On the Scope of Exclusionary Reasons in Law: Some Replies to Critiques[1]

Sobre el alcance de las razones de exclusión en derecho: algunas respuestas a las críticas

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Abstract: An important set of critiques regarding exclusionary reasons targets the scope of exclusion. According to these critiques, it is always or sometimes impossible to determine the scope of exclusion without recourse to the balance of the first-order reasons. Thus, exclusionary reasons cannot fulfil the function assigned to them. The paper first attempts to fill in the gaps in Raz's account of exclusionary reasons. It converts the conditions for legitimate authority, such

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as the expertise, the dependence, and the efficacy conditions for political/legal authorities, into scope restriction criteria. It does so by making use of the "clear mistakes" doctrine. Then, based on the foregoing, it demonstrates that the critics are mistaken in their claims that the determination of the scope of exclusionary reasons always or sometimes depends on the weights or the balance of first-order reasons.
Keywords: reasons; exclusionary reasons; scope of exclusion; authority; Raz; normal justification thesis; normative force.

Resumen: Un número importante de críticas relativas a las razones excluyentes se centra en el alcance de la exclusión. Según estas críticas, siempre o a veces, es imposible determinar el alcance de la exclusión sin recurrir al balance de las razones de primer orden. Así, las razones excluyentes no pueden cumplir la función que se les asigna. Este artículo intenta, en primer lugar, llenar las lagunas en la explicación de Raz sobre las razones de exclusión, al convertir condiciones para la autoridad legítima, tales como la experiencia, la dependencia y las condiciones de eficacia para las autoridades políticas/legales, en criterios de restricción de su alcance. Esto se logra al emplear la doctrina de los "errores evidentes". En segundo lugar, se busca mostrar que los críticos se equivocan al afirmar que la determinación del alcance de las razones excluyentes depende siempre o a veces de la ponderación o el balance de las razones de primer orden.
Palabras clave: razones; razones excluyentes; alcance de la exclusión; autoridad; Raz; tesis de la justificación normal; fuerza normativa.

Summary: I. *Introduction*. II. *The Trail: From the Conditions of Authority to the Scope of Exclusion*. III. *The Determination of the Scope and the Balance of First-Order Reasons: Contra the Critics*. IV. *Conclusion*. V. *References*.

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I. Introduction

Joseph Raz's work on the intersection of authority, law, and reasons has been vastly influential. The genius of his ideas regarding the point and the role of practical authority quickly captivated many legal and moral philosophers. Despite the success of his general philosophy on authority, there remained a group of scholars and philosophers who doubted the soundness of the idea of exclusionary reasons for action continuously and persistently (see for instance, Gans, 1986; Edmundson, 1993; Mian, 2002; Chang, 2016; Gur, 2018; Moreso, 2024; Himma, 2024). Apart from Ruth Chang and Kenneth Einar Himma, the cited authors challenged or raised doubts about the scope of exclusionary reasons either as their main issue or as related to broader issues with the account of exclusion. The "scope" in this paper refers to the range of first-order reasons that are excluded by a second-order reason. The gist of the objections was that the idea of exclusionary reasons failed because the determination of its scope, i.e., deciding whether a first-order reason is excluded, necessitates or *may necessitate* recourse to the balance of the same first-order reasons. Thus, the exclusionary reasons cannot play the role they are assigned in practical reasoning. Of the authors I will examine here, Gur makes the weaker claim that the determination of the scope of exclusion may necessitate recourse to the balance or the weight of first-order reasons, while other authors are committed to the stronger objection that this is always the case.

Exclusion may be limited in its scope. Raz never provided a complete account of how the scope of exclusionary reasons is to be determined. I cannot hope to fill that gap completely here. However, Raz's work carries the traces of how the scope of exclusionary reasons can be determined, at least in the context of the directives of legitimate political/legal authorities. I believe that such traces may provide a good basis for a complete account of scope determination. These traces are often found in or derived from the con-

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ditions of legitimate authority,[2] namely, the dependence and the normal justification theses.[3] I will argue that general restrictions on the scope of *legal* exclusionary reasons can be derived from the conditions Joseph Raz sets for the existence of legitimate authority. The examples that Raz's opponents offer to show that recourse to the underlying balance of reasons for action is sometimes necessary can instead be explained by appealing to scope restrictions grounded in those conditions. A legitimate political/legal authority —understood as an authority whose directives constitute exclusionary reasons— must satisfy three general criteria.

First, a legitimate political/legal authority must be efficacious: its directives must enjoy a sufficient level of general compliance among the relevant population. Second, the conditions required by the dependence thesis must be met. That is, the considerations informing the directive must concern the reasons for action that already apply to the agent. Finally, the authority must pass what may be called the "expertise" test. According to the normal justification thesis, this requires that the agent would better conform to reasons that apply to her by following the authority's directive than by relying on her own practical deliberation in the relevant domain.

[2] Legitimate authority in the Razian sense does not necessarily coincide with an authority that enjoys all-things-considered moral legitimacy. Instead, a legal authority may be legitimate, i.e., it may pass the relevant tests, only with respect to some issues. This stems from what Raz (1986) terms "flexibility in determining the scope of authority" (p. 73). Raz (1986) notes: "On the other hand the thesis allows maximum flexibility in determining the scope of authority. It all depends on the person over whom authority is supposed to be exercised: his knowledge, strength of will, his reliability in various aspects of life, and on the government in question. These factors are relevant at two levels. First, they determine whether an individual is better [more] likely to conform to reason by following an authority or by following his own judgment independently of any authority" (p. 73). Depending on the different levels and types of expertise, it may be the case that an authority is legitimate *with respect to* an agent concerning medical issues but not financial ones. I call such an authority "a legitimate authority with respect to medical matters" but "an illegitimate authority with respect to financial matters". The only implication of illegitimacy here is that the agent should not treat the relevant directive as an exclusionary reason.

[3] I am not claiming here that the dependence thesis is a condition for the existence of legitimate authority that is analytically distinct from the normal justification thesis. As I will explain below, it constitutes a condition only as much as it affects the normal justification of authority, i.e., only insofar as it affects the outcome of the normal justification test.

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The first section of the paper will outline what may be described as an adumbral route to determining the scope of exclusionary reasons in Raz's work. Raz generally maintains that mistakes made by a legitimate authority do not undermine the exclusionary normative force of its directives. This is because an authority that satisfies the expertise requirement of the normal justification thesis is, by hypothesis, better placed than the subject to determine whether a mistake has occurred. However, Raz remains notably silent on whether *clear* or manifest mistakes could affect the status of a directive as an exclusionary reason. Building on this silence, I will argue that the scope of exclusion of a directive can indeed be restricted when the authority commits a clear mistake.

The second section will be devoted to summarizing and critically assessing the arguments advanced by Raz's opponents. I will first present, in turn, the arguments developed by Gans, Mian, Moreso, and Gur. The first three authors maintain that determining the scope of exclusionary reasons invariably requires recourse to the balance of the underlying first-order reasons for action. Gur advances a weaker claim, according to which such recourse may sometimes be necessary. The remainder of the section will develop responses to these positions. I will argue that the scope-restriction guidelines articulated in the first section suffice to explain why, in the cases discussed by these authors, it is unnecessary to appeal to the balance of underlying first-order reasons.

II. The Trail: From the Conditions of Authority to the Scope of Exclusion

We know that exclusionary reasons have scopes. Such scopes may be limited. In other words, there may be a limit to the type and extent of the first-order reasons that they can exclude (Raz, 1999, p. 46, 1975, p. 487). However, Raz never really seems to give a full account of how the scope of exclusion is to be determined, although there are some references to factors such as the hierarchical

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rank of the issuer of the relevant directive (Gur, 2018, p. 55; Raz, 1999, pp. 46-47). I will argue in this section that conditions of exclusionary normative force can also function as limitations on the scope of exclusion.

