

In defense of exclusionary reasons

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Abstract

Exclusionary defeat is Joseph Raz's proposal for understanding the more complex, layered structure of practical reasoning. Exclusionary reasons are widely appealed to in legal theory and consistently arise in many other areas of philosophy. They have also been subject to a variety of challenges. I propose a new account of exclusionary reasons based on their justificatory role, rejecting Raz's motivational account and especially contrasting exclusion with undercutting defeat. I explain the appeal and coherence of exclusionary reasons by appeal to commonsense value pluralism and the intermediate space of public policies, social roles, and organizations. We often want our choices to have a certain character or instantiate a certain value and in order to do so, that choice can only be based on a restricted set of reasons. Exclusion explains how pro tanto practical reasons can be disqualified from counting towards a choice of a particular kind without being outweighed or undercut.

1 Introduction

Conflicts between reasons are resolved through various kinds of defeat. Joseph Raz (1986; 1999) proposed a new kind of defeat in order to explain a variety of apparently disparate phenomena, presenting a more nuanced picture of practical reason. Rather than outweighing or undercutting, sometimes one reason excludes another. This paper concerns what exactly it means for one reason to exclude another and how this contrasts with other kinds of defeat.

Reasons that can exclude others are central to Raz's accounts of, *inter alia*, authority, decisions, and rules. The role of exclusion in commands has received the most attention, often in the form of Raz's combinatorial concept of a preemptive reason and in the context of his influential service conception of authority. From the outset, the coherence and usefulness of exclusionary reasons has faced serious objections (Clarke 1977; Gans 1986; Moore 1988; Perry 1988; Alexander 1990; Hurd 1991; Schauer 1991; Edmundson 1993). Raz responded to some initial criticisms but has largely moved on. New concerns consistently arise (Mian 2002; Darwall 2010; Essert 2012), most recently from Whiting (2017) and Gur (2018). Buchanan (2011, 7) concludes that "no one has yet succeeded" in providing "a plausible account of exclusionary reasons."

Despite these concerns, theorists continue to employ exclusionary reasons to explain increasingly varied phenomena. This is especially true of legal theory (e.g. Warner 1995;

Sunstein 2016) but is also common elsewhere (e.g. Ferrero 2010; Henning 2011; Tuomela 2012; Stiliz 2013; Keren 2014). Herstein (2017) concludes that exclusionary permissions are central to his notion of standing by analyzing *tu quoque* and related practices, and Martin (forthcoming) distinguishes distinct categories of obligations according to types of exclusionary reason. Additionally, many people who work on authority or law employ Raz's conceptual analysis even when contesting his conception. For example, Darwall (2010, 261) accepts that creating exclusionary reasons "is a mark of practical authority."

My aim in this paper is to provide a novel account of exclusionary defeat according to which exclusion is a matter of justification. Raz recognizes the possibility of such a justificatory account and explicitly rejects it in favor of a motivational account. So my purpose here is not to defend Raz or to engage in deep exegesis of his view. I also don't aim to defend the use of exclusionary reasons in analyzing any specific phenomenon like commands or rules. Such concerns are downstream from our understanding of the nature of exclusionary reasons and more fundamentally exclusionary defeat. My focus is on whether we can give a coherent and compelling account of exclusionary defeat.

Here's the plan. In Section 2, I explain Raz's account and what I take to be its main problems, clearing the space for an alternative. In Section 3, I propose an alternative. I begin by redefining second-order reasons and then I articulate a notion of exclusionary defeat that focuses on how reasons can be disqualified from bearing on acts. In Section 4, I explain why we should expect normative force to be subject to exclusionary defeat in this way, especially in the case of morality. I address two lingering concerns and conclude in Section 5.

2 Raz's account

Following Raz, my focus in this paper is on practical rather than theoretical reasons. A practical reason (R) is a fact (F) that stands in the counting relation to some object (O) for some agent (A).¹ A positive reason counts in favor of or supports the object; a negative reason counts against or elides the object. We determine what we ought to do in a fundamental sense by accounting for the reasons that bear on an act and resolving conflicts between them via various notions of defeat. We ought to act in whatever way the remaining undefeated reasons support.

Exclusionary reasons are negative second-order reasons. Raz distinguishes between first- and second-order practical reasons by distinguishing two different kinds of objects. First order reasons have some act (ϕ) as their object while second-order reasons have acting-for-a-particular-reason as their object. Raz (1999, 39) defines second-order reasons as "any reason to act for a reason or to refrain for acting for a reason." An example is the case of Colin, who promises his wife to make decisions about their son's education based only on

¹ Although we sometimes we refer to a fact as the same reason across cases because it can be in more than one reason, I will avoid this; the reason is the relation between the fact, object, and agent, not the fact alone.

their son's interests (Raz 1999, 39). The promise excludes any other grounds that would otherwise be relevant for this decision, such as concerns of cost, broader social justice, or what the neighbors might think. Colin can only send his son to a school for the reason that it would be best for his son.

Key to Raz's account is the idea that second-order reasons operate on a different normative level than first-order reasons. Imagine that the balance of all first-order reasons supports sending Colin's son to public school, so in one important sense Colin ought to send his son to public school. The promise as a second-order reason introduces a new and distinct sense of ought (Raz 1999, 41-45). If Colin's son's interests support private school, then once the promise excludes all the reasons that are not about the son's interests, Colin ought to send his son to private school. The second-order ought is what Colin ought to do all-things-considered but the first-order ought does not go away (Raz 1999, 44). For Raz, the excluded reasons still determine what Colin ought to do in another sense and we often care about that sense, which leads to a telling feature of the presence of exclusionary reasons: regret.

Consider a judge applying a minimum sentence where specifics of the defendant's case would support greater leniency and so the judge regrets the sentencing. On Raz's account, rules are exclusionary reasons. The judge ought to do what the sentencing rule says but the excluded first-order reasons support leniency, which is why the judge feels conflicted. There is a sense in which the judge ought to sentence the defendant to a harsh term and there is a sense in which the judge ought to be lenient.²

These cases illustrate the central tension that Raz posited exclusionary defeat to explain but also remains mysterious for many. In a paradigmatic case, the judge would decide by weighing the reasons for and against the options. But this is not how the judge reasons in this case; the rule oddly intervenes in the process and makes the reasons to be lenient in some sense irrelevant. This is what explains the judge feeling bound to sentence harshly. At the same time, the leniency reasons are clearly not irrelevant, which is why they can ground regret and another sense of what the judge ought to do. This is not the stereotypical balancing kind of practical reasoning yet it is also coherent and indeed common (Scanlon 1998, 50-55). To my mind, the whole point of positing exclusionary defeat is to explain such cases. The main challenge for any account of exclusionary reasons is giving a coherent account of how and why reasons operate in this manner.

