Philosophical Foundations of the Nature of Law

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3

Law's Authority is not a Claim to Preemption*

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In the past, it was thought that if there was a general obligation to obey the law, it would have to be content independent (applicable to law regardless of what it demands), universal (applicable to everyone who is subject to it), and categorical (comprehensively applicable to all duty-imposing laws).[1] Given the difficulty in establishing such an obligation, many more recent theorists have either given up one or more of these facets in order to make it easier for law to succeed in obligating, or they have refocused on the nature of the authority the law must claim and when we might have good reason to accede to that claim. Joseph Raz, for example, tells us that, by its nature, the law must claim moral authority where that authority consists in the capacity to provide preemptory or exclusionary reasons for action.[2] More generally, moral or legal obligations are understood as consisting in exclusionary reasons, which are first order reasons to comply with the content of the directive or obligation, coupled with second order reasons to exclude certain other reasons we might have from other sources. Among other things, this would mean that the law is telling us to replace our own reasons against a directed action with the reason that the action should be done simply because it is the law.

I am bothered with the idea that law tells us to replace our reasons. Of course, the law is frequently telling us what to do. But this characterization of the law as claiming to replace our reasons strikes me as making the law out to be more demanding than it

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[1] Kramer (2005: 179–80). It is usually generally (and still) agreed that any obligation to obey the law is only prima facie (or perhaps more correctly *pro tanto*, see Hurley (1989: 261); Edmundson (2004: 215–16), and can be outweighed by more pressing concerns. That otherwise authoritative directives can be defeated by pressing concerns should be distinguished from instances in which the law itself allows pressing concerns to trump those directives as a kind of exception.

[2] Raz (1979: 30).

actually is. Even if, as Raz claims, the law is only asking us to put aside reasons to act contrary to the directive in question[3] (implying it is unconcerned with our reasons for compliance), it attributes to law the claim that we ought never to act on contrary reasons. I don't believe this is an accurate characterization of the demands law places upon us, although it may be an accurate characterization of our response to its demands when we accede to its authority. Raz's conception of authority and preemptive reasons nicely captures our attitudes when we do accede to law's demands and obey simply because it is the law (and not out of fear of punishment or social disapprobation). So the question becomes: can we understand the theoretical treatment of law's claims in a weaker way without damaging the strengths of Raz's theory?

In this chapter I show that the law does not *claim* to preempt our reasons, although we allow it do so when we accept its authority. While Raz holds the law's claim to preemptive authority to be a part of his service conception, I show that the rest of the service conception does not require attributing this particular claim to law and that it is enough for us to allow it to preempt conflicting reasons when we agree to its demands. Although not fully developed here, the result of this will be that authoritative directives can be understood as simple commands, albeit commands that are generally to be legitimized, in accord with Raz's theory, whenever compliance helps the subject to conform better with the balance of reasons that already apply to her.[4]

This might seem a bit of a nit-picky pot shot at Raz's theory. But the importance of this clarification lies in a better theoretical reflection of our relationship to the law and its putative practical authority. Under Raz's current explanation, the law's ability to manipulate reasons that apply to us weighs heavily on the subject and amounts to a demand that we might be very reluctant to agree to. Many replies and criticisms of Raz stem at least partially from this reluctance.[5] But rather than focus, as others do, on seeing that reluctance as a reason to reject or alter Raz's notion of preemption, I want to focus on its role in Raz's notion of law's claim. If the law is not understood to be making such a stark demand, then it will be more palatable to allow for that manipulation of our reasons. Hence this attack on a small part of Raz's theory is actually meant as a way to deflect more serious criticism. Additionally, if we can interpret law's demands upon us in this slightly weaker way, then the task of legitimizing the authority of legal directives might become just a bit less arduous than Raz's theory otherwise seems to entail.[6]

The argument proceeds in three parts. In the first part I present an overview of Raz's theory, showing what I take to be a misstep in attributing the claim of preemption to the law and that Raz's own exposition does not require that

[3] Raz (2009: 140). [4] Raz (2006: 1018).

[5] Hurd (1991); Alexander (1990); Moore (1989); Perry (1989); Regan (1989); Regan (1990); Green (1988). Alexander (1990) is notable for presenting an argument that is somewhat similar in denying that the law provides exclusionary reasons but leaving open the possibility that we should still treat legal directives as exclusionary reasons. My argument differs in concluding that authoritative legal directives can actually be exclusionary reasons when we accede to them, but that law does not claim them to be.

[6] For some of Raz's reasons for making the legitimization of authoritative directives difficult see Raz (1986: 57).

attribution. This is only a half-argument in that it calls into question Raz's reasons for attributing the claim of preemption to law, but does not itself constitute a reason for rejecting that attribution. In the second and third parts, I present two independent but related reasons for rejecting the attribution of a claim of preemption to the law. One is the choice-of-evils (necessity) defense to a criminal accusation. If the law allows (especially novel) claims of necessity in defense to a criminal accusation, then it is cognizing individual reasons for contrary action as trumping authoritative directives—even potentially when those individual reasons were considered and rejected by a legislature. The other is the theoretical claim that the law has gaps (a claim made by Raz and many others). If the law has gaps then individuals must always use their own reasons when determining how to act in any potentially gappy situation. If those reasons are the same ones possibly excluded by a vague or conflicted authoritative directive, then the law cannot be understood to be claiming to preempt them.

Granted, each of these two independent reasons is limited in itself. The first only applies in legal systems that allow for choice of evil defenses. The second will only be applicable against any theorist who accepts that the law necessarily has gaps. But together, they cover quite a few bases. The first especially is useful against any argument that the law must claim preemption as a conceptual matter. Since we have an example of a legal system that cannot be understood to be making that claim (and it is from our own systems), it would appear that the claim cannot be a necessary characteristic of law.

1. Raz's service conception and the half argument from the failure of closure

Raz's service conception of authority was novel for understanding that, in order to be justifiable, authority had to serve the subject rather than vice versa.[7] On the other hand, legitimate authority is still understood as a right to rule, which the law, by its nature, must claim.[8]

The theory consists of two theses, each of which independently implies a third. The "dependence thesis" holds that, to be legitimate, authorities must base their directives on reasons that already apply to the subjects of those directives.[9] The "normal justification thesis" (NJT) holds that authority is normally justified where the subject does better at conforming to reason by following the directive than by following her own understanding of the balance of reasons with regard to the matter directed.[10] (To these Raz has also added an "independence condition," that the matter being directed by the authority is not one on which it is better to decide for oneself even at the risk of acting contrary to reason.[11])

[7] Raz (1986: 57). [8] Raz (1985: 6).
[9] Raz (1986: 47). [10] Raz (2006: 1014); Raz (1986: 53).
[11] Raz (2006: 1014); Raz (1989: 1180) (replying to Green (1989) at 810).

