

The Practical Otiosity of Exclusionary Reasons

Kenneth Einar Himma

University of Zagreb Faculty of Law, Zagreb, Croatia

Email: khimma@gmail.com

Abstract

One of Joseph Raz's most influential contributions to legal philosophy is the Exclusionary Thesis, according to which any prescription that counts as mandatory is identical with an *exclusionary* reason that bars acting on certain reasons favoring noncompliance. This essay argues that exclusionary reasons are otiose in the sense there is no deliberative work they are ever *needed* to do under objective norms of practical reasoning.

Keywords: *law; exclusionary reasons; practical rationality; Joseph Raz*

The claim that one should do what the balance of reasons favors doing is regarded as the most basic requirement of practical reasoning: on this uncontentious view, it is an objective requirement of practical reasoning—and one foundational to sound decision-making—that a rational subject should act always as the balance of reasons dictates.

Although intuitive in theory, this principle is messy and difficult to apply in practice because it requires weighing competing values and the corresponding reasons they define. There are many value assessments that can be made without deliberation, but any conflict between reasons that requires deliberation to resolve does so either because the underlying values do not differ much in weight or because they are not comparable and not amenable to evaluation in terms of their respective weights.

One of Joseph Raz's most influential contributions to philosophy and law addresses such conflicts: according to the Exclusionary Thesis, mandatory prescriptions¹ are identical with an *exclusionary* reason that bars acting on certain reasons favoring noncompliance.² One need not, on the Exclusionary Thesis, resolve conflicts among mandatory prescriptions by weighing the conflicting values; one can also do so, at least in principle, by abstaining from acting on the reasons excluded by the relevant prescription.

While the Exclusionary Thesis is, strictly speaking, a metaphysical claim about the properties constituting a prescription as mandatory, it suggests,

-
1. The class of mandatory prescriptions includes authoritative tellings.
 2. As he puts the matter, "a mandatory norm is either an exclusionary reason or, more commonly, both a first-order reason to perform the norm act and an exclusionary reason not to act." Joseph Raz, *Practical Reason and Norms* (Oxford University Press, 1999) at 58-59.

if not implies, that recourse to exclusionary reasons is sometimes required by objective norms of practical reasoning as the only or best means to reach a decision about what to do. It is hard to see how the Razian theory of practical reasoning could avoid this result if “the notion of exclusionary reasons is essential to the explanation of mandatory norms,” because what constitutes a norm or prescription as mandatory is, on his view, that it is, or gives rise to, an exclusionary reason.³

Although the Exclusionary Thesis enjoys widespread acceptance, it is contentious. Daniel Whiting rejects the concept of a second-order reason, arguing that we cannot choose to act for/against other reasons,⁴ whereas Noam Gur accepts the concept but denies that it is reasonable to completely exclude valid first-order reasons.⁵ Emran Mian and Stephen Perry argue that what Raz characterizes as ‘exclusionary reasons’ are ultimately first-order reasons that outweigh the countervailing first-order reasons.⁶ David Enoch argues that exclusionary reasons change the factual circumstances in a way that ‘triggers’ pre-existing reasons.⁷ Finally, Larry Alexander, Heidi Hurd, and Margaret Martin all challenge, though in different ways, the notion that law and practical authority govern subjects by providing exclusionary reasons.⁸

This essay offers a novel criticism. In particular, it argues that exclusionary reasons are practically otiose in the sense that there is no deliberative work that they are ever *needed* to do under objective norms of practical reasoning as we understand them. To this end, the first three sections explicate the Exclusionary Thesis: Section 1 explains three distinctions needed to understand the content of this thesis; Section 2 argues there are only three sources of value that endow a practical reason with what normative force it has; Section 3 applies the lessons of the second section to the Exclusionary Thesis. Section 4 concludes that norms of practical reasoning never *require* that we treat mandatory prescriptions as exclusionary reasons because there is no objective work that can be done *only* by exclusionary reasons in deliberations about whether to comply with a mandatory prescription.

3. *Ibid* at 73.

4. See Daniel Whiting, “Against Second-Order Reasons” (2017) 51:2 *Noûs* 398.

5. See Noam Gur, “Legal Directives in the Realm of Practical Reason: A Challenge to the Pre-emption Thesis” (2007) 52:1 *Am J Juris* 159.

6. See Emran Mian, “The Curious Case of Exclusionary Reasons” (2002) 15:1 *Can JL & Jur* 99; Stephen Perry, “Second-Order Reasons, Uncertainty and Legal Theory” (1989) 62:3-4 *S Cal L Rev* 913.

7. See David Enoch, “Authority and Reason-Giving” (2014) 89:2 *Philosophy & Phenomenological Research* 296.

8. See Larry Alexander, “Law and Exclusionary Reasons” (1990) 18:1 *Philosophical Topics* 5; Heidi Hurd, *Moral Combat* (Cambridge University Press, 1999); Margaret Martin, *Judging Positivism* (Hart, 2014). Martin also argues we do not regard law or authority as creating exclusionary reasons; while I think this requires more empirical evidence to establish, I am confident the methods of experimental philosophy would confirm her (and my) view.

