

REQUIEM FOR A CONCEPT: EXCLUSIONARY REASONS

by

Michael S. Moore¹

To be presented at the Conference in Tribute to the Philosophy of Joseph Raz

Yeoh Tiong Lay Centre for Politics, Philosophy and Law

King's College, London

Friday, October 27, 2023

¹ Charles R. Walgreen University Chair, University of Illinois; Professor of Law, Professor of Philosophy, Professor in the Center for Advanced Studies, and Co-Director of the Program in Law and Philosophy, University of Illinois at Urbana-Champaign. Thanks to Brian Bix, Ulrike Heuer, and Andrei Marmor for their comments on an earlier draft of this essay. Thanks also to the late Joseph Raz for his comments at the three formal occasions on which we exchanged views on the nature of exclusionary reasons: at the annual meeting of the American Philosophical Association, Pacific Division, Long Beach, California, in 1984; at the legal philosophy colloquium meeting in Tony Honore's rooms as Master of All Souls College, Oxford, 1988; and at the symposium on the work of Joseph Raz at the University of Southern California, Los Angeles, 1989.

1. Introduction

The concept of an exclusionary reason occupies a central place in the thought of Joseph Raz. It was, as Raz himself described it, the “central new idea concerning practical reason”² contained in his second and important book, *Practical Reason and Norms*.³ The concept played a central role in Raz’s theories of law, of authority, and of the authority of law, throughout his career.⁴ It also influenced his theory of freedom.⁵ As Jeremy Waldron described it in his obituary for Joseph,⁶ Raz’s concept of exclusionary reasons also “enabled him to make decisive contributions in moral philosophy,” contributions that “continued throughout his life...” Although Joseph never put it this way in our conversations about the concept, my suspicion has long been that he viewed his discovery of exclusionary reasons with much the same pride as Freud expressed looking back on his discovery of the wish-fulfillment and sleep-preserving nature of dreams: “insight such as this falls to one’s lot but once in a lifetime.”⁷

Despite there being a few subtle and minor variations, Raz’s concept of an exclusionary reason was remarkably constant throughout his 50 years’ usage of that concept. From the early articles that culminated in the publication of the first edition of *Practical Reason and Norms* in 1975,⁸ through Raz’s use of the concept in the eighties to explicate his theories of law and law’s authority,⁹ promising,¹⁰ and

² Joseph Raz, “Postscript to the Second Edition: Rethinking Exclusionary Reasons,” in Raz, *Practical Reason and Norms* (Oxford: Oxford University Press, 1990, reissued, 1999). Raz later added that his thesis of the widespread use of exclusionary reasons was “the only novel thesis this book advanced...” Id., p. 196.

³ Joseph Raz, *Practical Reason and Norms* (London: Hutchinson and Co., 1975).

⁴ I summarized the centrality of the concept to early versions of these theories of Raz in my “Law, Authority, and Razian Reasons,” *Southern California Law Review*, Vol. 62 (1989), pp. 827-896, reprinted as Chapter 5 of Moore, *Educating Oneself in Public: Critical Essays in Jurisprudence* (Oxford: Oxford University Press, 2000), particularly at pp. 128-150. (Subsequent citations to this article use the reprinted version’s pagination.)

⁵ Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986).

⁶ Jeremy Waldron, “Philosophy’s Gentle Giant,” *The New Statesman*, May 13, 2022.

⁷ Sigmund Freud, “Preface to the Third (Revised) English Edition,” *The Interpretation of Dreams* (James Strachey trans., *Standard English Edition of the Works of Sigmund Freud*, Vol. IV and V (London: Hogarth Press, 1953), written in 1931 looking back after 30 years had passed since the initial publication of the *Interpretation of Dreams* in 1899/1901.

⁸ Raz, “Voluntary Obligations and Normative Powers,” *Aristotelean Society Supplementary Volume*, Vol. 46 (1972), pp. 79-102; Raz, “Reasons, Requirements, and Practical Conflicts,” in S. Korner, ed., *Practical Reasoning* (New York: Oxford University Press, 1974); Raz, “Reasons for Actions, Decisions, and Norms,” *Mind*, Vol. 85 (1975), pp. 481-499, reprinted in slightly revised form in Joseph Raz, ed., *Practical Reasoning* (Oxford: Oxford University Press, 1978)(subsequent citations to this article are to the earlier version in *Mind*).

⁹ Joseph Raz, *The Authority of Law* (Oxford: Oxford University Press, 1979); Raz, “Authority, Law, and Morality,” *The Monist*, Vol. 68 (1985), pp. 295-324, reprinted in Raz, *Ethics in the Public Domain* (Oxford: Oxford University Press, 1994); Raz, “Authority and Justification,” *Philosophy and Public Affairs*, Vol. 14 (1985), pp. 3-29, also reprinted in Raz, *Ethics in the Public Domain*, supra.

¹⁰ Raz, “Promises and Obligations,” in P.M.S. Hacker and Joseph Raz, eds., *Law, Morality, and Society* (Oxford: Oxford University Press, 1977); Raz, “Is There a Reason to Keep a Promise?”, in G. Klass, G. Letsas, and P. Saprai, eds., *Philosophical Foundations of Contract Law* (Oxford: Oxford University Press,

freedom,¹¹ through Raz's three formal debates with me in the 80's about exclusionary reasons and through our working through the nature of deontological obligation via our jointly taught seminar in ethics in the spring of 1989,¹² through his "rethinking" of the concept for the second edition of *Practical Reason and Norms* in 1990,¹³ to the paper on the concept that Raz prepared for his participation in my and Leo Katz' November 2021 Seminar in Legal Theory,¹⁴ Raz described and defended an unchanging notion of exclusionary reasons. In what follows I therefore pay no attention to whatever subtle divergences there may have been in his usage or meaning of that phrase.

2. *The intended breadth of application of Raz' concept of an exclusionary reason*

We shall of course need to describe (in some detail, as it turns out) just what exclusionary reasons are and what Raz took them to be. That will occupy us in sections 3, 4, and 5 below. For now the following definition will suffice: an exclusionary reason is a reason not to act for certain reasons. Before I refine that definition, I here wish to detail the phenomena Raz took to be enlighteningly analyzed in terms of exclusionary reasons. What were such reasons thought by Raz to explicate? It is quite a diverse list of phenomena. Raz thought that exclusionary reasons could unpack: the obligations of the promisor created by the act of *promising*;¹⁵ the change in obligations owed to one who *consents*;¹⁶ the self-binding that occurs when one makes a *decision*¹⁷ or forms an *intention*;¹⁸ the creation of obligation and/or the self-binding that occurs when one takes an *oath*¹⁹ or when one makes a *vow*;²⁰ the deference that one owes to the *advice* of an expert when given on a subject of her expertise;²¹ the obedience owed by others to the *legal* (or at least law-like) *decisions* of arbitrators, judges, and sports umpires;²²

2014), pp 58-77, reprinted in Raz, *The Roots of Normativity* (Oxford: Oxford University Press, 2022). (The latter article, while glancingly affirming the thesis of the earlier article that promises give exclusionary reasons, in fact gives scant attention to that point, focusing rather on the question whether promises create first order, content-independent reasons for action; in the session of the 2021 Illinois-Penn Legal Theory Seminar in which Raz participated, he was unwilling to discuss or even have included in the course readings the earlier article where the thesis is central, making me wonder whether he had abandoned any reliance on exclusionary reasons to explicate the obligations created by promise.)

¹¹ Raz, *The Morality of Freedom*, supra.

¹² Our exchanges were formalized in Moore, "Law, Authority, and Razian Reasons," supra, and in Raz, "Facing Up: A Reply," *Southern California Law Review*, Vol. 62 (1989), pp. 1153-1235. My reply to Raz' "Reply" is in Moore, *Educating Oneself in Public*, supra, at pp. 22-29.

¹³ Raz, "Postscript," supra.

¹⁴ Joseph Raz, "Exclusionary Reasons," unpublished manuscript, last revision, November 3, 2021.

¹⁵ Raz, "Promises and Obligations," supra; Raz, "Is There a Reason to Keep a Promise?," supra. Raz' discussion of the reasons created by acts of promise at the close of his 1972 article, "Voluntary Obligations and Normative Powers," supra, contains no mention of exclusionary reasons.

¹⁶ Raz, "Authority and Consent," *Virginia Law Review*, Vol. 67 (1981), pp. 103-131; Raz, "Government by Consent," *Nomos*, Vol 29 (1987), pp. 76-95, reprinted in Raz, *Ethics in the Public Domain*, supra, pp. 355-369.

¹⁷ Raz, "Reasons for Actions, Decisions and Norms," supra.

¹⁸ *Id.* Raz construes intentions to be the causal products of decisions, not to constitute those decisions themselves.

¹⁹ *Id.*, p. 493; Raz, "Voluntary Obligations and Normative Powers," supra, at p. 97.

²⁰ *Id.*

²¹ Raz, *Practical Reason and Norms*, supra, at p. 77.