The dependence and the normal justification theses are said to imply a third thesis: the "pre-emptive thesis," that the fact of the authoritative directive is not simply one reason to be added to the balancing of reasons in determining how to act, but "should exclude and take the place of some of them."[12] Specifically, the authoritative directive preempts "the reasons [against the directive] that the authority was meant to consider in issuing its directives. . . ."[13] The dependence thesis implies the preemptive thesis in that the authority is already considering the reasons that apply to the subject in issuing its directive. Not to see the directive as preemptive would be to count the reasons behind the directed action twice: once in the balancing the subject would have been doing on her own, and again in importing the reason behind the authoritative directive.[14] The normal justification thesis implies the preemptive thesis in that, where the NJT applies, its success requires that the subject replace the background reasons against the directed action. The whole point of the NJT is that the subject does better at conforming to reason by following the authoritative directive than by acting on her own. If the authoritative directive does not preempt the background reasons leading to her own estimation of how to act, then the authority cannot do its job and get her to conform better to reason.[15]

Notice, however, that these theses imply only that the subject must *treat* the authoritative directive as preemptive, not that the law must claim to impose that preemption. Most of the time, the language Raz uses in explaining the preemptive thesis focuses on the subject's perspective in treating the directive as preemptive.[16] When we accede to the legitimacy of the authority and accept its right to issue directives that are binding upon us, we agree that we are bound to obey its commands. That bindingness may be understood in terms of reasons we have to exclude our reasons that militate against compliance with the directive. But this does not mean that the law is claiming to offer those exclusions, only to be justified in seeking to control behavior.[17] Hence, law's claim to authority, the claim of the right to rule, can be understood as a claim of the right to have its directives followed. However, this is a claim to control behavior and need not be a claim to penetrate that behavior to the reasons behind them. This point bears some emphasis: There are many ways to control the behavior of others. While admittedly most of them involve manipulating the subjects' reasons for action, we can also imagine dystopian scenarios in which subjects' behavior is controlled by mind control, and less dystopian scenarios in which behavior is controlled simply by limiting the physical options open to the subject (which controls behavior through

[12] Raz (1986: 46); Raz (2006: 1019).
[13] Raz (2006: 1019).
[14] Raz (1986: 58).
[15] Raz (1986: 58); Raz (2006: 1019).
[16] "The only proper way to acknowledge the arbitrator's authority is to *take* it to be a reason for action which replaces the reasons on the basis of which he was meant to decide" Raz (1985: 10) (emphasis added); Raz (1986: 46) (discussing the preemptive thesis in terms of the subject not "adding" the directive to the other reasons she already has); Raz (1990: 192–3).
[17] This could be seen as a reason to agree with others who have said that the right to rule and the duty to obey come apart. See e.g. Edmundson (1998), *passim*.

limitations placed on the choices open to the subject rather than through direct manipulation of the reasons the subject has for making one choice or another). While a directive or command is best understood as controlling behavior via the manipulation of reasons (the command, when authoritative, serves as a reason), the claim of authority is properly understood as a claim of the right to control behavior. Since that control can take forms other than the manipulation of reasons, we cannot immediately infer that a claim of the right to control behavior is a claim of a right to manipulate reasons. Of course, the subject is the ultimate determinant of her behavior (except in the mind control scenario) and so will view a directive she considers legitimate to be a reason not to act on contrary reasons.

While Raz's presentation of the preemptive thesis and his explanations of how authoritative directives consist in providing exclusive reasons are generally framed from the subject's point of view, he occasionally suggests that the law is demanding that we treat its directives as preemptive.[18] It is this that I wish to deny.

The argument to the conclusion that the law is claiming preemption might seem a simple matter of deductive reasoning: Authority consists in providing preemptive reasons. Law must claim to have authority. Therefore, law must claim to provide preemptive reasons. If I accept the two premises, it might seem that I am bound to accept the conclusion.

However, this is mistaken because the argument rests upon a principle of closure under entailment for claiming which is not supportable.[19] If I claim that the glass contains water, and water consists of hydrogen and oxygen, this does not mean that I claim that the glass contains hydrogen and oxygen. Even if we can say that the law necessarily claims authority, this does not mean that it must claim to offer preemptive reasons, even if authority operates on us by providing preemptive reasons.

Put another way, the nature of authority might consist in preemptive reasons for the subject of authoritative directives, but this does not mean that one who claims to have authority must demand that the subject preempt her (contrary) reasons with the reason represented by the authoritative directive. The nature of authority to the subject might be opaque to the claimant. Alternatively, even if the authority is aware that the subject receives the directive as a reason to preempt her contrary reasons, the authority need not be making that demand on the subject simply because the authority is more concerned with action than with reasoning. (This is a point Raz himself stresses.[20]) The legitimate authoritative directive must be based on reasons that apply to the subject. But since the authority's primary concern is compliance, getting the subject to *behave* in conformity with the balance of reasons that already apply, the authority is not generally concerned with the subject's *reasoning* after the directive has been issued. Yet the preemptive thesis

[18] Raz (1990: 150–1). [19] Soames (1987).

[20] In replying to H. L. A. Hart's claim that the function of an authoritative directive is to supplant the will of the subject Hart (1982: 253), quoted by Raz (1986: 39), Raz argued that authorities are not generally concerned with thought or deliberation, and are rather usually concerned only with action: Raz (1985: 7); Raz (1986: 39). See also Shapiro (2002: 406–7).

concerns the subject's *reasoning* about how to behave in response to the authoritative directive.[21] Insofar as the preemptive thesis holds that subjects must *take* the legitimately authoritative directive as a preempting reason, the thesis sets forth a norm of reasoning, even if the preemption itself consists in simply refraining from acting on the excluded reasons.

The argument from the failure of closure under entailment for claiming might not satisfy those who criticize Raz for the notion that a legal system can make claims at all. Of course, if we say that the law can make claims only as a metaphor or "metaphysical fiction,"[22] we would not be able to use the failure of closure under entailment for claiming as an argument against seeing the law as claiming to have preemptive authority. If there isn't really any claiming going on, then any opacity in the preemptive nature of authority to the claimant is irrelevant since there isn't really a claimant.[23] But if we do see it as a metaphor for the "demands" (understood in terms of our supposed obligations) made by a putative norm (or normative system), that would still be to focus only on the subject's perspective and how she *treats* the authoritative directive. To the extent we can distinguish between the demand made by a normative system and how the recipient of that demand treats it when accepting it and acting upon it, what constitutes proper acquiescence to that demand when accepting it can differ from what precisely is being demanded.

One place to see this is in Raz's argument that the preemptive thesis is required in order to prevent the double counting of reasons. If we have a rule and the rule is seen as a reason for the action along with the reasons behind the rule, then those reasons are being double counted.[24] Preemption is therefore needed to prevent the double counting of reasons by the person who performs the action, not necessarily by the authority. As far as the authority is concerned, it can pile on the reasons offered in the expectation that the subject will ultimately depend on one of them, even if some of them are in reality duplicates of others, and even if the subject ends up acting for some other reason than that he was directed to do so. Hence, it is fine for a parent to tell the child not to touch the stove because he will get burned, which will hurt, and because "I'm the mommy." The child can then choose which of these reasons seems more salient to him. Similarly, if one is confronted with a legal authority who happens to be generous in providing reasons, perhaps a police officer who tells you to detour because there is construction ahead, one can choose to act to avoid the construction, or to avoid expected sanction, or to comply with the justified authority. (In reality, our action is over-determined by these reasons

[21] Raz's "preemptive" reasons differ from Hart's "peremptive" reasons in that Hart's were explained as reasons to exclude other reasons from deliberation. Hart (1982: 253). Raz's preemptive or exclusionary reasons are reasons not to *act* on the excluded contrary reasons. Raz (1986: 39). Yet they are still reasons that go to the subjects' process of balancing reasons. See Shapiro (2002: 406–7), rejecting this distinction.

