

# Possibility & Force

A Study in the Theory of Reasons



A thesis submitted for the degree of Doctor of Philosophy

Faculty of Law

University of Oxford

100,000 words

Binesh Hass

Wadham College

Trinity 2018

# Abstract

This thesis is a study in the theory of reasons. In the main, it comprises three chapters that investigate a single question from different angles, namely, the question of what it is that makes reasons possible.

In Chapter 1, I propose a theory of what makes reasons possible. The theory progresses by defending a version of the thesis that ought implies can against an argument by John Gardner. What emerges from this defence is a formal model of possibility for facts that qualify as reasons for action. This contributes a new analytical test to the existing literature on normativity in respect of the question of what it is for a fact to be a reason.

In Chapter 2, I take up the question of whether legal rules are possible reasons for action. They are, indeed, commonly regarded in this way. Yet are such rules reasons for action themselves (the reflexivity thesis) or is a statement of a rule a way of paraphrasing reasons that we may already have (the paraphrastic thesis)? I argue for a version of the paraphrastic thesis.

In Chapter 3, I examine an influential methodology in the philosophy of law that underpins some influential theories on how legal rules can be possible reasons for action. I focus specifically on conceptual analysis as the methodology behind the requirement of compliance in Joseph Raz's theory of mandatory norms.

This requirement holds that if such norms are to be reasons, then they must allow for the possibility that one can do as a reason requires one to do because it requires one to do it. I argue against this view, holding that the requirement is impossible on methodological grounds.

What unifies the chapters of this thesis is a concern for what makes reasons possible. The take-home message is threefold. First, not all possible facts are possible reasons (Chapter 1). Second, legal rules are not themselves possible reasons (Chapter 2). And third, if we misuse the methods of conceptual analysis, we will end up with impossible reasons on our hands (Chapter 3). My tactic is to begin broadly by examining facts as possible reasons, then narrow down to one kind of reasons, namely, legal ones, and then step back to diagnose one source of impossible reasons.

# Acknowledgments

I have been helped by many people in the course of this doctorate. First and foremost, I thank Timothy Endicott, who supervised this thesis, for his extraordinary patience and encouragement. Our meetings at Balliol left an indelible mark on the way I view the philosophy of law and I am grateful for the insights I gained as a result of our many wonderful conversations. I am also grateful to my first supervisor, Denis Galligan, whose generosity and warm welcome initiated me on this journey.

This thesis was examined by John Gardner, Kimberley Brownlee, and Adam Perry. I owe much to the incredible depth and care of their engagement with my work. Many of the most vital improvements were spurred by their comments. Julie Dickson, Nicos Stavropoulos, and Leslie Green have my thanks as well for their gruelling yet, all things considered, gentle criticisms over the years on the various versions of this doctorate.

I am also grateful to the late Derek Parfit for his kindness and the thoughtful attention he gave to my philosophical development when he must have been preoccupied with so much else at the time.

Dan Goldstick, from the University of Toronto, has been my mentor since 2003, even when he did not know it, and I thank him for his tutelage and

commitment in showing me how to refine my thoughts throughout this thesis and, indeed, on so many other occasions.

Nick Barber, Richard Bronaugh, Jonathan Dancy, Hasan Dindjer, Duncan Kennedy, Nicola Lacey, Scot Peterson, Fernanda Pirie, Joseph Raz, and Ali Razavi all commented on parts of this work and I am grateful to them for giving me their time and allowing me to benefit from their thoughts.

For their helpful correspondence and for guiding my understanding of some of the neuroscientific research on the nature of human reasoning, I owe debts of gratitude to Robin Dunbar, Mark Buckley, Steve Fleming, Christopher Summerfield, and Nick Yeung from the Department of Experimental Psychology at Oxford.

Beyond Oxford, I presented parts of this thesis at conferences and seminars at the University of Cambridge, Harvard University, Sciences Po, École Normale Supérieure, and the University of Macerata, and am grateful to the audiences at these conferences for their feedback. A shorter version of Chapter 3, 'The Methods of Normativity', was published in *The Canadian Journal of Law and Jurisprudence* in 2017, and I thank the editor and anonymous reviewers for their help in sharpening my argument.

I also want to express my thanks to my friends Felix-Anselm van Lier, Helen O'Horan, Edward Posnett, Robert Rapaport, and Margarita Vaysman, who gave Oxford its magic and made my time there so memorable. For their lifelong

camaraderie, Kouros Fathi, Padideh Hassanpour, and Aria Ilyad know that no written thanks will do. To my partner, Clara Hensen, I owe a vast constellation of thoughts and feelings that together add up to much more than thanks for helping me see this project through in its final and most difficult phases.

This thesis is dedicated to two living angels—Monireh Mohammadi, my mother, and Naz Ghanea, my friend. None of this would have been possible without their support.

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# Introduction

In humanity's general lust for knowledge, negative judgments, which are negative not merely on the basis of logical form but also on the basis of their content, do not stand in high regard: one regards them as jealous enemies of our unremitting drive straining for the expansion of our cognition, and it almost takes an apology to earn toleration for them, let alone favour and esteem. [...]

But where the limits of our possible cognition are very narrow, where the temptation to judge is great, where the illusion that presents itself is very deceptive, and where the disadvantage of error is very serious, there the **negative** in instruction, which serves merely to defend us from errors, is more important than many a positive teaching by means of which our cognition could be augmented. The **compulsion** through which the constant propensity to stray from certain rules is limited and finally eradicated is called **discipline**.<sup>1</sup>

This thesis is a study in the theory of reasons. Its objective is to answer the question of what it is that makes reasons possible. Its chief domains of reference are the philosophies of normativity and law. In the philosophy of normativity today, all possible reasons are typically regarded as facts and, what is more, all facts are regarded as possible reasons. Yet it strikes me as an error to see the universe of reasons as being as coextensive with the universe of facts. I view this thesis as a corrective reaction to this error. Philosophers grant that not all facts are reasons but typically do not grant that not all facts are possible reasons. The simple thought

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<sup>1</sup> I Kant, *Critique of Pure Reason* (P Guyer and A Wood trans., CUP 1997) A709/B737. Boldface emphases are Kant's.

that unifies the arguments of this thesis, however, is exactly that. It is my view that though all possible reasons are facts, not all facts are possible reasons. Some facts can never be reasons for us. The payoff of this argument, which runs throughout this work, is that by narrowing the range of facts that constitute possible reasons, we can better understand the reasons that apply to us.

The corrective reaction I am describing is broadly Kantian in spirit. Kant's critical project centred on 'disciplining', as he used the term, the ambitions that philosophers had associated with the use of reason. Before the advent of the critical project, philosophers were generally of the view that the reach of reason spanned over everything that was thinkable. However, in the aftermath of Kant's Copernican turn in the eighteenth century, the field of philosophy became earthlier. Reason became disciplined, for those who cared to learn about its nature, and remained restricted to certain kinds of propositions. The project of this thesis is advanced in roughly the same vein but within the parameters of the philosophies of normativity and, more specifically, of law. I begin by asking about the limits of the possibility of reasons at the most general level in Chapter 1, then narrow my focus in Chapter 2 to the possibility of legal reasons. Chapter 3 narrows the field even further by critiquing what I take to be an influential methodology in the philosophy of law that produces, on my understanding, impossible reasons. Impossible reasons, I will say, are no reasons at all.

To set the bearings of what follows and contextualise the arguments to come, let me say a bit about what I take to be the general subject of this thesis

before turning to the task of outlining its chapters. After these prefatory remarks, I will try to explain nearer the end of this introduction what I take to be the bigger philosophical picture that concerns this thesis and how, indeed, this thesis contributes to that picture.

First let me get clear on my understanding of the subject of *normativity*, for the term is relatively new to philosophy and may still mean different things to different readers. If I say that ‘poverty is wrong’ then we would be right to say that that is a *normative* statement because it is, in part, a statement about value. The term ‘wrong’, in other words, is *evaluative* and not *descriptive* because its use requires judgment about what is good and bad, and not merely about what is or is not the case as a matter of fact.<sup>2</sup> To give another example, if I say that ‘we have reason to believe the gap between the rich and the poor is widening’, that too is normative because it is a statement about what you and I have reason to believe and not merely a statement of the facts to which the belief refers. Normativity as we can see extends over types of *doing*—or action in a rather broad sense. To believe something after all is to do something, namely, to have in one’s mind certain ideas about how things are or ought to be in the world. We can also speak more strictly about action and say that it is about acting in the more literal or intuitive sense. So

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<sup>2</sup> Strictly speaking, it is not the usage of a term, such as ‘wrong’, that makes it evaluative or descriptive but rather if it refers to a fact that is evaluative in nature. Here and throughout this thesis, I write in a linguistic mode for ease of speech and not because the object of my enquiry is language. The one notable exception is my discussion in Chapter 2 of the *paraphrastic thesis*.

the statement that ‘slavery is wrong’ is bound to a judgment about the ills of slavery and is typically thought to also entail, though I am simplifying the story, a reason for action not to promote it, where ‘not to promote’ is an act. These examples reveal what some take to be a major insight into the nature of normativity, which is that it centres on reasons. The judgment that ‘poverty is wrong’, for instance, entails *giving reasons* for the view that poverty is an ill from an evaluative perspective.

An interesting point to bear in mind about the subject of normativity is that it seems to be a distinctly human reality. We seem to be alone in the animal world in our daily preoccupations with evaluative thought. When we believe something or act in some way, we often assess our reasons for doing so in essentially evaluative terms. We ask, ‘Was that a good reason to act in that way?’ or ‘Do I have a good reason to believe this?’ We even assess each other in evaluative ways—‘Does *she* have a good reason to believe him?’ or even ‘Why did he do *that*?’ Non-human animals, of course, act and believe as well but, as Christine Korsgaard puts it, they do not take themselves so seriously as to stop and ask if the grounds of their actions or beliefs are good ones.<sup>3</sup> Our fellow animals seem to be more light-hearted than us and, indeed, at least as far as we can tell, normativity is a way of being that is very much limited to humankind. And yet, I will suggest, it is surprisingly perplexing to model an impossibility theorem of reasons that excludes, as a conceptual matter, non-humans. For it is one thing for it to be possible to give

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<sup>3</sup> C Korsgaard, *The Sources of Normativity* (CUP 1996) § 3.2.1.

reasons for one's actions, that is to say, to explain that I did *this* because I believed *that*, and another entirely for it to be possible for a reason to bear upon me—to apply to me—regardless of whether or not I use it to guide and explain my actions. It seems obvious that possibility in the first case will log the capacity for explaining oneself and the grounds for why we do what we do. This is something that we can do, whereas most non-humans cannot. But possibility in the second case, that is, in the case of a reason applying to me, is not ordinarily regarded by philosophers as being a question that is settled on grounds of capacity. A key line of the argument that I will suggest in Chapter 1, however, advances exactly that thesis.

One may notice that the theoretical line to walk can become rather thin at points, for reasons are often explanatory rather than normative. The reason why pigs cannot fly is that they have no wings,<sup>4</sup> and yet that by itself is not a normative statement. It is an explanatory one. No doubt it can be made into a normative statement by changing its form: 'we have reason to believe that pigs cannot fly because they have no wings'. So again we now have a reason to do something, namely, to believe in that proposition on the basis of the observation that pigs have no wings. Yet the work of carefully demarcating the conceptual difference between normative and non-normative reasons is not the subject of this thesis. So whenever I speak of reasons, I mean to indicate the normative kind. Most of what I have to

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<sup>4</sup> J Broome, 'Reasons', in RJ Wallace and others (eds), *Reason and Value: Themes from the Moral Philosophy of Joseph Raz* (OUP 2006) 34.

say, moreover, will centre on the concept of action in the intuitively literal sense of what it is to *act* rather than to believe or feel. The reason for this limitation is that reasons for belief and reasons for emotion do not have the same kinds of properties as reasons for action and their differences sometimes generate very different conclusions. I will not have the space to make the distinctions adequately, so I focus on just one: action. This focus makes this work a study in *practical reason* rather than theoretical reason.<sup>5</sup>

Now thinking about normativity as being about reasons may seem unsatisfactory, for now the question becomes about what it is for something to be a reason.<sup>6</sup> The prevailing answer from the literature is that a reason is a fact that counts in favour of a belief or action or feeling—or any of these things in combination. The more distilled answer is that a reason is a relation of *favouring*.<sup>7</sup> If I were to say ‘I believe that human activity is partly responsible for climate change, and that is why I think we ought to have more regulations for CO<sub>2</sub> emissions’, then there are at least three favouring relations we can think about. The first is the fact

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<sup>5</sup> The basic distinction between practical and theoretical reason is that the former bears upon intention and action, whereas the latter is about belief. For discussions of this distinction and related issues, see G Harman, *Change in View* (MIT Press 1986) and M Bratman, *Intention, Plans, and Practical Reason* (Harvard University Press 1987).

<sup>6</sup> Some think that the seemingly unsatisfactory story about normativity being about reasons is a clue. John Broome, for instance, has argued that it is an error to think that reasons are fundamental to either normativity or even rationality. See J Broome, ‘Reason versus Ought’ (2015) 25 *Philosophical Issues* 80.

<sup>7</sup> On *favouring*, see Scanlon TM, 2004, ‘Reasons: A Puzzling Duality’ in RJ Wallace, S Scheffler, and M Smith (eds), *Reason and Value: Themes from the Moral Philosophy of Joseph Raz* (OUP 2004) and J Dancy ‘Enticing Reasons’ in the same volume, esp 112–16.

that my having that belief about human action and climate change is a fact that counts in favour of the subsequent belief that we ought to have more regulations for CO<sub>2</sub> emissions. The second is the relation of favouring between human activity and climate change, which is to say that human activity is a fact that promotes climate change—or, more idiomatically, human activity is a *reason for* climate change. The third relation of favouring is between the fact that (i) human activity is a reason for climate change and (ii) greater regulations for CO<sub>2</sub> emissions. That is, the fact that human activity is partly responsible for climate change is one that counts in favour of adopting greater regulations for CO<sub>2</sub> emissions. In all these cases, the fact that something exists counts in favour of something else existing. The finer point to bear here is that to speak of existence in this way is not, crucially, to say that the content of what exists is true. This may seem mysterious until we think about beliefs. The fact that I have that belief about human activity and climate change is true—I, indeed, have *that* belief. But it is a separate question as to whether the content of my belief is true, which will not depend on my having that belief but instead on whether human activity is actually contributing to climate change. The question of what is true is in this sense different from the question of what is a reason. But this is not always the case. Some things are reasons precisely because they are true and irrespective of whether you and I believe in them or not. Throughout this work, these descriptions of the different kinds of reasons which I have been setting out will come to have technical names and, indeed, where the distinctions become especially important they will bear repeating. But we need not get into the technicalities just yet. For now it will be enough to observe that in all

of the examples I have provided so far, when a fact counts in favour of an action or belief or feeling, the relation of favouring is normative. When facts stand in explanatory relations, on the other hand, as with the example in which the reason that pigs cannot fly is that they have no wings, they are not reasons in the normative sense.

One would be forgiven for wondering whether examining reasons in terms of relations of favouring is not just a way of pushing the question back, for what is it for a fact to favour anything at all? There is a lot of recent literature on the matter,<sup>8</sup> and yet it turns out that for the purpose of my work it suffices to treat the relation of favouring as primitive.<sup>9</sup> That is to say, I will treat it as an axiom. But how could this be? How could a work on the possibility of reasons leave out an account of what it is for facts to count in favour of anything, let alone action? No doubt the question is non-trivial. My answer to it is twofold. First, there is growing consensus in philosophy today that it is correct to treat favouring as being axiomatic for the study of normativity. This is another way of saying that no further reductions seem

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<sup>8</sup> For a general discussion, see J Dancy, *Ethics Without Principles* (OUP 2004) ch 3.

<sup>9</sup> It is not uncommon amongst philosophers to treat reasons and favouring axiomatically. Scanlon treats reasons *and* favouring as primitive: 'I will take the idea of a reason as primitive. Any attempt to explain what it is to be a reason for something seems to me to lead back to the same idea: a consideration that counts in favor of it. "Counts in favor how?" one might ask. "By providing a reason for it" seems to be the only answer.' T Scanlon, *What We Owe To Each Other* (Harvard University Press 1998). Parfit treats it similarly: 'Facts give us reasons, we might say, when they count in favour of our having some attitude, or our acting in some way. But 'counts in favour of' means roughly "gives a reason for". Like some other fundamental concepts ... the concept of a reason is indefinable.' D Parfit, *On What Matters* (OUP 2011) 31.

fruitful beyond the notion that ‘a reason for’ is ‘a fact that counts in favour of’. The second and rather separate answer to the question is that the work of this thesis conceptually precedes accounts of the relation of favouring. This thesis is about the possibility of even that relation, for the detailed properties of favouring will depend in part on how the possibility of reasons is set out in the first place.

A further curiosity about reasons is that they are said to be facts. But what, after all, is a fact? One influential conception in philosophy which has endured for almost a century has roughly the following form, which is derived from Russell: ‘For any true sentence  $S$ , there is some entity, or entities, which makes  $S$  true.’<sup>10</sup> What Russell refers to as ‘entities’, which can be abstract, are facts. Facts are therefore *truth-makers*. In the non-linguistic mode, the formulation takes the form that Wittgenstein gives to it: ‘What is the case—a fact—is the existence of states of affairs.’<sup>11</sup> So that this thesis is not buried in metaphysical worries that do not directly pertain to the concerns of practical reason, I will adopt the foregoing view of facts.<sup>12</sup> With these prefatory remarks about the subject of this thesis and its

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<sup>10</sup> B Russell, ‘The Philosophy of Logical Atomism’ in RC Marsh (ed), *Logic and Knowledge: Essays 1901–1950* (George Allen and Unwin 1956). The quoted formulation I use is drawn from J Speaks, ‘Wittgenstein on Facts and Objects: The Metaphysics of the *Tractatus*’ (unpublished, 2007).

<sup>11</sup> L Wittgenstein, *Tractatus Logic-Philosophicus* (DF Pears and BF McGuinness trans, Routledge 2001) § 2. Differences arise in the accounts that Russell and Wittgenstein give to the details of the views just described. See H Hochberg, ‘Truth, Facts, and Possibilities in the Correspondence Theories of Wittgenstein, Moore, and Russell’ in R Haller and J Brandl (eds), *Wittgenstein: Towards a Re-Evaluation* (JF Bergmann-Verlag 1990).

<sup>12</sup> Russell and Wittgenstein both ascribe to a fact-based correspondence theory of truth that gives rise to the view of facts just described. There are several competing accounts on the matter. For the classical alethic pluralist account, see C Wright, *Truth and Objectivity*

various presuppositions in hand, let me now turn to the task of describing the general shape of its chapters.

Chapter 1 lays the groundwork for a theory of the possibility of reasons. This is a theory about what makes reasons possible. I focus especially on reasons for action and target the problem of the ‘baseline of ability’, which is used to help determine the applicability of the thesis that ought implies can. The thesis, often ascribed to Kant, is relevant to normativity in that it indicates the form and relevance of a particular reason to an agent on the basis of the agent’s ability to do as that reason requires. The baseline specifies the relevant set of abilities and thus indirectly specifies the relevant set of reasons. The main idea to be examined is owed to John Gardner. He has argued that what matters in the determination of whether a reason is possible is if it can be followed by some conceivable human being. The development of this position is due to two theorems and much of the Chapter is accordingly concerned with their analysis. The first theorem tries to explain the possibility of reasons through the idea of a conceivable rational being. This idea has shortcomings, however, because it fails to account for the embodied nature of rational beings and the implications embodiment in turn has for normativity. That gives us the second theorem: that possible reasons are to be explained through the notion of what can be done by conceivable human beings.

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(Harvard University Press 1992); for the ‘slingshot’ argument against the correspondence theory, see D Davidson, ‘True to the Facts’ (1969) 66 *The Journal of Philosophy* 748.

Part of the task for Chapter 1 is to develop these key insights from Gardner but to show ultimately that following them to their logical conclusions gives us a conception of possibility that is quite different from what we find in Gardner. Yet this is only a preliminary task and the analysis of Gardner is used in the service of more far-reaching theses about the possibility of reasons generally.

In the course of the argument of Chapter 1, I derive modal notions of normative possibility and impossibility with general applicability. Their function is to give preliminary tests of normative possibility, addressing the question: ‘Is fact  $F$  a possible reason for agent  $X$ ?’ The modal notions can be regarded as models or first-tier tests. If a fact fits the model of normative possibility, then it might be a possible reason for one as far as that model is concerned. A second-tier test is introduced under the banner of what I come to call *normative necessity* (or ‘T7’), which is a union of two ideas. The first is the doctrine of normative embodiment, which is itself a combination of three different kinds of possibility: logical, empirical, and nomological. The second is the notion of normative consistency, an idea imported from set theory, which is about determining the grounds of a reason’s possibility (eg, ‘ $F$  is a possible legal reason but not a possible moral one’). A further development of Chapter 1 is the derivation of a principle I call *actual possibility*. Its chief use is to set the limits of the possibility of the reasons that apply to you and me through an assessment of the actual limits of our respective capacities. This principle is the positive outcome of a lengthy critique of a more demanding view that occurs under the banner of the principle of *perfect possibility*. Roughly, this

principle holds that it is possible for a fact to be a reason for you if it could be a reason for the conceivably perfect version of you. For various reasons, I will suggest that perfection ought to be set aside in favour of actuality as far as the possibility of reasons is concerned.

My concern in Chapter 2 narrows considerably to centre on certain kinds of legal rules, namely, those which are made deliberately and are said to be mandatory. Such rules are commonly regarded as being reasons for action but it is not always clear what kind of reasons it is possible for them to be. Are they reasons for action themselves (the *reflexivity thesis*) or are they instead merely paraphrased statements of other reasons for action that we may already have (the *paraphrastic thesis*)? I will argue for a version of the paraphrastic thesis. In doing so, considerable attention is given to the neglected but important puzzle of the opaqueness of rules, which arises out of what some regard as the gap between the evaluative grounds of legal rules and what makes them into reasons for action. After examining an important articulation of the puzzle in the work of Joseph Raz, I argue that the reflexivity thesis is (i) undermined by certain features of rule-making, in particular the essentially evaluative nature of the creative process involved in making rules, and (ii) defeated by the principle of presumptive sufficiency, which in the main holds that a reason is presumptively sufficient, that is to say, it provides good-enough grounds for an action, whenever it determines what must be done absent facts that cancel the reason or absent other reasons that outweigh it. The result is that it is possible for rules to be paraphrastic statements of reasons but, conversely,

impossible for them to be reasons in themselves. This gives us a clearer picture of the conditions of possibility for one specific but ubiquitous kind of reason for action.

Both Chapter 1 and 2 reflect an attempt to limit the range of possible reasons and by doing so enable the emergence of a more focussed corpus of normativity. Chapter 3 extends this project with a critique of a certain kind of methodology that encourages the production of impossible reasons in the first place and, as I say, impossible reasons are no reasons at all. The methodology I have in mind is a certain way of doing conceptual analysis but this, no doubt, is a charge that is familiar to legal philosophers. Over the past decade or so, a considerable literature has grown up around the field that has argued that legal philosophers ought to take some kind of naturalistic turn in their work on general jurisprudence. Deep disagreement characterises the debate and the soundbites that have emerged from it are now familiar to most who have done work on method in the philosophy of law.<sup>13</sup> My argument in Chapter 3 is broadly sympathetic to those philosophers

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<sup>13</sup> To take just one choice cut: ‘The real worry about jurisprudence is not that it is descriptive—*of course* it is (or tries to be)—but rather that it relies on two central argumentative devices—analyses of concepts and appeals to intuition—that are **epistemologically bankrupt**.’ B Leiter, *Naturalizing Jurisprudence: Essays on American Realism* (OUP 2007) 175, emphasis in italics is Leiter’s, boldface is mine. It is not clear how much Leiter really meant it, for before and after that claim he concedes space for at least a very modest form of conceptual analysis. See B Leiter, ‘Naturalized Jurisprudence and Legal Realism Revisited’ (2011) Public Law and Legal Theory Working Papers and B Leiter and MX Etchemendy, ‘Naturalism in Legal Philosophy’ (2017) *The Stanford Encyclopedia of Philosophy* <<https://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=lawphil-naturalism>> accessed 1 May 2017.

who have argued for greater empirical input at the foundations of legal philosophical theories of law. I describe the argument of Chapter 3 as an examination of the relationship between phenomenology and analytic method. But this may sound loftier than intended. In truth, I proceed in my examination of that relationship by way of a specific case study, namely, the requirement of compliance in Raz's theory of mandatory norms. Proceeding in this way provides a degree of specificity that is otherwise neglected in the relevant literature on method. This is the Chapter's first payoff. The second, in my view, is that it draws its insights from a broad and unorthodox array of sources to support its arguments. It goes as far astray as the philosophy of art and cognitive neuroscience to collect its truths. The point of this kind of adventurism is to highlight developments in proximate disciplines that may otherwise be overlooked by legal philosophers too busy or perhaps too focussed to appreciate them. Assembling these disparate insights into a single line of argument, I will suggest that the requirement of compliance is beset by a range of epistemological difficulties that are symptoms of a strained methodology. Where Chapter 1 diagnoses the problem of impossible reasons at its most abstract and foundational level, and Chapter 2 hones in on a specific case study of such reasons, Chapter 3 rounds off the thesis by identifying at least one possible source of the problem of impossible reasons.

The main arguments of this work are motivated by the general view that limiting the domain of reasons will help us better understand the reasons that we have. I will say that our theory of reasons should be *realistic* and earthly—that our

theory should emphasise the practicality of practical reason—rather than *ideal* and otherworldly, involving standards which we can never hope to satisfy. This position contrasts with the well-defended view in the philosophical literature that we would do well to aim ‘wholeheartedly for the stars so that we may hit the ceiling’ because it is sometimes helpful and even necessary to do so.<sup>14</sup> But I will claim that an important payoff of a realistic theory of reasons is that it forecloses, from a philosophical point of view, the possibility of being misguided in our beliefs and actions by reasons that may apply to ideal versions of ourselves but do not, in the here and now, apply to the actual versions of ourselves. A second important payoff of the earthly view of reasons that I will defend in this work is that a theory that qualifies fewer facts as being reasons is a theory that allows us to better specify, as an epistemic matter, when we do or do not follow the reasons that apply to us. If these payoffs are not enough, there is a third. In abandoning ideal theories of normativity, we emphasise the practicality of practical reason by making it about guiding our actual selves, with all our mortal limitations, rather than god-like

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<sup>14</sup> K Brownlee, ‘Moral Aspirations and Ideals’ (2010) 22 *Utilitas* 241, 252. Brownlee draws on N Rescher, *Ethical Idealism: An Inquiry into the Nature and Function of Ideals* (Berkeley 1987) and CAJ Coady, *Messy Morality: The Challenge of Politics* (OUP 2008) 59. Coady writes: ‘it may, as Rescher suggests, be a significant psychological fact about people that they can reach remarkably high levels of performance by aiming at a perfection or advanced state that they know or believe to be beyond them.’ Elsewhere, Brownlee also offers an extended argument in favour of the view that we have reasons to try to realise genuinely valuable ideals for their own sake and not merely because it would be useful to do so (as, for instance, a psychological matter); see also K Brownlee, ‘Reasons and ideals’ (2010) 151 *Philosophical Studies* 433.

versions of us whose limitations have been abstracted away and, in the process, become unrelatable for most of us.<sup>15</sup>

A theory's payoffs, of course, do not constitute refutations of rival views. Payoffs need only make it sufficiently attractive to motivate a different way of looking at things. The theory of reasons found in this thesis provides, I will claim, such an alternative. But what exactly are the advantages of the theory on offer here in comparison to other rival theories? What I have sketched above is no doubt too general to distinguish the particular theory in this work from its rivals except in very rough ways, such as ideal versus non-ideal treatments of reasons. I will leave the refinement of this sketch to Chapter 1, but for now, let me just elaborate a couple of further points that will help motivate Chapters 2 and 3, which may not seem as directly related to the task of grounding the domain of reasons in the here and now as Chapter 1. The key motivation in Chapter 2 in particular is to work out what kind of reasons it is possible for one very important class of reasons—mandatory legal rules—to be. The focus on such a specific kind of rule may seem peculiar in a theoretical context concerned with the possibility of reasons as a general matter. The focus, peculiar as it may seem, is instructive because the study of the specific occasions insights into the general. Chapter 2 shows that one kind of thing that

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<sup>15</sup> Relatability is not an issue of imagination. It is not the case that if I were more creative with my powers of imagination, the issues I have with ideal theory would resolve. I can well imagine what it would be like to be a bat, but I do not in that process ever inherit the reasons of a bat.

mandatory legal rules cannot be reasons for action themselves. I will claim that such rules can only be statements of other reasons for actions that we may already have. One implication of this argument is a constricting of the range of possible reasons for action. I will also claim that it is no mere constriction either, for it strikes at an idealised view of mandatory legal rules that imputes to them an almost mythic *causa sui* force through which, without reference to anything beyond themselves, they come to be reasons for us to act. And yet, I will argue, this view of such reasons is just not correct. The more humdrum, non-ideal theory of rules as reasons for action, the theory that correctly describes their status, holds that they are merely statements of other reasons. This motivation to challenge the idealisation of reasons that I am describing is extended by Chapter 3 into the realm of philosophical methodology. In that chapter, I work to show that a certain way of doing conceptual analysis in the philosophy of law produces impossible reasons, which seem like reasons but, in virtue of their impossibility, are no reasons at all. The motivational theme of this line of work is now likely to be familiar: I adopt a hardnosed point of view that favours an empirical treatment of defining the limits of possibility, and that contrasts with a philosophical methodology—as I say, a certain way of doing conceptual analysis—that produces an ideal view of practical reason that tends to produce impossible reasons.

Chapter 3 may doubtless seem more speculative than the rest of this thesis because of the way in which it deploys a disparate array of data from neuroscience and elsewhere in the midst of a mostly philosophical debate on the limits of

possibility in practical reason. It will help offset this impression by saying something about the way in which I think empirical evidence bears upon the philosophical study of practical reason. An important error to guard against in the context of making sense of the relationship between philosophy and the empirical sciences is the notion that there can be ‘presuppositionless inquiry’ or ‘facts that are theory-free’.<sup>16</sup> We need theories to make sense of facts and, if reasons are facts, we will need a theory of reasons that precedes any empirical investigation in order to be able to answer the classificatory or conceptual question of how to qualify some but not all facts as reasons.<sup>17</sup> But that observation is not the beginning and the end of the matter. Whichever theory we advance to allow us to make sense of the reasons-as-facts paradigm, it will need to be responsive to the usual pressures of accurately describing the phenomena that the theory purports to capture. When this consideration is brought to bear on reasons for action rather than, say, a phenomenon that concerns the natural sciences, the picture becomes somewhat more complicated. For it is intuitive why and how a theory in the natural sciences may need to be amended or perhaps discarded in light of the facts it purports to treat. But how should a theory of reasons react to the facts that *it* purports to treat? The answer found in Chapter 3 is that the theory must react according to the

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<sup>16</sup> B Leiter, ‘Beyond the Hart–Dworkin Debate’ (2003) 48 *American Journal of Jurisprudence* 17, 34. For context, see J Finnis, *Philosophy of Law – Collected Essays: Volume IV* (OUP 2011) 33 ff.

<sup>17</sup> See J Gardner, *Law as a Leap of Faith* (OUP 2012) ch 11 and esp 277 ff for an illuminating discussion of when the clipboard-bearing investigation of law can begin (namely, after the relevant conceptual or classificatory questions have been answered).

environment of facts in which the theory is intended to operate—that is to say, the theory must stand in harmony with, it must be consistent with, the empirical features of the agents for whom it purports to be a theory of reasons. This is a thought that is carried right through Chapters 1 and 2 but defended in greater detail, and with reliance on empirical data, in Chapter 3. It is the thought that a viable theory of reasons must be a theory of reasons *for us* in the ‘now and around here’, as Bernard Williams was often inclined to put it,<sup>18</sup> or as ‘earthlings’, as David Miller puts it,<sup>19</sup> and not a theory of reasons for gods or godlike versions of us on some other planet.

And so the question of the possible ways in which empirical questions might bear on the study of practical reason is answered, in part, by placing the appropriate empirical limits on the demands that a theory of reasons might entail for the agents for whom it is meant to be a theory. The phrase ‘appropriate empirical limits’ is doubtless made to bear the brunt of the theoretical burden, for what limits exactly are going to be appropriate? The answer to this question will depend on the level of our analysis. Sometimes the appropriate empirical limits are individualised, varying from person to person (Chapter 1), whereas at other times the appropriate limits will reflect the particularities of mind that come from having

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<sup>18</sup> B Williams, *In the Beginning Was the Deed* (G Hawthorne ed, Princeton University Press 2005), though Williams more frequently used this phrase in his discussions of realist and ideal theories of liberalism in particular.

<sup>19</sup> D Miller, ‘Political Philosophy for Earthlings’ in D Loepold and M Stears (eds), *Political Theory: Methods and Approaches* (OUP 2008).

human brains and bodies (Chapter 3). But at all times, where the limits are placed is a matter that is informed by the relevant empirical data. If, for example, the neuroscientific evidence shows that we human beings are incapable of doing something with our minds that a theory of reasons requires, then that theory of reasons will need to be adjusted in light of the evidence. The order of effect is from the data to theory, and this holds even after recognising that certain conceptual classifications are necessary before we are able to make sense of the data. That is the sense in which empirical questions ought to bear on the theory of reasons. Such questions function as frontline defences against ideal theories that would abstract too much away from the agents to whom they are meant to be applicable. Abstracting away *too much*, in other words, is what makes a theory inapplicable, and that unfortunate outcome is what the empirical data is supposed to flag and foreclose.

