

University of Michigan Law School

University of Michigan Law School Scholarship Repository

Law & Economics Working Papers

3-8-2020

The 'Authority' of Law: Joseph Raz Reconsidered

Andrew Stumpff Morrison

University of Michigan Law School

Follow this and additional works at: https://repository.law.umich.edu/law_econ_current



Part of the [Law and Economics Commons](#), and the [Law and Philosophy Commons](#)

Working Paper Citation

Stumpff Morrison, Andrew, "The 'Authority' of Law: Joseph Raz Reconsidered" (2020). *Law & Economics Working Papers*. 195.

https://repository.law.umich.edu/law_econ_current/195

This Article is brought to you for free and open access by University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Law & Economics Working Papers by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

THE “AUTHORITY” OF LAW: JOSEPH RAZ RECONSIDERED

ANDREW STUMPPFF MORRISON*

Abstract. The article presents a critical reassessment of the legal philosophical writings of Joseph Raz. The critique develops from the author’s previous argument that law is – *contra* recent near-consensus – best understood as “the command of the sovereign, backed by force.” Given that this is the distinctly defining feature of law, Raz’s extended preoccupation with “reasons for obeying law” is misplaced and even nonsensical.

I. Introduction

In two earlier papers¹ I challenged the principal contentions of two of the most famous legal philosophers of the last century: H.L.A. Hart and Ronald Dworkin. As to Hart, I questioned the validity of his idea that “law” cannot be successfully defined, as had been earlier supposed, simply as the “command of the sovereign.” I argued that all laws, including those governing contracts and wills, are in fact directly reducible to a set of commands underwritten by a threat of force by the state. Moreover, those commands are aptly construed as emanating from a “sovereign,” so long as we properly interpret “sovereign,” in the abstract, as whoever or whatever is the ultimately authoritative source of conduct-coordinating information: that is, the source of such information that everyone in the relevant territory stably expects everyone else in that territory to regard as finally dispositive. The sovereign as so defined can be thought of as the relevant “signaling convention,” adopting the terminology of game-theory.

As to Dworkin, I suggested many of his writings are not, upon critical reading, even coherent or internally consistent. To the extent intelligible assertions can be recovered from Dworkin’s work – most prominently, to the general effect that law cannot, as a matter of definition, be fully separated from morality – I suggested those assertions are incorrect, for reasons ultimately similar to those underlying my critique of Hart.

* Lecturer, University of Michigan Law School; Adjunct Professor, University of Alabama Law School and Washington University in St. Louis Law School. I wish to thank Simon Blackburn and Mark Schwimmer for comments on an earlier draft; and Seth Quidachay-Swan and Danny Lawder of the University of Michigan Law Library, for research assistance. All mistakes are the author’s alone.

¹ Andrew Stumpff Morrison, *Law is the Command of the Sovereign: H.L.A. Hart Reconsidered*, 29 *RATIO JURIS* 364 (2016) (hereinafter “*Hart Reconsidered*”); Andrew Stumpff Morrison, *The Uncertain Relation between Coherence and Renown: Ronald Dworkin Reconsidered*, UNIV. MICH. PUB. L. R. PAPER NO. 460 (2017), available at SSRN: <https://ssrn.com/abstract=2604699> or <http://dx.doi.org/10.2139/ssrn.2604699> (hereinafter “*Dworkin Reconsidered*”).

Here I turn to the work of Joseph Raz, a writer who has followed in the tradition of Hart and Dworkin and whose name has cast, as did Hart's and Dworkin's, a long shadow (to judge by citation-volume, certainly) over contemporary legal philosophical thought.

II.

Background

I first briefly summarize the particulars of my earlier charges against Hart and Dworkin, particulars that are necessary background for what I will have to say about Raz.

1. Hart and the Idea of Law as the “Command of the Sovereign”

Historically, observers such as Jeremy Bentham and John Austin and Oliver Wendell Holmes regarded “law” definitionally – by way of distinguishing it from other collections of rules, such as ethics, or the rules of a game – as the “commands of the sovereign.”