1. *The Conditions of Exclusionary Normative Force*

I will not deal with the generic restrictions in detail here, but I will acknowledge that they exist. In order for a person to have authority over another, it is necessary that (i) the agent will better conform to reasons that apply to her by following the authoritative directive than by acting on her own, and that (ii) it is more important to conform to reason than to make her own mind. Raz (2009) writes:

> In particular one would expect it [a general account of authority] to address the moral problem with authority, namely, how can it be consistent with one's standing as a person to be subject to the will of another in the way one is when subject to the authority of another?
>
> The suggestions of the service conception is that the moral question is answered when two conditions are met, and regarding matters with respect to which they are met: First, that the subject would better conform to reasons that apply to him anyway [...] if he intends to be guided by the authority's directives than if he does not [...] Second, that the matters regarding which the first condition is met are such that with respect to them it is better to conform to reason than to decide for oneself, unaided by authority. I will refer to it as the independence condition). (pp. 136-137)

Later, Raz implies that the lack of authority may not be due to the fact that the normal justification test is failed, but due to the fact that it failed the independence test:

> Simple examples of regulations regarding dangerous activities or materials illustrate the point. I can best avoid endangering myself and others by conforming to the law regarding the dispensation and use of pharmaceutical

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> products. I can rely on the experts whose advice it reflects to know what is dangerous in these matters better than I can judge for myself [...] Of course, none of this is necessarily so. The law may reflect the interests of pharmaceutical companies, and not those of consumers. If that is so it may lack authority over me because it fails to meet the normal justification condition. But if it does meet the normal justification condition it is likely to meet the independence condition as well. Decisions about the safety of pharmaceutical products are not the sort of personal decisions regarding which I should decide for myself rather than follow authority. They do not require me to use any drugs, etc., and in that they are unlike decisions about undergoing a course of medication or treatment where we may well feel that I should decide for myself, rather than be dictated to by authority. (Raz, 2009, p. 137)

Note that Raz claims only that an authority is likely to meet the independence condition if it meets the normal justification condition, not that this is always the case. This implies that there may be cases where the directives of the authority do not constitute exclusionary reasons simply because the independence condition is not met. There may be a range of issues where deciding for oneself is more important than actually doing the right thing. Raz suggests that undergoing treatment or taking medication is an example of a case where the agent ultimately should decide for herself, regardless of whether it is ultimately the right decision.

The service conception of authority developed by Raz conceives of legitimate authority as assisting individuals in making better decisions that conform to the reasons they have (Raz, 2009, pp. 136-137). To qualify as a legitimate authority capable of this service, the authority must fulfil the requirements imposed by two theses. The first of these is called the dependence thesis. Accordingly, the authority can only serve the agents if its directives are based on the evaluation of the first-order reasons that are applicable to the agents. Such reasons are called dependent reasons (Raz, 1986, p. 47). The service cannot be provided in case the reasons the authority takes into consideration are not dependent reasons, but, for instance, reasons that apply to other agents. The condition of dependence

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serves not only as a guarantee of accuracy but also as a safeguard against exploitation. It may benefit the individuals within the body with authority that the agent acts in a certain way under certain circumstances. This may provide these individuals with a reason to issue a directive requiring the agent to take that action. However, such a directive would not qualify as an exclusionary reason because the dependence condition is not met. Raz holds that the dependence condition is not absolute. The authority may be justified in appealing to reasons other than the dependent reasons if this would overall make agents better conform to their reasons (Raz, 1994, p. 214, fn. 6).

There is reasonable doubt as to whether the dependence thesis is a stand-alone condition for legitimate authority from Raz's perspective. Sometimes Raz refers to the thesis as a constitutive part of the "service conception", the consequence of which is pre-emption, i.e., exclusion (Raz, 1994, pp. 214-215, 1986, p. 47). At other times, he omits the thesis altogether (Raz, 2006, p. 1014). Regardless of what Raz really thought, one can reasonably claim that the normal justification thesis is the "normal" and the "sufficient" way of justifying authority. The thesis asserts that for a de facto authority to be legitimate, it must be the case that the agent is more likely to conform to reasons that apply to her if she simply follows the authority's directive rather than acting upon her own evaluations (Raz, 1986, p. 53). In other words, the normal justification thesis requires that the de facto authority that evaluates the dependent reasons (i.e., first-order reasons that apply to the agent independently of the directive) is more expert than the agent. Note also that the satisfaction of the normal justification thesis requires the satisfaction of the dependence thesis, at least to a certain degree. For regardless of how expert an authority is, it cannot be the case, barring accidental coincidences between what the directive requires and what the agent ought to do, that the agent is more likely to conform to reasons that apply to her if she simply follows the directive rather than her own practical deliberations *unless* the expert's directive takes into account the reasons that were applicable to her.

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In other words, it is only if the expert has evaluated reasons that apply to her that the directive can have exclusionary normative force with respect to her. In what follows, I will mention the extra-condition added by the normal justification thesis as "the condition of expertise", while continuing to speak of the condition of dependence that might be subsumed under the normal justification thesis.

Raz points out that if the agent is to be as successful as the expert authority in conforming to his reasons, it is not sufficient that he simply accords a greater weight to the authoritative directive. In such a case, the agent would not be making full use of the authority's expertise:

> In cases about which I know that his [the expert's] performance is better than mine, letting his advice tilt the balance in favour of his solution will sometimes, depending on my rate of mistakes and the formula used, improve my performance. But I will continue to do less well than he does until I let his judgment pre-empt mine. (Raz, 1986, p. 68)

This is why, rather than considering legal directives of the expert authority as weighty first-order reasons, the agent must replace his own evaluations regarding the case with the authority's. This consequence of a legitimate authoritative directive's normative force is stressed by the pre-emption thesis.

The fulfilment of the condition of expertise depends on whether the authority can be considered more expert than the agent with respect to the issues that a legal directive concerns. Since legal directives are often rules having multiple addressees, the answer to the question of expertise might differ depending on which agent is concerned. Therefore, a legal directive might have exclusionary normative force with respect to certain agents while lacking such power with regard to others (Raz, 1986, p. 73; Mian, 2002, pp. 112-114). This "patchwork thesis" (Mian, 2002, p. 112) regarding the normative force of authoritative directives is desirable in the sense that it allows better experts to make better calls than the authority while enabling others to make the best decision they can.

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Besides the dependence and the expertise conditions, which apply generally to all authorities, there is also a separate condition that specifically applies to political/legal authorities. There are good reasons to think that legitimate political/legal authorities can only be de facto authorities. This is because legitimate political/legal authorities are expected to resolve large-scale coordination issues, and only de facto authorities can fulfil this expectation. Raz says:

> It will be noticed that the normal justification thesis identifies the case that must normally be established to show that a person has authority. It is not a matter of showing that he is entitled to have authority, but that he has it, that he is in authority, with all the consequences that follow from this fact [...] There is a strong case for holding that no political authority can be legitimate unless it is also a *de facto* authority. For the case for having any political authority rests to a large extent on its ability to solve co-ordination problems [...] These considerations explain why to say of someone that he is entitled to have authority means that he should be in a position of real power and then he will have legitimate authority. (Raz, 1986, p. 56)

A de facto authority here is not very different from Austin's sovereign: A de facto authority must enjoy some form of general power over the actions of the people (Raz, 1986, pp. 75-76). One difference is that Raz makes a distinction between mere power and de facto authority: De facto authority necessarily claims legitimate authority (Raz, 2009, p. 128). Overall, being a legitimate authority is different from having a right to de facto authority (Raz, 1986, p. 56). It can be argued that someone or a group of people would be more legitimate if they were to become de facto authorities. This is what having a right to de facto authority means. However, they cannot be considered a legitimate authority until they are first a (de facto) authority.