Raz's explanation relies on his notion of acting-for-a-reason, which defines second-order reasons. Acting for a reason is about how the agent is *motivated* when she acts. Exclusionary reasons are "reasons for not being motivated in one's action by certain (valid) considerations" (Raz 1999, 185). For example, Colin's promise excludes Colin being motivated by concerns of social justice when deciding where to send his son to school. It defeats concerns of social justice as motivating reasons. It does not defeat them as normative

² Strikingly, Raz (1999, 186) notes that it would be lucky if the agent tried what she ought to do in the second-order sense and *failed* such that she did what she ought to do in the first-order sense.

reasons. Since it does not concern their normative or justificatory character, they are not defeated based on weight, which is a normative matter. The remainder exists because they are still normative reasons for us and can justify regret, blame, and other responses.

For Raz, exclusionary reasons capture the tiered nature of practical reason. We often first face the higher-order decision about the manner in which we should make our first-order decisions; only then do we face the first-order question of which option to take. The higher-order decision often does some agenda-setting work, determining which options are available at the first-order level. In Raz's influential analysis of authority, for example, we recognize at the higher-order level that we should use whatever decision procedure is most likely to choose well because the issues at stake are of such importance.³ Thus, someone has authority when they fulfill the normal justification thesis: when obeying them is more likely to secure conformity with our underlying reasons than following our own judgment is.⁴

Raz's account faces three kinds of objections. The first has to do with whether an exclusionary account of some particular phenomenon works, such as authority or law, which I've set aside here. The second has to do with whether we can tell a coherent story about justification, defeat, and the structure of reasons that captures exclusion. This is the main concern that my new account is intended to address and so, both directly and indirectly, is the subject of the remainder of the paper. The third specifically concerns the motivating character of second-order reasons. These apply uniquely to Raz's account and to my mind are also decisive against it.

First, Raz seems to change the subject by introducing motivating reasons into issues that are better understood at the level of normative reasons.⁵ For example, appeal to motivating reasons seems to misconstrue the nature of promises. If I promise to pick you up at the airport, I take myself to be acting at the level of justification: I now have an obligation to pick you up. My promise is not about what motivations I should have when I pick you up. The idea that promises and all other exclusionary reasons are about how we should be motivated is at best odd.

Second, insofar as the motivating move makes sense, it seems to be derivative of a change in normative reasons. We can sympathize with Colin feeling the force of his son's interests but that invites the inquiry whether he should feel that way; if he literally cannot recognize anyone else's interests, that's problematic precisely because others' interests matter as well. If Colin came to believe that he was only justified in sending his son to private school, then it might make sense to strategically reason about which motivations he needs to manipulate to ensure that outcome. But such reasoning about his motivations only makes

³ When issues aren't so important, the independence condition is met and it is more important for us to decide for ourselves than it is to choose correctly (Raz 1986, 69).

⁴ This misses some important features of the relationship between authority and subject and the sort of deference that authorities demand (Adams 2018).

⁵ Thanks to a reviewer for pushing me to clarify this.

sense because he has determined how he ought to act and is concerned that he will not so act, perhaps due to weakness of will. When motivating reasons are relevant, it is because of their relation to the underlying normative reasons.⁶

For example, Raz (2006, 1022) argues that commands exclude all those motivations that would lead the agent to act in a contradictory way. The agent can act on any motivation that would lead her to ϕ but this makes the focus on motivation merely strategic: the agent should ϕ regardless of what motivation leads her to ϕ and should not ϕ regardless of what motivation would lead her to not ϕ . The motivations are being classified by what outcome they produce. This is only sensible if this is the justified outcome.

Third, most importantly and echoing Ross's (2002, 5) criticism of Kant, we cannot have a reason to act-for-a-reason because acting-for-a-reason is not something we can choose to do.⁷ Moore (1988, 878) raised an early form of this objection; as Whiting (2017, 404) nicely puts it, "In general you can do something *for a reason* but you cannot do something *for a reason for a reason*." Yet that is what Raz's account demands. Colin is supposed to choose to send his son to private school because it is in his son's interests because he promised only to act on his son's interests. Motivations do not seem to be under our control in the way required by Raz's account.

3 Exclusionary defeat

An important and widely known feature of the United States' legal system is the exclusionary rule. This rule governs whether certain evidence can be used in a criminal trial. If evidence is gathered in violation of a defendant's rights, for example, then the rule excludes that evidence. That evidence cannot be presented to the jury and, if it has already been, the jury is instructed to ignore it. The exclusionary rule defeats the evidence in an odd way. It doesn't give us better evidence that the defendant is innocent, nor does it show that the evidence is unreliable. Instead, it *disqualifies* the evidence, removing it entirely from the process. Exclusionary reasons analogously disqualify their target reasons. In this section, I offer a new explanation of this exclusionary effect.

On my account, exclusionary reasons are negative second-order reasons, but I understand second-order reasons differently. Very simply, a second-order practical reason takes another reason as its object. It bears directly on another normative reason rather than on an act, as in Raz's account (where the act is act-for-some-reason).⁸ In other words, a second-order reason is a fact that bears on whether and how another fact counts. For

⁶ The strongest cases against this, for example wanting a partner to help because they want to not because they are required to, seem to me to be better described as reasons to develop a certain character or virtue.

⁷ Thanks to a reviewer for pointing out this parallel.

⁸ I've purposely defined second-order practical reasons in such a way as to avoid needing to posit third- and higher-order reasons. Any reason which bears on another reason rather than directly on an act is second-order, even if it bears on another second-order reason. The 'directly' qualifier is necessary because a first-order reason could have an act that merely involves reasons in its object (Whiting 2017, 402).

example, the fact (F2) that the defendant's confession was obtained illegally counts against the fact (F1) that the defendant confessed counting when determining guilt (ϕ). When R2 excludes R1, R1 no longer counts in the way it purports to.

