RAZ’S CLAIM VIEW AND EXCLUSIVE LEGAL POSITIVISM

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I. Introduction

In times of constitutional crisis, when the source of ultimate authority is contestable, one of the contending authorities of a de facto government may stake a special claim to legitimate authority in order to reaffirm its sovereign supremacy. Two examples, one contemporary, the other medieval, will illustrate this point. In 2016 two British authorities, the Government and Parliament, claimed legitimacy to trigger Article 50 of the Treaty on European Union. In R (Miller) v Secretary of State for Exiting the European Union the High Court of Justice reaffirmed parliamentary sovereignty in these terms:

It is common ground that the most fundamental rule of UK constitutional law is that the Crown in Parliament is sovereign and that legislation enacted by the Crown with the consent of both Houses of Parliament is supreme (we will use the familiar shorthand and refer simply to Parliament).\(^1\)

A more complex constitutional crisis took place during the Western Schism, which lasted from 1378 to 1415. Some readers probably know that apostolic succession is fixed in Matthew 16:18, which says: “I also say to you that you are Peter, and upon this rock I will built my church […]” On the papal interpretation the Pope commands the Plenitudo Potestatis, that is, the highest authority in the Church. But the fact that three popes, Gregory XII at Rome, Benedict XIII at Avignon and John XXIII in Florence, claimed title to the Papacy left no room for an uncontestable papal claim. Eventually, the Council of Constance put an end to the crisis by invoking the conciliarist interpretation, according to which the Ecumenical council possessed the supreme authority of the Church.\(^2\) In effect,

\(^1\) R (Miller) v. Secretary of State for Exiting the European Union [2016] EWHC 2768 (Admin); italics added.
in its fifth session, held on April 6th, 1415, the Council approved the *Haec Sancta Synodus* decree that sought to resolve the constitutional crisis by claiming conciliar supreme authority. In this decree the Council claimed that it was the synod, and not the Popes, that had the highest legitimate authority. 

In the critical passage, the holy synod of Constance said:

*First it declares* that, *legitimately assembled* in the Holy Spirit, constituting a general council and expression of the militant Catholic Church, *has power immediately from Christ* and *that everyone of whatever status and dignity, even if a papal one existed, is obliged to obey it* in those matters regarding the faith, the elimination of the said schism and the general reform of the Church of God in its head and members.

In normal times, when a *de facto* authority commands general acquiescence, it has no need to lay a *special and explicit claim* to legitimate authority. Yet some legal philosophers contend that every legal system stakes a *general* and *implicit* claim to morally legitimate authority and that this feature characterizes the way in which law addresses citizens in telling them what to do. Among the authors who defend various forms of that position are Philip Soper, Joseph Raz, and Robert Alexy. The view probably derives from Max Weber’s contention that the state is by definition “the form of human community that (successfully) lays claim to the monopoly of *legitimate* physical violence within a particular territory”.

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4 John C. L. Gieseler, *A Textbook of Church History* vol 3 (John W. Hull tr, Harper and Brothers 1858) 229 (italics added). Gieseler reproduces the original text in Latin; the translation into English is mine.


Raz’s version of that view, which I will call the *claim view*, constitutes my focal point in this essay. Raz holds that *necessarily* all legal authorities, even de facto authorities, make a claim to legitimate authority. The claim view appeals to a notion of practical authority that is absent from Max Weber’s famous definition. In fact, Raz holds that for law’s claim to authority to be possible, law must be capable of excluding non-legal conflicting reasons by establishing legal directives that are exclusionary reasons for disregarding reasons for non-conformity.\(^7\) In fact, Raz says:

> The law’s claim to legitimate authority is not merely a claim that legal rules are reasons. It includes the claim that they are exclusionary reasons for disregarding reasons for non-conformity.\(^8\)

Raz thinks that law’s claim to legitimate authority is not merely consistent with but also foundational of a certain version of legal positivism. As is well known, the label “legal positivism” is used to denote a diversity of jurisprudential views. Therefore, I hasten to say that in this article I will focus on what Raz calls the “strong social thesis” or “sources thesis”, which he frames in this way:

> (ST) The tests for identifying the content of the law and determining its existence depend exclusively on facts of human behaviour capable of being described in value-neutral terms, and applied without resort to moral argument.\(^9\)

Other authors follow in Raz’s steps. Thus, Jules Coleman formulates “exclusive legal positivism” (EP) in terms of a central tenet and a supplementary negative proposition:

> (EP) The central tenet of exclusive legal positivism is the claim that the criteria of legality must be social sources. Membership in the category “law” cannot depend on a norm’s content or substantive merit. Something’s being a law cannot depend on its being the case that it *ought* to be the law.\(^10\)

Similarly, Leslie Green frames ST in this cursory way:

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\(^8\) Ibid.
(ST’) The existence and content of law depends on its sources and not on its merits.11

However, other authors circumscribe the scope of ST to rules and norms. For example, Will Waluchow defines exclusive positivism, which is meant to represent ST, in this way:

(EP) the view that the existence of a valid legal rule is solely a function of whether it has the appropriate source in legislation, judicial decision or social custom, matters of pure social fact, of pedigree, which can be established independently of moral factors.12

Similarly, John Gardner formulates “the distinctive position of legal positivism” (LP) in these terms:

(LP) In any legal system, whether a given norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not its merits.13

The difference between Raz’s framing of ST and a rules-focused version of ST (e.g., EP, LP) is that the former requires any content of law to be identifiable on the basis of social sources, whereas the latter only refers to the identification of legal rules and norms (and perhaps legal standards and principles as well). Consider definitions of legal terms, such as “fault”. According to ST, a moral definition of “fault” might be recognized as part of the content of law if the definition met the relevant membership criteria (for instance, it was established in a judicial decision). According to the rules-focused version, however, that moral definition might not be considered part of the law because it is not on its own a rule or norm. For my purposes this subtle difference is inconsequential.

Raz argues that the claim view warrants the sources thesis in what he calls the “narrow interpretation”, which holds that the truth or falsity of legal statements (i.e., those that identify law and state its content) “depends on social facts which can be established without resort to moral argument.”14 His argument is that the main function of authoritative legal

directives is to preempt non-legal conflicting reasons, and that the only way law can perform this function is by providing exclusionary reasons that preempt resort to moral argument.

My goal in this article is to propose a pragmatist interpretation of Raz’s view and discuss its relation to his case for exclusive legal positivism. Specifically, I contend that Raz defends a presuppositional ascription of a claim to moral authority to authoritative duty-imposing and normatively committed uses of legal language by official spokesmen and argue that the claim view does not warrant ST, but rather a weak version of exclusive legal positivism (WST). This variety accepts that the pragmatic moral presupposition of legal language may be cancelled on particular occasions, and that the cancellation operates through resort to moral considerations.

The pragmatic interpretation of the claim view has roots in recent works on the pragmatics of legal language. Richard Holton suggests that Raz endorses the proposition that legal officials say that they have legitimate authority, but he defends a different view. For Holton legal officials do not say but just implicate that they have legitimate authority.15 Andrei Marmor offers a comprehensive discussion of conversational implicatures, semantically encoded implications and, most importantly, pragmatic presuppositions in legal language, though he himself does not explore the pragmatics of law’s claim to legitimacy.16

A parallel line of inquiry originates from Bernard Williams’s account of “thick terms” such as treachery, brutality and courage. Williams characterizes these concepts by saying that “the way these notions are applied is determined by what the world is like (for instance, by how someone has behaved), and yet, at the same time, their application usually involves a certain valuation of the situation, of persons or actions.”17 In a lucid study Pekka Väyrynen offers a pragmatic, non-semantic explanation of the evaluations conveyed by the normal

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use of thick terms. Väyrynen argues that truth-conditional negation and other entailment canceling operators do not suppress the evaluations conveyed by thick terms. He takes this as evidence that those operations do not target the semantic entailments but the utterance implications of “thick sentences” such as “X is lewd”. Väyrynen contends that evaluations associated with thick terms and concepts are pragmatic conversational implications. David Enoch and Kevin Toh take their cue from Väyrynen’s discussion and suggest that “legality” and other legal concepts can be analyzed as thick terms, but they remain neutral as to the semantic or pragmatic character of the evaluative component.