1. The Logical Space of Reasons

We cannot adequately evaluate the Exclusionary Thesis without understanding the nature of an exclusionary reason; and we cannot understand the nature of an exclusionary reason without explicating its conceptual, inherent, or essential properties—i.e., the properties that constitute something as an exclusionary reason. This section articulates three distinctions that are needed to fully grasp the Exclusionary Thesis.

i. Subjective and Objective Reasons

Our conceptual and epistemological practices distinguish between subjective and objective reasons.⁹ Given that the term *subjective* means “existing in the mind; belonging to the thinking subject rather than to the object of thought,” the concept of subjectivity is agent-relative in the sense that it is concerned with the conscious mental states of an agent: something counts as subjective for an agent *P* in virtue of its being discerned by *P* and hence, to put it in language mirroring the definition’s, in virtue of *having its source* in *P*’s mind.¹⁰ A reason *p* thus counts as subjective for *P* if and only if it is a proposition *P* regards as favoring doing or believing *s*, for some *s*. *P* need not instantiate an occurrent belief (i.e., one that *P* is aware of) that *p* favors *s* to count as regarding it as favoring *s*; it is enough that *P* instantiates a latent belief in the form of a disposition to that effect, even if *P* never considers the matter.

The notion of an objective reason arises out of the idea that there are good and bad reasons for believing and doing things. Given that the term *objective* means “existing independent of thought or an observer as part of reality,” the concept of objectivity is agent-independent in the sense it does not refer to the conscious mental states of an agent: it is hence not a requirement for a proposition to count as an objective reason that it ‘exists’ in some agent’s mind.¹¹ A reason *p* thus counts as objective for *P*, if and only if it is a proposition *P* should regard as favoring *s* when deciding whether or not to *s* because *p* counts as a reason to *s* in virtue of favoring *s*. A proposition that counts as an objective reason favoring

9. This distinction is sometimes framed in terms of internal and external reasons: *internal reasons* refer to subjective reasons because they exist in the mind of, and are hence internal to, the subject, whereas *external reasons* refer to objective reasons because they exist regardless of whether they exist in the mind of a subject. This taxonomy derives from the debate between *reasons/justification internalism* (i.e., the only reasons or justifications that exist are defined by the subject’s motivations), and *reasons/justification externalism* (i.e., there exist some reasons that apply to subjects regardless of their motivations). See e.g. George Pappas, “Internalist vs. Externalist Conceptions of Epistemic Justification” in Edward N Zalta & Uri Nodelman, eds, *The Stanford Encyclopedia of Philosophy* (Spring 2023), online: plato.stanford.edu/entries/justep-intext/.

10. “Dictionary.com” (last visited 11 November 2024), online: www.dictionary.com/browse/subjective sub verbo “subjective”.

11. *Ibid.* sub verbo “objective”.

\underline{s} exists and thus has force that supports \underline{s} regardless of whether anyone regards it as supporting \underline{s} : its existence *qua* reason that favors \underline{s} is therefore not dependent on anyone's mind.¹²

Our conceptual and epistemological practices entail that there exist objective norms of epistemic and practical reasoning (or rationality) which determine whether reasons count as good. There can be propositions an agent regards as reasons to do or believe \underline{s} that count as good because they satisfy these putatively mind-independent norms and hence count as favoring \underline{s} regardless of what anyone thinks; and there can be propositions an agent regards as reasons to do or believe \underline{s} that do not count as good because they do not satisfy those norms and hence do not count as favoring \underline{s} regardless of what anyone thinks. Although it is surely arguable that we lack reliable epistemic access to the content of these objective norms, our conceptual and epistemological practices entail that we can be mistaken in our assessments of what reasons favor and thus entail the existence of such objective norms of epistemic and practical reasoning.

ii. *Motivating and Justifying Reasons*

Our conceptual and epistemological practices entail a second distinction, which, unlike the above, pertains only to practical reasons. A *motivating reason* to do \underline{a} is a proposition that a subject views, or ought to view, as inclining them to do it; motivating reasons function to incline—and therefore to motivate—subjects to do what they are motivating reasons to do. A *justifying reason* to do \underline{a} is a proposition that a subject views, or should view, as justifying doing \underline{a} under some set of norms governing their acts;¹³ justifying reasons function to justify subjects in doing what they are justifying reasons to do.¹⁴

Motivating reasons are wholly descriptive propositions that are regarded, or should be regarded, as having normative force that motivates a subject to do what they favor doing. A motivating reason counts as subjective for a subject if they regard it as having force that inclines and thus motivates them to do what it favors doing; it counts as objective if they *ought* to regard it as having force that motivates them to do what it favors doing. The descriptive proposition that judges are authorized to punish murder with life imprisonment expresses a subjective

12. What I call *objective reasons* are sometimes referred to as *normative reasons*, whereas what I call *subjective reasons* are sometimes referred to as *motivating reasons*. See e.g. Jonathan Dancy, *Practical Reality* (Oxford University Press, 2000).

13. Justifying reasons are sometimes referred to as *normative reasons*. See e.g. David McNaughton & Piers Rawling, "Motivating Reasons and Normative Reasons" in Daniel Star, ed, *The Oxford Handbook of Reasons and Normativity* (Oxford University Press, 2018) 171.