Understood in this way, exclusion is clearly a matter of normative reasons and justification. When a reason is excluded, it no longer counts. This avoids the concerns that come with appealing to motivating reasons but also causes its own problems. A main problem is that this characterization appears to muddle the distinction between exclusion and undercutting (or what is also called cancelling). On my account, undercutting reasons are also second-order reasons. Yet there is no point to positing exclusion if it is the same as undercutting since exclusion will not be able to do any distinct explanatory work. The remainder of this section is devoted to distinguishing exclusionary defeat. The second main problem is whether we can plausibly explain how normative reasons can have this exclusionary effect. Articulating that problem and addressing it is the task of the final two sections.

Reasons defeat is best understood through the lens of reasons conflict. Direct conflict between reasons occurs when both bear on the same object.⁹ Both first-order and second-order reasons can come into direct conflict with reasons at their own level. Direct conflict between first-order reasons occurs when both reasons bear on the same ϕ , as when R1 supports ϕ ing and R2 supports not ϕ ing. Often this is because R2 supports ψ ing such that ϕ and ψ cannot both be performed. Direct conflict between second-order reasons occurs when both a positive and negative second-order reason bear on the same reason: the former counts in favor of it counting, the latter counts against it counting. Direct conflicts of either sort are settled by comparing weight or strength; R1 defeats R2 by outweighing it.¹⁰

Indirect conflict between reasons occurs when one reason (R2) bears on another reason (R1) in such a way as to undermine it. By definition, then, all and only negative second-order reasons cause indirect conflict. Considered on its own, R1 has no defense against R2, so R2 defeats R1. When R2 completely elides R1, R1 no longer supports ϕ ing, so A's actions would be determined by the balance of reasons independent of R1.¹¹ But there may be R3 relevant to R1 that indirectly or directly conflicts with R2, an R4 that conflicts with R3, and so on. We only know whether R1 supports ϕ ing in this context once all the higher-order conflicts that bear on it have been resolved. Since higher-order conflicts bear on whether a reason counts when ϕ ing, all higher-order conflicts must be resolved before direct conflicts; first-order direct conflicts of the paradigmatic sort are the last step in determining the balance of reasons.

⁹ Raz (1999, 25) defines reasons conflict to constrain it to direct conflict.

¹⁰ At the second-order level, though, weight may resolve conflicts between exclusionary and inclusionary reasons but not conflicts between exclusionary and intensifying reasons.

¹¹ Indirect defeat can come in degrees such that the defeated reason gives less support to its object than it otherwise would but still gives some support. I think this is true of both undercutting and exclusion (consider mechanical weighting procedures). But it will be easier to discuss the issues in more absolute terms, so I'll focus on complete elision.

The important point for us is that there are different kinds of indirect conflict and so different kinds of indirect defeat. Indirect conflict attacks a reason's status *qua* reason: it attacks the counting relation between fact and object. The higher-order reason (R2) consists of a fact (F2) bearing on another reason (R1/O2), which itself consists in a fact (F1) bearing on an object (O1). We can taxonomize types of indirect defeat according to how F2 bears on R1: it is a fact about F1 or ϕ ? These correspond respectively to undercutting and exclusionary defeat.¹² R2 undercuts R1 when it identifies a feature of F1 that explains why F1 does not count when ϕ ing. R2 excludes R1 when it identifies a feature of ϕ that explains why F1 does not count when ϕ ing.

Put another way, facts about the context of choice can undercut while facts about the choice itself can exclude.¹³ A reason is undercut when it doesn't count in these circumstances; a reason is excluded when it doesn't count for this kind of choice. Both undercutting and exclusion thus depend on the idea that in a different context, the target reason (R1) counted or would have counted. Then something changes or another reason is brought to bear such that the target reason no longer counts in the same way. We can understand this idea of change in different ways, for example temporally, modally, or as a matter of *prima facie* and *pro tanto* reasons. I think all can be relevant but don't have the space to pursue this in detail. What's important is that undercutting and exclusion differ based on what part of the target reason their fact is about. A reason is undercut when the context of choice, or the state of affairs, changes; a reason is excluded when the choice under consideration changes. (In the final section I attempt to address concerns about how clearly this distinction can be made.)

Here's a simple example of the contrast. Consider a normal hamburger and the reasons Kelly might have to eat it, for example its tastiness: the fact (F1) that the burger is tasty counts in favor of (ϕ) eating the burger. The fact (F2) that something rotten has been added to the burger undercuts R1: in essence, it renders the burger less tasty or not tasty. In contrast, the fact (F3) that Kelly is vegetarian excludes R1: the burger is still tasty but tastiness has been disqualified as grounds for choosing whether to eat the burger. We can't make it the case that Kelly ought to eat the burger by making it tastier or by making the tastiness reasons weightier; Kelly's vegetarianism defeats the tastiness reasons but not as a matter of weight. Kelly's choice regarding the burger is determined by their commitments, disqualifying some kinds of considerations from mattering. R2 is an undercutting reason because F2 is about the burger; R3 is an exclusionary reason because F3 is about the sort of choice Kelly is trying to make.

This example includes what I take to be three important features of exclusionary defeat. They are what I term *choice sensitivity*, *narrow scope*, and *limitation*.¹⁴ First,

¹² So exclusion is not undercutting, contra, e.g., Levy (2015, 367).

¹³ Thanks to two reviewers for pushing me to clarify this.

¹⁴ Raz (1986, 42, 46, 61) discusses similar issues. As a reviewer rightly noted, a fuller account of exclusionary reasons requires further detailed explanation of these features.

explaining the defeat of the tastiness reasons is best explained by appeal to the choice itself: for the choice to be vegetarian, it must disqualify reasons to consume like tastiness when the food is animal flesh. Second, because it is in the choice and not the state of affairs, the excluded reasons still count in various ways. Included in this is regret: because the burger really is still tasty, Kelly may regret not being able to eat it. But it includes other things as well. Kelly's non-vegetarian companion may decide to eat the burger, unlike when the tastiness has been undercut by the rotten additions. Third, the tastiness reasons are only excluded insofar as Kelly's vegetarian commitments hold. If Kelly is starving or is being forced to eat something with animal flesh, then they may choose to eat the burger precisely because it is the tastiest option available. Exclusionary defeat has these features precisely because it concerns facts about the choice being made, in contrast to undercutting. Making the same kind of choice will give exclusionary reasons even when circumstances change: Kelly also ought not eat the hot dog. When the tastiness reasons are undercut, they cannot support any act that relied on tastiness but when they are excluded, they can support other choices that don't have the same character.

