Abstract
The question of how legal directives bear on our reasons for action constitutes one of the pivotal quandaries with which legal philosophy grapples. This paper examines one influential thesis in this regard: Joseph Raz’s pre-emption thesis. According to the pre-emption thesis, the reasons provided by authoritative directives are not to be added to all other reasons that are relevant when assessing what to do, but rather should exclude some of them. I argue that although at first glance the pre-emption thesis seems appealing, on closer inspection fundamental difficulties are revealed. Focusing on its application in the legal context, I challenge that thesis, noting that an alternative conception – which I term the weighing-conception – is not susceptible to the same challenge. I commence by pointing out certain cases in which subjects ought to, and are likely to, disobey a directive, acting on moral reasons. I then turn to probe two questions: (1) whether the pre-emption thesis purports to apply in these cases, i.e. whether the directives concerned are authoritative ones; and (2) whether, assuming that the pre-emption thesis is applicable, these cases can be reconciled with the thesis by distinguishing the reasons for which subjects disobey from the reasons alleged to be excluded.

As to the first question, I submit that no satisfactory criterion is capable of ruling out the possibility that the pre-emption thesis purports to apply in the cases under discussion. One of the main criteria I examine in this respect is embodied in a concomitant thesis of Raz’s: the normal justification thesis. I consider whether the authoritativeness condition laid down by the normal justification thesis can be met in the cases concerned (if so, this authoritativeness condition will not preclude the pre-emption thesis’s applicability). I illustrate that given Raz’s characterizations of the normal justification thesis, it is possible that a directive-issuer would comply with that thesis in the cases in question; thus, authoritativeness cannot be ruled out in these cases on the grounds of the normal justification thesis. As to the second question, I suggest that reasons for which subjects disobey in the cases concerned are in fact the same reasons that, according to the pre-emption thesis, are supposed to be excluded.

The cases under discussion, therefore, transpire to be cases where subjects ought to, and are likely to, act on those reasons alleged by the pre-emption thesis to be excluded. I conclude that these are counter-examples to the pre-emption thesis, and at the same time support is lent to the alternative model, i.e. the weighing-conception, being well suited to account for these cases.

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Introduction

In what way do legal directives – e.g. legal rules, decrees, and rulings – bear on practical reason? That is, in what way do legal directives bear on the reasons for action (i.e. reasons to act in a certain manner) of the people to whom they are addressed? Joseph Raz’s pre-emption thesis offers a possible basis for an answer to this thorny and fundamental question. The thesis contends that:

…the fact that an authority requires performance of an action is a reason for its performance which is not to be added to all other relevant reasons when assessing what to do, but should exclude and take the place of some of them.

The above thesis – and, at its heart, the Razian notion of exclusion of reasons – has had a remarkably profound impact on the study of jurisprudence. Many nowadays conceive of law’s normative force and the notion of legal authority in terms of that thesis: to bind authoritatively means, on this understanding, to provide pre-emptive reasons. But the pre-emption thesis’s repercussions reach even further provinces. The thesis has been assigned an important role in the advocacy of Raz’s exclusive positivism against other prominent schools of thought in contemporary jurisprudence. Roughly put, the argument to this effect is that law can pre-empt reasons for action only if its content is identifiable without recourse to those reasons for action, and since authoritative law does (and is meant to) pre-empt reasons for action, it must be the case that its content is identifiable that way. These far-reaching implications of the pre-emption thesis leave no doubt, to my mind, as to the importance of scrutinizing the thesis’s own validity and strength. It is this task that is taken up in this paper.

I shall begin by sketching the main tenet of the pre-emption thesis. The term ‘exclude’, figuring in the thesis, is employed by Raz to suggest that an authoritative directive, in addition to giving a reason for action, gives an exclusionary reason: a reason to refrain from acting on certain other reasons. Such exclusionary reasons are conceptualized by Raz as belonging to a second order of reasons, since, instead of bearing directly on our actions,
their effect pertains to other (first-order) reasons for action.\textsuperscript{7} Exclusionary reasons do not compete in weight with the reasons they exclude, as reasons of the same order do where they conflict with one another. Rather, in the case of a conflict between exclusionary reasons given by an authoritative directive and the purportedly excluded first-order reasons, the former will always prevail regardless of the weight of the latter.\textsuperscript{8} Which reasons are thus excluded? Raz’s answer is that an authoritative directive excludes the reasons underlying it, i.e. first-order reasons which the authority had power to consider when issuing that directive.\textsuperscript{9} At various occasions, however, Raz refers to a narrower scope of excluded reasons, to the effect that not all of the underlying reasons for and against the directive-act are said to be excluded, but rather only those against it.\textsuperscript{10} To illustrate the gist of the pre-emption thesis, consider the following example. John drives to his workplace through a road on which the driving speed limit, set by a legal authoritative rule, is 40 mph. According to the pre-emption thesis, John ought to treat this rule as an exclusionary reason; thus, for instance, even if John is late to work, which may be a reason for him to drive faster than 40 mph, under the speed limit rule he should \textit{not} act on a balance of reasons that weighs up this reason to drive faster than 40 mph against the opposing reasons the rule provides, as the rule excludes the former from his reasons for action.

An alternative conception, which Raz refers to as the ‘common view’ and which he then dismisses,\textsuperscript{11} is what I shall entitle here \textit{the weighing-conception of legal directives’ bearing on practical reason} (in short, \textit{the weighing-conception}). On this view, the way authoritative directives affect practical reason is explicable by the property of weight, rather than by reference to the notion of exclusion. That is, legal authoritative directives do not exclude any reasons for action. Rather, they give rise to certain reasons that operate and compete with other reasons, merely by means of their weight. The weighing-conception, as defined herein, is in fact a generic title broad enough to encompass a range of nuanced approaches. One such approach, for instance, runs along the following lines: the effect of a legal authoritative directive on our practical reasoning may be grounded, \textit{inter alia}, in the fact that the authority is in a better position to make the relevant decision, as it has advantageous knowledge, expertise, insight into broader and long-term policy

\textsuperscript{7} ibid 36, 39.
\textsuperscript{8} ibid 36, 40, 189, 190. Note that, according to Raz, conflicts between two exclusionary reasons turn on their relative weight (ibid 40).
\textsuperscript{9} ibid 192; J Raz, 'Facing Up: A Reply' (1989) 62 S Cal L Rev 1153, 1194 (hereafter ‘Raz, FU’).
\textsuperscript{10} J Raz, 'The Problem of Authority: Revisiting the Service Conception' (2006) 90 Minn L Rev 1003, 1018 (hereafter ‘Raz, PA’); Raz, PRN (n 1) 144.
\textsuperscript{11} Raz, PRN (n 1) 191–192. More precisely, he discusses at this juncture one possible approach that can be subsumed under the weighing-conception.
considerations, etc. To the extent that these conditions obtain, in the presence of an
authoritative directive prescribing an act \( A \), we have reasons to regard the case for doing \( A \) as
weightier than it would have seemed to us in our independent and uninfluenced judgment.\(^{12}\) Furthermore, a legal authoritative directive may bring about an actual shift in the balance of
reasons; it may give rise to some reasons for action that place weight on the balance, tilting it
in favour of doing what the authority requires. For example, an authority may have better
resources, effective measures of enforcement and salience, all of which render it apt to affect
the conduct of people; this means that, insofar as we want to coordinate with others, we have
a further reason to follow the authority’s directives.\(^{13}\)

The preceding factors, when present, make it likely that by following a given
authoritative directive subjects would improve their conformity with reasons applying in the
relevant context. Further reasons, to which legal authority gives rise, derive from more
general considerations related to the overall function of a legal system (rather than
consideration of conformity with reasons underlying a particular legal directive or a
particular legal context). For instance, the violation of at least some types of legal directives
may have undermining repercussions for the effective functioning of a legal system, which
is, in turn, normally essential to the securing of certain goods that are vital from the
perspective of citizens.\(^{14}\) Such factors may entail an additional reason to follow legal
directives.\(^{15}\) These are merely examples meant to illustrate the main principle of the
weighing-conception; they are not an exhaustive list of the reasons that arise in the presence
of legal directives, nor need we enter into discussion concerning the foregoing examples and
the extent of their application.

According to the weighing-conception, then, the reasons generated by an
authoritative directive conjoin with other reasons subjects have (regardless of the law) for
performing the act prescribed by the directive, if they have such reasons, and assign
additional weight in favour of this course of action. Moreover, these legal reasons compete in
weight with reasons subjects have against the directive-act, in cases where they have such
reasons. The weightier these legal reasons, the more they would tip the balance in favour of


\(^{13}\) See: Regan (n 12) 1025–1031; Alexander (n 12) 7.

\(^{14}\) For example, it is likely to be conducive to their ability to predict the consequences of their acts, and thus to advance certainty about what they ought to do; it provides non-violent means of dispute-resolution, etc.

\(^{15}\) This may connote the Rawlsian duty to comply with just institutions (J Rawls, A Theory of Justice (Revised edn, OUP, Oxford 1999) 293).
acting as the directive prescribes. Accordingly, at least under certain conditions, it would be appropriate to adopt a (defeasible) presumption that authoritative directives should be followed. Indeed, it is not suggested by the weighing-conception that whenever a subject deems that a directive he faces is wrong, or envisages good reasons against the act it prescribes, he ought to defy it. Rather, on this conception, a subject ought to defy a directive only where, despite the tilting effect legal reasons have on the balance of reasons, reasons against the directive-act are weightier than (non-legal and legal) reasons in favour of it.