The stream of philosophy I have been describing, of course, is not the only way to think about practical reason. One can very well ask why a theory of reasons ought to be amended in light of any kind of empirical evidence that reveals the limits of our species' abilities, cognitive or otherwise. Indeed, one sometimes finds important defences of the exact opposite way of doing things in the philosophical literature. Working out what is better for us, for example, is sometimes said to require working out what is best first, a thesis that moves us towards ever greater

perfection in our ideals.<sup>20</sup> Under this sort of framework, it would not be clear why a theory of reasons ought to be amended if it entails cognitive requirements that do not, say, sit in harmony with the findings that happen to be current in cognitive science today. Indeed, perhaps the theory will be consistent with future findings. Thus, someone who thinks that our theories are not idealistic enough may perhaps be inclined, in the face of the existing data, supportive or otherwise, to retort: So what? Setting aside potentially corroborating findings in the future, why should a theory of reasons that is concerned with possibility be concerned with empirical possibility and not some other kind of possibility, such as rational possibility? The reply to this important line of thought will require a lengthier unpacking of the different kinds of possibility than what would be appropriate for an introductory chapter. It will turn out, or so I will argue, that empirical possibility is a necessary ingredient of making sense of possibility within the domain of practical reason. I will claim that it is untenable as a theoretical matter to cherry-pick the kinds of possibility we like and, in the process, exclude the kind that concerns empirical data. Cherry-picking in that way produces incomplete accounts of the realities that concern the theory of reasons. That is the short answer. The much longer answer comes in Chapter 1, which concludes that empirical possibility is, as I say, one necessary element of a tenable theory of reasons that includes other kinds of possibility. That conclusion is picked up again in Chapter 3, which deploys

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<sup>20</sup> J Gardner, 'The Evils of Privatization' (unpublished, University of Oxford 2017) 18.

empirical data as a restraint on any attempt of a theory of reasons to excessively abstract away the salient features of the agents for whom it is meant to be a theory.<sup>21</sup>

The story of reasons that arises from what I have been saying over the past couple of paragraphs can be represented as being ‘earthly’ rather than ‘otherworldly’ insofar as it subjects our theories to the pressures of empirical facts. I take that story to be, for the most part, descriptive rather than evaluative. That story is descriptive in that it explains why a theory of reasons whose ambitions include providing an accurate account of our realities as human beings who have reasons must also retain ambitions about accurately describing the limitations of being human rather than, say, some other species or kind of thing. I do not take the story to be evaluative, however, because it does not include an argument about how adopting the story of reasons found in this work would help us morally excel or live more virtuously.<sup>22</sup>

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<sup>21</sup> The view I am describing regards non-ideal theory—insofar as it is coextensive with, or significantly incorporates, empirical evidence—as a restraint on excessive abstraction. Some philosophers, even those who do not believe that ideal theory is a pre-requisite for ideal theory, regard the operation of restraint going in the opposite direction, namely, from ideal to non-ideal theory. See, for example, A Hamlin and Z Stemplowska, ‘Theory, Ideal Theory and the Theory of Ideals’ (2012) 10 *Political Studies Review* 48. I pick up on some of this literature in § 3.3 in Chapter 1, in my discussion of the principle of actual possibility.

<sup>22</sup> I will claim that the descriptive account of reasons found in this thesis is not evaluative—*excepting*, of course, the value that accurate descriptions of anything can be said to have. Importantly, a descriptive account, to borrow from Andrei Marmor, is one that does not ‘purport to justify or legitimize any aspect of its subject matter’ and, to that extent, it purports to be neutral about the moral issues that pertain to the subject matter such an account encompasses. A Marmor, ‘Legal Positivism: Still Descriptive and Morally Neutral’ (2006) 26 *Oxford Journal of Legal Studies* 683, where Marmor is in conversation with a number of legal philosophers who claim that legal positivism is a normative and not merely descriptive theory of law. I engage with some of this literature in Chapter 3, where I examine the relationship between conceptual analysis and empirical evidence.

Some may view this as a limitation of what is on offer in this work, and I am inclined to agree with that judgment. I imagine that a truly systematic theory of the possibility of reasons would elucidate the ways in which delineating that possibility enables us to live better moral lives by virtue of revealing a clearer picture of the reasons for action that we do and, just as importantly, do not have. A systematic delineation of the possibility of reasons should be able to tell me about the details of why, for instance, my status as a moral agent is not impugned if I do not act upon a fact which, in light of the delineation, turns out to be no reason for me to act at all. But the arguments of this thesis do not come close to realising that end because no attempt is made to draw out and defend the moral implications of the boundaries of possibility that are set out. This non-comprehensiveness is explained in turn by the fact that much energy was poured into the preliminary job of working out where even the boundaries of possibility need to be placed in the first place. This inevitably pushed the task of examining the subsequent moral implications of the boundaries to another day and another project.

Now some might think that the lapse in comprehensiveness just mentioned actually reflects an error about how to properly demarcate classificatory boundaries. I say, for instance, that I do not examine the moral implications of the limits of the possibility of reasons which I defend in this thesis and, what is more, that the work involved is descriptive rather than evaluative in nature. And yet in some areas of philosophy, the project I have been describing would be a non-starter. Some philosophers of law, for example, recognise that identifying the content of the

notion of the rule of law ‘requires moral judgment’,<sup>23</sup> which would include premises about the moral value that a legal system can have in regulating aspects of community life and the conduct of the community’s officials.<sup>24</sup> On this view, demarcating the idea of the rule of law is inextricable from the relevant moral judgments associated with placing the right moral premises at the foundations of the idea of the rule of law itself. With this view in mind, is there an analogous story to be told about the theory of reasons? Could it be that placing the foundations of a theory of reasons is an undertaking to be mixed, necessarily, with the work of describing and analysing certain moral issues that are prompted by the expansion or restriction of the possibility of reasons? We have reason to believe that the answer to this question is Yes. For the business of reasons is inextricably bound to the business of values, for reasons are not *just* facts, but facts that count in favour of action or belief—and vitally, the operation of *favouring* is one of valuation. But is every valuation *moral* valuation? Of course not. A situation in which I cannot win a game of chess is a reason for me—it is a fact that, for me, favours an attempt to force a draw but, other things being equal, my circumstances entail no question of moral value. Yet a theory of reasons would be impoverished indeed if it did not have something to say about the reasons for action that arise as a matter of us living together in communities, which is a condition that is ineradicably bound up with

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<sup>23</sup> T Endicott, ‘The Reason of the Law’ (2003) 48 *American Journal of Jurisprudence* 83. For an opposing view, see J Raz, *The Authority of Law* (OUP 1979) ch 11, esp 224 ff, where Raz argues that the rule of law is, at most, a ‘negative value’.

<sup>24</sup> Endicott, ‘The Reason of the Law’, 83.

some of the central questions of morality. And so the affirmative answer to the question of whether the story of reasons is analogous to that of the idea of the rule of law—namely, a story that necessarily requires moral judgment in the attempt to put together a viable theory of the subject matter—is one that counts against the work of this thesis. That is because this thesis does not offer much by way of in-depth analysis of the moral questions that are relevant, almost necessarily so, to the operation of practical reason in arguably its most important environment, that is, environments in which there are two or more agents. So that, doubtless, is a vital limitation of what is to come in this work. And yet the limitation I have just sketched also reveals just how expansive a theory of the possibility of reasons will need to be. So expansive, perhaps, that no single work could reasonably hope to offer a treatment of its numerous aspects.



This introductory chapter concludes my view about the bigger picture of this thesis. As the foregoing survey suggests, this is the thesis of a fox.<sup>25</sup> It is billed as a study in the theory of reasons and yet no attempt is made to offer an explicit theory of the genus of reasons. The explanation for this is a judgment about the subject matter. There are too many kinds of reasons and their collective scope too vast to allow for a satisfactory and non-trivial statement of the nature they might all share.

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<sup>25</sup> A fox is something between a squirrel and a hedgehog. Cf J Gardner, *Law as a Leap of Faith* (OUP 2012) vi, a proud ‘intellectual squirrel (way beyond a mere fox)’.

If reasons are facts, then the explanation is a good one, for a theory of reasons in general would be like a theory of facts in general. This study, at least, is not so ambitious. Having said that, certain theses are advanced and defended throughout this work that sit together under a single programme of research. The chief aim of this work is to specify the conditions of the possibility of reasons. For easy browsing and so that all the theses that serve that aim can be found in a single place, I present them below as a prefatory index of what is to come:

- A first-tier test for the possibility of a reason is that it must allow for one to do as it requires precisely because it requires one to do it *or*, to put it formally, it is possible for R to be a normative reason for X to  $\phi$  if and only if it is necessarily possible for X to  $\phi$  for R as a motivating reason. This is the principle of *positive normative possibility* (Chapter 1).
- As a second-tier test, whether a reason is possible is a question that is to be asked from within domains, such as the domain of law, and furthermore, doing as the reason requires must be nomologically possible. For any system of reasons for action  $\Gamma$ , X has a reason  $\Gamma\{R\}$  to  $\phi$  only if  $\Gamma\{R\}$  is (i) normatively consistent and (ii) it is nomologically possible for X to  $\phi$  for  $\Gamma\{R\}$ . This is the principle of *normative necessity* or *T7* (Chapter 1).
- The principle of *perfect possibility* ought to be rejected. This principle holds that you and I ought to be held up to the standards of what the perfect versions of us would have reason to do (Chapter 1).

- I supplant perfection with *actuality*. The reasons that apply to you and me derive, in part, from a hardnosed assessment of the actual limits of our capacities. This gives us the principle of *actual possibility*: R is a normative reason for the actual X to  $\phi$  only if the actual limits of X's capacities do not prevent X from  $\phi$ ing for R (Chapter 1).
- The relational view of reasons that dominates the study of practical reason today is to be amended in light of the principle of actual possibility so that every reason is a 'reason for' an actual person to do some act at some point in time (Chapter 1).
- Insofar as legal rules are possible reasons for action, they often—if not always—imply purported evaluative reasons. This impacts the puzzle of the opaqueness of rules, which holds that (i) reasons are evaluative and yet (ii) rules are reasons despite not being evaluative. Reconciling (i) and (ii) as part of the same theory of rules is said to be a puzzle. It turns out that it is only superficially a puzzle (Chapter 2).
- The view that legal rules are themselves reasons for action and not merely statements of what we have reason to do (the *reflexivity thesis*) is false because (i) it does not comport with certain features of rule-making and (ii) it is defeated by the principle of presumptive sufficiency (Chapter 2).
- Instead, legal rules are merely statements of other reasons (the *paraphrastic thesis*). This is the only sense in which it is possible for legal rules to be reasons (Chapter 2).

- For you and me to do as a legal rule requires of us is for us to act in conformity with its justifications, not in conformity with its literal requirements (Chapter 2).
- The normative concepts that are to feature in our reasoning about reasons, such as legal rules, must pass the test of validity (ie, logical possibility) *and* the test of soundness (ie, extra-logical possibility). When normative concepts do not pass either test, they sometimes produce impossible reasons (Chapter 3).
- An important example of a normative concept that does not pass the test of soundness is *compliance*. I *comply* with a reason when I do as it requires me to do because it requires me to do it, rather than for some other reason. The *requirement* of compliance in one influential theory of mandatory norms in the law is that it must be possible to comply with legal rules. And yet it turns out that it is impossible to do so (Chapter 3).
- Part of the explanation for the construction of an impossible normative concept (ie, compliance) is the misapplication of analytic method. The use of analytic method without sufficient regard for extra-logical possibility sometimes gives us concepts that have no practical use because they are extra-logically impossible. This result is a special demerit in the domain of practical reason, which is concerned with human action (Chapter 3).

# Chapter 1

## The Possibility of Reasons

### Abstract

This chapter presents a theory of possibility for the domain of normativity. This is a theory about what makes reasons possible. The theory progresses by defending a version of the thesis that ought implies can against an argument by John Gardner. What emerges from this defence is a model of possibility for facts that qualify as reasons for action. Thus, if a fact fits the model, it is a possible reason. This contributes a new analytical test to the existing literature on normativity in respect of the question of what it is for a fact to be a reason.

### § 1 Introduction

What follows is a theory of possibility in the domain of normativity. The problem that the theory targets is the so-called ‘baseline of ability’, which is used to partly determine the scope of the thesis that ought implies can.<sup>1</sup> The thesis is to be found as an important point of disagreement throughout a number of philosophy’s subfields. In moral philosophy, ‘ought implies can’ is used by some to establish a relation between abilities and obligations, while in epistemology, it helps to specify

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<sup>1</sup> J Gardner, ‘Reasons and Abilities: Some Preliminaries’ (2013) 58 *The American Journal of Jurisprudence* 63.

the plausibility of the doctrine of doxastic voluntarism,<sup>2</sup> which concerns the question of whether one has voluntary control over one's beliefs. The baseline of ability varies between subfields but in its general form it indicates the form and relevance of a particular reason to an agent on the basis of the agent's ability to do or believe as that reason requires. In theories of normativity, the thesis applies to what are called guiding or normative reasons.<sup>3</sup> These are reasons that apply to one regardless of whether one in fact proceeds to follow them. In a relatively recent essay on reasons and abilities, John Gardner has argued that what matters to the validity of a normative reason is whether it is possible for it to be followed by some conceivable human being.<sup>4</sup> This prompts an obvious but neglected line of inquiry: What is it for a *reason* to be possible? This is the question that concerns this chapter. What motivates it is in part the view, defended throughout this thesis, that possibility ought to be a necessary condition of the requirements of normativity. Accordingly, if an idea about how we should think about certain kinds of reasons is impossible, then it should not figure as a normative requirement.

The course of the argument is as follows. I will begin in § 2 with a study of Gardner's views on the baseline of ability for normativity. The initial focus will be

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<sup>2</sup> See, for example, E Sosa, E Villanueva, and B Reed (eds), *Epistemic Agency* (Blackwell 2013).

<sup>3</sup> The terms differ between writers but such reasons are generally used to contrast motivating reasons, which refer to the reasons used by an agent to do as the normative or guiding reasons require of one.

<sup>4</sup> Gardner, 'Reasons and Abilities', 72.

on two of his theorems. One tries to explain the possibility of having reasons through the idea of the conceivable rational being (§ 2.1) and the other through the idea of the conceivable human being (§ 2.2). In examining the first, I derive the modal notions of normative possibility and impossibility (§ 2.1.1). The function of these notions will be to give preliminary formal tests of possible and impossible reasons for one. The modal notions are like models in that they try to describe the structure of normative possibility and impossibility. So if a fact fits one of the models, then it is a possible or impossible reason for one as far as the model is concerned. But the models presuppose rationality because for one to take a fact as a reason means that one can engage with it as a reason. So I proceed in § 2.1.2 to explain that to speak of conceivable rational beings is in fact to speak of conceivable beings who necessarily have certain cognitive capacities (though, as we shall see, this is not sufficient for rationality). I then try to show that this shift is a significant development in thinking about possible reasons because it entails the controversial view that different cognitive capacities enable different possible reasons for one (§ 2.1.3). I will then introduce in § 2.1.4 an objection to the notion of conceivability in normativity in order to show that Gardner's first theorem is vulnerable to a reductio. Gardner's second theorem (§ 2.2) about the conceivable human being does not fare better against the reductio but it does contain the kernel to an important idea—namely, embodiment—that can be used to develop better theorems of normative possibility. In §§ 2.2.1 and 2.2.2 I will develop the idea of embodiment for normativity by combining three different kinds of possibility: empirical, logical, and nomological. A final ingredient for explaining the possibility

of reasons is the notion of domain consistency, an idea I import from set theory (§ 2.2.3). The product of all this is a theorem that tells us when a reason is possible for one. In § 3, I consider some of the theorem's implications for existing work in the philosophy of normativity, namely, the doctrine of compliance in Raz's theory of mandatory norms (§ 3.1), and the thesis, defended by Gardner and others, that disability does not disable the reasons that apply to one; it merely disables the ability to do as such reasons require (§ 3.2). This catchy thesis—that disability disables ability and not reasons—will be the subject of a lengthy critique. One of my objectives in this chapter is to show why the possibility of reasons sometimes hinges on ability, so it is important for my purpose to explain why the catchy thesis is sometimes false. The payoff of the critique is a fortified defence of an important insight of this chapter, namely, that understanding the normativity of a fact does not make it a reason for me. That is to say, not all normative relations are reason-relations. More is needed to make a fact into a possible reason.

Before I begin, it will help to state the assumptions that I do not defend and to clarify some terms that may arise and mean different things in other areas of philosophy. The main concern of this chapter is with the relation between agents and reasons for action (rather than reasons for belief or emotions). The question of the possibility of reasons is accordingly limited. It is to be investigated in relation to a hypothesised agent. So whenever I say that a reason is possible, I mean that it is possible for that reason to apply to some agent. Likewise, to say that a reason exists, in the present idiom, is to say that it is applicable to, or obtains for, some

agent. This framework fits with the relational view of reasons, which holds that a reason is always a reason for someone. Throughout this chapter, my concern will moreover almost exclusively be with normative and motivating reasons. Additionally, I will proceed on the basis of the view that reasons are facts. Thinking about reasons in this way may seem puzzling if one is to ask about what it is for a reason to be possible. For if reasons are facts, the question of this chapter may collapse into the even more foundational question of what it is for a fact to be possible (or its derivative, namely, what it is for a reason to be a certain kind of fact). Yet that is not how the present enquiry is to be interpreted. Strictly speaking, under the view that reasons are facts, the question is more accurately stated as: ‘What is it for a reason to be possible *for one*?’ The emphasis, then, will be on the possibility of normative relations between facts and agents. These relations are called reasons. Now thinking about reasons as facts is not the only way to think about them but it has been an influential way to do work on reasons, especially since the 1970s, the so-called age of discovery in the philosophy of normativity. Parfit conceptualises reasons somewhat differently as things that arise due to facts but admits that the relation is likely circular: that facts give us reasons; that a reason is a fact that counts in favour of something; that to count in favour of something is to give a reason for it; and so on. Parfit says that a good way to deal with the circularity of accounting for the concept of a reason is to just proceed by way of examples—

‘by getting people to think thoughts that use these concepts’.<sup>5</sup> I will accordingly treat the thesis that reasons are facts as primitive. As for agents, I will try to make do with the thin conception that they are things that can respond to reasons in the right way.

## § 2 Normative Possibility

We may begin by asking how we are to understand the direction of implication between ought and can. Is it that if a normative ‘ought’ applies to one, then it implies that it cannot be the case that one does not have the ability to do as the ought requires? Some of the recent work that has been done on the subject has prompted the relevance of the relation between reasons for action and what is humanly possible. And so, when we say that ‘if a normative “ought” applies to one, then it cannot be the case that one does not have the ability to do as the ought requires’, what is it that we mean by ‘one’? The question arises in a way for Gardner, who puts the point like this:

For the purposes of applying [the thesis that ought implies can] to me, are we interested in what I am able to do as things stand, or in what I would

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<sup>5</sup> D Parfit, *On What Matters* (OUP 2011) 31.

be able to do if only my will were not weak, or in what is humanly possible even though I would never personally be able to do it, or what?<sup>6</sup>

The concern with what is humanly possible in the context of what one ought to do is significant because it marks the beginning of an implicit theory of normative possibility. This is a theory about what kind of reasons are possible for our species and what kind of requirements are possible for those reasons.<sup>7</sup> I will try to make the theory explicit as I find it in the essay by Gardner and then proceed to develop what I take to be its most important insights.

Gardner's analysis of the relation between reasons and abilities is concerned primarily with various interpretations of 'ought' and 'can' in the context of the thesis that 'ought implies can'. Fourteen variations of the thesis are examined before he settles on the following, which I will call 'Gardner's theorems' or 'T1' and 'T2' for short:

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<sup>6</sup> Gardner, 'Reasons and Abilities', 64.

<sup>7</sup> The distinction between reasons and normative requirements might appear unfamiliar to some readers. In fact, it tracks the familiar distinction between first- and second-order reasons. For example, if I promise to buy you a coffee, I have given myself a first-order reason to buy you a coffee. The reason is the promise. On the standard view of promises in the philosophical literature, I have also given myself a second-order reason because it is a requirement of that particular kind of reason—namely, promissory reasons—that I must do as I promised to do because I promised to do it rather than for some other reasons. A theory of normative possibility explains both the possibility of reasons and the possibility of normative requirements.

T1: X has a reason to  $\phi$  only if at least one conceivable rational being has the capacity to  $\phi$  and X is a rational being.

T2: X has a reason to  $\phi$  only if at least one conceivable human being has the capacity to  $\phi$  and X is a human being.

T1 and T2 function as minimal necessary conditions of having a reason to do something. They are more detailed formulations of the general ‘ought implies can’ such that, in the case of T1, the statement ‘X ought to  $\phi$ ’ means that X has a reason to  $\phi$  only if at least one conceivable rational being has the capacity to  $\phi$  and X is a rational being. In the case of T2, we substitute the word ‘human’ for ‘rational’. In an obvious sense, Gardner’s theorems are to be interpreted with caution. It is clear, for instance, that it does not follow that one has a reason R to  $\phi$  merely because some conceivable rational or human being can  $\phi$ .<sup>8</sup> The theorems are to be read in the spirit of *ceteris paribus*. They follow if other things are equal, meaning that R is relevant to one, that it is justifiable, and so on. These are considerations I will not examine. My first task instead will be to examine the details of each theorem

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<sup>8</sup> In the Introduction I stated that I would proceed on the basis of the view that reasons are facts but that when I ask about the possibility of reasons, it is not meant to be a query about the possibility of facts. The focus, instead, is on possibility of the normative relation between (i) facts that are reasons and (ii) agents. That normative relation, indeed, is a *fact* and one can ask about how it can be possible. The notation throughout this chapter is accordingly read in this way. And hence, to ask about the possibility of ‘R’ as a reason for agent X to  $\phi$  is to ask about the possibility of the corresponding normative relation between R and X in relation to  $\phi$ ing and not the possibility of the fact R simpliciter. Some may think that this is an unnecessary clarification, for to say that R is a reason is always to say that it is a reason *for* some agent (the relational view of reasons).

and then test the significance of the difference between them. I will suggest that the arguments that motivate the move from T1 to T2 ought to also motivate a move away from T2. Beyond T2, I examine eight further formulations before suggesting that a certain T7 offers the best explanation of what it is for a reason to be possible for one. First, however, we must see how we get to T1.

### § 2.1 Conceivable normativity

An important motivation for deriving T1, as I see it, is to block the possibility that under some conditions daffodils, say, can be answerable to reasons. This may seem a peculiar priority but it is not. On the contrary, it is of significant theoretical importance. We must be able to explain why some things are excluded from the domain of normativity. Daffodils present a kind of test case for Gardner and I will follow him in trying to explain how a theory of normativity can be constituted such that it becomes impossible for daffodils to have reasons. It turns out that this task is more difficult than it seems. It is, however, theoretically worthwhile. By putting pressure on the explanation of why daffodils do not have reasons we will be able to better explain why we sometimes do or especially do not have reasons to do things. One question that I will ask near the end of the Chapter is whether, for instance, an individual with an obsessive-compulsive disorder has a reason not to behave compulsively. The answer, I will suggest, is that sometimes they do not have such

a reason. Explicating the case of the daffodil provides an opportunity to illustrate why.<sup>9</sup>

For Gardner, the capacity to engage with reasons is a necessary condition for being subject to reasons. Those things that lack this capacity likewise cannot be found rationally wanting and accordingly are not answerable to reasons. ‘Only the rational’, he co-writes elsewhere, ‘answer to reasons.’<sup>10</sup> Gardner’s argument rests on a description of two necessary features of reasons: first, that reasons are such that they are there to be conformed with; and second, that they are there to be used as guidance, that is to say, to be followed. An important condition of having a reason is that it must be logically possible to conform to it by following it. We might say that daffodils cannot satisfy the second condition and thus cannot be said to have reasons to do as they do. The language of conformity and guidance is Gardner’s but he does not explain what he means. It will help in later analysis to fill in the blanks on these terms. Elsewhere, in the philosophy of law, for instance, the terms compliance and conformity are used to describe the form of congruence between an agent’s reason for action (their motivating reason) and the reason for action that

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<sup>9</sup> Perhaps it is not obvious why the well-studied notion of intention cannot by itself block the theoretical possibility of a daffodil having reasons. Since daffodils cannot intend, they cannot act *for* reasons. Yet notice that sometimes we do things unintentionally, but that we would not conclude from this that the absence of intention in such cases entails that we do or do not have reasons to do as we do. We may well have had reasons to do what we unintentionally did in fact do. It seems therefore that possibility has priority over intention and not that intention is what makes it possible for a reason to apply to one.

<sup>10</sup> T Macklem and J Gardner, ‘Human Disability’ (2014) 25 King’s Law Journal 60, 76.

in fact applies to the agent in respect of that act regardless of whether the agent uses it as the basis of their action (the normative reason). We say that whenever a reason  $R$  requires that an agent  $X$  must  $\phi$ , then  $X$  complies with  $R$  if  $X$  takes  $R$  as their motivating reason to  $\phi$ . By contrast,  $X$  will conform to  $R$  if they  $\phi$  for any reason but  $R$  (or perhaps for no reason at all). In other words, whenever the normative and motivating reasons match in  $X$ 's mind, we have compliance; and whenever they do not match but  $X$  still  $\phi$ s, we have conformity.<sup>11</sup>

So what could it mean to say that daffodils are not subject to reasons? In the language of conformity and compliance, it means that it must be logically possible for a daffodil to comply, that is to say, it must be logically possible for the daffodil to do as a reason requires because that same reason requires it. But Gardner argues that this is not possible because daffodils cannot do things for reasons. Thus, although the actions of daffodils may be appraised according to reasons—their pushing up towards the light and away from the earth, for instance, can be *regarded* as being done for good reasons—and although daffodils might themselves become reasons for agents—for example, a reason for us to appreciate certain floral

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<sup>11</sup> Gardner himself prefers the language of guiding and explanatory reasons for normative and motivating reasons respectively but the terminological difference does not matter. Gardner's usage of these terms occur in the context of his theory of justification in the philosophy of criminal law. See Gardner, *Offences and Defences*, 91ff. For counter examples to the idea that motivating reasons are logically bound to normative ones, see EJ Bond, *Reason and Value* (CUP 1983) 29.

arrangements—neither observation entails the view that they have reasons to do things.

### § 2.1.1 Modal normativity

The case of the daffodil presents an opportunity to model an impossibility case for normativity. This will help in subsequent analysis to explain why some things do not have reasons and why some things do. Call this the model of normative impossibility (NI). It combines the notions of motivating and normative reasons, defined in the preceding section, with modality.

NI: If it is necessarily impossible for  $X$  to  $\phi$  for  $R$  (as a motivating reason), then it is necessarily impossible for  $R$  to be a normative reason for  $X$  to  $\phi$ .

NI will help us explain the status of the daffodil. First, however, we should derive a positive theorem of normative possibility (NP) with general applicability.

NP: It is possible for  $R$  to be a normative reason for  $X$  to  $\phi$  if and only if it is necessarily possible for  $X$  to  $\phi$  for  $R$  as a motivating reason.

Relatives of NP occur throughout the philosophy of normativity under the view that it is necessarily true of every motivating reason that the agent who acts on it, also believes it to be a normative reason for the act in question. Now in an obvious

sense, NP in its current form will not be able to withstand very many counterexamples. The fact that it pivots on a bidirectional ('if and only if', in contrast to T1, T2, and NI) makes it especially vulnerable in this regard. Just because, for instance, one takes something as a motivating reason to do some act does not mean that it is in fact a normative reason for one to do *that* act (though if one takes it as a motivating reason, then one is rationally required to believe it to be a normative reason). For example, the fact that the law prohibits parking on weekdays would not ordinarily be a reason for one to call one's grandmother. That law is not a reason to make that call. That is to say, the fact that one can take some reason as one's motivation for some act does not make that motivation a normative reason for that act. There are two ways to block the proliferation of counterexamples like this and other reductiones ad absurdum. The first is to observe that neither NP nor NI are to operate in isolation from a more detailed theorem of normative possibility, such as T1 or T2. The modal notions are to be viewed as first-tier tests of possibility whereas T1, T2 and others that I will either derive or develop are second-tier tests. Thus, a possible reason must satisfy both NP and some version of T (I will say a certain T7). The second way to block the proliferation of counterexamples and reductiones is to stipulate that NP is to follow from considerations that show that R is justifiable on sufficiently developed evaluative grounds. I will prefer the first route—combining NP or NI with a second-tier theorem of possibility such as T1 or T2—in order to avoid unnecessarily opening a front of argument about the relation between values and

reasons. For now, in any case, the chief utility of the modal notions is to help account for the place of daffodils vis-à-vis reasons.

### § 2.1.2 Rational capacities

It is significant that T1 is about the capacity for rationality. Remember that the theorem states that  $X$  has a reason to  $\phi$  only if at least one conceivable rational being has the capacity to  $\phi$  and  $X$  is a rational being. Gardner does not explain what he means by stipulating a rational being in this way or what it might mean to conceive of a rational being. It will be well to try to fill in the blanks. This will require a working definition of what it means to be rational.

Is it that a being is rational if it can grasp the introductory syllogisms of classical logic? Or perhaps the baseline of what constitutes rational ability is higher and a being is rational only if it can understand the proofs of, say, algebraic geometry? Conceptions of the rational being vary and tend to get controversial quickly. Some might say, Niko Kolodny calls them ‘rationalists’, that a rational being is to be ‘understood as one whose attitudes either stand in certain structural relations, or result from certain formal procedures’.<sup>12</sup> Much will depend on what one means by ‘certain structural relations’ or ‘certain formal procedures’. If we were

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<sup>12</sup> N Kolodny, ‘Why Be Rational?’ (2005) 114 *Mind* 509, 510. Kolodny is describing the view of Michael Smith in MA Smith, *The Moral Problem* (Blackwell 1994).

to adopt an empirical line of description, we would need an empirical account of the relevant forms of cognition that satisfy what we want to describe as ‘rational thought’. If our approach were instead formal, we would require a description of some system of logic, adherence to which we would call ‘rational’. Both orders of description are necessary for a decent statement of what it is to be a rational being. And, as one can see, the matter complicates rapidly and it will not do, against this backdrop of complication, to set a baseline of ability at ‘a conceivable rational being’ without explaining what that might mean. The view Kolodny calls ‘rationalist’, for example, belongs to Michael Smith, who pushes his point even further by saying that a necessary condition of being fully rational is being fully informed. Smith moreover notes that being fully informed is a separate matter from what it means to have certain structural or procedural relations between a being’s attitudes. For Smith, being fully informed is a matter of certain relations between facts and a being’s beliefs. This is a view that mirrors Rawls’ notion of deliberative rationality, which is about the ‘full awareness of the relevant facts’ coupled with a ‘careful consideration of the [relevant] consequences’.<sup>13</sup> A similar but more demanding view is found in Williams, who said that to be fully rational is to satisfy three conditions: (i) that one has no false beliefs in respect of the matter at hand; (ii) that one has all the relevant true beliefs in respect of the matter at hand; and (iii) that one deliberates correctly in respect of the matter at hand.<sup>14</sup> To add to these views, we

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<sup>13</sup> J Rawls, *A Theory of Justice* (Harvard University Press) 1971, 408 and §64.

<sup>14</sup> B Williams, *Moral Luck* (Cambridge University Press 1981) ch 8.

observe that there are different kinds of rationality. There is, for instance, practical and epistemic rationality, and being rational could constitute responding well to the right category of reasons or even responding well to what Parfit calls the right category of apparent reasons.<sup>15</sup>

The problem for T1 is that it must comport with some conception of what it is to be a rational being but says nothing about what that conception might be. But perhaps, in Gardner's defence, it does not matter for T1 how we conceive the rational being as long as we have some conception. Whatever conception we choose, we might say that it is a matter of plugging it into T1 and proceeding from there. If that is the route we wish to choose, however, T1 in its current form becomes a purely formal contribution in a debate that is mostly substantive. Its utility is accordingly limited. Perhaps that is a shortcoming. But suppose we grant that we have some reasonably sound and coherent conception of the rational being in mind when we posit T1. Would that mark the end of the theorem's difficulties? I suggest that it does not. Whatever conception of rationality we choose, we will see that to be rational is, in part, to have certain capacities. There will be other necessary features of the rational being; perhaps, as some have suggested, features such as being aware of the right facts. But it is unlikely to be controversial to postulate that at least one feature will constitute a set of capacities and that these capacities are going to be partly cognitive. If we grant this postulate, then it follows

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<sup>15</sup> Parfit, *On What Matters*, ch 5.

that a 'rational being' is at least in part a 'being with certain cognitive capacities'.

T1 becomes:

T1': X has a reason to  $\phi$  only if at least one conceivable being with certain cognitive capacities has the capacity to  $\phi$  and X is a being with those cognitive capacities.

Henceforth, wherever I say 'certain cognitive capacities', I will be referring to those capacities that partly constitute 'rationality'. This will work no matter the conception of rationality we choose so long as that conception concedes that certain cognitive capacities are necessary for rationality.

The shift from T1 to T1' may seem insignificant but it is not. In describing the details of T1', we are required to consider not some being in its general form but rather the specific capacities of specific beings. This follows from the replacement of 'a rational being' with 'a being with certain cognitive capacities'. We know that individuals exhibit varying cognitive capacities and that some are especially good at certain kinds of reasoning and bad at certain others. If one is sufficiently bad in some particular area of reasoning, we could say that the capacity to engage with that kind of reasoning is lacking. If one doubts that reasoning works like this, then the matter will turn on an empirical account of the cognitive bases of reasoning. What we do know seems to support the thesis that reasoning, like other

brain functions, is to some extent localised.<sup>16</sup> Neuroscientists call this the thesis of functional specialisation and it is advanced as a principal premise of the theory of modularity, one of two major theories of cortical processing.<sup>17</sup> An important feature of the functional specialisation thesis is that inabilities in one area of reasoning do not necessarily carry over to inabilities in others, and likewise with abilities. There are, for example, those who cannot reason—or at least reason very badly—about facts that are about emotions. Yet these same individuals can be exceptionally gifted in reasoning about mathematical facts. What follows is the observation that a single human being can be both rational and irrational between different domains, a conclusion that will strike many as intuitive (and comforting).