In conclusion, a directive of the authority[4] will have exclusionary normative force (i) as long as the authority enjoys overall obe-

[4] In *Practical Reason and Norms*, Raz mentions "mandatory norms". This expression rarely

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dience and continues to claim legitimate authority, and (ii) if the dependence and (iii) the expertise conditions are met, and (iv) unless the directive concerns an issue that is within the scope of generic restrictions described above. In the next section, I will mention how and if each of these conditions can be turned into scope restrictions.

2. *From the Conditions to the Scope Restrictions*

In this section, I will argue that the conditions for exclusionary normative force can also serve as restrictions on the scope of exclusionary reasons. However, initially, I will discuss how the authority's mistakes affect the directive's exclusionary normative force. As will be seen, some mistakes are relevant in determining the scope of exclusion.

A. *Authoritative Mistakes*

The service conception of authority does not hinge on the assumption that legitimate authorities do not make mistakes. Even experts make mistakes. The question is whether such mistakes affect the exclusionary character of its directives. Raz (1986) is clear about one point: "there is no point in having [legitimate] authorities unless their determinations are binding even if mistaken" (p. 47). If the

appears in his later books. I should clarify how "directives" are related to "mandatory norms". Raz considers "justified" norms as exclusionary reasons: "In the preceding section I argued that norms justified as labour-and time-saving devices, those justified as error-minimizing devices, and those issued by authority and justified by the wisdom of the authority or by the need to secure coordination must be regarded as exclusionary reasons" (Raz, 1999, p. 74). Then he adds: "There are many different methods of justifying norms and I know of no general argument which would show that all possible justifications require the norm to be an exclusionary reason" (Raz, 1999, p. 74). These imply that not all norms are exclusionary reasons. Now, Raz believes that "mandatory norms" are norms that constitute exclusionary reasons (Raz, 1999, pp. 58-59; Himma, 2024, p. 457). However, the mandatory nature of such norms seems to stem from the fact that they are "justified". Justification, in return, suggests that norms, whether they are moral themselves or not, must be justified from a moral perspective if they are to count as "mandatory norms". Legal directives are mandatory norms if they pass the necessary tests of justification mentioned in this section.

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agent is to guarantee that she conforms to the reasons that apply to her as well as the legitimate authority would do, she needs to replace her own evaluations regarding the first-order reasons with the authority's. Allocation of different weights on the evaluations of the authority and the agent would not guarantee the level of the authority's expertise[5] (Raz, 1986, pp. 67-68).

Raz also mentions in passing that some errors may disqualify the authoritative directives from enjoying exclusionary normative force without elaborating: "On the contrary, there is no point in having authorities unless their determinations are binding even if mistaken (though some mistakes may disqualify them)" (Raz, 1986, p. 47). This probably refers to a distinction Raz makes between jurisdictional[6] and non-jurisdictional mistakes in the following pages. Accordingly, each authority has jurisdictional boundaries inside which its directives may exhibit exclusionary normative force (Raz, 1986, p. 62, 1989, p. 1194). Elsewhere Raz (1999, p. 192) provides a clearer picture of what he means by jurisdiction. Accordingly, each legitimate authority has a jurisdiction consisting of actions it can command. Only directives within the sphere of jurisdiction can have exclusionary force. It is rather unclear when exactly one can talk about the existence of a jurisdictional restriction. It can be assumed that general restrictions on the issues over which the authority's directives enjoy exclusionary normative force are jurisdictional. These restrictions may be self-imposed (Raz, 2009, p. 8, fn. 7) or imposed by a higher authority. Alternatively, jurisdictional restrictions can be

[5] This is, of course, for the cases where the superior expertise of the authority can be determined with certainty. In a previous piece, I argued, largely drawing on Stephen Perry's conception of reweighting reasons (Perry, 1989) and Sarah Moss's "probabilistic knowledge" (Moss, 2018), that different weights can be assigned to the evaluations of the agent and the authority where the agent can only have probabilistic knowledge regarding the authority's level of expertise (Gülgeç, 2024, pp. 115-138).

[6] By "jurisdiction", Raz (1986) seems to refer to any sort of limit to the powers of authorities: "Most, if not all, authorities have limited powers. Mistakes which they make about factors which determine the limits of their jurisdiction render their decisions void. They are not binding as authoritative directives" (p. 62). As such, the jurisdiction differs from the scope of exclusion in that a directive outside the jurisdiction of the authority cannot exclude any first-order reasons, while only exclusionary reasons have scopes of exclusion.

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imposed by non-legal factors. Cases where certain issues are exempted from the exclusionary normative force of the authoritative directives, because these issues are such that deciding for oneself is more important than conformance to reason, also exemplify jurisdictional restrictions. The authoritative directives' lack of exclusionary normative force may also be non-jurisdictional. In other words, it may be the case that although the authority generally may exercise exclusionary normative force regarding some issues, it may fail to do so because of the mistakes it commits in fulfilling the dependence and the normal justification theses. This requires a discussion regarding the difference between great and clear mistakes.

Raz touches upon the confusion between great and clear mistakes while replying to a possible objection. The objection argues that an authoritative directive can have exclusionary normative force as long as it does not deviate much from the correct balance of the underlying first-order reasons (Raz, 1986, p. 61). Raz correctly notes that regardless of the gravity of the deviation from the correct balance of first-order reasons, the normative force of the directive must remain unaffected, provided that the conditions of legitimate authority, i.e., the dependence and the normal justification tests, are fulfilled (Raz, 1986, p. 62). After all, an authority is to be considered legitimate because in any given situation it can evaluate the matter better than the agent, regardless of whether it actually makes the best possible decision or if any mistakes it makes are small or great: the agent would likely do worse than the authority. Also, because the authority is the superior expert, it is in a better situation to judge whether there is a mistake or whether it is a great one.

A great mistake may be clear, that is, clearly noticeable without resorting to the actual balance of reasons. Raz distinguishes clear mistakes from great mistakes and implies that the gravity of the mistake is not by itself a reason to deny an authoritative directive exclusionary normative force, while refraining from commenting on whether the clarity of the mistake may be:

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> The failure of this objection stems from its confusion of a great mistake with a clear one. Consider a long addition of, say, some thirty numbers. One can make a very small mistake which is a very clear one, as when the sum is an integer whereas one and only one of the added numbers is a decimal fraction. On the other hand, the sum may be out by several thousands without the mistake being detectable except by laboriously going over the addition step by step. Even if legitimate authority is limited by the condition that its directives are not binding if clearly wrong, and I wish to express no opinion on whether it is so limited, it can play its mediating role. Establishing that something is clearly wrong does not require going through the underlying reasoning. (Raz, 1986, p. 62)

From this, it can be inferred that for our purposes, a great mistake is one that significantly affects the supposed course of a practical deliberation, while a clear mistake is a mistake that can be detected without going through the practical deliberation. In the example he provides, Raz only mentions a great change in the outcome of the operation as a signal of a great mistake. This can sometimes be the case. However, it should not be necessary that the outcome of a practical deliberation is significantly affected by a great mistake. Assume that there are reasons in favour of and against taking an action. One reason on each side is very weighty. It may be the case that although the deliberator commits two great mistakes by neglecting both weighty reasons, the outcome of the deliberation does not really differ from what it was supposed to be.

I argued in the past that it generally needs to be conceded that clear mistakes affect the exclusionary force of a directive because the determination of clear mistakes does not necessitate recourse to the actual balance of the relevant first-order reasons (Gülgeç, 2020, pp. 124-125, 2023, pp. 38-39; Regan, 1989, pp. 1010-1031). I will repeat and detail this view here with reference to dependence and the expertise conditions. Here, I would like to stress the agent-dependent nature of a mistake's clarity. Accordingly, an agent's level of expertise is still relevant to the determination of whether a mistake is a clear one *from the perspective of the agent* (Gülgeç, 2023, pp.

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38-39). Therefore, if the exclusionary character of a directive is to be rejected based on a clear mistake, this also will be agent-relative. Take the example Raz uses. The idea that in an operation of addition, the sum cannot be an integer where there is only one decimal fraction among the added numbers may appear to be clear to someone who has undergone the basic level of math training. However, the mistake would not be clear to someone who has no training in math. Therefore, if the directive is to lose its exclusionary normative force due to a clear mistake (which is an issue that will be discussed below in relation to the dependence and the normal justification theses), this would only be true for agents with basic math training.