Robert Alexy too defends a pragmatist account of his own version of the claim view. For Alexy law claims that its norms conform to moral correctness, not that it possesses moral authority. Alexy argues that there is a performative contradiction between issuing a committed legal statement and rejecting the underlying claim to moral correctness. However, Alexy’s version of the claim view is different from Raz’s. In a way similar to Hart, Alexy distinguishes between the observer’s and the participant’s perspectives. He presents his own version of law’s claim to moral correctness when he discusses the claim as understood from the participant’s perspective. He argues that, from the participant’s perspective, law is a moral practice. In the case of each legislative norm or each judicial decision, the drafter, legislator or judge is committed to the implication that her directive or ruling satisfies the claim to moral correctness. If this commitment is not satisfied, that is, if the norm or decision is morally wrong, it is legally defective. The connection between legal validity and moral validity is a qualifying connection. Alexy gives two examples. If a constitutional legislator establishes in article 1 of the Constitution that, for instance, “X is a sovereign, federal and unjust republic”, that article would involve a pragmatic contradiction. The other example is about a judge who rules: “The defendant is sentenced, on the basis of a wrong interpretation of the law in force, to life imprisonment.”

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18 Pekka Väyrynen, The Lewd, the Rude and the Nasty: A Study of Thick Concepts in Ethics (Oxford University Press, 2013),
19 Ibid., chapter 3.
21 Alexy, The Argument from Injustice 36-38.
22 The Argument from Injustice 35-62.
says that this statement has likewise a conceptual defect. That is, Alexy asserts that the constitutional legislator’s declaration and the judge’s pronouncement pragmatically imply moral propositions. In the former case, the legislator pragmatically implies that $X$ is a just republic. In the latter case, the judge pragmatically implies that her sentence relies on a morally correct interpretation of existing law. For Alexy law officials perform speech acts that pragmatically imply moral propositions.

The article is organized in this way. In section II I briefly clarify the content of the claim view and differentiate three possible theses: the conceptual thesis, the semantic singularity thesis, and the semantic entailment thesis. In Section III I discuss and dismiss three critiques of the claim view: the verification critique, the legalistic critique, and the semantic critique. In the following section I offer a pragmatic reconstruction of the claim view, which is grounded on the proposition that legal language pragmatically presupposes moral authority. In Section V, I show that law is not capable of claiming or pretending to claim legitimate authority if its directives or institutions obviously violate uncontroversial moral principles. I argue that the claim view can only warrant a weak version of exclusive legal positivism (WST). I summarize my arguments in Section VI.

II. The Content of the Claim View

Raz argues that one necessary or essential property of legal systems is that they make a claim to moral authority. He asserts that this property serves to distinguish law from the rule of bandits:

What makes mere *de facto* authorities different from people or groups who exert naked power (e.g., through terrorizing a population or manipulating it) is that mere *de facto* authorities claim, and those

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23 Gardner suggests that Alexy is misled by his constitutional example. It’s only at the level of constitutional norms that recognition of moral incorrectness can jeopardize law’s general claim to moral authority. John Gardner, “How Law Claims, What Law Claims,” in *Law as Leap of Faith*, Oxford University Press, 2012, 143-144.
who have naked power do not, to have a right to rule those subject to their power. They claim legitimacy. They act, as I say, under the guise of legitimacy.²⁴

Though Raz holds that that a naked system of power, that is, one that altogether dispenses with a claim to moral authority, is not a legal system, he would be happy to concede that such a form of social governance is a logical possibility.²⁵ However, Raz’s claim view does not involve a semantic analysis of the word “law”, for he says that “the explanation of the nature of law cannot be equated with an analysis of the meaning of any term.”²⁶ He accepts that the concept of law captured by the claim view is a historical category in pointing out that that concept has developed in the Western world in recent times. He adds that it is our concept of law and that other cultures may have different concepts that designate alternative forms of social control. Raz emphasizes that his inquiry is nonetheless universal: “While the concept of law is parochial, ie not all societies have it, our inquiry is universal in that it explores the nature of law, wherever it is to be found.”²⁷

I think that our familiarity with the claim view stands in the way of a clear understanding of its content, so a brief review will prove useful. For careful discussion, we must differentiate three different theses that are possibly associated with the claim view:

**Conceptual Thesis:** A system of social governance that lacks a normative vocabulary essentially including such terms as “duty”, “right” and “ought” does not count as a legal system.

**Semantic Singularity Thesis:** In legal statements and duty-imposing pronouncements made by legislators, judges and other legal officials the terms “duty”, “right” and “ought” have the same meaning as in moral propositions.

²⁴ Raz, *Between Authority and Interpretation* 128.
²⁶ Raz, *Between Authority and Interpretation*, 30.
²⁷ Ibid., 32.
**Semantic Entailment Thesis:** Committed legal statements and duty-imposing pronouncements made by legislators, judges and other legal officials entail moral propositions.

Raz says that legal authorities essentially use a deontic language by means of which they confer rights or impose duties. In fact, Raz writes:

[I]t is clear that all legal authorities do much more. They claim to impose duties and to confer rights. Courts of Law find offenders and violators guilty or liable for wrongdoing.28

Raz asserts that this is a conceptual feature of law. To warrant this thesis he invites us to consider the following hypothetical:

[T]ry to imagine a situation in which the political authorities of a country do not claim that the inhabitants are bound to obey them, but in which the population does acquiesce in their rule. We are to imagine courts imprisoning people without finding them guilty of any offence; damages are ordered, but no one has a duty to pay them. The legislature never claims to impose duties of care or of contribution to common services. It merely pronounces that people who behave in certain ways will be made to suffer. And it is not merely ordinary people who are not subjected to duties by the legislature: courts, policemen, civil servants, and other public officials are not subjected by it to any duties in the exercise of their official functions either.29

It seems that we would not be inclined to categorize such form of social governance as a system of law. The conceptual thesis holds that law uses an essentially normative vocabulary, which is to be found also in moral language. This thesis naturally leads to the semantic singularity thesis. Raz says that legal statements designate practical reasons that derive from acts of *de facto* authorities, but he adds that the word “duty” as used in legal statements means a duty imposed on other people for moral reasons, as distinct from reasons of self-interest. Thus he equates the meaning of “duty” in legal language to that of “duty” in moral propositions.

29 Ibid., 27.
The semantic singularity thesis might (mistakenly) suggest the semantic entailment thesis. This thesis asserts that committed legal statements and official pronouncements hold a *semantic relation* to moral propositions. It is clear that, according to Raz, official pronouncements lay a claim to the legitimacy of the legal authority.\(^{30}\) Authoritative pronouncements intend to create valid norms and, indirectly, moral reasons for the addresses to act as those norms prescribe. Raz takes this as an evident linguistic fact:

The claims the law makes for itself are evident from the language it adopts and from the opinions expressed by its spokesmen, i.e. by the institutions of the law. The law’s claim to authority is manifested by the fact that legal institutions are officially designated as “authorities”, by the fact that they regard themselves as having the right to impose obligations on their subjects, by their claims that their subjects owe them allegiance, and that their subjects ought to obey the law as it requires to be obeyed (i.e. in all cases except those in which some legal doctrine justifies breach of duty).\(^ {31}\)

It is also certain that Raz understands the claim he ascribes to official pronouncements as a *moral* claim. In fact, he defines legitimate authority as the moral power to establish moral obligations on a group of subjects.\(^ {32}\) According to the claim view, when law claims legitimate authority, it claims to have the moral power to bind its subjects. In his review of Hart’s *Essays on Bentham* Raz says that, if one issues a directive telling others how they ought to behave, one must assume that they have moral reasons to act in the way instructed by the directive:

[I]t seems that rules telling other people what they ought to do can only be justified by their self-interest or by moral considerations. My self-interest cannot explain why they ought to do one thing or another except if one assumes that they have a moral duty to protect my interest, or that it is in their interest to do so. While a person’s self-interest can justify saying that he ought to act in a certain way, it cannot justify a duty to act in any way except *if one assumes* that he has a moral reason to protect this interest of his. Therefore, it seems to follow that I cannot accept rules imposing duties on other people except, if I am sincere, for moral reasons.\(^ {33}\)

\(^{30}\) Raz, *The Authority of Law* 158-159.

\(^{31}\) Raz, ‘Authority, Law and Morality’ 199-200.

