The Curious Case of Exclusionary Reasons

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1. Telling stories, making claims

This essay is a commentary on one aspect of Joseph Raz’s carefully told story about the law. The story has been in the telling for quite some time, spread between works of legal and political philosophy. The focus of this essay is on a special aspect of two prominent themes in this story, authority and autonomy. The aspect in question is the notion of exclusionary reasons.1

Though there is no strict division of labours between Raz’s philosophy of law and his morality of freedom, there is a marked difference of emphases.2 In his writings on the nature of law, the concept of authority is prominent and is made in fact to do a great deal of work. The law is conceived of as a mediating system. Individuals rely on the interlocking structure as the background for the realisation of their autonomous projects. In order to fulfil its mediating functions, the law must claim authority and in the process of claiming that authority, it must supply exclusionary reasons. This is a controversial thesis, or at least it will be contested in this essay. It is also in order to claim authority that the law must work with and within publicly ascertainable standards and it is this stipulation that leads into the sources thesis and the need to think in terms of a rule of recognition that contains no moral criteria. It often appears that Raz is an exclusive legal positivist exactly because of the nature of authority.

In his political morality on the other hand, the emphasis is on autonomy and autonomy is drawn on again and again. It is asked to perform a series of labours. The account of authority and especially the notion of exclusionary reasons sometimes, however, as we might expect, challenges autonomy. This essay will seek to argue not that authority and autonomy are indeed absolutely irreconcilable, but that autonomy consistently escapes and pesters Raz’s notion of authority and that perhaps it makes the existence of exclusionary force impossible. Moreover, it will be argued that exclusionary force is conceptually problematic. It is difficult to understand, it is difficult to maintain, and it is difficult to see the point of it.

This essay would have contained many more mistakes were it not for the comments and criticisms of Nigel Simmonds, Sylvie Delacroix, Matthew Kramer, Joseph Raz and a referee for this journal. I am indebted to them for having saved me from some blushes.


2. For a similarly slanted critique of Raz’s political morality, see E. Mian, “Authority and Autonomy: bend them, shake them, any way you want them” (2001) 61 Politeia 95.
As there are no fairy princesses or horn-backed dragons in this story, let me start by elucidating Raz’s idea of authority from its beginning.

2. The nature of law’s (claim to) authority

Raz adopts an almost stipulative strategy when it comes to explicating the nature of the authority of law. In the most significant discussions of the concept, he begins not exactly by describing the features of law or its operation, but by outlining the central function that law has to fulfil and then reasoning that in order to fulfil this function, law needs to claim authority of a certain kind, and hence it does. There seems to be at least one chapter missing from his story. Nevertheless, let us accept his leaping off point, the analogy to the arbitrator. Indeed:

Consider the case of two people who refer a dispute to an arbitrator. He has authority to settle the dispute, for they agreed to abide by his decision. Two features stand out. First, the arbitrator’s decision is for the disputants a reason for action. They ought to do as he says because he says so. But this reason is related to the other reasons which apply to the case. It is not just another reason to be added to the others, a reason to stand alongside the others when one reckons which way is better supported by reason. The arbitrator’s decision is meant to be based on the other reasons, to sum them up and reflect their outcome. This leads directly to the second distinguishing feature of the example. The arbitrator’s decision is also meant to replace the reasons on which it depends. In agreeing to obey his decision, the disputants agreed to follow his judgement of the balance of reasons rather than their own. Henceforth his decision will settle for them what to do.

We can conceive of the disputants in this example as being involved in the pursuit of personal objectives, interested in exercising their autonomy. Raz understands autonomy as authorship. Autonomy hence requires not only some degree of freedom, but also engagement: “Autonomy is opposed to a life of coerced choices. It contrasts with a life of no choices, or of drifting through life without ever exercising one’s capacity to choose.”

The disputants in this example are then competing to bring their authorship to bear. Their conflict comes to a stage where neither of the two can achieve their personal objectives and write the achievement of those objectives into their lives. Their achievements depend on some form of co-operation or accommodation. In order for their autonomy to be realised, it is necessary for the authority to intercede. This story is next told at a higher level of abstraction:

It is an essential part of the function of law in society to mark the point at which a private view of members of the society, or of influential sections or powerful groups in it, ceases to be their private view and becomes a view binding on all members notwithstanding their disagreement with it. ... [I]t does so and can only do so by providing publicly ascertainable ways of guiding behaviour and regulating aspects of

3. I am taking these to be AL, ch. 3; MF, ch. 3; EPD, ch. 10.
4. EPD at 196-97.
5. MF at 371. Emphasis added.
social life. Law is a public measure by which one can measure one’s own as well as people’s behaviour. It helps to secure social co-operation not only through its sanctions providing motivation for conformity but also through designating in an accessible way the patterns of behaviour required for such co-operation.6

The reference is to, what Raz calls, the mediating function of law. The core supposition is that we live in complex societies which are made up of a number of different communities, a plurality of viewpoints and orientations. Nevertheless, we are required to occupy the same space and make demands of the common set of resources. If we desire public goods, we are required to co-operate with one another. If we desire private goods, there may be a minimal set that we can pursue entirely on our own, but fundamentally, we are again required to co-operate with one another. It follows that we need some sort of mediating ether, some homogeneous, public set of standards that we can all ascertain the content of, set our disputes against, heed, and in these ways, dissolve our co-ordination difficulties. In Pufendorf’s language, we need a means of turning the noise and jarring dissonance of social life into musical harmony.7 In Raz’s story, this mediating role is played by the law. It:

provide[s] an intermediate level of reasons to which one appeals in normal cases where a need for decision arises…. The advantage of normally proceeding through the mediation of rules is enormous. It enables a person to consider and form an opinion on the general aspects of recurrent situations in advance of their occurrence. It enables a person to achieve results which can be achieved only through an advance commitment to a whole series of actions, rather than by case to case examination.

More importantly, the practice allows the creation of a pluralistic culture. For it enables people to unite in support of some ‘low or medium level’ generalizations despite profound disagreements concerning their ultimate foundations, which some seek in religion, others in Marxism or Liberalism, etc. I am not suggesting that the differences in the foundations do not lead to differences in practice. The point is that an orderly community can exist only if it shares many practices, and that in all modern pluralistic societies a great measure of toleration of vastly different outlooks is made possible by the fact that many of them enable the vast majority of the population to accept common standards of conduct.8

The law works by simplifying our practical reasoning. It transfers us from a domain in which our disagreements are too detailed and widespread, to a much more limited domain of mediating norms and publicly ascertainable standards. This move, in order to achieve its aim, requires us henceforward to refrain from acting on any of the ‘excluded’ reasons. We have then an analogue to the arbitration example. If left to our own devices, we will come to different orderings of the dependent reasons and continually take differing courses of action. This will not do however, for we do feel a need to co-ordinate, or at least, a substantial degree of autonomy can only be achieved if there is co-ordination. We are required so to submit our

6. AL at 51.
8. MF at 58.
disputes to the arbitration or mediation of the law. And of course, once this sub-
mission has been made, we need to abide by the decisions of the law, or conduct
ourselves by the standards that it formulates. We mustn’t regress and act on our
own orderings of the original, dependent reasons, because then what would be the
point of having made recourse to the arbitration of the authority in the first place.