One might get the impression that, although Raz did not make a final decision in *Morality of Freedom* on whether clear mistakes by the authority affect the exclusionary normative force of a directive, he later changed his mind in "Facing Up: A Reply" (Raz, 1994).[7] When replying to Regan, Raz (1989) notes:

> if one knows that another person performs better than oneself… and if one has not further information which would suggest in which subclass of cases the other person's judgment is better than one's own, then one will do better by following the other person's advice. (p. 1194)

Regan's point can be represented by the following short quotation:

> My own view, of course, is that if the authority is clearly in error, its directives are not binding. We do not follow an indicator-rule in a case where it is clear [...] that the indicator-rule leads to the wrong conclusion. For the same reasons, we should not follow a clearly erroneous directive from an authority. (Regan, 1989, p. 1030)

[7] This was, for instance, Gur's reason for doubting that my arguments were compatible with the Razian conception of exclusion during our online discussion organized by the University of Palermo.

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Raz gives the following reply:

> The one substantive difference of opinion between us revealed by this discussion lies in Regan's suggestion that it would be reasonable for people in the situation envisaged in my example, who lack any further information, to adopt a policy of following their own judgment when they feel that the case is clear and following the authority when they are less clear, or when they feel that the case is close. Regan thinks it is a priori true that, for the most part, people make more mistakes in the latter type of case than in the former. I doubt this assumption in this general form. I tend to think that it holds good only where people have a good enough grasp of what determines the correctness of decisions [...] In other cases, especially in cases in which they hold mistaken beliefs about the matter they decide on [...] there is no reason to believe that there is a positive correlation between seeing the matter as clear and a likelihood of being right.
>
> When one does have an account of what makes a decision right then one may well have the additional information required to indicate in what subclass of cases the other person is worse than oneself. In such cases one should not follow the other person's advice regarding that subclass of cases at all [...] this conforms to the aim of my argument which was meant to show that considerations of reliability may lead to letting others' views pre-empt one's judgment or to their dismissal as irrelevant. (Raz, 1989, p. 1195)

I will claim that the quoted passages by Raz do not demonstrate his rejection of the "clear mistakes" doctrine. If anything, they demonstrate that he would reject a version of the doctrine that is not at all the one defended here. Raz opposes the claim that an agent ought to follow her own reasoning when she believes that it is a clear-cut case. Raz is correct to oppose this view because an agent may have wrong beliefs about the case, and her clarity may be a mistake. Clarity can be understood as either the degree of the strength of the agent's belief that the authority made a mistake or the objec-

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tive certainty of the authority's mistake. In my account, it is the latter, and Raz rejects only the former.

In fact, Raz's further elaborations hint that he may agree with the clear mistakes account presented in this paper. I stressed that a scope restriction based on a clear mistake, that is, the withdrawal of a first-order reason from the set of excluded first-order reasons due to a clear mistake committed by the authority, requires agents to possess a certain level of knowledge. This is because a mistake may be clear to people with certain knowledge, experience, or position, but not to others. In the second paragraph of the long quotation by Raz, he stresses that if the agent is knowledgeable about what constitutes the rightness of a decision, then he or she would be in a position to tell in which cases the authority is less competent than him or her. In these cases, there is no exclusionary normative force to be attributed to the authority's directive. The clear mistakes account adopted in this paper constitutes an example of cases in which, although the authority is generally more expert than him, the agent can tell that, with regard to a particular case or group of cases, the authority is worse. Therefore, Raz would most likely adopt the clear mistake account offered here.

In what follows, the distinction between great and clear mistakes will be important. Accordingly, unclear mistakes do not affect the exclusionary normative force of directives regardless of their gravity. On the other hand, clear mistakes may rip a directive of exclusionary normative force, again, regardless of their gravity.[8] I will come back to the distinction between the two below in the context of the dependence and the normal justification theses.

[8] A directive that lacks exclusionary normative force may still be binding. By "binding", I mean that the question "ought the agent comply with the directive" can be answered affirmatively. This can be done with or without reference to exclusionary reasons. In this sense, exclusionary normative force and binding force must be distinguished. In one sense, an exclusionary directive may be non-binding because the protected reason it provides is defeated by a non-excluded first-order reason (see Raz, 1999, p. 40). Conversely, a directive that is not exclusionary may still be binding. The first-order reasons to comply with the directive can be stronger than the combination of the first-order reasons on the contrary.

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B. *The Jurisdictional Restrictions*

The jurisdictional conditions may impose restrictions on the exclusionary force of a legitimate authority's directives. In other words, the directives of a legitimate authority do not enjoy exclusionary normative force over a range of cases. The authority may restrict the scope of its directive itself. It may just as well be the case that a higher authority restricts the scope of the authority's directives. Lastly, there are generic, non-legal restrictions regarding the reasons that can be excluded by a directive. The jurisdictional restrictions serve as scope limitations for the exclusionary force of authoritative directives. Let I_p be issues regarding which exclusionary normative force cannot be exercised, and I_a be issues where it is allowed. In case the first-order reasons underlying a legal directive are a combination of I_p- and I_a-reasons, the legal directive will fail to exclude I_p-reasons even if the legal directive is issued by an authority fulfilling the conditions of legitimacy.

C. *The Dependence Condition*

One of the conditions for the exclusive normative force of authoritative directives is that —barring exceptions— the evaluations underlying the legal directive must[9] take into account the first-order reasons applicable to the agent. What happens when the authority fails to take into account an applicable first-order reason? Here, the distinction made between great and clear mistakes, along with their effects, becomes pertinent. Even experts make mistakes, and when those mistakes are clear, they can be pointed out or noticed by agents with lesser knowledge. If possible, the reason that

[9] As I explained earlier, the "must" here does not mean complete compliance with the dependence condition. The authority may be justified in evaluating reasons other than those applying to the agent. However, the dependence condition must be satisfied at least to a certain level if the normal justification condition is met. The necessity here refers to this minimum level. I did not attempt to demonstrate here how this threshold is to be determined. However, it is obvious that the normal justification cannot be met if the authority takes into account none of the reasons that apply to the agent.

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the authority failed to consider must be held outside the scope of exclusion. Notice that it would not make sense to rip the legal directive off complete exclusionary normative force: The rest of the authority's evaluation should still be assumed to be much better than the agent's. It would be a waste of legitimate authority not to make use of that part of the directive. Instead, one should assume that the disregarded reason is not within the scope of exclusion and include it in the balance of the non-excluded first-order reasons beside the protected reason provided by the directive. Depending on whether the disregarded and the protected reason support conflicting actions and whether the disregarded reason defeats the protected reason, it may be the case that the authority's directive is not binding, albeit it possesses exclusive normative force.

This first case, where the authority clearly fails to consider a reason that it was supposed to, allows the agent to continue her practical deliberations on the level of non-excluded first-order reasons by taking the weight of the disregarded reason and the protected reason into account. How about the cases where the authority is clearly mistaken in considering a reason? There are two possibilities. First, it may be the case that the mistakenly considered reason is evaluated by the authority as being contrary to the action supported by the protected reason, i.e., the action that the directive ultimately demands. In such cases, there is no reason to rip the legal directive of its exclusionary force: ultimately, the extra weight assigned to the reason that was not supposed to be taken into consideration did not change the result of the expert authority's conclusion.