[22] Himma (2001: 279).

[23] Raz does believe that the notion of the law being able to make claims upon us must be more robust than simply reducing such claims to those made by officials. This is necessary in order to understand the demands of customary laws, which have force without official enactment. Raz (1979: 29).

[24] Raz (1985: 23).

and it is unlikely that a subject simply chooses one on which to act, instead acting because the balance of all these reasons is in favor of compliance.) In complying with the legitimate authority for the sake of that authority, *we* are using the authoritative directive to preempt other reasons that apply to us.[25] This does not entail that the authority is asking us to do so. The authority does not generally care what reasons we follow so long as we comply (which is why the directive preempts only contrary reasons).

One objection that might be raised notes that the failure of closure argument ignores the distinction between the semantic content of claims and their pragmatics.[26] This is the notion that the meaning of a given utterance depends partially upon the use to which the utterance is put and can come apart from the semantic content of that utterance. This objector might say that "The law claims to preempt contrary reasons" is an accurate account of *what* law claims but not *how* it makes that claim. If these come apart then it would be possible to say that the failure of closure holds for the contextual pragmatics of the claim but not the semantic content, "and sometimes the semantic content of a sentence is not itself asserted, or even included in what the speaker is committed to."[27]

There are a number of difficulties with this objection stemming again from the fact that the law is not a person and its claim is not a verbal act. For one, the distinction between semantics and pragmatics is about utterances (understood as "specific events, the intentional acts of speakers at times and places"[28]), and while it might make sense to attribute to law the claim to have or to be a practical authority, that does not mean we understand it to utter that claim. Since law is not the kind of thing that can make an utterance, it does not make sense to say that we can distinguish the semantics and pragmatics of its claims.[29]

On the other hand, one might note that where there is no speaker, it doesn't make sense to point out the failure of closure either; if the claiming is itself only metaphorical and not reducible to a person's utterance, then perhaps the law "claims" everything that is entailed by its "claim." Not only can't the law's claims be reduced to particular official utterances (since there can be law without official enactment), they also cannot be reduced to the wording of particular laws. Raz says that the law's claim to have or to be a practical authority is a conceptual feature of law wherever it is encountered.[30] In that, it is a property of legal systems rather than

[25] Raz (1985: 23) (showing that we must choose between the authority and the underlying reasons to determine our actions).

[26] I am indebted to Matt Bedke for this objection.

[27] Soames (2008: 404). Notice that this qualification actually helps my argument since once we focus on the pragmatics rather than the semantic content of the claim, we are in a position to say that the law's claim is not supposed to include the claim of preemption when understood as the semantic content of its claim to have practical authority.

[28] Korta and Perry (2011).

[29] To be more precise, we might understand the law to perform utterances in the wording of written statutes and court decisions, and in what comes out of the mouths of officials. While for any of these there might be a distinction between the semantic content and pragmatics of the utterance, the claim to authority is attributed to the law as an institutional whole (and as a conceptual truth) and not to its individual parts. To that extent, this particular claim cannot be seen as an utterance.

[30] Raz (1986: 76–7).

individual laws. (We might go so far as to say that it is an emergent property of legal systems in their purported supremacy and comprehensiveness[31] that supervenes upon the individual legal norms.) Maybe we can do without the "claiming" language, but probably only by using other terminology that still has some metaphorical aspect: the "demands" the law places upon us, the norms it "purports" to impose upon us, etc. We are subjects of those norms and we are anthropomorphizing the law a bit in order to impute to it a kind of agency in its impositions of norms. Perhaps the most precise way to speak about this would be to say that "society purports to impose these obligations upon us through the institution of law," since we might be more comfortable attributing that bit of agency to a collection of people than to an abstract social institution. But whether we attribute the claim of authority to law, to society, or to government, we cannot simply leap from the claim of authority to the claim of preemption.

More importantly, however, it is precisely with the semantics of the claim that we are concerned. In sections 2 and 3 I will advance arguments that it cannot make sense to attribute the claim of preemption to the law because it contradicts other important facets of law. That contradiction goes to the semantic content of the claim we are attributing to the law and not the way in which it is made.

This discussion underscores the importance of the perspective from which we analyze the claims law makes. Another possible reply turns Raz's reliance on the subjects' perspective into an attack on my basic position. The reply reminds us that Raz is always looking at authority from the standpoint of the subject rather than the claimant. Hence the attribution to the law of the claim to exclude the subjects' contrary reasons is an attribution made from the subjects' point of view (as is underscored by my discussion of our anthropomorphizing the law by attributing claims to it). Since I am saying the subject allows the law to preempt reasons by acceding to the law's claim to authority, when we look at the law's claim from the subject's perspective it still makes sense to attribute the claim of preemption to the law. That is, the claim to authority itself is really just attributed to the law by its subjects, so if the subjects accede to the legitimacy of that authority by allowing it to preempt their contrary reasons, then it still makes sense for them to attribute that claim of preemption to the law.

This is a powerful reply and not to be rejected lightly. But I think that my following arguments will show the weakness of this position. Even if we understand the nature of law's authority from the standpoint of the subject, our theory of that authority should present a coherent picture of what law must be demanding of us based on the way it operates. If other facets of the law (available to its subjects) make a demand to preemption implausible as in tension with those other facets, then it would be far better for a theory of its authority (analyzed from the standpoint of its subjects) to avoid that attribution of a demand to preemption.[32]

[31] Raz (1990: 150–1).

[32] Of course many, if not all, legal systems frequently make conflicting demands upon their subjects. But a theory of law's authority is not a given legal demand that can come into conflict with others. Rather, a theory of law's authority such as Raz's is supposed to be setting forth conceptual truths

While this section shows that Raz's argument need not reach the conclusion that the law claims to preempt our non-legal background countervailing reasons when it makes its necessary claims to authority, I have not yet shown a good reason to deny that it does so. In the next two sections I tackle that task.

2. Choice of evil defenses

That the law does not claim to exclude our non-legal reasons for action is at least true in legal systems (such as ours) that cognize choice-of-evils (also called "necessity") as a justification defense to some crimes. However, if it is true in some legal systems, then the claim of preemption is not a necessary component of law's claim to legitimate authority.