²² Raz, *The Morality of Freedom*, supra, at p. 41; Raz, *The Authority of Law*, supra, at p. 297.

the obedience that legal systems claim are owed by citizens and judges to the *laws* of the legal system in which they reside;²³ the obedience owed to the *commands*²⁴ of those possessed of legitimate practical authority over one; the obedience owed to the utterances of those possessed of legitimate practical authority generally (and not just the commanding utterances of commanders, military or otherwise);²⁵ and the obedience owed to all other forms of what Raz blanketly labelled, “mandatory rules.”²⁶

That is quite a list. But also illuminated by the concept of exclusionary reasons are items not on the list. Two such items are threats²⁷ and requests.²⁸ Here the concept of an exclusionary reason is useful but not because it is part of the nature of such things to give exclusionary reasons; rather, the concept is illuminating about threats and requests because it is the *absence* of exclusionary reasons (in describing the impact of such things on our reasons) that is illuminating. Both threats and requests of friends, in Raz’s view, share with all of the items on the list the characteristic that they create new reasons for action, reasons that the one threatened or requested did not have before the threat or request was made. On Raz’s view, this is also true of promises, consent, oaths, vows, rules, etc. But unlike a promise, say, or an order issued by one in authority, a mere request does not preclude one from weighing the pros and cons of doing the action requested. It is thus open to one not to do the action requested, if there are good reasons for so doing. And the same is true of threats: despite the common expression of those threatened – “I had no choice” – practical rationality allows a real choice to those who are threatened, viz, they are permitted to weigh the pros and cons of doing the action that averts the threat (taking into account of course the weightiness of the value of avoiding the harm threatened). Thus, threats and requests can be understood as acts that create new reasons for action but which do not give exclusionary reasons in addition.

My principal aim in this section is to reduce the seeming heterogeneity of Raz’s list of the items explicated by his concept of an exclusionary reason. I do this by placing all such items into one of three categories. *First*: there are those items that either are, or are commonly thought to be, exercises of normative powers by persons. The concept of normative powers was an early conceptual innovation of Raz’s.²⁹ Built explicitly on Hohfeld’s notion of a normative power (as a second order legal relation that could be used to change Hohfeld’s first order legal relations of duties, rights, and privileges),³⁰ Raz’s concept was to deal with the limited sovereignty we as persons have to create or extinguish the rights, duties, liberties, and permissions that either law or morality would otherwise hold us to. Most of what deontic morality requires or permits of us is not up to us individually or collectively to create or amend.³¹ We are each obligated not to lie, cheat, steal, rape, or kill, and except for some instances of

²³ Raz, *The Authority of Law*, supra.

²⁴ Raz, *The Morality of Freedom*, supra, at p. 37.

²⁵ Id., chapter 3.

²⁶ Raz, *Practical Reason and Norms*, supra, chapter 2.

²⁷ Id., p. 83.

²⁸ Id.

²⁹ See his 1972 “Voluntary Obligations and Normative Powers,” supra. This was developed into Chapter 3.2 of 1975’s *Practical Reason and Norms*, supra. Raz revisited the concept of a normative power in his “Normative Powers,” in Raz, *The Roots of Normativity*, supra.

³⁰ See Heidi Hurd and Michael Moore, “The Hohfeldian Analysis of Rights,” *American Journal of Jurisprudence*, Vol. 63 (2018), pp. 295-354.

³¹ If this is not intuitively obvious, think how obviously unsatisfactory would be the view that all of deontic morality is the product of some historical human or human-like actor doing something, e.g., a Supreme Commander making all moral truths true by virtue of his commanding them (the “will theory of obligation” of certain strands of Catholic theology). Either there is an infinite regress – such a Supreme Commander must also then have commanded that all of his commands are binding, and that

consent by the victim, none of us can alter those obligations. But we do have the limited moral sovereignty (or are commonly thought to, at least) to: extinguish some obligations of others by consent; create obligations for ourselves by promises, vows, and oaths; have obligations created for us by the commands, laws, or judicial decisions issued by those with legitimate practical authority over us; and create collectively those social rules that, for example, solve co-ordination problems that we are obligated to solve and which, when solved by some salient social rule, make obedience to that rule obligatory.³² This first category is a very important one in understanding Raz's development of the concept of exclusionary reasons, because explicating the nature of these items was his principal reason for inventing the concept.

Second, there are those items that are not plausibly thought to be exercises of normative powers but are instead heuristic means by which we sometimes can do better in our judgments about what rights, duties, permissions, and liberties we possess or to which we are subject. Consider by way of example the advice of experts. When the weatherman tells you that it is going to rain today so it is not a good day for a picnic, his advice does not change in any way your *reasons* (pro and con) for the *action* of having a picnic. Thus, for example, the goodness of fresh air while one eats and socializes and the badness of getting wet remain the reasons for and against picnics that they are irrespective of the advice. Good advice by epistemic authorities merely changes what one should believe about whether those reasons for action have purchase on the occasion in question. Such advice gives you new *reasons for belief* about whether the reasons for action that you already have will or will not be instantiated on the day in question. As a second example, consider how Aquinas splits the difference on an old theological conundrum, the Euthyphro dilemma: Aquinas held that sometimes something is good because God commands it, but other times God commands it because it is good.³³ In the first case an omnipotent God exercises her normative power to create or extinguish obligations by command; in the second case an omniscient God doesn't change anything about an antecedently existing morality by her commands (and thus does not exercise any normative power) but she does add to the reasons believers have for *believing* one thing rather than another about the content of that unchanged morality.

It is thus not plausible that the advice of experts is an exercise of what Raz means by normative power, yet Raz explicitly held that the advice of an expert (say a friend who knows the stock market well) "is an exclusionary reason for me..."³⁴ So Raz must have meant something different here by "exclusionary reason" than he did in the first items above discussed; for in cases of advice the advice works no change of our reasons for action (because there is no exercise of any normative power) so there cannot be any excluding of reasons pro or con the action of investing as the stock market expert advises. What that different meaning of "exclusionary reason" is must await succeeding section 5 detailing the different meanings the phrase may have.

Notice that on some views of a number of the items on Raz's list besides advice of experts, these items are not plausibly to be construed as being exercises of normative powers either. First and foremost of these are where Raz started his analysis of exclusionary reasons, with the decisions and

moral truth will require a further command, etc. – or there must be some moral truths that are not true because they were commanded.

³² On the idea of social rules, see (of course) H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961). See also Michael Moore, "Three Concepts of Rules," *Harvard Journal of Law and Public Policy*, Vol. 14 (1991), pp. 791-795, reprinted as chapter 4 of Moore, *Educating Oneself in Public*, supra.

³³ Thomas Aquinas, *Summa Theologica*, 2a2ae 57.2.

³⁴ Raz, *Practical Reason and Norms*, supra, at p. 77. Ulrike Heuer points out to me that Raz apparently changed his mind about this, in Raz, "On Respect, Authority, and Neutrality: A Response," *Ethics*, Vol. 120 (2010), pp. 279-301.

intentions we each make about our own future behavior.³⁵ Deciding to do some action A does not add to or subtract from the reasons pro and con we had for doing A; if we nonetheless use such decision later as our “reason” to do A, it will be because: like Ulysses, we know that our decisional capacities were better when we earlier decided compared to later when the time for acting has arrived;³⁶ or we believe that the costs of redeciding what to do outweigh any incremental gains in better decision-making we could make by redeciding; or others have relied on what we earlier decided; etc. In each such instance it is implausible to think that we can make right by our decision what was not right before that decision was made; rather, it is only that we have reasons to believe that leaving things as we earlier decided them is better even if there is some chance that what we decided might not be quite right.

We might likewise view vows, oaths, summary rules, and even promises in the same way. Rather than seeing these as exercises of normative powers that create obligations for us that we would otherwise not have, they might be seen as giving only reasons for believing that our earlier decisions (which in such cases we have cast in the form of a vow, an oath, a promise, or even a “pinky-swear”) are better harbingers of the truth about what we ought to do than decisions later when temptations or other distortions of judgment will arise.³⁷ In which case these items too, like advice, if they give exclusionary reasons at all, must do so in a sense of that concept different than the concept used in the first set of cases above.

Thirdly and lastly, the big dog in this show for me is one that Raz only treated obliquely in his usages of “exclusionary reasons.” This involves the possibility that the categorical obligations of deontological moral norms also should be seen as giving those subject to them exclusionary reasons, in some sense of that phrase. Raz often wrote of “mandatory norms” and “mandatory rules” as giving exclusionary reasons,³⁸ but did he mean to include the obligating rules of deontological morality within those terms? Raz’s explicit definition of “mandatory rules/norms” suggests that he did. He said that by the phrase he intended to pick out “one important type of rule,” one that was “practical” in the sense that “rules ... of this type are normally stated by saying that a certain person ought to, should, must, etc., perform a certain action.”³⁹ Further, that “only ‘categorical’ rules” are to be included in the extension of the phrase, not “technical rules (such as instructions how to bake a cake or operate a computer).”⁴⁰

Such language certainly seems broad enough to be fairly construed as including the deontological rules of morality within it. Yet Raz himself scarcely mentions exclusionary reasons in connection with deontological norms. In the seminar that he and I devoted entirely to deontological versus consequentialist ethics in the spring of 1989, I do not recall Joseph ever mentioning exclusionary reasons as an explication of deontological obligation. When Raz wrote about rights – a natural place to discuss the exclusionary reason-giving nature of correlative duties -- there was similarly no mention or use of the concept of exclusionary reasons.⁴¹ One might think that this absence of any discussion of

³⁵ Restricted to the decisions and intentions of the actor herself. Nothing said here applies to the decisions and intentions of arbitrators, judges, or umpires.