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<sup>16</sup> See, for example, E Heit, 'Brain Imaging, Forward Inference, and Theories of Reasoning' (2015) 8 *Frontiers in Human Neuroscience* 1 and O Houdé and N Tzourio-Mazoyer, 'Neural Foundations of Logical and Mathematical Cognition' (2003) 4 *Nature Reviews* 507; and MI Posner and others, 'Localization of Cognitive Operations in the Human Brain' (1988) 240 *Science* 1627.

<sup>17</sup> The other theory is called distributive processing and in the main it holds that the brain's regions are more interactive and are functionally interconnected rather than localised and specialised. For an overview, see A Caramazza and M Coltheart, 'Cognitive Neuropsychology twenty years on' (2006) 23 *Cognitive Neuropsychology* 3. In philosophy, Jerry Fodor has famously argued for a modularity theory of mind. See JA Fodor, *The Modularity of the Mind* (Boston: MIT Press, 1983) and JA Fodor, *The Mind Doesn't Work That Way* (MIT Press 2000). For a critical review, see S Schneider, 'Yes, It Does: A Diatribe on Jerry Fodor's *The Mind Doesn't Work That Way*' (2007) 13 *Psyche* 1. See also LM Antony, 'Rabbit-pots and Supernovas: On the Relevance of Psychological Data to Linguistic Theory' in A Barber (ed), *Epistemology of Language* (OUP 2003).

## § 2.1.3 Universe of reasoners

The kernel of these arguments is to be found in the reasoning Gardner brought to bear in safeguarding daffodils from the reach of reasons. Remember that Gardner argued that daffodils are not answerable to reasons because they lack the ability to engage with reasons. We said that if daffodils cannot engage with reasons, they cannot offer them in defence of what they do or do not do. They cannot be said to have reasons even though we might in our more imaginative moments appraise the things they do according to reasons. In this section, I will describe in more formal terms the case of the daffodil in juxtaposition to the case of a hypothetical person. This will also help prompt an objection to my interpretation of T1 and T1' that will be productive to try to meet. The formal apparatus to follow will become especially useful in § 3, where the implications of its use will illuminate further cases where reasons for one are not possible under certain conditions.

Let us suppose a set whose members are every reasoner and every reason. For rules of *membership* (what counts as a member) and *pairing* (how the members relate), we borrow once more from Gardner. We noted that a necessary condition of having a reason is that it must be logically possible to conform to it by following it and that to follow a reason is to have it as a motive in doing as it requires. Thus:

Membership: M1: Something is a reasoner only if it can follow a reason.

M2: Something is a reason only if it can be followed.

The rules of membership also generate a rule of pairing and a subordinate rule covering the use of the word ‘for’:

Pairing: P1: A reasoner X has a reason R to  $\phi$  *only if* X can  $\phi$  *for* R.

P1': To  $\phi$  *for* R is to *process* R *as a motive* in  $\phi$ ing.

I introduce the verb ‘process’ to metaphorically represent the capacity of responding to reality. The metaphor will suffice as a placeholder for our purposes because nothing will turn on what it is to *process*. A ‘motive’ is a technical term from the literature used to indicate considerations that are taken to favour an act.<sup>18</sup> Certain bizarre implications stemming from P1' are blocked by the rules of membership. For example, we are not permitted to infer that ‘rocks *process* the tide because they undergo abrasion’. We cannot infer this because rocks do not satisfy the rules of membership for this set. Likewise, it is safe to infer that daffodils are not members according to our rules. Now call this set with these rules of membership and pairing the *universe of reasoners and reasons* or ‘U’ for short. Its purpose will be to help us mark the boundaries of normativity in such a way that allows us in our later arguments to avoid the *reductio ad absurdum* that flowers and rocks have reasons to do things.

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<sup>18</sup> For a succinct treatment of competing interpretations of ‘motive’, see Stephen Darwall’s discussion of Jonathan Dancy’s *Practical Reality*: S Darwall, ‘Desires, Reasons, and Causes’ (2003) 67 *Philosophy and Phenomenological Research* 436.

According to the arguments already rehearsed, it appears that daffodils have no ability to engage with reasons and therefore have no reasons. But suppose that Vader, who is a reasoner, cannot follow just certain kinds of reasons. In our idiom, we could say that he does not *pair* with those reasons. Now suppose a subset of  $U$  that contains only those reasons that Vader cannot follow. Let ' $\lambda$ ' stand for this subset. We may say that Vader is not a member of  $\lambda$  in order to indicate that he does not have the ability to follow  $\lambda$ -reasons, which are the reasons in  $\lambda$ . To make the case more intuitive, suppose that  $\lambda$ -reasons are reasons about human emotions. Vader's case will not appear radically unfamiliar to us. After all, we are all likely to know of persons in our lives who are bad at reasoning about certain kinds of facts. Let us assume, for argument, that the bad ability is actually no ability at all and that the cause of this inability is that Vader lacks the relevant cognitive capacities or neural networks that would enable him to reason about emotions. His condition is like that of someone with achromatopsia, which is a congenital disorder that involves total colour blindness. A person with this condition does not have the genes that enable the perception of colour. Yet it does not follow from Vader's circumstances that he does not have other cognitive capacities that enable him to have other kinds of reasons, that is to say, to *pair* with other subsets of  $U$ . But it does follow that at least in respect of emotions, Vader appears much like the daffodil. Like the daffodil, Vader does not have the requisite cognitive capacities or neural networks that would allow him to respond to certain facts. Now we ask: Can Vader ever have a  $\lambda$ -reason  $R$  to  $\phi$ ?

If we accept the arguments that secured the conclusion that daffodils do not have reasons, and if we further accept the derivation of T1' from T1, then we must accept that the answer to this question is No. It does not follow that Vader has *no* reason at all to  $\phi$ . It does not even mean that Vader is not blameworthy if he does not  $\phi$  (assuming that  $\phi$ ing can be a required action for him by some other non- $\lambda$  reason).<sup>19</sup> It only means that *if* he ought to  $\phi$ , then the 'ought to  $\phi$ ' will not follow from any  $\lambda$ -reason. For the daffodil, lacking any and all capacity for thought (I assume), including therefore the capacity to engage with reasons, U is as  $\lambda$  is for Vader. For Vader,  $\lambda$  is as U is for the daffodil. If we accept T1', the fact that Vader lacks the cognitive capacities that are relevant to  $\lambda$  entails not having  $\lambda$ -reasons. In the case of the daffodil, the capacity to engage reasons is total and likewise the daffodil's lack of reasons is total. For Vader, the incapacity to engage with reasons is localised to one kind of reason,  $\lambda$ , and likewise his lack of reasons is localised to  $\lambda$ .

I will generalise the foregoing result in § 2.2. First, however, I must consider an important objection to the way I have interpreted T1 and T1' in order to construct a more detailed relation between Vader and  $\lambda$ - reasons.

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<sup>19</sup> Though some, including Gardner, believe that in the debate about whether ought implies can, blameworthiness is a red herring, an argument with which I agree. For a discussion of this issue, see: H Frankfurt, 'Alternate Possibilities and Moral Responsibility' (1969) 66 *The Journal of Philosophy* 829; PA Graham, 'Fischer on Blameworthiness and "Ought" Implies "Can"' (2011) 37 *Social Theory and Practice* 63; and JM Fischer, "'Ought-Implies-Can", Causal Determinism and Moral Responsibility' (2003) 63 *Analysis* 244.

#### § 2.1.4 The conceivability objection

The preceding section is likely to be considered controversial by some. A sceptic may object to the way in which I related the case of Vader, who lacked the ability to engage with a subset of U defined by  $\lambda$ , to the daffodil, which lacked the ability to engage with U in its entirety. I will consider two variants of this objection now and then proceed to explain the related matter of the motivation to shift the baseline of ability as a prerequisite for having reasons from T1, which is about a conceivable rational being, and T1', which is about a conceivable being with certain cognitive capacities, to T2, which is about a conceivable human being.

A sceptic might say that the case of Vader in respect of  $\lambda$  is not analogous to the case of the daffodil in respect of U. It might be said that the emphasis of T1 was the conceivability of at least one agent being able to  $\phi$  and of Vader being that kind of agent—rather than that agent simpliciter, a crucial point. But the daffodil was said to have no reason to  $\phi$  not merely because it could not  $\phi$  but because, as Gardner puts it, no conceivable daffodil can follow a reason, can use a reason for guidance, and so not being able to do this entails the conclusion that no daffodil, conceivable or actual, has reasons to do as it does.<sup>20</sup> That is to say, no conceivable daffodil can satisfy NP, which is to  $\phi$  for some motivating U-reason R; but some

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<sup>20</sup> Gardner, 'Abilities and Reasons', 69 fn 9.

conceivable version of Vader could  $\phi$  for  $\lambda$ -reason R. Call this the conceivability objection (CO).

CO: Suppose T1 or T2 or their derivatives. Given any R that requires X to  $\phi$ , it is possible to conceive of a being of X's kind that can  $\phi$  for R. Therefore, R is a possible reason for X to  $\phi$ .

I will consider two variants of this objection.

The objection in its general form is reasonable but based on an error about the relation between the nature of reasoning and the cognitive capacities that partly constitute one's ability to reason. Consider once more the specifics of T1. We said that X has a reason to  $\phi$  only if at least one conceivable rational being has the capacity to  $\phi$  and X is a rational being. Then we observed that to speak of a rational being is to speak of a being with certain cognitive capacities. This gave us T1'. But the other important part of T1 and T1' was the conceivability element. In respect of T1', then, what do we mean when we speak of a conceivable being with certain cognitive capacities? Do we mean a being who has 'certain cognitive capacities' across every domain of reasoning? If that is what we mean, then for any agent X, any R is a possible reason, for it seems always possible to conceive of such a being as X's point of comparison. Yet this is an implication we may wish to avoid if we

do not want our point of comparison to be a kind of deity of rationality.<sup>21</sup> Such a conception seems to me absurd because not only is no person like that but, more importantly, it is likely to be the case that no person can ever approximate that conception. For there are very likely to be facts about our world which we cannot comprehend as facts because we do not have the necessary means, cognitive or otherwise, to do so. This is a postulate about known unknowns, so to speak. If we cannot comprehend something as a fact, then we cannot comprehend it as a reason. Such postulated facts will likewise not comport with NP because it is a necessary condition of NP that in order for one to take something to be a reason (to have it as a motivating reason for one), one needs to be able to reason about it as a reason. Given that some such facts—facts which we cannot comprehend and therefore cannot take as reasons—exist for all of us, it follows that no conceivable being of any relevance could satisfy the foregoing interpretation of 'T1'. The interpretation, that is to say, in which the 'conceivable being' component of 'T1' is taken to mean an agent who has 'certain cognitive capacities' across all the subsets of U. Call this the first variant of the conceivability objection.

Yet this is not the only interpretation of the conceivability objection that is available. We may ask instead whether 'T1' could mean that although no conceivable agent of any relevance has cognitive capacities across every domain of

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<sup>21</sup> Those persuaded by Aristotle may object that that is precisely the relevant point of comparison, that is to say, the *telos* of the perfect human being is one constituted, in part, by a human being with perfect rationality. I will take up this objection at length in § 2.1.5.

reasons, some conceivable agent of relevance could have those capacities in the domain of reasons that concerns us in the determination of whether an agent has a reason derived from that domain. Suppose that such a reason  $R$  is a member of the subset  $\lambda$  and that  $R$  is regarded by some to be a reason for Vader to  $\phi$ . According to this second interpretation of the conceivability objection, the question is not whether a conceivable being has abilities across all of  $U$ . The sceptic might grant that no such being could be relevant to Vader. The question instead, they might urge, is whether one could conceive of a being that is the same kind as Vader who would have the cognitive capacities required to engage with  $\lambda$  specifically rather than  $U$  in its entirety. The sceptic might say that conceiving of such an agent will always be possible, for our powers of conception are really our powers of imagination and, as far as we can tell, these are limitless. To secure the status of a  $\lambda$ -reason for Vader requires just that we employ our imaginations in the right direction. This answer enables the view that any  $\lambda$ -reason  $R$  can be a reason for Vader even if he cannot reason about  $\lambda$  because it will still be possible to conceive of a version of Vader who has the right cognitive capacities to engage  $\lambda$ , and hence  $\phi$  for  $R$ .

This second variant of the conceivability objection seems plausible but depends on an open-ended notion of what is conceivable. The question arises in a way for Gardner, who puts it like this:

Which physical capacities should we attribute to the ideal rational being in setting the baseline of ability? Should we attribute to her the ability to leap

over the stars, such that ... the rest of us could have reasons to leap over the stars? Should we attribute to her the ability to travel back in time, such that ... the rest of us could have reason to travel back in time? Should we attribute to her the ability to give birth to herself, such that ... the rest of us could have reason to give birth to ourselves? It is pretty clear that the last of these abilities cannot be attributed to any rational being, or indeed to any being, for it is logically impossible to give birth to oneself. However, beyond that it is hard to know what to say.<sup>22</sup>

Gardner tries to resolve the difficulty he describes by shifting the baseline to what is conceivable for the embodied rational being, the relevant version of which, he says, is the human being. I will examine this move in the section to follow (§ 2.2) but for now it will be important to take what we can for our analysis of 'T1' and the conceivability objection. Since the emphasis of the objection is on conceivability, it is well to share Gardner's worries about the limits of what can be conceived. Should we accept the suggestion that the limits of what we can conceive for the ideal rational being are really just the limits of our imagination as long as the fictions that follow are logically possible? Perhaps, though this will require an explanation of what kind of logic we prefer for our imaginings. Would it be classical logic so that we proceed with our conceptions bound only by axioms such as non-contradiction? Or do we prefer, since we are concerned with the limits of imagination, to proceed

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<sup>22</sup> Gardner, 'Reasons and Abilities', 72.

with a stranger set of axioms such as those found in dialetheist logic so that not even non-contradiction could bind us? I do not know the answers to these questions but I doubt that the matter will be resolved by simply setting the limit at what is logically possible. What is logically possible is itself an issue of controversy and different logics set different parameters. What is more, resolving the question of which logic to select for stipulating the limits of what is logically possible does not resolve the underlying difficulty of setting limits on what can be conceived. To see this, consider once more the case of the daffodil. We said that the daffodil cannot satisfy NP because it cannot engage with reasons. If the only limits we set on what we can conceive, however, are the limits of logical possibility, then the argument against the possibility of daffodils with reasons unravels even if we proceed with just the basic axioms of classical logic. For it is certainly possible as a logical matter to conceive of a daffodil with limitless powers of reasoning. This daffodil could easily satisfy the requirements of NP. That is to say, it could take  $R$  to  $\phi$  as a motivating reason because it would be able to reason. No logic, as far as I am aware, could foreclose the coherence of this sort of conception. There would be nothing logically incoherent or impossible about it. Would it follow under such a conception that daffodils have reasons to do things, such as write great novels? If we accept T1', then the answer to this question is an unfortunate Yes. Since the conclusion is absurd, I suggest that T1' ought to be rejected. Without a theorem that can obstruct the possibility of daffodils with reasons, the domain of normativity risks proliferating out of control. We will then have to contend with all manner of conceivable flowers and rocks with powers of reason. To put the point more

seriously, I believe that to understand what it is to have reasons requires that we understand what it is not to have reasons. A theory of what reasons are possible for one must by implication also say something about what reasons are not possible for one. Yet we cannot offer such an explanation from within the frameworks of T1 and T1'. Both reduce to the absurd. We need therefore some other theorem, one that I will say is sensitive to the embodied nature of being human. Before developing that theorem, however, it will help to set aside a resilient view of human beings that has persisted since the days of Aristotle. This is the view that the standards to which we ought to hold ourselves, including normative standards about which reasons apply to us, are to be derived from a regulative ideal, namely, a conception of the form or *telos* of the human being, whose perfection involves perfect rationality. From this point of view, given the right conceivably perfect human being with perfect powers of rationality, everything is a possible reason.

#### § 2.1.5 Regulative ideals

It will not be enough for some readers to simply set aside the Aristotelian view just described because it seems absurd. The attraction of proceeding with a regulative ideal was built into T1', with its emphasis on conceivability:

T1': X has a reason to  $\phi$  only if at least one *conceivable* being with certain cognitive capacities has the capacity to  $\phi$  and X is that kind of being with those cognitive capacities.

I claimed that 'T1' would enable the view that for any  $X$ , any  $R$  is a possible reason, because it would always seem possible to conceive of such a being as  $X$ 's point of comparison. To some, that sounds like good news and it may even terminate the conceptual problem of the possibility of daffodils having reasons. Think, for instance, of the difference between daffodils and human beings. Would we not be right to say that if a human being were in a vegetative state, that would be terrible and depressing, yet if a daffodil were in such a state, then that would be exactly as it should be? This would allow us to say that the difference between the daffodil and the human being is that the human being would be held up to the mirror of perfection that befits human beings, which includes perfection in the exercise of rationality. Thus, every time we fall short of that perfection, though we are doomed to, that is a form of failure with which we must reckon.<sup>23</sup> Those moved by this Aristotelian picture may also claim that the regulative ideal of perfection in rationality also provides a folk-psychological explanation of the feelings of regret

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<sup>23</sup> For samples of the view that what matters is the ideally rational versions of ourselves, see: the discussion of the rationalist instrumentalist argument in S Finlay, 'The Obscurity of Internal Reasons' (2009) 9 *Philosophers' Imprint* 1, 3: 'R is a reason for  $A$  to  $\phi$  only if  $A$  would, if ideally rational, be motivated to  $\phi$  by believing R'. For other samples of this view, see B Williams, 'Internal and External Reasons' in B Williams, *Moral Luck* (CUP 1981) 106ff; T Scanlon, *What We Owe To Each Other* (Harvard University Press 1998) 20–32; J Brunero, 'McDowell on External Reasons' (2007) 16 *European Journal of Philosophy* 22, 24; M Smith, *The Moral Problem* (Blackwell 1994) 151, discussing the 'evaluating possible world' (which is 'what we, not as we actually are, but as we would be in a possible world in which we are fully rational', though one may interpret 'fully rational' as different from 'perfectly rational'); and, more generally, the discussion of ideal motive accounts of normative reasons in J Gert, *Brute Rationality - Normativity and Human Action* (CUP 2004) ch 6, esp 120ff on the 'simplified ideal motive account' ('A fact  $F$  is a reason for an agent  $A$  to  $\phi$  in circumstances  $C$  iff  $F$  could motivate  $A$  to  $\phi$  in  $C$ , iff  $A$  were perfectly rational').

we sometimes experience in our more reflective moments when we fall short of realising that ideal. Now it is clear from this brief description that the classical orthodoxy has a certain theoretical appeal, for it can do work on a few fronts. Yet there is at least one good reason to set it aside in formulating a model of possibility in the domain of reasons, and that is the epistemic payoff for normativity.<sup>24</sup>

The payoff comes by way of narrowing our philosophical focus on the range of facts that qualify as reasons for action. To see the utility of the move, it will help to first observe a few further details of the classical orthodoxy. Under the classical orthodoxy, reasons for action are everywhere and their heavy ubiquity often effects a reason for inaction, or at least seems to. For instance, I have a reason, as I write

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<sup>24</sup> Though I focus on the epistemic payoff for setting aside the classical orthodoxy, there are other reasons to do so as well. For example, some philosophers argue that there is a plurality of perfections for rationality with competing conceptions of excellence and failure—see, for instance, MG Titelbaum and M Kopec, 'When Rational Reasoners Reason Differently' in M Balcerak-Jackson and B Balcerak-Jackson (eds), *Reasoning: Essays on Theoretical and Practical Thinking* (OUP, forthcoming) and M Kopec, 'A Pluralistic Account of Epistemic Rationality' (2017) *Synthese* <<https://doi.org/10.1007/s11229-017-1388-x>> accessed 23 December 2017. And, of course, David Hume rejected the idea of perfection itself, saying that we could never come to have knowledge of it because it is not possible to conceive of perfection through induction. Of those who sought to use induction to that end, Hume said: 'they have aided the ascent of reason by the wings of imagination; otherwise they could not thus change their manner of inference, and argue from causes to effects; presuming, that a more perfect production than the present world would be more suitable to such perfect beings as the gods, and forgetting that they have no reason to ascribe to these celestial beings any perfection or any attribute, but what can be found in the present world', D Hume, *An Enquiry Concerning Human Understanding* (P Millican ed, OUP 2007) 101. Hume thus stands in opposition to many others, including Leibniz, whose conception of metaphysical perfection were required for his conception of God (for God is omniscient and omnipotent, both forms of perfection), see GW Leibniz, 'Essays on the Justice of God and the Freedom of Man' in GW Leibniz, *Theodicy* (A Farrer ed, EM Huggard tr, Open Court 2015), and see also the discussion in J Rawls, *Lectures on the History of Moral Philosophy* (B Harman ed, Harvard University Press 2000) 105ff (on Leibnizian perfectionism) and 217ff (on Kantian perfectionism).

this manuscript at this very moment, to be off the coast of Sicily looking for drowning migrants whom I can help, or in Ghouta digging out civilians from bombed-out buildings, or in almost any other disaster-stricken place but here at my desk writing a thesis on reasons. It is clear that the urgency and pressure of these other facts are real and normatively relevant to me on the basis of certain moral considerations that I presuppose, and yet it is equally clear that I have a reason, separate from these other facts, to regulate my attention. But it would hardly impress anyone—that is, if we were to accept the classical view in which I have a reason to be off the coast of Sicily, or in Ghouta, or another disaster-stricken place—to say that ‘I have other things to do right now, such as write an abstract treatise on reasons’ is something that could constitute a defeating or excluding reason in relation to those other possible reasons to be in those other places. That conclusion, however, is profoundly unsatisfying, for it would leave us with a sin-ridden view of ourselves in the domain of reasons in which we are interminably failing to live up to even the most rudimentary precepts of rationality, such as that one ought to do what one has most reason to do.<sup>25</sup> Let me suppose that being in

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<sup>25</sup> The claim that it is a basic precept of rationality that we ought to do what we have most reason to do, and that we interminably fail to live up to it, is not seriously affected by the ongoing disagreement in the literature about the normativity of reasons between *perspectivists* and *objectivists*. The former believe that this precept of rationality requires just that we do what we have most reason to do *according to the perspective, or point-of-view, that we inhabit or in view of the perspectival facts we possess*. Thus, if all of the evidence I have leads me to believe that writing an abstract treatise on reasons is weightier for the time being than being off the coast of Sicily looking for drowning people, then I ought to write my treatise. Objectivists, on the other hand, argue that what matters are all the normatively relevant facts when it comes to my situation, and that all such facts lead to the conclusion that I ought to be off the coast of Sicily, where I can help save lives, and that is more

those other places and helping out in the way I have described constitute weightier reasons than the reasons I have right now to do write this tract. What then? Now the way in which some philosophers deal with this condition has been to say that, though I have reasons to be off the coast of Sicily, and in Ghouta, and elsewhere, those reasons *do not constitute reasons to try to do those things* because it would be irrational to do so given my current circumstances.<sup>26</sup> Although the normative reasons to do those things persists, the reasons to try to do them do not necessarily materialise, according to this line of reasoning, on grounds of irrationality, unless by trying to do them I help myself to doing them, ie, helping drowning migrants, digging out civilians from the rubble, and so on.<sup>27</sup> Call this the *feasibility thesis*.

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important than a treatise on reasons. Yet not even the perspectivist, let alone the objectivist, would deny that we are constantly failing to do what we have reason to do, even when ‘what we have reason to do’ is perspectivally restrained. On perspectivism, see G Björnsson and S Finlay, ‘Metaethical contextualism defended’ (2010) 121 *Ethics* 7; on objectivism, see PA Graham, ‘In defense of objectivism about moral obligation’ (2010) 121 *Ethics* 88. For an overview of these disagreements that resolves in favour of perspectivism, see E Lord, ‘Acting for the Right Reasons, Ability, and Obligation’ in R Shafer-Landau (ed), *Oxford Studies in Metaethics – Volume 10* (OUP 2015).

<sup>26</sup> Others, such as Elizabeth Anscombe, would say that this is a problem of performance rather than judgment about which reasons apply to me. GEM Anscombe, *Intention* (Blackwell 1963): ‘the mistake is not one of judgment but of performance’ (56–57), grounded in ‘a difference of form between reasoning leading to action and reasoning for the truth of a conclusion’ (60). Yet it is not clear to me how this would not rupture the necessary connection between practical reasoning and the formation of intentions, which is the prevailing understanding in the study of practical reason today, so I leave Anscombe’s view to the side.

<sup>27</sup> Gardner, ‘Reasons and Abilities’, 73 deploys this line against David Copp, who objects to pointless reasons. D Copp, ‘“Ought Implies Can”, Blameworthiness, and the Principle of Alternate Possibilities’ (2008) 68 *Analysis* 69. Gardner writes: ‘It strikes [Copp] as wasteful of rational energy that people would have reasons for action that they cannot ever hope to conform to. But there need be no waste of rational energy involved. A reason to do something is not a reason to try to do it. One’s reason to do something yields a derivative reason to try to do it only if, by trying to do it, one will help oneself to do it.’

According to it, a reason for action is not an ipso facto reason to try to do the act for which it is a reason. Other considerations impact the derivative reason to try to do the actions for which I have reasons. It stands in contrast with both the classical Aristotelian view that the conclusion of practical reason is an action *itself*,<sup>28</sup> and the more modern view, held by many philosophers, that sound practical reasoning ought to result in the intention to do as the reason under deliberation requires one to do.<sup>29</sup>

Feasibility thesis: A reason R for X to  $\phi$  is a reason for X to try to  $\phi$  only if by trying to  $\phi$ , then (i) X actually  $\phi$ s or (ii) X progresses towards actually  $\phi$ ing.

For those who believe in it, the feasibility thesis is the basis for the explanation that, for instance, the reasons that wheelchair users might have to run the four-minute mile do not generate reasons to try to do so, because it would be irrational for them to do so, but the reasons to run the four-minute mile do generate a different set of

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<sup>28</sup> '[W]henever one thinks that every man ought to walk, and that one is a man oneself, straightaway one walks' (Aristotle, *The Movement of Animals*, 701a8-12 in *The Complete Works of Aristotle* (J Barnes ed, Princeton University Press 1984)). Most action theorists reject the Aristotelian thesis, though some, such as Sergio Tenenbaum and Michael Bratman, defend suitably qualified versions of it. See S Tenenbaum, 'The Conclusion of Practical Reason' in S Tenenbaum (ed), *Moral Psychology* (Rodopi 2007) and M Bratman, *Intention, Plans, and Practical Reason* (Harvard University Press 1987) 18–20. Bratman suggests that an intention is not merely an attitude or desire, but that it is in fact a form of progress towards doing what was required of one by practical reasoning, which marks an end to the process of deliberation. Thus, the formation of an intention, the view held by many action theorists, is in fact an action, which was Aristotle's view.

<sup>29</sup> For example, G Harman, 'Practical Reasoning' in A Mele (ed), *The Philosophy of Action* (OUP 1997) 168.

derivative reasons to lobby for developments in medical technology that would allow them to run it.

So, according to the feasibility thesis, if a reason requires that I  $\phi$ , then I ought to  $\phi$  only if by trying to  $\phi$  I end up, in fact,  $\phi$ ing or by trying to  $\phi$  I progress towards actually  $\phi$ ing. Let me assume that the thesis is satisfied, from the first-person perspective, with belief rather than knowledge, such that I need only believe that in trying to  $\phi$ , I will successfully  $\phi$ . Accordingly, the thesis will need to be paired with a workable decision theory, that is to say, a theory about the extent to which I can measure the accuracy of my beliefs and use those credence scores as part of my practical reasoning in deciding whether I ought to try to do as a reason requires of me. Without a credence model, it would not be clear to me, from an epistemic point of view, whether trying to  $\phi$  will actually result in my  $\phi$ ing or progressing towards  $\phi$ ing, which is the basis of the thesis' position on the question of whether I ought to  $\phi$ . Yet even fitting the feasibility thesis with a working credence model would leave it unequipped for the task of accounting for the prosaic uncertainty that attends the possibility that I cannot believe that I can do something until I try to do it. A worry for the thesis in this regard is that it sometimes generates loops in reasoning. Suppose, for instance, I believed in the feasibility thesis and asked myself if I ought to run a four-minute mile if I also believed that I had such a reason. The answer, on the basis the feasibility thesis, is Maybe. For I could not believe that I could run it unless I tried; and yet it is not the case that I should try, according to the thesis, unless I believed that I could run it. This, it seems, is a loop.

Now suppose further that I introduced a decision theory to this scenario and observed that the credence score my theory produced tipped the scale just barely in favour of believing that it is not the case that I ought to try. Would that be a conclusive reason not to try to run the four-minute mile? The answer again seems to be an inconclusive Maybe. For it would very much depend on how badly I desired to try in the first place, or what I thought of the merits of trying to run a four-minute mile for its own sake, or if I were a believer in Einstein's credo that without attempting the absurd, I would never achieve the seemingly impossible. So equipping the feasibility thesis with a credence model, which it needs in order to avoid loops, does not make things much better for it.<sup>30</sup>

These objections aside, it is worth emphasising that the manoeuvring just described under the feasibility thesis leaves the reasons for action in place—that is to say, it is still the case that though I have a reason for action to be off the coast of Sicily looking for drowning people, I have no reason to try to act upon that reason unless my trying helps me do that act. That reason to so act does not dissipate by shifting the emphasis on the feasibility of my attempting to do as it requires me to do. For it would indeed be feasible if I put my mind to it and set aside my current commitments (none of which seems as pressing as the examples I have provided),

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<sup>30</sup> It is worth noting that matters are made worse for the feasibility thesis if instead of belief we proceeded with the stronger threshold of knowledge. For then, assuming that I had a reason to run the four-minute mile, I would not be justified, according to thesis, to try to run it without knowing that I could do it or help myself do it. Given that the standards of knowledge are more stringent than those pertaining to belief, whatever holds for the latter will hold for the former and then some.

made the right travel arrangements, learned the complex set of skills I would need to help drowning people, and so on. What we see here is a certain kind of difficulty, not unfeasibility or irrationality. So shifting the weight of the argument for the classical orthodoxy from reasons for action to reasons for trying action sustains the condition of interminable failure in which we cannot live up to the standards of the reasons that apply to us. Notice, moreover, that the failure is not redressed by showing up off the coast of Sicily and helping drowning people. For even then, there is the real probability of a temporally endless continuum of further and more urgent humanitarian crises elsewhere. The balance of reasons will very likely resolve in favour of doing something other than what one happens to be doing at any given point in time. And so the continuum guarantees that we fail to live up to the reasons we have under this view no matter what we do—forever. On this account, I may never, in fact, do what I have most reason to do.<sup>31</sup>

Doubtless, some philosophers will argue that this is a bullet we must bite.

It is a permanent feature of our existence that we are doomed to fail in the face of

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<sup>31</sup> This is not to say that it is necessarily the case that we never do as the reasons that apply to us require us to do. We are able to do as all kinds of prosaic and non-prosaic reasons require from us all the time. Yet the question is whether we are able to do what we have *most* reason to do at any given point in time given the features of the world we inhabit, one example of which is the continuum of ever-greater humanitarian crises around the world. Though I have a reason to write this footnote right now, and I am able to conform to that reason and, by writing it right now, satisfy it, it is nevertheless the case, at least as it appears to me, that I have weightier reasons to do something else, such as help drowning people off the coast of Sicily. This, at least, is the line of reasoning that follows from having Aristotelian perfect rationality as the regulative ideal in the act of determining the reasons that apply to me.

at least most of the important reasons that apply to us no matter what we do and, moreover, that this is guaranteed by the demandingness of certain principles of rationality.<sup>32</sup> And yet it seems that, even if this conclusion were true, it would be of little if any practical significance at all, for whatever implications we might draw from it (such as the suggestion that, though we are doomed to failure, we must nevertheless try our best to do what we have reason to do), we could draw from the next-to-best or good-enough account of what we ought to do, which need not include demands that emanate from ideals of perfection. This returns me to what I said would be an epistemic payoff for setting aside the notion of perfect rationality as the relevant normative ideal in moving us closer to a model that can function as a test for the possibility of reasons. Perhaps I should add ‘in the real world’ to this last sentence—for philosophers have sometimes observed that ideal theory—for example, a theory in which we are held up to the standards that would apply to a deity of rationality—serve no instructive, deployable purpose in discussions about

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<sup>32</sup> This point needs to be distinguished from the observation that when reasons for actions conflict and that the grounds of the conflict are, for example, incommensurability, it will inevitably be the case that one reason or set of reasons will remain unsatisfied at least by our actions at a given point in time. Incommensurability, then, can be said to produce an enduring form of loss in the face of reasons’ demands. Another and more quotidian observation pertains to the varying ‘weights’ reasons have. If I have two conflicting sets of first-order reasons to undertake different courses of action, and if I resolve this conflict between these two by deciding to conform to the weightier set, then the defeated set reflects a form of loss in the face of reasons’ demands, too. This is because the defeated set does not cease to contain reasons. Now given that we constantly need to decide between different courses of action reflecting different sets of reasons, it is a permanent feature of our rational lives that we constantly fail to satisfy certain (defeated) reasons. Yet neither the story of incommensurability nor of the varying weights of reasons is a close analogue of the observation about interminably failing to satisfy a principle of rationality itself, which features in the story of the regulative idea of perfection in rationality.

what we ought, in fact, to do. Here is Joseph Heath, for instance, lamenting about the state of his sub-field's neglect of the live question of guiding our actual practice in the here and now:

I was reminded of the importance of this the other day, in the Department [of Philosophy at the University of Toronto], chatting with a few colleagues about current debates in just war theory. One of them, who has made rather substantial contributions to this literature, said 'Well, of course, the problem is that the mainstream position in the philosophical literature is so far removed from the actual practice of any nation-state ever, that nothing anyone says has any relevance to the real world.' At which point I said, 'Yeah, the environmental ethics literature is exactly the same,' and another colleague chimed in and said, 'Yeah, the global justice literature is exactly the same ... actually come to think of it, the whole egalitarianism literature is the same.' Thinking about it, I realized that this list could be extended quite considerably—of areas where philosophers have simply written themselves out of any and all policy discussions, by abstracting away so many features of the real world that there is nothing left to prevent the adoption of extremist views.<sup>33</sup>

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<sup>33</sup> J Heath, 'Kymlicka on interculturalism vs. multiculturalism' (*In Due Course – A Canadian Public Affairs Blog*, 18 March 2015) <<http://induecourse.ca/kymlicka-on-interculturalism-vs-multiculturalism>> accessed 11 August 2017.