14. All epistemic reasons are justifying reasons if we lack the kind of volitional control over our beliefs that we assume we have over our acts. While we can choose to do things to ensure that we continue to believe what we want to believe (say, by ignoring conflicting evidence), this does not amount to the kind of direct volitional control we assume we have over what we do: I can raise my hand by willing it, but I cannot make myself believe something by willing it. Although it might be true that the mental events we characterize as 'willing' are neither free nor causal in the relevant sense if either determinism or epiphenomenalism is true, those events correlate with our acts in a way they do not correlate with our beliefs.

motivating reason for *P* to abstain from murder if and only if *P* either regards it as having normative force that motivates them to abstain from doing so or would regard it as having such force if undecided about whether to kill a person and trying to decide whether to do so.¹⁵ It expresses an objective motivating reason for *P* to abstain from doing so if objective norms of practical reasoning dictate that *P* *should* regard it as a reason to abstain.

The character of justifying reasons is not as clear in this regard: if they are expressed by propositions that prescribe behavior, they are normative in character; however, if they are expressed by propositions that merely report what is prescribed, they are descriptive in character. If, for instance, the reason justifying a judge in sentencing someone to a term of life imprisonment is a legal norm that obligates them to do so, then the proposition expressing it is normative; however, if it is the proposition expressed by the sentence that “judges are required by law to impose a term of life imprisonment for murder,” then the proposition expressing it is descriptive. Either way, our conceptual practices entail that propositions expressing justifying reasons function to justify behavior under the same system of norms that create those reasons in the first place.

iii. First- and Second-Order Practical Reasons

A third distinction is between first- and second-order reasons. A first-order practical reason is a reason concerned with something other than another practical reason, such as a state of affairs that is, or should be, valued by the agent, whereas a second-order practical reason is a practical reason concerned with a first-order practical reason.¹⁶

A first-order reason to do *a* is a reason that functions, or should function, to induce an agent to do *a*. *P*'s desire to consume an alcoholic beverage might create a first-order reason to do so either as a descriptive matter of fact concerning what is happening in their thinking about whether they ought to do so or as an objective matter of practical reasoning concerning what should be happening in their thinking about whether they ought to do so. In the first case they regard the desire as a first-order practical reason to have a drink, whereas in the second they should regard it as such.

A second-order reason with respect to doing *a* is a practical reason that functions, or should function, to induce some agent to act or refrain from acting on some first-order practical reason with respect to *a*. If *P* has an urge to have an alcoholic beverage but wants not to act on it because they are a recovering alcoholic, the latter desire might create a second-order reason that precludes them from acting on any first-order reasons to consume it as a descriptive matter of

15. The claim is not that these descriptive claims logically entail the relevant normative claims, which would commit the is-ought fallacy; the claim is rather that we treat certain descriptive claims as giving rise to reasons to do something. The is-ought fallacy is a logical fallacy and thus applies only to claims of logical entailment. See e.g. Charles Pigden, *Hume on Is and Ought* (Palgrave Macmillan, 2010).

16. See Raz, *supra* note 2 at ch 1.2 for more discussion of the distinction.

fact concerning what is happening in their thinking about whether they ought to do so *or* as an objective matter of practical reasoning concerning what should be happening in their thinking about whether they ought to do so. In the first case they regard the desire not to act on the urge as a second-order reason to abstain from acting on some of the applicable first-order reasons to consume the beverage, while in the second case they should regard the desire not to act on it as such a reason.

iv. The Constitutive Properties of an Exclusionary Reason

For purposes of the Exclusionary Thesis, the relevant reasons are second-order, objective, and motivating in character. To begin with, since exclusionary reasons function to exclude first-order reasons, they count as second-order reasons in virtue of being about those reasons. Further, since exclusionary reasons function to bar *acting*—i.e., induce one to abstain from acting—on the excluded first-order reasons, and since only motivating reasons can induce one to abstain from acting on other motivating reasons, they count as motivating reasons.¹⁷ Finally, since the Exclusionary Thesis describes the content of objective norms of practical reasoning and is not an empirical sociological claim about how people ordinarily decide what to do, the relevant reasons count as objective. Fully fleshed out, the Exclusionary Thesis asserts, then, that it is necessarily true that mandatory prescriptions create objective motivating reasons that bar acting on certain first-order reasons favoring noncompliance.

2. Three Irreducible Sources of Objective Motivating Reasons

We cannot explain how mandatory prescriptions create objective exclusionary motivating reasons without identifying the source of value that endows them with whatever normative force they have. A proposition can motivate a rationally competent subject to do or abstain from doing *a* if and only if they regard it as having normative force that favors doing *a* or abstaining from doing *a*. But a motivating reason can have such force only to the extent it favors a state of affairs that is, or ought to be, valued by the subject.

Rational self-interested subjects like us are motivated to do things by three kinds of values that cannot be derived from more basic values: these values express whether an act (1) meets the requirements of morality; (2) conduces to self-interest; or (3) results in art or beauty.¹⁸ These three irreducible sources

17. For an account of exclusionary *justifying* reasons, see NP Adams, “In Defense of Exclusionary Reasons” (2021) 178:1 *Philosophical Studies* 235.

18. It is generally assumed that moral and prudential values are the only two irreducible sources of normativity. See e.g. Roger Crisp, “Prudential and Moral Reasons” in Star, *supra* note 13, 800. While I am convinced altruistic value can be explained in terms of moral and prudential values, our nonconceptual aesthetic practices seem to entail that beauty is intrinsically and hence irreducibly valuable; ‘beauty for its own sake,’ as the saying goes. But nothing of importance here turns on this.

of value endow any proposition that counts as a mandatory prescription with what normative force we regard it—or should regard it—as having.