\(^{32}\) Joseph Raz, *The Morality of Freedom*, 23, 26; Raz, *Between Authority and Interpretation* 134.

According to the semantic entailment thesis, the relation between authoritative pronouncements and moral propositions is semantic. But does Raz in fact endorse this thesis? As I said in the introduction, Holton argues that Raz is committed to the semantic entailment thesis, because he asserts that when a legal official issues a duty-imposing norm he says that the addressee has a moral obligation. 34 In fact, at one point Raz seems to assert just that:

It is possible that while judges believe that legal obligations are morally binding this is not what they say when they assert the validity of obligations according to law. It may be that all they state is that certain relations exist between certain people and certain legal sources or laws. Their belief that those relations give rise to a (moral) obligation may be quite separate and may not be part of what they actually say when asserting obligations according to the law. But such an interpretation seems contrived and artificial. 35

Yet this text is very dubious. To start with, Raz does not contend that when judges assert the validity of legal obligations, they entail that such obligations generate corresponding moral obligations. What he means is that judges rather say (in a loose sense of “say”) that they believe that such obligations give rise to moral obligations. So Raz does not endorse the semantic entailment thesis, but a different thesis that holds that there is a linguistic relation between judicial pronouncements about legal duties and their belief about the moral validity of corresponding moral obligations.

III. Criticism of the Claim View

Raz’s claim view has been subjected to harsh criticism by a number of legal philosophers. Such criticism is, generally speaking, misguided. For ease of exposition, I will classify the most familiar challenges under three headings: the verification critique, the legalistic critique, and the semantic critique.

34 Richard Holton, “Positivism and the Internal Point of View,” 607.
a. The Verification Critique

Some authors have challenged the claim view (especially the semantic entailment thesis) by contending that it cannot be verified by legal practice. Ken Himma says that if the claim view were true, we would be able to verify that officials make an explicit moral claim to obedience in the appropriate contexts. He thinks that “there is only one likely context from which we might infer an official claim of moral duty that can be attributed to the legal system – namely, the judicial practice of punishing criminal violations that the defendant justifies on moral or religious grounds.”36 Yet Himma argues that he knows of no judicial decision that states that citizens have a moral duty to obey the law. Making essentially the same point, Ronald Dworkin argues that officials’ making the claim may be a contingent feature of some legal systems, but not a necessary trait of law. Dworkin says that law might be enacted and applied by a group of legal officials who share Oliver Wendell Holmes’s moral skepticism. His point is that legal officials might reject the idea of moral obligation as a matter of philosophical view and still be legal officials.37

The problem with this kind of critique is that it ignores the fact that the claim view essentially includes the conceptual thesis, which is a necessary proposition about law, not an empirical one. Gardner asserts that the proposition that law claims moral authority just involves a non-elliptical but also non-autonomous ascription of agency to law.38 Law is represented by law-applying officials, who in their official capacity claim that there are moral obligations and rights. On Gardner’s interpretation, the fact that legal officials and judges claim moral authority when they speak on behalf of the law is a defining feature of officials acting in their official capacity.39 Therefore, when Holmes speaks of rights and duties as a member of the Supreme Court, he claims “the moral authority of the Supreme Court, speaking on behalf of law itself, to review the moral authority of a democratically

This claim is compatible with Holmes’s avowed moral skepticism, because such position cannot be ascribed to law.

b. The Legalistic Critique

It has also been pointed out that law’s claim to authority is a legal claim, not a moral claim. Thus, Hart rejects the semantic singularity thesis by arguing that “when judges or others make committed statements of legal obligation it is not the case that they must necessarily believe or pretend to believe that they are referring to a species of moral obligation.”41 Adopting a Hartian stance, Himma says that the fact that legal systems characteristically use terms such as “rights” and “duties” (i.e., the conceptual thesis) is not sufficient ground for concluding that they make a moral claim to authority (i.e., the semantic entailment thesis), for the claim might be taken in a purely legal sense.42 Echoing such contentions, but focusing on Robert Alexy’s version of the claim view, John Finnis argues that the dilemma between a legal system that lays a moral claim to correctness and a system of “naked power relations” is a false one. He claims that a normative system could regulate power relations by Hartian primary and secondary rules conferring legal rights and imposing legal duties. Therefore, Finnis argues that a Hartian system of law need not be an organization of bandits, as contended by Alexy.43 He defends the view that a rule-based exploitative legal system is a conceptual possibility, even if its nature or purpose is not masked by a claim to justice, and contends that Alexy just begs the question against that view.44

As against these distinguished voices, I believe that the legal interpretation of law’s claim to authority is unacceptable. In effect, if law’s claim to authority were conceived of as a legal claim, its propositional content would be either superfluous or necessarily false. On the one hand, the claim would be practically superfluous if it just reiterated that the legal system imposes a set of legal obligations. Alf Ross makes the point in a simple way. He

40 Gardner, op. cit., 147.
42 Himma, Law’s Claim of Legitimate Authority, 289.
44 Ibid., 93.
argues that if the validity of the law just means that citizens have a duty to obey the law, that is, a duty to behave in the ways required by the law, then the question is, “How do you obey the law?” He goes on to answer: “By fulfilling your legal obligations, e.g., by paying your debts. It follows that the duty to obey the law does not prescribe any behavior which is not already required by the law itself.” On the other hand, if the proposition embedded in the legal claim stated that there is a practically non-redundant legal obligation to obey the set of all legal obligations, it would be necessarily false, for the idea that there is a legal obligation that is not contained in the set of all legal obligations is an oxymoron. It echoes Russell’s set of all sets that are not members of themselves. So the claim must be a moral claim.


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c. The Semantic Critique

It is important to emphasize that the semantic entailment thesis does not follow from the semantic singularity thesis. When law claims that citizens have obligations, it claims that they have obligations in the moral sense, because law claims to have the capacity to create moral obligations by its enactments on the basis of its legitimate authority. This is the core of the semantic singularity thesis. Whereas legal obligations are obligations in the moral sense, there are moral obligations that are not legal obligations. An example can illustrate this point. Promises create moral obligations but there are moral obligations that are not created by promises. The semantic singularity thesis holds that legal and moral obligations are obligations in the same sense, not that all moral obligations are legal obligations.

Duarte D’Almeida and Edwards reject both the semantic singularity thesis and the semantic entailment thesis. They write that a legal obligation cannot be a merely claimed obligation because a merely claimed obligation is not a real obligation. Admittedly, the proposition that law claims that subjects have an obligation reports the speech act performed by a certain speaker. So D’Almeida and Edwards hold that if the legal statement “X has a legal obligation to do φ” is the same as the claim “Law claims that X
has a moral obligation to do \( \phi \)”, then “it seems to follow that there really is no such thing as a \emph{legal obligation}”.\footnote{Ibid.} Why not? It is not problematic to say that \emph{law imposes legal obligations by claiming that there are corresponding moral obligations}. This seems to be Raz’s view. If law has legitimate authority, then the claimed moral obligations are genuine moral obligations. But the existence of legal obligations does not necessitate the existence of the claimed moral obligations. Curiously, D’Almeida and Edwards discuss this interpretation in a footnote and dismiss it without careful examination:

Might Gardner reply that legal obligations just are claims made by law-applying officials about non-legal obligations? On that view, X would have a legal obligation to \( \phi \) when and because law-applying officials claim that X has a non-legal obligation to \( \phi \). One reason this view is untenable is that it would have to dismiss – implausibly – as self-contradictory judicial pronouncements of the following sort: “While X is morally obligated to \( \phi \), he has no legal obligation to do so”.\footnote{Ibid. (footnote 31).}

I think that this critique misses the point. As is well known, Raz classifies legal statements into two classes: \emph{internal or committed legal statements} and \emph{legal statements from a point of view} (i.e., detached statements).\footnote{The Authority of Law, 153-159.} While committed legal statements \emph{say} (in a pragmatic sense) that law’s moral claim is redeemed, detached legal statements just \emph{assume} that the claim is redeemed. An internal legal statement morally approves of law’s authority and presupposes that legal obligations are moral obligations. In contrast, detached legal statements merely assume law’s moral authority. This assumption is consistent with holding that legal obligations are claimed moral obligations.