The insight here is important. Not only is it that the perfect is the enemy of the good, but that it even seems that the perfect has no place in our actual practical reasoning in the here and now.<sup>34</sup> On reflection, this is unsurprising. Perfection, like other expressions of the extreme, provides limited practical guidance that one could put to use in deciding what we ought to do, which, lest we forget, is the aim of practical reasoning. I take this to unfortunately undermine the poetic suggestion that though the regulative ideal of perfect rationality proffers standards which we can never in our mortal coil hope to satisfy, we are still able to live by the light this ideal sheds, and that in orienting ourselves to that light, we do better. And yet it appears that this view is just not true.<sup>35</sup>

Now what could we gain from setting aside perfect rationality as our regulative ideal? I have suggested that the payoff will be epistemic, by which I have had in mind the simple implication that by narrowing down the range of possible reasons that apply to us, we can more precisely specify, as an epistemic matter, when

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<sup>34</sup> Incidentally, we find this view reflected in *King Lear*, of all plays, in the mouth of the Duke of Albany: ‘How far your eyes may pierce I cannot tell / Striving to better, oft we mar what’s well.’

<sup>35</sup> What I am rejecting is what Alan Hamlin and Zofia Stemplowska call the path-dependence argument, which they also reject. It holds that ‘more-ideal theory’ is a prerequisite for less-ideal theory if we conceive of the latter as identifying ‘short-term reforms’ that are subject to real-world feasibility restraints whose ‘long-term reforms’ aim at ‘more-ideal theory’ which have fewer, less stringent (or perhaps no) real-world feasibility constraints. Under such a view, it may seem that more-ideal theory is necessary for specifying the destination at which short-term, less-ideal reforms are aiming. Thus, if a short-term, less-ideal reform does not facilitate our moving towards the long-term, more-ideal state of affairs, then it ought to be set aside on account of its inconsistency or unhelpfulness. See A Hamlin and Z Stemplowska, ‘Theory, Ideal Theory and the Theory of Ideals’ (2012) 10 *Political Studies Review* 48, 59. I return to this paper in § 3.3 below.

we do or do not follow the reasons that apply to us. A further payoff is that by abandoning an ideal theory of normativity—or at least a feature of such a theory that is ideal—we emphasise the practicality of practical reason by giving it earthly coordinates that can guide us, with all our mortal limitations, rather than god-like versions of us whose limitations have been abstracted away and to whom most of us probably cannot relate.<sup>36</sup>

A payoff, epistemic or practical, of course, is not a refutation, and it need only make it sufficiently attractive to entertain a different way of looking at things. I think that what I have just described does just that. It enables us to proceed in a way that is less like science fiction and more like a hardnosed, investigative approach to figuring out which reasons actually apply to us. The result, of course, will be familiar: sometimes we live up to the standards of the reasons that apply to us, and sometimes we do not. When we do not, it will not be because we are not deities—because we are not perfect—but because we may have made a mistake somewhere along the line. Though the result of this line of reasoning is familiar, the implication for our understanding of practical reason is controversial because it means that whether a fact is a normative reason for me will partly depend on my

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<sup>36</sup> The claim about the unreliability of god-like versions of ourselves is not about a lapse in imagination that impacts our theory of reasons. It is not, in other words, an issue that resolves if only I could more creatively imagine how the actual me relates to the possible, god-like version of me.

circumstances.<sup>37</sup> I will now suggest that the details of my circumstances will, in turn, partly be defined by the features of my particular embodiment.

## § 2.2 Embodied normativity

The line of reasoning developed has thus far enabled the removal of one fiction-like presence from the domain of normativity, namely, perfect rationality as the regulative ideal in deciding when and why we have reasons. It is now time to meet a further challenge to the aim of making practical reason earthlier, and that is the challenge of disabling the conceptual possibility of daffodils with reasons, which we have seen poses strange problems for accounts of normativity. To recapitulate the difficulty, recall the pairing of the theorem of normative possibility (NP) and the conceivability objection to the possibility of daffodils with reasons (CO) from § 2.1.4:

NP: It is possible for R to be a normative reason for X to  $\phi$  iff it is necessarily possible for X to  $\phi$  for R as a motivating reason.

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<sup>37</sup> On the standard view, one's circumstances have the potential to mitigate blameworthiness. They do not terminate the status of facts as reasons, however. On my view, they do have the potential to terminate that status.

CO: Suppose T1 or T2 or their derivatives. Given any R that requires X to  $\phi$ , it is possible to conceive of a being of X's kind that can  $\phi$  for R. Therefore, R is a possible reason for X to  $\phi$ .

The objection was that no possible daffodil could have a reason to  $\phi$  not merely because no daffodil could  $\phi$  but because no daffodil, conceivable or actual, could follow a reason or to use it for guidance—that is to say, to treat a fact as a motivating reason. This gives us the conclusion that no daffodil has reasons to do as it does. Against this line, I argued that conceivability is no barrier at all to a conception in which it is possible for daffodils to reason, for there is nothing in the rules of classical logic, at least, that would forbid it. I took this as grounds for moving on from T1 and T1' and argued that we need a stronger theorem with a more robust impossibility threshold if we are to have a better conceptual grip of when a fact is a possible reason for us. I suggest that the stronger theorem will, in part, come by way of a greater attentiveness to the embodied nature of being human. Indeed, one way to resolve the strange conceptual problems that daffodils pose for normativity is to stipulate that the baseline of ability applies just to human beings. For Gardner, the problem comes, as he puts it, 'of the Kantian manoeuvre of abstracting the rational being from the human being'. If we are to investigate normativity and the relation between what one ought to do and what one can do, then we must see that the human being is the embodied rational being. Thus, we get Gardner's second theorem:

T2: X has a reason to  $\phi$  only if at least one conceivable human being has the capacity to  $\phi$  and X is a human being.

The remarks about Kant not appreciating the importance of the embodied nature of the rational being aside, the basis for the move to a concern for the ‘human being’ is unclear. If it is embodiment that concerns us, then the shift in our analysis ought to be from the ‘rational being’ to the ‘embodied rational being’. There are, after all, more things on this planet that are rational than just humans. Though perhaps it is redundant to lay emphasis on embodiment because to be a ‘being’, rational or otherwise, is already to be an embodied being. Perhaps, then, T2 is about emphasis in that it directs us in building a theory of normativity to reckon more fully with the properties of our humanity, one of which is embodiment. In this regard T2 has an advantage T1 and T1' did not have. But it shares with its predecessors a certain disadvantage. I will review both the advantage and disadvantage and suggest that the former can be used to neutralise the latter and that this move will in turn assist in formulating an improved theorem.

The advantage of T2, with its emphasis on embodiment, is that it requires an explication of what it is to be embodied and how embodiment relates to the question of what one ought to do. This is partly an empirical matter and, as I will try to show in resolving the conceivability objection, any move to more concretely bind the question of what one ought to do to an evidence-based account of what one can do is going to be welcome. Call this *embodiment advantage*.

The disadvantage of the transition to T2 is that it requires us to discard by fiat the problems associated with the notion of conceivable daffodils with powers of reason. This is to say that T2 just stipulates that our normative concerns extend just to human beings even if our normative theory is unintentionally more expansive. Resolution by fiat is unlikely to satisfy anyone. It will not do to assert that although our theory of normativity permits the possibility of daffodils with reasons, our concern is just with the implications of the theory for humans. In addition to the difficulty of trying to resolve a philosophical issue by fiat, the problem, as I say, is that if we cannot work out a theory of what reasons are impossible (reasons for daffodils, for example), then we risk a proliferation of possible reasons, including possible reasons for us human beings. Yet this would be theoretically undesirable. So we must resolve the problem that conceivable daffodils with powers of reason pose for our theories of normativity. Call this the *proliferation disadvantage*. It stems from the conceivability objection, which we were unable to resolve from within the framework of T1' (for remember that it was logically consistent to conceive of a daffodil with certain cognitive capacities that would enable it to satisfy NP).

Perhaps it will be possible to set the proliferation disadvantage aright by means of extending the embodiment advantage. The first step in doing so is to correct the leap from T1' to T2. Gardner is right to suggest that we should not follow Kant in abstracting the rational being from the embodied being and right also in suggesting that we should direct our attention to the importance of

embodiment for the philosophy of normativity. But it does not follow from this that our concern ought now to be the human being. Had we maintained T1, the concern would have become:

T2': X has a reason to  $\phi$  only if at least one conceivable embodied being has the capacity to  $\phi$  and X is an embodied being.

Yet this is an undesirable result because it seems to allow a single reason to cut across different kinds of embodied beings—different species even. Its imprecision is too severe. From T2' we would be warranted to say, for example, that a human being, X, has a reason to secrete several litres of microfibrinous slime (an act  $\phi$ ) as a defence mechanism against ocean predators only if at least one conceivable being (a hagfish, for those curious to know) has the capacity to do so and X is an embodied being, which it is. So this will not do. The formulation is partly rectified if we substitute 'that kind of being' for 'an embodied being' and, drawing on T1', further clarify that we mean an embodied being with certain cognitive capacities:

T2'': X has a reason to  $\phi$  only if at least one conceivable embodied being with certain cognitive capacities has the capacity to  $\phi$  and X is that kind of embodied being.

This is better but does not push the embodiment advantage far enough to resolve the conceivability objection and avoid the implications of the proliferation disadvantage. To wit, observe that it remains possible to coherently claim from within the framework of T2'' that a daffodil (X) possibly has a reason R to  $\phi$  since

at least one conceivable daffodil—one conceived of in harmony with the rules of some system of logic and endowed with the relevant powers of reason that would enable it to satisfy NP—has the capacity to  $\phi$ . In leaving this possibility open, T2" does not go far enough to resolve the conceivability objection.

To do better we must press the embodiment advantage further. The first step will be to recall our analysis of T1'. The contribution of T1' was its emphasis on reconstituting T1's 'conceivable rational being' as a 'conceivable being with certain cognitive capacities'. This development opens space in our theory of normativity for a specification of what it is to be a rational being. This will not necessarily give us a complete account of what it is to be rational, for as we observed alongside Williams and others, we will also require that other criteria be satisfied (for example, knowledge of certain relevant facts). But the development of T1' is a step in the right direction. Under its rubric we are permitted to bind 'cognitive capacities', for instance, to certain cortical processes and observe also that these processes vary between agents. Yet how does this development help us meet the conceivability objection? The answer in part requires that we read 'cognitive capacities' in a naturalistic way, that is to say, as referring to some biological facts about our embodied being. Another part of the answer requires that we appreciate the fact that no logic can foreclose the possibility of coherently conceiving of an agent that can in some absurd way satisfy the formal requirement of what it is to have a reason to do something. That is to say, the lesson to draw from the inadequacy of a theorem that demands just logical possibility as its criterion of

validity is that it can be easily manipulated with an imaginative conception of some possible world in which flowers have the requisite abilities to satisfy NP. Barring the suggestion that what we actually require is a footnote to one of the foregoing theorems that asks that we not manipulate it, we will need more robust criteria of validity. Logical possibility is just one but necessary part of these criteria. I will say that another part is empirical possibility.

### § 2.2.1 Empirical and logical possibility

The importance of empirical possibility derives in part from what we have already said about embodiment. Yet what is it for a reason for action for some existing agent to be empirically possible? The matter is analysed in different ways in the literature. Peter Graham, for example, writes of an agent's general and specific abilities in the context of his analysis of the moral 'ought': an arachnophobe, he writes, may have a general ability to touch a certain spider due to their ability to move their hands at will but they lack the specific ability to touch it because of their arachnophobia.<sup>38</sup> He couples the distinction between general and specific ability with a further distinction between general and specific opportunity: a professional tennis player, for instance, has the ability to play tennis in general but would not have the specific ability to play tennis if they were locked up somewhere without

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<sup>38</sup> PA Graham, "Ought" and Ability' (2011) 120 *The Philosophical Review* 337, 342.

the right paraphernalia. Ralph Wedgwood similarly writes that it is necessary for the truth of a proposition containing a (normative) ‘ought’ to be bound to a determination of whether an agent has the power to do as that ought requires them to do at a particular time.<sup>39</sup> Gardner instead writes of the relevance of an agent’s capacity and opportunity in the negative such that an impediment to the former refers to an attenuated aspect of the agent themselves (for example, their cowardice) while impediments to the latter refer to an agent’s circumstances (for example, their socioeconomic condition). These writers are indicating the same sort of concern, namely, that it is important at some level for there to be a reckoning with the empirical conditions of an agent in the determination of whether a normative construction of the form ‘X ought to  $\phi$ ’ is valid. Though Gardner does not use the notion of empirical possibility explicitly, its relevance is clearest in T2, when he binds normativity to the fact that we are embodied beings. The implications of this move will concern us shortly.

For now, we can try to begin to capture the relevance of empirical possibility for normativity with the following formulation:

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<sup>39</sup> R Wedgwood, ‘Rational “Ought” Implies “Can”’ (2013) 23 *Philosophical Issues* 70, 72. For an elaboration of Wedgwood’s semantics of ought, see R Wedgwood, *The Nature of Normativity* (OUP 2007) chs 4 and 5.

T3: X has a reason to  $\phi$  only if it is logically and empirically possible for X to  $\phi$  for that reason.<sup>40</sup>

Some might think that T3 steers us off course, for it is not clear what it means for it to be logically possible for X to  $\phi$  for that reason or even why it is a good idea to incorporate the strict limits of empirical possibility into a theorem of normativity. The motivation behind T3 is the thought that it ought to matter to a theory of normativity that certain things are possible and others impossible. As we observed in our work on the case of the daffodil, logic alone will not safeguard against the absurd. That was the moral of the lesson. One hypothesis to test is to see if empirical possibility can do the kind of safeguarding we want. Hence its inclusion in T3. The difficulty will be to formulate a version of empirical possibility that itself does not invite further absurdities.<sup>41</sup> What about logical possibility? What are the grounds of its inclusion? I will examine these issues now, beginning with logical possibility.

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<sup>40</sup> Some might think that it is redundant to say 'logically and empirically possible', for whatever is empirically possible is *a fortiori* logically possible. I will try to show the utility of separating the possibilities in the pages to follow.

<sup>41</sup> Gardner, 'Reasons and Abilities', 67–68: 'Should we use the absolute baseline, disregarding no impediments at all? ... The problem is that if we include all impediments to A's  $\phi$ -ing in deciding whether A has the ability to  $\phi$ , we have to include whatever makes it the case that A does not  $\phi$ . We have to include A's disinclination, her competing goals, her bad temper, her ignorance, her caprice, her difficult situation, her bad luck, etc. The upshot is that A has the ability to  $\phi$  only if A does  $\phi$ . But this [is] absurd.'

Observe that one advantage of T3 is that it brings us closer to a resolution of the conceivability objection that hounded T1, T2, and their derivatives. It does so by collapsing conceivability, which underpinned Gardner's theorems, into logical possibility.<sup>42</sup> Some might object that 'collapsing' conceivability into logical possibility is something of an overstatement since for something to be conceivable is just for it to be logically possible to be imagined.<sup>43</sup> But this is a different sort of thing than a product of the imagination that is logically possible. It may be logically possible to conceive of P, but it does not follow that P is logically possible. P might have all sorts of internal contradictions that render it logically impossible, the effect of which has no bearing on whether one can imagine P without making any logical errors. The logical possibility in this case operates on the capacity for conceiving (for example, we can say that if some condition about something is satisfied, then

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<sup>42</sup> For complications of this collapsing, see D Chalmers, 'Does Conceivability Entail Possibility?' in TS Gendler and J Hawthorne (eds), *Conceivability and Possibility* (OUP 2002). Conceivability is often run as a test for possibility in the epistemology of modality; see, for example, Williamson, *The Philosophy of Philosophy*, 163. See also S Yablo, 'Is Conceivability a Guide to Possibility?' (1993) 53 *Philosophy and Phenomenological Research* 1. For an overview of the different kinds of possibility, see I Hacking, 'Possibility' (1967) 76 *The Philosophical Review* 143 and I Hacking, 'All Kinds of Possibility' (1975) 84 *The Philosophical Review* 321. For analyses that are more directly relevant to normativity, see Wedgwood, 'Rational "Ought" Implies "Can"', 71–73 and Graham, "'Ought" and Ability', 341.

<sup>43</sup> Against this view, Hilary Putnam writes: 'we can perfectly imagine having experiences that would convince us (and that would make it rational to believe that) water isn't H<sub>2</sub>O. In that sense, it is conceivable that water isn't H<sub>2</sub>O. It is conceivable but it isn't logically possible! Conceivability is no proof of logical possibility.' H Putnam, *Mind, Language and Reality, Philosophical Papers*, vol 2 (CUP 1975) 233. For an opposing view, see S Kripke, *Naming and Necessity* (Oxford: Basil Blackwell, 1990) 122–25.

conceiving of it is logically possible).<sup>44</sup> But it does not operate on the products of conceivability. This, then, is not the kind of relation we want between the two notions. What we want is a logical possibility that operates on both the capacity for conceiving something and also on the products of that capacity. Implementing this gives us T4:

T4: X has a reason R to  $\phi$  only if it is (i) logically possible to conceive of R, (ii) R is logically possible, and (iii) it is empirically possible for X to  $\phi$  for R.

I have added the letter 'R' in order to avoid repeating the phrase 'that same reason'. The formulation in general is unfortunately cumbersome but it will do for the time being. To avoid also being cumbersome in what follows, whenever I say 'logically possible' I will mean the combination of T4's (i) and (ii). A foreseeable objection is that the capacity for conceivability has nothing to do with logical possibility, a point to which I will turn in § 2.2.2. Furthermore, it will be necessary later on to examine elements (i) and (ii) in greater detail on their own, so call them LP<sub>1</sub> and LP<sub>2</sub> respectively. And finally, T4 does not dispute that many of the things we conceive of in our imaginations are unlikely to be faithful to logical axioms. This

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<sup>44</sup> It is perhaps not intuitive how the capacity for conceivability could depend on logical possibility. I address this issue under the heading of nomological possibility in § 2.2.2.

unfaithfulness is often a good thing. But these products of the imagination are not of the domain of normativity.

Some might wonder why. Why, indeed, ought one to be logical for the purpose of normativity? Why is logical possibility a necessary condition of T4? Why should logical possibility be a necessary condition for normativity more generally? For much of this chapter I have tried to show that logical possibility is not sufficient for the purpose of securing the foundations of a theorem of normativity whose purpose is to show when one has a reason. And now I have claimed that it is necessary. Must I now defend its inclusion in T4?

The question of why logical possibility is a necessary condition of normativity is related to the question of why one ought to be rational. I mention this because one might be tempted to rely on existing accounts of why one ought to be rational for the purpose of defending the claim that normativity ought to be logical.<sup>45</sup> Some of the reasoning that counts in favour of the former is transitive for the latter. To see this, we must first mark the difference between rational and logical necessities. For what is necessary is always possible and it is easier to establish the case for logical possibility in the domain of normativity through necessity. We observe that it is logically necessary that if all As are Bs and all Bs are C, then all

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<sup>45</sup> On this subject, see Kolodny, 'Why Be Rational' for arguments in support of the view that there are no reasons to be rational in general. For replies, see: J Broome, 'Wide or Narrow Scope?' (2007) 116 *Mind* 361 and K Setiya, 'Cognitivism About Instrumental Rationality' (2007) 117 *Ethics* 649.

As are Cs. It is rationally necessary that if one believes that all As are Bs and all Bs are Cs, then one ought to believe that all As are Cs.<sup>46</sup> It is, however, not inevitable that one will believe this conclusion.<sup>47</sup> Some other belief that one may have (perhaps about the undesirable implications of believing C) can stop one from believing C. It is indeed possible to fail to believe what follows from a syllogism, meaning that logic does not entail rationality—otherwise, as Korsgaard puts it, it would be impossible for one to fail to believe what is logically necessary. We know, however, that we fail in this way all the time. And yet it stands that whenever one is rational, one is necessarily logical. So conceived, rationality is partly a psychological state while logic is a kind of formal procedure. Whenever the procedure figures in one's cognition in the right way—for example, the cognitive processes involved in syllogistic reasoning—we can say that one is to that extent logical. And so if we ought to be rational, then in being rational we are also to that extent logical. This does not yet show that normativity requires logical possibility as a necessary condition yet but we are getting closer.

Some philosophers believe that the connection between logic and rationality is constitutive, so to say that one is a condition of the other may seem

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<sup>46</sup> Assuming the absence of complications such as, for example, the possibility that the evidence for 'All As are Bs' is independent of the evidence for 'All Bs are Cs', and that each is 70% probable, then, absent other evidence, it is likelier than not that 'All As are Cs' is not true, for the conjunction of the two premises is just 49% probable.

<sup>47</sup> For a discussion of these ideas, see C Korsgaard, *The Constitution of Agency* (OUP 2008) 26–68.

puzzling. This particular question of the relation between the two will not make a difference for my present purpose. If they are constitutive, then the argument I will make should encounter less resistance. The argument is as follows. Normativity is in part concerned with instrumental rationality. According to some philosophers, this is amongst the least controversial substantive ideas of normativity.<sup>48</sup> Instrumental rationality is concerned with the structural or formal relation between the ends an agent intends and the means they ought to take to achieve their ends. The instrumental principle states that one is rationally required to take the necessary means to achieve one's ends.<sup>49</sup> This is a process that is partly regulated by reasons and (or) oughts.<sup>50</sup> If logic is a condition of rationality—or if logic and

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<sup>48</sup> See, for example, RJ Wallace, 'Practical Reason' in EN Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Summer 2014 Edition) § 4 <<http://plato.stanford.edu/archives/sum2014/entries/practical-reason>> accessed 8 May 2016.

<sup>49</sup> It does not follow from it that one has an undefeated or conclusive reason to take the means to the ends one intends. For it may be that the ends one intends should not have been intended to begin with, or that other more valuable ends require that one take different means. For a discussion of this issue, see J Raz, 'The Myth of Instrumental Rationality' (2005) 1 *Journal of Ethics and Social Philosophy* 1. What *is* conclusive is that one has a reason to take those means; and that, *if* the end is required, so are those means.

<sup>50</sup> There is discord in the philosophy of normativity about the place of reasons. John Broome, for instance, has argued that the primacy of reasons in contemporary work on the subject is a dogma that has taken root over the last few decades. Against Raz, Skorupski, and others, Broome argues that reasons are fundamental neither to the ontology of normativity nor rationality. He argues that what is fundamental is the ontology of ought. I do not think that I need to take a position on this issue in order to posit logical possibility as a necessary condition of normativity. For both reasons and oughts are bound up with logical possibility in that they require, when considered correctly, a system of consistency, and to the extent that logic is a system of consistency then to the same extent are the ontologies of ought and reasons logical. Broome argues against the primacy of reasons in several of his texts. For a recent statement, see J Broome, 'Reason versus Ought' (2015) 25 *Philosophical Issues* 80.

rationality are mutually constitutive—then it follows that normativity is also concerned to that extent with what it is for a reason to be logically possible. This seems to be the route of least resistance to establishing the claim that logical possibility is a necessary component of normative possibility.

### § 2.2.2 Nomological possibility

Yet T4 uses logical possibility in two ways. We had LP<sub>1</sub>, which was about the logical possibility of conceiving R; and we had LP<sub>2</sub>, which was about the logical possibility of R itself. Perhaps it is not obvious how LP<sub>1</sub> is relevant to a theorem of normativity. For a reason to figure in one's mind is a cognitive act whose possibility is of a biological rather than logical kind. Indeed some philosophers have described this kind of possibility as nomological rather than logical.<sup>51</sup> Something is

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<sup>51</sup> Gendler and Hawthorne, *Conceivability and Possibility*, 4. Some philosophers, notably David Hume, have held that nomological possibility is contingent on metaphysical possibility since the laws of nature could have been otherwise in some other possible world. Metaphysical possibility in contemporary philosophy is considered to be primitive (for example, throughout the edited volume by Gendler and Hawthorne). It is standardly explained through the semantics of possible worlds (or more precisely, the terminology of possible worlds, actuality, and possibility). For Kripke, who introduced the term 'metaphysical possibility' in *Naming and Necessity*, P is actually the case iff P is actually the case in the actual world and P is metaphysically possibly iff P is the case in some possible world. To complete the description: P is necessary iff P is the case in all possible world; P is impossible iff it is the case that P is possible in no world; and P is contingent iff it is possible that P is the case and not necessary that P is the case. For a study of the relation between metaphysical and nomological possibility, see S Shoemaker, 'Causal and Metaphysical Necessity' (1998) 79 *Pacific Philosophical Quarterly* 59 and A Sidelle, 'On the Metaphysical Contingency of Laws of Nature' in Gendler and Hawthorne, *Conceivability and Possibility*.

nomologically possible iff it is compossible with a certain set of laws of nature; for example, something is physically possible iff it is compossible with the laws of physics; it is biologically possible iff it is compossible with the laws of biology; and so on.<sup>52</sup> For these philosophers logical possibility on the other hand is standardly understood to centre on non-contradiction such that something is logically possible iff no contradiction follows from its description according to the standard rules of deductive inference. So how can LP<sub>1</sub> be a kind of logical possibility? The issue may be one of taste. Some may prefer to speak of the necessary natural conditions of its being the case that P in a context governed by some collection of natural laws such that what the proposition that P asserts to be so is possible iff it comports with these laws, hence ‘nomological possibility’. The rules of a given *nomos* determine the necessary conditions for P. On the other hand, some may prefer instead to speak in more abstract structural terms such that the satisfaction of certain stipulated formal conditions enables the operation we choose to call ‘conception’ (or ‘conceivability’). I will proceed with the former route. I can see that it would make better sense in the domain of normativity especially since nomological possibility will pair nicely with the embodiment criterion from earlier analysis. We may then say that nomological possibility in the domain of normativity is to be understood by describing the implications of embodiment for the cognitive capacities that underpin reasoning and partly underpin rationality. This terminological shift to

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<sup>52</sup> Gendler and Hawthorne, *Conceivability and Possibility*, 4.

nomological possibility will shortly pay conceptual dividends. First we reformulate our theorem as follows:

T5: X has a reason R to  $\phi$  only if R is (i) nomologically possible and (ii) logically possible, and (iii) it is empirically possible for X to  $\phi$  for R.

Something is nomologically possible iff it is compossible with the laws of nature. I take the laws of nature to be the relevant set of laws for the kind of embodiment that interests us, specifically as these laws pertain to the facts of human nature. It is also the kind that might interest Gardner, who sought to correct the ‘Kantian manoeuvre of abstracting the rational being from the human being’. That is to say, it is the literal kind of embodiment which is about having a human body, one of whose characteristic capacities is the cognitive kind that partly constitutes rationality. I therefore do not mean embodiment in any kind of figurative or aesthetic sense.

One might wonder how nomological possibility is to sit alongside empirical possibility. Are they not the same? Indeed, one advantage of reconstituting LP<sub>1</sub> as nomological possibility is that it now seems to hit two targets at once. To see this we ask the question of what it might be for a reason for action to be empirically possible for one in the nomological sense. However we formulate an answer, it will be necessary to leave room for the possibility that one sometimes might not do as a reason requires one to do. Otherwise, as Gardner observes, we are left with a

reductio such that one only ever has a reason to do what one actually goes on to do. It is, as he puts it, ‘part of the very idea of a reason that one might imaginably fail to do what the reason would have one to do—that one’s actions could be assessed relative to the reason and found wanting.’<sup>53</sup> So what is it for a reason for action to be empirically possible in the nomological sense without eliminating the possibility that one can sometimes fail to do as a reason requires? I suggest that the answer has two parts. First, the reason for action must be compossible with the relevant laws of cognition. The laws of cognition, however, differ between different kinds of cognitive beings. Which laws are relevant will depend on the type of agent for whom it is said a reason applies. If it is said that a reason applies to a human agent, then the relevant formulation is that the reason for action must be compossible with the relevant laws of human cognition. Or, strictly speaking, *having* the reason for action must be compossible with the laws of human cognition. This is to say that a valid reason for action cannot require one to do what one cannot do with one’s brain. A reason for action cannot require one, for example, to consciously process a thousand facts at the same time in one’s brain in order to satisfy some intellectual value. Nomological possibility in this sense—call it cognitive nomological possibility—will have significant implications for some important normative requirements in contemporary work on practical reason (especially in the philosophy of law). In § 3, I will try to draw out these implications with some

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<sup>53</sup> Gardner, ‘Reasons and Abilities’, 67–68.

examples from Raz and Gardner. The second part of the answer to the question of what it is for a reason for action to be empirically possible for one in the nomological sense is that the reason for action must be such that the action it requires is compossible with the laws of nature more generally—call this general nomological possibility. It entails the implication that a reason to (literally) leap over the stars is no reason at all for one. In this I agree with Gardner.<sup>54</sup> It may still be valuable if one could do such a thing. It may even be valuable to daydream about such a thing. But values, however interdependent they may be with reasons,<sup>55</sup> are not actually identical to reasons for action. Some values are just reasons for belief, such as the belief that it would be wonderful if one could leap over stars. One implication, then, of incorporating nomological possibility into normativity is that not all values issue in reasons for action (though many do). Now since we have collapsed empirical possibility into the nomological kind,<sup>56</sup> we must reformulate as follows (bearing in mind that nomological possibility carries the two implications just described):

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<sup>54</sup> *ibid* 72.

<sup>55</sup> For example, Raz, *Engaging Reason*, 54f: ‘all the concepts involved [in explaining action]—intention, reason, rationality, intelligibility, and value—are interdependent. We cannot but explain one in terms of the others. This interdependence, far from being vicious, is the reason for our ability to explain each of them by means of the others. This ability is lost if one concept entirely depends on just one other.’

<sup>56</sup> The distinction between the two kinds of nomological possibility—cognitive and general—may seem peculiar to some. Why posit a special class of nomological possibility for cognition but not other possibly relevant cases, like physical nomological possibility? I have no objection to these further possible cases but I cannot in the present work take up the task of specifying the full range of nomological possibilities. I imagine that if a fully specification were achievable, it would allow one to discard the general class of nomological possibility.

T6: X has a reason R to  $\phi$  only if (i) R is nomologically possible and (ii) it is logically possible for X to  $\phi$  for R.

### § 2.2.3 Normative consistency

The task now is to explain the details of LP<sub>2</sub>. This was the requirement that R is to be logically possible. But what is it for R to be logically possible? In an obvious sense, R is merely logically possible iff it is not logically necessary that  $\neg R$ . But this formulation is vulnerable to complications on several fronts,<sup>57</sup> and it is not entirely clear how it can be applied in the domain of normativity. We can be more precise by drawing on some standard modal distinctions from metaphysics and logic between possibility and necessity. For possibility, we say that R is possible iff R is contingent or necessary; and for necessity, R is necessary iff R is true but not contingent.<sup>58</sup> We can adopt the same structure as nomological possibility to say that R is logically possible iff R is compossible with the laws of logic. George Bealer is sceptical about the utility of this kind of formulation for logical possibility. For one

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<sup>57</sup> Descartes and Hume are two famous examples of construing this kind of logical possibility in very different ways. See R Descartes, *The Philosophical Writings of Descartes*, vol 2 (J Cottingham, R Stoothof, and D Murdoch trans, CUP 1989) 108 / AT VII, 152; and D Hume, *A Treatise of Human Nature* (DF Nortion and MJ Norton eds, OUP 2000) 1.2.2. For a comparative discussion of the views of Descartes and Hume on possibility, see Hawthorne and Gendler, *Conceivability and Possibility*, 13–26.

<sup>58</sup> For a statement of these distinctions, see G Bealer, 'Modal Epistemology and the Rationalist Renaissance' in Hawthorne and Gendler, *Conceivability and Possibility*, 77ff.

thing, it seems to rule nothing out that is not already ruled out by some other form of possibility. Logical possibility, he argues, just *is* possibility unless, I take it, that what we have in mind is the kind of possibility involved in just making statements. This brute kind of possibility aside, what would be wrong in saying that R is logically possible iff R is merely consistent with the laws of logic? This is familiar terrain. We have already observed that there would be nothing inconsistent or contrary to the axioms of logic in conceiving of a daffodil that can reason. That observation was part of the explanation for setting aside T1. But Bealer has worries of his own, such as ‘Triangles are necessarily circles’ and ‘Water contains no hydrogen’. He argues that the trouble with accepting mere logical consistency as a form of possibility is that it is a kind of slippery slope. Thus we can say that ‘P is “propositionally possible” iff P is consistent with the laws of propositional logic’; then from this we can say that ‘Everything is both F and  $\neg$ F’ since it is not precluded by propositional logic (to preclude it we would need quantifier logic since propositional logic does not handle quantifiers such as ‘all’ and ‘some’), and from that we are required to reckon with the possibility that, in some propositional sense, everything is both F and  $\neg$ F.<sup>59</sup> The way to avoid the problems that result from this sort of possibility, says Bealer, is to avoid the troublesome term ‘logical possibility’. Instead we ought to restrict our usage to the well-studied notions of what is ‘logically consistent’ and what is ‘metaphysically possible’.

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<sup>59</sup> Bealer, ‘Modal Epistemology and the Rationalist Renaissance’, 79.