Corresponding to these three irreducible sources of value are three basic irreducible kinds of motivating reasons: moral, prudential, and aesthetic.¹⁹ Motivating reasons favor doing (or not doing) something because doing (or not doing) it realizes some kind of value that motivates and should motivate our behavior because—and only because—we care and should care about that value. Moral reasons favor donating to charity because, and only because, donating to charity realizes moral value we care and should care about enough to attempt to realize through our acts; prudential reasons favor accepting a job offer because, and only because, doing so realizes prudential value we care and should care about enough to attempt to realize through our acts; and aesthetic reasons favor using a particular shade of red on a painting because, and only because, doing so realizes aesthetic value we care and should care about enough to attempt to realize through our acts.

It is worth noting that if the Exclusionary Thesis is true, then any objective second-order exclusionary motivating reason created by a mandatory prescription as a matter of metaphysical necessity must be of the same irreducible kind as the objective first-order motivating reason it creates as a matter of metaphysical necessity. If a mandatory moral norm gives rise to an objective exclusionary motivating reason as a matter of metaphysical necessity, that reason must also be moral; if a prudential mandatory prescription creates an objective exclusionary reason as a matter of metaphysical necessity, that reason must also be prudential; and so on.

Although a mandatory prescription of one type might create an objective motivating reason of some other type, it can do so only incidentally and thus contingently. For instance, the mandatory moral norm barring murder creates an objective first-order motivating moral reason not to commit murder as a matter of metaphysical necessity. But if we assume every morally wrongful act is ultimately punished with eternal torment, the moral prohibition of murder also creates an objective first-order prudential reason not to kill as a means to avoid eternal punishment. It is a necessary truth that an objective moral prohibition gives rise to an objective first-order motivating *moral* reason to comply; to say doing *a* is objectively wrong is, in part, to say that one has an objective reason to abstain from doing *a*; however, whether such a prescription also implicates an objective first-order motivating *prudential* reason depends upon contingent facts, such as whether the prohibited act will be punished.

3. What Work Do the Razian Examples of the Exclusionary Thesis Do?

Raz's Exclusionary Thesis is grounded in metaphysical claims that cannot be derived from our conceptual practices; as Raz puts the matter, "The distinction

19. In contrast, there are as many different types of justifying reasons as there are systems of norms that create them by constraining our behavior.

between first-order and second-order reasons for action has not been recognized or discussed by philosophers. This is no doubt due at least in part to the fact that it is not reflected in any straightforward way in our use of the expressions of ordinary language.”²⁰ But even so, since the Exclusionary Thesis asserts a necessary relationship between mandatory prescriptions and exclusionary reasons, it is, in part, a metaphysical claim.

That said, the Exclusionary Thesis also expresses a claim about the content of what we take to be objective norms of practical reasoning. As Raz explains:

My claim is that a useful explication of the notions of strength, weight and overriding is possible but only at the cost of restricting their scope of application and that if we embark on such an explication the theory of conflict must allow for the existence of other logical types of conflicts and of conflict resolutions.²¹

But the only plausible reason for thinking that certain types of resolvable conflicts cannot be resolved without considering exclusionary reasons is that these objective norms of practical reasoning sometimes require subjects to consider exclusionary reasons to resolve them.

There is little reason to worry about the metaphysical claim. The claim that, as Raz points out, our conceptual practices have not yet recognized the existence of exclusionary reasons does not entail that the concept of an exclusionary reason is incoherent or that such reasons do not exist; there are surely many metaphysically possible concepts that have not yet been recognized or incorporated into our conceptual practices.²² Indeed, the concept of an exclusionary reason is one of those concepts because it is not commonly recognized by those whose conceptual and epistemic practices one would think the Exclusionary Thesis is intended, in part, to explain.

That said, the claim that our conceptual practices have not traditionally recognized the existence of such reasons calls into question the notion that objective norms of practical reasoning require that we consider such reasons as a means to resolve the relevant class of conflicts. If our conceptual practices do not recognize exclusionary reasons, it must be at least partly because rational subjects like us rarely, if ever, attempt to resolve the relevant conflicts by recourse to such reasons; however, if we assume (i) we count as rational beings in virtue of characteristically making decisions that minimally conform to objective norms of practical reasoning, but (ii) we rarely, if ever, attempt to decide what to do by considering exclusionary reasons, it is because such norms, as we understand them, never require that we consider them in deciding what to do.