Starting in the 1950s,² H.L.A. Hart strenuously disagreed with this formulation, on the grounds of its employment both of the words “command” and “sovereign.” The law could not be a “command,” in all cases, he argued: How are “commands” involved in laws that do not prohibit crimes but instead govern, say, optional conduct like the formation of contracts or wills? Moreover, who is the “sovereign,” in, for example, a democracy? No person or collection of people, acting in their individual capacity, meets the necessary description, yet democracies have laws.

Hart's critique achieved relatively quickly a position of unquestioned dominance within the legal academy. For the several generations since, effectively no prominent legal philosopher has accepted as the definition of law that it is the “command of the sovereign.”

In my earlier article about him³ I subjected Hart's arguments to question. For details, the reader is referred to that paper, but the gist consists of two sets of assertions: First, all laws, including those applicable to contracts and wills, are in fact characterizable as “commands” – albeit in some cases command that are not unconditional but instead *contingent*. Commands of the latter type assume the general form “If person W acts in the following way X, then all persons of class Y are commanded to act in the following way Z.” Such a formulation successfully characterizes the laws of contracts, and of wills – and of all other fields often thought to fall within Hart's critique, including laws governing corporations and trusts.

Second, Hart's (and many others') idea of the “sovereign” is definitionally incorrect, as insufficiently general. Introducing ideas from game theory and linguistic philosophy, I suggested it is simplistic and wrong to treat “sovereign” as necessarily a reference to a specific person or

² H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1957); H. L. A. HART, THE CONCEPT OF LAW (1961).

³ Morrison, *Hart Reconsidered*, *supra* note 1, at 368-378.

group of people. The point can be illustrated by reflecting first upon the central case in which the sovereign *is* a specific person: that of a monarchy. In specific: if a king or queen commands that something be done or not be done, it is not (at least in the usual case) fear of personal individual physical force by the monarch him- or herself that compels a subject's compliance. It is instead an implicit understanding that *everyone else* will treat the monarch's commands as dispositive. A subject's request that the monarch's guards, or army, or police, simply disregard the monarch's commands will (in a stable state) be expected to be met with refusal. And that prediction is based, in turn, on a prediction that those guards, or army, or police, will themselves feel constrained by the predictive sense that everyone around *them* will treat the monarch's commands as dispositive.

This is an example of unstated community "convention," a concept developed in game theory and the linguistic philosophy of writers such as David Lewis. The source of coordinating instruction implicitly and stably accepted by the relevant community at a given time as governing is referred as the source of the relevant "signaling convention," whose instructions all those involved are observed to be treating as – and observed to be observing others to be treating as – determinative of their own conduct. In a monarchy, the ultimate signaling convention is the monarch herself.

At an abstract level the situation in a different form of state, such as a democratic republic, is exactly the same. Here, though, the source of the accepted signaling convention is no longer a specific person and his or her heirs, but rather a person or body designated by a specific set of rules which have themselves been implicitly accepted as dispositive by the governed population. In the United States, for example, the ultimate "signaling convention" as of this writing is those legislative pronouncements issued and signed by bodies and officers conventionally accepted as having been designated in accordance with a specific document, the Constitution, as well as further delegations and documents conventionally accepted as having been adopted in accordance with that Constitution. A proper definition of the phrase "rule of law" would, in fact, be something like: "a system under which the stably accepted ultimate signaling convention is a specific text, rather than a specific person."

Accepting the definition of "sovereign" in this generalized form, as "the source of the prevailing signaling convention" (of which monarchy is but one type of instance), permits valid definition in all cases of "law" as the "command of the sovereign." Hart was wrong.

2. Dworkin and the Attack on "Positivism"

Ronald Dworkin was much more prolific than Hart, and less intelligible. He built his reputation initially on an attack of Hart – not, to be sure, on Hart's skepticism that law is the "command of the sovereign," as to which Dworkin seems from all evidence to have agreed with Hart, but from something like an opposite perspective: Dworkin faulted Hart for having drawn a definitionally distinct line between "law" and "morality." Dworkin defined, more or less, the

idea of a separation between legal and moral rules as the doctrine of “positivism,” which he attacked.