Two prongs of what Raz calls the service conception of authority have thus far
been clarified:

The dependence thesis: authoritative directives are to be based on the dependent
reasons, that is, the reasons which apply to the subjects of the directives and which
bear on the circumstances covered by the directives. Presumably if legal directives
were not so based, they would not be involved in mediation and would be, in some
stronger sense, directing conduct. The dependence thesis can then be conceived
as a sort of a jurisdictional condition based on the foundational argument from func-
tion. The dependence thesis also enables us to hone in on and identify a commu-
nitarian echo in Raz’s work. The dependence condition can be read as a
commitment to particularism. The authority has to be responsive to the reasons
active amidst its subjects, just as the arbitrator can only appeal to standards that
both the disputants accept. I want to pick out a sentence from the chunky quotation
featured above: “The point is that an orderly community can exist only if it shares
many practices, and that in all modern pluralistic societies a great measure of tol-
eration of vastly different outlooks is made possible by the fact that many of them
enable the vast majority of the population to accept common standards of conduct.”
The mediating function of the law hence is achieved by working with common stan-
dards. It has to be possible for the authority to pick out norms that are communal,
that are shared by the (vast majority of) participants in the system. The authority
can no doubt attempt to maximise liberty or efficiency, it can no doubt pursue an
ideal political morality, but only, it would appear, under the constraint of depen-
dence. The authority cannot interfere overly with or go bounding outside the shared
practices, because, Raz maintains, an orderly community can only exist if it shares
many practices.

The pre-emption thesis: the authority, we have seen, is to be considered a
source of exclusionary reasons. Its directives do not constitute just ordinary reasons
that are to be added to the balance of the other reasons, rather they are to exclude
the other reasons. They are to be reasons for action in and of themselves.

At this juncture, the reader may be suffering a sensation of rising alarm. Certainly
some commentators have panicked on reading these sections of Raz’s work.
Timothy May, for instance, has remarked that on Raz’s analysis, “the subject seems
to be eliminated from the determination of her behaviour.”9 Is Raz indeed contend-
ing that it is critical to the very function or nature of law that it possess exclusionary
authority? Is the subject of law really required to abdicate his autonomy, through
the mechanism of pre-emption, albeit for the sake of autonomy in a different

Heidi Hurd is typically more careful, she does on occasion also read Raz as advocating expansive
heteronomy, see Moral Combat (Cambridge: Cambridge University Press, 1999).
instantiation? There is an exceedingly important distinction that I have thus far failed to make explicit. There are two separate issues, law’s claim to authority and the validity of that claim to authority. Raz’s argument is only that the law claims to possess exclusionary force. Whether it does or does not in fact possess this species of force is a separate question and one that cannot be answered in the abstract. Indeed, there is a bright-line distinction “between an explanation of the notion of authority and a complete moral argument about the conditions under which anyone has legitimate authority.”

What are these conditions? It is important to elucidate them, for until we do so, the notion of exclusionary reasons does seem somewhat arbitrary, perhaps especially in the context of law. Though we can appreciate the explanatory appeal of the notion, though we can see how it fits the mediating function of law, there must be a concern, or at least, a curiosity as to the basis for exclusion. On a more austere analysis, law might be said to create only a fear of coercion. That fear may be such as to evacuate all other reasons from the mind of the subject, but this is not exclusion in the Razian sense. Before the law was formulated there were the first-order reasons \( X \) and \( Y \) for performing act \( A \) and reason \( Z \) for not doing so. After a law prohibiting act \( A \) has been formulated and promulgated, there are still the first-order reasons \( X \) and \( Y \) for performing \( A \) and reason \( Z \) for not. The only difference appears to be that there is now also a sanction-based reason \( S \), for not doing \( A \). This is the only difference because there is, certainly for the exclusive legal positivist, nothing intrinsically moral about the content of a law. What a law stipulates is not necessarily the morally correct course of action or inaction. This then is why the distinction between the law’s claim to exclusionary force and the law’s possession of exclusionary force is so critical. This then is where the normal justification condition comes in. It is the condition which the law must purify in order to possess exclusionary force, in order to create a new first-order reason for action. It is the third prong of Raz’s service conception of authority, and was missing from the set-up above. It comes into the place taken by consent, which Raz specifically rejects as a basis for law’s authority, in the arbitrator analogy.

**The normal justification thesis:** the normal and primary way to establish that the authority indeed has authority is to show that the individual is likely to better be able to comply with the reasons which apply to him if he accepts the directives of the authority as binding and tries to follow them, rather than if he tries to follow the reasons which apply to him directly.

### 3. Notes on normal justification

#### a. moral masters and moral maestros

Exclusionary reasons provide the possibility of an ‘indirect’ approach to acting in accordance with reason. They provide an ‘indirect’ means of avoiding moral

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10. *FU* at 1185.
11. *AL*, ch. 12; *MF*, ch. 4.
error and benefiting from the moral expertise that an authority may possess. They are instrumental to “the attempt to maximise conformity with certain reasons not through compliance with them but through compliance with an alternative set of reasons, i.e. the rules which are tailor-made so that compliance with them maximises conformity with the underlying reasons.”

At the same time though, exclusionary reasons do possess the capacity to turn autonomy into a spectre. The normal justification condition is the means by which their effect and scope is to be policed. The notions of authority and exclusionary force here are not intrinsically hostile to autonomy, indeed they can augment autonomy, but the normal justification thesis is critical to this equilibrium. By this stage, it should be uncontroversial to state that authority can enable autonomously chosen projects. In this statement, there is not only the assurance that for projects requiring co-operation, authority is instrumental rather than detrimental, it is also at this juncture intended to bear the connotation that autonomy does not require one to continuously decide and seek all goods on one’s own. It is perfectly consistent with autonomy for me to assign the running of my crocodile farm to someone else, the landscaping of my garden to another and the trading of my stocks and shares to someone else again. Similarly, the argument will go, it is not inconsistent with autonomy for me to assign certain decisions to a legal authority. However, just as the conditions of consent and contract will determine the scope and limits of my other assignations, normal justification determines the interaction with authority.

There are aspects of my life though that I ought not to assign to anyone else, or let anyone else dictate, if I am to be faithful to the ideal of autonomy. This is one respect in which the normal justification needs to be toughened up: ‘the condition of autonomy’. On occasion, even if following the authority will enable me to better conform with the reasons that apply to me, the realisation of my autonomy will require that I not do so. As Raz explains, the autonomy condition is designed to take account of “the intrinsic desirability of people conducting their own life by their own lights” and so “the case for the validity of a claim to authority must include justificatory considerations sufficient to outweigh such counter-reasons.”

We are now equipped to go wading into the theoretical marshlands of normal justification itself. There is a need for care here. Raz is not claiming that rules are of their nature ‘tailor-made’ so that compliance with them maximises conformity with the underlying reasons. He isn’t even claiming that there is always at least an attempt by the authority to tailor the rules of a legal system in this style. That would be a curious claim. It is not difficult to conceive of or to find examples of legal systems in which rules are cut to a rather different design. The claim is

12. PRN at 193.
14. MF at 57.
15. I am of course far from the first to venture into this quagmire. There is a substantial and well-known body of literature on these problems. See, for instance, Symposium: The Works of Joseph Raz (1989) 62 S. Cal. L. Rev. 731; Raz has however responded to much of the prior literature in FU and many of the comments here go beyond those responses. Also I do make points that I believe have not been made before.
only: if a rule satisfies the normal justification condition, that is, if a rule will indeed enable the subject to better conform with the underlying reasons that apply to him, it is entitled to exclusionary force. Of course we may want to be extremely sceptical about the moral expertise of the rule-givers. Is their expertise reliable? Can it be rigorously evaluated? After all, in a pluralist context, from the point of view of an individual citizen, it may not be so simple to distinguish an opposing opinion from an inexpert opinion. Where is the line between moral expertise and ideology? What interests does the rule manifest? Was the rule formulated genuinely so as to enable individuals to better conform with the reasons that apply to them, or was it the product of the machinations of lobbyists and sectional interests? There are some very good reasons for being sceptical of the moral expertise of modern legal authorities, or for casting aspersions on their claim that it is the moral expertise available to them that they primarily rely upon. However, as Raz writes:

Reality has a way of falling short of the ideal ... naturally not even legitimate authorities always succeed, nor do they always try to live up to the ideal. It is nevertheless through their ideal functioning that they must be understood. For that is how they are supposed to function, that is how they publicly claim that they attempt to function, and that is the normal way to justify their authority (i.e. 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), and naturally authorities are judged and their performance evaluated by comparing them to the ideal.16

I propose that there are two ways to conceive of normal justification. The second is not an alternative to the first, but a supplement. It is possible to think of normal justification in terms of individual rules in particular encounters, and it is possible to think of normal justification in an aggregated sense, that is, across the lifetime of a rule or across a system or sector of rules.