³⁶ Just the kind of example Raz gives at the very beginning of his development of the concept of exclusionary reasons. See his 1975 “Reasons for Action, Decisions, and Norms,” *supra*, at pp. 485-486.

³⁷ For a notable example of such a view about all of these items, see Heidi Hurd, “Promises Schmomises,” *Law and Philosophy*, Vol. 36 (2017), pp. 279-343.

³⁸ Raz, *Practical Reason and Norms*, *supra*, ch. 2.

³⁹ *Id.*, at p. 49.

⁴⁰ *Id.*

⁴¹ Joseph Raz, “On the Nature of Rights,” *Mind*, Vol. 93 (1984), pp. 194-214; Raz, “Legal Rights,” *Oxford Journal of Legal Studies*, Vol. 4 (1984), pp. 1-21; Raz, “Hart on Moral Rights and Legal Duties,” *Oxford Journal of Legal Studies*, Vol. 4 (1984), pp. 123-131. It is also true that in none of these articles is there much mention of deontology either, with the exception of a passing acknowledgement of Kant.

exclusionary reasons in such contexts to be due to Raz not being a deontologist in his ethics. But there are two reasons why this would be insufficient as an explanation: one, it is not clear that Raz didn't at least flirt with the idea that parts of morality were deontological in character;⁴² and second, as I shall develop subsequently in section 6, Raz was at least as concerned to tease out the concepts implicit in others' moral views, even those with which he did not agree, as he was in articulating concepts useful to articulating what he himself viewed as the correct moral views. So that even if Raz was not himself a deontologist, he certainly knew that many other ethical philosophers are, meaning that such views would need to be accommodated by including within the extension of the "mandatory norms" that give exclusionary reasons, the categorical norms of a deontological morality.

In any case, whatever may have been Raz's intentions with respect to using some concept of exclusionary reasons to elucidate the nature of deontological obligations, it is an interesting question whether the concept is useful in this third context of its usage. The looming presence of Kant's ethics, concerned as it was with right actions being done *for right reasons*, would make the question interesting, if it were not already so in its own right. But irrespective of Kant, the essential deontological idea that otherwise good-making states of affairs are in some way excluded when one is in the grip of a deontological obligation, suggests that the idea of exclusionary reasons might be fruitful in elucidating deontology. Indeed, since many of the items of the first context of usage – promises, laws, commands -- are often used in ethics textbooks as standard examples of deontological obligations, how exclusionary reasons figure into deontological obligation generally may influence mightily how those reasons figure into the subset of deontological obligations that are created by the exercise of normative powers.⁴³

3. *The core meaning of "exclusionary reasons"*

Raz fully grounded his conceptualization of exclusionary reasons in his own accounts of: (1) what reasons are; (2) how "practical" reasons for action differed from "theoretical" reasons for belief; (3) how objective, justifying reasons for action differed from subjective, explanatory reasons for action; (4) how in the normal case there is more than one reason that bears on any given action and where one faces a conflict of justifying reasons that point in different directions, rational action consists of acting on the balance of reasons; (5) how second order justifying reasons for action differed from first order justifying reasons for action; (6) how conflicts between first order and second order reasons differed from

⁴² Thus Michael Smith and Philip Pettit construe Raz' discussion in his *Morality of Freedom* at least to give "a sympathetic hearing to the claims of deontological constraints." Pettit and Smith, "The Truth in Deontology," in R. Jay Wallace, Philip Pettit, Michael Smith, and Samuel Scheffler, eds., *Reason and Value: Themes from the Moral Philosophy of Joseph Raz* (Oxford: The Clarendon Press, 2004), at p. 153.

⁴³ As will be seen in section 8 on the "real rules" of deontology below, a more complete exposition would examine norms of permission and not just norms of obligation in assessing whether the norms of deontology give exclusionary reasons. That is because what I elsewhere (Moore, *Causation and Responsibility*, supra, pp. 38-40) call a "strong permission" is an agent-centered prerogative not to consider good states of affairs when one is strongly permitted by morality to do some action, and this looks potentially exclusionary of the reasons about those good states of affairs. Raz was clear in his own mind that the norms creating what he called, "strong permissions" – by which he meant, permissions explicitly created by some norm and not merely existing as the implication of there being an absence of an obligation not to do the permitted action – were not to be included as mandatory norms. Raz, *Practical Reason and Norms*, supra, at p. 49. Moreover, independently of permissive norms' non-inclusion as mandatory rules, Raz thought that "the notion of a permission based on an exclusionary reason is not an important one." Id., at p. 90. I omit discussion of the norms of permission not because I agree with Raz here, but for reasons of space.

conflicts between first order reasons alone, in that second order reasons necessarily conflict with the first order reasons that are within their content, and the second order reasons necessarily win out in such conflicts; (7) how negative second order reasons for action differed from positive second order reasons for action. Working through these seven items allowed Raz to arrive at what I shall call his “core” notion of an exclusionary reason.

Space does not allow us to work through here Raz’s thoughts on most of the items above.⁴⁴ Briefly, Raz thought (1) that all reasons were a kind of fact, (2) that reasons for belief were evidence the goodness of which was to be judged by epistemic standards whereas reasons for action were constitutive of moral properties the goodness of which was to be judged by moral standards,⁴⁵ and (3) that justificatory reasons were possible motives for action because they showed that there was something desirable about that action or its consequences (and were thus given to justify at least in part that action) whereas explanatory reasons gave the causally operative motives with which some historical action was in fact done (and were thus given to explain, not to justify, some action). Further, Raz held that what made deontic logic uninteresting in this context was that it only dealt with resolved conflicts of reasons whereas Raz’s interest was in how reasons conflicted in almost all decisions in life, and in the different modes ((4) or (6) above) by which such conflicts should be and are resolved.

As to the fifth item above, second order reasons, Raz characterized these in terms of the content of a reason for action: whereas an ordinary, first order reason for action was a reason having as its content an action or an omission, a second order reason had as its content a first order reason. In some sense of “about,” a second order reason was about a first order reason for an action, rather than about that action itself. Raz recognized that there could be different conceptualizations of first vs. second order reasons.⁴⁶ In light of these divergent usages of the distinction between first and second order reasons, Raz stipulated his own meaning to this in any event technical phrase.

Raz recognized that the distinction between second and first order reasons for action would diminish in its importance if all first order reasons for action also and necessarily gave second order reasons to do the act in question for the reason that the first order reason specified. Raz thus rejected the Kant-like view that it is never enough (for an act to have full moral worth) to simply conform one’s behavior to the reasons for action constitutive of morality, that one must also do such actions for the reason that morality requires it. Second order reasons for Raz are special and exceptional, not ubiquitous;⁴⁷ sometimes morality requires not only that we do certain acts but also that we either do them for certain reasons or not do them for certain other reasons. But normally deontic morality only requires that we do what morality commands, however we might be motivated.⁴⁸

As to the seventh item above, negative second order reasons, Raz urged that a positive second order reason was a reason to do or not to do some action for a certain reason, whereas a negative second order reason was a “reason to refrain for acting from some reason,”⁴⁹ by which Raz meant one

⁴⁴ In my “Law, Authority, and Razian Reasons,” *supra*, I have a go at this. I also there explore briefly Raz’s theory of individuation of “complete” reasons and their “parts” such as operative versus auxiliary reasons.

⁴⁵ “Moral” in the broad sense equating it with practical rationality.

⁴⁶ Raz, “Exclusionary Reasons,” *supra*, at p. 6. One of these different conceptualizations was Harry Frankfurt’s, in his “Freedom of the Will and the Concept of a Person,” *Journal of Philosophy*, Vol. 68 (1971), pp. 5-20. When Joseph subleased Harry’s apartment in Manhattan, some wags dubbed it the “second order reason house” because of their shared vocabulary.

⁴⁷ Raz, “Postscript,” *supra*, at pp. 179-182. Raz revisits the issue in greater depth in “Exclusionary Reasons,” *supra*.

⁴⁸ Aretaic rather than deontic morality plausibly differs here.

⁴⁹ Raz, *Practical Reason and Norms*, *supra*, p. 39.

either did not do the action at all or one did the action in question but not for the forbidden reason. Raz early on thought that positive second order reasons were not of much interest or significance,⁵⁰ but as we shall see I think that that is not the case.

One might worry that really there is no difference between positive and negative second order reasons. The thought behind such a worry is that a positive second order reason implicitly excludes all other reasons, while likewise a negative second order reason implicitly permits all other reasons; meaning that one sort of secondary reasons can equivalently be stated in terms of the other. While these implications are true enough, there are still this difference: in cases of reason-less actions – the existentialists' famous *acte gratuit* – a positive second order reason requirement will not be satisfied (whereas any implied negative second order reason requirement would be); likewise, a negative second order reason requirement -- while it would be satisfied by reason-less actions as well as by actions for other-than-excluded reasons -- would for that reason differ from a constellation of implied positive second order reason requirements.