Dworkin’s voluminous writings are highly problematic: for a full enumeration, the reader is directed – in his case, even more than Hart’s – to my previous article about him.⁴ Abridged, however: I argued that Dworkin failed ever to generate a reasonable definition of “positivism” which actually had any subscribers in the world; that he spent much of his efforts constructing straw-man arguments against positions not analytically connected to positivism, however defined; and that, most damningly, he failed consistently or coherently to identify how moral principles are to be understood to impinge – as a matter of definition – on law. He was ultimately reduced simply to asserting, weakly and without coherent rationale, that rules promulgated by Nazis were not, definitionally, properly regarded as “law,” even where Nazis control the state; but laws protecting human slavery in the United States were, definitionally, “law.”⁵

My previous article was mostly concerned with identifying and illustrating the internal contradiction and incoherence in Dworkin’s work. But I also observed that, if the question really is whether there is a bright definitional difference between “law” and “morality” the answer is yes, for the same reason that Hart was wrong: Law is properly defined as the “command of the sovereign” and therefore may not – will not, in the case of evil regimes – have anything to do with morality.⁶

III.

The “Authority” of Law

Which brings us to Joseph Raz. On the one hand, as we all knew by the 1960s, law cannot be thought of as a “coercive order.” That explanation is crude and childish: Coercion is almost the furthest thing from law. On the other hand, this insight nonetheless leaves the nagging question of why people very often in fact do seem to follow legal rules. If we think hard enough, we must eventually conclude the explanation is that law must be some other kind of “norm:” that is, some other kind of “reason for action.”⁷

A significant part of both H.L.A. Hart’s and Ronald Dworkin’s writings had to do with the “normative” aspect of law; that property law is said to have – and that is not the prospect of coercion – which makes people feel they should obey it. Professor Raz, a legal philosopher at both Columbia University Law School and, like Hart and Dworkin, Oxford, has like those writers devoted quite a lot of time to thinking about what kind of norm, or reason for action, law could be, given that it does not involve the “threat of evil.”

⁴ Morrison, *Dworkin Reconsidered*, *supra* note 1.

⁵ *Id.* at 21-23.

⁶ *Id.* at 19-20.

⁷ JOSEPH RAZ, *PRACTICAL REASON AND NORMS* (1975; Oxford Univ. Press edition 1999), at 9.

It must first be noted that Raz has been much more forthright than Dworkin, for example, about when it is he is talking about “law” and when it is he is talking about “morality” – much less apt than Dworkin to let his discussions simply blend from one into the other and back without acknowledgement. It does not fall within the author’s present intention to assess Raz’s views in the broader field of moral philosophy; thus, those parts of his work dealing purely with that realm will not be discussed here.

Raz has, nonetheless, had much to say about law. He has taken a number of legal philosophical positions, including defending “legal positivism” against Dworkin.⁸ His first contribution to the literature here of interest, however, is a new argument Raz added to the existing canon summarized by Hart for the starting stipulation of all three philosophers: that coercion is not essential to law.

Raz’s newer argument⁹ on this point is now famous; it goes in the academy under names like “the society of angels thought experiment,”¹⁰ and it runs as follows. Imagine a society comprised entirely of people who *want* to follow the law, and for whom sanctions for noncompliance are therefore *unnecessary*:

Perhaps even human beings may be transformed to become such creatures. It is reasonable to suppose that in such a society the legislator would not bother to enact sanctions since they would be unnecessary and superfluous. If such a normative system has all the features of a legal system described above then it would be recognized as one by all despite its lack of sanctions....