The semantic singularity thesis does not support the conclusion that the proposition “While X is morally obligated to \( \phi \), he has no legal obligation to do so” is self-contradictory. Even if X is morally obligated to \( \phi \), law might fail to pronounce its decision that X is obligated to \( \phi \), in which case X would not have a legal obligation to \( \phi \). While the meaning of the duties imposed by law is identical with the meaning of moral obligations, it is law’s
pronouncement about \( X \)'s obligation to \( \phi \) that constitutes \( X \)'s legal obligation to \( \phi \). In turn, \( X \) would really have a moral duty to \( \phi \) if law had justified moral authority to require \( \phi \).

Therefore, if a court utters the sentence “While \( X \) is morally obligated to \( \phi \), he has no legal obligation to do so”, it says that no legal authority has created a moral obligation for \( X \) to do \( \phi \). This does not mean that \( X \) has no moral obligation to do \( \phi \). “\( X \) is morally obligated to \( \phi \)” might well be true, even if \( X \) is not morally obligated by a legislative enactment or a judicial decision. The court’s pronouncement is not self-contradictory. It makes perfect sense for the court to declare that \( X \) is legally permitted not to do \( \phi \). Neither the semantic singularity thesis nor the semantic entailment thesis preempts this possibility.

Sometimes the semantic singularity thesis is not clearly distinguished from the semantic entailment thesis, the latter being an easy target. Thus, Holton understands the internal point of view as based on “a moral attitude constraint”, according to which officials in a legal system must believe that they are morally justified in enforcing the norms they issue and that subjects are morally obliged to comply with them.\(^{51}\) Holton thinks that Raz gets it right in holding that internal or committed legal statements are moral claims, but he argues that the semantic entailment thesis is incompatible with ST (the social sources view).\(^{52}\) If the legal statements “You have the legal duty to do \( \phi \)” entailed the moral proposition “You have the moral duty to do \( \phi \)”, the falsity of the latter proposition would entail the falsity of the legal statement, and this would mean that the truth conditions of legal statements include moral truths.\(^{53}\)

But, as suggested above, Raz does not even accept the semantic entailment thesis. This thesis is incompatible with the narrow interpretation of the sources thesis, according to which the truth of legal statements does not depend on moral considerations. He certainly embraces the semantic singularity thesis. What he contends with respect to the relation between authoritative legal utterances and moral judgments is that a duty-imposing legal

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\(^{51}\) Holton, “Positivism and the Internal Point of View,” 607.

\(^{52}\) Ibid., 613.

\(^{53}\) Ibid., 610-11.
norm issued by authority $A$ presupposes $A$’s belief in a moral proposition that is true if and only if the corresponding moral duty exists. He says that citizens really have the duties and rights that law says they have only if law is morally legitimate:

Far be it for me to claim that all legal systems do enjoy moral legitimacy, which means that legal duties are really duties binding on people rather than being the demands governments impose on people. All I am saying is that when it is assumed that any legal system is legitimate and binding, that it does impose the duties it purports to impose [...] in such cases we cannot separate law from morality as two independent normative points of view, for the legal one derives what validity it has from morality.\(^{54}\)

Gardner accords with this interpretation. He says that law’s claim to moral authority can be true or false, because law’s claims are first-order moral propositions that can be true or false regardless of their legal validity. Such moral claims are true in case the moral obligations and rights really exist, and false if those claimed obligations and rights are illusory.\(^{55}\) That is, Raz holds that an authoritative directive to do $\phi$ is morally binding on its addressees if the authority’s moral claim is true. However, it is not necessary for the legal norm to be valid that the associated moral proposition be true. A valid duty-imposing legal norm claims that the addressee has, because of the legally valid creation of the norm, the corresponding moral duty. Raz emphasizes that whether the claim is true or false does not affect the legal validity of the norms. What is necessarily true is that law makes the claim. So we might say that legal duties are not moral duties, but rather “claimed moral duties” that become “moral duties simpliciter” if authority’s claim to legitimacy is true.

By the same token, Raz holds that committed legal statements implicate belief in the associated moral propositions. However, this does not mean that the test for identifying a legal norm and establishing its content depends on the truth conditions of that moral proposition. Indeed, Raz’s view about the meaning of official pronouncements is not inconsistent with ST. There are two reasons for affirming the coherence of his position. First, as will be more carefully developed in the next section, an implicature conveys information or content in a non-truth-conditionally way (i.e., beyond the utterance’s truth-
If a judge pronounces a committed legal statement, belief in the corresponding moral duty is implicated, but it is not the truth of this moral belief that is a practical reason for the addressee to act as the norm requires. It is rather the fact that the lawmaker has expressed his decision about how the addressee ought to act in a way that meets the legality criteria established in the pertinent legal system. Second, committed legal statements are just one possible way of conveying information about legal norms. Detached legal statements are another way that lacks the implication of belief in a moral proposition. ST does not require that the identification of legal norms and the description of their content be made through committed legal statements. Detached legal statements could do the job as well. Finally, Raz would also be prepared to accept that an external observer (who is not a legal official) could identify and describe law by uttering factual statements that use moral terms in an “inverted-commas” sense. Such external legal statements would just describe the moral claims made by legal officials with respect to citizens’ duties and rights.

IV. A Pragmatic Interpretation of Law’s Claim

According to Holton’s interpretation, Raz rejects a pragmatic interpretation of the relation between the official use of prescriptive legal language and moral propositions. Holton attributes the semantic entailment thesis to Raz. However, I have already shown that this thesis is alien to Raz’s assertions. What Raz means is that when judges assert the validity of legal obligations, they are talking about moral obligations. In other words, their speech acts are associated with belief in a moral claim, even if the association is not necessarily one of semantic entailment. Raz defends the semantic singularity thesis, but rejects the semantic entailment thesis. What judges say in official pronouncements makes reference to moral obligations, but such pronouncements do not entail the proposition that subjects have the corresponding moral obligations.

Holton proposes a pragmatic version of the claim view, though the pragmatic account is rather an interpretation of Raz’s admittedly obscure texts. I think that Holton gets close to

the truth when he asserts that a legal rule *pragmatically implicates* belief in a moral proposition:

Similarly, if the existence of a system of laws strictly requires that all the judges believe they are morally binding, then when a judge makes a judgment, we can infer that the judge thinks it is morally binding. But she has not strictly *said* that it is.\textsuperscript{57}

My own pragmatic interpretation is slightly different. If a legal official issues a duty-imposing rule with the intention that the addressee recognizes that he has a moral reason to fulfil that duty, he *pragmatically presupposes* that he has moral authority to turn his utterances into moral considerations for the addressee; otherwise, he could not reasonably intend that the addressee takes his utterance as a reason for accepting that he has a moral reason to do as the rule requires. Thus, if we consider Raz’s few assertions on this particular issue, we can conclude that he regards the relation between (1) and (2) as a *pragmatic presupposition*. Therefore, I suggest that the claim view be interpreted in terms of the “pragmatic presupposition thesis”:

**Pragmatic Presupposition Thesis** Official pronouncements and committed legal statements pragmatically presuppose moral authority by the lawmaker.

The concept of pragmatic presupposition is mainly associated with the work of Robert Stalnaker.\textsuperscript{58} He intuitively explicates the notion in this way:

To presuppose a proposition in the pragmatic sense is to take its truth for granted, and to assume that others involved in the context do the same. … Presuppositions are propositions implicitly *supposed* before the relevant linguistic business is transacted.\textsuperscript{59}

This passage seems tailor-made to interpret Raz’s scriptures about the implicitness of the claim to legitimate authority. On this reading, Raz holds that legal statements imposing

\textsuperscript{57} Richard Holton, “Positivism and the Internal Point of View,” 611; italics in the original.

\textsuperscript{58} Robert C. Stalnaker, *Context and Content, Essays on Intentionality in Speech and Thought* (Oxford University Press, 1999).