Bealer's argument against logical possibility can be incorporated into our theorem of normativity as a friendly amendment on the condition that it is paired with an explanation of logical consistency. An important property of something that is logically consistent is that it is relational. It is unclear, for instance, to say simply that 'R is logically consistent'. For we ask: Consistent with what? In classical logic, a set of formulae is said to be consistent iff it does not entail any contradictory opposite formulae. Adopting this idea, we can say that a domain of normativity (a legal system, for instance) is consistent iff it does not issue contradictory reasons for action—or, strictly speaking, reasons for actions which it is impossible to jointly perform. For example, a legal system that does not direct one to stop at a red light and not stop at a red light at the same time. Or perhaps a legal universe in which the phenomenon of the conflict of laws does not arise. But, of course, this is not possible and perhaps legal systems cannot be consistent in the same demanding way that a classical logic can be consistent. The way to accommodate this reality is to observe the difference between the consistency that applies to a set of formulae A (or a domain of reasons for action in its entirety) and the consistency that applies to the relation between some subset of A and A itself (or the relation between some particular reason for action and the domain of reason for action itself). In classical logic, both kinds of consistency are possible for a set of formulae. In normativity, this is wishful thinking. Reasons for actions even in single domains often require

that we do different acts at the same time, sometimes even the exact opposite acts.<sup>60</sup> The only kind of consistency available in complex normative systems such as law seems to be the kind that describes the relation between a single reason for action (or a subset of a domain of reasons for action) and the domain of reasons for action to which that reason belongs in its entirety. This is the kind of consistency with which I will be concerned, so call it *normative consistency*.

Examples of normative consistency are easy to identify. In the modern state, for instance, a particular law can be said to be normatively consistent with the law in general iff it does not contravene the state's constitution and other foundational norms that demarcate the state's domain of law. The notion of normative consistency also indicates that reasons for action are always issued from within some domain of normativity (otherwise, we ask 'Consistent with what?'). In this sense, a reason always has a source with which it can be consistent (for example, 'R is consistent with Canadian law'). We can see this if for any R, we ask 'Why?' So R requires that one  $\phi$ ? Why? If R is a legal norm, then the answer is in part that the law requires it. If R is a moral norm, then the answer is in part that the principles of morality require it. The point in these and other cases will be that R is never self-sufficient even when it is linked to some foundational evaluative premise. It is not

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<sup>60</sup> This phenomenon is often described under the heading of 'incommensurability' in practical reason. On this, see, for example, Raz, *Engaging Reason*, 102–03. For an argument against the possibility of incommensurability in normativity, see C Kelly, 'The Impossibility of Incommensurable Values' (2008) 137 *Philosophical Studies* 369.

its own grounds for action. And since R will always have grounds, those grounds are to be the basis of determining normative consistency. So when we ask ‘Consistent with what?’, the answer will be ‘those grounds’—for instance, the norms of some legal system.

The difference between logical and normative consistency (in the way just described) will complicate our expression a little bit. We can try to incorporate it by stipulating that any R (a reason for action) is to be a member of a system of reasons for action ‘ $\Gamma$ ’ that necessarily includes at least one other reason for action. In the language of set theory, we can think of  $\Gamma$  as a set with a cardinality that is necessarily greater than 1 (otherwise R will just be consistent with itself).<sup>61</sup> To express the idea that R is of the set of  $\Gamma$ , we write ‘ $\Gamma\{R\}$ ’ (read ‘R of  $\Gamma$ ’, for example, ‘the legal rule R of jurisdiction  $\Gamma$ ’) and since  $\Gamma$  has at least two reasons for action, I will write ‘ $\Gamma\{R,S, \dots\}$ ’ (S being some other reason for action). R is therefore normatively consistent with  $\Gamma\{R,S, \dots\}$  iff R does not contradict  $\Gamma$ . We do not write ‘... iff R does not contradict S,’ in order to keep space for value pluralism and the possibility of incommensurate reasons for action. Normative consistency is to be ascertained in relation to the whole of the normative system to which R belongs

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<sup>61</sup> In a fictional world in which a domain of reasons for action has just a single reason for action, then the consistency applicable to classical logic seems possible.

rather than just some parts.<sup>62</sup> To incorporate these observations, we have the following:

T7: For any system of reasons for action  $\Gamma$ ,  $X$  has a reason  $\Gamma\{R\}$  to  $\phi$  only if  $\Gamma\{R\}$  is (i) normatively consistent and (ii) it is nomologically possible for  $X$  to  $\phi$  for  $\Gamma\{R\}$ .

This, to me, seems to be a better explanation of what it is for a reason for action to be possible for one than anything we have tested thus far. T7 incorporates the doctrine of embodied normativity by binding the idea that one has a reason to do something to nomological possibility. It is also a more precise statement of what it is for something to be a reason for one by making normative consistency a condition of having a reason. From the doctrine of normative consistency, for instance, it is still possible that one has a reason to  $\phi$  even if it is not possible that one has a reason to  $\phi$  for  $\Gamma\{R\}$ . That is, it may be the case that  $\phi$  is required by some other domain of normativity and that the reason that requires one to  $\phi$  is consistent with that domain and also satisfies the condition of nomological possibility. I will leave these

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<sup>62</sup> One might ask how it can be that a reason can fail to contradict  $\Gamma$  if it contradicts a member of  $\Gamma$ . If  $\Gamma$  is a system of law, for instance, it is all too possible. Two specific laws can contradict each other but remain consistent with the law in general if each is consistent with the constitution of that system. One would not say that each law contradicts the system, just that they contradict each other and that there is some vagueness or indeterminacy in the law.

considerations here and turn now to draw out some of T7's implications for other areas of normativity.

### § 3 Implications

I have said that it ought to matter to a theory of normativity that certain things qualify as reasons and some things do not on grounds of impossibility. I suggest that this has implications for some influential work in the philosophy of normativity. I will consider two examples, one from Raz and one from Gardner.

#### § 3.1 Compliance

The example from Raz is the notion of compliance from his theory of mandatory norms. It is the idea that in certain circumstances one ought to do as a reason requires one to do because the reason requires one to do it. For example, if the law requires one to stop at a red light, then one complies with the law's requirement if one stops at the red light because the law requires it. If one stops for any other reason, then one has conformed to but not complied with the law. The notion, as I see it, entails a singularity of intention. If one does the required deed for a reason or reasons other than, or supplementary to, the reason that requires compliance, then the reason that requires compliance will be reduced to 'merely a statement of

what we already have reason to do'.<sup>63</sup> This is an implication that Raz works hard to block because it has undesirable consequences for his general theory of mandatory norms, especially as it relates to obedience.<sup>64</sup> Part of the answer to blocking it, for Raz, is through the notion of compliance. I will forego an examination of the implication that Raz works to avoid in order to argue more simply that it does not matter as far as the idea of compliance is concerned because compliance is not even an eligible idea for normativity. The reason for this is that insofar as compliance requires a singularity of intention—that is to say, intending to act for a single reason—then it cannot satisfy T7 because it is nomologically impossible in the cognitive sense for the human brain to ever act for a single reason. This is just a fact about the human brain and there is, as far as I can tell, an abundance of research from cognitive science and neuroscience behind it.<sup>65</sup> I collect and examine some of this research in Chapter 3. For now, it will assist us to consider the case of Seuss, who tries his best to obey the law. His case will help illustrate the point of T7. Suppose that in our legal philosophy we say that compliance must—as a theoretical matter—be at least possible. That is to say, it must be possible for Seuss to do as the law requires for the reason that the law requires it even if—especially if—one

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<sup>63</sup> J Raz, 'Reasoning With Rules' in J Raz, *Between Authority and Interpretation* (OUP 2011) 207.

<sup>64</sup> Obedience is a topic to which I will return in Chapter 2 in my discussion of legal rules. For now, I briefly note that compliance is a necessary component of obedience. If I do as I am commanded to do but not because I have been commanded to do it, I have merely conformed to the command. Mere conformity is not obedience.

<sup>65</sup> I discuss some of this research in Chapter 3.

has no other reason to do as the law requires. Seuss comes to the red light in his car and intends to obey the law in the sense just described. In our theory, we would ordinarily say that Seuss has at least *one* reason to stop at the light, and that is the reason given to him by the law. As a practical matter, it will not matter whether this requirement is possible in the way encapsulated by T7. We can just *say* that Seuss stopped because the light is red. But notice that our practical manner of speaking about reasons is loose. Why did Seuss stop at the light? Because Seuss is not colour blind, his perceptual apparatus is reliable, he is not being chased by assassins, he is in a jurisdiction that requires drivers to stop at red lights, his breaks are working, the light is in fact red, and so on.<sup>66</sup> Where did the single reason go? It is buried amongst the other facts that also constitute his reasons for action. How are we to count reasons? Is it enough to proceed loosely for practical purposes? I do not see why not. But as a philosophical question about practical reason and its metaphysics, the precision of our quantification matters and that is where T7 becomes relevant. Amongst other uses, it helps us count correctly.

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<sup>66</sup> I note the ontological consistency between these observations, namely, that these reasons are all facts rather than instances of beliefs (eg, 'Seuss believes his perceptual apparatus is reliable') or knowledge (eg, 'Seuss knows ...'). This keeps us in harmony with one of the undefended initial presuppositions of this thesis, which is that reasons are facts.

### § 3.2 Disability and reasons

The example from Gardner presents a less abstract and more interesting case. Suppose that Vader has a pathological compulsion to wash his hands. The medical diagnosis is OCD, which according to the relevant authorities is in part a disorder of the brain.<sup>67</sup> Suppose further that Vader understands the value of putting an end to his compulsive handwashing, which means that he can satisfy NP. The question is: Does Vader have a reason not to compulsively wash his hands? For Gardner, the answer is a clear Yes. I will suggest that the answer is a clear Maybe.

Gardner argues that Vader would have a reason to seek treatment and ‘acquire the capacity to conform to reasons not to wash [his hands] that [he] already has’ unless Vader is ‘the kind of being who cannot have reason to do anything at all’.<sup>68</sup> The unstated assumption—the answer to the question ‘But why?’—is that the disorder is bad on evaluative grounds and that it would be better for one not to compulsively wash one’s hands. The compulsiveness causes extreme forms of anxiety and other kinds of psychologically debilitating states that get in the way of living as well as one could. These considerations in turn produce the reason to seek treatment so that one can come to conform to the reason that one has not to compulsively wash one’s hands. One problem with this line of reasoning is that it

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<sup>67</sup> International OCD Foundation, ‘What is OCD?’ <<https://iocdf.org/about-ocd>> accessed 10 May 2016.

<sup>68</sup> Gardner, ‘Reasons and Abilities’, 70–71.

takes it for granted that evaluative facts (eg, the disorder is bad or that one would be better without it) always produce reasons for action. Sometimes they do not.<sup>69</sup> When they do not, the reason may be related to nomological impossibility. The clue for this observation is in Gardner's own reasoning but he does not bring it to bear on the case of the compulsive hand-washer in the right way. He says that *unless* Vader is the kind of being that cannot have reasons at all, then he has the relevant reason not to compulsively wash. In my own terms, this would mean that under NP, Vader would not even be the kind of being to have reasons to acquire the capacity to have reasons. In other circumstances, we find the thesis that disability disables ability, not reasons. The point of the thesis is that the reasons that one might have do not disappear on account of one's inability to do as they require. They persist in spite of one's weaknesses, limitations, and circumstances. Let me call this view the *persistence thesis*.

One of the principal aims of this chapter has been to show that the possibility of reasons is contingent on ability provided that that contingency is properly qualified, namely, by NP and certain features of T7. Yet if the *persistence thesis* is true, then my argument is false. I have already skirmished with a related thesis in § 2.1.5 on regulative ideals in my discussion of the relation between reasons for action and reasons for trying to do the things for which we have reasons

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<sup>69</sup> I believe that this is a view held by Gardner also. See, for example, his and Timothy Macklem's remarks about hyenas in Macklem and Gardner, 'Human Disability', 69, 70, and esp 76.

for action. I called that claim the *feasibility thesis*. Together with the Aristotelian regulative ideal of *perfection in rationality*, the persistence and feasibility theses work to provide an account of the applicability of normative reasons in our practical reasoning. It will be well to restate and summarise the operations of this trinity of theses about normativity before proceeding to suggest a way to dismantle it further by setting aside the claim about disability disabling ability and not reasons.

The first element of the trinity, the regulative ideal of perfection in rationality, is the framework's foundation, for it purports to establish the reasons that apply to us on the basis of what would apply to the ideal, perfectly rational versions of ourselves. The feasibility thesis adds to this by attenuating the demands of the regulative ideal on how we ought to act, implying the view that though the reasons that would apply to us if we were ideal are often too demanding, we need only try to do as they require if, in so trying, we will in fact proceed, or it will at least help us proceed, to doing as they require. The third element of the framework is the persistence thesis, which, after the attenuating effect of the feasibility thesis, as I say, raises the bar again and reasserts the persistence of the reasons that apply to us beyond our ability to do as they require of us.

Now I have already argued that the perfection in rationality ideal ought to be set aside for the purposes of practical reason. I made this argument, which was not intended as a refutation, on the basis of a pair of premises whose deployment yields an epistemic payoff worth having if we wish to make practical reason earthlier. Earthlier and perhaps even allow us to avoid the retrospective complaints

about the impracticality of practical reason reflected in the anecdote from Joseph Heath about some of philosophy's other subfields. The first premise for setting aside the ideal was that doing so would enable a significant narrowing of the range of reasons that apply to me and to which I need to regulate my attention. The second premise for setting the ideal of perfection in rationality aside was that the model of practical reasoning that relies on it is one in which we are unable to satisfy even the most rudimentary principles of rationality, such as the principle that one ought to do what one has most reason to do. If a standard is so ideal as to be impractical because being guided by it would always result in our ultimate failure, then it is liable to being ignored (or worse). This gives us the suggestion that we would be better off with a model of practical reasoning that can be of use to those who wish to use it. I then turned my sights to the feasibility thesis and argued that it was associated with two difficulties: first, without a credence model, the thesis generates loops in reasoning; and second, even with a credence model, the thesis sometimes remained inconclusive about whether one ought to try to do what one has reason to do.

The final element of this tripartite framework, as observed, is the persistence thesis. In a certain sense, the persistence thesis is an elaboration of the regulative ideal of perfection in rationality. Under that ideal, something qualifies as a reason for me if a conceivable version of me who is endowed with perfect rationality could be guided by it, that is to say, could take it as the grounds of his action in doing as the reason requires. The persistence thesis extends this by

drawing out an implication of the ideal, which is that even if the actual version of me cannot comply with that reason,<sup>70</sup> my shortcoming in that regard has no bearing on the integrity or existence of that reason. That reason, in other words, persists in its application to the actual me no matter my limitations because it applies to the conceivable me who is perfectly rational. Let me now return to the details of Vader's circumstances, which present us with an intuitive thought experiment to test the persistence thesis.

The implications of the persistence thesis for Vader's case are clear enough. One who endorses the thesis will argue that his inability to do as the normative reason not to compulsively wash his hands requires has no effect on that reason's applicability to him. That is to say, the fact that Vader either cannot take that normative reason to be his motivating reason to stop washing his hands or that he just cannot stop washing his hands even when he has the right motivating reason

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<sup>70</sup> In the coming pages, I will need to rely a bit more on the modal term 'actual', so it will be well to specify exactly what I will mean by it. Letting  $x$  stand for an object (eg, 'Seuss'),  $y$  stand for a state or condition (eg, 'tall'),  $S$  for some agent,  $P$  for a proposition, ' $\neg$ ' for negation, and  $t$  to designate time, we can proceed by stipulation with the following true propositions:

Actuality:  $x$  is  $y$  at  $t$ .

Knowledge of actuality:  $S$  knows that  $x$  is  $y$  at  $t$ .

Actuality-to-possibility principle: If  $P$  is actually true, then  $P$  is possibly true.

Non-actuality:  $x$  could have been  $\neg y$ .

I draw these in part from A Vaidya, 'The Epistemology of Modality' in EN Zalta, *The Stanford Encyclopedia of Philosophy* (Winter 2017 Edition) <<https://plato.stanford.edu/archives/win2017/entries/modality-epistemology>> accessed 9 May 2017.

reflects nothing of the status of the normative reason. Let me call this first stream of the persistence thesis' reply to my conclusions about Vader's hand-washing condition the *followability objection*. It holds that followability does not log the applicability of a reason. I will return to it shortly.

Now in respect of the compulsive hand-washer, I previously advanced an argument by analogy to the daffodil, observing that the daffodil had no reason to do anything because it had no cognition at all. I then narrowed the argumentation to Vader, arguing that as the daffodil was to U, having no capacity to engage with the universe of reasoners and reasoning in entirety, Vader was to  $\lambda$ , meaning that Vader had no capacity to engage with some subset of U (namely,  $\lambda$ ). The case of Vader the compulsive hand-washer is exactly the case of the relation between Vader and  $\lambda$ . Not having the kind of embodiment that would enable him to successfully act upon  $\lambda$ -reasons by virtue of his exclusion from  $\lambda$ , such reasons could not figure as possible normative reasons for him. Against this line of thought, one who endorsed the persistence thesis might argue that the argument by analogy to  $\lambda$  is misleading, because Vader could still grasp the suggestion that he ought to stop washing his hands. Vader's case, that is to say, is one of extreme akrasia, for in spite of being able to grasp the reason, his will nevertheless does not submit to the reason. To make the point less metaphorical and possibly less dramatic, the sceptic might add that, setting Vader aside, many people in the real world who have OCD seek treatment and that the reason they do so is probably because they believe that their compulsive hand-washing constitutes a form of acting that puts them in a sub-

optimal state. This means that these individuals with OCD understand that they have a reason to stop washing their hands, for that is presumably why they seek treatment. Though it could be the case that individuals with more severe cases of mental illness may not grasp the reasons not to do some of the destructive or otherwise sub-optimal actions that they do, the case of OCD does not typically reflect that kind of severity. That is, Vader's OCD does not by itself necessarily entail a failure of ability in grasping that he has a reason to stop compulsively washing his hands. It could be that in cases of self-delusion, where Vader, for instance, believes that he is perfectly fine and that his hand-washing is just another way of proceeding in life, then it would be difficult to integrate him into the story of rationality. Yet Vader's, at least in the way it has been supposed here, is not such a case. Let us call this second stream of the persistence thesis' reply to my conclusions about Vader's hand-washing condition the *comprehensibility objection*.

The followability and comprehensibility objections have a number of significant implications for the arguments of this chapter. For one thing, if an important function of the model of possibility that I have advanced is only successful at policing the boundaries so far out from the core circumstances of practical reason—namely, in ordinary day-to-day cases that are, for many of us, free of the vicissitudes of severe delusions and other mental illnesses—then the model is of limited use. I may even be accused of advancing a theory that, after all, is not that much earthlier than the theories that I have criticised throughout this chapter. What is more, the model appears to reflect a certain theoretical overkill because it

seems like an attempt to place the boundaries much further down, attempting to eliminate the application of reasons in cases where the inabilities one might have, or the challenges of one's circumstances, are much more modest than the examples used in the course of this chapter. The model, in other words, is much more robust than it needs to be. Let me now take these two streams of objection and their implications in turn.

### § 3.2.1 Followability

As regards the followability objection—summed up in the notion that disability disables ability, not reasons—we can begin with a general observation about a well-defended orthodoxy in the theory of reasons today, which is the relational view of reasons.<sup>71</sup> This holds that reasons are always reasons for some agent to do some act (omissions constituting forms of action, too). Within the framework of the relational view of reasons, philosophers differ about the question of whether reasons are the facts themselves or rather the relations between facts and agents, which would make the relations themselves the cardinal facts in the theory of reasons.

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<sup>71</sup> Both agent-neutral and agent-relative theories of reasons posit reasons in relation to agents and acts. To say that R is a reason is to say that it is a reason for someone to do something. Agent-neutral and agent-relative theories differ only in the degree of the relational specificity—ie, R is either a reason to  $\phi$  for all agents (the agent-neutral view) or it is only a reason for some specific agent(s) (the agent-relative view)—but both share the noted orthodoxy about the inherent relationality of reasons. For a relatively recent statement of this debate, see S Blackburn, 'The Majesty of Reasons' (2010) 85 *Philosophy* 5.

Wherever one's more detailed allegiances lie within this camp, what unites the philosophers under its banner is its commitment to the view about the relationality of reasons. If we proceed with this understanding of reasons—which I agree is the right understanding—then what does that imply for the view that disability disables ability, not reasons? For if I am unable to do the thing I am said to have a reason to do, a conclusion that would be correct only if it were suitably qualified by NP and T7, then what is my relation to that purported reason? One might be tempted to say that the relation is still there, but it is just indirect. Let me call this the *indirectness property*. It reflects the aspect of the account under discussion in which the relevant relation would be the one between the actual me, who does not have the ability to do as the reason requires, to the possible me, who is perfectly rational and unaffected by any akratic tendencies. That perfect possible me sheds the light by which the imperfect actual me ought to conduct its affairs. And yet ask the actual me what relationship I have to the possible perfect me and I would say: Nothing. Or, at least, nothing of material value to my practical reasoning in the here and now. My relation to that mythical version of me is as immaterial to my practical reasoning as my relation to Zeus or any other figure of otherworldly imaginings.<sup>72</sup>

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<sup>72</sup> This is not to say that these imaginings do not have a certain intuitive appeal. Indeed, they do, and their historical roots are well-documented. The Catholic Church, for instance, has its doctrine of *imitatio Christi*, or the imitation of Christ, and the related principle of *imitatio Dei* is found throughout the Bible: 'Be ye therefore imitators of God, as beloved children' (Ephesians 5:1); 'Therefore you are to be perfect, as your heavenly Father is perfect' (Matthew 5:48)—sentiments summed up by Americans in the acronym WWJD: 'What would Jesus do?' For the more secular amongst us, there has always been 'What would Socrates do?'

Now these are arguments I have already defended in § 2.1.5 on the status of regulative ideals in the domain of practical reason. Here I will only emphasise that the conclusions that this line of thought yields require careful treatment. For it is important to avoid the result that I only ever have reason to do what I in fact do, or that the actual me cannot, by dint of the argument against the status of perfection, have reasons to change its ways because that would mean comparing myself to the perfect version of me. On my view, however, the reasons to do the things that I fail to do or the reasons for self-improvement are not derived by way of a comparison to a perfect ideal. They are instead derived through an assessment of what I have the ability to do given the limitations of possibility set out through NP and T7. I will expand on this last remark in a moment.

Now the foregoing arguments may not dissuade one from the claims of the first stream of objections. For we can imagine amending the thought experiment such that, in the place of ‘the possible version of me with perfect rationality’, which attempted to establish the indirect relation between the actual me and the purported reason, we could insert ‘the possibly better version of me’. Suppose now that there is a purported reason for me to run the four-minute mile. If I were to ask about what established the relation that that purported reason had to the actual me, the answer would be the modest ‘the better version of me’ rather than what I have argued would be the implausible answer ‘the version of me with perfect rationality, who could grasp that I had such a reason’.

There is undoubtedly an interesting question about the order of derivation here. From where would the notion ‘better’ come if not in relation to some point between the actual and the perfect? Does the concept of ‘better’ then require the concept of ‘perfect’? In a very abstract sense, the idea of betterment would involve, for instance, the elimination of flaws, which may lead to perfection, a state in which no flaws remain. And so the answer would be Yes, the notion of ‘better’ is conceptually linked to the concept of ‘perfect’. Yet it need not be. An argument, for instance, can be flawless, but it can be possible to make it better still by augmenting or restricting its scope, which could improve its usefulness in establishing the truth or falsity of the propositions to which it is thought to apply. In light of these observations, let us suppose that the purported reason for me to run the four-minute mile, in spite of the inability to do so that characterises my actual self and perhaps my apparent inability to grasp that I had such a reason, established itself as a reason for me through its connection to the better version of me. The thought here is that the better version of me could both grasp that it had this reason and that it had the ability to do as it required, namely, to run the four-minute mile. The question now is about how this better version of me came to be—or, rather, came to be *conceived*. By my lights, the only acceptable conception for the purpose of assigning practical reasons would be one that is a result of an assessment of the limits of the capacities of the actual me. The result of this conception is still a possible me and *that possibility*, importantly, is very much *possible for the actual me*. This is contrasted with what I have regarded as the unacceptable conception that is not demarcated by the limits of the capacities of the actual me—unacceptable, that is, for the business of

practical reason. I suggest that this contrast is very stark indeed, reflecting what we might regard as a *humanistic turn* in the way in which we establish the possibility of reasons that apply to each of us.

The implications of the foregoing line of reasoning for Vader's hand-washing condition are becoming clearer. First, in assessing whether Vader has a reason to stop washing his hand, in spite of the challenges imposed by his OCD, the correct question is not: What would Vader do if he were perfectly rational and perfectly in control of his will? Rather, the question is: What ought Vader do in view of the limits of his actual capacity? Notice that this query shifts the assessment that one must make in deliberating about whether Vader has a reason to stop washing his hands from the conceptual world to the empirical, for that is what the assessment of the absolute limits of his actual capacities would entail. If that hardnosed assessment yields the judgment that Vader's OCD is severe enough that those absolute limits could not accommodate an ability to stop washing his hands compulsively, then he would have no reason to do so. The more general implication of this line of thought is that without the right kind of embodiment, which make up one's capacities, certain reasons are not possible for one. To place this alongside Macklem and Gardner's phrasing: it is not the case that only the rational answer to reasons; rather, only beings with the right kind of embodiment answer to reasons, where embodiment partly defines one's capacities. Vitaly, this embodiment varies between agents.

Let me summarise this way of thinking about the possibility of reasons before I proceed to consider the comprehensibility objection. I have argued that the following principle, let us call it the *perfect possibility principle*, should be rejected:

Perfect possibility: R is a normative reason for the actual X to  $\phi$  iff R is a normative reason for the conceivably perfect conception of X to  $\phi$  for R.

In its place, I suggested that we proceed with what we can call the *actual possibility principle*:

Actual possibility: R is a normative reason for the actual X to  $\phi$  only if the actual limits of X's capacities do not prevent X from  $\phi$ ing for R.

I also observed that the actual possibility principle is better able to facilitate a foundational understanding in the theory of reasons today, namely, the relationality of reasons, than the perfect possibility principle. This is because actual possibility does not suffer from the vagaries of the indirectness property, on which perfect possibility relied in explaining how something could be a reason for me by dint of it being a possible reason for a conceivable version of me with perfect rationality. In other words, the principle of actual possibility is better able to facilitate the relationality of reasons because it restricts conceivable relations to actual agents (and their actual limits). This demarcation returns a change in the relational view of reasons:

Relationality: Every R is a ‘reason for’ an *actual* X to  $\phi$ .<sup>73</sup>

This gives us an earthlier version of an already earthly way of thinking about reasons.

### § 3.2.2 Comprehensibility

I now turn to the second stream of the persistence thesis’ reply to my conclusions about Vader’s hand-washing condition, namely, the comprehensibility objection. This objection began by noting that, unlike the case of Vader’s relation to  $\lambda$ , which was one in which he could not even grasp  $\lambda$ -reasons, Vader’s OCD does not present

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<sup>73</sup> A similar move—or at least a move made with a similar instinct—is found in Bernard Williams’ responses to his critics in B Williams, ‘Replies’ in JEJ Altham and R Harrison (eds), *World, Mind and Ethics: Essays on the Ethical Philosophy of Bernard Williams* (CUP 1995) 189ff. In the context of a discussion of Aristotle’s notion of *phronimos*, or ‘a correct deliberator’, Williams examines the sentence form: ‘If  $x$  were a correct deliberator,  $x$  would be motivated in these circumstances to  $\phi$ ’, which he says ‘will yield a truth under any substitution for  $x$ , granted only that the substitution in the antecedent yields an intelligible possibility [...] It follows that on this account (R [namely: ‘A has a reason to  $\phi$ ’]) does not make a statement distinctively about A at all. [...] But the *phronimos* is an ideal type, and the fact that he is invoked does not make the formula any less impersonal, relative to particular agents. On this account, (R) invokes the person A, but none of its content is distinctively about A. [...] But, in considering what he has reason to do, one thing that A should take into account, if he is grown up and has some sense, are the ways in which he relevantly fails to be a *phronimos*. Aristotle’s *phronimos* (to stay with that model) was, for instance, supposed to display temperance [...] But, if I know that I fall short of temperance and am unreliable with respect even to some kinds of self-control, I shall have good reason not to do some things that a temperate person could properly and safely do.’ The counterpoint to Williams’ position is John McDowell’s piece, ‘Might there be external reasons?’, in the same volume of essays.

problems that are about comprehension.<sup>74</sup> That is to say, he can still grasp that he has reasons to stop washing his hands compulsively. His OCD story is about a severe strain of akrasia that is induced by illness rather than one in which he does not, like the daffodil, have the requisite cognitive abilities to grasp the reasons that apply to him. What is more, people in the real world who have OCD often seek treatment, which is likely to indicate that they can grasp the reasons they have to cease their compulsions. These considerations together imply that, contrary to my view, Vader does have a reason to stop washing his hands compulsively, which may mean that he has a derivative reason to seek treatment for his condition, and, moreover, that that is a reason whose comprehensibility is not prevented by his OCD.

The foregoing account of Vader's state of affairs seems rather persuasive until we start to ask about what it is that privileges comprehensibility's effect on

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<sup>74</sup> That it is possible for Vader to comprehend R as a reason for action indicates that R is comprehensible to him. Accordingly, I take the word 'comprehensible' to mean 'capable of being comprehended', which is the OED definition. My usage differs from what some philosophers write of 'intelligibility', which in ordinary language means roughly the same thing as 'comprehensibility'. For example, Raz in *Engaging Reasons* (ch 2) and 'The Truth in Particularism' in B Hooker and M Little (eds), *Moral Particularism* (OUP 2003) writes of the 'intelligibility principle', which refers to the idea that reasons can explain the difference between the good and the bad. But that is not what I mean by the ordinarily synonymous word 'comprehensible'. Elsewhere, Raz uses 'intelligibility' in a way that is closer to my usage of 'comprehensibility'; he says that '[i]ntelligibility depends [...] on how things looked to the agents at the time. Justification and evaluation depend on how things really were at the time, though they allow for different types or dimensions of evaluation which take greater or lesser account of the agents' subjective perspective' (*Engaging Reasons*, 31). To avoid the varying meanings associated with the word 'intelligibility', I will stick to 'comprehensibility'.

practical reason in this way. I take comprehensibility to be an epistemic category rather than, say, a physical category. So it is not the case that if Vader has the right kind of height, then he ought to stop washing his hands compulsively. Rather, if he comprehends the premises that constitute the reason to stop compulsively washing his hands in the right epistemic way, then he ought to stop doing so. Comprehensibility, on this view, is privileged as a normative category in a way that other categories, such as height, are not. If this is the conclusion that is sought, then the comprehensibility objection will need to show that, unlike other categories, comprehension is a sufficient condition of having a reason for action. For that is the thrust of the objection. If Vader comprehends his state of affairs, which includes a reflexive judgment about his having the condition that he has and that he would be better off without it, then that is sufficient in turn for having the reason to stop washing his hands compulsively. Yet one of the implications of my arguments in this chapter, particularly in relation to T7, has been that no single category is sufficient for one to have a reason to do anything at all. If I am right about what I have been saying, then comprehensibility is only one cognitive category amongst other kinds of categories that must be satisfied for something to emerge as a reason for action for one. This argument is somewhat analogous to the argument about the relation between values and reasons. In § 2.2.2 on nomological possibility, we saw that even though values and reasons are interdependent, they are neither the same thing nor are they coextensive. Some values do not lead to reasons for action. Instead, they may only point to having certain beliefs. Whatever value might be had in my conceivable ability to leap over the stars, for instance,

would not by itself translate into a reason for action, though I can see it figuring as a belief that it could be nice to daydream about the prospect. Comprehensibility looks to me as though it sits in the same kind of relation vis-à-vis reasons for action. Though, like value, it is a necessary condition of me having a reason for action, it is by no means sufficient.

But perhaps this is the wrong way to think about comprehensibility. It is not, an objector might say, that comprehensibility per se is what is sufficient for the application of a reason to me, but the fact of my comprehension of the value of the action that the reason signals. In this light, it appears that comprehensibility per se is not analogous to value in its relation to reasons—for though both are necessary for reasons, together they are sufficient. For Vader, it means that if his OCD does not get in the way of his comprehension of the value of not washing his hands compulsively, then he has at least a derivative reason to seek treatment such that he can conform to the reason that he has—or so it seems. My suggestion is that we avoid this way of ascribing reasons because it would return us to the old way of thinking about them through the lens of the regulative ideal of perfection. I have argued that this route is, amongst other things, epistemically onerous and not of much use in actual practical reasoning. To summarily restate these positions, it is epistemically onerous because it leaves us with a standard of rationality which we cannot satisfy and it is impractical because it requires one to conceptualise a relation to an ideal that is so fictional as to be unrelatable. Now the case of Vader comprehending the value of not compulsively washing his hands may not seem to

fit the form that my objections against perfection target. His case is not, after all, about perfect rationality and he need not relate himself to such a being. So how could he be said not to have a reason to put an end to his compulsion and, at the least, a derivative reason to seek treatment?