In order to understand how the choice-of-evils defense precludes law's claim to preemption, I need a distinction from the literature on criminal law. There is some controversy over the boundary of this distinction, but it will not affect the use to which I put it. The law generally allows both justification and excuse as defenses to crimes. An excuse is offered in defense when the accused admits committing the action that fits the external definition of the crime, but argues that she was not responsible for the action because of circumstances that prevented her from avoiding it. In general (and admitting there are exceptions to this way of characterizing the distinction), if one were to view a situation that would later be grounds for excuse from the crime, one would still have good reason to intervene to prevent the action if possible. This includes as examples cases such as crimes of passion (jealous lover situations), perhaps individuals assaulting or killing their habitual abusers when not under direct threat by them, perhaps acts done under certain kinds of insanity (to the extent that the applicability of the definition of the crime itself is not vitiated).

Justification (of which I take choice-of-evils to be an example) is different. If one were to view an action that conforms to the external elements of a crime in a situation that would later be grounds for a justification defense, one would not have a good reason to intervene to prevent the action. For example, if someone witnessed a fire that threatened the life of someone trapped inside a building, one would be justified in running into the adjacent fire extinguisher store and appropriating a fire extinguisher to use in extinguishing the fire. If the only way to separate two people locked in mortal combat was to render each of them unconscious, one would be justified in doing so even though it has all of the external characteristics of engaging in battery oneself to do so. In either of these cases, another person would not be justified in stepping in to prevent the action that usually constitutes a crime.

This is important for underscoring the fact that, in justification situations, the accused is asserting that his reasons for non-compliance were enough to trump the

about the nature of law itself. If we believe that the institution of law is not incoherent at its core, then any successful theory of its authority must be in harmony with other common or core facets of its operation.

authoritative directive. What's more, in systems where the law countenances this defense, the law is thereby allowing its authority to be trumped by the subjects' countervailing reasons. Since law necessarily claims that all valid laws are authoritative, then to say with Raz that the law claims preemption is to say that it claims we ought never to act on contrary reasons. But in systems that specifically allow subjects to act on contrary reasons, the law cannot be seen as claiming to exclude those reasons and the claim to preemption cannot be understood as a conceptually necessary feature of law.

The State of Illinois defined the choice-of-evils defense as follows:

> Conduct which would otherwise be an offense is justifiable by reason of necessity if the accused was without blame in occasioning or developing the situation and reasonably believed such conduct was necessary to avoid a public or private injury greater than the injury which might reasonably result from his own conduct.[33]

The decision for a court on a case of first impression for a novel use of the necessity defense is then whether the accused's belief was reasonable. The court is called upon to decide, in effect, if it was reasonable for the accused to believe that the test of the normal justification thesis failed in that instance and the accused would do better to look to his own devices in balancing reasons. But if the law (in the person of the court) is called upon to decide that, then either the law cannot be claiming authority as legitimated by the NJT, or it must not be making claims to preemption. Accepting the latter option is more palatable if we wish to maintain the advantages of the service conception.

Choice-of-evils involves using reasons that are usually moral, perhaps personal, and generally non-legal (at least on first impression) to defend against conviction for the commission of a crime. If the law recognizes that justification as a defense to a given crime, then it is recognizing that one's own reasons can trump, and are therefore not excluded by, law's supposed claim to exclusionary authority. If the law holds out the possibility of novel justifications being successful defenses, then the law carves out a space for trumping reasons that must be non-legal when used since there is no description of the content of those reasons within the law. (This is why novel applications of the defense are particularly important for our purposes—the reasons behind a novel defense are not yet part of the law.) Hence, any classes of reasons that are allowed to serve as novel justification defenses to criminal prosecution would not be excluded by law's putative claims to provide exclusionary reasons.

We should not conclude from this that law's claims of preemption are simply unsuccessful in these cases. Nor should we see this as a situation where we do not accede to law's preemptive claims. Rather, since the law itself is permitting (and even encouraging) action for these kinds of reasons, the law cannot be claiming to exclude them at all. Hence, legal authority cannot be claiming to exclude such

[33] Ill. Rev. Stat. 1971, ch. 38, par. 7–13 as quoted in *People v. Unger* 66 Ill. 2d 333, 341 (1977), a commonly taught case in criminal law textbooks, with thanks to Guyora Binder for pointing this and the subsequent case out to me.

non-legal reasons. More importantly, if the nature of the law allows for these kinds of justifications (admittedly, they may not be present in every legal system), then it is difficult to see how legal authority itself rests on a claim to preclude reasons that might be cited later in choice-of-evils defenses.

This argument from choice-of-evils is somewhat limited in that it depends primarily on the availability of cases of first impression for the particular necessity defense. Once the particular defense is presented successfully, then the class of reasons characterized by that justification arguably becomes legal, perhaps as a type of exception to the crime. Prior to the first acceptance of a particular claim of choice-of-evils, however, the class of reasons serving as a justification is non-legal unless they are found elsewhere in the law (in which case they would not really be first impressions anyway). Thankfully, Illinois and many other jurisdictions that countenance necessity defenses define them in a way that leaves them open to novel uses.

A first objection to this analysis comes from Raz himself: such justifications are not limits on legal authority.[34] Rather, they are all to be interpreted as exceptions to the crime against which one uses the justification to defend. Raz specifically countenances necessity defenses as a doctrine "designed to allow exceptions to legal requirements. . . . The point is that the law demands the right to define the permissible exceptions."[35]

There are several ways to resist this move, however. First of all, it strains the imagination to say that choice-of-evils reasons are already exceptions built into the definition of the crime in cases of first impression. That is, the first time the particular justification is successfully used in court, it does not make sense to say that it was already carved out of the crime before the precedent was set (especially not for a legal positivist like Raz). Furthermore, there are two ways of interpreting this reply, both of which still preclude seeing the law as claiming preemption. One might take this claim to mean that the person still broke the rule represented by the law, but that she was justified in doing so. Or one might take the claim to mean that the justification is an exception that is not yet written into the rule; so that the person with the justification does not break the rule at all. Putting aside the Wittgensteinian point that this might be a distinction without a difference, both still cede authority to the individual actor to discover the choice-of-evils exception on her own, as circumstances arise. Both allow the individual to act for her own reasons in contravention of the law as written and previously applied. And this allowance is itself a part of the law. So the law cannot be telling us that we should not act for those reasons.

While it is true that the law is reserving to itself the right to define the permissible exceptions (which Raz sees as a reason to underscore its authority on the matter), the fact that it does so after the fact in cases of first impression means that it cannot be asking its subjects to exclude their contrary reasons before the exception is legally cognized. While the effect of such legal recognition is to carve out that exception

[34] I thank Jason Paget for pointing this out to me.

[35] Raz (1986: 77).

retroactively, since the point of authority is to guide and coordinate behavior, the otherwise authoritative directive is not performing that function for the subject with the ultimately successful novel necessity defense.[36] One might be tempted to say that the court is simply recognizing that the directive was not legitimate for the subject with a successful novel necessity defense. But that cannot be right because by carving out the exception, the court is maintaining the authority of the directive. (Under Raz's theory a court can *invalidate* the legality of a directive, but it is not clear how it could agree to the *illegitimacy* of the directive's authoritativeness without invalidating it since the law must claim authority. The legitimacy of a directive's authority is a moral, not a legal notion.) The result is that it makes more sense to attribute to the law a simple directive, about which it can later recognize retroactive exceptions, than the claim: "Exclude contrary reasons for action except any YOU determine too important to exclude, about which we will later decide whether to exempt."