Although Raz disavows any intent to challenge the intuitive practical principle that “[i]t is always the case that one ought, all things considered, to do whatever

20. Raz, *supra* note 2 at 36.

21. *Ibid.*

22. *Ibid.*

one ought to do on the balance of reasons,” he presents three examples to illustrate that it “is not *normally* applied to many quite common conflict situations.”²³ Insofar as he endorses the thinking in these examples, there are two claims here: (1) subjects should not consider this principle in such cases as an objective matter of practical reasoning, because they can be properly resolved only by recourse to exclusionary reasons; and (2) subjects do not *normally* resolve them by considering what the balance of reasons requires. Claim (1) is a normative claim about how we should resolve such conflicts, while claim (2) is an empirical descriptive claim about what we ordinarily do when resolving them. But apart from illustrating how exclusionary reasons apply in these cases, Raz never gives an argument for either claim.²⁴ The next three subsections discuss these examples, while the last section provides a general evaluation of the Exclusionary Thesis.

i. Ann

The most plausible examples in which exclusionary reasons might be needed are concerned with situations where the subject does not feel able to decide some matter. Consider Raz’s discussion of his thought experiment involving the fictional character Ann, who needs to decide whether to accept an offer for a complicated investment product before it expires, despite feeling too tired to make a trustworthy decision on such matters. As Raz describes her predicament:

The snag is that she has to decide that same evening for the offer to make the deal will be withdrawn at midnight. The proposed investment is a very complicated one, that much is clear to Ann. She is aware that it may be a very good investment, but there may be facts which may mean that it will not be a good bargain for her after all, and she is not certain whether it is better or worse than another proposition which was put to her a few days before and which she is still considering. . . . But Ann has had a long and strenuous day with more than the average amount of emotional upsets. She tells her friend that she cannot take a rational decision on the merits of the case since even were she to try and work out the consequences of accepting the offer she would not succeed; she is too tired and upset to trust her own judgement. He replies that she cannot avoid taking a decision. Refusing to consider the offer is tantamount to rejecting it. She admits that she rejects the offer but says that she is doing it not because she thinks the reasons against it override those in its favour but because she cannot trust her own judgement at this

23. *Ibid* at 36-37 [emphasis added, footnote omitted].

24. Similarly, Raz never gives an argument for the Normal Justification Thesis, which also expresses, at least in part, an empirical claim about how people *normally* justify authority: “the *normal* way to establish that a person has authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him . . . if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly.” Joseph Raz, *The Morality of Freedom* (Clarendon Press, 1986) at 53 [emphasis added]. These are crucial, and surprising, omissions.

moment. . . . She insists that, though she is taking a decision against the offer, she can rationally do so not on the ground that on the merits the offer ought to be rejected but because she has a reason not to act on the merits of the case.²⁵

While one can coherently conceptualize such a decision as relying on exclusionary reasons not to decide on the merits of the offer, that decision can be every bit as coherently modelled as grounded in the balance of first-order reasons regarding whether Ann should make any decision at all about the contract. It is true, of course, that *deciding not to decide* involves not accepting the offer because one can accept an offer only by means of some affirmative act; however, the most plausible grounds for declining when forced to decide are the first-order reasons militating against even considering it when not feeling optimally alert.

It is crucial to understand that just considering the offer's terms as much constitutes an act as accepting the offer by saying *yes* or declining it by saying *no*. Treating the issue of whether to decide as a first-order question (i.e., one that can be resolved by weighing the first-order reasons) acknowledges that deciding whether to decide counts as an act because it instantiates all of the constitutive properties of an act. To decide whether to decide to do *a* is to perform the act of deciding whether to consider doing *a*. Deciding not to decide is no different from deciding not to *a* for any non-decisional act *a*; the properties constituting the relevant mental processes as an act are the same in both cases.

Notwithstanding that Raz has simply written his views about the potential utility of objective exclusionary reasons into Ann's deliberations in this first thought experiment, it is clear such reasons perform no essential function in her thinking. Given that it is likewise clear the applicable objective first-order motivating reasons decide the matter (and every bit as soundly), the Ann example shows only that the concept of an exclusionary reason is coherent and that recourse to exclusionary reasons is not necessarily *irrational*; however, those claims are not even presumptively contentious.

What matters for our purposes is whether norms of practical reasoning ever *require* us to consider exclusionary motivating reasons in deciding whether to do something. There is nothing in Raz's discussion of this example that even remotely suggests recourse to such reasons is necessary to make a decision that counts as rational—much less one that counts as justified. Objective second-order exclusionary motivating reasons are otiose in this case for this reason.

ii. *Jeremy*

The discussion of Jeremy is grounded in Raz's views about the nature of practical authority and what that requires in deliberating about whether to follow an authoritative telling:

Jeremy is ordered by his commanding officer to appropriate and use a van belonging to a certain tradesman. Therefore he has reason to appropriate the van. His friend

25. Raz, *supra* note 2 at 37.

urges him to disobey the order pointing to weighty reasons for doing so. Jeremy does not deny that his friend may have a case. But, he claims, it does not matter whether he is right or not. Orders are orders and should be obeyed even if wrong, even if no harm will come from disobeying them. . . . The order is a reason for doing what you were ordered regardless of the balance of reasons.²⁶

As Raz represents Jeremy's thinking, the order precludes his acting on his own assessment of the order's moral character: "It means that it is not for you to decide what is best."²⁷

Two observations are useful here. First, since this is a thought-experiment and not an empirical report of what some actually existing person does when deciding whether to follow an order, it cannot support any claims about what subjects like us *normally* do. As was true of the Ann example, Raz writes his views about how one *can* coherently decide whether to follow an order into Jeremy's thinking to show that the concept of an exclusionary reason is coherent. Indeed, there is nothing in the discussion that even insinuates Jeremy *should* treat the order this way.