The discussion in this paper will not concentrate on the weighing-conception. Instead, the analysis poses a challenge to the pre-emption thesis, while the weighing-conception figures in the background as an alternative that is unsusceptible to the same challenge. Thus, insofar as the pre-emption thesis will fall short of the mark, credence will be lent to the weighing-conception. I shall now introduce the method I am going to use in order to challenge the pre-emption thesis. For this purpose, consider the following hypothetical dialogue:

George: Reasons of type X (hereafter Reasons-X) exclude reasons of type Y (hereafter Reasons-Y), rather than being added to them. Thus, whenever there occurs a conflict between Reasons-X and Reasons-Y, the former will prevail regardless of the relative weight of these reasons.

Catherine: Your claim is an appealing one but, at the end of the day, I think it is incorrect. Reasons-X do not exclude Reasons-Y, and thus whenever there occurs a conflict between the two reasons it will be resolved by their relative weight. In many cases, Reasons-X and Reasons-Y will not be in conflict at all. Moreover, where such a conflict arises, often Reasons-Y will be less weighty than Reasons-X, and thus the latter will prevail (we may even adopt, at least under certain conditions, a presumption to that effect). Hence, practically, in many cases it will appear as if Reasons-X exclude Reasons-Y, and this appearance might lead one to think in terms of exclusion. However, what is really taking place here is that Reasons-X overcome Reasons-Y by virtue of weight.

George: Your claim is interesting. But can you prove it?

Catherine: One way of proving it is to show that in some cases (at least one) of a conflict between Reasons-X and Reasons-Y, where the latter reasons are very weighty, they prevail over the former and not the other way around. Such a phenomenon cannot be accounted for by an exclusion-conception,

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while it is explicable by a weighing-conception. If you agree with me (as I think you would) on what is the right practical resolution, i.e. what is the right thing to do, in these cases, then you will have two available ways to defend your exclusion claim: (1) showing that reasons which are defeated in these cases are in fact not Reasons-X (and hence are not the type of reasons claimed to be exclusionary); or (2) showing that reasons which prevail in these cases are in fact not Reasons-Y (and hence are not the type of reasons alleged to be excluded). If I manage to show at least one such instance in which neither (1) nor (2) are valid, I will have made the case against your account and lent support to the alternative account.

A similar principle is applied in this paper regarding the contention that legal authoritative directives are exclusionary reasons: I introduce a category of cases in which subjects face a certain legal directive, but should act (and, we may expect, many of them would act) on moral reasons to the effect of disobeying that directive (Section 1). I proceed to investigate two issues: (1) whether the pre-emption thesis purports to apply in these test cases, i.e. whether the directives in question are authoritative (Section 2); and (2) whether the pre-emption thesis, if it is supposed to apply, may accommodate these test cases by affirming that the reasons prevailing there are not within the purview of the allegedly excluded reasons (Section 3). I submit that: (1) no satisfactory criterion is able to rule out the possibility that the pre-emption thesis purports to apply in these test cases; and (2) the reasons prevailing in these test cases are in fact the same ones that, according to the pre-emption thesis, are supposed to be within the scope of excluded reasons. Hence, I argue, these are counter-examples to the pre-emption thesis, as they turn out to be cases where subjects ought to, and are likely to, act on reasons alleged to be excluded.

A few more preliminary remarks are in order before we turn to the argument. First, some suppositions I make and terminology I employ: (1) the analysis proceeds on the assumption that authoritative law makes a certain difference in terms of subjects’ practical reason, i.e. that it affects in some way what subjects ought to do. (2) My terminology includes references to authoritative law as a reason for action or as generating a reason for action. By this, I do not mean to contest the substantive view that the law itself (or, the fact that a certain law exists) is not, and does not generate, a reason for action, but rather it is merely indicative of reasons for action that subjects have irrespective of the law or it changes reasons for action by affecting factual conditions.17 In principle, this view fits into the category I term the weighing-conception. Having said that, it is impossible to discuss here the

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17 Suggestions along similar lines have been made, for example, by Donald Regan (Regan (n 12) 1022–1032) and by Larry Alexander (Alexander (n 12) 7–9). See also: Perry (n 12) 930, noting that authoritative directives are not ‘objective’ reasons for action.
further question of whether law actually generates reasons. (3) The discussion presupposes that reasons for action generated by authoritative law are, as termed by Raz, ‘content-independent’ ones. Namely, that an authoritative directive obtains its status as a reason for action because it emanates from an authoritative source, and not due to the merits of the act it prescribes. The content-independence thesis, it bears noting, is requisite for the pre-emption thesis’s validity; for if one holds that the status of a given authoritative directive as a reason for action is predicated, partly or wholly, on the merits of the act it prescribes – i.e. its conformity with underlying reasons – one may not allege, as the pre-emption thesis does, that the directive is a reason for action which excludes its underlying reasons.

Another cluster of preliminary comments should be made about the confines of this paper: (1) it is an examination of the notion of exclusionary reasons merely in the legal context, i.e. the claim that legal authoritative directives exclude reasons underlying them. The paper will not discuss Raz’s contention that our practical reason in respect of various other normative concepts, which extend beyond the legal sphere (e.g. decisions, personal rules, promises), is best captured by the notion of exclusionary reasons. Nothing that will be asserted here, therefore, should be understood as an assertion regarding these normative concepts. Similarly, the discussion shall focus on legal authorities, rather than non-legal authorities, such as the one parents exercise over their children. (2) The analysis will concentrate on mandatory authoritative directives, i.e. directives requiring a certain action or abstention, imposed by an authority; it will leave aside other types of legal norms, such as voluntarily incurred legal obligations (e.g. contractual ones). (3) The bearings of

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18 Raz, MF (n 2) 35–37.
20 Raz, PRN (n 1) 40, 191.
21 For more general objections levelled against the notion of exclusionary reasons, see: DS Clarke, 'Exclusionary Reasons' (1977) 86 Mind 252; Moore (n 19); Dare (n 4) 18–32.
22 I use the term ‘authorities’ to denote what Raz terms practical authorities; according to Raz, these are authorities whose utterances are themselves reasons for action, in contrast to theoretical authorities whose utterances as such merely provide reasons to believe in the existence of a certain state of affairs (Raz, PRN (n 1) 62).
23 The term ‘directives’ is purported here to include both utterances whose subject matter and addressees are narrowly defined, and utterances (such as rules) whose subject matter is more general and whose addressees are normally unspecified.
24 I shall also not discuss what Raz calls permissive norms (Raz, PRN (n 1) 85–97), though it seems to me that the conclusion reached here is applicable, mutatis mutandis, to that context. For a critical analysis of exclusionary reasons and pre-emptory force in connection with rights, see: NE Simmonds, Central Issues in Jurisprudence: Justice, Law and Rights (Sweet & Maxwell, London 2002) 256–263, 298–304. As for power-conferring legal norms (Raz, PRN (n 1) 97–103), whether they confer power to create (or change or submit to) exclusionary reasons turns on whether other legal norms are exclusionary reasons.
authoritative directives on practical reason shall be viewed primarily from the perspective of subjects of the law, rather than that of legal officials.25

A final stipulation is methodology-related. It is impossible to explore, in the present confines, the methodological controversies concerning the nature of evaluative judgments bound up with legal theory.26 It should be noted, however, that the argument advanced in this paper, if valid, is likely to have bearings, inter alia, under Raz’s own methodological premises. According to Raz, his account of authority is meant to single out ‘…important features of people’s conception of authority.’27 It implicates an explanatory element (explaining conceptions people actually have) but also an evaluative filter (referring only to important features). Now, in the present paper, I shall point out that where subjects face a directive that is clearly immoral in the extreme, they should – and many of them would – disobey, and I shall argue at length that this is irreconcilable with the pre-emption thesis. How could this argument be translated into Razian methodological terms? First, the argument indicates cases where subjects’ actual conduct, and by the same token their true conceptions,28 might be inconsistent with the pre-emption thesis; second, the argument stresses that subjects should act (not merely do act) that way, entailing that such conduct reflects important rather than aberrant attitudes. This comment however is not to suggest that the present analysis is committed to Razian premises as to the nature of evaluative judgments figuring in jurisprudence.29 With these preliminaries in mind, let us embark on substantive discussion.

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25 For Raz the pre-emptive force of the law applies also to courts, though a legal system may allow courts some leeway regarding the application of laws (J Raz, 'Postema on Law’s Autonomy and Public Practical Reasons: A Critical Comment' (1998) 4 Legal Theory 1, 18).
27 Raz, MF (n 2) 65–66; Raz, EPD (n 4) 193, 236–237.
28 The actual conduct of agents does not always necessarily correspond with their conceptions. Conceivably, due to different kinds of human error agents can make as well as problems of weak-will, they might act in a way which deviates from what is really entailed by their bedrock-level normative conceptions. However, these are typically not the circumstances in the test cases which will be discussed here.
29 Inasmuch as one holds that legal theory must engage in moral evaluations concerning the justification of law, the scope of the duty to obey, etc., one is likely to take Raz’s ‘evaluative filter’ as implicating similar evaluations. By contrast, Julie Dickson proposes that Razian legal theory should be seen as ‘evaluative-but-not-morally-evaluative’ (J Dickson, Evaluation and Legal Theory (Hart, Oxford 2001) 29–69; Dickson (n 26) 125).
1. Posing the challenge and delimiting the possible rejoinders

1.1. The challenge set out

There are different types of cases in which one ought to violate a legal directive. The discussion in this paper will draw on one such category of cases, which, for reasons of brevity, I shall entitle: Situation A. Under Situation A, a subject of the law faces a directive (issued by a state official or institution) that is clearly immoral in the extreme. Assume that the immorality involved is so grave that it decisively requires disobeying the directive, outweighing any other consideration for obedience (if any such consideration is present). For instance, a directive to take the life of an innocent person would be, at least in normal circumstances, an extremely immoral directive, and thus may well give rise to a Situation A. Labouring our imagination much further is not necessary, as the history of mankind, and particularly that of the last century, furnishes myriad examples of Situation A. Now, in Situation A subjects should not, and it seems that many of them would not, obey the directive. In so doing, subjects would act on moral reasons (for Raz, first-order reasons) pertaining to the act they are being told to perform, and this is what they ought to do.