\textsuperscript{59} Ibid. 38; italics in the original.
obligations and conferring rights presuppose a claim to legitimate authority. When Raz 
talks about the claim that law makes, he refers to the claim that a particular class of legal 
spokesmen make in specified linguistic contexts. Do official pronouncements about rights 
and duties entail the claimed proposition that the authority is morally legitimate? The 
answer is no. Entailment is a semantic relation defined by conventional rules of meaning 
and largely independent of the context. Suppose the King wants to impose on their subjects 
an obligation to do $\phi$ (e.g., pay the Crown 5 pounds). So he addresses his subjects and 
utters:

$$
(1) \text{You ought to } \phi.
$$

According to the claim view, in uttering (1) the King makes the following implicit claim:

$$
(2) \text{I have legitimate authority to tell you to } \phi.
$$

It seems clear that the relation between (1) and (2) is not semantic. There are various ways 
to show this point. Basically, the relevance of the background information is critical for 
testing whether a certain linguistic relation is pragmatic rather than semantic. For instance, 
the relation between (1) and (2) depends on the fact that the King is addressing his subjects 
in an authoritative way. That fact is context-dependent: it is not guaranteed by the 
semantic content of (1) according to semantic rules that establish the meaning of “ought”. 
So, for example, if the King uttered an ought-proposition in a context in which it is clear 
that he is not using authoritative discourse, the kind of relation that holds between (1) and 
(2) would not hold. Suppose the King addresses the Pope and pronounces an utterance that 
is semantically similar to (1):

$$
(1’) \text{Your Holiness, you ought to } \phi \text{ (e.g., allow my divorce).}
$$

It is clear that the King does not take (2) for granted in uttering (1’). In other words, the 
information contained in (2) is not in the common ground. Indeed, (2) is irrelevant in this 
context. The King is just expressing a moral or political claim about the Pope’s behavior.
However, the semantic content of “ought to φ” should generally remain invariant across changes in speech context.

How is it possible for Raz to endorse the semantic singularity thesis and reject the semantic entailment thesis (holding instead the pragmatic presupposition thesis)? The key to understanding his position is his thesis that any directive capable of being authoritative must possess two features. Because of its centrality in the interpretation of Raz’s position, it is worth quoting the “two features passage”:

The two features are as follows. 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 behave. Second, 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.60

Raz clarifies what it means to say that the authority must present the directive as “his view” (even if it’s not truly his view) about how the addressees ought to behave (the first feature). It means (1) that the authority must present the directive as relying on moral reasons applicable to the addressees, and (2) that the authority cannot present the directive as based on his own self-interest. The first feature ensures that if I issue an authoritative directive telling you how to behave, I am expressing to you my view about how you ought to behave. The fact that legal propositions imposing duties and conferring rights pragmatically presuppose moral authority can be explained by resorting to the second feature of authoritative directives. According to this feature, the addressee must be capable of identifying the directive without appealing to reasons or considerations on which the directive purports to adjudicate. This means that the moral reason provided by the directive must be ascertainable by the addressee without his pondering over other reasons or considerations about how he ought to behave. Independent ascertainability by the addressee of the directive is only possible if the reason derived from the authoritative utterance is content-independent, that is, logically independent from any other considerations that might directly apply to the addressee’s behavior. Taken together, all these points seem to warrant the following two propositions as necessary truths about normative discourse in authoritative contexts:

60 Raz, “Authority, Law, and Morality” 202.
1) If I tell you that you ought to \( \phi \), I tell you that it is my view that you ought to \( \phi \).

2) If I tell you that it is my view that you ought to do \( \phi \), I tell you that you have a moral reason \( R \) to \( \phi \) such that \( R \) is grounded in my telling you that it is my view that you ought to \( \phi \) and \( R \) is not entailed by any other moral reason applicable to your \( \phi \)ing.

Suppose now that the King addresses his subjects in an authoritative context and tells them that they ought to \( \phi \):

3) I tell you that you ought to \( \phi \).

Then subjects can infer that the King also says:

4) I tell you that it is my view that you ought to \( \phi \). (By 1)

By uttering (4) the King tells his subjects that they have a content-independent moral reason to do \( \phi \):

5) I tell you that you have a moral reason \( R \) to \( \phi \) such that \( R \) is grounded in my telling you that it is my view that you ought to \( \phi \) and \( R \) is not entailed by any other moral reason applicable to your \( \phi \)ing. (By 2)

Now the King could not utter (5) in a meaningful way if he did not presuppose that he has moral authority. Therefore, if the King presents the directive as “his view” about addressees’ obligation to \( \phi \) he \textit{pragmatically presupposes} that he has moral authority to require subjects to \( \phi \) and \textit{says in a non-truth-conditional sense} that addressees have a moral duty to \( \phi \). In this way, the semantic singularity thesis can be held together with the pragmatic presupposition thesis.

If the King truly believes in the view he expresses as his view, his utterance is sincere. But he might present the directive as if it expressed his view on addressees’ obligation to \( \phi \) without really believing in the conveyed normative proposition. Either way, since the King utters (3) with the intention of making his subjects recognize that they have a moral reason to \( \phi \) that is grounded on his presenting his view to them that they have a moral reason to \( \phi \), the King must take it for granted that he has a moral power to tell subjects how they ought
to behave before uttering (3). In fact, by the very concept of a moral reason, the King’s success in telling his subjects that they have a content-independent moral reason to \( \phi \) in authoritative contexts is only possible if the King has a moral power to tell subjects how they ought to behave. Therefore, the use of “ought” by any speaker in an authoritative context presupposes the speaker’s moral power to tell her addressee how she ought to behave. In other words, any speaker in an authoritative context makes an implicit claim to legitimate authority when he tells someone else what duties and rights she has.

If the above reconstruction represents what Raz means to say when he contends that the claim to legitimate authority is a necessary characteristic of legal language, it is clear that he does not need to demonstrate that all legal systems explicitly articulate a claim to the effect that citizens have a moral duty to obey the law. If we interpret “claim” in the explicit sense, the claim view is obviously false, for most legal systems do not contain declarations or other explicit statements endorsing legitimate authority. In contrast, on the presuppositional interpretation the claim view captures one important assumption embedded in the kind of moralized discourse that legislators and judges canonically use.

V. The Qualified Sources Thesis

Raz regards law’s claim to legitimate authority as the chief ground for defending ST, his version of exclusive legal positivism. The argument from the claim view to exclusive legal positivism proceeds through a critical step that we can call the conceptual argument. In fact, Raz says that considerations related to the claim view “create a weighty argument in favor of the sources thesis.”\(^6\) This argument merits careful consideration.

Raz holds that “only those who can have authority can sincerely claim to have it.”\(^6\) And he also argues that sincerity and conceptual correctness are normal or typical conditions of law’s claim to legitimate authority:

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\(^6\) Raz, ‘Authority, Law and Morality’ 199.
\(^6\) Ibid.200.
Since the claim is made by legal officials wherever a legal system is in force the possibility that it is *normally* insincere or based on a conceptual mistake is ruled out. It may, of course, be sometimes insincere or based on conceptual mistakes. But at the very least in the normal case the fact that the law claims authority for itself shows that it is capable of having authority.  

He concludes that for law to claim authority “it must be capable of having it, it must be a system of a kind which is capable in principle of possessing the requisite moral properties of authority.” For Raz the sources of error in the claim to authority may be of two kinds: non-moral or non-normative, and moral or normative. Raz’s position with respect to errors related to the moral attributes of authority is different from his position with respect to conceptual and factual errors, that is, errors about the non-moral conditions. First, Raz does not hold that law makes a claim to moral authority under any specific conception of moral authority. Thus, Raz does not mean that law can tell its addressees that they ought to comply with legal directives when the balance of reasons tell them to act otherwise only if it claims at the same time that its requirements will guide them to exercise their practical autonomy in the ways identified by any specific moral/political theory of authority (i.e., Raz’s well-known service conception). In fact, he does not say that law claims the normative status that the service conception or any other theory of legitimate authority demands. Second, Raz holds that every legal system claims to be normatively authoritative, but he does not assert that every legal system *is* authoritative. Therefore, he is committed to holding that law can authoritatively require an action that is really banned by the balance of moral reasons. The claim view is a conceptual claim about law, and, hence, independent from any moral/political conception of authority. Thus, Raz’s remarks emphasize that law’s claim to legitimate authority may be false. For instance, he says:

If of necessity all legal systems have legitimate authority, then we can conclude that they have the features which constitute the service conception of authority. But it is all too plain that in many cases the law’s claim to legitimate authority cannot be supported.  