However, if the reason that clearly was not supposed to be considered supports the resulting action required by the directive, some difficulties emerge. The problem with these cases is that there seems to be no way for the agent to continue its practical deliberations while doing both, continuing to treat the directive as an exclusionary reason and making up for the mistake. The agent, as the less expert of both parties, cannot legitimately reach a conclusion regarding what the authority would have decided if it did not consider

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the problematic reason. In these cases, one has to reach an all-or-nothing decision regarding the exclusionary character of the authoritative directive. Whether the reason taken into account in a clearly mistaken fashion tipped the balance of authority's evaluations or not requires recourse to the balance of the overall first-order reasons, regarding which the authority is in a better position to evaluate as per the normal justification thesis. Since, the pre-emption thesis requires that the agent replace her own evaluations with those of the expert authority, her decision on whether the reason taken into account as a mistake can be taken out of the scope of exclusion cannot depend on whether she thinks it tilted the balance of first-order reasons in any particular direction. It appears that the solution to this second problem requires the re-creation of the very problem the authoritative directive was supposed to resolve. In such cases, it needs to be acknowledged that the authority's directive cannot have any sort of exclusionary normative force.

D. *The Expertise Condition*

If a directive is to have exclusionary normative force, it needs to be the case that the agent would conform better to his reasons if he simply followed the authority's directives rather than following the conclusions of his own practical deliberations. This can be called the condition of expertise. Now, it is often the case that reasons requiring expertise in different fields are relevant regarding an action. Take, for instance, Ahmet's case. Ahmet is an economist considering whether he ought to go outside to join an important meeting that will potentially contribute to the economy of the area. There is a municipality directive prohibiting citizens from going out on the day of the meeting, as there has been some sort of chemical leak from one of the factories around. The directive was based on the opinions of the medical experts. Therefore, even if there are health benefits of going outside, Ahmet must refrain from basing his action on his own evaluation of whether such benefits are outweighed by the hazards of going out. However, since

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the directive was based on the opinion of the medical experts, they are not more expert than Ahmet in evaluating the reasons in favour of Ahmet's going out that stem from the potential of economic contribution. Therefore, even if the medical authorities considered economic reasons to go out, the authoritative directive is not based on expert opinions regarding economic reasons to go out. In such cases, the best option available to the agent is to take the authoritative directive as an exclusionary reason regarding medical first-order reasons and to weigh the protected reason provided by the directive alongside economic (and other) first-order reasons. This means that the condition of expertise also serves as a restriction upon the scope of exclusion.

Perhaps an objection could be made to my suggestion. Given a situation involving a range of medical and economic reasons, is it not possible to come up with a more comprehensive conception of expertise to reach an all-or-nothing decision regarding the exclusionary force of an authoritative directive? Assume that the agent is as expert at economic matters as the authority is at medical matters. Then assume that the authority is slightly better than the agent at evaluating economic matters than the agent is at evaluating medical matters. This means that the probability that the authority reasoned correctly regarding economic matters is higher than the probability that the agent correctly evaluated the medical reasons. Therefore, overall, the agent would do better to defer to the final judgment of the authority rather than the balance of all first-order reasons. However, this is not the best available route, and this is perhaps where Raz was not clear. It is better for the agent to limit the scope of the authoritative directive to the first-order reasons regarding which the authority is the expert, while relying upon his own evaluations elsewhere. I conclude, therefore, that the expertise condition also serves as a scope restriction or a test for scope determination.

It is crucial to note that the normal justification thesis pertains to the authority and not necessarily to its directives. In other words, as long as it is the case that an agent would better con-

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form to reasons that apply to her by simply following the directives of the authority regarding an issue, the directives of that authority would enjoy exclusionary normative force. Clear mistakes in the conclusion of the directive serve as an exception to this by breaking the connection between the legitimacy of the authority and the exclusionary character of its directives. Accordingly, in cases where it is clear from the perspective of the agent that an authority fulfilling the expertise condition issued a directive requiring the wrong action, the agent must conclude that the directive is not an exclusionary reason with respect to her. Here, the mistakes concerned are those that affect the result of a practical deliberation. In other words, a clear mistake of evaluation by the better experts must be one that has an effect on the result reached. For instance, mistakes regarding the assigning of weights to different reasons do not affect the exclusionary force of a directive even if they are clear, provided that such a mistake does not render the result clearly mistaken. The fact that the expertise condition is met renders the authority the better expert regarding the assignment of weights to reasons, and there is no reason to rip its directives from exclusionary normative force unless the result reached by the authority is clearly mistaken.

E. *The Condition of Efficacy*

Some coordination problems require the existence of an efficacious authority. Raz emphasizes this by saying:

> A wise man can tell me which options belong to that set, but he cannot tell me which of the options to choose before it is known what others will do. Sometimes that can be known on the basis of existing facts. Many people are likely to believe that many will choose a particular option and therefore they will choose it themselves; hence one has reason to follow them and choose it as well. Sometimes, however, there is no option in the designated set that will be the obvious choice. In such cases, what one needs is something that will make a particular option the one to follow. (Raz, 1986, p. 30)

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Being a *de facto* authority means exercising some sort of power over the actions of the population, i.e., enjoying some form of obedience. This condition of "efficacy" does impose an obvious restriction on the scope of exclusionary reasons. Concerning these coordination issues, solutions of which require the existence of de facto authority, it is a precondition of legitimate political/legal authorities that they are also de facto authorities. A directive may concern an issue where at least some of the relevant first-order reasons concern a coordination issue that can only be resolved by an efficacious authority. Where the authority issuing the directive does not enjoy efficacy with regard to these matters, its directive cannot be thought of as excluding the relevant first-order reasons.[10] At least some of the critiques to be examined below concern the scope of exclusion in political/legal contexts where the condition of efficacy may find application. However, none of my replies to the critiques focuses on the determination of scope of exclusion based on the condition of efficacy.[11]

III. The Determination of the Scope and the Balance of First-Order Reasons: Contra the Critics

1. *The Arguments Summarized*

[10] Naturally, there are further discussions to be carried out that due to space limitations, I cannot consider here. For instance, is it required that the authority lacks efficacy completely regarding an issue to conclude that its legal directives cannot exclude first-order reasons related to that issue? Regardless of the answer, it is sufficient for my claim that at least in cases of complete inefficacy the condition of efficacy also serves as a scope limitation.

[11] One doubt may be that all these conditions of exclusionary normative force and restrictions on the scope of exclusion are undesirable when it comes to the normative force of legal directives. We want to limit the grounds on which a legal directive may be disobeyed, and all these conditions and restrictions may seem to facilitate disobedience to legal directives. In response, I would like to stress the crucial difference between the exclusionary normative force and the bindingness of a legal directive. A legal directive may be binding even if it completely lacks exclusionary normative force with respect to an agent, in that it may be the case that the agent ought to conform to the directive on the balance of first-order reasons. On the other hand, exclusionary normative force cannot guarantee that a legal directive is binding. Even if a legal directive constitutes an exclusionary reason, the protected reason provided by the directive may be defeated by unexcluded reasons.

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Chaim Gans is the first to develop the argument. Gans believed that the reasons we have for the rules can be conformed to by taking the purposes for which they exist as reasons to do as the rule requires, i.e., simple first-order reasons for action, just as by treating them as exclusionary reasons (Gans, 1986, p. 382). Gans views this as a response to what he terms the "argument from justification" (Gans, 1986, p. 377).

Gans continues by asking questions regarding the scope of exclusionary reasons. If exclusionary reasons have scopes, such scopes must be available to the agents. Gans notes that although Raz did not answer the crucial question of how this scope is to be determined, the answer seems obvious. The scope is to be determined by weighing the reasons for having the rule against the reasons that conformance to the rule will violate (Gans, 1986, p. 385). He then goes on to provide an example concerning decisions which are, according to Raz, exclusionary reasons[12] (Raz, 1975, p. 490).