The answer lies in the principle of actual possibility, which I introduced in the preceding section on followability. As noted, the principle holds that R is a normative reason for the actual X to  $\phi$  only if the actual limits of X's capacities do not prevent X from  $\phi$ ing for R. In light of this principle, whether Vader has a reason not to compulsively wash or not will depend on an assessment of the limits of his actual capacities. If his condition is sufficiently severe and putting an end to the compulsions is beyond his actual capacities, then he has no reason not to wash compulsively. This holds even if he completely comprehends the value of treatment and the prospect of living without the compulsion and its associated ills, anxieties, and so on. These considerations, of course, do not touch the understanding that his condition is regrettable because he is unable to partake in the value of a life without obsessive compulsions. And, what is more, these considerations do not even touch the reasons he might have to try to stop his compulsions by seeking treatment. Yet how could this be? Is it not the case that the reason for trying to  $\phi$  is derived from the reason to  $\phi$  itself? So how comes it that he may have a reason to try to stop his compulsions but not a reason to stop his compulsions? The answer, once more, is in the principle of actual possibility, according to which if Vader has *the capacity to try* to seek treatment to end his compulsions, then, ceteris paribus, he has a reason

to do so.<sup>75</sup> No doubt, the demand on one's capacities is less onerous in the case of trying to  $\phi$  than it is in the case  $\phi$ ing, which means that all cases of trying to  $\phi$  are more likely to satisfy the actual possibility principle. This leaves us with the intuitive result that we ought to try if we can, indeed, try.<sup>76</sup> This is distinct from the position of the feasibility thesis noted in § 2.1.5, namely, that we ought to try only if we can somehow succeed in doing the thing we are trying to do. According to my line of thought, neither the value of an act itself nor the comprehension of that value are sufficient conditions for the possibility of a reason, for neither are concerned with modality. That is to say, neither establishes the possibility of a reason. They establish other things that are necessary for practical reasoning: the possibility of value and the possibility of comprehending value.<sup>77</sup>

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<sup>75</sup> Now what about the case of the wheelchair user who might be said to have a reason to run the four-minute mile. Have I enabled the absurd conclusion that they ought to try to do so if they have the capacity to try? The answer is No, and it is important to guard against this error. The actuality principle is to part of a constellation of other principles—together comprising a model of the possibility of reasons—that includes resources to block certain absurd implications. The wheelchair user has no reason to try to run the four-minute mile because, unfortunately, they cannot run. That, by T7, is enough to block the suggestion that they ought to try.

<sup>76</sup> On this point, in particular, it may be worthwhile to remember that not all reasons are conclusive reasons, so though I may have a reason to try, that is not to say that I have a conclusive reason to do so. The conclusiveness will need to be established through the addition of other considerations, such as the weight of the evidence that counts in favour of successfully doing the thing for which I have a reason to try to do.

<sup>77</sup> These considerations suggest that a further utility of the actual possibility principle is that it allows us to think about comprehensibility's place in practical reason in a way that leaves an important insight that has emerged in the literature intact. This is the insight that the concepts of intention, reasons, rationality, value, and comprehensibility are interdependent rather than one just being completely dependent on another. I will leave this investigation for another day. On interdependence in practical reasoning, see Raz,

### § 3.3 Actual possibility

One vital consideration to bear in mind about the actual possibility principle is that its content cannot, despite appearances, be purely empirical. Nor can a comprehensive assessment of the actual capacities of any agent be a purely empirical matter either. In this section, I will try to explain why this is the case—that is to say, why a seemingly empirical principle must have a non-trivial conceptual component. By non-trivial, I mean any observation beyond the one that points out that the actual possibility (AP) principle is itself a conceptual construction, that is to say, a construction that specifies relations between concepts rather than relations between other kinds of things. For ease of reference, let me present the principle again:

AP: R is a normative reason for the actual X to  $\phi$  only if the actual limits of X's capacities do not prevent X from  $\phi$ ing for R.

By virtue of expressing logical relations between its various elements, AP is a conceptual construction. AP contains nothing empirical but it purports, as I have defended it, to leave space for empirical input, as a necessary matter, in the adjudgment of whether R is a normative reason for X to  $\phi$ . Whether that thesis is non-trivial will depend on how far one pushes the envelope on 'empirical input'.

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*Engaging Reason*, 54f. Here but not elsewhere in the same work, Raz is using the term 'intelligibility' in the way I have been using the word 'comprehensibility'.

My elaboration of AP pushes it quite far, but one would be right to wonder just how empirical the empirical input here is anyway; if it is not very empirical, then the principle will need to be read in a suitably adjusted light. Consider, for example, the ‘actual limits of X’s capacities’ component (‘actual capacities’ for short) of AP in the context of someone who manages to run the 4-minute mile once but then, try as they might, is never able to do it again.<sup>78</sup> Can this person run the 4-minute mile?

The answer to that question will turn, in part, on our analysis of ‘can’. We can draw some of this analysis from Tony Honoré, whose distinction between the particular and general uses of ‘can’ will prove helpful in filtering the conceptual and empirical elements of our answer to the question of whether the runner can clock a 4-minute mile.<sup>79</sup> The question plays on two uses of ‘can’, what Honoré calls ‘can (particular)’ and ‘can (general)’ or CP and CG, respectively, for short. Between the two, CP is the more fundamental. In relation to particular actions, such as running the 4-minute mile, CP pertains to—or, as Honoré puts it, what ‘governs the use of the notion’ is—success or failure.<sup>80</sup> With CP, the schema is as follows: (i) if our runner tried and failed to run the 4-minute mile, then they could not run it; (ii) if

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<sup>78</sup> I thank John Gardner and Kimberley Brownlee for especially probing questioning on this topic.

<sup>79</sup> AM Honoré, ‘Can and Can’t’ (1964) 73 *Mind* 463. A schema similar to Honoré’s is presented in AR Mele, ‘Agents’ Abilities’ (2003) 37 *Noûs* 447. See also A Kenny, ‘Human Abilities and Dynamic Modalities’ (1976) 72 *Synthese* 209. For a linguist’s analysis of the same topic, see FR Palmer, ‘Modals and actuality’ (1977) 13 *Journal of Linguistics* 1.

<sup>80</sup> Honoré, ‘Can and Can’t’ 464.

they tried and succeeded, they were able to do it; (iii) if they will fail, no matter how hard they try, then they cannot do it; and (iv) if they will succeed when they try, then they are able to do it. With (iii) and (iv) in particular, CP tracks the usage of ‘will’ and has a ‘predictive force’. As regards CG, on the other hand, its usage is not settled solely by the question of success or failure on some particular occasion. By virtue of pertaining to types of actions rather than particular actions, CG is able to accommodate instances of failure because it reflects general competence. If a person is a competent chess player, say, they will be able to deflect the Fried Liver Attack, for otherwise they would not be a competent chess player,<sup>81</sup> for part of the definition of a competent chess player is that one can deflect well-known opening gambits. In the spirit of its generality, CG is about one’s normal or standard performance in respect of some action in that one normally succeeds in carrying out that action when one tries to do so. The ‘normally succeeds’ descriptor, when it is accurate, constitutes a sufficient condition for using CG, *but* in the case of the negative, that of failure, it is not necessary for the agent to always fail. It is merely sufficient, Honoré explains, to *nearly* always fail:

‘Can you go rounds this course in under ninety?’ ‘No, I can’t, though I once did it in 88.’ When evidence of actual performance is not available, it is a sufficient ground for asserting ‘he can (general) do such-and-such type of

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<sup>81</sup> An old opening gambit, the Fried Liver Attack involves White sacrificing its knight in exchange for displacing Black’s king, typically on the sixth move.

action' that if he tried to, he normally would succeed, and a sufficient ground for asserting 'he can't do such-and-such a type of action' that, if he tried, he would always or nearly always fail.<sup>82</sup>

So, in cases where a competent chess player tries but fails to deflect a well-known opening gambit, one which they would ordinarily be able to deflect if they were inclined to try, we would be right, thanks to the conceptual indeterminacy of 'can', to help ourselves to a serving of both CP and CG.<sup>83</sup> That conceptual indeterminacy of 'can' is what enables us to say that when CG is deployed in the context of even a particular action, rather than a general type of action, the agent is judged according to how they would normally perform. The same indeterminacy also allows us to deploy CP in the same context and say that the agent could or could not do the act which they tried to do. To put this all together, in our judgment of the competent chess player who fails to deflect a well-known opening gambit, we would be right to say that they could (in the general sense) and could not (in the particular sense) deflect the attack in question. That judgment, as noted, is a product of a useful conceptual indeterminacy in 'can'.<sup>84</sup>

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<sup>82</sup> Honoré, 'Can and Can't', 465.

<sup>83</sup> *ibid* 468.

<sup>84</sup> In that analysis, Honoré also pays a significant amount of attention to the role of 'trying', which I need not broach again here. For more on the topic of trying, see also J Gardner, 'The Wrongdoing that Gets Results' (2004) 18 *Philosophical Perspectives* 53, where Gardner takes the view that one only has a reason to try to do as a reason requires of one if there is a possibility of success in doing as that reason so requires (55).

With these distinctions in hand, let me return to AP and the question of whether its ‘actual capacities’ component is a purely empirical issue. As the foregoing analysis of CP and CG shows, a judgment about the actual capacities of an agent requires a conceptual untangling of the indeterminacy embedded in the use of ‘can’, a notion we are required to put to use in figuring out an agent’s actual capacity in relation to some action.<sup>85</sup> Now I should add that Honoré’s analysis of CP and CG goes beyond the point at which I have taken the matter in that he pays a lot of careful attention to describing the particular ways in which the two uses of ‘can’ are conceptually connected. The addendum to that analysis, however, is that CP and CG are also empirically inseparable. General judgments about ‘can’ or, in my own words, ‘actual capacities’ are necessarily linked to judgments about the particular instances that make up the actual capacity in question. If I want to know whether someone is a competent chess player but do not want to rely on authoritative indicators such as the player’s official ratings or on the judgment of the player’s peers, then, other things being equal, I need to judge the player’s performance in previous games. That judgment requires empirical homework. That homework, of course, needs to be done in full view of the conceptual indeterminacy captured by the different usages of ‘can’ that determine judgments of ‘actual

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<sup>85</sup> One need not, of course, always be strict with one’s usage of ‘can’, for the word has cognates in English, such as ‘able’, ‘capable’, ‘capacity’, and the like. The current work, however, does not need to employ finer distinctions, for nothing in my argument, I hope, turns on our usage of the words that are used to denote the ideas about possibility which are at stake.

capacity'. Our answers to questions such as 'Can this athlete run the 4-minute mile?' and 'Can this chess player deflect that well-known attack?' will vary depending on what it is that we are trying to question. That much is clear, and it would be strange indeed if our judgments did not constitute a complex cocktail of conceptual and empirical data. So how exactly should AP be read in the light of these considerations?

Our answer to that question will benefit from incorporating some relatively recent work in the theory of ideals. Alan Hamlin and Zofia Stemplowska, for instance, analyse a range of concepts that pertain to the classic contrast between ideal and non-ideal theory.<sup>86</sup> Some of these concepts can be co-opted directly for the purpose of fleshing out the actual possibility principle. The concepts luckily come in pairs: (1) abstraction and idealisation and (2) fact-sensitivity and fact-insensitivity.<sup>87</sup> With the first pair, abstraction is understood to involve bracketing but not denying the truth of some predicate in a description, which is often helpful as a form of simplification that allows one to direct attention to the more significant

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<sup>86</sup> Hamlin and Stemplowska, 'Theory, Ideal Theory and the Theory of Ideals', 48. Hamlin and Stemplowska in turn rely on O O'Neill, *Towards Justice and Virtue: A Constructive Account of Practical Reasoning* (CUP 1996) § 2.1 on abstraction and idealisation. On the ethical implications of abstraction and idealisation, see O O'Neill, 'Abstraction, Idealization and Ideology' in JDG Evans, *Moral Philosophy and Contemporary Problems* (CUP 1988).

<sup>87</sup> Hamlin and Stemplowska survey two other pairs which I leave out: (i) full compliance and non-full compliance; and (ii) perfect justice (or another value) and local improvement in justice (or another value).

aspects of some issue.<sup>88</sup> Idealisation, on the other hand, involves ascribing predicates, often ‘enhanced’ predicates, that are false of the subject to which they apply, and in denial of what would be true predicates.<sup>89</sup> As Hamlin and Stemplowska remark, however, it is not always so easy to decide whether one is abstracting or idealising in respect of one’s subject matter:

[I]magine that we are concerned to include a treatment of the motivation of agents in our theory, and we recognise that in the ‘real world’ there is considerable heterogeneity of motivation. Recognising the relevant degree of heterogeneity may make our model too unwieldy to be useful, so we consider adopting an assumption that limits the heterogeneity within the theory. This is clearly a false assumption, but is it an idealisation or an abstraction? One might answer that it is an abstraction if there is no reason to think that the assumption changes what we conclude from our theory. But how can we know? For problems where simplification is necessary but where the relationship between elements of the problem is unclear, there is no straightforward, and perhaps no helpful, distinction between idealisation and abstraction.<sup>90</sup>

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<sup>88</sup> Hamlin and Stemplowska, ‘Theory, Ideal Theory and the Theory of Ideals’, 50, and O’Neill, *Towards Justice and Virtue*, 39.

<sup>89</sup> O’Neill, *Towards Justice and Virtue*, 40.

<sup>90</sup> Hamlin and Stemplowska, ‘Theory, Ideal Theory and the Theory of Ideals’, 50. I should add that the targets of Hamlin and Stemplowska’s paper are entire theories, such as

Now what does this tell us about the real-world feasibility that AP attempts to help to ascertain? For one thing, excess abstraction and idealisation both pull away from the kind of empirical restraint that is built into AP. Between the two, AP favours abstraction by virtue of idealisation's tolerance for false predicates. One can abstract without assuming any false predicates about one's subject, yet idealisation, at least as it is understood by Onora O'Neill and Hamlin and Stemplowska, allows for falsehood. Sometimes, these false predicates render a theory unsound. For example, one idealises rather than just abstracts if one assumes that human beings have certain rational capacities or ways of thinking about reasons that are not achieved or realised by many or even any actual human beings.<sup>91</sup> A theory that deploys these conceptions of human beings is thus not merely abstract but potentially unsound if the attendant idealisations are not supported by the kind of empirical data that would justify the theory's application to—or the application of the relevant segments of the theory to—actual human beings. That is to say, the extent to which such a theory would be unhelpful to explaining the thing that it attempts to explain would be commensurate with the extent to which its idealised premises are empirically unsupported. Does any of this count against idealised elements of a theory or idealised models in general? Certainly not, for idealisations, as noted, are

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Rawls' ideal theory of justice, rather than isolated principles, such as the principle of actual possibility.

<sup>91</sup> O'Neill, *Towards Justice and Virtue*, 41. My target in this regard has been the possibility of compliance, as discussed in § 3.1 of this chapter, and throughout Chapters 2 and 3.

only unhelpful to the extent that they are unsound (and they are not necessarily unsound) and, second, idealised constructs often have a point. For example, many economists believe that idealised models of consumers can be interesting and instructive for the purpose of producing certain kinds of predictions in the context of limited empirical data.<sup>92</sup> How, then, are we to incorporate the utility (and necessity) of idealisation into AP?

That question takes us to the second and related pair of concepts in Hamlin and Stemplowska's schema of real-world feasibility: fact-sensitivity and fact-insensitivity. 'A theory', as they say, 'is more fact-sensitive the more facts it recognises and incorporates as elements of the model or as constraints on the model.'<sup>93</sup> Fact-sensitivity and -insensitivity, however, are matters of degrees, and even significantly fact-insensitive ideal theories can have important explanatory value, for they can represent real-world causes and their effects, as John Pemberton helpfully explains:

The standard idealized models of the operation of a spring, a pendulum or an ideal gas are causal by virtue of the fact that there are immediately identifiable causes that underpin these models. ... Causal idealized models can on occasion tell us what happens in real, nonideal situations when the

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<sup>92</sup> For criticism, see JM Pemberton, 'Why Idealized Models in Economics Have Limited Use' in MR Jones and N Cartwright, *Idealization XII: Correcting the Model – Idealization and Abstraction in the Sciences* (Rodopi 2005) esp 45.

<sup>93</sup> Hamlin and Stemplowska, 'Theory, Ideal Theory and the Theory of Ideals', 51.

causes identified in the idealized model are modeled sufficiently accurately and operate in a sufficiently undisturbed way in the real situation under consideration. It is the presence and operation of the identified causes in reality that, under the right circumstances, allow the idealized model to approximate the behavior of that reality. Empirical evidence may allow us to calibrate the degree of approximation.<sup>94</sup>

Pemberton imparts a few takeaway lessons that we can use alongside those found in Hamlin and Stemplowska. First, the explanatory power of an idealised, fact-insensitive model depends for its veracity on the degree of its fact-sensitivity. Second, the explanatory power of such a theory will depend, also in part, on the idealised elements of the theory existing stably across the theoretical and practical divide. The more contingencies such an element is exposed to in the real world, the less likely it is to stay true to its idealised formulation and hence the less likely it is that the idealised element will be able to reflect the real world phenomenon it is meant to track. And third, the idealised elements of a theory can be calibrated with empirical evidence so that every round of calibration nudges the formulations of these elements from fact-insensitive idealisations to fact-sensitive abstractions. It is possible to formalise these lessons for the actual capacities element of AP. Here is

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<sup>94</sup> Pemberton, 'Why Idealized Models in Economics Have Limited Use', 35–36.

one possibility inspired by the literature on bounded rationality and satisficing:<sup>95</sup>

for every idealised element  $i$  that corresponds to an actual phenomenon  $a$ ,

$$a = i - f_1 \dots f_n$$

where the '=' symbol represents 'is the difference of', '-' is 'minus', and ' $f_1 \dots f_n$ ' reflects the iterative process of factual calibration, or fine-tuning through empirical evidence, in the pursuit of greater fact-sensitivity. Call this process 'empirical calibration'. By its lights, actual capacity, to take our example, is what remains after the idealised capacity is pared down through an iterative process of empirical calibration.<sup>96</sup>

The foregoing considerations enable us to read AP with a fuller awareness of how the question of empirical feasibility can be addressed. Yet these considerations also leave open the equally crucial question of the extent to which any iterative process of empirical calibration can determine the parameters of a conceptual construct, such as 'actual capacity'. In other contexts, political theorists, such as David Miller, have argued that, for example, the value of justice is subject to feasibility constraints such that a thoroughly unfeasible requirement cannot be a

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<sup>95</sup> On satisficing and bounded rationality, see HA Simon, *Models of Bounded Rationality* (MIT Press 1982) and HA Simon, *Reason in Human Affairs* (Stanford University Press 1983).

<sup>96</sup> See the end of § 3.2.3 of Chapter 3 for a test case of empirical calibration.

requirement of justice.<sup>97</sup> It would be an error, however, to think that that view entails the conclusion that the value of justice can be fully specified with reference to what is feasible only.<sup>98</sup> As many philosophers have been right to point out, it is often important to specify what justice would be in the absence of feasibility constraints and, what is more, that we sometimes need to know whether a purported requirement of justice is not actually such a requirement, as Hamlin and Stemplowska put it, ‘*merely* because satisfying it is not feasible, or because it would not be required by justice anyway’.<sup>99</sup> Further, imposing feasibility constraints on the value of justice can sometimes lead us to radically unethical conclusions.<sup>100</sup> But

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<sup>97</sup> D Miller, ‘Political Philosophy for Earthlings’ in D Loeopold and M Stears (eds), *Political Theory: Methods and Approaches* (OUP 2008), cited in Hamlin and Stemplowska, ‘Theory, Ideal Theory and the Theory of Ideals’, 55. Needless to say, Miller’s view is not shared by everyone. Gardner, for instance, in a review of Amartya Sen’s *The Idea of Justice*, takes issue with both Rawlsian political liberalism for not being ‘idealistic enough’ and with Sen for ignoring certain ‘Rawlsian truths’, such as the idea that to work out what is better, we first need to work out what is best, or that to ‘know the difference between a more “radical case of injustice” and a less radical case ... one needs to know the difference between a big departure [and] a small departure from some standard of justice, which is not possible if one refuses to explain what the standard is, from which departures are being measured.’ See J Gardner, ‘Amartya Sen’s *The Idea of Justice*’ (2011) 6 *Journal of Law, Philosophy and Culture* 241, 247. For more along this line of thought, see D Emmet, *The Role of the Unrealisable* (Palgrave Macmillan 1994) and N Rescher, *Ethical Idealism: An Inquiry into the Nature and Function of Ideals* (Berkeley 1987).

<sup>98</sup> Hamlin and Stemplowska, ‘Theory, Ideal Theory and the Theory of Ideals’, 55.

<sup>99</sup> *ibid*, emphasis in the original.

<sup>100</sup> There are many apparent cases of injustice whose redress seem infeasible if not impossible. Here is an example of infeasibility noted by Robert Talisse. It is well-documented that discrimination as a result of implicit biases results in all kinds of serious, life-changing harm for all kinds of people, be it racism, sexism, homophobia, and so on. To make matters worse, evidence suggests that being aware of these implicit biases does not often counteract the biases and, what is more, even individuals who are harmed by discriminatory implicit bias are no less likely to avoid enacting discriminatory bias against their own group than others even after debiasing training (involving, for instance, the implicit-association test, which sometimes works to exacerbate the biases for which it tests). Bearing all of that in mind, the ideal theorist is still able to point out the injustice of the

notice that the relationship between a value such as justice and feasibility constraints is not the same kind of relationship as that which exists between a principle such as actual possibility and feasibility constraints. A principle is not always a value. Principles can sometimes be—indeed, can merely be—theoretical constraints which are evaluatively neutral. I am suggesting that AP is such a principle. AP helps us understand reality better by facilitating, as part of the larger set of theses advanced in this chapter, a more accurate way of determining the domain of possible reasons for us. Yet AP is not itself a value, in much the same way as other explanatory or classificatory principles are not values, despite their ability to expand or constrain the applicability or deployment of values. This observation also enables a further clarificatory point about the boundaries of this chapter and thesis more generally, which is that what distinguishes (a) the real-world feasibility questions that attend political philosophical debates about ideal theory on the one hand, and, on the other, (b) the real-world feasibility questions that attend this thesis' treatment of ideal theory and practical reason, is that (a) aims at evaluative conclusions whereas (b) aims at descriptive conclusions.

No doubt, that last statement is an abstraction (not idealisation) of the job description of this thesis, for the evaluative–descriptive divide is not always a particularly clean one. Insofar as AP is concerned with qualifying some candidate

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discriminatory bias in spite of the apparent infeasibility of counteracting it. It is a startling implication that that conclusion is not available to the theorist who holds that infeasible requirements cannot be requirements of justice.

facts as reasons for action and disqualifying others, it obviously packages significant evaluative implications. But this observation remains consistent with the idea that AP itself is not an evaluative principle any more than, say, Hart's rule of recognition, which, like AP, is first and foremost a classificatory doctrine. The upshot of this move is that it allows for AP to exist in harmony with much of the recent work that has been done on the importance of unrealisable values. Take, for example, Kimberley Brownlee's thesis that it is possible for us to have reasons to realise and try to realise 'genuinely valuable ideals' for their own sake rather than simply for the sake of helping us achieve realisable ends.<sup>101</sup> Part of Brownlee's view is that an important role for ideals in practical reasoning is as objects of expressive value, that by 'adopting a genuinely valuable ideal, such as goodness, courage, or authenticity, we can express our commitment to goodness, courage, authenticity irrespective of how well we come to embody that ideal'.<sup>102</sup> As far as it goes, that view is completely consistent with the constraints of AP. Consider the ideal of courage. Supposing, for the sake of argument, that it is an unrealisable ideal, we may still have a perfectly realisable reason to express our commitment to that ideal

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<sup>101</sup> K Brownlee, 'Reasons and ideals' (2010) 151 *Philosophical Studies* 433. Brownlee's chief interlocuters in that paper are Bart Streumer and Ulrike Heuer, whose arguments about whether we can have reason to do what we are unable to do she takes to task and ultimately rejects: B Streumer, 'Reasons and impossibility' (2006) 136 *Philosophical Studies* 351; B Streumer, 'Reasons, impossibility and efficient steps' (2009) 151 *Philosophical Studies* 79; and U Heuer, 'Reasons and impossibility' (2010) 147 *Philosophical Studies* 235. For the companion paper to Brownlee's 'Reasons and ideals', see K Brownlee, 'Moral Aspirations and Ideals' (2010) 22 *Utilitas* 241.

<sup>102</sup> Brownlee, 'Reasons and ideals' 443.

because that ideal is intrinsically valuable, which is perfectly consistent with the actual possibility principle. But do expressive values necessarily entail reasons for action? I suggested in § 2.2.2 of this chapter that the answer to that question is No. Values, including expressive values,<sup>103</sup> no matter how interdependent they are with reasons, are neither the same thing as, nor are they coextensive with, reasons for action. Some values do not produce reasons for action, though they may produce reasons for belief. So there is no inconsistency with a view of genuinely valuable but unrealisable ideals that honours their expressive role in practical reasoning with the views about actual capacity I have defended thus far.

There is, however, room for greater quarrelling with some of the other claims that are sometimes ushered alongside the aforementioned view about the expressive value of ideals. Let me take a few examples from Brownlee before closing this chapter. Brownlee argues that there is sometimes a spectrum of unrealisability such that we can ‘distinguish amongst the degrees and types of unrealisability in various ideals.’<sup>104</sup> The first example of this is the ‘never-endingness’ that some ideals seem to entail, such as the ideal of being a good parent. Because being a good parent

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<sup>103</sup> Expressivism as it is understood here consists of two main ideas: (i) actions are expressive insofar as they convey meaning; and (ii) expressions matter (sometimes from a moral point of view) by virtue of being expressions, and this is true independently of the consequences they entail. This take on expressivism is distinct from the theory of ethical expressivism in moral philosophy, which is the view, very crudely put, that moral statements merely express attitudes. On the idea of expressivism as it is relevant to my discussion (and in the context of legal theory more generally), see, for example, T Khaitan, ‘Dignity as an Expressive Norm: Neither Vacuous Nor a Panacea’ (2012) 32 *Oxford Journal of Legal Studies* 1.

<sup>104</sup> Brownlee, ‘Reasons and ideals’, 441.

is something that one is unlikely to be able to live up to every day, it is an ‘unrealisable challenge in virtue of its ongoingness’ or, in a word, its unsustainability.<sup>105</sup> A second example of the way in which an ideal can be unrealisable as a matter of degrees is ‘limitless progressiveness’ in the way that, as Brownlee notes, ‘[o]ne could always be a better parent than one is being or has been.’<sup>106</sup> Thus, in the context of unrealisability being a function of unsustainability or limitless progressiveness, it may appear that the actual capacity view I have been defending is not quite fit for purpose. For if actual capacity, suitably defined by AP and its empirical calibration theorem, is able to settle the question in favour of not having a reason at one point in the diachronic spectrum that Brownlee describes, does it follow from that that one does not have a reason simpliciter, that is to say, irrespective of the temporality? Or how, indeed, does AP fit into the story about the kind of unrealisability that centres on the relevance of satisfying reasons through time?

Consider the case of unsustainability first, namely, the suggestion that the ideal of being a good parent is unrealisable because it is too challenging to live up to everyday. Would we not be right to say that in cases where a reason applies to us over a suitably long period of time or across a suitably protracted period of performance what matters in our judgment of whether one has lived up to the ideal

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<sup>105</sup> *ibid.*

<sup>106</sup> *ibid.*

is a holistic view of one's performance? The ideal grandmaster of chess may not make the best move at every turn, but they may still win almost every game in their competitive career (or, indeed, in the course of a long and protracted game against a tough opponent); the ideal footballer may not pass with 100 per cent accuracy, but may still be the ideal passer; and the ideal musician may not perform every note perfectly, but would not be judged to have played a complex composition imperfectly on account of holding a note longer than expected. In all of these examples, it would be imprudent in one's judgment to count discrete lapses in ability against the agent in respect of whether they have satisfied the relevant ideal.<sup>107</sup> It would be imprudent because the judgment of perfection in these activities is necessarily holistic, and to hone in on one or two particular moves of

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<sup>107</sup> The examples I am providing here revolve around a conception of the ideal that is necessarily indeterminate, which is more intuitive in some cases than others. For example, one might believe that the ideal goalie is one who keeps the puck out of the net in every game, which would make it appear as though the criterion of the ideal is simple, from a conceptual point of view, because it is quantitative. In other cases, such as that of the ideal painter, the relevant criteria are complex because they are qualitative and vague. What I am suggesting, however, is that even in cases where the criteria of an ideal seem simple, such as in the case of the ideal of the goalie, no simple criterion, such as a shutout in every game, is sufficient for the satisfaction of the ideal. Suppose, for instance, that in my career as a goalie, I saved every shot. No puck ever made it past me. But in addition to my prowess in front of the net, I was a lousy team player: I was nasty to my fellow team members and got under everyone's skin to the extent that I diminished my team's ability to score goals (and hence avoid draws), celebrate well, have fun, be decent to one another, and partake in other good things that are essential to team sports. Now if the goalie's role is not merely to keep the puck out of the net, then I think we would agree that I fell short of the relevant ideal. So even with ideals that seemingly suggest satisfaction through a kind of quantitative achievement, such as saving every shot, the indeterminacy with which we need to reckon is vast. The ideal of the goalie ends up being quite complex, just like the ideal of the painter. One might even say that the goalie's ideal is especially complex because, in addition to having certain qualitative criteria (eg, contributing to team cohesiveness), there is also a challenging quantitative criterion (ie, saving every shot).

the chess grandmaster, or a small set of passes of the footballer, or on one note of the complex musical composition would be to mischaracterise what constitutes the ideal. So the father who has an off-day here and there and is not able to live up to the standard of the ideal parent every day would be unfairly judged if they were said, on account of these lapses, to have failed to live up to the ideal of a good parent. The ideal of a good parent is capacious enough to absorb discrete lapses. If we accept these suggestions about what constitutes the ideal across time, when sustainability is a relevant feature of the ideal, then the idea of actual capacities starts to make a lot more sense, especially when we retain Honoré's useful distinction between the general and specific senses of 'can'. A parent may not have the actual capacity at some specific point in time to live up to the ideal of the good parent (a lapse of CP vis-à-vis that ideal), but may nevertheless have the actual capacity as a general matter, judged overall across a suitably defined period of time (a satisfaction of the ideal on account of CG).<sup>108</sup> So it is appears that the

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<sup>108</sup> Or is it that the ideal of the chess grandmaster is one in which every move is the best possible move, or that the ideal of the football player is one in which every pass is an accurate pass, or that the ideal of the musician is one in which every note is played as beautifully as possible (or perhaps exactly as the sheet music requires, when sheet music is relevant)? In the case of parenting specifically, if by ideal one means something like 'perfection at every turn', then one is already so far removed from what constitutes parenting that that ideal is not going to make much sense, I would venture, to any actual parent now or at any future point in time, for what could 'perfection at every turn' even mean in the context of parenting? And in the case of the musician, is it not the case that at least in certain genres of music, such as the one with which I am most familiar, flamenco, that the grittiness of mistakes—of imperfection—actually elevates the music (what flamenco aficionados refer in hushed tones about the *duende* of a guitarist's expression)? These remarks, of course, are speculative but they do enough to put pressure on the suggestion that the ideal is 'perfection at every turn'. Less speculative arguments against perfection as a regulative ideal were advanced in § 2.1.5.

unrealisability of an ideal may not be relevant at the level of analysis that pertains to CP, since the satisfaction of an ideal is not a question that will be settled by a judgment that takes discrete lapses, or particular instances, as its points of reference. Bearing this point in mind, we can rest assured in our view of the parent who does not *seemingly* live up to the ideal of the good parent every day, because they will not be judged to have fallen short of that ideal on the basis of any particular day. Thus, the never-endingness of the ideal of the good parent that Brownlee has in mind actually counts in favour of, rather than against, the parent who does not parent ideally every day.

Now if the unrealisability of the ideal that Brownlee has in mind is to be relevant, it must be so at the level of generality, which takes us to her second example, that of the limitless progressiveness of certain ideals. According to Brownlee, certain ideals, such as that of the good parent, which extend through time and allow for infinite, or virtually infinite, progress are unrealisable because one could always do better than how one is doing at present, or how one has done in the past. But is this really true? Let me just consider for a moment a diametrically contrasting case, namely, *evil*, and suppose that it is an *ideal*.<sup>109</sup>

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<sup>109</sup> Ideals are often understood as reflecting values, and evil is no value. See, for example, Rescher, *Ethical Idealism*, 83, cited in Brownlee, 'Reasons and ideals', 441.