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63 Ibid. 201; italics added.  
64 Ibid. 199.  
65 Ibid., 200.
Though the claim view is independent from the service conception, the notion of a claim to legitimate authority relies on Raz’s characterization of authority.\textsuperscript{66} In effect, in claiming legitimate authority a legal system must also claim that addressees treat its directives as exclusionary or preemptive reasons. For Raz the exclusionary character of legal directives is included within law’s necessary claim to legitimate authority, otherwise Raz could not use the claim view to ground ST. Now it is one normative thesis within Raz’s theory of legitimate authority (the “preemption thesis”) that spells out the ability of authoritative reasons to preclude other possibly conflicting reasons. But one might not conclude that the exclusionary character of legal directives, which is a hallmark of Raz’s exclusive legal positivism, is conceptually linked to Raz’s theory of legitimate authority. Stefano Bertea rightly says that the exclusionary character of the directives issued by an authority is a defining feature of “authority” and “legal authority”.\textsuperscript{67} Whereas the preemption thesis is a normative thesis that morally requires agents to treat an authority’s directives as preemptive when the other two theses are met (the “normal justification thesis” and the “dependence thesis”), the claim view relies on the conceptual proposition that says that a person or an institution can count as an authority only if its requirements are exclusionary reasons. This conceptual proposition resembles the preemption thesis, but the two propositions have different logical status.

Raz also holds that the service conception has a role in warranting ST:

A decision is serviceable only if it can be identified by means other than the considerations the weight and outcome of which it was meant to settle.\textsuperscript{68}

But Raz asserts that his argument for ST draws on the “mediating role” of authority, which \textit{derives from} the service conception, but not on the service conception itself.\textsuperscript{69} That is the reason why Raz makes it clear that the normal justification thesis “and the others which go with it” are not assumed in the argument for ST:

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\textsuperscript{66} Stefano Bertea, \textit{The Normative Claim of Law} (Hart 2009), 103-105.
\textsuperscript{67} Ibid., 105.
\textsuperscript{68} Raz, ‘Authority, Law and Morality’ 203.
\textsuperscript{69} Ibid. 204.
Can it not be objected that my argument presupposes that people know the normal justification thesis, and the others which go with it? To be sure, such an assumption would not be justified. Nor is it made. All I am assuming is that the service conception of authority is sound, i.e. that it correctly represents our concept of authority. It is not assumed that people believe that it does.  

In order to show the independence of the claim view from any specific moral/political theory of legitimate authority, it is useful to distinguish between two possible formulations of the claim view: the \textit{de re} formulation and the \textit{de dicto} formulation.\footnote{Ibid. 204.} Let “\(T\)” be a variable for any theory about the truth conditions of the proposition that a given authority is morally legitimate. According to the \textit{de re} formulation, the claim view would say something like this: \textit{There is a true theory of legitimate authority \(T\) such that every legal system \(L\) claims that treating its directives as preemptive satisfies \(T\).} Since Raz holds that there is a single true theory \(T\) of legitimate authority and that \(T\) is the service conception, the claim view as understood in the \textit{de re} fashion would mean that every legal system claims to satisfy the conditions established by the service conception. This is not what Raz means to say. On the alternative, \textit{de dicto} interpretation, the claim view would read thus: \textit{Every legal system \(L\) claims that there is a true theory of legitimate authority \(T\) such that treating \(L\)’s directives as preemptive satisfies \(T\).} On the \textit{de dicto} reading, \(L\)’s claim does not refer to the service conception but to whatever theory of legitimate authority \(L\) might deem true. This reading is noncommittal with respect to any theory of legitimate authority. Therefore, on the \textit{de dicto} formulation law’s claim of legitimate authority is not committed to the service conception of legitimate authority. It is the \textit{de dicto} formulation the one that Raz has in mind.  

The \textit{de dicto} formulation explains why the claim view is not incompatible with philosophical anarchism, the view that “some people subject to the law are not obligated to obey its requirements when law holds them to be so obligated”.\footnote{For the distinction between \textit{de re} and \textit{de dicto} ascriptions of propositional attitudes, see, for instance: Ernesto Sosa, “Propositional Attitudes \textit{De Dicto} and \textit{De Re},” \textit{Journal of Philosophy} 67 (1970), 883-896. \footnote{Bas Van Der Vossen, “Assessing Law’s Claim to Authority,” \textit{Oxford Journal of Legal Studies} 31 (2011), 489.}} Himma says that the truth
of philosophical anarchism would make the claim view false “[f]or if there is no conceptually possible legal system in which law’s claim to authority is true, then it is false that law is capable of legitimate authority.” However, the *de dicto* formulation is not committed to the truth of the moral proposition embedded in the claim ascribed to law. Van der Vossen rightly indicates that the falsity of law’s claim to legitimate authority, which would be entailed by the truth of philosophical anarchism, would not show that the claim view is false; it would only mean that the propositional content of the claim is false:

For we are also familiar with concepts that involve the making of claims that are false. Consider, for example, scientific theories. Almost all rival scientific theories make claims about the world that are false. However, this provides us with no good reason to change our understanding of them.

The *de dicto* interpretation of the claim view indicates that Van der Vossen is right. Whereas philosophical anarchism excludes the truth of the claim view interpreted in the *de re* formulation, it is clearly consistent with the *de dicto* formulation.

By the same token, Hart’s contention that Raz’s claim view entails a cognitivist interpretation of moral and legal statements is misguided. Hart says that Raz endorses a “reason-based and cognitive explanation of normativity” which “connects the idea of duty with a special sort of reason for action the existence of which is an objective matter of fact.” But a cognitive account of duty is not a necessary part of the claim view. In fact, if the moral claim ascribed to law is necessarily neither true nor false because its embedded moral proposition do not report an objective matter of fact, the ascribed moral claim cannot possibly be true. An “error theory” would then be the natural supplement to the claim view. Just as John Mackie says that all ordinary moral judgements are erroneous inasmuch as they include a claim to objectivity, an *error account of law* might suggest that all legal propositions are mistaken in that they include a claim to moral authority. But this account would not affect the claim view; it would just make the *moral claim* false. To illustrate

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74 Van Der Vossen, “Assessing Law’s Claim to Authority,” 490.
basically the same point, Leslie Green invites us to assume that all theological propositions are false. Even so, he argues, the Pope’s claim to legitimate authority would be meaningful because “part of what it is to be Pope is to claim apostolic succession from St. Peter.”

Prominent among the non-moral conditions are the conceptual attributes. Raz thinks that law cannot fail to satisfy the non-moral conditions of authority. Since good faith errors are always possible, law might sincerely but erroneously claim authority. But Raz thinks that there are some errors that are inconsistent with sincerity and linguistic success. He says that if law sincerely claims authority, it must conceptually be capable of having authority. For instance, law must be a normative system. A set of propositions about volcanoes or other entities that cannot communicate with people cannot claim to have authority.

Raz’s argument seems to depend on three premises: (1) law necessarily claims to have authority; (2) law’s claim to authority is normally sincere and conceptually correct, and (3) to sincerely and successfully claim to have authority, law must be capable of having authority. Raz seems to conclude from these propositions that law normally have all the non-moral attributes that make it capable of having authority.

Why does Raz regard conceptual errors as incompatible with successful performance of authoritative speech acts? He asserts that legal officials cannot be “systematically confused” about the conceptual conditions of the claim to 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.” The best explanation of Raz’s assertion is that he assumes that conceptual errors about central concepts of our practices are normally evident. Any other potential explanation would sound ad hoc. If so, Raz should have said that conceptual errors about simple and central concepts of our practices are normally evident, for we would not require correctness about complex concepts as a condition of successful authoritative speech. For example, consider the concept of blame. We might argue that we cannot be systematically confused about the conceptual conditions

77 Leslie Green, “Positivism and the Inseparability of Law and Morals” 1049.
79 Ibid. 201.
of blame because, given the centrality of responsibility institutions in our political structures, their claims and conceptions are formed by and contribute to our concept of blame. However, people are generally confused about the conceptual conditions of blame, as shown by the perennial debates about whether free will is a conceptual prerequisite of blame. By the same token, people are often confused about the concept of freedom (e.g., they confuse freedom of the will with social freedom), or they get confused about the concept of probability (e.g., they hesitate when calculating the probability of an event that is a member of various classes). Confusions around intricate concepts seem pervasive in vast areas of our normative and social practices.