Suppose that a person has reached a decision regarding a generic situation to act in a certain way when faced with these kinds of situations. Then assume that the person has discovered new facts that establish the wrongness of the decision. According to Gans, the practical problem faced by the person stems from the fact that changing the decision will paint her as an indecisive person, while sticking to the decision will lead to wrong actions:

> Or suppose that a man discovers new facts which make him acknowledge that a judgment on which he has decided to act already was wrong. And suppose that if he changes the decision now, people [...] will consider him irresolute. His practical problem now is not whether the judgment on which his past decision was based is right or wrong. He knows that it is wrong. [...] It seems to me that it distorts the facts here to say that because he has already decided

[12] Raz says: "To make a decision is to put an end to deliberation. It is also to refuse to go on looking for more information and arguments [...] No doubt in most cases, the refusal to reopen the case is not absolute. Usually, it is accompanied by some unspecified rider —provided no new information becomes available, or more strongly, provided no major change occurs, etc. Not all decisions are of the same strength, not all of them are subject to the same escape clause. But all of them are exclusionary reasons" (Raz, 1975, p. 490).

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> on this problem, he now excludes the newly discovered reasons from the old balance of reasons [...] The proper description of the situation is the following: the fact that the old decision is wrong is a reason not to act on it. The fact that if one changes the decision one will be thought of as an indecisive person is a reason to act on it. (Gans, 1986, p. 386)

Gans is confident that the practical problem must be resolved by weighing "the evil of acting for it against the evil of not acting for it" (Gans, 1986, p. 386). Then he importantly adds: "Every reason which outweighs another reason is also a reason not to act for the latter" (Gans, 1986, p. 387). Gans concludes that the scope of exclusionary reasons must be determined by weighing "the justification of the exclusionary reason against the eventual conflicting first-order reasons" (Gans, 1986, p. 389). The determination of the scope of exclusion, therefore, necessitates recourse to the weight of the reasons to hold certain reasons as exclusionary reasons.

Emran Mian offers a similar argument. Accordingly, "in order to decide whether the authority has moral expertise, the individual will have to refer to the dependent reasons" (Mian, 2002, p. 106). The truth of the authority's claim to expertise can only be verified by the agents by "familiarizing" themselves with the dependent reasons (Mian, 2002, p. 106). Accordingly, while determining if a directive is to be considered as an exclusionary reason or not, the reason stemming from the fact that following the directive will make it more likely for the agent to conform to the balance of reasons against the reason stemming from the value of one's deciding for oneself even when it involves the risk of getting the balance of first-order reasons wrong (Mian 2002, p. 107). In other words, the value of authority might clash with the value of autonomy, and a directive can only be exclusionary if the former outweighs the latter. Ultimately, Mian considers the balance between the value of autonomy and the value of authority as a balance between two different sets of first-order reasons concerning whether to treat the directive as an exclusionary reason or not (Mian, 2002, p. 108).

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Noam Gur's and J.J. Moreso's more recent works can be counted as two important elaborations on the original Gansian idea that deserve to be examined in more detail. Noam Gur agrees with Gans that the exclusionary normative force would be undermined in case its scope depended on the comparative weights of reasons in favour and against complying with a directive that is considered as an exclusionary reason:

> As Chaim Gans noted [...] we do not have, for every rule, a list of reasons excluded by the rule [...] And even if we could and were to produce such lists, how would we demarcate the line between excluded and unexcluded reasons? Wouldn't the demarcation depend on the *weight* of reasons for and against compliance with the rule? Raz's answer cannot be "yes, it would". For, as noted by Gans, it would be self-undermining for the pre-emption thesis to claim that some reasons are excluded from competing with others by their weight, but that the question of which reasons are thus excluded is determined by their weight. The weight of reasons is the one thing that the scope of exclusion cannot depend on. (Gur, 2018, p. 54)

Gur makes use of Jane's case for his core argument, which aims to demonstrate that in some cases the scope of exclusion cannot be determined without making reference to the weight of the dependent reasons (i.e., first-order reasons that apply to the agent independently of the directive). Jane is a postal service worker tasked with delivering mail. In the relevant jurisdiction, there is a statutory provision in the form of "No person shall knowingly obstruct or delay the delivery of mail, or knowingly act in a way that brings about obstruction or delay of mail delivery". Jane, while driving a van loaded with mail, notices an injured person in critical condition by the side of the road and takes him to the hospital, saving his life but thereby "knowingly obstructing or delaying" the delivery of the mail. Gur wants us to assume that there is nothing in the relevant jurisdiction that legally permits Jane to defy the statutory rule and concludes that Jane must be acting on moral reasons (Gur, 2018, p. 53).

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Gur thinks that Jane, because she obviously took the morally right action, must be acting on a very weighty, non-excluded moral reason. Therefore, one needs to be able to explain why the moral reason Jane acted on was not excluded by the statutory provision without taking the weights of first-order reasons into account. Raz (1999, p. 192) believes that each authority may only exercise exclusionary normative force within its jurisdiction. The directive-issuer's rank is one factor that may lead to a broader or narrower jurisdiction (Raz, 1999, pp. 46-47). However, as Gur rightly points out, this cannot decisively refute the challenge posed by his example: It may just as well be within the jurisdiction of the lawmaker to exclude the moral reason acted on by Jane (Gur, 2018, p. 55). Next, Gur considers if the reason Jane acts on is one of the dependent reasons and ultimately gives an affirmative answer (Gur, 2018, pp. 55-56). Gur then considers some possible objections based on different theories of interpretation to see if the rule could be said not to apply to Jane's case (Gur, 2018, p. 56-67).

J.J. Moreso agrees with Gans in claiming that Razian reasons fail to exclude because any determination as to the scope of such exclusion necessitates recourse to the balance of the first-order reasons. An important feature of Moreso's paper is the distinction he makes between the exclusionary force of legal directives with respect to law-applying officials and non-officials. Based on Raz's claim that the constitutionality review of legislation confers on the courts a power to modify the constitutionally protected moral considerations (Raz, 2004, p. 13), Moreso concludes that the constitutional provisions, then, cannot be exclusionary with respect to the judges conducting the constitutionality review (Moreso, 2024, p. 154). Regarding a specific example concerning the Spanish Criminal Code (the burning of the Spanish flag), he further argues that in rights-based constitutional adjudication:

> it seems that it is necessary to go to the underlying reasons that found the granting of that right, and we cannot delimit the scope of the reasons ex-

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> cluded by the criminal code without weighing them with what is established by the Constitution. (Moreso, 2024, p. 154)

In another example, Moreso (2024) considers the case of self-defence. Accordingly, the scope of exclusion of the directive prohibiting the killing of another individual is restricted by the cases of self-defence. Moreso argues that it is only by resorting to the balance of first-order reasons that one can determine whether the initial attack was illegitimate or whether the defence was proportionate (Moreso, 2024, p. 155). Ultimately, Moreso's conclusion is that exclusionary normative force is impossible, whether it targets law-applying officials or non-official addressees (Moreso, 2024, pp. 153-157).

2. *Contra the Critiques*

A. *Exclusionary Reasons Exclude Regardless of Their Weight*

Gans claims that reasons outweighing contrary reasons are also reasons not to act on the outweighed reasons: "Every reason which outweighs another reason is also a reason not to act for the latter" (Gans, 1986, p. 387). Therefore, all practical problems seem to be resolvable based on outweighing relationships. One does not need a second level of practical reasons in order to account for the phenomenon of "not acting on certain reasons":

> Do we have, for every rule, a list of reasons which may be violated by it (i.e., excluded by it) and a list of reasons which may not be violated by it? How do we prepare these lists? Raz does not answer these crucial questions. It seems however that the answer would have to be: Yes; by weighing the reasons for having the rule against the reasons violated by following it [...] if the exclusionary force of rules is calculated on the basis of the weight of the reasons for having them, is the operation of the rules as exclusionary reasons different in substance from the operation of outweighing? (Gans, 1986, p. 285)

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Every reason to φ is also a reason not to -φ. Moreover, every reason to φ is a reason not to -φ, *for any reason*. Gans is mistaken to hold that an outweighing relationship is necessary for a reason to be a reason not to act on a contrary reason. The outweighing reason is necessary if the agent is to be justified in not acting on the contrary reason. If we assume that there is only one reason for and one reason against φ'ing, it is only if the reason to φ defeats the reason to -φ that the agent ought to refrain from acting on the reason to -φ. This sense of "exclusion" that Gans has in mind is parasitic on weight relationships. Exclusionary reasons exclude certain first-order reasons successfully regardless of the weight of the excluded reason. In other words, the "exclusion" of a defeated first-order reason by the defeating first-order reason and the exclusion of a first-order reason by a second-order reason are different instances of exclusion. Moreover, exclusionary reasons serve agents not only by enabling them to make better decisions through the exclusion of first-order reasons conflicting with the protected reason, but also by saving them time (Raz, 1999, p. 59): Agents do not even need to evaluate other first-order reasons that support the same action as the protected reason. This function of exclusionary reasons cannot be explained by Gans's approach.