That a subject ought to disobey in such an extreme situation is uncontroversial among legal philosophers, though further concomitant questions are moot: e.g. some hold that a gravely iniquitous directive cannot be a law in the appropriate sense of the word or that it is, at best, a ‘lawless law’, while others maintain that it may properly be called a law, but

30 At this stage I leave open the question of whether that official or institution possesses authority, generally or according to Raz’s conditions of authoritativeness. I elaborate on this issue in Section 2.
31 The definition of Situation A does not presuppose any specific theory of ethics. Moreover, the qualified formulation of Situation A suggests that directives it takes in are such that would likely be regarded as intolerable according to a variety of ethical approaches.
32 This conforms to a wide range of ethical approaches. Even those who hold that in principle such an act may be justified under some circumstances on the footing that it induces greater gain than loss are likely to confine this conviction to very special circumstances.
33 It is not likely that all subjects would disobey under Situation A, nor that in every political culture, in all conditions, and however intensely coerced, the bulk of them would actively resist or refuse to cooperate with such acts. Note in this regard S Milgram’s well-known behavioural study concerning obedience to authority (S Milgram, Obedience to Authority: An Experimental View (Tavistock, London 1974)).
ought to be contravened on moral grounds. Of those who envisage a general \textit{prima facie} moral obligation to obey the law, some hold that this obligation does not apply at all to an austerely iniquitous directive, whereas others might propose that the obligation applies there but is defeated by competing considerations. Regardless of these questions, Situation A refers to the common ground that a subject ought not to follow such a directive, which is the only ground requisite at this stage of the analysis.

In the following sections I investigate whether Situation A indeed contradicts the pre-emption thesis. It might not embody a counter-example to the pre-emption thesis if the thesis is simply not applicable in this situation since the directive in question is not authoritative (hereafter \textit{the no-authority reply}). Moreover, it might not form that counter-example if, assuming that the pre-emption thesis is applicable, it can be established that the reasons for which subjects defy, and ought to defy, the directive in question are outside the scope of reasons that are purported to be excluded (hereafter \textit{the scope-of-exclusion reply}).

Prior to further discussion, it is worth emphasizing that Situation A does not encompass every case where an act prescribed by a directive is less than optimal or even morally wrong. Both according to the pre-emption thesis and according to the weighing-conception it may well be that subjects ought to follow directives in such cases. From a weighing-conception perspective, as noted earlier, one may seek to explicate this by various (content-independent) reasons to obey the law, which are likely to outweigh a minor or moderate deficiency of a certain directive. Such cases, therefore, are unrevealing for our purpose. Situation A is different: it is a situation in which the wrongness of the directive is of \textit{very hefty magnitude}, rendering disobedience warranted.

\begin{thebibliography}{99}
\bibitem{Hart200} Hart (n 26) 200–212. Schauer states that: ‘positivist theory allows the citizen to refuse to obey morally reprehensible laws.’ (Schauer (n 16) 200).
\bibitem{Finnis26} Finnis (n 26) 360; Dworkin, TRS (n 34) 192–193.
\bibitem{Raz202} In section 2, I take up the questions of whether such a directive is necessarily not authoritative; on the basis of what criteria this can be established, and what implications those criteria have for the pre-emption thesis.
\bibitem{RazFU9} On one occasion, Raz states in a footnote that ‘if for some reason the conflict between the exclusionary reason and the first-order reason is not a partial one but a head-on collision’ the conflict resolution will turn on the respective weight of these reasons (Raz, FU (n 9) 1168). I am not certain how broadly he intends this statement to apply; does he mean that whenever subjects encounter a directive that fails to reflect the relevant background reasons (as in Situation A, but also other situations), they should act on the balance of reasons rather than obey the directive? If so, the notion of legal exclusionary force becomes an extremely emaciated notion, incongruent with the one emerging from the rest of Raz’s writing.
\bibitem{RazPRN1} The wrongness of the directive is, by hypothesis, also a \textit{clear} wrongness. In this context, Raz remarks: ‘Establishing that something is clearly wrong does not require going through the underlying reasoning’ (ibid 62). (The wording ‘going through the underlying reasons’ here should be taken as deliberating or reflecting on the underlying reasons). N.B., the question relevant to our discussion is whether subjects act on underlying reasons, and not whether they must engage in extensive deliberation or reflection on these reasons. These two questions are very different ones, as Raz acknowledges (Raz, PRN (n 1) 25; J Raz, \textit{The Authority of Law}:
1.2. Usual and unusual cases

Moving on to examine how Situation A bears on the pre-emption thesis, one may notice that this situation is a rather unusual one. This might bring into discussion comments of Raz, in which he qualifies the claim of exclusionary force with regard to some unusual cases. For instance, when discussing an example regarding a soldier who treats his superiors’ commands as exclusionary reasons, Raz notes: ‘[the soldier] admits that if he were ordered to commit an atrocity he should refuse. But his is an ordinary case, he thinks, and the order should prevail.’\textsuperscript{43} (i.e. it should prevail regardless of the balance of first-order reasons). One might get the impression, then, that Raz would respond to Situation A simply by asserting that, even if we acknowledge that in this set of cases subjects act on background reasons, these are unusual cases and thus cast no doubt on the pre-emption thesis’s validity as an explanation of the vast majority of cases.

However, it seems that we should not take Raz to be advancing the preceding argument, at least not as a self-contained argument. Rather, he appears to found the distinction between ordinary and exceptional cases on some criteria that would strive to explain exceptional cases, such as Situation A, as cases that fall either under the no-authority reply or under the scope-of-exclusion reply. These replies should be read into Raz’s remark quoted above, for the following reasons. First, although at some points, such as the foregoing quotation, Raz does not explicitly mention the issues of lack of authority or scope of exclusion, at several other points where he distinguishes between ordinary and exceptional cases he does so expressly on the grounds of authoritativeness conditions or the scope of exclusion.\textsuperscript{44} It is likely, then, that the same reasoning is tacitly presupposed by comments such as the above. Second, a different construal of Raz would be implausible: it would clearly be insufficient to say, regarding a case where subjects act on background reasons, that the case is exceptional without further explaining why and in what respects it is exceptional. Obviously one cannot defend a theory merely by asserting that instances incompatible with it are exceptional ones. Even legal theories that overtly adopt a methodology that distinguishes between central cases and peripheral cases do not pick and choose cases \textit{ad hoc}.\textsuperscript{45} Instead,
they draw distinctions based on relevant criteria, thus ‘…one’s account of the other [i.e. peripheral] instances can trace the network of similarities and differences, the analogies and disanalogies, for example, of form, function, or content, between them and the central cases…’

In light of the above, it is far more plausible that Raz has in mind certain criteria on the grounds of which exceptional cases can be differentiated from ordinary ones, even where he is not explicit about it. In our context, the possible ways to establish such differentiation would be either through the no-authority reply or through the scope-of-exclusion reply.

These constraints on our discussion also emerge from the dialogue articulated in the introductory section. The very point of a proposition that reasons of a certain type (any type) exclude reasons of another type is that the former surmount the latter regardless of their relative weight. In this sense, exclusion is a conclusive concept; whenever the conditions for its application obtain, i.e. whenever there is a conflict between purportedly exclusionary reasons and purportedly excluded reasons, the former must triumph over the latter. It is this conclusive character of the thesis under discussion that dictates the way to meet the challenge posed here: if one suspects that in a certain case purportedly exclusionary reasons are defeated by purportedly excluded reasons, and if there is no debate over what an agent ought to do in this case, the only way to dispel such doubts is either by explaining why the former are not supposed to be exclusionary reasons or by explaining why the latter are not supposed to be excluded ones. One or some instances, however rare or unusual, in which the foregoing cannot be established, would make the case against the exclusion claim. In fact, insofar as one concurs that generally there are some good reasons for obeying legal directives, one can only expect that if there exist cases where legal directives ought to be disobeyed, these will be unusual ones; for these cases must be such that they involve reasons for disobedience that are even weightier than the reasons we have for obedience. Having delimited the possible replies to our challenge, let us proceed to explore the first of them: the no-authority reply.

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46 ibid 10–11.
47 pp 5–6.
48 There is a different sense in which it is not claimed by Raz that exclusionary reasons must be absolute nor conclusive (Raz, PRN (n 1) 27–28), as he accepts that they might be cancelled by certain conditions or overridden by reasons outside their scope of exclusion or by other second-order reasons. My analysis takes these provisions into account, and therefore searches for a counter-example in the form of a case in which purportedly (valid) exclusionary reasons are overridden by first-order reasons that are supposed to be within the scope of exclusion.

49 Similarly, the principle expressed in the above dialogue entails that other arguments attempting to evince weaknesses of the weighing-conception or an appeal the pre-emption thesis may have (e.g. Raz’s argument from subjects’ psychological phenomenology (ibid 40–45, 74–76)) are not objections to the present thesis, unless they are able to accommodate the recalcitrant cases pointed out here, i.e. Situation A. (For a critique of the phenomenological argument, see: C Gans, 'Mandatory Rules and Exclusionary Reasons' (1986) 15 Philosophy 373, 387–390; Dare (n 4) 27–28; Moore (n 19) 860–863. See also: Raz, FU (n 9) 1164–1165).
2. Lack of authority

The no-authority reply contends that directives in Situation A are not authoritative ones, and thus the pre-emption thesis is not supposed to apply in this situation. In this section, I show that authoritativeness cannot be ruled out under Situation A, at least not on the basis of authoritativeness conditions that are compatible with the pre-emption thesis. I elaborate particularly on the authoritativeness condition set forth by Raz’s normal justification thesis, probing whether this condition can be met under Situation A. The answer, as we shall see, depends on further questions regarding the way in which the normal justification thesis is meant to apply. I articulate three different possible ways to conceive of the normal justification thesis in that respect. I argue that Raz endorses one of these three understandings, whereas his position departs widely from the other two. I then illustrate that, given Raz’s characterizations of the normal justification thesis, it is possible that a directive-issuer in Situation A would comply with that thesis; thus, authoritativeness cannot be precluded in Situation A on the footing of the normal justification thesis.