Another objection might remind us that any duty to obey the law is always *pro tanto*. We can still see the obligation to obey as a moral obligation and interpret that obligation as an exclusionary reason since moral obligations always yield to more pressing moral obligations. Hence to claim that the legal obligation is a moral obligation (which is implied by law's necessary claim to *legitimate* authority) is not say that it must trump other moral obligations. Since choice-of-evils defenses are generally made on the basis of moral obligations, the law is simply making space for the possibility that the obligations it claims to impose are trumped by more pressing moral obligations. In a sense, these defenses are there simply to exculpate when the *pro tanto* conditions are not met.

There are two lines of response to this objection, each dispositive in itself. The first is that legal definitions of such justification defenses do not usually require them to be based on moral obligation. This is apparent from the consequentialist language used in Illinois's definition, as well as the provision for private harms. While using the word "evil" might make the justification sound moralistic, the test is judged in terms of consequences. So, unless one is a strict consequentialist who believes that the meaning of moral duty itself is to promote the best consequences, one can imagine situations in which one can make use of a choice-of-evils defense on the basis of providing for the best consequences without having to claim that one fulfilled a moral duty in doing so. If it is possible, for example, to offer a successful justification based on following an entirely prudential reason over a legal duty (as suggested by the Illinois statute), then it is difficult to see how the legal duty could still be claimed to be exclusionary since that prudential reason is precisely one reason it would be claiming to exclude (by kind). That is, if one can use some self-interested reasons to trump legal duties, and we don't regard those self-interested reasons as moral reasons, then non-moral reasons can be used to trump legal obligations and therefore those obligations cannot be understood to be a demand to exclude those non-moral reasons. Furthermore, as long as there is

[36] This point will be developed further in section 3.

any possible legal system that allows justifications which are not based on more pressing moral duties (certainly no stretch of the imagination considering it applies to our own under some very common moral theories), then at least those systems do not make comprehensive claims to provide exclusionary reasons. As long as there are possible legal systems that do so, we cannot say that it is a conceptual truth about the law that it must claim to provide exclusionary reasons.

A second line of defense against this objection reminds us that the law does not present itself with these exceptions built in. When one's actions fit the external elements of the crime, one must affirmatively present the justification to defeat the application of the law and avoid conviction. To say that the law does not claim to be offering exclusionary reasons still allows the law to claim to be absolute, and even for it to claim to impose a comprehensive and content-independent demand (so long as that demand is not understood as a claim to provide exclusionary reasons). Choice-of-evils defenses are offered as exculpating only after the fact of the action. The law's demands may be absolute; but it is enough to constitute our agreement or acquiescence to those demands if we admit them only *pro tanto*. The presence of the choice-of-evils defense is not understood to be guiding behavior in itself and on its own. Indeed, we have to engage in the otherwise prohibited behavior, and risk the failure of our contemplated justifications, in order to reach the point where they can be invoked. Hence we should not see the *pro tanto* character of any moral obligation to obey the law to be what is provided for by defenses of justification.

Another important objection comes from Raz's language in explaining his service conception of authority. "[A]uthoritative directives preempt those reasons against the conduct they require *that the authority was meant to take into account* in deciding to issue its directives."[37] Hence legal directives are not meant to exclude *all* non-legal reasons for action, just those that weigh against the legal directive and that the legal authority "was meant to take into account" when fashioning legal policy. Choice-of-evils defenses, this objector might claim, capture exactly those reasons that the legal policy makers could not have taken into account, allowing them to exculpate non-compliance. Therefore legal directives can still purport to be offering exclusionary reasons because they function as second order reasons to exclude only first order reasons of the kind that legal policy makers meant to exclude. If one comes up with a novel reason for action that can serve as a justification, then the policy makers could not have included that reason in their deliberation and it could not have been meant to have been excluded by the legal directive.

This is a strong objection but not an insurmountable one. First of all, for this to be a correct interpretation of Raz, we would be weakening considerably the possibility of a successfully binding authority. This comment of Raz's is offered in explaining his Normal Justification Thesis, that we are justified in acceding to the claims of authority when we do better at complying with reasons that already apply to us by following the authoritative directives than by deducing what the balance of reasons require on our own. If the reasons that are to be excluded by the

[37] Raz (2006: 1018), emphasis added.

authority are to be limited to those that they already were meant to have considered in issuing the directive, then we would be in a position of always having to check whether the reasons we are considering against complying with the directive are ones that the authority was meant to have considered and rejected. This would seem to lead us back out to considering the advisability of each action on its own and rejecting the claims of authority (complying with the directives only when we had our own reasons for doing so). It undermines the whole point of authority, since checking whether they are of the type meant to be rejected by the authority requires us to make an assessment of their advisability on our own.

Since Raz believes that the claims of authority must in principle be capable of success, this cannot be a correct interpretation and the reasons that the authority is purporting to exclude must be much wider in scope. A footnote on the page following the text quoted above seems to support this broader interpretation:

> [T]here are two kinds of reasons the preemption thesis affects: First, it preempts reasons against the conduct required by the authoritative directive. Second, it preempts reasons that do not necessarily bear on the pros and cons of behaving as the directive requires, but that do militate against the desirability of issuing the directive. These may be that the matter should be left to individual discretion, or that the directive will have undesirable side effects that make it undesirable, and so on.[38]

It appears that the reasons the authority was "meant to consider" are grouped by kind. It would do no good for Raz's theory to say that every reason must be considered and rejected by the authoritative legislator in minute detail. They are considering reasons under general descriptions. Authoritative legislators are meant to consider broadly described situations that would lead to successful justifications. If they choose to reject them by not including them as an explicit exception to a legal directive, then they are implicitly leaving it up to the courts to carve out exceptions on a piecemeal basis (a facet to which we will return shortly).

A valuable concurrence in a 1979 Vermont Supreme Court opinion[39] makes precisely the Razian point,[40] claiming that choice-of-evils defenses are not available when the reasoning done by the defendant was considered and rejected by the legislature. Justice Hill argued that the defendants had no recourse to the necessity defense for their actions trespassing in protest at a nuclear power plant where the legislature had specifically determined that the benefits of nuclear power outweigh the risks.[41] If the reasons relied on by the defendant were not already considered and rejected by the legislature (but were still of the type meant for consideration in their policy determinations), then he would be free to rely upon them in disobeying the law. However, Hill was concurring in the result and taking the majority to task for redoing the legislature's weighing of reasons for and against nuclear power by

[38] Raz (2006: 1018 n. 19).

[39] *State v. Warshow*, 138 Vt. 22, 28 (1979), Hill, concurring.

[40] "They exclude reliance on conflicting reasons, not all conflicting reasons, but those that the lawmaker was meant to consider before issuing the directive." Raz (2006: 1022).

[41] There is a modicum of irony in the use of this case since substantially the same fact pattern was used by Raz to support a kind of duty to obey the law. Raz (1984: 146).

deciding even to entertain the defense. Hence, we can imagine a majority response to Hill that defends the court's decision to entertain the defense and re-weigh those reasons in deciding if the defendants acted reasonably. But that would be to say that even the reasons supposedly considered and rejected by the policy maker in issuing the authoritative directive can be used in a choice-of-evils defense. Hence, the law cannot be said to require their exclusion as a conceptual matter.