First, regarding the individual rule individually. Does this rule enable me to better conform with the reasons that apply to me? The key question is even if it does, does this mean it has exclusionary force, or does this merely mean that it is a strong first-order reason of considerable weight? The problem with the first answer is a simple one. The rule may well appear to enable me to better conform with the reasons that apply to me at the present time, given my present circumstances. But at other times, in other situations, will it enable me to better conform with the reasons that apply to me? I can’t of course decide this right at the beginning, and so surely I can never quite accord exclusionary force to the rule, because I must always keep peeking back at the dependent reasons, in order to discern, whether at other times, in other situations, the rule is enabling me to better conform with the reasons that apply to me? I can’t of course decide this right at the beginning, and so surely I can never quite accord exclusionary force to the rule, because I must always keep peeking back at the dependent reasons, in order to discern, whether at other times, in other situations, the rule is enabling me to better conform with the reasons that apply to me? Of course, Raz may respond at this stage by explaining that exclusionary reasons are subject to revision, and also, that they can come from the beginning with scope-restrictions built in. The problem with this response though, is that it seems to eviscerate the notion of exclusionary force fairly significantly. It no longer means what it appears to mean on the surface, and it is no longer all that distinct from the alternative conception of weight. It isn’t clear why the exclusionary

16. MF at 47.
account is to be preferred to the outweighing account. Why can’t we say that if the authority does indeed possess an element of moral expertise, for the sake of our autonomy, we are required to take this into account, but exactly and only that. We are required to take it into account and to act with it if it satisfies normal justification and so outweighs the opposing reasons, but are entitled to shrug it off if it is outweighed by the opposing reasons?

There remains though the aggregation strategy. Things get a little messy at this stage, but the argument is effectively this: as the paragraph above suggested, when normal justification is thought about in discrete situations, it doesn’t seem to make too much sense. If normal justification holds, the rule is accepted as binding. But if normal justification holds, and I have gone through the evaluation to decide whether or not normal justification holds, in what sense am I relying on the rule and not on the underlying reasons directly? Similarly, say as a consequence of this first encounter, I adopt the rule, what if in the next encounter, the rule is not going to enable me to better conform with the underlying reasons? If I stick with the rule, I have violated normal justification, and my action is unjustified. If I jettison the rule, surely this proves that the underlying reasons are what counted throughout and so the rule was redundant all along.

Raz may want to intervene though as follows:

One escapes from the dilemma in those cases where conformity with the underlying reasons is improved if one does not attempt to comply with them. In such cases conformity with the underlying reasons is secured by complying with the rule, or rather a better degree of conformity than can otherwise be achieved is so obtained. This can justify complying with the rule even when it requires action which the underlying reasons do not. Such compliance may still be the best strategy to maximise conformity with the underlying reasons.17

This argument can also work with regard to a sector of rules or a legal system overall. So if the authority can be established as having particular moral expertise on some subject, even if it doesn’t so have overall, normal justification could be satisfied for rules issued by the authority on that subject. And if it does have general moral expertise too, if that can somehow be established and explained, then normal justification could be satisfied across the legal system as a whole. That is, a rule that taken singly doesn’t appear to enable individuals to better conform with the reasons that apply to them, can still justifiably be said to have exclusionary force, if there is a danger that in starting to distinguish between what rules do and do not possess normal justification, the individual may make mistakes, and hence begin to lose the benefits of being guided by an authority with general moral expertise.

I want to raise two issues here. One, in order to decide whether the authority has moral expertise, the individual will have to refer to the dependent reasons. Clearly, though the authority may make a persuasive claim to expertise, I can’t adjudicate the force of that claim without making myself familiar with the dependent reasons. Also, I can’t just settle the question of the authority’s expertise once and

17. PRN at 194.
for all. Depending on how I perceive the quality of the rules it issues, depending on my own circumstances, depending on societal or institutional changes, I will want to and indeed ought to return to the question of the authority’s expertise with varying frequency. It will only continue to satisfy normal justification even in this aggregate sense, if it continues to display moral expertise, and I can only assess that by dipping back into the dependent reasons and indeed acting on the basis of those dependent reasons, when I feel that the authority no longer deserves its claim to moral expertise.

Two, can this aggregation genuinely ground exclusionary force, in the sense that when confronted by a rule, even if I accept the claim to cumulated normal justification prior to that point, depending on the content of the rule, aren’t I going to check that normal justification still holds, that even after this rule, the authority has a sufficiently high normal justification score? What I mean is that even if in this present situation a rule does not enable me to better conform with the reasons that apply to me, does that rule overall still satisfy normal justification, or does the sector of rules, or the legal system that it is a part of, still satisfy normal justification? This question, I venture, has to keep being asked, if normal justification is to be read as a genuine threshold condition on exclusionary force. Does the asking of this question though, and of course, subsequent action on the dependent reasons if the answer is negative, violate the exclusionary thesis? Not strictly speaking, no. Certainly deliberation on the excluded reasons is never forbidden. That is not part of the notion of exclusionary force. It is only action on the excluded reasons which is disallowed. What is worth noting though is that on this reading, the possibility of action on the excluded reasons is never ruled out. Exclusion is always tentative. It has a limited scope.

In fact, again it is difficult to see why ‘exclusion’ provides a better idiom or understanding than ‘conflict of weight’. Especially if we introduce ‘the condition of autonomy’. That is, the idea that there is a value in deciding for oneself even if one thereby creates a risk of getting the balance of reasons wrong. As Raz explains, “the case for the validity of a claim to authority must include justificatory considerations sufficient to outweigh such counter-reasons.”

Note here the use of the term ‘outweigh’. But that isn’t the crux of the argument. Given the autonomy condition, I must be extra-mindful of the cumulated normal justification score. Critically, I am always contemplating the possibility of jettisoning the exclusionary reason if it slips below a certain normal justification level. Critically, the exclusionary reason is excluding neither the possibility of my working out the balance of all the underlying reasons for myself, nor the possibility of acting on my own assessment if the cumulated normal justification score falls below the score that I can myself generate. On the one hand is my running assessment of how well the authority is serving the dependent reasons that apply to me. This assessment factors in its moral expertise; the loss of autonomy I suffer by handing over

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18. The suggestion here is very similar to the argument made by, for instance, Donald Regan, “Authority and Value” (1989) 62 S. Cal. L. Rev. 995. Rather than characterising laws as exclusionary reasons, Regan characterises them as ‘indicator-rules’.
19. MF at 57.
my decisions to the authority; the content of its directives. On the other hand is my running assessment of how well I could serve my dependent reasons by deciding for myself. And this assessment also factors in moral expertise, in this case my own; the gain in autonomy I would attain by wresting the making of decisions from the authority; the content of my own directives for myself, as set against those of the authority. It seems that what is really going on here is a contest of weight, based on first-order reasons. The terminology of exclusion may suffice, but it does not seem as persuasive.

**b. come together**

Another component of the case for the ‘indirect approach’, that is, the case for treating laws as exclusionary reasons so as to conform better with the underlying dependent reasons, is the argument from co-ordination. Law, it is argued, solves co-ordination problems. Individuals need co-ordination problems solved if they are to secure public goods and co-ordination is necessary or helpful even for the pursuit of many private projects. Hence even though on the count of expertise alone, the condition of normal justification may not be satisfied for particular individuals, the possibility remains that because members of a legal system are relying on others and others are relying on them, there is a reason to co-ordinate conduct via legal rules. This reason can serve to guide the individuals through the normal justification threshold.