I think that Raz’s position can be charitably interpreted as avoiding a commitment to law’s full-scope possession of the non-moral properties that make it capable of having authority. On this interpretation, he does not ground his case for ST on law’s unrestricted sincerity and lack of conceptual confusion. For instance, his case is not affected by the fact that some complex concepts may generate confusions that are compatible with successful communication in authoritative contexts. By the same token, insincerity related to some qualities of law would not be at odds with Raz’s argument for ST. Suppose that a judge justifies a politically expedient decision by appealing to credible factual assessments that he knows are wrong. Raz might say that this system of law is still law because it pretends to have authority by presenting its norms as its view about how people ought to behave.

Thus Raz might weaken premise (2) by stating that, even if law typically has all the non-moral attributes of authority, there are two non-normative features that are basic for anything to be capable of being authoritative. In fact, I have already underscored the centrality of the “two features passage”. I think that Raz might weaken (2) as a way of strengthening his conceptual argument, thus rejecting objections such as those based on the complexity of some concepts. In any case, it is certain that Raz says that, in claiming legitimate authority, law cannot normally be insincere or confused about the satisfaction of the two basic non-moral features: (1) law presents its binding directives as its own view on
how subjects ought to behave, and (2) such directives can be identified by social, non-moral criteria. By means of the first feature Raz allows for the fact that law might merely pretend to have authority. He thinks that misrepresentation is so easy that the concept of de facto authority only requires the appearance or color of authority, that is, the presentation of the directives as the authority’s view on what subjects should do. It is worth quoting the relevant passage:

Strictly speaking, to be capable of being authoritative a directive or a rule has actually to express its author’s view on what its subjects should do. But given that this element is one where pretense and deceit are so easy, there is little surprise that appearances are all one can go by here, and the concept of de facto authority, as well as all others which presuppose capacity to have authority, are based on them. If the rule is presented as expressing a judgment on what its subjects should do, it is capable of being authoritative.

Since “pretence and deceit are so easy”, Raz says that sincerity is a normal but not a necessary feature of law’ presupposition. This coheres with his general view that rules can be insincerely accepted:

Must a person who accepts a rule therefore believe that there are reasons of the right kind for it? I have suggested that if the rule is accepted sincerely and in good faith, then it is accepted for the right reasons. But there can also be insincere acceptance, or pretence acceptance for reasons of a different kind.

The second feature picks out the possibility of non-moral identification of binding directives as a conceptual condition of authority. Raz rules out conceptual confusion about law’s “mediating role”. He assumes that legal officials cannot be thought to believe that law is authoritative if it is not possible for citizens to identify its directives without relying on moral reasons and argument. Legal officials are very unlikely to hold obviously confused beliefs about such a central and simple feature of the concept of authority as its

81 Ibid 203; italics added.
mediating role. Raz then assumes that law’s claim is sincere. Indeed, he takes officials’ beliefs about the possibility of non-moral identification of authoritative rules as evidence for law’s actual capability to be identified without appeal to moral argument. If legal officials make a sincere claim, they believe that law is capable of having authority and this belief is reliable with respect to the basic features of the concept of authority. While belief in law’s legitimacy is compatible with confusion and insincerity, it seems incompatible with obvious confusion and insincerity. If confusion or deception about law’s legitimacy is too obvious, legal officials’ belief in law’s legitimacy can be discarded.

Raz rejects the possibility of legal systems normally making insincere or confused claims about the two features. In abnormal cases, however, law’s claim might merely be pretense. Though most members of the whole class of legal systems, that is, typical legal systems, sincerely claim to have authority, some abnormal or atypical legal systems might merely pretend to have authority. For Raz pretense is enough if it is confined to a few members of the whole class of legal systems. In fact, Raz says that the appearance of authority is sufficient for law to claim authority. What is indispensable for law to claim moral authority is for lawmakers to present their directives as their views of how citizens should behave. Since “appearances are all one can go by here”, if an authority pretends that its rules express its judgment on what subjects should do, it is capable of being authoritative.

In contrast, moral errors are normally not obvious and, therefore, compatible with authority presenting its directives as expressing its morally preempting view about how subjects ought to behave. It is difficult to spot any other motivation for his appeal to the distinction between the non-moral two features and the moral conditions of authority in order to establish that law’s claim just implies that law is capable of satisfying the two non-moral features.

In other words, I think that Raz holds that law’s claim must be normally sincere and conceptually correct with respect to the two basic features and concludes that law must be capable of being authoritative. Therefore, the normality qualification, as applied to the two features, allows atypical legal systems to count as law. But recall that the sources thesis
(ST) is grounded on the two premises that portray the two non-moral features. Just as those premises are restricted to typical legal systems, so too must ST be restricted to typical legal systems. Therefore, the conceptual argument can justify the proposition that the existence and content of typical legal systems (i.e., those that avoid insincerity and conceptual confusion about the two features of the claim of authority) depend on its sources and not on its merits. Qualified in this way, the sources thesis is compatible with the fact that atypical legal systems may include moral considerations as legality criteria for establishing what rules and principles constitute valid law. Therefore, the sources thesis that is supported by the conceptual argument must be accordingly adjusted:

\[ \text{WST}_1: \text{The existence and content of typical legal systems depend on facts of human behavior and not on moral considerations.} \]

Raz regards an error with respect to the possibility of non-moral identification as normally obvious and, therefore, incompatible with law’s claim of legitimate authority. If legal officials are sincere in claiming law’s moral authority, their beliefs in this respect are reliable, for a conceptual error about the “mediating role” of authority would be too obvious. However, law is only typically sincere, and therefore the claim view can only justify a version of ST that is qualified by a “typicality condition”.

I have suggested that some conceptual confusions may not be obvious, even if they relate to our central concepts. Conversely, I want to suggest now that some moral errors may be too obvious to be consistent with law’s presenting its directives as its own view about how subjects ought to behave. For example, the immorality of many directives of Nazi law was so obvious that it is implausible to think that Nazi lawmakers were able to sincerely or credibly claim moral authority about them. We have concluded that law can sincerely but erroneously claim that it has authority, but not if the error is too evident. This applies to moral errors too. When such errors clearly falsify the de dicto ascription of the legitimacy claim to law, because there is no plausible theory of legitimate authority \( T \) such that treating law’s directives as preemptive satisfies \( T \), law’s claim is pragmatically canceled. Thus, bandits cannot sincerely or credibly claim that their directives meet the conditions of any plausible theory of moral authority, because too many of their directives serve their own
interests rather than being guided by moral considerations. When a coercive regime is morally outrageous, the grounds for concluding that it lacks moral legitimacy are unlikely to be contestable, or, conversely, likely to be obvious. Now, extending the conceptual argument to obvious moral errors, Raz should say that a wicked legal system cannot sincerely or credibly claim moral authority. In fact, if an authority commits too many obvious moral errors, he shows that he is not capable of having moral authority. However, Raz says that “Nazi rules may not be authoritatively binding, but they are the sort of thing that can be authoritatively binding.”

My argument is that the normality qualification is not the only one Raz needs to introduce. Law’s capability to sincerely claim authority must be qualified to exclude cases in which binding directives are so obviously immoral that they cannot be presented as expressing law’s view about how subjects ought to behave, but only as expressing how bandits in power want subjects to behave. Raz plausibly holds that pretense and deceit are normally so easy that the pragmatic presupposition of legitimate authority is not affected by the deceit insofar as law presents its directives as if they were its view about how citizens should behave. But the authorities must be minimally trustworthy for their discourse to be conceptually successful. Now the appearance of authority is credible if law’s claim is not undermined by obvious moral or non-moral mistakes; such mistakes would make it very unlikely that legal officials really believe in the claim they make on behalf of law.

The point is that pretense and deceit are not so easy when a regime obviously flouts the basic moral exigencies that make its pragmatic presupposition of legitimacy meaningful. Therefore, the argument from law’s claim to moral authority also shows that typical legal systems must be capable of satisfying those obvious moral conditions in whose absence law cannot even pretend, let alone claim, that it is authoritative. The pragmatic presupposition is cancelable when there is a pragmatic contradiction between what a speaker presupposes and what he says. In the case of law’s claim to authority, the contradiction arises between law’s claim to moral authority and its establishing norms that openly and manifestly belie

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the claim that there is a theory of legitimate authority that could possibly justify that kind of authoritative settlement.