Even though the majority did not find acting on those reasons to be reasonable, entertaining the defense meant that the court deemed it proper for the defendants to consider acting on those reasons even though the legislature had already rejected them. While allowing the mere *consideration* of these reasons does nothing to call Raz's analysis into question,[42] the possibility of the court finding that *acting* on reasons explicitly rejected by the legislature could have been reasonable (which is entailed by entertaining the defense) means the majority does not understand the law to be claiming to exclude those rejected reasons.

It seems much more correct to say that the legislature chooses to remain silent or vague on the reasons they considered possible exceptions precisely to leave open-ended the possibility of novel justifications without undermining the authority of the directive itself. If we consider the fire-extinguisher theft mentioned above, it is very likely that the legislators imagined such a scenario and chose not to include it in the wording of the law because there is already a provision for crafting necessity defenses. A legislature's silence is not merely the result of an inability to consider all possible justifiable exceptions; it is a deliberate openness of the law stemming from a likely legislative desire that violators take the directive seriously when deciding to accept a risk that a novel affirmative defense will not be successful. Hence we cannot simply say that the reasons undergirding any novel defense was not of the type the legislature was meant to have considered. We can imagine them specifically considering these reasons and still deciding not to include them as exceptions.

One wrinkle in this analysis is Raz's observation that the supposedly excluded reasons do not include reasons in favor of the action that the law commands.[43] Hence, the law need not be saying to us that we must follow it simply because it is the law in order to comply with it. It is permitted to follow the law for our own reasons precisely because those personal reasons that still militate in favor of conformity are not excluded (although in doing so, we are not accepting the legal norms internally). Nevertheless, this point carries no weight against my claim that novel choice-of-evil defenses preclude the conceptual claim that law must be claiming to provide exclusionary reasons. Since the choice-of-evil defenses are offered precisely in cases where agents do not comply with the law, and they are offering their own reasons for *non*-compliance, the fact that Raz's theory does not have law exclude reasons in favor of compliance is immaterial to this argument.

Another twist on this objection comes from another qualification Raz makes. Raz notes that "to fulfill its function, the legitimacy of an authority must be

[42] See nn. 20 and 21.

[43] Raz (1998: 17 n. 39) and accompanying text; Raz (2009: 144). This point was suggested to me in conversation with David Velleman.

knowable to its subjects."[44] One might say that in a case where the subject has a good novel choice-of-evils defense, the authority of the directive for that subject at that time is not knowable since the subject in such situations would not be able to access whether the directive is helping her to conform better to the balance of reasons. But this cannot be right since it is clear that in deciding to act contrary to the directive, the subject is deciding that the directive is not authoritative for her at that time. So perhaps it is more correct to say that the lack of the directive's authority is knowable and the court is simply empowered to recognize the correctness of the subject's decision that the directive is not authoritative. However, as noted above, the effect of the court's decision to validate the novel choice-of-evils defense is to include it as a new legal exception to the directive, not to recognize the directive's lack of authority for that subject at that time. It would make no sense under Raz's theory to contemplate a court denying the authoritativeness of a directive without deeming it invalid as that would violate law's claim that all its directives are authoritative.[45] And lest the objector reply that the court carving out the exception is rendering the directive legally invalid as against that subject at that time, consider that the court's recognition of the exception does nothing to change the directive's membership in the set of valid laws for that jurisdiction. A successful claim of necessity does not carry the recognition of any change in the directive's validity, only its applicability. That change in applicability was brought about by a subject deciding correctly that certain reasons contrary to the directive were not to be excluded by the directive. The best way to make sense of the *legal* provision for such a subject-determined change is not to attribute the claim to exclude those reasons to the law in the first place.

The most worrisome objection stems from Raz's observation that a permission is still an exercise of authority.[46] In essence, where a right is granted in law, or an exception is carved out (by legislature or by court), the law is refraining from exercising its authority in that carved out area. But since it is the law that determines the content and limits of those permissions and rights, the law is still claiming preemption in those areas in which it chooses to issue directives. This is an important reminder for enumerated exceptions and rights, but I do not think it can win the day where novel justifications are concerned. The possibility of novel justifications must be understood (at least within Razian positivism) to be exceptions without content until a decision is made by a legal body, an issue to which we return in section 3. If the function of authority is to get individuals to comply better with reason than they would do if left to their own devices, it does not make sense for it to claim on the one hand to preempt our contrary reasons and at the same time leave open catch-all exceptions that we must use our own devices to fill. One might note that it is still the law that remains the final arbiter of whether the newly raised justification is successful. This may be true, but at the moment of action (before the law makes its determination), in choosing the lesser of two evils in a novel situation, the subject is either rejecting guidance or acting under no guidance.

[44] Raz (2006: 1025). [45] Raz (1986: 76–7). [46] Raz (1990: 151).

To say that the law claims to preempt our contrary reasons but leaves open catch-all exceptions is to say that it provides no guidance whenever we find ourselves in a lesser-of-two evils situation. It seems to me to make more sense to say that before an exception is carved out, the law does provide guidance and allows us to reject that guidance in such situations. That is to say that it is not claiming to preempt our contrary reasons, since it is still allowing us to act upon them.

To be clear: choice-of-evils is not itself a reason to reject the service conception. Raz could just respond that when we are in a choice-of-evils situation, we are clearly in a situation where the authoritative directive isn't passing the NJT (i.e. isn't justified). The law is, in essence, incorporating this realization into its own claim of authority. Rather, choice-of-evils is a good reason to think that the law cannot be *claiming* preemption since it is itself carving out a way in which the subject is legally permitted to decide when the NJT fails. To be fair, Raz confronts the idea of such justifications.[47] But he doesn't seem to appreciate the impact this facet of the law has on his notions of what law must claim.

However, the strong objection that the availability of novel necessity defenses amounts to a catch-all exception over which the law still exercises authority by determining legality after the act raises the issue of legal gaps. Until a decision is made by an authoritative body, there is not yet a fact of the matter whether a novel justification is a defense to the crime for which it was offered. It might be thought that those gaps can somehow provide room for law's claim to preempt our contrary reasons, so it is to those gaps we now turn.

3. Gaps

Raz and many other theorists who say that the law claims exclusionary authority also say that the law is a matter of social fact, or even that the law is a social convention. These claims are important in allowing us to see the truth conditions for claims about what the law requires. For example, it is true that the speed limit on the New York State Thruway is 65 m.p.h. For this to be the kind of thing that is capable of having a truth value, there must be certain social conditions that must be present to make it true. Many such theorists also say that because law is a social fact the law has gaps: situations in which there is no fact about what it requires, permits, or proscribes.[48]

The gappiness of the law would hinder the law's ability to be successful in its supposed claims to authority if those authority claims are interpreted as purporting to exclude our non-legal reasons. Alternatively, the gappiness of the law precludes the theoretical conclusion that the law is claiming to exclude our personal reasons.