There are a number of points to notice about this argument. One, it can clearly only apply to situations where there is a need for co-ordination. It is not universalisable. Two, its force will depend on the extent to which co-ordination is already extant. Hence if the social bases of co-ordination are strong, there isn’t much of an argument for according the law exclusionary force, specifically so that it can organise co-ordination. Three, to appeal to the reason from co-ordination, the C-reason, is by no means enough in any case, for the individual may well conclude, whilst acknowledging the existence of the C-reason, that because the authority has got it so wrong with this particular rule, no-one ought to co-ordinate around it, especially not her. Alternatively, because C-directed rules are likely to be designed to be easily comprehended, and to avoid giving rise to administrative corruption, the individual with knowledge of the field may find that in truth there is no reason to conform to certain aspects of the rule (“the inevitable simplifications”, as Raz tags them20) because she is able to discern that those aspects are not essential for her to fall in with the C-reason, to fit into the co-ordinated morass. The overarching point is that regarding co-ordination too, just as with moral expertise, there must ensue a ‘contest’ between the moral autonomy of the individual and the directives of the authority. Normal justification of course presages this contest, but this contest, as was argued above, seems to fit better a ‘weight’ account, than an ‘exclusion’ account.

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20. *EPD* at 333.
We see then that there are problems with establishing that the law possesses exclusionary force on the basis of the C-reason. Raz however could respond that of course, whether the law ever possesses exclusionary force is an entirely contingent matter. And the arguments above do not necessarily knock out the possibility of the law ever possessing exclusionary force. Though they do suggest that even when the C-reason does support the law’s claim to authority, perhaps authority should be thought of in terms of creating a weighty reason for action, i.e in terms of ‘weight’ rather than ‘exclusion’. There is a further argument however which can aid in establishing that the C-reason never quite warrants even the claim to exclusionary force. It is argued that the law is able to solve co-ordination problems by identifying a solution, or a way of doing things, it makes one course of action ‘salient’.21 There is subsequently no reason to regard the directive itself as a reason for action. The reasons for action remain as they were. But if one wants to attain the common good, if there is a desire or need for co-ordination, if the C-reason holds, then there is a hub, a solution, made visible to all through the agency of the law, around which one can orientate one’s conduct and reasonably expect others to do so too. The reason to favour this account over Raz’s account is quite straightforward. If there is a desire, a felt need for co-ordination in a society, so long as the law is able to make one course of action salient, there will result co-ordination on its basis. There is no reason for the law to make the additional claim to exclusionary force. If the antecedents to the C-reason do not exist though, co-ordination per the law may still occur, but this will be because of the fear of sanction, or because of generalised respect for law, not because the law is making an empty claim to exclusionary force. Raz does have certain rejoinders to this approach however.22

As he understands the argument, it does not explain why the solution that the legal authority has identified is salient. Raz contends, “[t]he fact is, of course, that the prescribed conduct becomes the salient solution because people assume that the authority was within its rights in passing the statute, and that is why each one expects the others to obey it.”23

This isn’t necessarily correct. People may well believe the authority to be acting without its rights, or understand that others will believe the authority to be acting without its rights, but nevertheless expect others to obey it, because of the fear of coercion or because the authority is generally well-respected and well-regarded. Anyway, Raz’s argument here misses the mark. The salience theorist is not seeking to deny that an authoritative solution becomes the salient solution (centrally) only when people assume that the authority was acting within its rights. The salience theorist is not committed to arguing that any directive of the authority is salient.


22. There may be other rejoinders to this approach too. However, I will consider only Raz’s rejoinders, for they connect intimately with his arguments for exclusionary reasons. I only wish to establish that there is no good reason for preferring Raz’s account of co-ordination to the salience account. It may be the case that both accounts are mistaken.

23. *FU* at 1188.
Clearly, if people don’t assume the authority was within its rights, the directive may well fail to acquire salience. Though this also is not necessarily true. It may still be salient, and be a hub for co-ordination, because of the fear of coercion and so forth. The crux of the argument between Raz and the salience theorist is over what it means for the authority to have acted within its rights. For Raz, this means that it has claimed and maybe gained exclusionary authority. For the salience theorist, it means that it has inserted itself into a contest of first-order reasons and identified one solution as the salient one. This solution has salience, not because the authority possesses exclusionary authority, but possibly because the authority has expertise, or because there is an especially high risk of moral error amongst individuals acting alone, or because the authority has won acclaim and respect over time, or simply because the authority has an arsenal of coercive techniques at its disposal, and fundamentally because there is a felt need for co-ordination. The felt need can not of itself produce the solution. But it does create the need for a solution. And if any of the other factors are present, which make it likely that the authority’s co-ordination solution will acquire salience, co-ordination may well occur. In this way, the salience theorist can explain, without using the notion of exclusionary reasons, why the solution proposed by the authority does become the salient solution and why each expects the other to obey.

Raz continues:

Two reasons show the inadequacy of the argument. First, at best the argument shows the legitimacy of the authority to set up new schemes of co-ordination. At the beginning the statute, one may say, is binding because it gives hope that co-ordination will emerge. But after a while the statute ceases to matter. If a co-ordinative practice emerged, then one ought to conform for that reason, regardless of whether the statute is still in force. If a co-ordinative practice failed for some reason to emerge, then one has no reason to follow the statute, for it will now be likely that it simply failed, and that it lost its chance to motivate the emergence of a co-ordinative practice. The second way the previous argument fails to establish the legitimacy of the authority is that it merely establishes that its directive is an ordinary reason for action. It fails to establish that it is a pre-emptive reason. But authoritative directives are pre-emptive reasons.24

The second point made here consists just of a stipulation. Raz states that authoritative directives are pre-emptive reasons and then chides the salience account for failing to establish authoritative directives as pre-emptive reasons. This is clearly question-begging. The dispute here is exactly over whether authoritative directives are pre-emptive reasons or not, and the role of the argument from co-ordination in that dispute is still under consideration.

The first argument is misleading too. For a start, it assumes that in the salience account, so to speak, salience is all that matters. Hence it alleges that at the moment of promulgation, under the salience account, an authoritative directive is binding only “because it gives hope that co-ordination will emerge”. This is wrong. The directive is potentially binding also because it expresses the expertise of the

24. *FU* at 1189.
authority, because the authority enjoys respect in the community, so forth. However, to confront the central component of the argument. Raz’s point is that when the directive is successful, still it does not become binding, rather it is the co-ordinative practice that forms the reason for action. And this reason exists regardless of whether the statute is still in force. This is partially accurate. There is a C-reason readily derivable from an efficacious co-ordinative practice. But the statute is nevertheless binding. It was the statute that established at least partly the salience of the practice in the first place. It is the statute which continues to concretise the practice, explain the details of the practice to those who are fuzzy on them, or to those who have yet to join the practice. Also, the statute has efficacy, in terms of potentially providing a reason for action, in the form of a threat of coercion, vis-à-vis those who find the reason emerging from the practice insufficient.

What is especially puzzling is why Raz believes the argument that he makes does not count back against his own account. For the individual confronted by a Razian authority, surely the situation is the same. If a co-ordinative practice has already emerged, there is a sense in which, provided that the individual is convinced by the need for co-ordination and by the content of the co-ordinated conduct involved, there is no call for going back to the statute. Indeed Raz has written in an essay on the obligation to obey the law, that there is a prima facie reason to obey the law, with respect to schemes of social co-operation, but that this moral reason derives entirely from the factual existence of the co-ordinative scheme and not from the fact that the law is or has been instrumental in the institution or maintenance of the scheme.\footnote{AL, ch. 12.} If the individual is not convinced by the practice itself though, then we can expect that he goes back to the statute and he conducts a normal justification calculation, taking into account the expertise of the authority, how following its directives has helped him to fare in the past, so forth: i.e., the Razian and salience-theory descriptions of the individual’s reasoning coincide.