Even a society of angels may have a need for legislative authority to ensure coordination.... [Members of the society] may pursue many different and conflicting goals and they may share our difficulties in settling disputes and resolving conflicts of interests by mutual agreement. They differ from us only in having universal and deep-rooted respect towards their legal institutions and in lacking all desire to disobey their rulings. They have, therefore, all the reasons that we have for having legislative authorities and an executive.¹¹

That is: Even if everyone in society wanted to follow the law, and, therefore, coercive sanctions for violating the law were unnecessary, there would still be a need for “law.” Thus coercion is not essential to law.

This argument has been taken as at least as persuasive as Hart’s; it has helped secure the ascendancy of Hart’s law-is-not-quintessentially-coercive view.

⁸ JOSEPH RAZ, *THE AUTHORITY OF LAW* (2d ed. 2009) 55 (hereinafter RAZ, *AUTHORITY OF LAW*) at 47-61.

⁹ Raz seems to share credit for the argument with John Finnis. JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 266-268 (1980). But Raz appears to have come up with it first.

¹⁰ John Gardner, *Law’s Aims in Law’s Empire*, in *EXPLORING LAW’S EMPIRE: THE JURISPRUDENCE OF RONALD DWORKIN* (SCOTT HERSHOWITZ, ED. 2010), 207, 209.

¹¹ RAZ, *PRACTICAL REASON AND NORMS*, *supra* note 7, at 159.

Only a bit of further thought experimentation is required, however, to identify the critical failure here. *How do the people in this imaginary world know what is “the law?”* Raz assumed that question away; but let us imagine there are two entities issuing edicts to the society’s angels, both of which sets of edicts are titled “The Law:” A senate, elected by majority vote of the angels; and a single individual angel who calls himself King Rex. And the question before us is which, if either, of these sets of edicts actually deserves the title “law?” Professor Raz’s hypothetical takes us the following distance and no further: *If (1) King Rex’s decrees are exactly the same as the senate’s, and (2) there is no other claimant for the source of “the law,”* it still could be the case that we have “law,” even though coercion will never, in practice, enter the picture. Fair enough. But the instant Rexian rules are the slightest degree inconsistent with senatorial rules in a way that renders simultaneous compliance with both impossible, the thought experiment breaks down. We are logically prevented from hypothesizing willing compliance with both sets of rules. We are told the population of angels desires to follow “the law” – but they face the insuperable obstacle to their desire that they can’t know what that is. A “rule of recognition” is needed, and missing.

The *specific reason* for this problem is that the possibility of coercion has been artificially removed. Only if an angel knew *what would happen* in the case of someone’s *noncompliance* with one or the other sets of rules – senatorial or Rexian – could the angel obtain the answer to the question “What is the law of this jurisdiction?” that the angel needs. The rule of recognition is always the same:¹² The law would be whichever set of edicts (if either; but it could not be both) would be punishable by force with no appeal from the holder of monopoly power in the territory under consideration.

That definition of anything, including “law,” is useless which does not allow us to distinguish what is being defined from what is not being defined; and so Professor Raz’s hypothetical is useless – except that, by failing, his example demonstrates the opposite of the intended thesis. By artificially removing the element of coercion, the example proves how perfectly essential that element is to identifying “law.” (As will be seen below, Raz’s reasoning would more persuasively prove there is no noncoercive *normative* content to “law.”¹³)

In any case Raz’s imaginary-world approach is a fallacy from start to finish. Imagine a world where nails do not exist, where everything is held together by fitting, or with adhesives or screws. Such a world would nonetheless have a need for something somewhat like what we, in our world, call a “hammer.” Carpenters use hammers for lots of tasks, including forcing fitted pieces of wood and metal into place and prying things apart. In the imaginary world carpenters would continue to require some such tool, although they wouldn’t use it to drive nails. Is a tool’s usefulness in driving nails essential to its being called a “hammer”? Would this tool be called a “hammer” in the imaginary world? The society would, as Raz says of law in the society of angels, “have many of the same reasons we have for having hammers.” Yes. But there is no

¹² See Morrison, *Hart Reconsidered*, *supra* note 1, at nn. 29-34.