On what grounds can the no-authority reply claim that directives in Situation A are not authoritative ones? To start with, it is conspicuous that the no-authority reply may not establish that a certain directive is not authoritative on grounds that the directive’s content is objectionable, i.e. failing to reflect underlying reasons. For it would be circular to state that directives, if authoritative, exclude underlying reasons, and at the same time to concede that what determines whether a directive is authoritative, and thus excludes underlying reasons, is its conformity with underlying reasons. To be successful, then, the no-authority reply must use some other conditions of authoritativeness as its fulcrum. We may indeed find in Raz some such other conditions of authoritativeness.

2.1. The service conception of authority

Raz’s service conception of authority lays down conditions of authoritativeness that appear to be distinct from a case-by-case content-based evaluation of directives, and, thus, may be suitable to uphold the no-authority reply. On this conception, an alleged authority must meet two conditions in order to acquire legitimate authority: (1) chiefly, that subjects are more likely to conform to (background) reasons applying to them if they follow the directives of that alleged authority, rather than trying to follow their own judgment on the merits (Raz terms this condition the normal justification thesis); (2) even where the normal justification

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50 Raz, MF (n 2) 53.
thesis is complied with, the matter being regulated must be one in which it is more important to act in conformity with reason than to decide for oneself how to act (Raz terms this condition the independence condition). This condition would not be met in certain domains characterized by special intrinsic desirability that people would follow their own light, e.g. in the case of one’s choosing of one’s friends and partner. In the framework of Raz’s service conception, therefore, lack of authority is attributable to non-compliance either with the normal justification thesis or with the independence condition. I shall accept, arguendo, the service conception, and will examine the no-authority reply on this basis.

It is easy to discern that Situation A may occur where the independence condition obtains. That is, if we assume with Raz that there exist distinct domains where it is more important to decide for oneself than to conform to reason and distinct domains where it is more important to conform to reason than to decide for oneself, it is clear that Situation A may come about also in the latter type of domains. For instance, an order to take the life of an innocent person (most likely a Situation A) surely can figure in some domains – e.g. in a military operational context – that are not characterized by the special intrinsic desirability of individual self-governance which is referred to by the independence condition. This being so, the analysis in this section will henceforth concentrate on the first condition of authoritativeness mentioned above, i.e. the normal justification thesis.

Is it necessarily the case that a directive-issuer under Situation A would not comply with the normal justification thesis? The answer, I shall contend, is negative. Given Raz’s characterization of the normal justification thesis, it is possible (though surely not always the case) that a directive-issuer under Situation A would comply with the normal justification thesis. As will be expounded below, whether a given directive-issuer complies with the normal justification thesis is a matter that will, inter alia, turn on the question at what level of generality the normal justification thesis is intended to apply. The normal justification thesis refers to the likelihood that subjects would better conform to reasons applying to them by following an authority. Raz stresses that this should be tested on an individual basis, i.e. with

51 Raz, PA (n 10) 1014.
52 Raz, MF (n 2) 57.
53 Raz’s dependence thesis contends that ‘all authoritative directives should be based on reasons which already independently apply to the subjects of the directives and are relevant to their action in the circumstances covered by the directive’ (ibid 47). As will be explained below (pp 26–27) Raz does not treat compliance with the dependence thesis regarding a given directive as a condition for its authoritativeness (ibid 38, 47, 55). Rather, this thesis only represents a standard of ‘an ideal exercise of authority’ (ibid 47). Yet, to comply with the normal justification thesis, one would probably need to accomplish at least a fairly good degree of compliance with the dependence thesis in most cases (see: ibid 55).
each person afresh taking into account his knowledge, understanding, skills, strength of character, etc. This nonetheless leaves some questions regarding the level of generality at which the test is wielded. I shall stipulate three possible understandings in this regard, and I shall argue that Raz endorses the third one. The three understandings are as follows:

1. The test is to be applied separately in respect of each legal directive, referring to the likelihood that an individual would conform better to the reasons underlying that particular directive by following it (hereafter the discrete-directives approach).

2. The test should refer to the likelihood that, by following all legal directives of a legal system, an individual would conform better to the entire range of reasons that apply to him and that are relevant to any directive of the legal system, on the balance of things, i.e. conformity with reasons in the case of some directives which outweighs non-conformity in the case of others (hereafter the cumulative approach).

3. The way to view the test lies in between the two foregoing approaches. While the test should not examine each particular directive in isolation, it is flexible enough to take account of variations in the degree of competence possessed by the directive-issuer and the subject, respectively, in various legal contexts. Given such variations, the test will refer to the likelihood that an individual would conform better to reasons germane to the legal context concerned by following all legal directives in that context. Directives may be contextually classified for this purpose according to their function and/or according to the domain they regulate, e.g. environmental issues, safety measures in workplaces, financial issues, national defence, etc. (hereafter the contextual approach).

It would be useful first to illustrate succinctly how the difference between these three approaches bears on whether a directive-issuer in Situation A can comply with the normal justification thesis. If we apply the discrete-directives approach it appears impossible that a directive-issuer in Situation A would meet the requirement set by the normal justification

54 Raz, MF (n 2) 73–74, 77–78, 104; Raz, EPD (n 4) 341, 347, 350. Yet, he agrees that in the case of some legal rules the obligation to obey is likely to apply equally to all citizens (ibid 341, 350).

55 The followings are not exhaustive of all possible ways to conceive of the normal justification. E Mian, ‘The Curious Case of Exclusionary Reasons’ (2002) 15 Can J L & Juris 99) notes that: ‘[i]t is possible to think of normal justification in terms of individual rules in particular encounters, and…in an aggregated sense, that is, across the lifetime of a rule or across a system or sector of rules’ (ibid 105). The first alternative Mian mentions is not discussed here, as I assume that the normal justification is tested in the long run. The second alternative he points out envelops three defferent sub-alternatives (a rule/a system/sector of rules) correlating the three understandings discussed here.
thesis. For, by following an extremely immoral directive, subjects would not better conform to the reasons relevant to their acts in the circumstances covered by that directive. If, on the other hand, we espouse the cumulative approach it is possible that a directive-issuer in Situation A would comply with the normal justification thesis, if the immoral directive concerned is an exception, while on the whole by following his directives subjects are better likely to conform to the entire array of reasons applying to them. Finally, if we adopt the contextual approach, it is also possible that the directive-issuer under Situation A would meet the condition laid down by the normal justification thesis. This will be the case if, despite the one deficient directive in question, his entire directives in the legal context concerned are likely to lead subjects to better conformity with the reasons applying to them in that context. For instance, a directive-issuer may be sufficiently skilled and well-informed regarding matters of national defence (as well as having the moral competence required in this context) and yet on a specific occasion might fail, to the effect of issuing a wrong directive related to that very context.

True, an incident of an extremely immoral directive may, *inter alia*, be a result of incompetence of the alleged authority generally or regarding the relevant context. Yet, local instances of a radically immoral directive resulting from a specific moral failure, misjudgement, human error, a breakdown in communication between officials, etc., may occur even where the authority is generally competent.56 This would not necessarily be the case and perhaps even is not likely to be the case, but it is possible. Therefore, it seems that under the cumulative approach or the contextual approach, the possibility that the normal justification thesis will be complied with in Situation A cannot be precluded. I shall return to examine in detail the implications of the generality of the normal justification thesis. But let us first discuss Raz’s position regarding the three approaches. At one juncture Raz adverts directly to the generality of the normal justification thesis:

On the one hand generality is built into the account: the normal justification of authority is that following it will enable its subjects better to conform with reason. One cannot establish that this is the case in one case without establishing that it is the case in all like cases. Authority is based on reason and reasons are general, therefore authority is essentially general. On the other hand the thesis allows maximum flexibility in determining the scope of authority. It all depends on the person over whom authority is

56 If one disagrees with this, I suspect that one’s notion of ‘general competence’ is not really general, and that one’s approach is in effect reducible to the discrete-directives approach.
supposed to be exercised: his knowledge, strength of will, his reliability in various aspects of life, and on the government in question.\textsuperscript{57}

This remark seems to draw near the contextual approach. While pointing out the generality of the normal justification thesis, Raz stresses that the thesis depends on factors like the subject’s individual knowledge and reliability \textit{in various aspects of life}, and by this he endows it with a contextual character. This is especially so since we know that in reality individuals’ skills usually vary from one domain to another. While some people are particularly skilled, for example, in matters of education, others would be remarkably apt in everything that has to do with mechanics. These inferences, which point to the contextual approach, find some corroboration in further comments of Raz:

Of course sometimes I do have additional information showing that the authority is better than me in some areas and not in others. This may be sufficient to show that it lacks authority over me in those other areas.\textsuperscript{58}

...the extent of the duty to obey the law in a relatively just country varies from person to person and from one range of cases to another.\textsuperscript{59}

Raz, therefore, allows differentiation between areas or ranges of cases to which rules apply. He mentions various ways of classifying rules, e.g. according to their function or the domain of human activity they regulate.\textsuperscript{60} Thus, for example, 'a]n expert pharmacologist may not be subject to the authority of the government in matters of the safety of drugs\textsuperscript{61} if in this context he is better likely to succeed by following his own judgments and disregarding the directives of the government.