One bit of precisification of the concept of second order reasons that I nowhere saw Raz address concerns cases of mixed motives, both of the overdetermining (each reason sufficient but only jointly necessary), the concurrent (each reason necessary and only jointly sufficient), or the mixed (no reason necessary or sufficient) kind.⁵¹ When a positive (or negative) second order reason requires (or forbids) a certain action being done for a certain reason, will that reason be satisfied by an act done where *one of the reasons* motivating that act is of the required or forbidden kind? A well known legal example where the U.S. Supreme Court faced this ambiguity is in its construal of the federal taxing power under the U.S. Constitution; the Court has construed the Constitution to impose a second order reason requirement, namely, that the legislation in question be passed for the reason that such passage will raise revenue (and not for illicit regulatory reasons), and held this second order reason requirement to be met if Congress' "primary motive" was to raise revenue even if that motive was mixed with other motives of the (illicit) regulatory kind.⁵²

4. *The place of exclusionary reasons within the Razian family of reasons*

The work done by Raz's concept of exclusionary reasons cannot be understood without some understanding of other sorts of reasons that Raz posited to exist. These were:

- (1) *Content independent reasons*. These are conceived as first order reasons for action created by the exercise of normative powers;⁵³ because of this latter fact the force/weightiness/degree of stringency of such reasons is not proportionate to their content (and thus the name) but rather, to the degree of authority possessed by the source exercising the normative power that created them.
- (2) *Protected reasons*. Raz conceived of a protected reason as a "molecular" combination of two "atomic" reasons: a first order content-independent reason created by the exercise of a valid normative power, protected by an exclusionary reason that had within its scope other,

⁵⁰ Raz, "Reasons for Action, Decisions, and Norms," *supra*, at p. 487.

⁵¹ These possibilities, and more besides, are explored in Moore, *Causation and Responsibility: An Essay in Law, Morals, and Metaphysics* (Oxford University Press, 2009), pp. 410-425.

⁵² *United States v. Butler*, 297 U.S. 1 (1936).

⁵³ Raz, *The Morality of Freedom*, *supra*, at pp. 35-37. As Raz acknowledges, he adopted the notion from Hart.

conflicting first order reasons that otherwise would compete with the content-independent reason in determining the balance of reasons on which one should act.⁵⁴

- (3) *Dependent reasons.* Raz's notion of a dependent reason is most easily understood via the example he himself used to explicate the concept:⁵⁵ when two parties voluntarily submit themselves to binding arbitration of a dispute between them, the arbitrator's decision becomes for them a content-independent reason for doing the action ordered by the arbitrator. But this kind of content-independent reason binds them only if it is based (in the arbitrator's mind) on other first order reasons pro and con that the arbitrator is obligated by his role to consider. Both these reasons that are to be considered by the arbitrator, and the decision of the arbitrator that is based on them, Raz called dependent reasons. The arbitrator's weighing of these dependent reasons need not be correct – else his decision would no longer be “content-independent” – but nonetheless he must take them into account when he does the weighing. That is why I earlier held that for Raz, the dependent reason constituted by the arbitrator's decision “is best construed as a kind of content-independent reason whose independence is in jeopardy.”⁵⁶
- (4) *Pre-emptive (occasionally, “preemptory”) reasons.* These are a subspecies of protected reasons. “A pre-emptive reason is a dependent (first order) reason that is also an exclusionary (second order) reason, and what is excluded are the antecedently existing reasons on which the dependent reason depends.”⁵⁷

5. *The non-core meaning(s) of “exclusionary reasons” – three possible senses of the phrase*

Throughout his career Raz was very clear about there being three possible senses with which his phrase, “exclusionary reason,” could be used, and he was both clear and unwavering in his intention to use it in only one of those senses throughout the body of his work. Because I have earlier laid out in some detail these three senses,⁵⁸ I can be brief in my description of them here.

- (1) *The motivational sense.* From first to last this is Raz's intended sense of the phrase: “An exclusionary reason is a second order reason to refrain from acting for some reason.”⁵⁹ I call this the motivational sense of “exclusionary reasons” because it construes the moral norms giving such reasons to forbid being motivated in a certain way as one does some action. The reason being excluded on this interpretation is not an objective, first order, justifying reason, but rather, a subjective, explanatory reason. (The reason doing the excluding is of course still an objective, justifying reason, not itself a subjective, explanatory reason.) This is also fairly

⁵⁴ Raz, *The Authority of Law*, supra, at p. 18. As Ulrike Heuer recognizes in her contribution to this volume, “The Point of Exclusionary Reasons,” one has to broaden the application of “protected reasons” to make eligible any first order reason that is constitutive of moral obligation, else that concept will not apply to ordinary moral obligations, i.e., the obligations not created by the exercise of valid normative powers. In this paper Heuer further amends Raz so as to tie the force and scope of exclusionary reasons to the nature of the first order reasons that they protect when such exclusionary reasons are part of a protected reason package.

⁵⁵ Raz, “Authority, Law, and Morality,” supra, at p. 297; Raz, *The Morality of Freedom*, supra, at p. 41.

⁵⁶ Moore, “Law, Authority, and Razian Reasons,” supra, at p. 149.

⁵⁷ Id.

⁵⁸ Id., pp. 150-155.

⁵⁹ Raz, “Reasons for Action, Decisions, and Norms,” supra, at p. 487. See also Raz, “Exclusionary Reasons,” supra, for an identical definition 46 years later.

construed to be Kant's sense of secondary reason, albeit Kant was more concerned with positive second order reasons ("reverence for the moral law") than the negative ones.

- (2) *The justificatory (or right-making) sense.* In this sense what an exclusionary reason excludes is a first order, justificatory reason, not an explanatory, motivating reason. A first order justificatory reason for action is normally right-making or wrong-making, good-making or bad-making; when it is excluded by an exclusionary reason attached to some action, that moral force (vis-à-vis that action) is stripped from it in the sense that that normal force has no bearing on the rightness of that action. In this sense an exclusionary reason may change what the balance of reasons together indicate is the right thing to do, whereas in the motivational sense exclusionary reasons work no such change.
- (3) *The heuristic (or decision-strategy) sense.* Early on Raz appreciated that exclusionary reasons might be construed so that what is excluded by them is psychological consideration of the excluded first order reasons by the decision-maker as she is making her decision.⁶⁰ We sometimes have reason not to reason further about some choice we must make, sometimes for reasons of foreseen incapacity at the later time when further deliberation would occur, sometimes for information costs needing to be incurred to see whether such reasons apply, sometimes because we have reached the point of diminishing returns in further deliberation, sometimes because certain reasons have well known cognitive biases built into their consideration, etc. An exclusionary reason in this sense is a reason not to reason (think about, deliberate about, weigh), or not to reason more, about certain reasons.

Raz consistently rejected these last two interpretations of his concept of an exclusionary reason. As to the third, the heuristic interpretation, Raz thought that this interpretation was "obviously wrong [because] [t]here is no reason to prevent a person in such circumstances from going through the [excluded] arguments to amuse himself or as an exercise, etc., so long as he does not trust his judgment enough to act on it."⁶¹ As to the second interpretation, Raz saw clearly the difference between that interpretation and his favored motivational interpretation because he constructed cases where the one subject to an exclusionary reasons "got lucky," namely, he did not act for the excluded reason – his motivation was fine, in other words – but nonetheless by a bit of serendipity the state of affairs found desirable by the excluded reason was brought about by the actor anyway. In which case the actor both did not violate the exclusionary reason created by his obligation but by that actor's "lucky mistake" he achieved what the balance of all reasons (including even the excluded ones) would have dictated anyway.⁶²

6. *Two criteria for judging the fecundity of a concept of exclusionary reasons*

In the three sections succeeding the present one, I shall criticize Raz for his exclusive use of the motivational sense of "exclusionary reasons" in all three of the settings I distinguished earlier in section 2. First, however, I wish in this section to lay out the ground rules for any such criticism of Raz. How do we – how should we -- judge whether one conception of a concept is better than another? One old and

⁶⁰ Raz, *Practical Reason and Norms*, supra, at p. 48.

⁶¹ Id.

⁶² See the examples collected by Raz in his "Facing Up: A Reply," supra, at p. 1159; Raz, "Postscript," supra, at pp. 185-186, 197-198. In her paper in this volume, "The Point of Exclusionary Reasons," supra, Ulrike Heuer documents how surprising is this feature of Raz's thought to many commentators on Raz and thus how they often miss this aspect of his thought (while she is herself clear that this is indeed just what Raz thought).

obvious way to make such judgments is by seeing whether the conception cuts nature at its proverbial joints. In this case the relevant piece of nature is morality and more broadly practical rationality: do the reasons we have for doing or not doing certain actions exist in the way that Raz charts with his motivational sense of “exclusionary reasons?”

It is unclear to me whether Raz himself would ever have accepted this arena for the adjudication of his claims about there being exclusionary reasons. For carving nature up at its joints requires that there be a nature with joints that can be so cut up, and Raz was consistently chary of committing to the metaphysically realist meta-ethics that would posit the existence of objective reasons for action. Herbert Hart’s reading of Joseph’s early work assumed that Raz was committed to the position that there are objective reasons for action.⁶³ But Raz himself was decidedly non-committal about this. Thus, in his introduction to his 1978 collection of readings on practical reason, Raz cautioned that: “Nothing in this introduction supports the view that there are, for example, moral values binding even on those who do not adopt them or that such values are reasons for action for those who reject them.”⁶⁴ Yet Raz did clearly reject the seeming alternative: the Humean (Raz calls it the “fashionable”) position that the only reasons for action one has are those that are in line with one’s subjective desires; this, Raz said, “is clearly unacceptable if it means that a person is completely free to adopt any goals he likes...”⁶⁵ And Raz throughout his career argued against the view “that moral and other derivative considerations are reasons only if adopted by the agent and that at least his adoption or non-adoption of moral considerations is not necessitated by reason or nature.”⁶⁶ So Raz’s ultimate meta-ethical position, like Hart’s before him,⁶⁷ is unclear; he simply noted that “[t]he truth or falsity of this claim is the fundamental question of moral epistemology,”⁶⁸ and left it at that.