¹³ See text at note 32-33, *infra*.

reason to think the society wouldn't *call* this tool a "hose." We can only imagine what the imaginary people of this imaginary world would call this imaginary thing. The argument – Raz's *approach* – is ineffective in defining any term in our own world. In our own world the purpose and capacity of driving nails seems essential, based on empirical observation of *usage*, to the definition of a "hammer,"¹⁴ just as the purpose and capacity of coercing behavior seems essential to the definition of "law."¹⁵

Nonetheless the thought experiment convinces Raz – as Hart and Dworkin were convinced before him – that coercion is not a logically necessary constituent element of "law." The issue, then, of interest to Raz is: Whence, if not from the threat of evil, comes law's "authority?"

One of the arguments Hart had made against the necessity of coercion to law is that the "coercive model" does not explain the "internal perspective," by which people supposedly *feel* an obligation to comply with legal rules. Recall that in the views of both Jeremy Bentham and John Austin, "to be under an obligation" meant the same thing as "to face the possibility of punishment."¹⁶ Hart strongly disagreed. He argued law must be viewed as more than just a predictive enterprise by which we say merely that "If a person does X, then Y will happen to him." That view reflects, he said, an "external perspective," which is insufficiently explanatory:

[I]t is possible to be concerned with the rules, either merely as an observer who does not himself accept them, or as a member of the group which accepts and uses them as guides to conduct. We may call these respectively the "external" and the "internal points of view"...After a time the external observer may, on the basis of the regularities observed, correlate deviation with hostile reaction, and be able to predict with a fair measure of success, and to assess the chances that a deviation from the group's normal behavior will meet with hostile reaction or punishment. Such knowledge may not only reveal much about the group, but might enable him to live among them without unpleasant consequences which would attend one who attempted to do so without such knowledge...What the external point of view, which limits itself to the observable regularities of behavior, cannot reproduce is the way in which the rules function as rules in the lives of those who normally are the majority of society. These are the officials, lawyers, or private persons who use them, in one situation after another, as guides to the conduct of social life, as the basis for claims, demands, admissions, criticism, or punishment, viz., in all the familiar transactions of life according to rules. For them the

¹⁴ To forestall sophistry, let's acknowledge up front that there are different kinds and meanings of "hammer." We are referring here to the noun involving the common hand-held carpentry tool.

¹⁵ Raz has given us, for example, no reason to conclude that his angels would prefer the term "law" to the term "rules" for the sanctionless principles to which they voluntarily adhere, and that is what the whole argument is about.

¹⁶ See Morrison, *Hart Reconsidered*, *supra* note 1, at 365.

violation of a rule is not merely a basis for the prediction that a hostile reaction will follow but a *reason* for hostility.¹⁷

Thus Hart distinguished between an external observer – even one who goes to live among the group and *deliberately follows the rules, in order to avoid “unpleasant consequences”* – and the “officials, lawyers, or private persons” who “use the rules” as “guides” to the conduct of their behavior. Dworkin, for his part, applauded this “refinement of positivism” by Hart, which he said gave law “the cast and call of obligation that the naked commands of Austin's sovereign lacked,” and thereby allowed Hart to “rescue” positivism from “Austin’s mistakes.”¹⁸

Raz has reflected at much greater length upon this internal perspective. What could be its basis? Given – as Hart and Dworkin had said and Raz agrees – that people have an internal, moral obligation to comply with law, what is the *reason* for that obligation?

Starting with the common thought, which broadly speaking and with appropriate qualifications and amplifications I endorse, that authority is a right to rule, the theoretical question is how to understand the standing of an authoritative directive (as I shall call the product of the exercise of the right to rule). If issued by someone who has a right to rule, then its recipients are bound to obey. The directive is binding on them and they are duty-bound to obey it. But how could it be that the say-so of one person constitutes a reason, a duty, for another? Is it that easy to manufacture duties out of thin air?¹⁹