It becomes transparent, then, that Raz’s position may sit comfortably with the contextual approach. Now, how distinct and distant is Raz’s approach from the cumulative approach? Very much so, I suspect. The cumulative approach appears to be at sharp variance with Raz’s piecemeal conception of the scope of legitimacy of governmental authorities.\textsuperscript{62} His conception in this regard is piecemeal in two closely related ways, which were alluded to above:\textsuperscript{63} first, in the sense that it discriminates between distinct contexts of legislation; second, in the sense that it admits differentiation between individuals,\textsuperscript{64} allowing

\textsuperscript{57} Raz, MF (n 2) 73.
\textsuperscript{58} ibid 68–69.
\textsuperscript{59} Raz, EPD (n 4) 341, 350.
\textsuperscript{60} ibid 341, 347–350; Raz, MF (n 2) 74.
\textsuperscript{61} Raz, MF (n 2) 74. See also: ibid 77–78.
\textsuperscript{62} Raz, MF (n 2) 70, 74, 80, 99–100, 104; Raz, EPD (n 4) 347, 350.
\textsuperscript{63} pp 14–17. Authorities, for Raz, are ‘relational both regarding who has to take an authority’s word as authoritative, and regarding what matters…’ (Raz, PA (n 10) 1033–1034).
\textsuperscript{64} n 54.
'considerable variations in the extent of governmental authority over the population over which it claims authority.' In contrast, the cumulative approach is, first, unreceptive to discrimination of contexts, and in this sense it views the question of whether or not a government obtains authority as an ‘all-or-nothing’ question. If, by following the law, a subject would better conform to the entire assortment of reasons applying to him, in the cumulative sense, i.e. conformity with reasons in the case of some legal directives which outweighs non-conformity in the case of others, then the government attains authority over him in all legal contexts. Second, the cumulative approach, since it treats the question as an all-or-nothing question, is more prone to yield the corollary that a reasonably just de facto authority will acquire legitimate authority to a broad and invariable extent over at least a large segment of the population. For it seems sensible to suppose that the regulation of society by a nearly just authority introduces some vital overall gains to individuals’ lives. From a subject’s point of view, even if in his own area of expertise (or, more rarely, areas of expertise) he is in a better position to decide than the authority is, this fact is likely to be outweighed, on the balance of things, by the overall gains the authority brings into his life (if indeed these factors are weighed against one another, as they are under the cumulative approach). Therefore, if one presupposes the cumulative approach, adopting an all-or-nothing test, one does not seem to have a reason to endorse a very qualified approach to the scope of legitimacy of governmental authorities, as Raz does.

At the justificatory level, the cumulative approach may seek validation from the notion that law’s normative force depends, to a considerable measure, on its systematic nature, i.e. its overall functioning as a legal system. This important feature of the law, one may hold, would be lost through contextual variations of the normative force different legal directives have (i.e. the normative force they have qua legal directives). This notion conforms to John Finnis’s ‘seamless web’ argument:

The law presents itself as a seamless web. Its subjects are not permitted to pick and choose among the law’s prescriptions and stipulations. It links together, in a privileged way, all the persons, and all the transactions…

On this view, a subject (call her Sarah) may well have a reason to obey laws she deems wrong or laws imposing burdens to which she has no intrinsic relation. Such a reason is

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65 Raz, PA (n 10) 1029.
66 This may be so, in part, due to basic functions of authorities, such as the facilitation of co-ordination, advancement of certainty, dispute resolution, etc.
67 JM Finnis, ‘The Authority of Law in the Predicament of Contemporary Social Theory’ (1984) 1 Notre Dame J L Ethics & Pub Pol'y 115, 120. Despite Finnis’s formulation (i.e. ‘The law presents itself…’), it seems that he refers not merely to what the law ‘claims’ but rather also to what the normative force of normal legal systems is.
partly embedded in an assumption that the bulk of her fellows obey (and if not, are coerced to obey) laws, including laws they deem wrong or laws imposing burdens to which they have no intrinsic relation, but which secure goods essential to Sarah.\textsuperscript{68} To demonstrate, a manufacturer may have a reason to obey the law, and thus, let us say, not to pollute a river that goes by her factory, even if she objects to anti-pollution regulations, since she recognizes that the law fulfils some essential functions such as protecting her factory from trespassers, enforcing her contractual rights, etc.\textsuperscript{69} (This line of thought is consistent with the fact that there are other (moral) reasons, of much greater gravity, to do or avoid doing what certain laws, respectively, prescribe or proscribe, e.g. a legal prohibition of murder). From the ‘seamless web’ perspective, the law’s quality of solving co-ordination problems in society is conceived of broadly, as having signification extending beyond the scope of particular discrete directives or classes of directives and lying also in the relation between people’s conduct under different directives across a legal system.\textsuperscript{70}

Thus accentuating the systematic nature of law may encourage one to think of a more general reference point embraced by the normal justification thesis, i.e. the cumulative approach more than the contextual one.\textsuperscript{71} Raz, however, envisages a much patchier image of the normative force of the law and a narrower notion of co-ordination.\textsuperscript{72} In an essay which is, in part, a reply to Finnis’s ‘seamless web’ argument, he notes that cases where co-ordination of a large number of people is required, ‘[a]lthough central to the normal functioning of the law, …cannot be generalized to generate an obligation to obey the law of a relatively just state’, \textit{inter alia}, since ‘not all laws purport to fulfil such a function….’\textsuperscript{73} This, too, brings out the stark difference between Raz’s normal justification thesis and the cumulative understanding of the normal justification thesis.

We have observed that Raz’s position bears some resemblance to the contextual approach and is far removed from the cumulative approach. It remains to be seen what Raz’s stance towards the discrete-directives approach is. Despite its contextual appearance, hypothetically Raz’s position could be compatible with the discrete-directives approach. This

\textsuperscript{68} ibid 20.
\textsuperscript{69} ibid 119.
\textsuperscript{70} ibid 135–136.
\textsuperscript{71} This is not to associate Finnis’s view with the normal justification thesis.
\textsuperscript{72} Yet, the notion of co-ordination Raz refers to is broader than that which is commonly used in game theory (Raz, FU (n 9) 1189-1194), and he stresses the centrality and primacy of the propensity to facilitate co-ordination in his normal justification thesis (Raz, FU (n 9) 1164, 1180; Raz, MF (n 2) 56; Raz, EPD (n 4) 341, 349).
\textsuperscript{73} Raz, EPD (n 4) 349.
would have been the case, had Raz approved contextual classifications that are so specific to the effect that a context, in the relevant sense, may be narrowed down even to the scope of one discrete directive. Let us further explicate this idea by using Raz’s own terms. Raz notes that:

…a person or body has authority regarding any domain if that person or body meets the condition regarding that domain and there is no proper part of the domain regarding which the person or body can be known to fail the condition.74

Suppose one discrete directive could count as ‘a proper part of a domain’ in the sense used by Raz above. This would entail that any single directive that fails to improve subjects’ conformity with background reasons is not authoritatively binding, which is the equivalent of the discrete-directives approach.

But, in fact, the discrete-directives approach runs afoul of Raz’s conception of authority, as the following remarks convey:

Authority is legitimate only where conformity with reason is better and more securely assured by following authority than by acting on one’s own. This is consistent with the fact that conformity to the authority’s demand may be, on occasion though not in general, sub-optimific. For example, on occasion it may fail to reflect correctly the underlying reasons which it is meant to reflect.75

An authority is justified, according to the normal justification thesis, if it is more likely than its subjects to act correctly for the right reasons. That is how the subjects’ reasons figure in the justification, both when they are correctly reflected in a particular directive and when they are not. If every time a directive is mistaken, i.e. every time it fails to reflect reason correctly, it were open to challenge as mistaken, the advantage gained by accepting the authority as a more reliable and successful guide to right reason would disappear.76

…sometimes immoral or unjust laws may be authoritatively binding, at least on some people. The existence of occasional bad law enacted by a just government does not by itself establish much. However just a government may be, it is liable to pass undesirable and morally objectionable laws from time to time…. Even so it may be that regarding each individual, he is less likely successfully to follow right reasons which apply to him anyway if left to himself than if he always obeys the directives of a just government including those which are morally reprehensible.77

74 Raz, PA (n 10) 1027.
75 Raz, FU (n 9) 1161.
76 Raz, MF (n 2) 61.
77 ibid 78–79.
Raz, therefore, categorically renounces the discrete-directives approach. For on the discrete-directives approach the content of each and every directive can be looked at separately and is open to challenge, so that if a particular directive is found to be mistaken, i.e. failing to reflect correctly underlying reasons, it will be discarded. If this approach were espoused, according to Raz, ‘the advantage gained by accepting the authority as a more reliable…guide to right reason would disappear.’78 Thus conceived, the normal justification thesis would lose its distinctiveness, and so would the pre-emption thesis.79

We may now return to view what implications the generality of the normal justification thesis has for our subject matter. If the contextual approach is adopted and the discrete-directives approach is rejected, then, as noted earlier,80 we cannot preclude the possibility that under Situation A a directive-issuer would comply with the normal justification thesis. To repeat, knowledge and skills possessed by an authority, generally or in the relevant context, are conducive to its likelihood to decide rightly; but they cannot entail or guarantee that in every event directives it produces would be right. Even where an authority is sufficiently competent, local instances of a moral failure, misjudgement, human error, a breakdown in communication between officials and so on, may occur. Raz confirms something similar:

However just a government may be, it is liable to pass undesirable and morally objectionable laws from time to time. This need not be due to any shortcomings in the government. Even assuming complete good will and unimpeachable moral convictions, inefficiency, ignorance and other ordinary facts of life will lead to objectionable laws being passed.81

Conceivably, some such failures may even result in directives that are clearly immoral in the extreme, or what has been titled here, Situation A. A couple of examples may help to flesh out the point. First, imagine a certain country in which, besides the predominant ethnic group, there exists an ethnic minority inhabiting one of the provinces. Some members of this minority, aspiring to political independence, set off a rebellion. As part of this, small teams of rebel-militants initiate from their province artillery attacks (i.e. firing by cannons) aimed at military sites in the country. These attacks occasionally result in some casualties; say, a handful of people have died this way during the few months that have passed since the rebellion started, among them soldiers but, unintentionally, also some citizens living adjacent to the attacked military sites. Every time the military locates the sources of the

78 ibid 61.
79 See related comments in: Dworkin, TY (n 4) 1672; Mian (n 55) 105–106.
80 p 16.
81 Raz, MF (n 2) 78–79.
rebels’ fire, the military uses artillery to fire back at them. Each of these military counter-attacks and their targets has to be pre-approved by the President, who, by virtue of his office, is also in supreme command of the army. Assume that the President possesses, and is known to possess, adequate competence, generally and in the context of national defence and military matters like the one at stake, such that he would meet the normal justification condition. Moreover, the President is empowered by a legislative act, in a broad manner, to issue the aforementioned edicts.