For those of us not as cautious about meta-ethics as was Raz,⁶⁹ the moral geography of objective reasons for action is at least one obvious place to test Raz’s description of how that geography stands. Is morality/practical rationality so shaped that it ever gives us exclusionary reasons for action, and if so, in what sense(s) of that phrase? But even if we accept the appropriateness of this first arena, there is also a second arena in which we should test Raz’s claims about exclusionary reasons, this one more congenial to Raz’s own views of what he was trying to chart with his taxonomy of reasons. As Raz

⁶³ H.L.A. Hart, *Essays on Bentham* (Oxford: Oxford University Press, 1982), at p. 159.

⁶⁴ Raz, “Introduction,” *supra*, at p. 7.

⁶⁵ *Id.*, at p. 15

⁶⁶ *Id.*, at p. 17. Arguments against such a position were continued by Raz in his “Notes on Value and Objectivity,” in Brian Leiter, ed., *Objectivity in Morality and the Law* (Cambridge: Cambridge University Press, 1999), reprinted in Raz, *Engaging Reasons: On the Theory of Value and Action* (Oxford: Oxford University Press, 1999).

⁶⁷ Hart’s meta-ethical equivocations were expressed in his book review of Gilbert Harman and John Mackie in *The New York Review of Books*, Vol. 25 (1978).

⁶⁸ Raz, “Introduction,” *supra*, at p. 17.

⁶⁹ See, e.g., Michael Moore, “Moral Reality,” *Wisconsin Law Review*, Vol. [1982], pp. 1061-1156; Moore, “Moral Reality Revisited,” *Michigan Law Review*, Vol. 90 (1992), pp. 2424-2533; Moore, “Legal Reality: A Naturalist Approach to Legal Ontology,” *Law and Philosophy*, Vol. 21 (2002), pp. 619-705; all three essays are collected in Moore, *Objectivity in Ethics and Law* (Aldershot, UK: Ashgate, 2004). Joseph’s advice to me as I was writing the first two of these articles was that meta-ethics had become so technical that I should leave it to the specialists in that branch of philosophy. Nonetheless his curiosity was pricked enough by my moral realism that in 2001 at Columbia University he sponsored the conference on naturalism in moral and legal philosophy for which the third article in the series was written. Like Hart, who also read and commented on these articles to me, Joseph to my knowledge remained an agnostic in meta-ethics, despite my best efforts.

himself described this arena, “Our concern is merely with the concepts we employ in practical reasoning, not with the truth of statements made by their use if there are any such.”⁷⁰ The test for a concept like that of exclusionary reasons was thus how “deontic sentences are ... normally used by people to assert that which they take to be valid, correct, or perhaps even true.”⁷¹ This arena leaves aside the “first person” questions of the objective reasons arena, and asks instead the “third person” questions about whether people typically or usually believe that promises, for example, give protected reasons for acting in accordance with what is promised. For those who believe that they are bound by promises, do they (implicitly perhaps) conceive that that binding is captured by the notion of exclusionary reasons? For those who believe that promises are not binding, do they conceive that the binding that they deny exists for promises would be captured by the notion of exclusionary reasons if it did exist?

One should see this second arena for the testing of concepts of practical reason as of a piece with the conceptual analysis that dominated Oxford philosophy of the 1950’s, ‘60’s, and 70’s and that was the language-oriented substitute for any more metaphysical analyses about the nature of things.⁷² Raz’s first book⁷³ was in this vein, following upon Herbert Hart’s like book of two decades earlier.⁷⁴ As Hart described such conceptual analysis, it was only partly in line with ordinary language philosophy’s focus on the linguistic conventions that arose out of language use. Rather, the conventions in play were more broadly those arising out of how people thought and behaved.⁷⁵ One could perhaps tease out of such conventions concepts quite surprising to those whose conventions they were.

This gives us two sets of questions to ask as we next survey the three sorts of items to which Raz applied his concept of exclusionary reason: one, do any of these items actually give exclusionary reasons and if so in what sense of the phrase? And second, irrespective of the answer to the first question, do people actually reason in a way that presupposes their (perhaps implicit) belief that these items give exclusionary reasons for action in some sense, and if so, in what sense? I take it that Raz’s concept of exclusionary reasons would be vindicated if it figured into affirmative answers to either of these two sets of questions. In the three sections that follow I deal seriatim with the three sorts of items that I distinguished in section 2 above.

7. *Does the advice of others, or our own decisions, intentions, vows, etc., give us exclusionary reasons for action, and if so, in what sense?*

One of the things for which Raz’s analysis of exclusionary reasons is well known, is the “stickiness” that that analysis is said to rightly attribute to intentions and decisions. As Michael Bratman has also charted in detail,⁷⁶ none of us could function as what might be called “Sartrean persons,” that

⁷⁰ Raz, “Introduction,” *supra*, at p. 7.

⁷¹ *Id.*

⁷² What some called the “semantic ascent” of the era, beginning with Gilbert Ryle’s seminal, *The Concept of Mind* (London: Hutheson, 1949). See, e.g., Richard Peters, *The Concept of Motivation* (London: Routledge and Kegan-Paul, 1958), and virtually all of the other “little red books” in the R.F. Holland edited series in philosophical psychology.

⁷³ Joseph Raz, *The Concept of a Legal System* (Oxford: The Clarendon Press, 1970).

⁷⁴ Hart, *The Concept of Law*, *supra*.

⁷⁵ Thus Hart in the Preface to *The Concept of Law* (p. v) urges that his conceptual analysis of law in the book should be seen as “an essay in descriptive sociology.”

⁷⁶ Michael Bratman, *Intentions, Plans, and Practical Reason* (Cambridge, Mass.: Harvard University Press, 1987).

is, agents for whom everything was always open to being redecided at each moment of time.⁷⁷ We each need to let our decisions about what to do (as well as what to believe) become at least provisional fixed points for us as we make further decisions and plans and form further beliefs. Indeed, it is symptomatic of a kind of mental deficiency if one's intentions do not have this sort of fixity to them.⁷⁸

Raz's concept of exclusionary reasons seems well suited to capture this feature of intentions and decisions: one of their essential functions is to exclude from further consideration the sorts of pros and cons that go into a decision about what to do at some future time. They might well seem to be the kind of first order, content independent, dependent reasons combined with second order (also dependent) exclusionary reasons that Raz used in his analysis of the arbitrator's decision, the kind of decision that for Raz exemplified the idea of a pre-emptive reason. Yet ordinary decisions lack the normative backing that makes the arbitrator's decision binding. With voluntary arbitration, the parties have by agreeing to arbitration exercised their normative powers so as to endow the arbitrator with the power to bind them with her decision. There is no analogous use of our normative powers to bind us to our own, ordinary, daily decisions, for the simple reason that we have no such normative powers. We can pretend that we do, by casting our decisions as a "promise I make to myself," vows, oaths sworn to "on our mother's grave," pinky swears, "cross my hearts and hope to die," and other even more bizarre rituals. But we know that these are only (at most) symbolic of the resolve we have not to change our mind, not means we have to bind ourselves from making such changes of mind.

Contrary to what Raz argued, ordinary decisions about our own future behavior join the advice of others in giving us, at least initially, reasons for belief, not reasons for action. It will often be rational to believe that the decisions of others reflected in their expert advice to us, and the earlier decisions of ourselves, better reflect the balance of reasons for action on which we should act than would later decisions by ourselves when the time for action has arrived. When it is rational to believe this, then it will also be rational not to consider the merits of our decisions again. Such a reason for belief thus does generate a reason for action, but it is a reason to refrain from doing something, namely, from doing the mental action of reconsidering the reasons pro and con behind some earlier decision by ourselves or by advice-giving others.

This is to utilize what I called the heuristic sense of "exclusionary reasons." It is not Raz's motivational sense of the phrase, because considering something is a psychological process that is excluded; no motivations are prohibited as the reasons for which one may not act, nor is considering certain reasons excluded because it might lead to being motivated by those reasons. Likewise, the justificatory sense of "exclusionary reason" is not in play in this context either; our decisions do not rob any reasons that were reasons pre-our-decision from counting post-our-decision; all reasons retain their evaluative valence.

⁷⁷ The label because of Sartre's language about the openness to the future of all who are not acting in bad faith, in his famous 1940's essay, "Existentialism is a Humanism," excerpted and reprinted in G. Novak, ed., *Existentialism Versus Marxism* (New York: Dell Pub., 1966).