This understanding of exclusionary defeat closely mirrors some features of Scanlon's discussion of the complex structure of reasons. His discussion raises various issues of cancelling, enabling, and exclusion. What I call exclusion he discusses as "bracketing... reason-giving force" (Scanlon 1998, 52). Not only is such bracketing possible, "Much of our practical thinking is concerned with figuring out which considerations are relevant" (Scanlon 1998, 53). Further, bracketing demonstrates the three features of exclusion noted above. When bracketing a friend's feelings during a tennis match, "My concern for his feelings is not eliminated or even diminished; I just judge them not to be relevant to certain decisions" (Scanlon 1998, 52). Relevance is determined by the nature of a narrowly defined choice: his friend's feelings are irrelevant to whether he should try to hit a winning shot but still relevant to collegiality in the game.

In the rest of this section, I explain further cases of exclusionary defeat to demonstrate the scope of the phenomenon as well as some important differences among cases. This is meant to motivate a general and ecumenical commitment to exclusionary defeat at a descriptive level. The phenomenon is so widespread that denying the coherence of exclusion as a mode of reasons defeat is inadvisable. Instead, the concern is about explaining exclusionary defeat at the level of moral reasons and justification. That is the focus of the next section.

We see exclusionary defeat at work in very different contexts. Most fundamentally, it appears that certain kinds of values and disvalues are constituted by their limitations or their inclusiveness.¹⁵ Autonomy requires that I have control over my life and you don't (Raz 1999, 199). Whether I am justified in ϕ ing or not does not depend on whether you have given me

¹⁵ Raz (1999, 183) raises the interesting example of ascetic reasons.

permission to ϕ : the exclusion of your judgment as determining whether I should act in some way is constitutive of my autonomy.¹⁶ If I can only ϕ when you give me permission to ϕ , I am subservient to you and this disrespects my autonomy, treats me paternalistically, makes me subordinate, and so on (Dempsey 2013, 20). Such interference is wrong not because my judgment outweighs yours but because for my decision to be autonomous at all, your judgment must be excluded from determining whether I am permitted to ϕ . Autonomous decisions are autonomous just because some (otherwise apparently relevant) considerations are excluded from determining how the agent ought to act.

Similarly, fairness requires identical treatment across relevant features and no differential treatment across irrelevant features. The exclusion of treatment on irrelevant features is partly constitutive of fairness; fair policies must exclude religion as the grounds for hiring public employees. To treat someone fairly, only relevant features can count; fairness gives exclusionary reasons that disqualify irrelevant features from counting to justify differential treatment.¹⁷ When I have reasons to respect someone's autonomy or treat them fairly, I have some exclusionary reasons: deferring to another's judgment or acting on irrelevant features would constitute disrespecting their autonomy or treating them unfairly. Again, exclusion is constitutive. The point isn't that fairness outweighs differential treatment on irrelevant features; what it *means* to treat them fairly is to exclude irrelevant features. Fairness may then be balanced against other values but exclusion is part of what constitutes fair treatment.

Moving away from values themselves, some social practices only work because and when they include exclusionary reasons: given the purpose of the practice, including some considerations as the basis for some decisions would be self-defeating. Arbitration must exclude the parties' personal judgment of the merits of the decision as grounds for conformity (Raz 1986, 41-42). Inclusion of these defeats the purpose of arbitration, which we use precisely when the parties' personal judgments are at odds and can't be resolved otherwise. Arbitration without exclusion is self-defeating. Given that exclusion has the three features of choice sensitivity, narrow scope, and limitation, this doesn't mean that the parties ought to follow the arbitrator's decision no matter what. Arbitration as a practice only makes sense under some conditions; the decision's exclusionary power only holds within the bounds in which the practice itself holds.

Many practices involve exclusionary reasons in less obvious ways. Scanlon (1998, 52) notes:

Being a good teacher, or a good member of a search committee, or even a good guide to a person who has asked you for directions, all involve bracketing the reason-giving force of some of your own interests which might otherwise be quite relevant and legitimate reasons for acting in one way rather than

¹⁶ Dempsey (2013) and Herstein (2017) both argue that autonomy involves exclusionary permissions; in some circumstances, I get to choose whether to include or exclude your wishes or advice, for example.

¹⁷ Thanks to a reviewer for noting the parallels to fairness in Rawls' (1999, 118) veil of ignorance.

another. So the reasons we have for living up to the standards associated with such roles are reasons for reordering the reason-giving force of other considerations.

Here the agent has taken up a role and the reasons she has for acting in that role exclude some considerations from her decision-making. It might feel good to assign grades based on one's feelings towards students but, given the ideals and values in the role of the teacher, some kinds of considerations can't count when assessing students. Those excluded reasons aren't merely outweighed: increasing the weight of your feelings won't justify moving the assessment just a little.

Exclusion arises in the context of many kinds of personal relationships because it captures some elements of partiality. As Martin (forthcoming, 16) points out, being bored by ballet is relevant to whether to attend a professional performance but not your daughter's. The relationship disqualifies boredom from counting and failing to attend because of boredom would be blameworthy. Similarly, if a friend is sick, mere inconvenience does not count against visiting them. Friendship is in part constituted by ignoring certain considerations in favor of the friend's interests and precisely not weighing whether the friendship is worth the costs. Mere inconvenience is excluded as a reason not to care for your friends (Scanlon 1998, 54).

Exclusionary reasons are also often relevant within the context of specific decisions. Returning to Colin, we can understand his promise to only decide about his son's schooling based on his son's interests: it represents a view of what is good about the choice or what sort of choice is being made.¹⁸ Vehement disagreement may arise about the character of the choice before even considering different outcomes. Similarly, parents might ask their child to make a choice about which university to attend without accounting for cost. They worry that including reasons of cost would skew the decision, based on a certain understanding of the kind of choice being made.