The argument works on the counterfactual too. That is, if the co-ordinative practice has failed to emerge. Under the salience account, Raz alleges, there is no reason to follow the statute, for it is likely that it has simply failed, and that it has lost its chance to motivate the emergence of a co-ordinative practice, to express a C-reason. This again is a careless argument from Raz as reasons deriving from the expertise of the authority, or prudential reasons, may well remain. There is no need to assume that the salience-theorist is only concerned with C-reasons. The key point though is that on the Razian account too, if a co-ordinative practice has failed to emerge, the reasons for according the statute binding force also will have been much eviscerated. The C-reason will no longer hold. The statute may hence find it very difficult to satisfy the test of normal justification and so acquire binding force.

What I have been aiming here to establish then is that first of all, the argument from co-ordination leads into normal justification calculations which again may be better characterised as contests of ‘weight’ than instances of ‘exclusion’. Second, that the argument from co-ordination struggles to instantiate a case for exclusionary reasons at all. It seems that a salience account which can establish the binding force
of authoritative directives, but only in terms of first-order reasons, may be preferable.

What is also significant about the salience account is that it looks much more like the sort of argument that someone with ‘communitarian interests’ ought to be making. The communitarian believes that there are certain communal norms that stretch across the whole society, possessing connections in the varying communities and individual outlooks. We have already noted that Raz himself believes that this is often the case. He maintains that orderly communities must and do share many practices. He maintains that at least the vast majority of the population can and do accept common standards of conduct. Subsequent to these claims, it is especially puzzling that Raz adopts the approach that he does to co-ordinative practices. In order to establish co-ordinative practices, the authority is best placed and most likely to succeed when it makes use of the communal norms and shared standards of conduct. In this way, it sets a salient solution to the co-ordination problem. The notion of exclusionary force is irrelevant.

Of course the communal norms and shared standards of conduct may be repugnant. Raz certainly does not believe that the community is the receptacle of moral truth. In such a situation, clearly the authority ought not to seek co-ordination on the basis of the shared norms and standards. However, in such a situation, if the authority does attempt to seek co-ordination on the basis of morally acceptable norms and standards, its coercive powers might help, but it is highly unlikely that the mere claim to exclusionary force will make any difference.

c. the patchwork thesis

It is a natural consequence of the normal justification thesis that there can only be patchwork authority. Exclusionary force, if there is such a thing, will be patchy. This is essentially just a summation of some of the above discussion. Most clearly, from the arguments based on the moral expertise of the authority/ the risk of moral error amongst individuals, it follows that the authority can only possess authority in a patchwork across individuals. The authority will have moral expertise superior to some individuals, but not others. Similarly, with regard to the argument from co-ordination, because the need for co-ordination will vary across contexts, the authority will only possess authority in a patchwork across situations. Sometimes the C-reason will be sufficiently potent to ground authority, sometimes not. Of course, the picture is not quite so straightforward. For a start, the argument from moral expertise, let’s call this the M-reason, may also lead to a patchwork across situations. The authority will have the requisite level of expertise in some contexts, but not in others. And then the argument from co-ordination may also lead to a patchwork across individuals. One individual may acknowledge the need for co-ordination. Another may value his own autonomy more, or may have positive reasons not to co-ordinate. Now of course Raz does adduce remarks on how the authority of law is likely always to be patchwork. For instance:

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
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scope of authority. It all depends on the person over whom authority is supposed to be exercised: his knowledge, strength of will, his reliability in various aspects of life, and on the government in question. The test is as explained before: does following the authority’s instructions improve conformity with reason? For every person the question has to be asked afresh, and for every one it has to be asked in a manner which admits of various qualifications.26

A scenario that immediately comes to mind involves a directive, which in a particular situation, vis-à-vis a particular individual, produces a M-reason but not a C-reason, or vice versa. Does it satisfy normal justification? Presumably we can work this out. But the point is that given that there is a patchwork along (at least) two dimensions, we are continually going to have to be weighing M-reasons against C-reasons. The exclusionary force of the authority’s directive is going to be unstable. Again, there is reason to become interested in a ‘weighing’ account and to question the adequacy of an ‘exclusion’ account.

The patchwork thesis has further significance for our phenomenology of authority. It turns out that the arbitrator analogy is misleading. It works off a deferral model of authority, whereas normal justification actually takes us into a dialogic model of authority.27 So far as the dependence thesis, the analogy holds. Just as the arbitrator may only use the reasons which already apply to the disputants, the authority may only use the reasons which already apply to its subjects. Normal justification gets in further though. The authority is required to formulate rules that would enable all or the vast majority of citizens to better conform with the underlying reasons that apply to them. Or at least that is the ideal against which authority is to measure itself. It is unlikely to attain this ideal, for the normal justification condition is a stiff one. As Raz explains, “[t]he test is as explained before: does following the authority’s instructions improve conformity with reason? For every person the question has to be asked afresh, and for every one it has to be asked in a manner which admits of various qualifications.”28 This is how the authority of the legal system differs from the authority of the arbitrator.

In the arbitrator example, the normal justification condition does not apply. The test of whether following the authority’s instructions improves conformity with reasons is inapplicable for the disputants have already consented to being bound by the arbitrator’s decision. Raz suggests that the normal justification condition merely takes the place of consent in the arbitrator example, but this is not quite right. It does take its place, but it also changes the dynamics of the situation. In the arbitrator example, the disputants have signed the decision over to the authority, they are deferring to the authority. In the case of legal or political authority though, the citizens have assigned the decision to the authority, but they are not deferring to the authority. They are not handing over the right to rule. The final decision remains with them. Autonomy, in the sense of authorship, is retained because there is to be a dialogue with the authority over whether it is satisfying the condition

27. These terms are taken from J. Cunliffe & A. Reeve, “Dialogic Authority” (1999) 19 Oxford J. Legal Studies 453. The following discussion has benefited greatly from their article.
of normal justification: *for every person the question has to be asked afresh, and for every one it has to be asked in a manner which admits of various qualifications.* The citizen continues to exercise his autonomy and the recognition of the authority becomes a process involving continuing reflection, judgement and qualification.

It is probably important just to have clarified this difference between two cases which Raz maintains are analogous. There may be a further issue however. The dialogic model seems to be inconsistent with the assumption underlying the normal justification condition. When normal justification is established, the individual accepts that the authority is better able to enable him to conform with the reasons that apply to him. How though can I come to that conclusion? I ask the question, I enter into the dialogue, but surely I will only be able to conclude the authority would better enable me to conform if I myself possess a level of moral expertise such that it allows me to characterise the situation, work out the balance of reasons, i.e. only if I myself could have come to the decision made by the authority.

Two examples. The first is given by Raz.\(^\text{29}\) There is an issue of drug safety. The drug administration has authority over me because it has expertise, knowledge, experience in deciding these issues. It thus enables me to better conform with the reasons that apply to me. Normal justification is satisfied. Autonomy is protected. But not quite. I am simply not in a position to enter into a dialogue with the authority. I actually can’t rigorously ask the normal justification questions in this situation. It is true that the authority has expertise, it may even be true that it would better enable me to conform with the reasons that apply to me, but there is no way that I can actually know that. Only if I had the expertise of the authority could I answer the normal justification question definitively. I simply don’t know which considerations apply. I simply don’t know what the balance of reasons is. There is just such an imbalance between the authority and me in this example that I can’t actually hold it to the normal justification condition. I don’t know whether its decision is in conformity with reason. I can’t tell if its information is sound. I can’t tell if it is dominated by corporate interests. I can’t tell what its motives are. I haven’t read the studies. I haven’t researched the results from its use in other countries. I may be justified in accepting its authority however, simply because I don’t have the time or the inclination to learn all the details, read all the reports. It is consistent with my autonomy for me to secede this arena of action to authority, but it is not, I suspect, consistent with normal justification. There can be deferral here but not dialogue.