We are assuming, then – without being told why – that a person has a “right to rule,” and we are wondering why we should obey that person. Raz’s answer is that what makes us obey law is not the state’s power to coerce, but rather that we may be morally bound to do so – for reasons ultimately similar to those that morally bind us to honor promises we make to other people:

By promising, we impose on ourselves obligations that we did not have before, and we do so simply by communicating an intention to do so. In exercising authority we impose on others duties that they did not have before, and we do so simply by expressing an intention to do so.²⁰

But: “A person can have authority over another only if there are *sufficient reasons* for the latter to be subject to duties at the say-so of the former.”²¹ That leads rather directly to the question: When are there sufficient reasons? Raz’s answer is his famous “service conception”:

¹⁷ HART, THE CONCEPT OF LAW, *supra* note 2, at 89-90 (emph. in original).

¹⁸ Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 19 (1967) (emph. added).

¹⁹ Joseph Raz, *The Problem of Authority: Revisiting the Service Conception*, 90 MINN. L.REV. 1003 (2006).

²⁰ *Id.* at 1012-13.

²¹ *Id.* at 1013 (emph. added).

The suggestion of the service conception is that the moral question is answered when two conditions are met, and regarding matters with respect to which they are met: First, that the subject would better conform to reasons that apply to him anyway (that is, to reasons other than the directives of the authority) if he intends to be guided by the authority's directives than if he does not (I will refer to it as the normal justification thesis or condition). Second, that the matters regarding which the first condition is met are such that with respect to them it is better to conform to reason than to decide for oneself, unaided by authority (I will refer to it as the independence condition).²²

Boiled down: You're morally bound to obey someone such as your government if you would be better served by doing so.

Among the many volumes generated in response to this idea can be found the following passage:

The normal justification thesis allows that you might have authority over me simply in virtue of the fact that you can direct my behavior better than I can myself. That strikes me as seriously wrong. If John, [an] expert in Chinese cooking, wanders into a mediocre Chinese restaurant and starts barking orders at the cooks, it is entirely reasonable to eject him from the kitchen, notwithstanding the fact that the cooks have reasons to prepare good food and would benefit from John's instruction.²³

Well, yes; seriously wrong. Thirty years after coming up with the "service conception" Raz acknowledged this same general – one hesitates to be as blunt as to use a phrase like blindingly obvious – objection:

One possible reaction to the service conception is that it misses its target.... It describes the conditions that have to hold if an authority is to be capable of successfully discharging its tasks, but it is not and cannot be the case that everyone who can discharge a task well has that task. *Not everyone who can be a good prime minister of a country is the prime minister of that country*, not everyone who can be a good teacher in the primary school of my neighborhood is a teacher in that school. Moreover, no one is a prime minister or a teacher just in virtue of the fact that they can perform the task well.²⁴

So: how does the service conception deal with the difficult fact that not everyone who can be a good prime minister of a country is the prime minister of that country? As follows:

²² *Id.* at 1014.

²³ Scott Hershovitz, *The Role of Authority*, 11 PHILOSOPHERS' IMPRINT (Issue 7, p. 1) (2011) at 17.

²⁴ Raz, *supra* note 19, at 1032 (emph. added).

[T]here are significant differences between theoretical and practical authorities....Some expertise can be the basis of predictions of future events. But it cannot change anything. *The ability of practical authorities to improve coordination, a factor entirely absent from the activities of theoretical authorities*, makes them subject to derived reasons to secure preexisting goals in ways not otherwise possible. They can, as a result, change things in the world.²⁵

Which as far as one can tell means: 1. Those who happen to hold power are more able, because they hold power, than anyone else to be of service to the citizenry. 2. Meanwhile, according to the service conception, a person has authority if that person is able to be of service. Therefore 3. Those who happen currently to be in power have authority, because they are in power. Helpfully for Raz, this is stated so obscurely – as an enumeration of “significant differences between theoretical and practical authorities” as well as “derived reasons” – that it is not immediately obvious to the reader what it is he means to say.

If all this begins to seem faintly ridiculous, let us take a moment to locate ourselves on the conceptual map and remind ourselves how we reached our present coordinates.