Finally, exclusionary reasons are sometimes relevant because of circumstantial features of the choice situation (Raz 1999, 48). Unfortunately, many of Raz's central examples are circumstantial or what Scanlon (2004, 41) calls purely pragmatic: they concern "the costs and effectiveness of the process of deliberation, rather than the substantive relevance of the reasons it instructs an agent to ignore." Raz (1999, 37) discusses the case of Ann, who is offered a complex investment opportunity late at night and with a deadline of midnight. Ann has had a difficult day and is tired and upset. Raz says that Ann's weariness is an exclusionary reason for her to not attempt to make the investment decision at all. But her state has nothing to do with whether the investment is a good one, only with whether she can make a trustworthy decision about the investment in her current conditions, so how can it change her decision?

¹⁸ This is why Colin's promise counts as exclusionary on my view: it changes the choice from 'decide about schooling' to 'decide about schooling under the constraints set by the promise', rather than changing any features of the school or other matters of the context. Thanks to a reviewer for raising this question.

Accounting for circumstantial exclusionary reasons helps clarify the feature of exclusion I termed choice sensitivity. The oddity comes from framing her choice as simply whether to invest or not. Her options, though, are invest-by-midnight or don't invest. Her psychological state means that investing by midnight means investing based on an untrustworthy assessment. If we discovered some unprofitable feature of the investment, that feature would undercut the investment. A circumstantial exclusionary reason arises from identifying some feature of the situation in which the choice is being made.

Ann's case also illustrates the narrow scope and limitations of exclusion. If she could get her alert partner to assess the opportunity, or if she could rest before deciding, then she would have no exclusionary reason. Further, if the opportunity were not so complex or she were not quite so worn out, then the exclusionary reason may be overridden due to exclusion only working within certain closely-defined domains. The epistemology and pragmatics of how we encounter and manage exclusionary reasons are separate issues from how exclusionary defeat among reasons works, albeit difficult issues that sometimes muddle their operation in practice.

Circumstantial exclusionary reasons should not be a central case since they are made relevant to the choice extrinsically. The other examples of exclusionary reasons cannot be dismissed just by changing the circumstances of choice because exclusion plays a more constitutive role in the practice, decision, or value in question: the exclusionary reason arises from an intrinsic feature of the choice in question. Raz's focus on circumstantial cases, especially in making his case for his conception of authority, has misled subsequent discussion away from the more robust role that exclusion can play.

Some decisions only take limited factors into account. Autonomous choices are not deferred to others' directives; fair choices are not based on irrelevant features; good financial advice is not swayed by the advisor's pecuniary interests; accounting for monetary cost can distort an educational decision. Exclusion captures the way that the character of the choice being made can limit the set of relevant factors. Excluded reasons no longer count in what the agent ought to do with respect to that particular choice. Exclusion is a matter of the normative force or justificatory power of a reason being disqualified. This contrasts with Raz's account of exclusion as concerning motivating reasons.¹⁹ It avoids the criticisms that focus on motivations but encounters its own that focus on justification.

4 Justification

Moore (1988, 854ff) proposed and critiqued three interpretations of Raz's account of exclusionary reasons: justificatory, motivating, and decision-procedure. In response, Raz

¹⁹ Note that accounts of particular phenomena that rely on Raz's notion of exclusion will often be able to rely on my alternative without alteration, since many do not appeal specifically to motivating reasons.

(1988, 1156) defended the motivating interpretation and explicitly rejected the alternatives. Raz, Moore, and others have all offered arguments against justificatory exclusion. In this section I explain why it is plausible to think that reasons can be excluded as a matter of justification.²⁰

The main problem is this: it seems implausible that reasons can lose their normative force in the way exclusion requires. For example, in addition to giving some positive reason to conform, legitimate laws are supposed to exclude considerations in favor of law-breaking.²¹ Perhaps I am driving on the highway and see an animal suffering on the side of the road. The suffering gives me a reason to stop but it is illegal for me to pull over here. The law supposedly excludes the suffering but law can't have this power! We can see how the law could outweigh the suffering, as when the suffering is outweighed by the risks of pulling over on a crowded highway. But when the suffering is outweighed, it still matters, it still has normative force. The suffering could be undercut if the animal dies. But the suffering can't be disqualified: if suffering is intrinsically bad, as I am presuming, then it must constitute a pro tanto practical reason. Nothing can affect its normative force; certainly law or some rule can't. As Moore (1988, 856) puts it, "We do not have anything like this kind of sovereignty over morality."²²

But we do. Accepting Moore's basically realist approach, exclusion is at home in an understanding of morality where moral reasons are not always uniquely conclusive, do not simply agglomerate, and often involve trade-offs. On this picture of commonsense value pluralism (Scheffler 2004, 255), morality is a matter of value conflicts and losses, free choices, and complex relations. Exclusion is uncomfortable in, and unnecessary for, a picture of morality where values never need to be traded off, free choice is irrelevant, and moral reasons simply agglomerate. This is a picture of morality that a caricatured utilitarian could perhaps accept. But exclusion is indispensable for the more nuanced and, to my mind, more plausible view.

We can see exclusion at work in three areas.²³ First, morality is often indeterminate with respect to policies or laws and makes room for positive social practices to determine which moral reasons count and how within their jurisdiction. Second, social roles and, relatedly, organizations both rely on restricting which considerations count for participants when occupying the role or acting within the organization. Third, leading one's own life involves making such choices (often among roles and organizations).

First, morality is mostly indeterminate with respect to the precise details of public practices. An uncontroversial example is driving. The risks of driving mean that we must

²⁰ This may also be a defense of what Perry (1988) calls "objective" exclusionary reasons, as opposed to Raz's subjective account.

²¹ This is what I take to be a standard approach to legitimate law, which I am assuming for this discussion. Thanks to a reviewer for pushing me to clarify this.

²² Underlying this conviction may be the thought that every pro tanto practical reason counts for every decision.

