty Fund and the editor of the *Law Quarterly Review* (Essay 11).

Contents

PART I

LAW AND AUTHORITY

1

Legitimate Authority*

I. The Paradoxes

There is little surprise that the notion of authority is one of the most controversial concepts found in the armoury of legal and political philosophy. Its central role in any discussion of legitimate forms of social organization and of legitimate forms of political action makes the indefinite continuation of this controversy inevitable. The immediate relevance of the problem of authority to current controversial issues makes a dispassionate study of the subject all the more difficult. But beyond these extrinsic difficulties, the study of the concept of authority has to confront two major problems of intellectual origin: the methodological problem of how to avoid confusing the various quite distinct problems involving the notion of authority and the problem of the paradoxes of authority.

The paradoxes of authority can assume different forms, but all of them concern the alleged incompatibility of authority with reason or autonomy. To be subjected to authority, it is argued, is incompatible with reason, for reason requires that one should always act on the balance of reasons of which one is aware.[1] It is of the nature of authority that it requires submission even when one thinks that what is required is against reason. Therefore, submission to authority is irrational. Similarly the principle of autonomy entails action on one's own judgment on all moral questions. Since authority sometimes requires action against one's own judgment, it requires abandoning one's moral autonomy. Since all practical questions may involve moral considerations, all practical authority denies moral autonomy and is consequently immoral.[2]

* First published in Richard Bronaugh (ed.), *Philosophical Law* (Westport, Connecticut, 1978). I am indebted to J. E. J. Altham, K. Antley, L. J. Cohen, Philippa Foot, P. M. S. Hacker, and P. H. Nowell-Smith for their critical comments on an earlier version of the essay.

[1] For a version of this principle of reason see Davidson's principle of continence in his 'How Is Weakness of the Will Possible?', in *Moral Concepts*, J. Feinberg (ed.) (Oxford, 1969).

[2] This argument does not apply to theoretical authority. There is nothing immoral

Arguments along these lines do not challenge the coherence of the notion of authority nor do they deny that some people are believed to have authority or actually have *de facto* authority. They challenge the possibility of legitimate, justified, *de jure* authority. Their paradoxical nature derives not from their denial of legitimate authority but from the fact that the denial is alleged to derive from the very nature of morality or from fundamental principles of rationality. Moreover the arguments challenge the legitimacy not only of political authority but of all authority over rational persons.[3] If the very nature of authority is incompatible with the idea of morality and rationality, then those who believe in legitimate authority are not merely wrong or mistaken in one of their moral beliefs. They are committed to an irrational belief or are guilty of a fundamental misapprehension of the concept of morality or of that of authority. This gives these arguments a much greater force. They are, for example, immune from most sceptical arguments. For even if there is no way of distinguishing between right and wrong substantive moral beliefs, at least we can clarify moral concepts and establish relations of entailment and incompatibility between them. If the very concepts of morality and rationality are incompatible with that of authority, then even the sceptic will be able to know that all authority is immoral and submission to it is irrational.

Paradoxically the very force of these arguments is their weakness. Many who may be willing to accept lesser challenges to legitimate authority will be reluctant to accept this most sweeping challenge. Many who may be ready to accept that many authorities are not legitimate, even that no political authority is ever legitimate, will be deterred by the thought that no authority can ever be legitimate. Many who may be ready to concede that those who believe in the possibility of legitimate authority are wrong will shy away from the thought that they are irrational or have no idea what morality is about.

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in having authorities on how to cook, program a computer, reduce money supply, and so on, so long as one regards them as theoretical authorities only. Submission to theoretical authority may, however, be irrational, for arguments about the conflict between authority and reason are not confined to practical authority.

[3] They may be compatible with authority over small children and some mentally ill people.