1. *Given*: Law \neq coercion; and therefore the source of law’s “authority” is that:
2. *Given*: People feel a general moral “obligation” to follow law.
3. Why is #2 so?
4. Because of the “service conception.”
5. But what if some other, hypothetical, law-issuing government would be of *greater* service than our actual government?
6. We still would have the same obligation to obey our actual government, since, because it is the actual government, it has the actual power to do us greater service than the hypothetical government, which, being hypothetical, has no actual power at all to be of service.

Having gone through which exercise: It seems even more ridiculous. What made this construction possible? The two starting postulates are false (the falsity of #1 having been demonstrated in Part II above, and that of #2 about to be), so the rest is an extended meditation on counterfactual starting assumptions.

History offers other examples of extended meditations on counterfactual starting assumptions. For example, if we take as an assumption – as a given – that angels (of the more traditional Christian sort) exist, what is their relationship with the physical world? How many of

²⁵ *Id.* at 1034 (emph. added).

them can occupy exactly the same point in space? How many can, as it were, dance on the head of a needle?²⁶

As to Postulate #2, which Hart, Dworkin and Raz, as well as nearly the entirety of present-day legal philosophy²⁷ – take as a *point of departure*: *Does anyone even perceive a moral obligation to follow the law? Is there an internal aspect of law?*

Here is the example most often given: While driving, you arrive at a four-way stop sign at a deserted country intersection. You can see for miles in all directions with no living thing to be observed. You come to a near-stop, a so-called “rolling stop,” but don’t actually bring the vehicle to a dead halt before proceeding across the intersection. Is this an *immoral* act? Writers like Raz (and Dworkin, and Hart) simply take as given that most everyone thinks so.²⁸

That could be debated. In considering the validity of the postulate, however, I would suggest this usual hypothetical is not the best one. Even at a deserted intersection, the traffic stop is far from the limiting case. It is, first of all, hard to disentangle one’s long-held subconscious fears and well-founded caution. The law in question has good reason in general to exist: Stopping at intersections might be a salutary rule to follow regardless of what the law says. It’s also hard to be absolutely certain, in the back of our mind, that we really are free of the possibility of enforcement. Maybe there’s a radar-equipped police helicopter hovering somewhere. What we need, for our purposes, is a situation where there really can be *no other imaginable reason to follow the law than that it is a law*.

Take, then, instead something like the United States House of Representatives’ 2003 decree that items served in the House restaurant previously known as “French fries” would, to announce displeasure with a perceived lack of support by France for the U.S. invasion of Iraq, henceforth be called “freedom fries.”²⁹ Knowing of the existence of this law, which contains no enforcement mechanism, and which you think is stupid, while dining at the House restaurant you ask your 3-year-old daughter if she would like some of your “French fries.” If you have not “disobeyed” the law, you have certainly subverted it. Do you feel – in even the slightest, the infinitesimally smallest, way – *guilty*? In any fraction of the way you would, say, if you secretly offered your other daughter more fries because you can’t help liking that other daughter better?

²⁶THOMAS AQUINAS, *SUMMA THEOLOGICA* (ca. 1270), Q. 52; RICHARD BAXTER, *THE REASONS OF THE CHRISTIAN RELIGION* (1667) 530. Logic teaches that, in fact, if you start by assuming the truth of a false proposition you can by contradiction thereby prove the “truth” of any other proposition imaginable. We should therefore try to be careful with our starting assumptions. For a more rigorous and plausible definition of “authority” than Raz’s, developed not by legal philosophers but by political scientists and game theoreticians, see George J. Mailath, Stephen Morris and Andrew Postlewaite, *Laws and Authority* (unpublished manuscript available at <https://www.princeton.edu/~smorris/pdfs/laws&authority.pdf> (2001)).

²⁷ Frederick Schauer is a noteworthy voice of dissent. See note 30, *infra*.