Suppose that on a certain occasion the military recognizes two rebel-militants taking cover in a civilian apartment block. These rebels use a small-sized cannon to fire from this block. (Unlike the rest of the rebel-militants, who keep their distance from members of the minority who are not occupied in fighting so as not to endanger them.) It is known to the military that about three hundred innocent civilians not engaged in fighting live in this block, and therefore it is very likely that an artillery counter-attack in this case would bring about the death of many, if not all, of these innocent people. Other military alternatives, such as an infantry attack, are assessed to be very difficult and risky as the area surrounding the relevant block is laden with rebel-militants and fraught with obstacles. The President is urgently called upon to decide whether and how to react, and he is given the foregoing information. The atmosphere is highly tense, and he feels that he has had enough of these rebels’ attacks. Although he considers the likely loss of innocent lives and he deems this loss, in itself, undesirable, he decides that under the aforementioned circumstances, this is a price worth paying and orders an artillery counter-attack.

Those in the military echelon who are supposed to carry out this order refuse to obey it. They acknowledge that the attacks launched on military sites by the two rebel-militants in question might cause the death of some soldiers, and possibly even the incidental death of some innocent civilians of the majority group. Nevertheless, under the circumstances it is clear that the expected harm these two rebel-militants can cause (i.e. the scale of harm weighed together with the probability of its occurrence) is much lower than the expected harm to innocent lives that an artillery counter-attack on the aforementioned apartment block would cause. These army-men acknowledge that the President is aware of the relevant facts mentioned above, that he is generally competent to decide well in this context and that by and large his decisions are likely to lead them to conform to reasons better than they would have, had they acted alone. But this time they clearly envisage that a misjudgement came about and that the order is wrong in the extreme. They contravene the order although, by hypothesis, in
this jurisdiction no legal provisions (military or civil, including constitutional) capable of defeating such a Presidential order are in force;\textsuperscript{82} when disobeying the order these army-men act on pertinent moral reasons, e.g. the value of human life, which requires restraining the use of military force so as to minimize harm to civilians.\textsuperscript{83}

Now suppose a similar scenario with certain modifications: the President approves certain targets for a counter-attack. This time the targets are located only in bases of the rebel- militants, rather than in any civilian vicinity. One of those who are supposed to carry out the order, Michael, is a soldier whose role is to provide a crew operating a cannon with firing data such as the angles of firing, amounts of propelling charge to be used, etc. He calculates the firing data, \textit{inter alia}, according to the locations of the relevant targets, which he receives through orders coming from his superiors. The orders usually sound as follows: ‘Fire on target ….’ A target location is thus indicated by latitudinal and longitudinal coordinates (i.e. numbers consisting of several digits). Michael’s superiors are professional and highly competent officers who are likely to perform their (essential) role successfully, leading their subjects, including Michael, to better conform to reasons relevant to that context, and this is known to Michael. On our occasion, however, notwithstanding the general fitness of these officers, one of them makes a mistake, say a miscalculation or miswrite, and as a result one digit of the coordinates Michael receives from the headquarters ends up being erroneous. The mistaken location given to him is in an area densely populated by civilians, members of the minority in question. As it happens, he notices that the target he received is located in a civilian area, and, therefore, refuses to follow the order (although he does not necessarily know that this is the consequence of a technical error). Here too, when

\textsuperscript{82} Current public international law may be applicable in this case. To facilitate our discussion, we can assume that the case takes place at a time when such public international laws (conventions or customary law) did not exist (e.g. the beginning of the 20\textsuperscript{th} century). That disobedience in such cases should not depend on the provisions of public international law is significant not merely in the theoretical sense but also in the practical sense, for several reasons: first, public international law may always change; second, there may be cases of objectionable directives which are not covered or provided for by public international law; third, there are dissimilarities between the laws of different jurisdictions pertaining to matters of interpretation and application of public international law within the jurisdiction, as well as differences between the domestic point of view on public international law and public international law tribunals’ point of view; forth, and this amplifies the implications of the previous point, public international law itself has very limited means of enforcement. This may mean that, from a Razian perspective, public international law is not, in itself, \textit{de facto} authoritative and thus may not be legitimately authoritative, although the content of some provisions of public international law may gain that status within a certain jurisdiction insofar as they are given effect and enforced by domestic institutions within that jurisdiction (see: Raz, PA (n 10) 1036–1037; Raz, PRN (n 1) 150; Raz, FU (n 9) 1194).

\textsuperscript{83} It would be surprising if anyone claimed that under these circumstances the order should obeyed; however, in that case one may modify the example’s premises to render the order intolerably immoral in one’s own view – the substantive argument would stay the same.
Michael refuses to follow the order, he acts on relevant moral reasons, such as respect for human life.

In the foregoing scenarios, in view of the radically immoral content of the directive given to subjects, they ought to disobey while the normal justification thesis is complied with by the authority. Note, *en passant*, that even where in Situation A the directive-issuer will not comply with the normal justification thesis we do not expect that this, in itself, would be the sole reason why subjects disobey. It is implausible that subjects, deciding how to act in the face of such a radically immoral directive, would or should nevertheless confine their reasoning merely to the likelihood of their overall conformity with reasons in the relevant domain, rather than treating the specific and immediate deleterious consequences of following that directive as a self-contained consideration. This reinforces the conclusion that the normal justification thesis does not capture the reasons for which subjects disobey under Situation A. At any rate, our core finding is that under Situation A the directive-issuer may comply with the normal justification thesis, and thus may meet the authoritativeness conditions laid down by the service conception of authority.

One further clarification is in order. There is no denying that in some jurisdictions the legal system embraces means, such as constitutional protection of certain human rights, that allow courts to abolish directives like those discussed above. The first point to note in this regard is that insofar as one conceives such a judicial ruling as changing an existing law or as making new law,\(^84\) rather than applying an existing law, it follows that if subjects disobey prior to a judicial ruling (and in our case they are justified in disobeying even where no judicial decision approves), they act in defiance of a directive which, at the time they act, is valid. A second and perhaps more important point is that whether a certain legal system encompasses constitutional provisions that may defeat a given iniquitous directive is a contingent question.\(^85\) Cases in which such prevailing *legal* provisions are available are less revealing in terms of our enquiry, which contends with the principle question of whether *non-legal* reasons are excluded by legal directives. For the purpose of this enquiry, therefore, I

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\(^{84}\) Some might say that this depends on the law of a given legal system, i.e. whether it treats such directives as *void ab initio* or as voidable.

\(^{85}\) Raz mentions that if a directive ‘…violates fundamental human rights…’ it may be open to challenge (Raz, *MF* (n 2) 46). I take Raz to mean this is a ground for challenging authority only to the extent that the legal system in question incorporates the relevant rights (and subject to the provisions of that legal system regarding the appropriate procedure by which directives might be challenged), which is, again, a contingent matter. It is not likely that he refers to fundamental human rights in this context as an unfettered moral notion, for the recourse to such a notion is incompatible with the Razian theory that law is to be identified merely by an appeal to social facts and that law excludes its background moral reasons.
have concentrated on a case where there is no legal provision that defeats the relevant Presidential directive.\footnote{Under an alternative premise, to the extent that effective constitutional provisions do provide for cases where weighty enough reasons justify disobedience, such provisions might be thought of as constraints (imposed by the law) on the alleged exclusionary force of legal directives (subject to the above chronological point). If it is argued that in a certain legal system such constitutional provisions cater for all cases where weighty enough reasons justify disobedience, this would entail that exclusionary force, if it exists, is qualified by that legal system to the point of rendering it indistinctive from the weighing-conception.}

\subsection*{2.2. Jurisdictional and decision-making limitations}

We have discussed, in the previous section, the authoritativeness conditions put forward by the service conception of authority. This section will concern some additional ways in which the legitimate exercise of authoritative power may be limited. Legitimate authoritative power, Raz suggests, is often confined to a certain jurisdiction, and is often subject to certain restrictions as to the process through which authorities should reach their decisions. Let us consider whether such limitations may sustain the no-authority reply.