Imagine that Vlad, a 15th-century *voivode*, or prince of Wallachia, had an abiding penchant for evil.<sup>110</sup> Vlad, a true villain, would try at any moment in time to do the most evil thing he could imagine. In the 15th century, this entailed pillaging as many villages as he could and, the story goes, doing all kinds of unthinkable things to those unfortunate enough to get in his way. By all accounts, Vlad was the paragon of evil, embodying its ideal in every way conceivable for the 15th-century observer. For all his evil, Vlad was also an exceptionally studious alchemist, and so he managed somehow through his study of the dark arts to discover the secret to immortality. He promptly tried to act upon his discovery, but something went wrong in the alchemical experiment such that, though Vlad made himself immortal, he could only walk the earth for one decade per century. And so from that moment on, Vlad would appear every century in some part of the world and, retaining his desire to do evil, do the most evil thing imaginable. With every reappearance, he would avail himself of the new weapons of science, first guns, then missiles, then increasingly deadly viruses and gases and nuclear weapons. Now the question: Given that each of Vlad's centurial visits coincided with a new epoch of science whose means he could use to do evil, did he fail to live up to the ideal of evil, that is to say, to do the most evil, at any point in the past? The question targets the claim that certain ideals that extend through time allow for virtually infinite progress and, by virtue of doing so, are unrealisable because one could always do

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<sup>110</sup> For interest, see KW Treptow, *Vlad III Dracula: The life and times of the historical Dracula* (Center of Romanian Studies 2000).

better than how one has done in the past or how one is doing in the present. Yet the answer to the question about Vlad in particular is complex. Did Vlad fail to do the most evil with each of his centurial visits? In one sense, the answer is No. He did not fail because, with each of his visits, he satisfied an important criterion of the ideal, namely, 'do the most evil'. In another sense, Vlad did fail, for (a) *what is most evil* is distinct from (b) *doing the most evil*, and his subsequent visits reveal that his actions in the past fell short of (a). But that seems to be a contingent matter and, as far as evil is concerned, it is hard to see why (a) and (b) can never, by necessity, coincide. The material preconditions of (a) and (b) coinciding could one day come to pass, in which case Vlad could satisfy both horns of the ideal of evil.<sup>111</sup>

Now consider again the radically contrasting case of the ideal of the good parent. Is it the case that one could, at any given point in time, be a better parent than one is currently being? The answer to this question, too, is not especially obvious. Important aspects of the ideal of the good parent are likely to be contingent on context, since new opportunities to be a better parent are sometimes contingent on historical and material conditions. Access to better health and educational services in times of peace, for example, would inform certain parental duties that could arguably be part and parcel of the ideal of the good parent. The

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<sup>111</sup> One might say that if (a) and (b) coincide, that will reveal that the ideal in question does not allow of limitless progressiveness. If the notion of limitless progressiveness is not to be coextensive with 'deep impossibility', however, then it must allow for the possibility of (a) and (b) coinciding. I discuss this point further in the following paragraph and corresponding footnote.

flipside of that observation is that it is conceivable for a parent to live up to that ideal by making sufficiently good use of the opportunities that a particular time and place provide. Thus, insofar as the ideal is unrealisable as a function of the possibility of limitless progressiveness, that unrealisability at any particular point in time seems to be contingent rather than necessary. Now one could dissolve the discussion of this particular kind of unrealisability by eliminating the temporal and material elements, namely, by defending the view that it is *never* the case that one can live up to the ideal of the good parent. But that does not appear to be Brownlee's position, for she seems to grant that ideals are not necessarily unrealisable and that the class of ideals is to be distinguished from the class of 'deep impossibility'.<sup>112</sup> All

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<sup>112</sup> Brownlee notes that 'something may be an ideal for one person or for all persons at a given time, but prove subsequently to be realisable' (Brownlee, 'Reasons and ideals' 441). Does this mean that the ideal in question is pushed forward such that one is always in a game of catch-up with the ideal, or can the ideal become and remain realisable until, say, developments in science and perhaps our imaginations allow for further augmentations of the ideal? Citing Rescher, Brownlee notes that the 'ideals originate in the use of imagination "to contemplate value possibility that transcend the restrictive confines of the real"' (ibid, Rescher, *Ethical Idealism*, 83 (on ideals not being subject to the 'restrictive confines of the real')). However, whether the 'real' is restrictive or not for the ideal in question is a contingent matter and, what is more, and as Brownlee observes, 'ideals as a class can be distinguished from deep impossibilities such as living forever, travelling back in time, and so on', which I interpret as placing ideals within the realm of the possible rather than that of the impossible ('deep' or otherwise). There is also the related idea, shared by Nicholas Rescher and CAJ Coady, that ideals are like 'guideposts' (Rescher's term) so that an ideal can provide psychological impetus to excel. That idea about the practical utility of ideals, however, is cogent to the extent that it is supported by the relevant psychological and sociological data. The closest we get to data in Coady is a casual discussion about baseball statistics, and in Rescher there is none at all. Without data, for every anecdote or thought experiment about the performance-enhancing effects of striving towards some ideal, there is another anecdote or thought experiment about the oppressive and discouraging effects that ideals can have (think, for instance, of the language learner who never speaks the language they are learning for fear of making mistakes or sounding silly). In addition to this exchange of anecdotes, there is also *King Lear*: 'How far your eyes may pierce I cannot tell / Striving to better, oft we mar what's well', said the Duke of Albany. See Rescher, *Ethical Idealism*, 12–16 (on the performance enhancement effects of

of that is good news, for as long as such ideals are not necessarily impossible, they are possible reasons. As far as that issue is concerned, this chapter has only argued that impossible reasons are no reasons at all. If the realisability of ideals is a contingent matter—contingent on practical, real-world questions such as access to certain means—then that leaves space for the hardnosed apparatuses, such as AP and its theorem of empirical calibration for actual capacities, that qualify some facts as possible reasons for action for us and disqualify others on account of their impossibility.

#### § 4 Conclusion

My aim in this chapter has been to lay the groundwork for a theory of possibility for reasons. To do this, I began with a study of the thesis that ought implies can and defended a version of it against a set of criticisms advanced by Gardner. One positive result of the engagement was the development of a pair of modal models for normativity—normative impossibility (NI) and possibility (NP)—that I think can be used as first-tier tests for the possibility of reasons. A second positive result was the development of a theorem, T7, which I intended as a second-tier test for possibility. Further considerations centring on the fruitful objection that disability

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impossible goals) and CAJ Coady, *Messy Morality: The Challenge of Politics* (OUP 2008) 59 (discussion of baseball).

disables ability and not reasons resulted in the development of the principle of actual possibility, which concluded my arguments in favour of setting aside perfection as a relevant regulative ideal in the domain of practical reason. I then produced a short theorem of empirical calibration whose purpose is to assist in the specification of the actual capacity element of the principle of actual possibility, picking up along the way some important lessons from Honoré, Hamlin and Stemplowska, Brownlee, and others. Leaving out the normative impossibility theorem, we can put all these ideas on one page:

1. Positive normative possibility (NP):

It is possible for R to be a normative reason for X to  $\phi$  if and only if it is necessarily possible for X to  $\phi$  for R as a motivating reason.

2. Normative necessity (T7):

For any system of reasons for action  $\Gamma$ , X has a reason  $\Gamma\{R\}$  to  $\phi$  only if  $\Gamma\{R\}$  is (i) normatively consistent and (ii) it is nomologically possible for X to  $\phi$  for  $\Gamma\{R\}$ .

3. Actual possibility (AP):

R is a normative reason for the actual X to  $\phi$  only if the actual limits of X's capacities do not prevent X from  $\phi$ ing for R.

(a) Empirical calibration (EC):

For every idealised element  $i$  that corresponds to an actual phenomenon  $a$ ,  $a = i - f_1 \dots f_n$ , where ' $f_1 \dots f_n$ ' is an iterative process of factual calibration.

#### 4. Relationality (R):

Every R is a 'reason for' an *actual* X to  $\phi$  at  $t$ .

These theorems and the lines of argument used to advance them produce a generalisable model that gives an account of what it is for a reason to be possible.

In the next chapter, I will narrow the field of consideration from reasons generally to legal reasons specifically, asking about one particular kind of legal reasons: rules.

In what sense are they possible reasons for action?

# Chapter 2

## The Opaqueness of Rules

### Abstract

This chapter takes up the question of whether legal rules are reasons for action. They are, indeed, commonly regarded in this way. Yet are such rules reasons for action themselves (the reflexivity thesis) or are they instead merely statements of other reasons that we may already have (the paraphrastic thesis)? I argue for a version of the paraphrastic thesis. In doing so, considerable attention is given to the neglected but important puzzle of the opaqueness of rules, which arises out of what some regard as the gap between the evaluative grounds of legal rules and what makes them into reasons for action. After examining an important articulation of the puzzle in the work of Joseph Raz, I argue that the reflexivity thesis is (i) undermined by certain features of rule-making and (ii) defeated by the principle of presumptive sufficiency. The result is that it is possible for rules to be paraphrastic statements of reasons but, conversely, impossible for them to be reasons in themselves.

### § 1 Introduction

This chapter is, in part, a treatment of a neglected but important puzzle in the philosophy of law called *the opaqueness of rules*. One instructive articulation of the puzzle occurs in the work of Joseph Raz, for whom its resolution occupies an important place in his influential theory of practical reason.<sup>1</sup> In his theory of

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<sup>1</sup> J Raz, 'Reasoning With Rules' in J Raz, *Between Authority and Interpretation* (OUP 2011) and J Raz, *Practical Reason and Norms* (OUP 2002).

positive rules more specifically, Raz argues that though a rule is a reason for action, it is a reason of a peculiar kind because reasons are facts that indicate what is good in the action for which they are reasons.<sup>2</sup> But notice that a rule does not do this. A rule does not indicate that one should stop at a red light because it would be well to do so. A rule simply says that one must stop. In the language of the literature, a rule is *prescriptive* in that it states what must be done and it is not *evaluative* because it does not indicate what is valuable in the thing being prescribed. Hence the opaqueness of rules. They are opaque because they do not reveal what is good, only what must be done. This opacity is claimed by Raz and others to be a puzzle for action. A solution to it is accordingly meant to furnish the grounds for the thesis that though rules are opaque, they are nevertheless themselves reasons for action and not merely statements of what we have reason to do.<sup>3</sup>

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<sup>2</sup> J Raz, *Engaging Reason: On the Theory of Value and Action* (OUP 1999). Scanlon's 'buck-passing account' is an alternative and influential view of the relation between reasons and values; see T Scanlon, *What We Owe To Each Other* (Harvard University Press, 1998). For Scanlon, 'the claim that [something is] valuable is not a property that provides us with reasons. Rather, to call something valuable is to say that it has other properties that provide reasons for behaving in certain ways with respect to it' (96). For an attempted refutation, see AE Reisner, 'Abandoning the Buck Passing Analysis of Final Value' (2009) 12 *Ethical Theory and Moral Practice* 379.

<sup>3</sup> Some readers will recognise that the topic under discussion—whether rules themselves are reasons for action or can only ever be summaries of other reasons for action which justify them—was the subject of Rawls' 1955 essay 'Two Concepts of Rules' and then again the focus of a long and elaborate exchange between David Lyons and DH Hodgson in the 1960s. I leave these contributions to the side for most of this chapter (but return to them in § 4) in order to focus on the peculiarities of Raz's theory of rules given the extent of its influence in legal philosophy and, moreover, the sophistication and general applicability of its formal devices for the explanation of reason, intention, and action. For the early work on my topic, see J Rawls, 'Two Concepts of Rules' (1955) 64 *The Philosophical Review* 3; D Lyons, *Forms and Limits of Utilitarianism* (OUP 1965); and DH Hodgson, *Consequences of Utilitarianism* (OUP 1967). After Raz, others have worked on

Let me call the foregoing thesis the *reflexivity thesis* because it lays its emphasis on the possibility of rules *themselves* being reasons in spite of their opaqueness. I will contrast it to the *paraphrastic thesis*,<sup>4</sup> which refers to the view that reasons are merely statements of others reasons. In this chapter, one of my objectives will be to advance and defend two lines of argument against the reflexivity thesis. The first argument will show that rules are only superficially opaque and that, as a consequence, the puzzle is only superficially a puzzle. The superficiality manifests at two levels: the formal features of rule-making and, further, the practical realities of rules. This argument can be summarised by saying that, other things being equal, prescriptive reasons often—if not always—imply evaluative ones. If I am right, then the distinction between such reasons cannot do the work that Raz wants it to do when he argues that even though rules are opaque, they are nevertheless themselves reasons for action and not merely statements of

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the topic as well, such as: E Sherwin, ‘The Importance of “The Gap”’ (2016) 34 *University of Queensland Law Journal* 47; L Alexander and E Sherwin, *The Rule of Rules: Morality, Rules, and the Dilemmas of Law* (Duke University Press 2001); and L Alexander, ‘The Gap’ (1991) 14 *Harvard Journal of Law and Public Policy* 695. Alexander and Sherwin work in response to Frederick Schauer’s presumptive positivism theory of rules, and I do not have the room to carefully demarcate the similarities and differences between the theories of rules that respond to Schauer, and the theories of rules that respond to Raz. For Schauer’s main work on this topic, see his *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (OUP 1993). In the main, Schauer’s work is concerned with the so-called ‘asymmetry of authority’, which reflects the idea that it is often irrational and sometimes immoral for one not to do what one thinks one has reason to do, but that it is also rational and moral for legal to enact rules for the agents that fall under their jurisdiction. According to this view, it is both rational to disobey and to obey rules. On the same basic tension between rationality and obedience, see RP Wolff, *In Defense of Anarchism* (University of California Press 1998).

<sup>4</sup> I owe this term to Timothy Endicott.

reasons we already have. The chapter's second line of argument centres on the principle of presumptive sufficiency, which is another significant but neglected area of study in practical reason. I offer a new analysis of the principle and argue that either the principle renders rules into mere statements of their justifications, or it guarantees that rules themselves cannot be reasons for action in what I will call a *distinctive sense*. Both sides of this disjunction undermine the reflexivity thesis.

Before I begin, a few prefatory remarks on terminology are in order. Throughout this chapter I will say things like 'a prescriptive reason that one ought to  $\phi$ '. Strictly speaking, it is the fact of the prescription's existence that is a reason for action. And so wherever I am not speaking strictly, it is for ease of language. In every case, I mean to indicate that the fact of a prescription's existence is the reason for action. It does not follow that it is an undefeated or conclusive reason for action; it may just be one reason amongst others. A further clarification is about words such as 'ought', 'should', 'must', and other deontic cognates. I note that such words can be used non-normatively, as in 'you ought to be exhausted', but following John Broome I will try to always use them normatively.<sup>5</sup> By 'normative' I mean 'having the rational force of norms'; for instance, the extent to which a statement of the kind 'X must  $\phi$ ' (where X is the agent and  $\phi$  the act) can generate, in certain contexts, things such as obligation or duty. Another though possibly unhelpful way

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<sup>5</sup> J Broome, 'Reasons', in RJ Wallace and others (eds), *Reason and Value: Themes from the Moral Philosophy of Joseph Raz* (OUP 2006) ch 2.

to say this is that ‘normative’ refers to ‘norms’. As I noted at the outset of this thesis, I will also treat the word ‘reason’ normatively, leaving aside its non-normative uses. Sometimes I will refer to ‘justificatory reasons’ and in these instances too I will be referring to normative justificatory reasons and not motivating or explanatory ones.<sup>6</sup>

## § 2 Reasons and Rules

Theories are prompted by problems and so it will be well to state the difficulties that preoccupied Raz when he advanced his account of rules as reasons for action. It will be helpful to begin broad and end narrow and to do so for now from within the philosophy of Raz himself rather than introduce an external source of criticism.

### § 2.1 Intentions

In the philosophy of action, one of the most basic questions bears upon the kinds of reasons that figure in an agent’s decision to act. It goes without saying that not all of our actions are intentional.<sup>7</sup> That is to say, not all of them involve decision-

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<sup>6</sup> For why this distinction is important, J Raz, *From Normativity to Responsibility* (OUP 2011) ch 1.

<sup>7</sup> By intentional I mean that which is related to intention, which is not to be confused with intentionality. On this distinction, see JR Searle, ‘The Intentionality of Intention in Action’ (1980) 4 *Cognitive Science* 47.

making. But the case being considered here is the kind that is generated through practical reason, where  $X$  is an active agent and decides to  $\phi$  or  $\neg\phi$ , or decides not to decide and so on. For  $X$  to  $\phi$  means that, other things being equal, there is a set of features  $a$ ,  $b$ , and  $c$  of  $\phi$  that show  $\phi$  to be good and by virtue of the value of this set,  $X$  ought to  $\phi$ . This is the so-called classical approach to explaining agency. Its origins can be traced to the writings of Plato and Aristotle. Plato famously rejected the possibility of *akrasia*, or the weakness of will, when he argued that we never knowingly do wrong and that all our intentional actions aim at the good.<sup>8</sup> Raz in turn would defend the classical approach to agency as the only coherent way of accounting for the eligibility of actions, that is to say, why  $X$  might  $\phi$  rather than  $\neg\phi$ .<sup>9</sup> Reasons explain action, and reason itself, we learn, is in turn ‘explained in part by invoking value: valuable aspects of the world constitute reasons’.<sup>10</sup> But neither the concept of reason nor value is strictly dependent upon the other: we cannot, according to Raz, account for reason without value nor value without reason, for

all the concepts involved [in explaining action]—intention, reason, rationality, intelligibility, and value—are interdependent. We cannot but explain one in terms of the others. This interdependence, far from being

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<sup>8</sup> See *Protagoras* (358c-d). For the contemporary classic on this issue, see D Davidson, ‘How is Weakness of the Will Possible?’ in D Davidson, *Essays on Actions and Events* (OUP 1980).

<sup>9</sup> Raz, *Engaging Reason*, 28 (discussing an objection to the classical approach, ie that it confuses the intelligible features of an action with what might make it good).

<sup>10</sup> *ibid* 23.

vicious, is the reason for our ability to explain each of them by means of the others. This ability is lost if one concept entirely depends on just one other.<sup>11</sup>

The discussion of value here is important. It is important that reasons are bound to a view of the good because it explains why ultimately one might  $\phi$  rather than  $\neg\phi$ , for the things that we want to do we want to do for a reason, ‘we cannot want what we see no reason to want any more than we can believe what we think is untrue or contrary to the evidence’.<sup>12</sup> Likewise, I will not  $\phi$  because I think that there is no reason to  $\phi$ . I will  $\phi$  only if I have a reason and this reason or set of reasons will be bound to some belief that what is being done is good, that the set of features a, b, and c that inhere in  $\phi$  are regarded as good in at least some way.<sup>13</sup> This outline no doubt glosses over some of the complexity involved and it does not explain some categories of reasons and action which might reasonably be thought to constitute exceptions to the formulation of Raz’s theory just summarised. What is relevant for our purposes is the view that that reasons are bound to some belief about what might constitute the good. This, in the end, is how we get the conception that reasons are facts that indicate what is good in the action for which they are

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<sup>11</sup> *ibid* 31.

<sup>12</sup> *ibid* 54f. This view has a long pedigree as well. Cf D Hume, *An Enquiry Concerning Human Understanding* (OUP 2005) s 5; and B Williams, ‘Deciding to Believe’ in *Problems of the Self* (CUP 1973) 148.

<sup>13</sup> Raz, *Engaging Reason*, 54f.

reasons.<sup>14</sup> If rules are to be reasons within this framework, then they must be able to comport with the idea that reasons are bound up with some view of the good.

## § 2.2 Opacity

Rules themselves are unlike many other reasons because they do not offer any explanation of what is good in the action being prescribed.<sup>15</sup> Raz's enquiry into the

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<sup>14</sup> Raz, *Between Authority and Interpretation*, 205.

<sup>15</sup> Those familiar with the literature on the theory of explanation may object that it is unhelpful to metaphorically speak of rules as offering explanations. For what could it mean to say of a rule or even a reason that it does or does not offer an explanation? One would ordinarily think that explanations are offered by agents, not reasons or rules. Of course, I do not doubt the literal sense in which this is true, since neither rules or reasons do any kind of *offering* at all. But can they *explain*? I will proceed with the view that words such as 'indicate', 'say', 'explain', 'claim', 'state' and others that I use in phrases such as (i) 'prescriptive reasons do not indicate what is good in the thing for which they are reasons' or (ii) 'rules constitute reasons for action even though they do not make any evaluative claims to indicate what is good in the action being prescribed' mean that they do not offer an explanation in the sense captured by the pragmatic theory of explanation. In the main, this body of theory holds that an explanation is a 'correct description of observables', but for the purpose of work in practical reason, we can try to drop 'observables' because reasons are not observable even though some of the facts that give rise to them sometimes can be. On this conception of explanation, and leaving aside false explanations, a rule offers an explanation of—or indicates or says something about—what is good in the action it prescribes if it entails a correct description of the action's evaluative grounds. This gives us a working definition of *explanation*. Now on Raz's view, rules do not do this because they are opaque. For the pragmatic theory of explanation, see B van Fraassen, *The Scientific Image* (OUP 1980) 12. Alternatives to the pragmatic theory are numerous, though perhaps the most influential of these is Carl Hempel's deductive-nomological model, which holds that an explanation involves a deductive (ie, logical consequence) and nomological (ie, deriving from the laws of nature) relation between an explanandum and its explanans. Yet it is hard to see what might constitute a law of nature in the domain of practical reason except for those already contained under the deductive category, that is, those which pertain to the laws of thought: logic. Without surveying much else of the literature on explanations, I will proceed with the pragmatic model. For more on the deductive-nomological model,

opaqueness of rules begins here—specifically, we learn, his enquiry into the opaqueness of rules that are deliberately made and which are mandatory. If such rules make no evaluative claims, say nothing about what is good, then how do they figure in practical deliberation? Notice, first, that all normative or deontic statements—that is to say, statements about what we must or should or ought to do—are opaque in that they only state what we have to do, and not what value there is in it, and yet we know that there is nothing puzzling here. The puzzle derives from the contention that rules *themselves* are reasons and not, importantly, ‘merely statements of what we have reason to do’.<sup>16</sup> One way to terminate the puzzle would be to deny the premise that rules are reasons but this at the very least would be counterintuitive because rules are commonly regarded as such.<sup>17</sup> We often give the fact that there is a rule as a reason for the things that we do, that is to say, we point to rule R as a reason for act  $\phi$ ; but the question here is whether X should  $\phi$  because (1) R is a valid rule that acts as an injunction (a question, according to Raz, that is equivalent to ‘ought one to conform to R’—that is to say, ought one to  $\phi$  for R?); or is it that X should  $\phi$  because (2) R is a ‘good, wise, justified’ rule?<sup>18</sup>

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see C Hempel, *Aspects of Scientific Explanation and Other Essays in the Philosophy of Science* (Free Press 1965) 247f.

<sup>16</sup> *ibid* 207.

<sup>17</sup> It would also run against the grain of the autonomy thesis, the idea that rules make a difference: ‘If valid, they constitute reasons which one would otherwise not have but for them. While the considerations which justify a rule exist independently of the rule, they do not constitute the same reason for action that the rule constitutes’ (*ibid* 214).

<sup>18</sup> *ibid* 208.

The question is as old as philosophy itself, with its most notorious relative featuring in *Euthyphro*, where Socrates and his interlocutor were unable to determine whether that which is pious is pious because it is loved by the gods or whether the gods love that which is pious because it is pious.<sup>19</sup> For Raz, the gap between the two horns of this question is worthwhile because it allows him to argue that a rule can be binding, that it can be wrong to violate it, that it can be a valid reason for action, and yet that it can also be a bad rule from an evaluative perspective and which ought never to have been made in the first place. Rules, he says, ‘allow for a potential normative gap, a gap between the evaluative and the normative, that is between their value and normative force’.<sup>20</sup>

Raz’s terminology needs to be explained. The word ‘normative’ is sometimes understood in evaluative terms (claims about value, the good, etc) but its usage here is closer to the idea of the logical relations between norms or reasons. The phraseology aside, the point is to notice the separation between what gives rules their binding character and what might ground their goodness or justifiability. The obvious point is that what makes rules binding is ultimately an evaluative consideration, and this is something that Raz readily admits, yet he nevertheless

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<sup>19</sup> For a discussion of this question that centres on the so-called paradox of autonomy (ie is a norm binding because it is recognised as such (self-legislation), or is the norm recognised because it is binding (in which case there is no self-legislation)?), see J-R Sieckmann, *The Logic of Autonomy: Law, Morality, and Autonomous Reasoning* (Hart 2012) ch 1.

<sup>20</sup> Raz, *Between Authority and Interpretation*, 208.

leaves open the possibility that what gives rules their *binding* character may ‘derive from a range of considerations [sometimes called “deontic considerations”] which are altogether independent of evaluative considerations’.<sup>21</sup>

Having said this, it would be good to state once again the subtle but important issue at stake. What is it specifically that makes it possible for a rule to be a reason for action? Is it the more basic and fundamental evaluative considerations that Raz registers as ‘ultimately’ underpinning rules, or is the existence of the rule itself sufficient as a reason for action? Raz wants to advance the latter claim and he seeks to do so partly through the thesis taken from Hart about the content-independence of the justification of rules.<sup>22</sup> The idea in its essentials describes an aspect of practical reasoning found in various settings, from the commands of authority to the promises we make to ourselves and others; it describes how a justification of a promise or an authoritative command, may be found not in the content of the command, but from the brute fact that it is a command. It is, for instance, a definitional element of a command that obedience to it is rendered not because it indicates other and possibly better reasons to do the

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<sup>21</sup> *ibid* 209 fn 10: ‘*Normativity is ultimately based on evaluative considerations*, but in a way which leaves room for a normative gap.’ Emphasis in original. See also J Raz, ‘Promises and Obligations’ in PMS Hacker, J Raz, and HLA Hart (eds), *Law, Morality and Society: Essays in Honour of HLA Hart* (OUP 1979) 214–15.

<sup>22</sup> The term originates in HLA Hart, ‘Legal and Moral Obligation’ in AI Melden, *Essays on Moral Philosophy* (University of Washington Press 1958); see also HLA Hart, *Essays on Bentham: Jurisprudence and Political Philosophy* (OUP 1982) 253ff; and Green, *Authority of the State*, 39ff.

thing that the command requires, but to do the thing that the command requires because the command is what it is, namely, a command. And likewise, when X promises to  $\phi$ , it is one thing for X to  $\phi$  for the reason of the promise *because* that is what it means to promise, and another thing—an entirely different thing—when X  $\phi$ s for the reason that they subsequently learned that it would be good to  $\phi$  as a matter of expedience.<sup>23</sup> The point here is about the source of justification, an issue which is at the very heart of understanding what it means to have a reason for action and also at the heart of what it might mean for it to be possible for a rule itself to be a reason for action.

### § 2.2.1 Transitivity

A more formal way to describe what is happening when the justification of a rule is content-independent would be to say that when rules are so justified, the principle of the transitivity of implication does not apply. Raz, in fact, argues that

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<sup>23</sup> The critical literature on content-independence is considerable. Along formal lines, Paul Markwick argued in 2000 and then again in 2003 that content-independence, on at least two interpretations, is not a distinctive formal property of legal reasons (like rules). They either do not have the property at all or no reasons could lack it. In a less formal and more recent line of argument from 2011, George Klosko advanced four main objections against content-independent reasons, two of which merit mention here: first, that the analogy to promises which typically accompanies arguments in favour of content independence is inappropriate; and second, the self-image of the state is inextricably bound to a content-*dependent* conception of why agents have reasons to act as the law requires. P Markwick, 'Law and Content-Independent Reason' (2000) 20 *Oxford Journal of Legal Studies* 579; P Markwick, 'Independent of Content' (2003) 9 *Legal Theory* 43; and G Klosko, 'Are Political Obligations Content Independent' (2011) 20 *Political Theory* 1.

the principle of transitivity breaks down and cannot explain the fact that the 'justification of a rule is not, in and of itself, a justification for performing the action which the rule requires'. At most, the justification of a rule 'justifies giving the makers of the rule the power to make the rule'.<sup>24</sup> Yet Raz contends that this is as far as the justification of rules goes.

There is an obvious difficulty in the claim that the transitivity of implication breaks down in describing the tripartite relation between the justification of a rule (J), the rule itself (R), and the action that the rule requires ( $\phi$ ). This is the claim that J does not justify  $\phi$  *even when* J justifies R, which in turn justifies  $\phi$  (the alleged breakdown of transitivity, call it Proposition 1), but that nevertheless, in Raz's own words, 'of course, indirectly [the justification of the rule] justifies the action which the rule requires, as being an action in accordance with a rule which is thus justified'. In other words, J indirectly justifies  $\phi$  (call it Proposition 2).<sup>25</sup> And yet if Proposition 2 is true, then transitivity is intact. But then what are we to make of Proposition 1, which Raz also defends? Proposition 1, remember, is at the very centre of his argument in the essay 'Reasoning with Rules', where the term the 'opacity of rules' makes its first appearance in his published works. It is also where he states that the 'lack of transitivity in justification seems to me to be among the most important features of rules'.<sup>26</sup> And yet in this essay he also works to sustain

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<sup>24</sup> Raz, *Between Authority and Interpretation*, 210 fn 12.

<sup>25</sup> *ibid.*

<sup>26</sup> *ibid.* 214.

Proposition 2, that the justification of a rule indirectly justifies the action that the rule requires. The whole point of transitivity, needless to say, is its indirectness of implication, and so it is not at all clear why the principle is inadequate for rules if Proposition 2 is true. One might draw the distinction with Raz between the following:

Proposition 2: ‘the justification of a rule indirectly justifies the action that the rule requires’; and

Proposition 3: ‘the justification of a rule indirectly justifies the action that the rule requires as being an action in accordance with a rule which is thus justified’.<sup>27</sup>

We may ask whether there is a meaningful difference. Possibly—but only if transitivity is denied, and yet that is the very question at stake and so it cannot be begged. The difficulty, in any case, may well amount to a problem in the way Raz wants to formally represent his account of rules and reasons for action and it may be that the conceptual links he wants to draw are nevertheless sound; it could be that the formal model is simply the wrong one to describe what is going on between rules, their justifications, and the actions they require. This is a point that requires some kind of substantive clarification or revision in the Razian theory of rules and I will say more about this in the following section on what it means to posit

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<sup>27</sup> *ibid* 210 fn 12.

prescriptive reasons and, moreover, why we may or may not have reason to jettison transitivity as a regulative principle when we incorporate prescriptive reasons in a theory of rules.

For now it will be enough to see that the content-independence of the justification of rules is an additional feature of rules that is distinct from their opacity. Opacity refers to the idea that rules constitute reasons for action even though they do not make any evaluative claims to indicate what is good in the action being prescribed; and the content-independence thesis adds to this by stating that not even the justification of a rule will tell us anything about the goodness or badness of the action for which the rule purports to be a reason. From this, it is easy to see that opacity actually derives from the content-independence thesis, and it is this latter thesis which encapsulates the so-called normative gap between the evaluative and the prescriptive. It is also content-independence that Raz argues is responsible for the inadequacy of the principle of transitivity. What is more, the difficulties associated with opacity can only be resolved through making sense of content-independence—the question, that is, of how the justification of a rule can be content-independent.

### § 2.2.2 Autonomy of rules

The answer lies in a subsequent idea called the autonomy thesis.<sup>28</sup> This holds that rules, when valid, constitute reasons that one would otherwise not have were it not for the rule. It is only by explaining how rules can be autonomous that Raz thinks the puzzle of opacity will be solved and so allow for rules to be cast as reasons for action themselves and not just as statements of what we may already have reason to do. The answer comes through an examination of the structure of practical reason, which exhibits at least two levels.

First, we have ordinary reasons in the form of interests, desires, ideals, and so on. These can be as abstract or quotidian as one likes, their strengths or cogency can vary enormously, and conflicts between them are resolved when possible by ‘weighing’ them against one another.<sup>29</sup> This describes what are called first-order reasons and have been expressed symbolically by Raz as ‘ $R(\phi)P, X$ ’ or ‘the fact that  $P$  is a reason for  $X$  to  $\phi$ ’. One could rewrite this in a more intuitive and straightforward manner in this way:  $R(P) \rightarrow \phi(X)$ , where  $R$  is a function of fact  $P$  and  $\phi$  a function of  $X$  ( $\phi$  being an act of agent  $X$ ).

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<sup>28</sup> Raz, *Between Authority and Interpretation*, 215.

<sup>29</sup> cf Broome’s *pro tanto* reasons: ‘when the fact that you ought to  $\phi$  is explained by *pro tanto* reasons, the explanation retains central elements of the mechanical analogy. It includes one or more reasons for you to  $\phi$ , and it may also include reasons for you not to  $\phi$ . ... Each reason is associated with a metaphorical weight.’ Broome, ‘Reasons’, 37.

Then we have what are called second-order reasons, which are meant to capture a more complicated aspect of our patterns of reasoning. These are in essence reasons to act or not act upon first-order reasons. When a second-order reason occurs in the negative, that is to say, as a reason not to act upon a reason to  $\phi$ , it is called an exclusionary reason. The idea of exclusion does work on a few fronts. What is relevant here is that it explains how a second-order reason functions to exclude a valid and competing reason for  $X$  to  $\neg\phi$ . More than this, exclusion also involves not being motivated in one's actions by reasons which are not stipulated by  $R$  even, crucially, when such reasons are non-competitive, that is to say, do not require  $X$  to  $\neg\phi$ . This second feature of exclusion encapsulates content-independence, which sits at the very centre of second-order reasons. It was a modification of the original theorem that was introduced in the post-script of *Practical Reason and Norms* some fifteen years after the initial publication in 1975.<sup>30</sup> Its purpose was to address some of the questions that arose out of the distinction

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<sup>30</sup> And since then, there has been a good deal of critical commentary on exclusionary reasons. Christopher Essert, in a 2012 paper, argued that protected reasons, which work through exclusionary reasons, suffer from a dilemma concerning the scope of excluded reasons. He argues that the theory of protected reasons found in Raz is either defective in that it cannot account for how people actually act upon norms, which is a phenomenological complaint, or the theory licenses a form of double-counting reasons, which is a formal or analytic complaint. Further and more sustained complaints against exclusionary reasons have been advanced by Stephen Darwall, recently in a paper republished in March 2013. He argues that the capacity of mandatory norms to generate exclusionary reasons presupposes a model of accountability which centres on moral community. Darwall thinks that if this view is correct, then mandatory norms like rules derive their normative force not through exclusionary reasons but more directly from 'accountability relations' between people. C Essert, 'A Dilemma for Protected Reason' (2012) 31 *Law and Philosophy* 49; S Darwall, *Morality, Authority, and Law* (OUP 2013) ch 9.

between conformity and compliance.<sup>31</sup> This additional complication, however, need not trouble us at present. What is important to see for now is the structure of practical reason insofar as it describes how a rule, as a structure of reasons, generates a reason for not only an action but also a subsequent reason, an exclusionary reason, not to act upon other valid reasons, *even when these other reasons do not ask us not to do the thing that the rule requires.*

Remember that Raz's account of the architecture of practical reason is not evaluative. That is to say, it does not claim to make a moral or value-based case for how we *ought to* reason but rather how we do in fact reason when we reason correctly. The project in this specific regard but not others is primarily descriptive.<sup>32</sup> It is an account that is meant to accurately reflect our patterns of practical reasoning, especially as it bears upon mandatory norms such as rules and, more broadly, a part of our relationship to structures of authority such as states. This commitment to description has had a broad appeal and rightly so. Leslie Green, for example, uses the descriptive project to offer a modified formulation of the principle of exclusion in order to capture in formal terms the relation between an authority, a subject, and

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<sup>31</sup> Raz, *Practical Reason and Norms*, 185ff. In the philosophy of law, the terms conformity and compliance are used to describe the form of congruence between an agent's reason for action (their motivating reason) and the reason for action that in fact applies to the agent in respect of that act regardless of whether the agent uses it as the basis of their action (the normative reason). Whenever a reason R requires that an agent X must do act  $\phi$ , then X complies with R if X takes R as their motivating reason to  $\phi$ . By contrast, X will conform to R if they  $\phi$  for any reason but R (or perhaps for no reason at all).