²⁸ See Dworkin, for example, assuring us without citation or supporting argument (and without telling us what “generally decent” means) that “Both conservatives and liberals suppose that in a society which is generally decent everyone has a duty to obey the law, whatever it is.” Ronald Dworkin, *TAKING RIGHTS SERIOUSLY* (1978) at 21.

²⁹ Sheryl Gay Stolberg, “An Order of Fries, Please, but do Hold the French,” *N.Y. TIMES* (March 12, 2003), available at www.nytimes.com/2003/03/12/national/12FRIES.html. The Chairman of the House Appropriations Committee has exclusive jurisdiction over the restaurant, and his unilateral direction on this point had therefore the force of unreviewable “law.”

Maybe you do. I don't; and I hereby posit pretty much nobody else does. I think it's wrong to say anyone, or almost anyone, feels obligation to follow law *just because it's law*; and that, therefore, all the musings about what underlies that purported compulsion – the “internal perspective” – are wasted words.

I may be wrong about that; it is an empirical question. But it is an empirical question that has to be answered, more urgently, in the other direction, rather than simply assumed, by anyone who claims “the internal perspective” is a general feature of law. And, in fact, the reader does not need to rely entirely upon my views about what other people think. What empirical evidence exists, as recently and carefully catalogued by Professor Schauer, suggests that people do not generally perceive an internal obligation to comply with law.³⁰

Like Bentham and Austin, I suggest the general reason people comply with law, *qua* law,³¹ is, unexcitingly enough, exactly what it appears to be: a desire not to go to jail or be otherwise punished. (If an individual is under no apprehension of punishment for failure to do so, and no independent morally negative consequences would flow from such a failure, the question whether she *should* comply, morally, with law is I suppose a moral question for that person of no more (or less) interest than any other moral question, like whether she should eat meat. But I think the usual answer given would not be what Hart or Dworkin thought or Raz thinks.)

Let us revisit the angelic thought experiment of Raz's with which we started. Imagine a community of *anti*-angels, who by assumption never feel any internal moral compulsion whatsoever to comply with the law simply because it is law. Could we still have “law,” in that society? If the answer is yes, as I suggest it certainly seems to be, Raz's own method of reasoning (were it valid³²) would prove that *noncoercive normative authority*, not coercion, is irrelevant to law.³³

IV. Conclusion

In the end, Raz amply illustrates the nonsensical rabbit-warren in which legal philosophy has been trapped since the time of H.L.A. Hart. As if in an extended dream, the whole of a half-

³⁰ FREDERICK SCHAUER, *THE FORCE OF LAW* (2015), Section 5.2 (“To be specific, little actual empirical research focuses directly on the question whether people obey the law, sanctions and their own best judgments apart, just because it is the law. And what research there is appears more consistent with the conclusion that the law makes little difference under such conditions than with the opposite conclusion – that adding law to the decision making process makes a substantial difference apart from the sanctions the law may have at its disposal.”)

³¹ Of course if a law happens to coincide with an action or inaction as to which people otherwise feel morally compelled regardless of the existence of that law, they will by coincidence have and feel reason to follow that law. And there is at least some correlation in many places between what is law and what many people think is morally right. The issue is whether people feel the moral compulsion to follow *any* law, *anywhere* – in the U.S., in Russia, in Saudi Arabia – *at all times*, just because it is “law.” See SCHAUER, *supra* note 30, Ch. 5.

³² See text at notes 11-15, *supra*.

³³ This version of the thought experiment reduces, more or less, to Oliver Wendell Holmes' famous “bad man” example, which the field of legal philosophy has recently found so unpersuasive. See Morrison, *Hart Reconsidered*, *supra* note 1, at 381-382.

century of legal philosophy has approached its subject backwards. It has assumed the truth of a proposition which is false: that people feel themselves under a general moral obligation to follow law, and has insisted on that proposition's being made part of the definition of law. It has further assumed the falsity of a proposition which is true: that state coercion is what makes law "law," and has insisted on that proposition's being excluded from the definition of law. With these unquestioned, invalid starting assumptions the field has run, far.