I shall start with the more formal limitations. First, Raz mentions that ‘legitimate authority has the right to issue directives within the sphere of its jurisdiction’,\footnote{Raz, PRN (n 1) 192. See also: Raz, MF (n 2) 62.} and that jurisdiction is determined, \textit{inter alia}, ‘by the range of actions the authority can command.’\footnote{Raz, PRN (n 1) 192.} For example, ‘the house committee can require paying to a common fund, but not attending church service.’\footnote{ibid.} Thus, to the extent that a given authority is restricted by the definition of its role to a certain domain, this may suggest itself as a criterion of authoritativeness ostensibly distinguishable from a content-based assessment of its directives on their merits; e.g. we know that the house committee is in charge of matters of administration of the house, and possesses no authoritative power to issue directives extraneous to that domain. This is so, it may be submitted, irrespective of the merits of such \textit{ultra vires} directives, i.e. whether the act they prescribe is the right thing to do. Straightforward as this might be,\footnote{The relation between underlying moral merits and jurisdictional boundaries is a subject that cannot be elaborated here.} it fails to resolve our conundrum regarding Situation A. For extremely immoral directives may be issued by a person or institution pertaining to matters within the domain that this person or institution is normally supposed to regulate. This is illustrated in the rebellion example given earlier,\footnote{pp 21–23.} where we supposed that the President of a certain country, who by virtue of his office is also the commander-in-chief of the army, metes out a directive to commit a military action that is extremely immoral.
Second, one may submit that where some sheer distorting or biasing factors have influenced the decision-making of an authority, the decision concerned is rendered invalid. This may be the case, for example, where the decision-maker decides while being intoxicated or bribed.\textsuperscript{92} We can plausibly presume that the absence of such defects in the decision-making ‘environment’ is indeed a prerequisite for authoritativeness. Even so, while this sort of prerequisite can rule some cases out of consideration, it fails to disarm the problem posed by Situation A. For people, including public officials, may occasionally make mistakes, and even bad mistakes that bring about extremely immoral outcomes, where no special external factors, such as intoxication or bribery, are involved.\textsuperscript{93} Prerequisites regarding the decision-making ‘environment’, therefore, do not solve our puzzle.

The third limitation I shall consider is more substantive. When Raz refers to jurisdictional limitations he notes that jurisdiction ‘is also determined by the type of reasons the authority may rely upon….\textsuperscript{94}’ Probably, however, Raz is not be understood as saying that when an authority considers a reason that should not have been considered, this itself renders the directive in question not authoritative. For one thing, such an interpretation appears to be incompatible with Raz’s service conception of authority. True, he holds that authorities should rely on what he calls dependent reasons, i.e. reasons that ‘already independently apply to subjects of the directives and are relevant to their action in the circumstances covered by the directive.’\textsuperscript{95} (He terms this thesis, the dependence thesis). Nevertheless, Raz does not treat compliance with the dependence thesis regarding a given directive as a condition for its being authoritative. This is made explicit in the following remark:\textsuperscript{96}

The dependence thesis does not claim that authorities always act for dependant reasons, but merely that they should do so. Ours is an attempt to explain the notion of legitimate authority through describing what one might call an ideal exercise of authority. Reality has a way of falling short of the ideal. We saw this regarding de facto authorities which are not legitimate. \textit{But naturally not even legitimate authorities always succeed, nor do they always try to live up to the ideal.}\textsuperscript{97}

He then states that the normal way to justify authorities is:

\textsuperscript{92} Such factors are mentioned by Raz in the context of an example regarding an arbitrator (Raz, MF (n 2) 42).
\textsuperscript{93} An attempt to over-stretch the notion of bias as to cover any kind of misjudgement would render that notion indistinguishable from a content-based assessment of directives on the merits.
\textsuperscript{94} Raz, PRN (n 1) 192. See also: Raz, MF (n 2) 47.
\textsuperscript{95} Raz, MF (n 2) 47. To be precise, he maintains that they should rely on dependant reasons for the most part, but they may also consider some bureaucratic considerations which are ‘non-dependent reasons’ (Raz, EPD (n 4) 198, \textit{fn} 6).
\textsuperscript{96} Raz, MF (n 2) 38, 47, 55.
\textsuperscript{97} ibid 47. Emphasis added.
…not by assuming that they always succeed in acting in the ideal way, but on the ground that they do so often enough to justify their power."98

Thus, whereas the dependence thesis represents a standard of ‘an ideal exercise of authority’,99 it is not, in itself, a standard that an alleged authority must live up to in order obtain legitimate authority. Instead, the standard of performance which an alleged authority needs to meet in order to justify its power is exhausted in the normal justifications thesis, i.e. it must be the case that this authority ‘is more likely to act successfully on the reasons which apply to its subjects….’100 (Though, clearly, to comply with the normal justification thesis, a decision-maker would need to accomplish at least a fairly good degree of compliance with the dependence thesis in most cases).101

The crucial point of Raz’s service conception is that once we recognize that someone is on the whole more likely than we are to decide in compliance with reasons applying to us in a certain domain, it becomes rational for us to entrust him with the power to decide what we ought to do in that domain. Possibly, Raz wants to qualify this notion to the effect that if subjects happen to discover direct evidence pertaining to the decision-making process (which is rarely the case), showing that the decision-maker relied on blatantly irrelevant considerations, they may challenge his authority. Perhaps under this qualification the service conception of authority may maintain its bite. But the service conception would not tolerate a further qualification to the effect that subjects should disregard an authoritative directive whenever they think the authority took into account a wrong reason, that is, even when they have no direct evidence that the directive was based on utterly irrelevant considerations. For in the absence of such direct evidence, subjects can only detect defects in the way authorities make their decisions if they engage in a sort of backwards reasoning, inferring from the decision itself what the considerations underlying it are. On this understanding, subjects are expected to ‘see through’ the decision so as to reconstruct the reasoning behind it. To do so is, in effect, to second-guess the decisions of those to whom they should entrust the power to decide. Such an allowance would blunt the edge of Raz’s service conception of authority. This reinforces the conclusion that Raz is not likely to suggest that legitimate authoritative directives are only those which were based on right reasons.102

98 ibid.
99 ibid.
100 ibid 55. Emphasis added.
101 ibid.
102 For similar reasons, when Raz notes that ‘…if an authority acted arbitrarily’ its directives may be open to challenge (Raz, MF (n 2) 46), it is not likely that he subsumes under this category every case where the authority’s decision-making is affected by some wrong reasons, nor is it likely that he allows subjects to try to detect arbitrariness for this purpose by inference from the content of the directives they face, rather than on the
But even if one supposes that in order to be authoritative, directives must be based on right reasons, one cannot rule out in this way the possibility that a directive in situation A would be authoritative. The rebellion example depicted earlier provides a good demonstration in this regard. ¹⁰³ In this example, despite the two rebel-militants hiding in the apartment block in question, given the high number of civilians living in this block, the order to bombard it is a wrong one. But one cannot say that the order was based on a *kind* of reasons that the directive-issuer has no power to consider. The President, in our example, does consider the relevant reasons. His mistake merely pertains to the weight he accords to the various reasons and to the balance between them. The wrongness of the order, severe as it is, is an issue of degree. Probative of this is the fact that a modification of the numbers of militants and/or civilians figuring in the example may lead to a different conviction vis-à-vis the order in question. That is, if one assumes an example similar in all respects, except for the following: there are, say, two hundred militants and one civilian in the relevant apartment block; it may well be that the order to bombard the block would no longer be wrong in the extreme or wrong at all. Between this variant and the original example runs a continuum, i.e. the difference between them is a difference in degree not in kind. The example illustrates that even if the dependence thesis were treated as a precondition for authoritativeness it would not enable us to preclude the possibility of authoritativeness under Situation A.

To conclude this section, the various conditions of authoritativeness that the no-authority reply may plausibly invoke (considered separately or taken together) are incapable of ruling out the possibility of authoritativeness in Situation A. It bears emphasis that no contention was made to the effect that the directives subsumed under this situation are authoritative. Arguably, such extremely immoral directives can never be authoritative. I have merely intimated that this conclusion cannot be established without espousing conditions of authoritativeness which amount to a content-based assessment of directives’ conformity with underlying reasons, and that such conditions of authoritativeness render futile the claim that authoritative directives exclude reasons underlying them. The no-authority reply, therefore, fails to resolve the apparent contradiction between Situation A and the pre-emption thesis.

¹⁰³ pp 21–23.
3. Scope of exclusion

In the present section, I begin by briefly presenting the Razian notion of scope of exclusion. I subsequently examine what has been titled here the scope-of-exclusion reply, concluding that this reply cannot reconcile Situation A with the pre-emption thesis.

Exclusionary reasons, according to Raz, vary in their scope of exclusion; they may exclude all or only a certain class of first-order reasons. As to the question of which reasons are within the scope of exclusion of an authoritative directive, the following twofold answer can be extracted from Raz’s writing: (1) excluded reasons are ‘all the reasons both for and against [the prescribed conduct] which were within the jurisdiction of the authority’; (2) the foregoing reasons will, by and large, consist of what Raz terms the dependent reasons, namely, reasons that ‘already independently apply to subjects of the directives and are relevant to their action in the circumstances covered by the directive.’ As pointed out earlier, Raz refers on various occasions to a more qualified scope of excluded reasons, which encompasses not all of the reasons the authority was meant to consider, for and against the directive-act, but rather only those against it:

…authoritative directives preempt those reasons against the conduct they require that the authority was meant to take into account.

…the pre-emption excludes only reasons that conflict with the authority’s directive.