B. *The Case of Justified Disobedience and Mistakes of the Authority*

Gur argued that Jane's case where she violates the directive of the highest-ranking relevant authority regarding the delivery of mail by stopping and saving the life of a person cannot be explained by reference to the fact that the scope of exclusion was restricted and that the directive did not exclude moral reasons to obstruct the delivery of the mail in order to save a person's life. Gur does not discuss the expertise of the relevant issuer. This is most probably due to the fact that cases where it could be argued that there was no legitimate authority were discussed in the previous chapter (Gur, 2018, pp. 31-50), where Gur considers possible replies by the

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defenders of the pre-emption thesis. Scope restrictions, on the other hand, are relevant only with regard to the directives of legitimate authorities. Therefore, the authority in Jane's case must be an authority passing the normal justification test.

Despite the authority's directive, which is supposed to function as an exclusionary reason in the Razian sense, Jane still has a reason to save the injured person. This remains true even if Jane's reason to save the person is excluded by the directive, since exclusion does not affect the reason's status as a reason. Gur (2018, p. 56) correctly characterizes this reason as a dependent reason, i.e., as a reason that would apply to the agent independently in the absence of the directive (Raz, 1986, p. 47). Then he goes on to suggest that Jane's case of justified disobedience could be accounted for from the perspective of the pre-emption thesis if it can be demonstrated that Jane's reason for disobedience is not a "dependent reason" (Gur, 2018, pp. 55-56). Generic restrictions on the scope of exclusion create a gap between "dependent reasons", the balance of which must be reflected by the directive of the legitimate authority, and reasons applying to a case. The former group is narrower because there are reasons applying to a case that should not be reflected by the authoritative directive, for their inclusion in the evaluations of the authority would ultimately lead to the double-counting error.[13] Such reasons that apply to the case but cannot be reflected

[13] Dependent reasons are first-order reasons. As such, they are conceptually distinct from exclusionary reasons, which are a type of second-order reason. A legitimate directive —namely, an exclusionary reason— reflects the balance of dependent reasons. It is therefore crucial to clarify what "reflection" means in this context. First, reflection does not imply the assimilation of dependent reasons into the exclusionary reason. Dependent reasons retain their separate existence. Just as the existence of an object is distinct from the existence of its reflection or of the mirror itself, so too the dependent reasons remain distinct from the directive that reflects their balance. This point is further supported by the fact that first-order reasons excluded by an exclusionary reason continue to exist as reasons for action. Second, it is not the dependent reasons themselves that are reflected by the exclusionary reason, but rather their balance. The balance of dependent reasons concerns the assessment of both their relative weights and their directions —that is, whether they count in favor of or against the action in question. The correct balance of dependent reasons can be determined only through correct practical evaluation. The practical evaluation underlying an authoritative directive coincides with the authority's beliefs about how the agent ought to evaluate those dependent reasons. Even here, however, there is no genuine incorporation. What is reflected —the way the agent

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by the authoritative directive are outside the scope of exclusion. Therefore, Gur is correct that if Jane's reason is not a dependent reason, it can be argued that it is outside the scope of exclusion. The traces of generic restrictions on the scope of exclusion from Raz's work suggest that these concern highly personal cases. Jane's reason does not concern such a personal issue. Ultimately, Gur is correct in arguing that one does not have sufficient reason to argue that Jane's reason is not among the dependent reasons.

Not qualifying as a dependent reason could explain remaining outside the scope of exclusion. This does not mean that qualifying as a dependent reason is the *per quam* condition for being within the scope of exclusion, and this seems to be where Gur is mistaken. As I have argued above with respect to the dependence condition for legitimate authority, it is possible for a dependent reason to remain outside the scope of exclusion due to not being taken into consideration by the authority. As will be remembered, the difference between clear and great mistakes plays a role here. Accordingly, as long as the authority satisfies the normal justification condition, it must be the authority that is in a better position to judge whether a given reason is relevant to the case or not. That is why even great mistakes committed in determining the relevant reasons cannot affect the exclusionary scope of the directive. The case is different with regard to clear mistakes in considering an irrelevant reason or failing to consider a relevant one. Accordingly, the clear mistake of failing to consider a dependent reason serves as a limitation on the scope of the directive. Cases where the authority was clearly mistaken to include a reason in its deliberations on the directive either do not affect or abolish the exclusionary normative force of a directive. Jane's case could be an example of the first case.

Now, as demonstrated in the first section, the dependence thesis may serve as a condition for the legitimacy of the authority as well as a factor restricting the scope of exclusion. There-

ought to evaluate the dependent reasons— remains independent of the authority's beliefs about it, which constitute the reflection. Just as a mirror may distort the object it reflects, a legitimate directive may be mistaken.

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fore, we may continue to assume that the authority in Jane's case is legitimate while also arguing that it committed a clear mistake by not taking Jane's reason into account. This could or could not be the case. If this were the case, Jane's reason to obstruct mail delivery to save a life was not excluded by the directive. In such a case, Jane's action, if it was the right action, could normatively be justified because Jane's moral reason to obstruct the delivery of the mail defeated the protected reason provided by the directive.

What if the authority actually considered Jane's reason but still issued the directive? This time, it is the expertise condition that needs to be evaluated in connection with clear mistakes. I argued in the first section that if the action required by the directive is clearly mistaken, the directive cannot enjoy exclusionary normative force even if the authority meets the expertise condition. Is the action required by the directive in Jane's case, i.e., ignoring the dying person and continuing to deliver the mail, obviously mistaken? Gur seems to think so: after all, the whole point of the discussion is to demonstrate that the pre-emption thesis cannot account for at least some cases of justified disobedience to the law (Gur, 2018, p. 70). If, then, the result of the expert authority's deliberations is clearly sufficiently mistaken to lead to a mistaken conclusion, the directive cannot have exclusionary normative force with respect to the agent from the perspective of whom the mistake is clear. It seems like the pre-emption thesis, at least in its form defended here, could account for Jane's case of justified disobedience.

C. *Authoritative Directives Create Exclusionary Reasons Only for Their Subjects*

An authoritative directive only creates an exclusionary reason for its subjects. If a directive does not address a subject, it cannot be expected to have exclusionary force with regard to her. Imagine two different directives within a code of obligations. One establishes that individuals ought to fulfil their contractual obligations. The other authorizes the courts to decide on appropriate repara-

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tions in case the contractual obligations are violated. Many would recognize the existence of two different directives here.[14] One addresses the individual and establishes that contractual obligations ought not to be violated (D_1). The other requires the court to decide on appropriate reparations in case such a violation occurs (D_2). Now, assume that there is another provision allowing parties to default for a few days in fulfilling their contractual obligations (D_3). Even if it could be argued that in deciding whether a certain latency in payment qualifies as a violation of the contract, the court had to resort to the balance of the reasons underlying D_1 and D_3, such directives do not address the court. They can be said to be *applied* by the court, but since they do not address it, they cannot have exclusionary normative force with respect to the court. It is D_2 that could have an exclusionary force with regard to the actions of the court. Therefore, it needs to be demonstrated that the said decision cannot be given without recourse to the balance of reasons underlying D_2 if the example is to say anything regarding the scope of exclusionary reasons.