²³ I take these to be generally sympathetic with Raz's important work on values, pluralism, and practices.

coordinate around rules that substantially lower the risk, for example lowering the likelihood of head-on collisions by separating out directionally grouped lanes on the road. But our reasons to separate lanes do not tell us whether we should drive on the right hand-side or the left-hand side: the moral reasons are indeterminate. We decide this by convention; once the decision is made, it determines that we are all obligated, within particular jurisdictions, to drive on one side or the other. In one place, the choice to drive on the left excludes our genuine pro tanto moral reasons for a policy for driving on the right while in another, the moral reasons to drive on the left are excluded by the community's choice to drive on the right.²⁴

We might worry that this case is too limited, perhaps thinking that this indeterminacy is only present in *mala prohibita* cases, or that there are no genuine moral reasons in such cases. But all judiciable legal rules must be much more complex than what morality determines. Just like with traffic regulations, you can make a law against murder so poorly that it is unjustified, for example if it allows exceptions of race or gender. But, for example, the Model Penal Code defines murder thusly (1962, §210.2):

- (1) Except as provided in 210.3(1)(b), criminal homicide constitutes murder when:
 - (a) it is committed purposely or knowingly; or
 - (b) it is committed recklessly under circumstances manifesting extreme indifference to the value of human life. Such recklessness and indifference are presumed if the actor is engaged in or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping or felonious escape.

The only way to understand this definition is to refer to many other parts of the code, including the definitions of other offenses and of mental states. Morality doesn't completely determine each element, let alone the specific contents of the statute.

This is not to deny that there are better and worse choices or that we can morally evaluate this rule. It is simply to say that there is no uniquely morally right definition of murder such that every jurisdiction must instantiate it and that if it doesn't instantiate the definition in that way, it wrongs those over whom it imposes its rules. As long as you endorse indeterminacy of this weak sort, you have justificatory exclusion among moral reasons. By writing the statute one way, you prioritize a certain set of reasons and exclude others from counting. This represents a balance among conflicting values or reasons that is not uniquely determined by morality but left up to social settlement via institutions.

The second case where morality clearly makes room for exclusion is at the level of social organizations and roles (Raz 1986, 58). Recall Scanlon's example of being a teacher, which requires excluding some reasons of personal self-interest when making decisions regarding students. All roles within social practices define themselves by determining what considerations are relevant for role occupants. A role that failed to do this would allow each

²⁴ Such reasons are not cancelled; sometimes we should conform to them, as in emergencies.

occupant to determine what their role requires and how to balance all considerations in every decision. In turn, this would lead to wild inconsistencies in how role occupants act and ultimately would undermine the practice's ability to coordinate action and pursue its ends, i.e. to survive as a social practice at all.

Relatedly, organizations are partly constituted by rules and roles, which determine which sorts of values they can pursue. In order to be a coherent practice through time, these rules and roles must be relatively settled and so represent a choice about which values will be pursued in what ways. Most organizations specialize and pursue specific goods according to their type, for example churches, businesses, or schools, and cannot pursue all goods simultaneously. The reasons to pursue other values or to pursue their values in other ways are excluded by the chosen settlement as represented by the current organizational form.

Consider again the criminal trial. Criminal trials constitute and pursue many distinct values, some of which conflict. The core value is accuracy: we want trials to identify who committed some violation. But we know that trials should also be fair, respectful, follow rule of law, and much else. These will require some rules that reduce accuracy, as when probative evidence is excluded because it would be unfair to the defendant or would enable too much power on the part of the state (Ho 2016).

My account explains this by appeal to the character of the decision being made. The determination of legal guilt at a criminal trial is grounds for the state to punish the defendant and so the decision involves much more than accuracy. It is simultaneously about pursuing justice for victims, the public officially determining the cause of and responsibility for a violation, the public condemning the violation, the state exercising its power and intentionally harming someone, respect for the defendant, and perhaps deterrence or retribution. Accounting for all these disparate elements is crucial to understanding the jury's choice and thus which reasons should count towards that decision.

Third, from the perspective of the individual, we most often make choices at this intermediate level of roles and about what sorts of considerations will be relevant. This is our personal moral autonomy at work: what kind of person we are is up to us. Scanlon (1998, 53) argues that "Much of our practical thinking is concerned with figuring out which considerations are relevant to a given decision, that is to say, with interpreting, adjusting, and modifying this more general framework of principles of reasoning." He gives the example of playing a round of golf. The reasons we have to golf depends on how we frame that choice: as a temporary amusement, a way to reconnect with friends, a lifelong pursuit, or career. We get to decide how golf matters in our life, which then determines the reasons we have to play this round. Morality does not demand that all or none of us play golf.

Exclusionary reasons are thus best seen in combination with inclusionary reasons. These are not merely intensifying or enabling reasons (Dancy 2004): they are about which reasons should count in the first instance at all, what kind of considerations matter for the sort of choice being made. Parents might argue about whether they should take broader social justice concerns into account when deciding where to send their child to school. They

might later urge their child to consider proximity to ailing relatives when deciding where to go to university. These are all questions of which reasons are relevant to which sorts of choices, and this is often up to us. Although being a pro tanto reason may also be an inclusionary reason, sometimes there are defaults against including otherwise apparently relevant considerations (Ho 2016, 110) and such an inclusionary reason can be defeated.

Utilitarians struggle with all these issues—the indeterminacy of rules, roles in social practices, and personal autonomy—precisely because they think moral reasons uniquely determine every choice. A utilitarian ignores what it means to be a friend because overall utility could demand sacrificing the friend or friendship on any occasion. But if there is space for conflict and decisions in morality, as commonsense holds there to be, then exclusion helps us explain how we make such choices. Various considerations are not cancelled; that would be too strong on any non-subjectivist account of moral normative force. Instead, within certain bounds, it is up to us individually or collectively to decide which considerations are relevant, bracketing off others, in order to make our choices have a certain character.

5 Objections and conclusion

To conclude I address two lingering issues facing my justificatory account of exclusion. First, the distinction between exclusion and undercutting may appear unstable. R2 undercuts R1 when F2 is about F1 and R2 excludes R1 when F2 is about $O1/\phi$. This presumes that we can define F1 and ϕ in a principled manner.²⁵ The fact that the defendant confessed is a reason to find him guilty. That reason is undercut if we identify something about the confession that elides that connection, for example if the confession was faked. That reason is excluded if we identify something about our choice that elides that connection, for example that we want to decide fairly. But, the worry goes, both types of indirect defeat rely on features of both the confession and the decision. The reason is undercut because the confession is faked *and* we want our decision to be accurate. The reason is excluded because we want our decision to be fair *and* the confession was coerced. Kelly's tastiness reasons are excluded because they are vegetarian and because the burger is made of meat. So my distinction fails.