The second example features a decision by the faculty board of a law school. The board decides that the jurisprudence course is to feature twenty hours of lectures on Ronald Dworkin and no lectures on Joseph Raz. Being an especially keen student, I have read the standard texts by both authors over the previous summer and much of the commentary on the significance and value of their work. I am now in a position to enter the normal justification dialogue. I consider Raz to be the better writer and believe his ideas about the nature of law to be more persuasive. I pen a letter of complaint to the faculty board. They reply with a summary of their

\(^{29}\) Though he uses it to illustrate a different point: *MF* at 159.
reasons for preferring Dworkin. They cite his ideas about constructive interpretation and the semantic sting. In this example, there is not the differential capacity characteristic of the previous example. I am in a position to evaluate the decision made by the authority and to decide whether it better enables me to conform with the underlying reasons. If I remain strident in my Razophilia, clearly, I will have refused to accept that normal justification is satisfied and will have refused to accept the authority of the board. If though I accept the decision of the board, then of course I have changed my mind from preferring Raz to preferring Dworkin. The authority does not better enable me to conform with the underlying reasons, I concur with the authority. Subsequent to the dialogue, I have enabled myself to conform with the underlying reasons just as well and in the same way as if I had followed authority to begin with. But if I had followed authority to begin with, I would have done so without actually believing that it was enabling me to better conform with the underlying reasons.

What I have tried to establish is that the normal justification condition may be somewhat incoherent. It seems incapable of grounding the assignation of authority. When the authority possesses vastly more knowledge and expertise than me, I am not in a position to establish whether it in fact promotes conformity with reason. I can’t even say that it is more likely to promote conformity with reason than myself. I am not in a position to decide for myself. I am not in a position to evaluate the decision of the authority. Normal justification doesn’t really fit the situation. When I possess just as much knowledge and expertise as the authority, when I am in a position to evaluate whether its judgement is better than mine, the normal justification condition seems to create a situation where there is no space between the judgement of the authority and my judgement. My autonomy is not at odds with the authority. We both agree that the course of action initially identified by the authority and then endorsed by me promotes conformity with reason. This is akin to individualised consent. The pre-emption thesis, for instance, just seems to have vanished.

The above analysis however has gone a little too quickly and employed too rigid a dichotomy, between cases where there is a vast difference in expertise and knowledge and cases where there is no difference. Clearly there is a continuum of scenarios where the variable is what I will label the K-differential. What the normal justification thesis and the dialogic model of authority may enable us to do is to set maximum and minimum values for the K-differential. When the K-differential is too large, the normal justification thesis is eviscerated, the calculation cannot be made, and so to use that schema would actually be to compromise autonomy. There are two pressures in such a situation.30 There is a pressure on the autonomous individual to either justify moving from a dialogic relation with authority to a deference relation, or to go about acquiring knowledge or expertise in the area, i.e., decreasing the K-differential so to bring the normal justification condition and the

30. I am using the term ‘pressure’ here in preference to the term ‘obligation’. I suspect that there probably is an obligation too, but I fear that if I use that term, I will be expected to adumbrate the scope and details of the obligation and that would take me far/further from the central issues.
dialogic model back into play. I suspect though that there may also in some circumstances be a pressure on the authority to disseminate the information that it has, to explain its reasoning and to set up accountability mechanisms, again in an effort to reduce the K-differential. When the K-differential is nil or negligible, the normal justification thesis obliterates the notion of authority. That, I presume, is less problematic than the opposite scenario. If the K-differential is kept between these two quanta though, normal justification may be able to do some work and may be able to regulate the conflict between authority and autonomy as it is intended to by Raz. I suspect that it remains the case that whenever there is a non-trivial K-differential, it is not quite correct to say that the authority yes, does enable me to better comply with the reasons that apply to me. I suspect that whenever there is a K-differential, a statement in such absolute terms cannot be made. Whenever there is a K-differential, the best response may be ‘it seems right’ or ‘that’s fair enough’.

I may be aided in making that response by my perceptions of the authority’s past directives and by my assessments of outcomes that it has suggested in the past. I will not maintain that the normal justification thesis is utterly incoherent. However, it is necessary to read considerations of differential knowledge and expertise into the thesis.

Before moving on from the morass of normal justification, I want to adumbrate one final set of issues. The normal justification condition may need a procedural component too. The suggestion is that even where the directive of the authority does indeed enable the individual to better conform with the reasons that apply to him, the individual may have legitimate grounds for rejecting the directive if he has reasonable grounds for believing there is bias in the process by which the directive is formulated, or if the process has been kept unduly private. Moreover, a Marxist may be justified in rejecting the authority of a directive even if the particular directive does indeed satisfy normal justification, on account of his belief that the directive is part of a system of laws which systematically privileges and reinforces a hegemonic structure. I suspect that I also may be justified in rejecting the authority of a directive which though fine in itself is a precursor to the production of further directives which are not going to satisfy normal justification, or is the mild, first manifestation of a tendency that I am eventually going to find objectionable. These procedural considerations can work the other way too. It may be

31. There might be perhaps the suspicion that in this discussion, I have mixed up the terms ‘conformity with reason’ and ‘better conformity with reason’. Raz, it might be argued, only needs to prove the latter whereas I have been arguing in terms of the former. I resist this objection. It is clearly true that in cases where the K-differential is higher than a certain level, it will be impossible for the individual to work out even if the authority enables better conformity with reason. A more extended rejoinder would also I suspect elaborate the thought that the two notions cannot be separated. I cannot work out if something enables me to better conform with reason unless I know what it would mean to conform with reason per se.

32. There may be one other reading which saves the normal justification thesis from incoherence. It may be said that where there is a K-differential, although I may not be in a position to work out exactly if the authority better enables conformity with the reasons that apply to me, it may nevertheless be the case that it does, or does not.

33. I bring up the Marxist specifically because Raz includes the Marxist in his descriptions of the pluralistic culture which authority is able to mediate within.
the case that a directive is not going to enable me to better conform with the reasons that apply to me, but that because it is the result of a fair, inclusive procedure I accept that it nevertheless has authority for me. It may even be the case that understanding the concept and justification of authority in contemporary liberal legal systems depends exclusively or largely on procedural considerations and not on substantive considerations as Raz assumes.

4. Other kinks in the story

a. rethinking exclusionary reasons

One way to put it is to say that even if exclusionary reasons are admitted there is a sense in which nothing is excluded, every valid consideration plays its role (though of course not every reason “wins”). It is merely a matter of structuring the reasons, of elucidating their proper interrelations, and this involves the exclusion of some reasons by others.34

We have seen that there is consistently a problem with understanding exactly how it is that exclusionary reasons exclude dependent reasons. It has become apparent that the dependent reasons often come back into action, so to speak. We need then to make clearer what it is that exclusionary reasons do. This perhaps can be done using a distinction that Raz has used elsewhere between the deliberation stage and the execution stage.35 At the deliberation stage, or the legislation stage, there is no exclusion involved. This is the point at which the rule is first encountered, or the promise is made, or the decision is formulated- it is now that the initial normal justification calculation is carried out. Hence all the relevant dependent reasons can or should be in play. It is subsequent to this act of legislation, when the execution stage is entered, that the exclusionary force kicks in. It kicks in because otherwise there would have been no point in going through the deliberation stage. There would be little point in formulating a rule if every time that the rule was to be applied, the entire reasoning process that had gone into the making of the rule was going to be rehashed. The execution process however is not entirely automatic. Hence the possibility remains of the rule being questioned. In certain circumstances, or if circumstances change, the rule is pressed, and so there is a return to the deliberation stage, a return to the decision about whether the rule satisfies the normal justification.