But this simply affirms what is obvious—namely, that we can think about orders in this way without incoherence; and that claim does not even *purport* to tell us either how subjects *should* deliberate with orders, as an objective matter of practical reasoning, or how we *normally* deliberate with them, as a descriptive matter of fact. The Jeremy thought-experiment shows no more than that recourse to exclusionary reasons in deciding whether to follow an order is not necessarily *irrational*. As was true of the discussion of Ann, all we can infer about the Exclusionary Thesis is that it expresses a coherent thesis about the nature of a mandatory prescription and about the content of norms of practical reasoning—which, again, needs no argument.

Second, it is clear that Jeremy can justifiably reach the same result without recourse to second-order motivating exclusionary reasons if he conceptualizes orders as giving rise to first-order motivating reasons that can be outweighed only in exceptional cases, as when necessary to prevent gross injustice; this would, of course, conform to our shared views about the nature of orders: not even the United States *Uniform Code of Military Justice* requires that soldiers obey every order no matter how problematic it might be from a moral standpoint.²⁸

Indeed, given that the idea of an exclusionary reason was unfamiliar to philosophers until Raz explicated the concept, it is more plausible to hypothesize that ordinary speakers, like Jeremy, would regard an order as creating only weighty first-order reasons to do what they require. Objective exclusionary motivating reasons, again, perform no function that cannot be performed as well simply by weighing the first-order motivating reasons and are thus also practically otiose in this case.

26. Raz, *supra* note 2 at 38.

27. *Ibid.*

28. It requires only that a "lawful general order" be obeyed. *Uniform Code of Military Justice*, 10 USC § 892 (2018) at art 92.1.

iii. Colin

Colin is considering whether to resign from his job so he can write a book he has long been wanting to write. Resigning would compromise his ability to pay tuition for a public school, but Colin had promised himself that he would not consider his own interests in making decisions about how best to educate his son.

Suppose Colin has now to decide whether or not to send his son to a public school. Among the relevant reasons are the fact that if he does he will be unable to resign his job in order to write the book he so much wants to write, and the fact that given his prominent position in his community his decision will affect the decisions of quite a few other parents, including some who could ill afford the expense. However, he believes that because of his promise he should disregard such considerations altogether. . . . Colin's promise, like Ann's fatigue, does not affect the balance of reasons.²⁹

This example breaks no ground. As was true of the other examples, the discussion of Colin's dilemma does not even attempt to show that norms of practical reasoning require Colin to consider objective exclusionary reasons in this instance. The Colin example, like the others above, shows just that there is no inconsistency *necessarily* involved in regarding a promise as creating an exclusionary motivating reason. But, as was true of the examples above, this shows no more than that it is not necessarily irrational to do so, on our shared views about what norms of practical reasoning require of us.

Tellingly, all Raz concedes about Colin's reasoning is that he "believes that he has a reason for not acting on certain reasons and that means *he believes that he may be justified in not acting on the balance of reasons.*"³⁰ While the idea that the concept of an exclusionary reason is coherent, again, entails that it is not necessarily irrational to consider them, Raz is unwilling to acknowledge even that Jeremy *may* be justified in not acting on the balance of reasons. Raz's apparent unwillingness to endorse even the weak claim that Jeremy *could* be justified in acting in this one instance against the balance of reasons is not implausibly construed as skepticism about the Exclusionary Thesis.

But as was true of the first two examples considered above, one can more naturally model Colin's decision as grounded entirely in the balance of applicable first-order reasons than as a decision grounded in an exclusionary reason not to act on some class of excluded reasons. Promises can naturally be modelled—and I would hypothesize are more commonly conceived by ordinary individuals—as creating just strong first-order reasons that are outweighed only when breaking a promise is necessary to prevent consequences that catastrophically impact someone's well-being.

There is thus nothing in any of these three examples that supports either the purely descriptive claim that rationally competent subjects sometimes treat

29. Raz, *supra* note 2 at 39.

30. *Ibid* [emphasis added].

certain propositions as exclusionary reasons or the normative claim that objective standards of practical reasoning sometimes require doing so. Objective exclusionary motivating reasons are otiose in each of these examples.

4. The Practical Otiosity of Objective Exclusionary Motivating Reasons

The results of the last three sections would not surprise Raz, as he avoids even insinuating that norms of practical reasoning *require* us to consider second-order exclusionary reasons in making decisions about whether to do something. In each of these examples, Raz avoids endorsing or repudiating the claims that (i) one may sometimes be justified in acting against the balance of reasons; and that (ii) objective norms of practical reasoning might sometimes require subjects to consider exclusionary reasons.