It's true that we can muddle undercutting and exclusion by switching between relevant descriptions of the cases but this is no surprise and also no theoretical hurdle. Choosing what description of an act is salient for decision-making and evaluation is central to moral judgment. Scanlon's discussion emphasizes that often the difficult part of decision-making occurs at this higher-order level, not at the level of balancing first-order reasons.

²⁵ A reviewer helpfully observed that this bears similarities to the wrong kinds of reasons problems raised by Rabinowicz and Rønnow-Rasmussen (2004). My appeal to context is not fully specified here, serving merely to indicate how I take exclusionary reasons to work. This does make exclusionary reasons rather context- and often even preference-sensitive on my account, but I take it this is consistent with the commonsense pluralism and autonomy considerations above.

Children try to exploit different descriptions: “I’m not hitting, I’m just moving my arms and they got in the way.” The problem is not that different descriptions bring out different features of the case but deciding which description best captures the choice, related practices, the role and priority of the values involved, and so on.

In the case of the criminal trial, the first question is whether some fact is relevant to determining the truth of the matter; accuracy about who committed a violation is the primary value. This is why we can identify unfair trials, kangaroo courts, and so on as trials and courts; although they flout the further values that we place on trials, they take identifying a violator as their primary outcome. Confessions are relevant evidence because they can be a reliable indicator of who committed the crime. That is their first presentation. Then we recognize that in the context of publicly accusing someone of a violation, condemning them, inflicting hard treatment, and so on, accuracy cannot be our only guiding value. Fairness and respect enter the picture and can restrain what kinds of evidence we use—not only in terms of how evidence is gathered, but removing prejudicial evidence, making sure evidence is presented to peers, and so forth. Undercutting a confession involves showing that it cannot serve its essential evidential function; excluding it involves showing that our other values constrain us from using it as evidence although we would still like to.

That’s why exclusion leaves a remainder that it will often make sense to account for in related practices. For example, sometimes excluded evidence is included if it is shown that it would have been discovered by legal means and sometimes evidence that is excluded for the purposes of a criminal trial that can be included in civil proceedings. In contrast, undercutting makes exclusion redundant; there’s no point in excluding a fake confession because it should already be taken out of the decision due to its lack of evidential value.

We can see the core of the concern even here because an undercut confession is still a good reason in many ways, just not as a confession. It is good reason to ask how misleading evidence was used, for asking the defendant what happened, and so on. We have been considering undercutting and excluding the confession as grounds for the specific ϕ of a jury determining legal guilt. The same facts that constituted reasons for the jury with respect to that act can constitute different kinds of reasons, for different agents, for different ϕ s.

We cannot identify whether a fact has the potential to undercut or exclude another reason without a fuller context about what decision that reason is for, including some stance on which values matter for that choice and in what order. Once that is settled, as in the trial case, then we can distinguish between undercutting and exclusion more clearly, although in a way that likely still requires judgment. This may be pragmatically difficult but it is not a reason to reject the distinction.

The final issue I address here concerns remainders and limitations. I argued above that commonsense morality makes space for decisions and practices that disqualify or exclude some considerations, and I gave many examples of such cases. But this might still seem like too much power; even if it’s true that our laws exclude some considerations, it can’t truly affect their normative force, as in the case of the animal suffering on the side of the road.

This has to do with the narrow scope of exclusionary defeat. The law disqualifies the dog's suffering as the grounds for me to *legally* stop but the dog's suffering still matters in a variety of ways. The fact that the dog is suffering arguably counts in favor of investigating whether I can exit safely and return, calling animal control, regretting my inability to help, advocating for more exceptions to traffic laws, and much else. The dog's suffering is excluded from being a reason to break traffic law. But the dog's suffering can matter in a variety of ways and still functions as a moral, practical reason. The main issue seems to be the law's supposed claim to practical supremacy, not exclusion; but legality doesn't always matter and the scope of the law's exclusion only extends to instances where legality matters.

This is why excluding and undercutting are so different. The ability to cancel a moral reason at whim would truly be surprising. Excluding is narrowly tailored to a particular choice in question and, as a moral matter, it may be the case that deciding to choose in a certain way and thereby exclude some consideration in fact requires compensatory acts elsewhere. Further, reasons that are excluded may under some conditions be so important that they ought to be conformed to.

This helps us understand a classic concern, recently reframed by Gur (2018, 22). Military commands standardly exclude serious moral considerations such as civilian casualties: even if a particular subordinate believes that a mission is too risky to innocents, they are required to obey because of the exclusionary force of the command. But this explanation only goes so far. If the command is to commit a heinous act, then the very kind of reason that was excluded under standard conditions, i.e. balancing military objectives against killing innocents, seems to obviously justify disobedience. This is a puzzle: how can such reasons be both excluded and count?

If exclusion was like canceling, then this would be impossible because whatever fact undercut the reason for the purposes of not counting for the subordinate would equally undercut the reason for the purposes of disobeying the command. But exclusion is about whether some fact counts for some act—under the right description. And “obey the command” and “commit a heinous act” are very different descriptions. We are aware that, for various reasons, we approach acts under different descriptions but can be mistaken about the most salient one, and so as good agents we are on the lookout for exceptions to our normal frameworks, especially under exceptional conditions like war. Subordinates are aware that sometimes they should just obey even when they disagree and sometimes they should reject a command; in modern militaries they are trained with just such a distinction, as they are made aware that they should not follow illegal orders.

Here's a general explanation of this phenomenon. The presentation of an act under a certain description highlights its role in a broader social practice and the values that we pursue through that practice. An agent ought to do what an excluded reason favors just in those conditions where that reason is so strong that it outweighs making the choice under the auspices of the practice in question (not when it outweighs the value of having the practice at all). When it is more important to ϕ than be a good soldier, one ought to ϕ even

when ϕ ing is based on reasons that would normally be excluded in soldiering. Such is the case when ϕ is avoiding an atrocity. This is distinct from such excluded considerations always being weighed by the agent. The reasons being set against each other are not the normal first order reasons but include the higher-order reasons we have to engage in a practice of this sort.