There are many parallels between my example and Moreso's example based on the Spanish Constitutional Court. First, Article 20-1a) of the Spanish Constitution resembles D_1 above: it establishes a general obligation. The statute criminalizing the burning of the Spanish flag, in turn, (for our purposes) resembles D_3 because it creates an exception to the general obligation, a case where freedom of expression seemingly is not to be protected. D_2 in Moreso's case would be Article 161-1a), which authorizes the Constitutional Court to annul unconstitutional statutes. Should we not conclude then that the simple fact that the Constitutional Court must appeal to the balance of the reasons underlying Article 20-1a) and those underlying the provision of the penal code are irrelevant because they do not address the court, and that what matters is the balance of reasons underlying Article 161-1a), which addresses the Court?

[14] This is true unless one adopts a Kelsenian theory of individuation (Raz 1980, 77-85) according to which there would be a single norm addressing the courts.

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This straightforward objection to Moreso's example is not immediately available because Article 20-1a) of the Spanish Constitution seems to address the Constitutional Court: just as the Parliament, the executive, other constituents of the judiciary, and maybe even citizens due to the horizontal effect of constitutional rights, the Constitutional Court is also to refrain from taking actions infringing the freedom of expression. So, it seems that Article 20-1a) addresses the court, and it is crucial whether the Court must appeal to the balance of the reasons underlying the said provision.

The crucial point here is the appropriate characterization of the practical question that the Constitutional Court is considering. Article 20-1a) is applicable to cases where the Court is considering taking an action that could potentially violate the right to freedom of expression. The reasons underlying the said constitutional provisions are reasons that its subjects have in order to respect or violate the freedom of expression. I believe that this cannot be, at least not in the first place, what the Court is evaluating, even when it is claimed to resort to the balance of the reasons underlying Article 20-1a) and Article 543 of the Spanish Criminal Code. Such a balance, provided that it is necessary to appeal to it, is required to determine if the condition for the application of Article 161-1a) is fulfilled. They are not the reasons underlying Article 161-1a), which can truly be said to govern the action the Court is evaluating to take. Ultimately, regardless of the decision given by the Constitutional Court, it will not be the Court's decision in the strict sense of the term that violates the right to freedom of expression. A legally faulty decision of the Constitutional Court would violate Article 161-1a) and not Article 20-1a). If this is so, it must be the case that Article 20-1a) is not among the directives addressing the Court in this specific instance. Unless the balance considered is the balance underlying the directive addressing the Court, the necessity of appealing to this balance cannot undermine the conception of exclusionary reasons.

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D. *Recourse to Underlying Reasons vs. Recourse to the Balance Thereof*

What would be fatal for the account of exclusionary reasons is the necessity of appealing to the *balance* of first-order reasons in order to determine the scope of exclusion. Having to appeal to the dependent reasons, i.e., what they are or whether they were considered by the relevant authority while making the directive, is not only possible but may also be necessary for determining the scope of exclusion. As I explained in the first section, a reason would fall outside the scope of exclusion if the authority did not or failed to take it into account, *and if this is also a clear mistake*.

Mian and Moreso would be right if they claimed that the agents may sometimes have to "deal" with dependent reasons in order to determine the scope of exclusion. In its simplest form, I have argued that they must know if the authority committed a clear mistake in its evaluation of the dependent reasons. This requires "dealing with" underlying reasons without undermining the account of exclusionary reasons. What would undermine the exclusion account is not that agents may sometimes (in cases of clear mistakes) be required to carry out some deliberations with regard to dependent reasons. The account would fail only if they were required to balance the weights of first-order reasons in each instance of exclusionary reasons.

Take Moreso's example of self-defence. I noted in the beginning that knowing the scope of the exclusionary reason at least requires knowing the following two: 1) reasons that were taken into account by the de facto authority, and 2) the *de facto* authority's level of expertise in comparison to the agent's. Therefore, Moreso is right to claim that the determination of the scope of an exclusionary reason requires reference to the first-order reasons. Notice, however, that the jump from this to the requirement that one must refer to the *balance* of the first-order reasons is not justified. In other words, one does not have to know how the authority balanced these first-order reasons or whether it evaluated these reasons cor-

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rectly, barring the cases of clear evaluative mistakes. The evaluation regarding the capacity and capabilities of the authority is already covered by the condition of expertise, and one does not need to appeal to the underlying *balance* of the first-order reasons in order to determine if the normal justification test is passed. Agents may be required to consider dependent reasons. However, the account is safe unless it is demonstrated that they always have to refer to the *balance* or the *weights* of these reasons. Neither Mian nor Moreso offers a persuasive argument in that regard.

E. *Outweighing Relationships between Second-Order Reasons*

It is a virtue of Mian's argument that he is aware of possible conflicts between second-order reasons. Only an undefeated exclusionary reason can successfully exclude those first-order reasons that fall under its scope. The fact that it is valuable that one makes one's own decision regarding a matter is a second-order reason to act on certain reasons. Raz (2009, p. 137) recognizes this when he indicates that there are some matters regarding which expertise is possible, but one is required to reach a decision based on one's own evaluation of the situation.

These matters over which no exclusionary force is applicable could be stated as matters regarding which the value of autonomy defeats the value of authority. In other words, regarding these matters, it is more important that one does not rely upon someone else's judgment but her own evaluation than that one satisfies the balance of the first-order reasons to the best possible level (Mian, 2002, p. 107).

Mian's mistake is to think that the clash between the value of autonomy and the value of authority can be described as a clash between two sets of first-order reasons (Mian, 2002, p. 108). Sure, "having a reason to act based on one's own evaluation of the relevant reasons" can be formally expressed as "having a reason to φ", where φ stands for "acting based on one's own evaluation of the relevant reasons". The characterization of φ as a first-order reason

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based on the possibility of formally expressing it as a reason to φ, however, would be a mistake. What makes a reason second-order is the fact that it does not simply concern the action but the reason it is to be taken for. In other words, a second-order reason always comprises an internal element concerning the intentions of the agents. Therefore, an exclusionary reason ultimately does not mean that the agent ought not to φ. It simply means that the agent ought not to φ for R.

What Mian's arguments ultimately demonstrate is that one always has to take into consideration the weight of second-order reasons on the contrary while determining whether or not to conform to an exclusionary reason. Notice, however, that this condition is not a condition for the existence of an exclusionary reason but for its binding force. In other words, a defeated exclusionary reason still exists, albeit the agent ought to refrain from conforming to it.

IV. Conclusion

The number and quality of the critiques demonstrate at least that Raz has left behind the details of his account of exclusionary reasons to be straightened out. In this paper, I focused on the critiques targeting the scope of exclusionary reasons. At least as long as the scope is concerned, I think that Raz's account is rough rather than insufficient. I attempted to fill in the gaps in his account in a way that is consistent with the general Razian account of exclusionary reasons. Then I tried to demonstrate how this completed picture can be used to counter the criticism targeting the scope of exclusion.

The conditions for exclusionary normative force also serve as scope restrictions. Besides restrictions stemming from the dependence and the normal justification theses, the efficacy condition for legitimacy and the generic restrictions also play a role in determining the scope of exclusion for the directives issued by the authority. Lastly, mistakes affect the existence and scope of an ex-

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clusionary directive in different ways. Although unclear mistakes do not affect either the scope or the existence of an exclusionary directive regardless of their gravity, clear mistakes may affect both, depending on the case.

I made use of this general framework for scope determination to reply to the selected critiques of the scope of exclusion. What is common in all the selected critiques is that they claim the inevitability of having recourse to the weights or the balance of first-order reasons in order to determine the scope of exclusion. The second part of the paper replied to this core claim, along with pointing out other problems with the critiques. Ultimately, the are mistaken to argue that exclusionary reasons cannot fulfil the function expected of them because the agent has to repeat the deliberations of the authority in order to determine which first-order reasons are excluded.

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