Such reluctance is evident throughout his *Practical Reason and Norms*. On the first page of chapter 1, Raz describes his goal, modestly, as “to show that these distinctions are plausible and useful.”³¹ While he also claims, incongruously, “that a useful explication of the notions of strength, weight and overriding . . . *must* allow for the existence of other logical types of conflict and of conflict resolutions,” he does not attempt anywhere to argue that recourse to such reasons is ever required; and as we have seen, each of the examples he discusses are naturally modeled as conflicts that can be resolved simply by weighing the applicable first-order motivating reasons.³²

Indeed, it is crucial to note that Raz acknowledges, to his credit, he has no argument for the Exclusionary Thesis, explicitly characterizing it as a *proposal*:

This is the nub of the problem: How can a rule bear on whether one ought to ϕ without being a reason for or against ϕ -ing? . . . *Here is my proposal*: The fact that it is a valid rule that one ought to ϕ is both a reason for ϕ -ing and a reason for not acting for certain reasons for not ϕ -ing. In so far as the rule is a reason for ϕ -ing it merely relays the force of the reasons for ϕ -ing on which it is based.³³

And it is clear why: Raz *invented* the concept of an exclusionary reason in the hope, as he explained above, that it would prove “useful”—and surely understood how creative and novel the concept was.³⁴

One might nonetheless think that my analysis of the examples suffices to show that any first- and second-order devices for resolving the relevant conflicts are on the same level of deliberative priority; but this overlooks that first-order mechanisms are indispensable in constituting a mandatory prescription as defining a wrong of the relevant kind (i.e., legal, moral, or social). Without some mandatory

31. *Ibid* at 15.

32. *Ibid* at 36 [emphasis added].

33. J Raz, “Promises and Obligations” in PMS Hacker & J Raz, eds, *Law, Morality and Society: Essays in Honour of HLA Hart* (Clarendon Press, 1977) 210 at 221 [emphasis added]. I am grateful to one of the reviewers for directing me to this text.

34. See the text associated with *supra* note 31, above.

legal, moral, or social prescription to create an objective first-order reason to abstain, for instance, from intentionally killing people, there is no problem of any order in doing so. There is no first- or second-order problem because there is no legal, moral, or social norm that defines a wrong and hence no norm of any kind to give rise to the problem. Without some mandatory legal, moral, or social prescription to define a set of excluded reasons for killing someone, there are no exclusionary reasons to worry about. If objective exclusionary motivating reasons perform some valid function in our reasoning, it is, as Raz observes, to *protect* the applicable first-order motivating reasons by buttressing them at the second-order level.

But Raz never explains why the objective first-order reasons created by mandatory prescriptions as a matter of metaphysical necessity need protection or why only objective exclusionary reasons are equipped to perform this function. It is implausible to think that a mandatory *legal* prescription, which counts as mandatory only in virtue of being backed by a sanction, necessarily creates an objective exclusionary motivating reason. Mandatory legal norms do not necessarily give rise to objective *moral* motivating reasons of any order, since there can be wicked laws that do not create any objective moral reasons to comply; however, the only norms plausibly thought to give rise to objective exclusionary motivating reasons as a matter of *metaphysical* necessity are moral. The claim there are exclusionary *prudential* reasons that *require* acting against the balance of first-order *prudential* reasons is counterintuitive if not inconsistent with objective norms of prudential reasoning.³⁵

Further, the claim that mandatory moral prescriptions create objective exclusionary moral reasons as a matter of metaphysical necessity may seem plausible, since we conceive moral obligations as creating objective moral motivating reasons that trump any conflicting prudential motivating reasons; however, a second-order exclusionary *moral* reason would be needed only to resolve a conflict either (1) between two mandatory moral prescriptions, or (2) between a mandatory moral prescription and a prudential prescription.

As to (1), there is no reason to believe that a conflict between two mandatory moral prescriptions cannot be resolved by weighing just the first-order moral motivating reasons. For instance, we sometimes are faced with the difficult dilemma of whether to tell a friend a painful truth or whether to protect their feelings by concealing it. But these conflicts can be resolved by weighing the first-order reasons for telling the truth against those for protecting their feelings—which is, I would hypothesize, the way that ordinary individuals normally

35. Margaret Martin points out that Raz intended his service conception of authority to apply only to morally justified authority—or authority *per se*, as opposed to a merely *de facto* authority. See Margaret Martin, “Raz’s *The Morality of Freedom*: Two Models of Authority” (2010) 1:1 Jurisprudence 63. The Preemption Thesis would thus apply only to authorities whose directive gives rise to moral reasons to comply in virtue of being morally legitimate. This suggests that Raz is skeptical that the directives of a merely *de facto* authority create exclusionary reasons; it is also arguably inconsistent with his earlier view in *Practical Reason and Norms* that every prescription that counts as mandatory is, or creates, an exclusionary reason: see Raz, *supra* note 2 at 82.

approach such dilemmas. Though such reasoning is quite messy, we would have to engage in something similar to identify and assess any applicable exclusionary reasons; however, as far as I can tell, recourse to the Exclusionary Thesis simply makes things messier without affording any offsetting advantages.

As to (2), there is no reason to believe that a conflict between a mandatory moral prescription and a prudential prescription cannot be resolved by weighing the first-order reasons. Though I might be justified in concealing a painful truth from a friend, it would have to be for some other first-order reason than the first-order prudential reason to avoid unpleasantness to me—which is easily outweighed by the first-order moral reasons to be truthful. Weighing competing first-order values might not always be straightforward, but the Exclusionary Thesis simply inserts an additional step into the deliberation process that affords no obvious advantages.

One might worry there are cases where the first-order prudential reasons to perform a morally wrongful act *objectively* outweigh the conflicting first-order moral reasons to abstain from doing it, but the idea that prudential considerations *ever* defeat the objective first-order moral motivating reasons to which mandatory moral norms give rise cannot be reconciled with our ordinary evaluative moral practices.³⁶ Consider, for instance, the moral prohibition on torture. If these evaluative practices are the touchstone, the first-order moral reason not to torture a person necessarily outweighs any prudential benefits that may accrue to you from doing so: even if someone guaranteed you a trillion dollars to torture someone for just ten seconds, it is wrong to do so; from the standpoint of morality, the cost to human autonomy and dignity vastly exceeds the value of any prudential benefits to you.