I wish to emphasize that the problem of manifest radical injustice affects the entire class of legal systems, not just its normal or typical subclass. That is, both typical legal systems (which sincerely claim moral authority) and abnormal legal systems (which merely pretend to have moral authority) must satisfy obvious moral and non-moral conditions for law’s pragmatic presupposition to be kept in the relevant linguistic context. For instance, the fact that a legal system openly requires or allows systematic government’s violations of human rights defeats both a sincere claim and a mere pretense of authority. The reason is that a *pragmatic contradiction* can cancel the pragmatic presupposition of law’s spokesmen.

What is a pragmatic contradiction? It can be analyzed as a contradiction among the communicative contents conveyed by a speaker in a pragmatically enriched context through her linguistic performance and relevant communicational verbal and non-verbal actions. So a speaker cannot even pretend to be morally concerned about terrorism if she herself is engaged in terrorist actions. Similarly, a speaker in Nazi Europe who wanted to grab a house expropriated to Jews could not even pretend that she was morally concerned about the corruption of Nazi officials who allocated the best houses to their own families. And a legal system that is so wicked as to enforce extermination or slavery cannot even pretend to be morally legitimate. The conclusion of my argument is that Raz’s case for the social sources thesis must include a *moral qualification* as well. It is not necessary that the law *declares* that one of its norms is unjust or morally wrong. Widespread and manifest immorality alone can cancel Raz’s pragmatic presupposition. This kind of moral qualification requires a second revision of Raz’s argument for ST. Let me explain.

Remember that legal directives must be capable of being identified without recourse to moral reasons or considerations on which it purports to adjudicate. Most abstractly framed, Raz’s social sources thesis says that “the existence and content of every directive depend on the existence of some condition which is itself independent of the reasons for that directive.” But the existence of a wicked legal directive cannot be ascertained without

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84 “Authority, Law, and Morality” 204.
relying on the moral reasons against that directive. In effect, a duty-imposing legal directive sincerely claims or merely pretends to be morally authoritative, but both sincere claim and mere pretense are defeated by the manifest immorality of the directive. Since the pragmatic presupposition of moral authority is canceled by obvious immorality, the sources thesis (ST) as formulated by Raz cannot be warranted by the claim view. Indeed, ST says that “[t]he tests for identifying the content of the law and determining its existence depend exclusively on facts of human behavior capable of being described in value-neutral terms, and applied without resort to moral argument.” And the existence of wicked law cannot be established without resort to moral argument because of its presupposed claim to moral authority.

The above analysis also applies to a possible claim-view defense of Green’s rendition of ST, which asserts that “[t]he existence and content of law depends on its sources and not on its merits.” Despite their narrower scope, the formulations of exclusive legal positivism espoused by Waluchow (EP) and Gardner (LP) cannot be defended by the claim view either. Both formulations state that the existence of a valid legal rule or norm solely depends on its social sources, not on its moral qualities, and we have established that the pragmatics of legal language makes the identification of some legal directives dependent on their possible immorality not being too obvious for the claim or pretense to be conceptually successful.

Therefore, my criticism of Raz’s argument for ST shows that the claim view only supports a doubly qualified version of the sources thesis:

\[
WST_2: \text{The existence and content of typical and non-obviously-immoral legal systems depend on facts of human behavior and not on moral considerations.}
\]

The non-obvious-immorality qualification is independent from the typicality qualification associated with the condition of sincerity. The latter qualification seeks to accommodate the fact that a coercive normative system does not necessarily require to make a sincere claim to be classified as law. Thus, it suffices for a normative system to be classified as

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85 Raz, The Authority of Law 39-40, 47.
law that it merely pretends to be authoritative (without a good faith endorsement of the
proposition that the authority is morally legitimate). The non-obvious-immorality
condition accommodates a different fact, namely, the fact that, though legal officials can
abnormally pretend to be authoritative even if they don’t believe in their moral legitimacy,
even pretense is pragmatically defective in cases of obvious injustice or immorality. There
is, in fact, a pragmatic contradiction between pretending to be morally legitimate and
enacting heinous moral directives. One consequence of this conclusion is that Raz’s case
for exclusive legal positivism does not apply to obviously immoral legal systems.
Paradoxically, we need to resort to moral considerations to properly demarcate the domain
of legal exclusion of moral considerations. Therefore, ST, EP, LP and any other rendition
of exclusive legal positivism should be qualified in the WST double fashion if their
defenders wanted to justify them on the basis of Raz’s pragmatic presupposition argument.

Raz offers an alternative argument that further reduces the set of grounds to a “minimalist
premise”:

Its premiss is nothing more than the claim that it is part of or notion of legitimate authority that
authorities should act for reasons, and that their legitimacy depends on a degree of success in doing
so.86

Raz argues that, if legitimacy depends on a degree of success in acting for reasons, an
authoritative directive must be presented as the authority’s view. At first blush, this
inference looks like a non-sequitur, and Raz makes no effort to explain it. Perhaps he
thinks of this kind of inference. Suppose an authority issues a directive. By the minimalist
premise, he acts for reasons in issuing the directive. Therefore, the authority must be
assumed to think that the normative content of the directive is sound. This is similar to the
first feature. But this inference is a non sequitur. In fact, the authority’s reasons to issue
the directive might well be that he will benefit by subjects doing as the directive tells them
to do. So the first condition might only be true of typical legal systems.

86 “Authority, Law, and Morality” 204.
Raz also assumes that the fact that an authority issues a directive changes the subjects' reasons. Presumably this assumption also derives from the minimalist premise. An authority would not issue a directive if he is incapable of making a difference by doing so. From this assumption Raz wants to derive a condition similar to the second feature:

The existence and content of every directive depend on the existence of some condition which is itself independent of the reasons for that directive. Moreover, that further condition cannot simply be that that or some other authority issued another directive.  

But an authority cannot expect to have a reasonable degree of success in making subjects hold him to possess legitimate authority if his directives are evidently immoral. The existence and content of an authoritative directive depends on conditions of human behavior, but this does not mean that they are totally independent of the reasons for that directive. If the only moral reasons relevant to the directive are clearly against it, and the opposition between the directive and the reasons against it is obvious, the authority cannot present its overtly immoral view with the purpose of successfully changing subjects’ reasons. At most he can expect subjects to be credibly threatened to do as the directive orders. So the alternative argument also requires the non-obvious-immorality condition.

VI. Conclusion

I have argued that Raz’s claim view is immune to the main criticisms that have been leveled against it. One way of defending the claim view is to clarify its content. On the account I have proposed, the claim view includes the conceptual thesis and the semantic singularity thesis but rejects the semantic entailment thesis, which is clearly inconsistent with the sources thesis. Instead of the semantic entailment thesis, Raz’s claim view should be interpreted as defending the pragmatic presupposition thesis. Thus, even if we accept that legal and moral obligations have the same meaning, law does not entail that it has legitimate authority. Rather it pragmatically presupposes it has authority in intending its

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87 Ibid.
view about how people ought to behave to be taken by people as exclusionary reasons for making their decisions in those areas regulated by law.

The scope of the claim view should also be clarified. Raz contends that a claim to legitimate authority can be ascribed in a *de dicto* way to typical legal systems, that is, systems that use moralized language and whose spokesmen typically believe in their legitimate authority. Despite Raz’s assertions, only a moderate version of exclusive legal positivism can be derived from the presuppositional account of law’s claim to legitimate authority. That moderate version only applies to typical and non-evidently-immoral legal systems. There are two reasons for this scope restriction. First, law sometimes does not sincerely claim to have moral authority; it may merely pretend to have authority. Atypical legal systems of this kind do not entail that they are capable of being authoritative in the sense that its norms can be identified without recourse to moral reasoning. In fact, unlike sincere claiming, pretense and deceit do not require an accurate belief about the conceptual and factual features of law. Second, the pragmatic presupposition of moralized legal language can be canceled by law’s obvious immorality. As law’s claim is a pragmatic presupposition, it is subject to the peculiarities of context and background. If the immorality is plain and uncontroversial, official speakers cannot even pretend that the system has legitimate authority. In effect, any communicative content presupposed by the use of moralized language gets canceled as a result of the system’s pragmatically contradictory commitments. I conclude that Raz’s argument for exclusive legal positivism cannot exclude background moral considerations from law.