⁷⁸ Among the symptoms exhibited by the famous early example of the dependence of mind of brain, Phineas Gage, after he lost much of his prefrontal cortex to a tamping bar that pieced his skull, was a lack of stickiness to his intentions. His treating physician, John Martin Harlow, described Gage after the accident as being "no longer Gage" in part because, whereas before the accident "he possessed a well-balanced mind...very energetic and persistent in executing all his plans of operation," after the accident he was "capricious and vacillating, devising many plans of future operations, which are no sooner arranged than they are abandoned in turn for others appearing more feasible." Quoted in Moore, *Mechanical Choices: The Responsibility of the Human Machine* (Oxford: Oxford University Press, 2020), at p. 365 n. 111.

Raz made a number of responses to this heuristic interpretation of exclusionary reasons as applied to ordinary decisions and intentions. He thought, first off, that my heuristic sense of “exclusionary reason” made it the case that these kinds of exclusionary reasons were not second order reasons for action at all: (1) they were in the first instance mere reasons for belief about what our reasons for action are; and (2) in the second instance, they gave merely first order reasons not to perform the mental action of consideration of the excluded reasons.⁷⁹ Yet this second point by Raz would only be true in his preferred, motivational sense of what makes a reason a second order reason. Heuristic aids that give us reason to exclude further deliberation about our first order reasons for action are “second order” in a perfectly understandable sense, viz, their content makes them *about* first order reasons. That it is cognitively “about” rather than motivationally “about” should be neither here nor there; it is usefully pegged as second order because it is about first order reasons for action.

Raz also thought that it was “obviously wrong” to think that as rational agents we had any reason to debar ourselves from reconsidering the reasons behind already made decisions: “There is no reason to prevent a person in such circumstances from going through the arguments to amuse himself or as an exercise, etc., so long as he does not trust his judgment enough to act on it.”⁸⁰ Yet surely the reconsideration/continued deliberation that is the object of an exclusionary reason created by one’s own decision, is not the idle consideration Raz here pictures; what we have reason to exclude is real reconsideration where we regard it as yet open to (re)decision what it is that we should do. And by Raz’s own showing we do have reason to bar that kind of reconsideration. Such a reason is well called an exclusionary reason, if what is meant is this kind of second order reason, not Raz’s preferred motivational sense of the phrase.

Raz eventually came to realize that for many of his readers the goods to be achieved by ceasing endless re-deliberation after a decision has been made, seemed to support the heuristic interpretation of there being an exclusionary reason here, namely, a reason to exclude the old reasons earlier considered from being thought about again.⁸¹ Nonetheless Raz urged that “while the good to be achieved [by not reconsidering already considered reasons] has to do with one’s thinking, the reason it provides is a reason not to act for certain reasons.”⁸² In my language: while the good of greater decisional accuracy at lesser cost seems to justify a reason to cease thinking about decisions already made (the heuristic sense of exclusionary reason), what it really justifies is not being motivated by the considerations that went into the making of the original decision (the motivational sense of exclusionary reason). With respect, this seems like a kind of magical alchemy by which a reason not to think about some reason for an action becomes instead a reason not to be motivated by that reason as one does that action. The obvious question is, how can such alchemy be possible? Raz argued that the costs and other downsides of further decision-making would be “caused not by attending to or thinking about certain matters [i.e., the reasons pro and con doing some action that one had already decided to do], but by the fact that one does so because certain reasons should guide one’s behavior...”⁸³ There are two problems with this argument: one, it requires the implausible psychological supposition that when people deliberate or redeliberate about what to do, they are really deliberating about what reasons should motivate whatever actions they are going to do and not whether they should or should not do those actions; and two, that the costs, inaccuracies, and other downsides of continued decision-making are in any way either caused by such deliberation about motivations or alleviated by people being obligated not to be motivated by already considered reasons.

⁷⁹ Raz, *Practical Reason and Norms*, supra, at p. 48.

⁸⁰ Id.

⁸¹ Raz, “Postscript,” supra, at p. 184.

⁸² Id.

⁸³ Id.

8. *Do the deontological norms of morality give us exclusionary reasons for action, and if so, in what sense?*

In terms of what many people believe about deontological ethics, some concept of exclusionary reasons is plainly apt as an analysis of deontological obligation. Many people think that such obligations operate as “side-constraints”⁸⁴ that do not outweigh or override considerations of welfare but rather, displace such welfare considerations in determining what it is right to do. On such a view, deontological norms exclude “the serpent windings of utilitarianism”⁸⁵ from counting for or against those courses of action that are the subjects of such deontological norms. Most contemporary theorists broaden these thoughts so that what deontological norms exclude are not just considerations of welfare, but also considerations of all forms of good or bad states of affairs that are the consequences of actions subject to a deontological norm. Rightness of action is said to reside in conformity of that action to the dictates of the deontological norms, not to depend in any degree on the good or bad consequences of doing such an action on a particular occasion – this, despite the fact that for actions that are *not* the subject of a deontological norm, a sensible deontology admits the relevance of such consequences in determining right action.⁸⁶

Equally plainly, the concept of exclusionary reasons in play in these beliefs about deontological norms, is not Raz’s motivational sense of that phrase but is rather, the justificatory sense. None of the beliefs just canvassed make any mention of the (motivating) reasons for which an action is done. They rather focus on the (justifying) reasons that make the action right to do. Indeed, this justificatory reading of exclusionary reasons comes so naturally to theorists concerned about deontology that they unwittingly assume that this justificatory sense is what Raz must have meant in his invention of the concept.⁸⁷ Raz himself makes observations about “a relatively common way of reasoning” that seem fully supportive of this interpretation of exclusionary reasons:

“Consider the case of Jeremy, who was ordered by his commanding officer to appropriate a van belonging to a civilian. Let us assume that before reaching his decision Jeremy becomes convinced that the balance of reasons clearly indicates that he should disobey the order....Yet he...interprets his position in the army as entailing that he has to obey lawful orders regardless of their merits...Jeremy interprets the order [like a deontological norm] as meaning that it is not for him to act on a complete assessment of the pros and cons, that whatever his view of the case...all or most of the other considerations are to be excluded from the range of facts determining his action.”⁸⁸

⁸⁴ A term associated with Robert Nozick, *Anarchy, State, and Utopia* (New York: Oxford University Press, 1974).

⁸⁵ Kant’s famous phrase in the *Rechtslehre*.

⁸⁶ Larry Alexander and I chart these aspects of the consequentialism vs. deontology divide in our Alexander and Moore, “Deontological Ethics,” *Stanford Encyclopedia of Philosophy*, 2019 edit.

⁸⁷ See, e.g., Christopher Essert, “A Dilemma for Protected Reasons,” *Law and Philosophy*, Vol. 31 (2012), pp. 49-75; Daniel Whiting, “Against Second Order Reasons,” *Nous*, Vol. 51 (2017), pp. 398-420; Benjamin Kiesewetter, “Are All Practical Reasons Based on Value?,” in R. Schafer-Landau, ed., *Oxford Studies in Metaethics*, Vol. 17 (Oxford: Oxford University Press, 2022), pp. 27-53. I am indebted to Ulrike Heuer for these references.

⁸⁸ Raz. *Practical Reason and Norms*, supra, at pp. 41-42.

Raz would construe his “excluded from ... determining” language to mean “excluded from being the motives on which Jeremy may act;” but isn’t the justificatory reading more accurate of common ways of thinking: “excluded from counting towards the rightness of action?”⁸⁹

In the 2022 Illinois-Penn Legal Theory Seminar session devoted to Raz’s work with reasons, as well as in correspondence subsequent to the Seminar,⁹⁰ Ulrike Heuer raised the objection to this justificatory reading of “exclusionary reasons” that Raz too raised during his lifetime.⁹¹ The objection is that morality is not so structured that some of its valid reasons for action – constituted by good and bad states of affairs -- can be effectively cancelled by a deontological norm. They object that this is a “take away with one hand what is given by the other hand” kind of irrationality that no plausible view of morality should countenance. While I will very shortly announce and defend my long-held agreement with Raz and Heuer on this point,⁹² in the present context the point is bootless. For here we are charting what many or even most people believe about the reason-giving capacities of deontological norms, not what is true about those capacities. That people are mistaken in their beliefs does not mean that they don’t have such beliefs. And plainly they do, however mistaken I too think that they are. Deontology for most people flat-out substitutes norm-conformity for net balance of good over bad states of affairs as the touchstone of what is right, so that when combined with a background consequentialism, it displaces reasons – consequentialist reasons -- that without it would otherwise be valid reasons for action. Such displacing has nothing to do with the reasons which should motivate actors to do certain acts and everything to do with counting up the reasons justifying one action over another as the right thing to do.

⁸⁹ The “typical” qualification that I have been using throughout this section is to accommodate the fact that in comparatively rare instances deontological norms, as understood in common thought itself often reflected in the law, may well concern themselves with the reasons that motivate our actions (just as Raz says), and not just with our actions themselves. A plausible construal of the wrong of blackmail, for example, is that while one is not obligated not to disclose private and embarrassing information about another nor even not to threaten to do so, one may not threaten to do so for the reason that one hopes to extract money or other benefit from the victim. Likewise, a plausible construal of the wrongs of retaliatory eviction and retaliatory discharge from employment is that while one may evict an at-will tenant or fire an at-will employee for no reason, one may not evict or fire for the reason that it gets payback on a whistleblowing tenant or employee. Likewise, the wrong of sex discrimination may plausibly be construed so that while one may enact things like veterans’ preferences for state employment that in fact disadvantage women (who are disproportionately not veterans), one may not do so for the reason that it will disadvantage women. Likewise, the wrong of abusing legal process is plausibly construed so that while one may report criminal violations by one’s spouse to the police, one may not do so or threaten to do so for the reason that one seeks some advantage in civil marital dissolution proceedings. In my view these are the exceptions that prove the rule; they are not instances of some general truth that deontic morality concerns itself always or even often with the reasons for which we act.