The pre-emption thesis acknowledges that subjects may act upon first-order reasons not within the scope of exclusion of a directive. Inasmuch as these unexcluded reasons conflict with and countervail reasons the directive reflects, an act in defiance of the directive will be warranted:

In a case to which a reason incompatible with the norm, but not excluded by it, applies one must determine what one ought to do on the balance of reasons,

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104 Raz, PRN (n 1) 40.
105 ibid 192.
106 Raz, FU (n 9) 1194.
107 As mentioned above (n 95) he acknowledges that authorities may also take account of some bureaucratic considerations which are ‘non-dependent reasons.’
108 Raz, MF (n 2) 47.
109 p 3.
110 Raz, PA (n 10) 1018.
111 ibid 1022. See also: ibid 1021–1023; Raz, PRN (n 1) 144.
112 Raz, PRN (n 1) 79, 192.
113 Taking into account also considerations against disobedience having to do with its potential to encourage others to disobey even in cases where disobedience is not warranted (ibid 77, 192).
comparing the weight of the norm as a first-order reason with the weight of the competing reason.\textsuperscript{114} The foregoing specifications might give rise to what I have called the scope-of-exclusion reply, i.e. a contention that the first-order reasons calling for disobedience in Situation A are not those that are claimed to be excluded, and so Situation A is actually consistent with the pre-emption thesis. Let us examine the scope-of-exclusion reply. To begin with, recall that Situation A may come about, \textit{inter alia}, where the directive-issuer lacks the competence needed in order to direct subjects to better conformity with reason or where the decision-making process was defective in some obvious ways (e.g. the decision-maker was drunk or bribed). Raz maintains that under such circumstances the directive in question will not be authoritative, and therefore, for him, the notion of scope of exclusion does not even arise there; hence, there is not much point in analyzing the notion of scope of exclusion under these circumstances. But that is not the only possibility under Situation A. The discussion in Section 2 has led to the conclusion that under Situation A it is possible that the directive-issuer would comply with the normal justification thesis. As was stressed there, in principle incidents of a radically immoral directive may occur even where the directive-issuer is sufficiently competent to that effect, but due to a local misjudgement, human error or the like, promulgates a directive that fails to reflect correctly the relevant moral reasons. Moreover, we have seen in Section 2 that these situations may come to pass where procedural prerequisites are satisfied. In these circumstances, as the normal justification thesis and procedural prerequisites are complied with, the notion of scope of exclusion could have relevance.

However, the scope-of-exclusion reply seems inapposite here. Disobedience in Situation A is warranted on account of an acute failure of the directive to correctly reflect the moral reasons relevant to the issue being regulated. It is palpable, therefore, that where subjects discard such a directive, they are doing this on the basis of a judgment regarding the main moral reasons germane to the directive. Such reasons will fall under what Raz calls the dependent reasons, which are alleged to be excluded.

This may be illustrated by the rebellion example described in Section 2.\textsuperscript{115} I supposed there that, under certain circumstances, an order is given to the army to bombard two rebel-militants taking cover in an apartment block inhabited by three hundred innocent civilians.

\textsuperscript{114} ibid 77. See also: ibid 192.
\textsuperscript{115} pp 21–23.
The directive is issued by an empowered authority who is in charge of the subject matter and is of the highest echelon in the country (i.e., the President who is also, in this capacity, the commander-in-chief of the army). Thus, assuming with Raz that directives issued by high-ranking officials may have a scope of exclusion broader than that of directives issued by low-ranking officials, and, similarly, that the directive-issuer’s office or role-definition may affect the scope,\(^{116}\) in our example these factors assign the broadest scope of exclusion they can possibly assign. Furthermore, it was postulated that in the relevant jurisdiction no legal provisions (military or civil, including constitutional) capable of overriding such a Presidential directive are in effect. Now, to reiterate,\(^{117}\) a reader might assert something like: ‘Such an extremely immoral directive can never be authoritative’, and so he would see no point in discussing this directive’s scope of exclusion. Confronted with such an argument, I would be willing to quit the present line of enquiry. For, as was argued,\(^{118}\) such reasoning for lack of authority, plausible as it may be, is in fact a content-based assessment of whether the directive conforms to the balance of underlying reasons. Since such a resort to the balance of underlying reasons is at odds with the pre-emption thesis, it might be, after all, worthwhile to pursue further the current line of enquiry.

The aforementioned directive is clearly immoral in the extreme, and ought to be disobeyed. Where subjects refuse to comply with this directive, they act on moral reasons embedded in the value of human life,\(^{119}\) which requires curbing the use of military force in certain ways. Being some of the main moral reasons relevant to military operational orders, these reasons are surely what Raz calls dependent reasons and, accordingly, fall under the purported scope of exclusion.

Finally, let us turn to consider a possible objection. It might be contended that cases such as the rebellion example are to be viewed differently; that is, where subjects disobey the order, they act on reasons not to take the lives of innocent civilians. Even if the order-issuer possesses authority over the relevant domain (internal security matters, measures against national threats and the like) and over the subjects in question, this authority encompasses no power to exclude reasons not to take the lives of innocent civilians. Hence, the objection proceeds, when disobeying the order subjects act on reasons not within the scope of exclusion. This objection falls short of the mark. For one thing, the contention that reasons

\(^{116}\) He submits that such factors may constitute auxiliary reasons affecting the scope of the directive-issuer’s jurisdiction and, thereby, his directives’ scope of exclusion (Raz, PRN (n 1) 46, 79).

\(^{117}\) p 28.

\(^{118}\) ibid.

\(^{119}\) Of both the majority members and the minority members.
not to take the lives of innocent people are not within the scope of exclusion of the order (given our working assumption that the order is authoritative) seems to be implausible. Raz tells us that excluded reasons are the reasons against (or: for and against\textsuperscript{120}) the directive-act that the authority was meant to consider. Therefore, to submit that reasons not to take the lives of innocent civilians are unexcluded reasons is tantamount to saying that the order-issuer, in our example, was not meant to consider these reasons before issuing an order. This entailment is, of course, an absurd one.

To sum up this section: reasons for which subjects flout the directive under Situation A are in fact the same reasons that are alleged to be excluded, and thus the scope-of-exclusion reply turns out incapable of reconciling the pre-emption thesis with Situation A.

\textbf{Conclusion}

It is easy to see why many have found the pre-emption thesis persuasive. Most of us share the intuition that in the presence of a legal authoritative utterance our practical reason undergoes a substantive change. The pre-emption thesis has offered a straightforward explanation of what that change is. My aim in this paper, however, has been to propound that this explanation is, in the end, unsustainable. Let us take stock of the various observations made here.

At the outset, I have pointed out the two chief tenable alternatives for explaining the way authoritative law bears on practical reason (assuming that it does bear on practical reason somehow): first, authoritative law provides pre-emptive reasons, i.e. reasons that both require an action and exclude some opposing background reasons; second, authoritative law gives rise to reasons that operate and compete with other reasons, merely by means of their weight. I have noted that in some cases (probably quite many) either background reasons and legal reasons will not be in conflict at all, or, where such a conflict arises, background reasons against the act prescribed by a legal authority will be less weighty than the legal reasons the authority provides. In these cases, obviously, the practical result – i.e. what ought to be done – entailed by the pre-emption thesis and the practical result entailed by the weighing-conception will be similar. These ‘overlap cases’, then, do not help us to see whether it is a pre-emptory force or the property of weight that determines what we do and ought to do in the presence of legal authoritative directives. Instead, the most revealing cases

\textsuperscript{120} Raz, PRN (n 1) 192.
for our purpose can be those in which background reasons that militate against the directive-act are weightier than all reasons in favour of it.

I have focused on a group of cases in which it is straightforward that the reasons against following the directive are more compelling than any other present reason; cases where subjects are faced with a directive that is clearly immoral in the extreme (Situation A). In these cases, everyone agrees, subjects ought to (and we may expect that many of them would) flout the directive. In so doing, subjects would act on moral reasons germane to what they are being told to do. Whereas this result is easily explicable by the weighing-conception, it is reconcilable with the pre-emption thesis either on the grounds that directives in Situation A are not authoritative ones or on the grounds that the reasons for defying directives in this category of cases are not within the scope of excluded reasons.

I have argued that the no-authority reply does not resolve the potential contradiction between Situation A and the pre-emption thesis; no criterion is able to rule out the possibility that a directive in Situation A is authoritative unless lack of authoritativeness is grounded on the directive’s failure to reflect underlying reasons, whereas the latter reasoning is, in itself, inconsistent with the pre-emption thesis. In the final section, it was illustrated that the scope-of-exclusion reply cannot settle the ostensible contradiction between Situation A and the pre-emption thesis. The foregoing observations, if correct, give us a reason to believe that the cases designated here as Situation A (or at least some of them) are counter-examples to the pre-emption thesis. While these cases should compel one to reject that thesis, credence is lent to the alternative model, i.e. the weighing-conception, as this model seems well suited to account for them.

Whereas, in the justificatory sense, the main foundation upon which the pre-emption thesis stands seems to be the normal justification thesis, the counter-examples detected here denote that, at least in the legal context, some unavoidable factors render the move from the normal justification thesis to the pre-emption thesis impossible. Some of these factors were alluded to throughout our discussion: (1) human fallibilities and structural weak points in the workings of complex bureaucratic systems entail that local functional failures of law will occur, however competent the authority is. (2) Considering the immense powers entrusted to legal authorities, conceivably some of their failures may result in intolerably

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121 See for example: Raz, EPD (n 4) 214–215; Raz, MF (n 2) 41–42, 46–47, 57–59; Raz, PRN (n 1) 193–195; J Raz, 'Reasoning with Rules' (2001) 54 CLP 1, 15.
122 Some are also mentioned by Raz (see text to n 81, for example).
immoral consequences; in these cases subjects must refuse to follow their directives. (3) Insofar as such a failure is very clear, for the most part, subjects are more likely to observe it correctly.123 (4) Insofar as such a failure is severe it is more likely to be clear. These considerations, it seems to me, are overlooked by the reasoning leading from the normal justification thesis to the pre-emption thesis.

Finally, the present analysis commences with the question of how legal directives bear on practical reason, and concludes that the answer does not lie with the pre-emption thesis, but rather with the alternative conception. This conclusion, however, does not deny the possibility that the notion of pre-emption provides an answer to certain other jurisprudential questions. An interesting example comes in the form of Larry Alexander’s suggestion that ‘we may, for compelling first-order moral reasons, want institutions that demand that we act as if their decisions were morally preemptive…. But even if we do have compelling moral reasons to establish such institutions, their decisions cannot in fact be morally preemptive.’124 These further questions regarding the proper role of pre-emption and the limits of the weighing-conception must wait for a future occasion.

123 See: Regan (n 12) 1089 (for a broader discussion see: ibid 1003–1031, 1086–1095). See contra: Raz, FU (n 9) 1195.
124 Alexander (n 12) 10.