[47] Raz (2006: 1026): "legal systems typically allow some [countervailing reasons] to count and sometimes to override legal requirements."

[48] Raz (1979: 70–7) (arguing for the existence of gaps in the law where the law is indeterminate or there are unresolved conflicts).

If the law is gappy, then its claims are similarly circumscribed and it is not claiming to exclude non-legal reasons at all.

To say that the law is gappy is to say that the domain to which it (now) applies is somehow limited (although as Raz notes, it also claims the power to legislate on any subject[49]). This is clear from an examination of the opposing claim that the law does not have any gaps. Those who claim it does not have gaps say that every legal proposition is already true or false; every action is already legally prohibited, permitted, or required.[50] If the law does not give a direction regarding an act, then the act is legally permitted (in a system that includes a closure rule permitting any action not expressly prohibited—other systems could theoretically prohibit any action not expressly permitted). A new law simply changes the legal status of the act. Under this view, the domain of law with regard to actions is unlimited and everything is already within its ambit.

To deny this is to say that there are limits to what the law determines at the moment. A given limitation is contingent in the sense that the law could expand to include reasons heretofore ignored. Nevertheless, as long as there are gaps, there are situations to which the law does not apply. This is not necessarily the result of new situations. Rather, gaps tend to arise as a result of vague or borderline cases the application of the law to which has not yet been made firm, or as the result of conflicts in the law or in its application. In the time-worn example of "no vehicles in the park," those who believe the law is gappy claim that there is a gap before the appropriate legal official makes a decision about whether this rule applies to bicycles. This is because there is no legal fact of the matter of whether the rule applies to bicycles before the correct legal official makes a decision, thereby declaring that the law does or does not apply to bicycles.

Most who claim that the law has gaps do not claim that this is a contingent feature of the law, but rather it is in the nature of the law that it cannot speak to every possible situation since it rests on social facts and/or human conventions. If there is not a fact or convention in place yet for a given set of circumstances, then the law cannot yet cover those circumstances. Hence it is in the very nature of the law that it speaks to a limited set of issues. Even if the system has a closure principle, that principle only applies where the law is silent, not where it speaks in vague or contradictory terms.

Regarding those actions about which legal propositions would be indeterminate, i.e. within those gaps, the law cannot even in principle provide any direction. If it is not providing direction, it certainly is not claiming to exclude any reasons that an individual might have for or against actions within those gaps.

There is an easy objection here: if the law is guiding behavior, it is only doing so when and where it is offering directives. If the nature of those putatively authoritative directives is to claim to exclude individuals' non-legal reasons for contrary action, then that exclusion is only meant to apply where the directives apply. The law might not exclude reasons in the gaps, but it still can exclude reasons in those

[49] Raz (1990: 150–1). [50] See e.g. Dworkin (1991).

areas in which it does speak and that can still be the nature of legal authority. More importantly, it can still claim to exclude reasons for contrary action wherever it does apply.

The problem with this objection is that it would jeopardize the content-independent criterion for legal authority. Law is supposed to be capable of obligating you simply by the source of that obligation, rather than because of what it is telling you to do.[51] More to the point for Raz, it would jeopardize the function of authority to guide behavior in compliance with right reason. If the law has gaps, then the subject must always examine her situation and the contemplated behavior against the content of possibly nearby legal norms in order to determine whether she is in a gap. At the moment of action, it is always up to her to decide whether she is in a gap, using her own reasoning to determine whether the law applies to her. This undermines the point of authority under Raz's service conception. Some might see this as a reason to reject the claim that the law has gaps at all. However, one could just as easily see this as a reason to reject the idea that the law is claiming to provide exclusionary reasons.

This is not to say that every contemplated action might be in a gap. If the law is clearly speaking to one's situation and all the reasons are straightforward ones, then one treats the unproblematic law's legitimately authoritative guidance as excluding any contrary reasons. But the fact that one might find oneself in a gap, and needs to look to one's own devices in making both the determination of whether one is in a gap and how to act within, means that the law cannot be claiming to exclude reasons (contrary or otherwise) since that need to look to one's devices is a part of the nature of law.

To be clear: the problem does not arise because of gaps themselves, the problem arises from gaps in combination with the notion that the law claims to exclude contrary reasons. If it is not claiming to exclude contrary reasons, then the individual deciding whether she is in a gap is simply determining whether or not the law is speaking to her. If the subject has to determine for herself whether she is in a situation that legal reasons are supposedly excluding her other reasons, she can only do this by weighing the reasons that exist for and against the behavior she is contemplating in that situation. The characteristics of the situation that determine whether or not she is in a gap in the law also provide the reasons relevant to the contemplated action. Consider the novel decision about whether to ride one's Segway in the park upon confronting the sign indicating that vehicles are not allowed. The very determination requires her to reject any claim to exclude reasons that the law might be making. She must peer into the reasons behind the rule, which is to say she must weigh the very reasons considered by the legislature, a weighing that the NJT was to have helped us avoid.

[51] While for Raz the legitimacy of any directive is dependent somewhat on its content in that it must be based on dependent reasons, it is still the case that any obligation one has to a legitimate directive flows from the fact that the authority is in a better position to get the subject to comply with reason.

If, on the other hand, we do not see the law's authority as consisting in a claim to exclude non-legal reasons, but simply in the claim that it has a moral right to tell the subject what to do (that is, the simple issuance of directives), then the subject has only to determine whether she is covered by that directive. That will still involve weighing the reasons that the legislature was to have considered, but doing so is no longer quite so pernicious since she is admittedly in a gap. The law can still have gaps as long as its authority is not claimed to be exclusionary. The authority can still be exclusionary in that it is allowed to exclude reasons by the subject; but the claim to authority is not itself a claim to exclude reasons. If she determines that the law does apply to her situation, then she *treats* the legal directive as a preemptory reason against contrary action. She allows it the status of a preemptory reason by acceding to its authority over her and excluding those contrary reasons. But all the law has done was to tell her what to do. It did not make any further claims about how she should treat that directive vis-à-vis her pre-existing reasons against the action. That part was all her.

One might seek to push this objection further based upon the realization that the law can only exclude reasons when it provides guidance.[52] If providing guidance is a precondition for excluding reasons, then to say that the law provides no guidance in the gaps entails that it is not claiming to exclude reasons in those gaps. Hence, so this objection goes, this cannot be an argument against law not claiming to exclude reasons since every gap theorist (including Raz) would immediately agree that the law is not guiding (and hence not claiming to exclude reasons) in the gaps. Not saying the law claims to exclude reasons in the gaps does not force the gap theorist to agree that the law never claims to exclude reasons.