This sort of conflict is more complex but is also very familiar. As Raz describes them, they are relativized oughts: what I ought to do as a responsible person or what I ought to do as a soldier. More commonly, what I ought to do as a parent may come into conflict with what I ought to do as an employee. These cases are better described as conflicts between the oughts and roles because each is determined by a restricted set of considerations. The difficult reasoning, as Scanlon aptly describes it, is about balancing these different roles and sets of principles against each other rather than as a simple agglomeration of first-order reasons.

In conclusion, we often have reasons to act on the basis of restricted considerations. The idea of exclusionary defeat helps us make sense of such choices. Exclusion presents a more complex but also more accurate picture of our practical reasoning. Unlike Raz's original presentation which concerned motivation, exclusion should be understood as a justificatory matter which excludes normative reasons. An excluded reason does not count towards determining which option is justified for a choice of a specific type or with a certain character. This account of exclusionary reasons makes better sense of cases where exclusion appears in our practical reasoning, avoids the central problems with Raz's motivational account, and is consistent with widespread commonsense understandings of morality.

References

- Adams, N. P. (2018). The relational conception of practical authority, 37(5), 549-575.
- Alexander, L. (1990). Law and exclusionary reasons. *Philosophical Topics*, 18(1), 5-22.
- American Law Institute. (1962). *Model penal code: official draft and explanatory notes*. Philadelphia, Pa.: The American Law Institute.
- Buchanan, A. (2011). Reciprocal legitimation: Reframing the problem of legitimacy. *Philosophy, Politics & Economics*, 10(1), 5-19.
- Clarke, Jr., D. S. (1977). Exclusionary reasons. *Mind*, 86(342), 252-255.
- Dancy, J. (2004). *Ethics without principles*. Oxford: Oxford University Press.
- Darwall, S. (2010). Authority and reasons: Exclusionary and second-personal. *Ethics*, 120(2), 257-278.
- Dempsey, M. M. (2013). Victimless conduct and the *volenti* maxim: How consent works. *Criminal Law and Philosophy*, 7(1), 11-27.
- Edmundson, W. (1993). Rethinking exclusionary reasons: A second edition of Joseph Raz's

- “Practical reason and norms”. *Law and Philosophy*, 12(3), 329-343.
- Essert, C. (2012). A dilemma for protected reasons. *Law and Philosophy*, 31(1), 49-75.
- Ferrero, L. (2010). Decisions, diachronic autonomy & the division of deliberative labor. *Philosophers’ Imprint*, 10(2), 1-23.
- Gans, C. (1986). Mandatory rules and exclusionary reasons. *Philosophia*, 15(4), 373-394.
- Gur, N. (2018). *Legal directives and practical reasons*. Oxford: Oxford University Press.
- Henning, T. (2011). Why be yourself? Kantian respect and Frankfurtian identification. *The Philosophical Quarterly*, 61(245), 725-745.
- Herstein, O. J. (2017). Understanding standing: permission to deflect reasons. *Philosophical Studies*, 174(12), 3109-3132.
- Ho, H. L. (2016). The criminal trial, the rule of law and the exclusion of unlawfully obtained evidence. *Criminal Law and Philosophy*, 10(1), 109-131.
- Hurd, H. M. (1991). Challenging authority. *The Yale Law Journal*, 100(6), 1611-1677.
- Keren, A. (2014). Trust and belief: a preemptive reasons account. *Synthese*, 191(12), 2593-2615.
- Levy, Y. (2015). Normativity and self-relations. *Philosophical Studies*, 172(2), 359-374.
- Martin, A. M. (forthcoming). Personal bonds: Directed obligations without rights. *Philosophy and Phenomenological Research*, <http://doi.org/10.1111/phpr.12620>.
- Mian, E. (2002). The curious case of exclusionary reasons. *Canadian Journal of Law and Jurisprudence*, 15(1), 99-124.
- Moore, M. S. (1988). Authority, law, and Razian reasons. *Southern California Law Review*, 62(3/4), 827-896.
- Perry, S. R. (1988). Second-order reasons, uncertainty and legal theory. *Southern California Law Review*, 62(3/4), 913-994.
- Rabinowicz, W. and T. Rønnow-Rasmussen (2004). The Strike of the Demon: On Fitting Pro-attitudes and Value. *Ethics*, 114(3), 391-423.
- Rawls, J. (1999). *A theory of justice* (Rev. ed.). Cambridge, MA: Belknap Press.
- Raz, J. (1986). *The morality of freedom*. Oxford: Oxford University Press.
- Raz, J. (1988). Facing up: A reply. *Southern California Law Review*, 62(3/4), 1153-1235.
- Raz, J. (1999). *Practical reasons and norms* (2nd ed.). Princeton: Princeton University Press.
- Raz, J. (2006). The problem of authority: Revisiting the service conception. *Minnesota Law Review*, 90(4), 1003-1044.
- Ross, W. D. (2002). *The right and the good*. Ed. P. Stratton-Lake. Oxford: Clarendon Press.
- Scanlon, T. M. (1998). *What we owe to each other*. Cambridge, MA: Belknap Press.
- Scanlon, T. M. (2004). Reasons: A puzzling duality? In R. J. Wallace, P. Petit, S. Scheffler, M. Smith (Eds.), *Reason and value: Themes from the moral philosophy of Joseph Raz* (pp. 231-246). Oxford: Clarendon Press.
- Schauer, F. (1991). *Playing by the rules*. Oxford: Clarendon Press.
- Scheffler, S. (2004). Projects, relationships, and reasons. In R. J. Wallace, P. Petit, S. Scheffler, M. Smith (Eds.), *Reason and value: Themes from the moral philosophy of Joseph*

- Raz (pp. 247-269). Oxford: Clarendon Press.
- Stilz, A. (2013). Occupancy rights and the wrong of removal. *Philosophy & Public Affairs*, 41(4), 324-356.
- Sunstein, C. R. (2016). Beyond Cheneyism and Snowdenism. *The University of Chicago Law Review*, 83(1), 271-293.
- Tuomela, R. (2012). Group reasons. *Philosophical Issues*, 22(1), 402-418.
- Warner, R. (1995). Excluding reasons: Impossible comparisons and the law. *Oxford Journal of Legal Studies*, 15(3), 431-456.
- Whiting, D. (2017). Against second-order reasons. *Noûs*, 51(2), 398-420.