When looked at in this fashion, we can see that exclusionary reasons do not, as Raz concedes in the passage quoted above, exclude any of the dependent reasons. This is in two senses. First, because the dependent reasons figure at the deliberation stage. Second, because there is always the possibility of a return to the deliberation stage. Exclusionary reasons are far from absolute. They structure dependent reasons, they do not obliterate them.

When we come to this point in Raz’s analysis though, the difference between

34. \textit{FU} at 1168.
35. \textit{EPD}, ch. 10.
reasons being excluded and reasons being outweighed becomes somewhat difficult to discern. At the point of normal justification, that is at the end of the deliberation stage, what occurs? The reasons against the rule that may be adopted are outweighed by the reasons in favour of adopting the rule. Raz would come this far. But then he wants to say that both the reasons for and against the rule are excluded and the rule itself becomes the reason for action. The ‘weight’ account though wouldn’t, I venture, object to a largely similar formulation. The rule does in a sense exclude the dependent reasons, for it becomes a shorthand for the reasons that have outweighed the others, the reasons that have ‘won’. It becomes a ‘rule of thumb’. If the shorthand form is challenged however, it is unabbreviated, it is unpacked, the ‘winning’ reasons are explored. For the ‘weight’ account, the challenge at this point is to weigh the reasons that existed for adopting the rule against the reasons that there appear to exist in the present case for not using the rule, or for shredding the rule and formulating a different one. There should also be taken into account any expectations that may have formed on the basis of the rule. There are good reasons- stability, predictability, accountability- for continuing with a rule even if it appears in some particular case or set of cases to lead into an adverse result.36

The problem for Raz is that for the ‘exclusion’ account too, the reasoning involved is the same. Normal justification has to be done again, and normal justification will require consideration of all the same dependent reasons. Raz contended above that though there was a sense in which exclusionary reasons did not exclude anything, they did structure reasons and elucidate their proper interrelations. It does seem though that the ‘weight’ account structures reasons in the same way and finds their proper interrelations to be largely the same.

The problems for Raz arise essentially from the normal justification condition. He has to have that condition. On the other hand, because of that condition, there can be no such thing as absolute exclusionary force. There has to be the initial deliberation stage, in which nothing is excluded. More critically, there has to remain the possibility of exclusionary force being revoked throughout even the execution stage. Normal justification cannot be assumed. It must be taken seriously. And if it is to be taken seriously, this means that the calculation has to be checked from time to time. And so exclusionary reasons can always be outweighed. Hence the distinctiveness of the exclusionary account is lost.

b. do as I say, but don’t say what I do

It has been one of the objectives of the above discussion to demonstrate just how contingent the success of law’s claim to authority is likely to be. It should be made clear again, though attempts were made throughout to keep the distinction in view, that for Raz, the matters of law’s claim to authority and law’s actual possession of authority are entirely separable. This of course follows from Raz’s tenets of legal positivism. The law always claims exclusionary force. How is this claim to be

justified? Through the normal justification condition. It states that the claim to exclusionary force is justified when the authority better enables its citizens to conform with the moral reasons that apply to them. Hence clearly the law cannot always possess exclusionary force. If there was no distinction between the making of the claim and satisfaction of the claim, it would mean that legal authority somehow always enabled its subjects to better conform with the moral reasons that applied to them. A necessary connection between law and morality would thereby be formed. Clearly Raz has to resist that connection. And this is why the matters of law's claim to authority and law's actual possession of authority must remain strictly separable. 37

On the other hand, at other junctures, Raz adduces notes on the closing of this divide. Hence he writes about the notion of respect for law. He writes that when over a period of time, an individual becomes satisfied as to the good faith of the authority and does consistently find that its directives enable her to better conform with the reasons applicable to her, she may develop a sense of respect for the law. He writes:

It is a belief that one is under an obligation to obey because the law is one’s law, and the law of one’s country. Obeying it is a way of expressing confidence and trust in its justice. As such, it expresses one’s identification with the community. Respect for law does not derive from consent. It grows, as friendships do; it develops, as does one’s sense of membership in a community. 38

The significance of this attitude of respect for the law is that it can help to close the divide between the making of the claim and the granting of the claim. Hence even where normal justification does not appear on the other dependent reasons to have been satisfied, if the individual has come to respect the law, the individual may find its claim to authority nevertheless palatable. Alternatively, the individual may not test the normal justification of a rule too rigorously because of already having developed a respect for the law. Of course this attitude of respect for law is entirely contingent, and it functions only as a prima facie reason to grant the claim. It is also worth noting this as a further echo of the communitarian position, this likening of membership of a political community to friendship, this idea of the law becoming ‘one’s law’. The suggestion does appear to be that where this communitarian relationship develops, in the kind of legal systems that are able to sustain it, normal justification works slightly differently. The tension between authority and autonomy is reduced.

We can, on the flip side, find means for opening up the divide. Consider the phenomenon of ‘the gap’. 39 This represents the idea that rules are necessarily both

38. EPD at 338.
under- and over-inclusive. To take an example that Fred Schauer uses. In a restaurant there is a rule prohibiting the entry of dogs. The underlying justification of the rule relates to excluding the annoying disturbance that dogs can cause. The problem with the rule that it doesn’t extend to say, bears, which don’t come under the rule as expressed, but do come under the base justification and it does extend to say, guide dogs, which come under the text of the rule, but not under the base justification. It follows then that rules will claim exclusionary force because of their very nature as rules in situations where they cannot possibly possess exclusionary force, that is, satisfy the normal justification condition. It follows then that there is a necessary bifurcation. Law consists of rules. Rules are under- and over-inclusive. Law must always claim to have application where it cannot. Or as Larry Alexander puts it, “we may not be able to have what we need—authorities and authoritative rules—because however rational it is to establish them it is irrational to follow them.”

On the other hand, even the exclusion account has a way of bridging the gap. We discussed earlier the idea of cumulative normal justification, and that is what would count in gap situations. The rule may not enjoy normal justification and so pre-emption vis-a-vis this exact situation, but if the rule is justified across a range of situations, then it is rational to follow the rule. What the gap phenomenon does give us though is another set of situations in which the ‘weight’ account may be preferred to the ‘exclusion’ account. The rule may or not satisfy the normal justification condition, when considered in aggregation. We will have to consider the benefits that will accrue from following the rule set against the loss that will be incurred in the present instance. Again, the claim is not that the ‘exclusion’ account cannot accommodate this sort of weighing off, only that if it can, it is no longer distinct from the ‘weight’ account.

Let us evaluate where the exclusionary reasons account has brought us. In the Razian story of authority, authority always claims exclusionary force. We have however again and again struggled to give sense to the notion of exclusionary reasons and found that if exclusion is read in a ‘strong’ sense, it cannot be justified, in fact, it is impossible; if it is read in a ‘weak’ sense, it appears largely indistinguishable from notions associated with the ‘weight’ account. Either way, what we have seen is that authority cannot have the authority that it claims. The authority claims exclusionary force, in the sense of excluding action on the dependent reasons, in the sense of always enabling the individual to better conform with the reasons that apply to him. It is never entitled to this claim absolutely however. Sure Raz can complain that there is supposed to be a bifurcation between the claim to authority, what we might call, the authority-perspective on authority, and the grant of authority, what we might call, the individual-perspective on authority. Indeed he writes in the postscript to the second edition of Practical Reason and Norms,

The preceding section showed that reasoning with rules is reasoning with protected reasons. It did not establish that it is ever justified to reason with rules. It did not

40. See F. Schauer, Playing by the Rules, supra note 36.
establish that any authority is ever legitimate. Nor is it the function of this book to argue to such conclusions.\textsuperscript{42}