One can, of course, coherently model this case in terms of the reasons to which the prudential benefits give rise as having been excluded from consideration by a second-order exclusionary reason; however, there is no obvious reason to depart from the standard model in which the objective first-order motivating moral reasons not to torture someone vastly outweigh the objective first-order motivating prudential reasons to do so. The adoption of either model suffices to decide the relevant matter, but there is no obvious reason to adopt one that decides the matter on the strength of objective exclusionary reasons—especially since this notion is unfamiliar to the ordinary people whose practices a normative account of practical reasoning should be intended, in part, to theorize.³⁷ From the standpoint of shared views about what norms require of practical reasoning, then, the existence of exclusionary reasons is otiose in all such cases.

Though the Exclusionary Thesis also figures prominently in Raz's views about the nature and justification of authority, there is simply no work for which

36. When a prudential consideration appears to defeat a moral reason, it is because the applicable moral norm permits it. Such instances are, of course, incorporated into the relevant norms of practical reasoning.

37. An account that is not properly grounded in an observation of our evaluative practices presupposes falsely that the author of the account has epistemic access to the content of objective standards of rationality.

objective exclusionary reasons are needed in explaining our conceptual practices regarding authoritative guidance.³⁸ If it were true that only morally legitimate tellings count as authoritative, the objective first-order moral reasons to comply would do all the needed deliberative work: those first-order reasons either outweigh the conflicting prudential reasons or they do not; however, if they do not, there is no reason to think that there must be an objective exclusionary moral reason that tips the balance in favor of compliance by excluding those counter-vailing first-order reasons.

But it is utterly uncontentious, on our conceptual practices, that there can be morally illegitimate tellings that count as authoritative. One plausible way to construe the Normal Justification Thesis is as an empirical claim about how authority is normally justified as legitimate; however, this entails not only that there can be illegitimate authority but also that it is false that authoritative tellings necessarily create objective first-order *moral* reasons.

The problem is that if, as Raz thinks is true of the so-called “society of angels,” there can be tellings that count as authoritative that are not backed by sanctions, it is not true that authoritative tellings give rise to first-order *prudential* reasons as a matter of metaphysical necessity.³⁹ Since objective aesthetic reasons are irrelevant, there is no way to explain how authoritative tellings necessarily create objective motivating reasons of any kind if it is not true that every telling that counts as authoritative is backed by a sanction severe enough to deter enough noncompliance to enable the system or telling to minimally achieve its ends.

Though objective norms of practical reasoning require treating nontrivial sanctions as creating first-order prudential reasons to comply, it is because rational subjects like us regard nontrivial sanctions as potentially impacting our self-interest in ways that can bear on our most fundamental interests. It is, of course, for that reason that objective norms of practical reasoning require us to treat sanctions as creating first-order prudential reasons to comply. In none of the cases discussed in this essay is there any reason to believe objective norms of practical rationality *ever* require us to consider exclusionary motivating reasons.

The idea that there is no work that *objective* exclusionary motivating reasons are needed to do under norms of practical reasoning suggests they do not exist; if a proposition counts as an objective reason only if it favors something under norms of practical reasoning, then a proposition that objectively favors nothing does not count as an objective reason. But if it does not count as an objective reason, it does not exist *qua* reason. This does not entail, of course, that subjects will never, as a descriptive matter of fact, treat such propositions as exclusionary

38. Raz seems to believe the Preemption Thesis implies the Exclusionary Thesis; however, this provides little help. First, if he is correct, it would validate the Exclusionary Thesis only in the case of authoritative tellings, which is a subclass of the class of mandatory prescriptions. Second, Raz’s service conception of authority is contentious. The only thesis comprising the service conception that has not been challenged extensively in the literature is the Dependence Thesis.

39. Raz, *supra* note 2 at 159, n1.

reasons; however, it does imply any subject who does, *believing that it is a requirement of practical reasoning*, has made a mistake.

Either way, the practical otiosity of exclusionary reasons refutes the Razian claims that (a) “a mandatory norm is either an exclusionary reason or, more commonly, both a first-order reason to perform the norm act and an exclusionary reason not to act,”⁴⁰ and (b) “the notion of exclusionary reasons is essential to the explanation of mandatory norms.”⁴¹ If the only reasons to comply necessarily created by mandatory prescriptions are first-order reasons that must be weighed against other first-order reasons, then both of those metaphysical claims are false. There are no circumstances, as far as I can tell, where recourse to such reasons is required by objective norms of practical reasoning.

Kenneth Einar Himma is a continuing guest professor at the Faculty of Law, University of Zagreb. He is the author of *Coercion and the Nature of Law* (Oxford University Press, 2020); *Morality and the Nature of Law* (Oxford University Press, 2019); and *The Nature of Authority* (Cambridge University Press, 2025, forthcoming). He has published extensively in legal philosophy, philosophy of religion, and information ethics. Email: khimma@gmail.com

40. Raz, *supra* note 2 at 58-59.

41. *Ibid* at 73.