⁹⁰ Communication of Ulrike Heuer to Michael Moore and Leo Katz, Nov.2, 2022 (“On your view, we need to make it the case that something which is good...is not good anymore. That sounds both impossible and undesirable.”) In her contribution to this volume, “The Point of Exclusionary Reasons,” supra, Heuer herself has to engage in some fancy footwork to avoid relying on some “magical” (her term) transformation of otherwise valid reasons into ghosts of reasons that no longer count.

⁹¹ Raz, “Facing Up,” supra, at p. 1158 (“how reasons which are neither cancelled nor...overridden can fail to affect the rightness of action is not obvious”).

⁹² Moore, “Law, Authority, and Razian Reasons,” supra, at pp. 155, 167.

I have long urged that at the very least for one subspecies of exclusionary reasons Raz had to concede that the justificatory sense of exclusionary reason was the correct sense to use,⁹³ both to explicate what people believed and to draw out what is true. This was for the category of pre-emptive reasons. As Raz himself said in introducing this concept, “I shall call a reason which displaces others a pre-emptive reason.”⁹⁴ Such displacement (from counting towards the rightness of some action) has to take place with pre-emptive reasons else, as Raz again saw, one would otherwise “be guilty of double counting” both the content-independent first order reason constituted by the arbitrator’s order and the dependent reasons on which such order was based.⁹⁵ A fear of double-counting can arise only in the context where one is doing some counting – in this case, counting up of reasons determining whether an action is right or not.⁹⁶ Excluding dependent reasons in these contexts thus has nothing to do with the actor not acting on such reasons and everything to do with such reasons no longer counting in the determination of the right thing to do.

I thus conclude that in the arena of “common ways of thinking” about deontological norms, while such norms do give exclusionary reasons for action, they do not do so in Raz’s motivational sense but rather in what I have called the justificatory sense of the phrase. When we turn from conventional moral belief to morality itself, I think that deontological norms do not typically give exclusionary reasons in either sense. Such norms do not give exclusionary reasons in Raz’s motivational sense for the reasons already adverted to (here the truth of the matter joins common moral belief and practice): deontological norms typically have as their content right action, not right reasons with which right action must be done. Kant got this one wrong.⁹⁷ As to the justificatory sense of exclusionary reasons, deontological moral norms do not, as common thought has it, exclude valid reasons for action of the consequentialist kind from counting towards the rightness or wrongness of action; valid reasons for action always count for what they count for, with or without a deontological norm in the vicinity. Raz and Heuer are right about that. But such seemingly excluded consequentialist reasons are almost always outweighed by the badness of a deontological norm being violated so it can look like they are excluded from counting.

The “almost always outweighed” bit in the preceding paragraph is important. For those who, like myself, are “threshold deontologists” rather than Kantian, “though the Heavens may fall” absolutists about deontology, the badness of violating a deontological norm only outweighs consequentialist reasons up to some threshold in the weightiness of the latter kind of reasons. When “all of humanity” will be lost unless some norm of deontology is violated – Kant’s imagined example -- my threshold deontological view is that morality not only permits but requires that the deontological norm be violated. If that means torturing an innocent child to death, then so be it.⁹⁸ The upshot is that

⁹³ See, e.g., Moore, “Overview,” in *Educating Oneself in Public*, supra, at p. 28.

⁹⁴ Raz, *The Morality of Freedom*, supra, at p. 42.

⁹⁵ Id., at p. 58.

⁹⁶ My guess is that Raz saw that for pre-emptive reasons at least his motivational sense of exclusionary reasons was untenable. In his last writing on the subject, he decided he should “remain non-committal whether this pre-emption is best explained by the presence of exclusionary reasons [in his motivational sense], as I claimed since 1975.” Raz, “Exclusionary Reasons,” supra, at p. 1 fn. 1.

⁹⁷ With the qualification discussed in footnote 89, supra.

⁹⁸ Moore, “Torture and the Balance of Evils,” *Israel Law Review*, Vol. 23 (1989), pp. 280-344, revised and reprinted as chapter 17 of Moore, *Placing Blame: A General Theory of the Criminal Law* (Oxford: Oxford University Press, 1996). Joseph and I were together approached by the faculty at Hebrew University about writing this article from the vantage point of the ethics seminar we were then teaching together, but Raz declined to enter what he correctly predicted to be a politically contentious thicket.

consequentialist considerations cannot be excluded from counting else how could they do their rightness-determining work over the threshold?

True enough, early views of threshold deontology viewed it like some kind of moral anomaly, a “moral catastrophe” that when present made consequentialist reasons suddenly count when, before the catastrophe was looming, they were excluded from counting.⁹⁹ But my view of the matter is different. In what I call “sliding scale” versions of threshold deontology¹⁰⁰ (and what others call the “ratio” view¹⁰¹), each moral norm has its own level of bad consequences constituting the threshold over which the deontological norm no longer controls our action, and the height of that level is proportionate to the degree of stringency possessed by the norm in question. It takes less to justify violating the norm against stealing from someone, for example, than it does to justify violating the norm against killing them. And it is not the case that below such thresholds the goodness or badness of consequences didn’t count towards the rightness of the action whose consequences they were; we just don’t see them count until they spill over to justify action different than that required by some deontological norm.¹⁰²

While I was developing this view of threshold deontology in our joint ethics seminar, Joseph suggested to me the simile of the dam: one standing in front of the dam doesn’t see the water building up behind the dam until that water passes the threshold that is the dam’s height; but each and every bit of the water behind the dam is making its contribution to the total height of the water, the lowest bits as much as the bits we see spilling over the top. Likewise, each bad consequence that violation of a deontological norm would avert counts in favor of violating the norm, even if the work of most of such consequentialist reasons is unnoticed by us because (usually) outweighed by the very great badness of violating the deontological norm.

Not everyone, of course, shares my views, either about there being thresholds attached to deontological norms, or to them having the structure I have just summarized. For such people, the norms of deontology of objective morality may well seem to give exclusionary reasons for action, in the justificatory sense of the word.¹⁰³ On my take on how morality stands, however, there is no room for any such justificatory notion of exclusionary reasons to do any work.

What of the third sense of “exclusionary reasons,” the heuristic sense: do deontological moral norms give exclusionary reasons in that sense? Elizabeth Anscombe and Peter Geach, two very well known deontologists in the moral philosophy of a generation ago, both argued that it was immoral to even think about bad consequences the averting of which might justify violating a deontological norm of

⁹⁹ Bob Nozick for one used to speak of there being “moral catastrophes” in the presence of which the deontology of rights went out the window and previously excluded consequentialist reasons suddenly counted. Nozick, *Anarchy, State, and Utopia*, *supra*. Both Jeremy Waldron and I disavow this view in our recent exchange about threshold deontology. Michael Moore and Jeremy Waldron, “How Absolute Are Moral Absolutes?”, in Charles Tandy, ed., *Death and Anti-Death Volume 19: One Year After Judith Jarvis Thomson* (Ann Arbor, Mich.: Ria University Press, 2022), pp. 189-222.

¹⁰⁰ Moore, “Torture and the Balance of Evils,” *supra*.

¹⁰¹ Larry Alexander, “Deontology at the Threshold,” *San Diego Law Review*, Vol. 37 (2000), pp. 893-912.

¹⁰² This view of threshold deontology is developed in Moore, “The Rationality of Threshold Deontology,” in Heidi Hurd, ed., *Moral Puzzles and Legal Perplexities: Essays on the Influence of Larry Alexander* (Cambridge: Cambridge University Press, 2019); and in Moore and Waldron, “How Absolute Are Moral Absolutes?”, *supra*.

¹⁰³ As Ulrike Heuer has pointed out to me, such a deontology would need to spell out the scope of the exclusionary reasons given by such norms of deontology. Presumably within the scope of such reasons would be the good and bad states of affairs constituted by the consequences of doing the prohibited act on that occasion.

obligation.¹⁰⁴ The best construal of this is some heuristic sense:¹⁰⁵ it is not itself wrong to think about the potentially justificatory power of averting bad consequences by violating a deontological obligation; it is only dangerous to have such thoughts because thinking about it might just lead you to doing it. Notice that such a heuristic sense is parasitic on deontological norms giving exclusionary reasons in the justificatory sense; it is only because the averting of bad consequences don't count to make some action right that thinking about such consequences can be a bad idea (because presenting a danger that one might do the wrong thing, viz, act to avert such excluded consequences). So at best there is no independent heuristic sense of "exclusionary reasons" doing any work in this context. And even as a subsidiary add-on to using "exclusionary reasons" in its justificatory sense, isn't this heuristic sense implausible? Surely sometimes rational thinkers about deontological ethics should reconsider how and why the averting of bad consequences doesn't make right what otherwise is deontologically wrong. An injunction not to think about this can only be at most a summary rule, a rule of thumb, useful for children and other novices in ethics but inappropriate to full-fledged moral agents.