The question that arises however is that if it isn't clear that any authority is ever justified in making the claim that it does, why does it make that claim? Imagine especially if the authority was to read Raz’s work (or this essay maybe?) and discover the extent of the bifurcation between its perspective and the individual-perspective. Why make in an absolute form, a claim, that you know can only ever be granted in a patchwork form, if at all? One reason may be that the claim is needed so to fulfil some essential function. Raz does identify one such essential function that the law fulfils, and that is the function of mediation, of bringing about co-ordination in a society. It has already been argued however that it may not be necessary for law to claim exclusionary force in order to fulfil this function. What is also worth noting though is that Raz has recently wavered somewhat from his original ideas about the service conception of authority and its concomitant function. Hence he has stated:

How does the pre-emption thesis solve the problem of motivation? People can have reason to do what they are motivated to do, and they may be motivated to do what they have no reason to do. So even if the law’s subjects have a pre-emptive reason to comply with the law, it is not clear how that can contribute to the problem of motivation ... if people are not motivated to obey the law then the fact that the law has pre-emptive force will do little to motivate them; at least it will do nothing more to spur their motivation than would be done by any other normative force the law may have, or may have had.\textsuperscript{43}

This clearly is correct. What will motivate people is a C-reason, that is, a reason to co-ordinate conduct. The law does not create those reasons. Those reasons exist antecedently, if at all. It can support those reasons, it can concretise them, it can help people to realise the force of those reasons, none of these supplementary effects though depend on the claim to pre-emptive force. That claim in itself does not motivate obedience. Whether the law claims exclusionary authority, or merely epistemic authority, the exact shade of the normative claim is unimportant for the individual deciding whether or not to comply with the law. What matter for the individual are C-reasons and M-reasons and the threat of coercion. It follows then that in order to fulfil its mediating and co-ordinative role, the law does not need to possess exclusionary force after all. Indeed, it does not matter what sort of force it claims or possesses. What will matter more is how the populace is orientated towards the directives of the law, how they regard its expert-status, how inclined they are to co-ordinate with each other, and so forth.

Raz’s scepticism about the function argument does appear now to run fairly deep. He contends for instance that the argument from co-ordination is not an argument for the pre-emption thesis, it is an argument from that thesis.\textsuperscript{44} What then is left

\textsuperscript{42} PRNM at 194.
\textsuperscript{43} J. Raz, “Postema on Law’s Autonomy and Public Practical Reasons: A Critical Comment” (1998)
\textsuperscript{4} Legal Theory 1 at 12.
\textsuperscript{44} Ibid. at 10.
to constitute an argument for the pre-emption thesis? I have maintained already that the phenomenological arguments are unsuccessful. Of the teleological argument, it appears that Raz himself is no longer convinced. Hence he is either now relying solely on the phenomenological argument, or he believes that exclusionary authority is merely something that it is necessary for authority to claim. It is immaterial whether we ever grant the claim or not. It is not a claim about the true nature of the statements it is attached to. It is not a claim in furtherance of the so-called function of law. So what is it?

Raz writes,

It is in the nature of law that it claims authority, i.e. that it claims to be authoritative, and that means that it claims to have settled moral and other social issues (and not necessarily because they were controversial; sometimes there is simply a need for someone to decide, even when the matter is not controversial). 45

The question so has to be raised, there may well be this need for someone to decide but does this entity or individual have to claim exclusionary force for the decision? It is entirely possible that no-one will accord the decision the exclusionary force that it is claiming. The exclusionary force is not necessary for any functional or teleological reason. Is it just an existential need that we have as a community governed by law that this process is gone through? Will we cease to have a legal system if this need to decide is not met with a decision that claims exclusionary force for itself? Is it not odd, that it be of the nature of law, if that is indeed the thesis, that it claim a level of binding force that it may never attain and that it does not need to attain?

Consider the normal justification aspect. Is it the case that the law always claims that it better enables its citizens to conform with the moral reasons that apply to them? This seems an incredibly involved and far-reaching claim for a legal system to make. Legal systems surely aren’t in the business, necessarily, conceptually, of making moral pronouncements of such fundamental significance. It is entirely conceivable that there are legal systems that will make such a claim. Systems of religious law are for instance likely to make such a claim. But are all legal systems? Presumably, there would be a legitimacy gain in making such a claim. If a legal system was to discourse in normal justification terms, that would quite possibly enhance its legitimacy. It may be making a false claim, but it may still enhance its legitimacy. The problem with this explanation though is that again, it is not universalisable. Not all legal systems will be required to seek legitimacy in this fashion. Some legal systems, for instance, may survive perfectly well just through coercion, or through reliance on other power structures. And even if legitimacy is a concern, why would it not suffice for the authority to claim that it is expressing the balance of dependent reasons as it sees it, and it is seeing, recall, from a position of moral expertise, from a position of ascendance where it is able to take a wide range of issues and concerns into consideration? It could add a reminder as to the need for co-ordination in society, and then a further reminder, if the foregoing leaves the

45. Ibid. at 13-14.
addressee unconvinced, that it does possess the power of sanctions. What can also be envisaged no doubt is a situation or an entire legal system in which the authority foregoes the claim about expressing the balance of dependent reasons and suffices on the second claim, that it enjoys the prerogatives of coercion.46

One possible explanation for this kink in the story is that the story is being misread in a quite fundamental way. It may be the case that this is not a once upon a time universal fairytale. This may be a quite specific story about a particular time and a particular place. Raz does sound for most of his time as if he is doing conceptual analysis. He is writing a general theory of law. On the other hand, when he is discussing for instance, the mediating function of law, he has in mind quite directly modern, pluralist societies. It was suggested above that religious legal systems may be the sort of systems that do make the normal justification claim. Do contemporary liberal legal systems make the normal justification claim? It may be true that the authority of the liberal legal system is based on its ability to enable its citizens to better conform with the reasons that apply to them. And what is more, it is expected by its citizens to discourse in exclusionary terms. Raz may have been misled, or the reader may have been misled into interpreting a particularist thesis about certain types of legal systems (so far, perhaps religious and also, liberal or certain kinds of liberal legal systems) as a general thesis.

It does seem sensible to factor the social conditions of a system into the account when assessing the kind of claim made by the authority in that system. We are able to imagine legal systems in which it is not the normal justification claim that is made. There is, for instance, the legal system in which the officials refer only to their powers of coercion. There may be a legal system in which the officials openly attempt to enforce immorality. Clearly though the claims made by those systems interact with social and political conditions that are quite different from the social and political conditions found in contemporary liberal legal systems.

In one of his key discussions of the concept of authority, Raz explains that for instance, trees could not have authority because they cannot communicate with people and so, "one cannot sincerely claim that someone who is conceptually incapable of having authority has authority if one understands the nature of one's claim and of the person of whom it is made. If I say that trees have authority over people, you will know that either my grasp of the concepts of authority or of trees is deficient or that I am trying to deceive."47

I suspect that we can tinker with the background social conditions here to the extent whereby trees can be said to have authority. Imagine there is a culture which has bound together its notions of nature and of the sacred. It regards trees as the oracles of a higher moral authority. Whenever there is a dispute in this culture, the disputants are taken to the tree, they each choose a branch and sit under the tree until a leaf or a piece of fruit falls from one of the selected branches. The person who chooses the correct branch prevails in the dispute and this decision is also taken

47. EPD at 201.
to have precedential effect. The people in this culture do believe then that trees can communicate with people or alternatively, that the trees are a means of communication. It is possible to say then trees do have authority over people. This does not necessarily require us to mess around with the concept of authority, it just depends how we understand trees.

It is perhaps then this neglect or straightforward assumption of the background social conditions that leads Raz into the normal justification and pre-emption theses. I still believe that he is wrong. I venture that even liberal legal systems, perhaps especially liberal legal systems don’t make claims to exclusionary effect or claims in the nature of normal justification. There is no functional, teleological or existential reason for them to make these claims. It cannot be the implication of a general thesis. It may nevertheless be possible to argue that it is a tenable particularist, descriptive thesis.