The reply to this requires us to return to what exactly the gap theorist claims and what separates him from the theorist who denies that there are gaps. For the gap theorist, there is no fact of the matter about what the law requires in the application of vague or contradictory legal rules. It is not correct to say (with the anti-gap theorist) simply that the closure principle leaves the matter up to the subject and that is why the law is not providing guidance. Rather, since the law is a matter of social fact, there is not yet a social fact about whether the term "vehicle" legally applies to Segways. But this does not mean that we can assume that Segways are legally allowed by the closure principle until the appropriate official says otherwise (and applies that decision retroactively). That would be to say that there is already a fact of the matter and that fact simply changes after the official's decision, which would be to deny the existence of the gap. Instead, the reason the law is not providing guidance to the subject is that there is no fact of the matter about whether the guidance offered by the law is aimed at that subject. A more precise way of explaining the situation would be to say that the law offers guidance but that there is no fact about whether it is offering YOU (the putative subject) that guidance. In explaining gaps, above, I tried to suggest this by differentiating between what the law offers and what it provides. In a gap, the law offers guidance

[52] I am indebted to Stefan Sciaraffa for this articulation.

by issuing the general and vague or conflicted rule but never provides it to a subject who cannot determine whether the rule applies to her.

Consider what happens in the two most common instances of gaps, vagueness and conflict. In the case of vague laws, such as the vehicles in the park example, the problem is that the law is offering guidance in such a general way that it is impossible to determine whether that guidance is directed at you on your Segway (because there is no fact of the matter about whether it is doing so). If you were a legally sophisticated Segway rider who knew that no official had previously decided whether the Segway was permitted and believed that hence there was no fact of the matter of what the law requires you to do, you would know you are getting no guidance from the law and hence are reduced to predicting what the official will do. To make that prediction, you would probably need to peer into the reasons behind the vague rule and decide if your reasons are likely to be officially interpreted as covered by the rule. The less legally sophisticated Segway rider would try to determine if the law is providing guidance by asking directly whether he comes within the ambit of the vague term. That inquiry would also require him to peer into the likely reasons behind the rule in a (futile) attempt to apply the vague term where there is no fact about its application. (It is a futile attempt because there is not yet any legal fact about whether the vague term applies and hence a direct attempt to apply the term is not legally relevant.) So, even if we say that vague laws are offering guidance, that vague offer cannot be seen as a claim to exclude the reasons of those who cannot determine whether the vague term applies to their situations. Since vagueness is unavoidably part of law's nature, law cannot be claiming to exclude reasons of some people to whom the vague law will eventually be deemed to apply. Similarly, in the case of conflicting laws, we can say that the law is offering guidance, but failing to provide it because it is offering conflicting guidance. If we were to say that it is claiming to exclude reasons, then it would be claiming to exclude reasons both for and against the contemplated action. In offering conflicting guidance, it provides none. Since this is a structural feature of law (wherever internally in conflict) the law cannot be said to claim to exclude reasons as a conceptual matter. Since in both of these situations we can still say that the law offers guidance in setting forth a rule, and since the gap theorist who holds that the law claims to exclude reasons would say that the law is claiming to exclude reasons wherever there is a directive, that theorist would have to say that the claim to exclude reasons applies even in the case of gaps. The law is there offering guidance but not successfully providing it. Hence if the law claims to exclude reasons, that claim is patently false in any gaps. Rather than saddling the law with a necessarily false claim (something Raz says we cannot do anyway), it is preferable not to attribute this particular claim to it at all.

There is a deep way in which the choice-of-evils defense argument is actually a particular example of the argument from gaps in the law. This was alluded to in the need for the law to operate retroactively in recognizing novel necessity defenses. We might understand the subject who is contemplating whether her subjective contrary reasons rise to the level of a novel necessity defense to be considering whether she is in a gap. After all, if those contrary reasons really are novel, then the law has not yet

spoken on whether or not they constitute an exception and there is not yet a fact of the matter about whether they are an exception to the directive. By attributing to law the claim to preempt those reasons even as it holds out the possibility of exempting them from exclusion later on, we force the law into conflict with the avowed function of authority: to guide and coordinate behavior. Of course all retroactive operation of law (including any even slightly hard case decided by a court) cannot serve to guide the behavior of those to whom it is retroactively applied. But that does not create the same problem since we are usually concerned with law's behavior guidance overall when iterated and applied to others. Here, however, by attributing the claim of preemption to law we render the law's demands incoherent to anyone in such a gap. Given that gaps are inherent in law, the way to avoid seeing that incoherence in the fundamental nature of law itself is to say that the claim to authority is not itself a claim to preemption of contrary reasons. The subject *allows* the directive to preempt contrary reasons as a *consequence* of acceding to its authority.

One might note that both gaps in the law and novel choice-of-evil defenses are "penumbral" areas of law, where subjects are unsure of whether and how the law applies to them. This gives rise to the possible reply that it is not generally a good idea to reason straight from such penumbral areas to conclusions about the nature of law, since they are exceptional circumstances.[53] However this objection mistakes the use to which these penumbral areas are being put. While it might be rare that one finds oneself in such a gap or confronted with a possibly novel justification, the very *presence* of such circumstances is not penumbral to law itself. That is, if the gap theorists are right, then all legal systems necessarily have gaps. And we would certainly not say that legal systems that leave open the possibility of novel choice-of-evils defenses are outliers or penumbral examples of legal systems. It is the (ubiquitous) presence of these elements within the law that calls into question Raz's attribution of the claim to preemption. We cannot say that it is a conceptual truth about law that it claims to exclude contrary reasons when so many paradigmatic legal systems allow for novel choice-of-evils defenses and when all legal systems have gaps. While it is true that one will only rarely find oneself in such a gap, it is what the subject must do in order to determine whether she is in a gap and how to behave once she decides that she is that preclude the notion that the law must be claiming to exclude contrary reasons.

4. Conclusion

The claim to authority is not a claim to provide reasons. It is a claim of a right to direct action.[54] Reasons are irrelevant and opaque to the claim of authority itself; they are relevant to the assessment of that claim by the subject and to the decision about how to exercise that authority by the claimant. Raz's theory is primarily

[53] I thank Arie Rosen for raising this objection.

[54] Raz (2006: 1012).

directed to the subject of authority.[55] In almost all of the expositions of Raz's theory, the focus is on the reasons for action and compliance of the subject. The problems, theoretical and moral, that the service conception is supposed to solve, are primarily problems from the subject's point of view.[56] The normal justification thesis is that an authority is justified when the subject does better at conforming to reason by submitting to that authority. The preemption thesis is that one complies with authority by replacing one's reasons with the reason that its directives issue from a source with justified authority. It is in being the recipient of a justified claim of a right to direct action that we accede to that claim by replacing our reasons with its direction. But this does not entail that the authority is asking us to replace our reasons; it is only asking us to act as it directs. Hence the authoritative directive is not itself a claim to replace any reasons; it is only received as such when its authority is acknowledged by the recipient.

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[55] "[A]uthority helps our rational capacity whose function is to secure conformity with reason. It allows our rational capacity to achieve its purpose more successfully." Raz (2006: 1012).

[56] The theoretical problem is: "how could it be that the say-so of one person constitutes a reason, a duty, for another?" The moral problem is: "how can it ever be that one has a duty to subject one's will and judgment to those of another?" Raz (2006: 1012). Both are problematic primarily when seen from the subject's point of view. The authority is more likely confronted with problems of how to generate compliance and how to justify its legitimacy. Raz's two problems are certainly relevant for those concerns, but in a derivative way.

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