I thus conclude that in the arena of true morality, there is no sense of the phrase in which the norms of a deontological morality give exclusionary reasons for action. They do not do so in Raz's preferred motivational sense of the phrase; but neither do they do so in either the justificatory or the heuristic senses of the phrase either. It is only in the arena of "common ways of thinking" about deontological norms that "exclusionary reasons" has a place -- and even then, it is only in the justificatory sense of the phrase, and not the motivational sense, that it has such a place.

9. *Do the exercises of our limited normative powers to command, promise, issue laws, and make legal decisions create exclusionary reasons for action, and if so, in what sense?*

Here for reasons of space I must be brief. Fortunately, here I *can* be brief, for much of what was said in the last section about deontological obligations generally can also be said here, about obligations created by commands, promises, laws, and arbitrator and judge-originating legal decisions.¹⁰⁶ Indeed, I shall content myself here with doing no more than restating my conclusions in the last section, in this third context of usage of "exclusionary reasons."

¹⁰⁴ G.E.M. Anscombe, "Modern Moral Philosophy," *Philosophy*, Vol. 33 (1958), pp. 1-19, at p. 10; Peter Geach, *God and the Soul* (New York: Schocken, 1959), at p. 24. See also what Thomas Nagel once described to me as his own "Anscombean excesses," in Nagel, *Mortal Questions* (Cambridge: Cambridge University Press, 1979), at pp. 58-59.

¹⁰⁵ There is a rather more extreme, non-heuristic construal of Anscombe's and Geach's injunction here. They could be construed to be saying that thinking about bad consequences is itself the (mental) action prohibited by deontological moral norms, either in addition to or in substitution for the moral norms forbidding the (physical) actions being thought about. On the latter possibility, such a norm would then exclude thoughts about consequences, not actions causing such consequences (so that as long as one didn't think about it one could hang the proverbial innocent man to prevent a general lynching). This is wildly implausible, as Heidi Hurd examines in her "What in the World is Wrong?," *Journal of Contemporary Legal Issues*, Vol. 5 (1994), pp. 157-216, at pp. 170-174 dealing with what she there labels, "deliberational deontology."

¹⁰⁶ It is not quite as open and shut as that sounds. Although many obligations created by promises, etc., either are, or are commonly thought to be, deontological obligations, some are not. So the situations here dealt with are not always a subspecies of the general situation dealt with in the last section. And in any case, if there are exclusionary reasons at work in both contexts, the scope of (what is excluded by) those reasons differs: deontology seemingly excludes consequentialist reasons, whereas commands, promises, etc., seemingly excludes all reasons save that created by the command, promise, etc.

In the arena of commonly accepted moral beliefs, it seems as implausible that promises, commands, laws, etc., give exclusionary reasons in the motivational sense, as it was for deontological norms. Commanders, promisees, law-givers, etc., do not typically care whether those obligated to them by their commands, promises, or laws do what they were commanded to do, promised to do, or were legally required to do, *for the reasons that* they promised to do so or were commanded to do so, nor do they care whether those so obligated do what they are obligated to do for certain unsavory or bad reasons; they only care whether subordinates, promisors, and citizens actually do what they were commanded to do or promised to do. Conforming actions satisfy the relevant obligations; motivation is commonly regarded as irrelevant. But exclusionary reasons in the justificatory sense is another matter. As Raz himself observed repeatedly, legal officials (who Raz animalistically called, “the law”) typically claim that citizens should obey the law without judging for themselves the merits of individual laws.¹⁰⁷ Likewise, many regard promisors as no longer having open to them consideration of the pros and cons of a promised action – it is to be done because it was promised and those old reasons pro and con no longer count in determining the rightness of that action.¹⁰⁸ So common thought accords a place for exclusionary reasons in explicating the moral force of commands, promises, laws, and legal decisions; but only in the justificatory, not the motivational, sense of that phrase.

In the arena of true moral structures giving objective reasons, in no sense do exclusionary reasons figure into the explication of the nature of our obligations here. To begin with the motivational sense, common thought has it right: actions that conform to whatever obligations are created by commands, promises, laws, or legal decisions is all that such obligations require; conformity for certain reasons and/or not for others, is not required. So in the motivational sense of the phrase, exclusionary reasons are not created by these obligations any more than they are created by deontological norms of obligation generally. But as before with deontological obligations generally, the justificatory sense of exclusionary reasons is not here in play either. Common thought has it wrong insofar as it regards lawful commands, valid promises,¹⁰⁹ valid laws,¹¹⁰ or lawful judicial decisions,¹¹¹ as creating second order reasons excluding normally cogent first order reasons from counting towards the rightness of behavior in violation of what was ordered or promised. Thus, in reality as opposed to common ways of thinking about that reality, no such exercises of normative powers create exclusionary reasons for action, in any sense of the term.

10. Epilogue

It is a virtual certainty that there is much in this essay with which Joseph would not agree. I am sorry that I will not be able to hear those many disagreements, put forward in that inimitable style of his that was combined with his puzzled, slightly incredulous demeanor when he was listening to another speaking. The absence of Joseph while writing this essay has been a reminder how much he, often in tandem with Herbert Hart, had in the early stages of my career been an encouraging supporter as well as critic of my work. In those early days he was also quite free with his advice (although it was never cast

¹⁰⁷ Raz, *The Authority of Law*, supra.

¹⁰⁸ See, e.g., John Rawls, “Two Concepts of Rules,” *Philosophical Review*, Vol. 64 (1955), pp. 3-32.

¹⁰⁹ See Hurd, “Promises, Schmomises,” supra.

¹¹⁰ I explore this issue in depth with regard to statutes and with regard to common law rules, in Moore, “Authority, Law, and Razian Reasons,” supra, at pp. 163-167, 160-163, respectively.

¹¹¹ I explore this issue with regard to the res judicata effect of judicial decisions on the parties subject to them, in Moore, “Law as Justice,” *Social Philosophy and Policy*, Vol.18 (2001), pp. 115-145, reprinted in E.F. Paul, F.D. Miller, and J. Paul, eds., *Natural Law and Modern Moral Philosophy* (Cambridge: Cambridge University Press, 2001).

as giving me exclusionary reasons for either belief or for action). Writing this essay has taken me back and has reminded me of the debt that I have owed him for that early friendship and support.

I once compared Raz to Freud in the following respect: just as Freud made conflict of subjective, motivating reasons a touchstone of his work in psychology, so Raz made conflict of objective, justifying reasons the central motif of his philosophical psychology.¹¹² My present hope is that there is another similarity between Raz and Freud. After dissecting Freud's theory of dreams in some of my early work in the philosophy of science in order to make the theory testable,¹¹³ and after the central tenets of that theory were subsequently tested and by-and-large found wanting by others, I hoped and imagined Freud's reaction to be steadfastly still that quoted at the beginning of this article: pride in the theory being the kind of insight that comes but once in a lifetime. Such continued pride by Freud would have been rightly placed -- the dream theory was a brilliant piece of speculative theorizing, no matter how false it turned out to be when tested. I have like thoughts about Joseph's work with exclusionary reasons. Even if I am right in this essay that the concept as he conceived it does much less work than he hoped in the explication of the range of phenomena that interested him, still it was a brilliant piece of imaginative theorizing. What I wrote about Raz's work built on his concept of exclusionary reasons 35 years ago still seems entirely accurate to me:

"This is an elegant structure...Raz has truly integrated his jurisprudence and his political philosophy with his moral theory, conceiving the former as but a special application of the most general insights of the latter. Although complex in its detail, the whole is crisply specified and tightly unified. There is much to admire here."¹¹⁴

Joseph wrote to me on December 4, 2020.¹¹⁵ He had watched my then recent debate at University College London with Gideon Yaffe over some technical issues in how content is ascribed to mental states such as intentions. Joseph ventured that although he thought that I was right in my disagreements with Yaffe, Gideon was both "brilliant and deep." I passed Raz's scoring of our debate on to Gideon, whose reaction to Raz's comment well illustrates this last thought about Joseph's theory of exclusionary reasons: It is often more praiseworthy to be brilliant and deep than to be right.¹¹⁶

¹¹² Moore, "Law, Authority, and Razian Reasons," *supra*, at p. 142.

¹¹³ Moore, "The Nature of Psychoanalytic Explanation," lecture given to the Eighteenth Annual Lecture Series in the Philosophy of Science 1977-1978, University of Pittsburgh, first printed in *Psychoanalysis and Contemporary Thought*, Vol. 3 (1980), pp. 459-543, revised (in light of the detailed comments of Adolf Grunbaum, Carl Hempel, and Larry Laudan) and rewritten under the same title in L. Laudan, ed., *Mind and Medicine: Explanation and Evaluation in Psychiatry and the Biomedical Sciences* (Los Angeles: University of California Press (Pittsburgh Series in the Philosophy of Science), 1983).

¹¹⁴ Moore, "Law, Authority, and Razian Reasons," *supra*, at p. 150.

¹¹⁵ Personal communication, Joseph Raz to Michael Moore, December 4, 2020.

¹¹⁶ Personal communication, Gideon Yaffe to Michael Moore, December 7, 2020. (Gideon's actual words were, "I'll take brilliant over right Monday to Friday, midnight to midnight. So thank you very much, Joseph Raz...")