<sup>32</sup> In other respects, some have argued that Raz's project is broadly normative. See J Waldron, 'Normative (or Ethical) Positivism' in J Coleman (ed), *Hart's Postscript* (OUP 2001) fn 7.

a range of action. It is an account worth setting out for our purposes here, as we will see in the following section on prescriptive reasons.

Green says that ‘A has authority over B if and only if the fact that A requires B to  $\phi$  (i) gives B a content-independent reason to  $\phi$  and (ii) excludes some of B’s reason for not  $\phi$ -ing’.<sup>33</sup> This emerges partly out of a discussion of the seventeenth-century distinction between counsel and command that preoccupied Hobbes and Locke in *Leviathan* (part II, chapter 25) and the *Second Treatise* (§ 87). Hobbes held that ‘COMMAND is where a man saith, *Do this* or *Doe not this*, without expecting other reason than the Will of him that saith it’, whereas ‘COUNSELL is where a man saith *Doe*, or *Doe not this*, and deduceth his reasons from the benefit that arriveth by it to him to whom he saith’. This contrast should capture some of the difference between the commands of authority and advice. The former entails a forbearance of judgement on the part of the subject. But where both command and counsel are offered in imperative terms, only a command is advanced as a reason *itself* for the subject to do the thing that is commanded—it is, in other words, a reason produced by the will of the commander and which, crucially, seeks to displace whatever reasons for or against the action the subject might have.<sup>34</sup> Green argues that this distinction is an essential feature of political authority and is not limited to a theorist as absolutist about power as Hobbes. Locke the moderate also

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<sup>33</sup> Green, *Authority of the State*, 41f.

<sup>34</sup> *ibid* 37.

thought about political authority in similar terms when he argued that in civil society ‘All private judgment of every particular member being excluded, the community comes to be umpire, by settled standing rules; indifferent and the same to all parties.’ In both Hobbes and Locke there is the root of what Raz eventually came to describe through the principle of exclusion and which Green in turn articulated as ‘the idea that political order claims to exclude private judgement and to replace it with public and authoritative reasons for acting.’<sup>35</sup> Green’s description is the final element of what is now a complete composition of the concepts required to make sense of prescriptive and evaluative reasons and how the relation is sometimes said to result in the puzzle of opacity. With these descriptions in mind—those of content-independence, exclusion, transitivity, and the autonomy thesis—it is now time to turn to the task of assessing the solution to the puzzle on offer by Raz in order to see if it is possible for rules themselves to be reasons for action.

### § 3 Prescriptive Reasons

I began this chapter by saying that prescriptive reasons sometimes collapse into evaluative ones such that the prescriptive reason so collapsed cannot *itself* be a

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<sup>35</sup> For a similar argument, see F Schauer, ‘Rules and the Rule-Following Argument’ (1990) 3 Canadian Journal of Law and Jurisprudence 187, 190ff.

reason for action. If this is true, two things follow. First, the normative gap of practical reason is sometimes no gap at all. Second, rules themselves sometimes cannot be reasons for action.

### § 3.1 Normativity

Remember that for Raz, rules are prescriptive and so according to him the statement 'X must  $\phi$ ' tells us nothing evaluative. Notice also that a statement of the kind 'X must  $\phi$ ' is not a reason for X to  $\phi$ . It merely implies that there is such an underlying reason. Such a reason would indicate that 'it is good for X to  $\phi$ ', which is an evaluative property. Insofar as a rule is a reason for action, therefore, it is opaque in respect of the evaluative grounds of the action it prescribes. This does not change when we offer a complete statement of the reason. The reason will remain opaque because even a complete statement will 'fail to show what is good about the action for which it is a reason'.<sup>36</sup> One might object that the fact that the reason is generated by a valid or binding rule shows that it is good. This would be incorrect. The objection would only show that the action is required and that we have reason to perform it but it would not show in what way the action is good. To say that an action is required by a valid or binding rule would be to describe a normative and not an evaluative property of the action. Insofar as an action is

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<sup>36</sup> Raz, *Between Authority and Interpretation*, 205 fn 1.

required by the rule, one might say that it is *pro tanto* good but that is as far as it goes. It is good insofar as it is required by a valid rule. But notice that this would mean that the evaluative follows from the normative rather than the evaluative being the grounds of the normative. This is what enables Raz to argue that something like ‘X must  $\phi$ ’, insofar as it is a rule and hence a reason for action, tells us nothing evaluative.

In a trivial sense, it is obviously false that something like ‘X must  $\phi$ ’ tells us nothing evaluative. The following section (§ 3.1) on the prima facie selective and evaluative properties of prescriptive reasons will demonstrate this trivial falsehood. I say trivial because it is unlikely that what follows would escape a philosopher such as Raz and I myself believe that the issue of what it means for a rule *itself* to constitute a reason for action will turn on other and deeper questions than those related to what I call selective properties. But it will be well for the sake of thoroughness to quickly sketch the trivial falsehood of the claim that ‘X must  $\phi$ ’ tells us nothing evaluative. The sections following, from § 3.2 onwards, will turn to the more interesting issue of the reflexive properties of reasons for action.

### § 3.1.1 Selection

Notice that rules of the kind under consideration here—those which are deliberately made and require conformity unconditionally—presuppose a source with standing. One thing this tells us in this context is that the claim ‘X must  $\phi$ ’

requires (i) a superior to advance it in some way, (ii) a subject to whom it applies, and (iii) a range of action to which it is relevant.<sup>37</sup> For the moment, it does not matter that the authority is abstract or corporeal. Let me designate it with the letter A. What matters is that A posits what it posits rather than what it does not. We know that there are eight initial variations of what is possible in relation to A, X, and  $\phi$ .<sup>38</sup> And we also know that for A to require X to  $\phi$  rather than  $\neg\phi$  means that it must choose between the eight possibilities. What bears emphasis is the role of selection in determining not just the field of applicable rules, but also in choosing which rule is applicable under a given set of conditions. When we factor in the relevant conditions for the application of a rule, we see that it is not just eight possibilities but that the number is virtually infinite. What is clear is that A must always select from the range of possibilities available to it, and the fact that A requires X to  $\phi$  rather than  $\neg\phi$  is meaningful.<sup>39</sup> This is the first and relatively uncontroversial step of the trivial argument against the claim that 'X must  $\phi$ ' tells

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<sup>37</sup> 'Triadic social relation': Green, *Authority of the State* 42.

<sup>38</sup> Where  $A \supseteq \{X \cap \phi\}$  and where  $\neg X$  is any agent but X:

$A(X \rightarrow \phi) : A$ states (X must $\phi$ )	$A\neg(X \rightarrow \phi) : A$ does not state (X must $\phi$ )
$A(\neg X \rightarrow \phi) : A$ states ( $\neg X$ must $\phi$ )	$A\neg(\neg X \rightarrow \phi) : A$ does not state ( $\neg X$ must $\phi$ )
$A(\neg X \rightarrow \neg\phi) : A$ states ( $\neg X$ must $\neg\phi$ )	$A\neg(\neg X \rightarrow \neg\phi) : A$ does not state ( $\neg X$ must $\neg\phi$ )
$A(X \rightarrow \neg\phi) : A$ states (X must $\neg\phi$ )	$A\neg(X \rightarrow \neg\phi) : A$ does not state (X must $\neg\phi$ )

<sup>39</sup> Cf Raz, *Between Authority and Interpretation* 214: 'autonomy thesis': rules make a difference. So, too, does selection.

us nothing evaluative. It does not show that rules as prescriptive reasons are evaluative. It just shows that they necessarily require selection.

The second step is to demonstrate that selection is necessarily evaluative. This is unlikely to be controversial, especially if we retain Raz's thesis that reasons are facts that indicate what is good in the thing for which they are reasons.<sup>40</sup> Retaining Raz's thesis in this regard may commit us to the anti-Humean position in debates about the theory of action that what we desire, we desire for reasons related to what we think is good. I will not investigate the possibility of this commitment here because I wish to proceed from within Raz's framework in order to test it on the basis of its own premises.<sup>41</sup> Now, on this view, at the first-order level of reasons,<sup>42</sup> for me to select P rather than  $\neg$ P means that I prefer the former in some way, and I will prefer P to  $\neg$ P only if I believe that P is better or more worthwhile than  $\neg$ P in at least some way, even if only trivially and even if I am

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<sup>40</sup> Raz, *Engaging Reason*, 23 and 32.

<sup>41</sup> The commitment I am describing assumes a certain revealed preference theory of choice, which in the main holds that preferences reflect choice behaviour or choice dispositions. This, for instance, is Amartya Sen's view in 'Behaviour and the Concept of Preference' (1973) 40 *Economica* 241. Most philosophers today hold that preferences are kinds of judgments that explain dispositions and behaviour. See also F Dietrich and C List, 'A Reason-based Theory of Rational Choice' (2013) 47 *Noûs* 104. For Dietrich and List, preferences are contingent on motivating reasons, and motivating reasons in turn are a motivationally relevant proposition. For a critique, see DM Hausman, 'Revealed preference, belief, and game theory' (2000) 16 *Economics and Philosophy* 99, who argues that the notion of 'revealed preference' is unclear and ought to be abandoned, at least in the context in which it is deployed most (economics).

<sup>42</sup> Second-order reasons (such as promises) are produced by first-order reasons (such as the justificatory grounds of promising). Once produced, however, second-order reasons regulate first-order ones. My claims here are not incompatible with this view of the structure of reasons.

compelled to select it. If selection is grounded in reason, and if reasons are facts which indicate what is good in the thing for which it is a reason, then selection requires evaluative reasons (though they do not require such knowledge). Evaluative reasons are, in other words, built into the logic of selection. These are, of course, old insights which figured centrally even in *Protagoras*, which dealt in part with the goodness of intentional action. ‘No one’, Socrates argued,

goes willingly toward the bad or what he believes to be bad; neither is it in human nature, so it seems, to want to go toward what one believes to be bad instead of to the good. And when he is forced to choose between one of two bad things, no one will choose the greater if he is able to choose the lesser.<sup>43</sup>

What we have thus far are two claims: that rules necessarily require selection and that selection necessarily requires evaluative reasons. It is small wonder that an act of selection requires reasons, that reasons are fundamentally evaluative, and that in turn selection is bound to its evaluative grounds. This is just transitivity. What is more, Raz acknowledges that rules are *ultimately* justified on evaluative grounds,<sup>44</sup> but in a way which allows for the normative gap and which also allows a rule—and not its justification—to operate as a reason for action. So to say that rules require selection and that selection requires evaluative reasons is not incompatible with the

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<sup>43</sup> *Protagoras* 358c–d.

<sup>44</sup> Raz, *Between Authority and Interpretation*, 209.

view that rules themselves are reasons for action and not just statements of what we have reason to do. But from none of this does it follow that a prescriptive reason tells us nothing evaluative. At the very least, to know that a rule has been issued is to know that the issuer believed that the rule issued was both good and that it was good for it to be so issued. By these lights, one knows something evaluative about the rule. QED the trivial falsehood.

It is possible to press the trivial case a little further by noting that some evaluative judgments are actionable, which is to say that something like ‘ $\phi$  is good’ can sometimes entail that one ought to  $\phi$ .<sup>45</sup> The possibility of actionable evaluative judgments, however, will be treated as an assumption for it would require too great a diversion from the main argument to provide a satisfactory proof. It is fortunate, moreover, that the assumption can be drawn from Raz himself: ‘I am among those who believe that possession of a value property (that is, the property corresponding to a value, in the way that being beautiful corresponds to the value of beauty) constitutes a presumptively sufficient reason for an action.’<sup>46</sup> If we accept the

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<sup>45</sup> It is important to guard against the error that evaluative grounds (or values) always imply reasons for action. If I have an evaluative reason to  $\phi$  that stems from the value that  $\phi$ ing is good, I may not have a conclusive reason to  $\phi$  if, for instance, I could not succeed in  $\phi$ ing or that attempting to  $\phi$  would result in circumstances in which I make things worse for myself or others. I alluded to this possibility in § 3.2.1 on the followability of reasons in Chapter 1. For an extended discussion, see B Williams, ‘Replies’ in JEJ Altham and R Harrison (eds), *World, Mind and Ethics: Essays on the Ethical Philosophy of Bernard Williams* (CUP 1995) 189ff, especially in respect Williams’ discussion of the Aristotelian conception of *phronimos*.

<sup>46</sup> Raz, *The Practice of Value*, 144. Also: ‘by the nature of value and of reason, the value of what we care about is presumptively sufficient reason to engage in it’ (ibid 145). I rejected

assumption, one implication is that insofar prescriptive reasons such as ‘X must  $\phi$ ’ imply something evaluative, they are at risk of just being statements of what one may have reason to do on the evaluative grounds so implied. This is a kind of normative collapse rather than a normative gap. In such cases, one not only knows something evaluative about the rule, but one may even have good evaluative grounds to heed the rule’s prescriptions.

Suppose, however, that a sceptic of my argument were to say that the trivial falsehood I have described did not give us an evaluative account of the relation between an agent and an action that is required by an authority’s rule. The sceptic may grant that authority, in issuing a rule, is required to choose amongst the various options available to it and further grant that the authority chooses on the basis of the evaluative grounds before it, and even that the agent to whom the rule applies happens to be aware of these evaluative grounds. And yet, the sceptic might say, it is not clear that the agent to whom the rule is issued has been given an evaluative reason to do as the rule requires. The agent has been given the rule itself as a reason for action. All we get from the story about the properties of selection is that there are evaluative grounds for the authority to issue the rule, but that does not give us an evaluative account of the relation between the agent and the act that the rule requires. The reply to this line of thought is as follows. First, the puzzle of the

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this view in Chapter 1. Value, as I see it, is not sufficient for the possibility of a reason for action, though it is, indeed, necessary.

opacity of rules stems from the view that rules tell us nothing evaluative about the acts that they require. The story about the properties of selection entails the observation that there is at least one thing that the existence of a rule tells us that is evaluative and that is that the authority that issued it thought that it was valuable to do so. Part of these evaluative considerations are passed on to the rule and the action that it requires, for one is able to know that performing the action that the rule requires promotes the evaluative grounds that were used to advance the rule in the first place. Put differently, in acting as the rule requires, I promote the evaluative considerations that constitute the rule's genealogy. So it turns out that the opacity of rules is not as opaque as we might think.

Now what if the sceptic were to reply that the rule that I must pay taxes, for example, grants only the presupposition that the authority who made that rule had to make certain evaluative judgments in doing so. And yet, according to the sceptic, the fact that the authority had to do so does not reveal an evaluative *fact*. It tells us nothing evaluative about me paying taxes. It merely tells us that the authority, in its judgment of the considerations before it, believed that it would be valuable to issue a rule indicating that taxes must be paid. No doubt the authority could believe anything it wishes about the value of the rules it issues, but that would not be enough to establish that there is value in any of it. 'The existence of law is one thing', as Austin put it, 'its merit or demerit is another', and so too with the lawmaker's belief, the sceptic might add, for that belief is one thing, its evaluative

merits another.<sup>47</sup> On this account, rules that flow from mere belief retain a certain evaluative opacity because they bear no relation to evaluative facts. At the limit, they might reveal something about the authority's beliefs.

This looks to me as though it is an important objection to the account of the evaluative properties of selection set out in this chapter. The objection seems to ensure the evaluative opacity of rules by restricting the background work of rule-making to the realm of belief. The boundary between belief and knowledge, however, marks the end of the objection.<sup>48</sup> If we grant that at least some of the rules of law are issued with knowledge of the relevant evaluative facts, then the account of selection properties I have set it out will be true in at least those cases, for knowledge pertains to facts. A further point to bear in mind is that belief comes in degrees and, without complicating matters too much, it suffices to observe that if

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<sup>47</sup> J Austin, *The Province of Jurisprudence Determined* (CUP 1995) 157.

<sup>48</sup> I leave out the relevance of *acceptance* as opposed to belief and knowledge, for I do not have the room in this work to carefully distinguish it from belief. In general terms, acceptance refers to an attitude that I could hold and that could in turn lead me to act as though I had a normative reason to act in a way that that reason would require me to act *without* believing that, in fact, I had such a reason. For collected essays on the distinction between belief and acceptance, see P Engel (ed), *Believing and Accepting* (Spring 2000). In the philosophy of law, Joseph Raz, following Ulrike Heuer, writes that the acceptance of a proposition is to conduct oneself in accordance with 'the belief that there is sufficient reason to act on the assumption that the proposition is true'. Thus, accepting that P entails *belief* that it is justified to act as though P were true, but not the belief that P is, in fact, true. Acceptance is a key epistemic component of legal systems, as in, for example with the presumption of innocence and or how courts conduct their proceedings on the basis of the law of evidence, which entail no necessary belief in the content of what the rules of evidence require. See J Raz, *From Normativity to Responsibility* (OUP 2011) 38ff and U Heuer, 'Explaining Reasons: Where does the buck stop?' (2006) 1 *Journal of Ethics and Social Responsibility* 1.

A issues a rule R that requires X to  $\phi$  on the basis of, say, a credence of 0.9 in the proposition that R requiring X to  $\phi$  is valuable, then, other things being equal, the fact of X  $\phi$ ing inherits the same probability that it is valuable, that is to say, that X  $\phi$ ing promotes an evaluative fact. In the case of the rule that requires X to pay taxes, the evaluative fact that is promoted would be, *ceteris paribus*, the value that inheres in a certain degree of wealth redistribution that is logged by the taxation of X's income. Now on the view that accepts credence as a relevant feature of law-making, the opaqueness that Raz regards as a puzzle for action is one of degrees. But it is still a form of opaqueness that allows for the puzzle to be relevant to the question of how it is that a rule itself can or cannot be a reason for action.<sup>49</sup> Granting, then, that there is a sufficient degree of opaqueness, let me now turn to that question, namely, the question, again, of what it is for a rule *itself* to be a reason for action.

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<sup>49</sup> A further objection to my account of the evaluative properties of selection might take issue on the grounds that it is not necessarily true that if we know that R is a positive rule, that is to say, that it was deliberately made, then we also know something about what the authority knew or believed to be valuable about the rule that X must  $\phi$ . For, the objector might say, it could be the case that the authority who issued the rule to have done this arbitrarily or for the authority to have enacted R without knowing anything about, or even caring about, R's requirement that X must  $\phi$ . The reply to this variant of the sceptic is twofold. First, the rules that the sceptic has in mind are not the kind of rules with which I am concerned, as they are extraordinary and do not characterise the rules that are typically issued by authorities in healthy legal regimes. Second, that a rule was formulated on the basis of arbitrariness still indicates, necessarily, that the issuer of such a rule thought that it would be well to do, that is to say, good on evaluative grounds to issue rules on the basis of arbitrariness. This follows from considerations already rehearsed in § 2.1 of this chapter in my discussion of intentions. The rules that flow from arbitrariness likewise inherit these evaluative properties.

### § 3.2 Reflexivity

So what does it mean for a rule *itself* to be a reason for action? I have called the ‘itself’ part of the expression ‘the rule itself is a reason for X to  $\phi$ ’ its reflexive property. To understand its importance, we can try to contrast what it means for (1) a rule itself to be a reason for action and (2) a rule to be a reason for action. In the former, the qualifier ‘itself’ is not meant to imply the spurious claim that were a rule to occur in a vacuum devoid of the standard sociopolitical and cultural trappings that make a system of law what it is, then it would even then be sufficient as a reason for action. It is unlikely that anyone would say such a thing. So what is it that is meant when one claims that ‘a rule itself is a reason for action and not merely a statement of what we have reason to do’?

One interpretation would be that the rule and not its justification is sufficient as a reason for action. Perhaps that is all ‘a rule itself’ means. But Raz thinks that every reason is presumptively sufficient absent defeating reasons or cancelling facts.<sup>50</sup> If this is true, and unless the justificatory reasons qualify as defeating reasons or cancelling facts, which of course they do not, then the justificatory reasons of a rule are themselves also presumptively sufficient to do the thing that the rule requires. This, once more, just describes presumptive sufficiency and transitivity. Yet the interpretation of ‘the rule itself’ we are considering—that

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<sup>50</sup> Raz, *Practical Reason*, 27ff for defeating reasons and 187ff for cancelling facts. For reasons as presumptively sufficient, see J Raz, *The Practice of Value* (OUP 2003) 144f.

the rule itself and not its justification is sufficient as a reason for action—entails the denial of both presumptive sufficiency and transitivity. This prompts an important query. What might motivate this counterintuitive structuring of reasons in the law?

It will help to proceed by contrasting the standard transitive description for the set comprising (i) the justification of a rule, (ii) the rule itself, and (iii) the action required by the rule with the non-standard interpretation wherein R itself is a reason for X to  $\phi$ . The standard view takes the following form:

(A) If J justifies R, and R justifies  $\phi$ , then J justifies  $\phi$ .

The non-standard model implied in Raz's conception of the 'rule itself', on the other hand, comprises four descriptions and then one specification—that is to say, it implies four descriptions of relations between justifications, rules, and actions, and then a specification of one of these four descriptions as being the one that is directly relevant to the idea that 'the rule itself is a reason for action and not a statement of reasons we already have'. It will be helpful to explicitly state all four:

(B) J and R both justify  $\phi$ .

(C) J and  $\neg R$  justify  $\phi$ , where  $\neg R$  is 'not R'.

(D)  $\neg J$  and R justify  $\phi$ , where  $\neg J$  is 'not J'.

(E)  $\neg J$  and  $\neg R$  justify  $\phi$ , where neither J nor R justify  $\phi$ .

For ‘the rule itself’ to be meaningful, all four descriptions must be (1) necessary and (2) distinct. (1) They are necessary because for one to understand what it means for a rule itself to be a reason for action, one needs to know what it means for a rule itself not to be a reason for action. The sets in which this condition is true, that is to say, wherein the rule itself is not a reason for action, are described under (B), (C), and (E). (2) The descriptions, moreover, are distinct because they cannot be combined non-trivially, that is to say, without just inserting conjunctions between them.<sup>51</sup>

It is noteworthy that the ‘rule itself’ is indicated by just (D), where the justification is indicated in the negative ( $\neg$ J) but  $\phi$  is still justified by R. This describes just those instances in which the justification of a rule is not justifying X’s  $\phi$ ing. It enables one to claim that R is ‘active’ as a reason *itself* and not merely as a statement of other reasons under just two conditions:

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<sup>51</sup> This is especially clear if we use set-theoretic descriptions—take, for example, the quantified expressions of the first and second descriptions:

$$A'': \exists x: \{x \in J, x \in R, x \in \phi\} \qquad B'': \exists x: \{x \in J, x \in R^C, x \in \phi\}$$

where we let  $R^C$  indicate the complement of R (all members which are not members of set R). A non-trivially combined rule for both descriptions would imply that there exists an  $x$  which belongs neither to R (since given the first description it belongs to  $R^C$ ) nor  $R^C$  (since given the second description it belongs to R). So a generalised description of the model in which Raz’s ‘rule itself’ is meaningful is not possible. This particular finding does not necessarily expose a shortcoming in Raz’s theory since it just entails an awareness that the model in which the ‘rule itself’ is meaningful is a complex one with multiple rubrics for action (in contrast to the standard view of reasons, which has a single transitive description:  $\phi \subseteq R \subseteq J$ ).

- DC: Where the justification of a rule is incomprehensible, unknown, or otherwise unpersuasive to  $X$  (call it the *doxastic condition* because it relates to  $X$ 's beliefs about  $J$ ).
- CC: Where  $X$  has at least one competing reason  $P$  to  $\neg\phi$  in those cases where  $\phi$  is required by  $J$ , that is to say, the case in which the agent has a competing reason not to do the thing that is justified not by the rule but by the justificatory grounds of the rule (call it the *competitive condition*).

We now have in our hands a developing conception of what it is for a rule itself to be a reason for action. To summarise, (D) is true whenever DC or CC is true or both are jointly true. Together they help respond to the second of our two queries, which sought to understand what might motivate the counterintuitive structure of reasons in the law found in the work of Raz, specifically in relation to the alleged breakdown of transitivity. The first motivation centres on counteracting DC. Under such a condition, it is often still useful to require the act stipulated by the rule, which means that the rule itself, as a reason for action, must override the fact that—the reason that—the justification is incomprehensible, unknown, or otherwise unpersuasive to the agent. A second motivation responds to CC. Here, too, it is often useful to require that the prescribed act be performed notwithstanding the fact that there is at least one competing reason to do otherwise.

The doxastic and competitive conditions comprise what I call the reflexive properties of rules as reasons for action, that is to say, the properties of a rule when it is *itself* a reason for action and not merely a statement of reasons we already have. Notice that the conditions essentially reflect circumstances in which, for instance, one is subject to a prescriptive reason, such as a legal rule, but does not—or, at least, does not want to—do as the reason requires. However, there is also a central jurisprudential question about cases in which one has reasons to do the actions the law requires but not for the reasons provided by the law. The question arises in cases of obligations to obey the law and accounts of the nature of obedience. It will be helpful in the next section to explain how the rule itself is relevant to these cases as well before proceeding with my argument about the superficiality of the distinction between prescriptive and evaluative reasons and the implications this has for the reflexivity thesis.

### § 3.2.1 Obedience

‘[P]olitical authority,’ says Green, ‘of which legal authority is one species, is normally seen as a right to rule, with a correlative duty to obey [...] and to obey is not merely to comply with the law; it is to be *guided by it*.’<sup>52</sup> Green’s terms ‘comply’

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<sup>52</sup> L Green, ‘Legal Obligation and Authority’ in EN Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Winter 2012 Edition),

and ‘guided by’ are the terms Raz uses for ‘conform’ and ‘comply’ respectively. Robert Paul Wolff puts it more directly: ‘Obedience is not a matter of doing what someone tells you to do. It is a matter of doing what he tells you to do *because he tells you to do it*.’<sup>53</sup> As far as my treatment of the reflexive property of rules as reasons for action is concerned, it is not necessary to engage the thorny question of whether the law entails a general obligation to obey its directives. It will be enough to point out that the notion of the ‘rule itself’ is necessary for an account of the possibility of obedience to the law. For that is what it would mean to obey the law if it is to be possible to do as a legal rule itself requires it rather than for some other reason. Of course, the relation need not be one of exclusion. If prescriptive reasons P and R both require  $\phi$ , P and R can jointly figure as the reasons for action for an agent that is aware of them, with neither P nor R being a statement or summary of the other. Part of the standard picture of legal obligation is that if R is the legal reason for action and P is the non-legal reason for action, then R itself can function as the reason to  $\phi$  notwithstanding whatever considerations may centre on P. In this notwithstanding sense, R is said to itself be a reason for action and, we might add, not a summary of reasons we may or may not have by way of P or, indeed, any other reason for action. Call this the *obedience condition*:

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<sup>53</sup> RP Wolff, *In Defense of Anarchism* (University of California Press 1998) 9, cited in Green, ‘Legal Obligation and Authority’.

OC: Where R requires obedience, it must be possible for an agent to do as R requires because R requires it.<sup>54</sup>

We can append OC to DC and CC as constituting the reflexive properties of rules. OC corresponds to a further feature of practical reason, namely, the distinction between compliance and conformity. As we know, the former obtains when the reason why X intends to  $\phi$  is the very fact that it is required by R, and X knows that it is so required. Compliance is about this kind of congruency between the motivation of the agent and the rule—or what Hegel called the ‘moral element’ of the deed.<sup>55</sup> It obtains when X decides to  $\phi$  because the rule says that X should do so and not because it would be prudent or beneficial on some other grounds to do so. Conformity is different. It requires no motivational congruence between the agent’s reasons and the rule. X could  $\phi$  for reasons entirely unrelated to R’s requirement that X should  $\phi$ . This might be the case if X stopped at a red light because, for instance, their passenger made such a request rather than because the law required it. Here there is conformity to, but no compliance with, the law’s requirement to stop at red lights; instead, there is compliance with the passenger’s request and conformity to the law’s requirement.

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<sup>54</sup> One could call this an internalist conception of obedience. According to the standard reading of Bernard Williams’ essay ‘Internal and External Reasons’, R is a possible normative reason for X to  $\phi$  only if it is possible for X to  $\phi$  for R, which is an ‘explanatory dimension’ of R.

<sup>55</sup> GWF Hegel, *Elements of the Philosophy of Right* (AW Wood and HB Nisbet trs, CUP 2002) § 121.

Raz thinks reasons for action *in general require only conformity*: ‘reasons for action are, *barring special circumstances*, merely reasons to conform’ and ‘what matters is conformity with reason’.<sup>56</sup> But rules *are that special case* in which it must be *possible* to comply, for otherwise it would be impossible, as a conceptual matter, to obey the law—that is to say, to do as the legal rule itself requires for the reason that it requires it.<sup>57</sup> A surprising implication of this account of obligation is that it means that the justificatory basis of a legal rule is not to figure as the reason for the action that is required by the rule, for otherwise there would be no obedience to the rule. Hence the denial of both the principles of transitivity and presumptive sufficiency, for either would foreclose the possibility of obedience wherever: (i) an agent reasons transitively from the justification of the rule to the action it requires; or (ii) the justification of the rule is a presumptively sufficient reason for the action that the rule requires.

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<sup>56</sup> *ibid* 180ff and 190, emphases added. For a discussion, see B Celano, ‘Are Reasons for Action Beliefs?’, in LH Meyer, SL Paulson, and TW Pogge, *Rights, Culture, and the Law: Themes from the Legal and Political Philosophy of Joseph Raz* (OUP 2003) 40.

<sup>57</sup> For a discussion, see MS Moore, ‘Authority, Law, and Razian Reasons’ (1989) 62 *Southern California Law Review* 827, 875ff. See also Raz’s response in the same issue: J Raz, ‘Facing Up’ (1989) 62 *Southern California Law Review* 1153, 1174ff.

### § 3.3 Presumptive sufficiency

Yet how could it be that an account of practical reason could jettison *both* the principle of transitivity from classical logic *and* the principle of presumptive sufficiency from practical reason itself? How could a theory of reasoning be so demanding that it requires us to discard foundational standards of what it is to reason correctly in most other domains of reasoning? Is such a theory fundamentally alethic,<sup>58</sup> in that it requires premises that entail the view that there are distinct domain-specific truth-making properties? In this section, I will argue that whatever we might think of discarding transitivity for some areas of practical reason, it is not possible to likewise discard presumptive sufficiency without creating further conceptual problems.

A reason is typically described as presumptively sufficient whenever it determines what must be done absent cancelling facts or defeating reasons. It is possible to refine this with the following conception:

PS: P is a presumptively sufficient reason for X to  $\phi$  under two conditions: (i) if there does not exist another reason to  $\phi$  or  $\neg\phi$ ,

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<sup>58</sup> For the most prominent statement of alethic pluralism, see C Wright, *Truth and Objectivity* (Harvard University Press 1992). For a recent defence, see A Yu, 'Logic for Alethic Pluralists' (2017) 114 *The Journal of Philosophy* 277.

then it is justified for  $X$  to  $\phi$  for  $P$ ; and (ii) if  $X$  believes that  $P$  and only  $P$  applies, then for  $X$  to  $\neg\phi$  for  $P$  is a case of akrasia.<sup>59</sup>

The first condition contains a number of different considerations, the most important of which are cancelling facts (CF) and defeating reasons (DR). So that it is clear which conceptions of the foregoing notions are at play, it will be well to briefly state which ones I have in mind:

CF:  $C$  is a cancelling fact for me to  $\phi$  iff I have a reason  $R$  to  $\phi$  and  $C$  cancels  $R$  such that it is no longer a reason for me to  $\phi$  for  $R$ .

For example, if I promised to meet you at the train station at 10 p.m., the promise, as my reason for action, would be cancelled if you released me from it. It does not follow that I have no reason to meet you at the train station at that hour, just that

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<sup>59</sup> Raz, *From Normativity to Responsibility*, 46ff. The second feature is disputed by some but I am in agreement with Raz that the objections are unsustainable. See M Stocker, 'Raz on the Intelligibility of Bad Acts' and J Dancy, 'Enticing Reasons' in Wallace and others, *Reason and Value*. One point to bear in mind independently of these disputes is the distinction between presumptive sufficiency and pre-emption. A cause  $x$  is pre-empted in relation to an effect  $z$  when (i) another cause  $y$  is closer to the effect  $z$  and (ii)  $y$  causes  $z$  such that  $x$  can no longer cause  $z$ . I merely note the distinction between presumptive sufficiency, which I take to bear on justifications, and pre-emption, which is principally about causation, and leave the discussion of their priority to another day. On pre-emption, see J Stapleton, 'Unpacking "Causation"' in P Cane and J Gardner (eds), *Relating Responsibility – Essays for Tony Honoré on His Eightieth Birthday* (Hart 2001) 177 f, where Stapleton writes: 'To play a role in history of an outcome, the relevant element constituted or introduced into the scene by the targeted factor must not have been pre-empted by another factor. This is because that element must survive so that it can be a *necessary* member of the set of conditions that was, at least later, actually present and was sufficient to produce the outcome. ... History is a process where each new factor influences the range of possible futures because, inter alia, that factor may eliminate from the scene, as it stood at that point, an element necessary to a later possible fate' (emphasis belongs to Stapleton).

the promise is no longer an eligible reason for that action. An important feature of cancelling facts is that they do not rely on the strength of reasons in the way of defeating reasons. That a fact cancels a reason does not imply that the cancelling fact is the stronger reason. It indicates nothing about the strength of reasons, just that a reason that is cancelled is no longer a reason for the action for which it was once a reason.

What does centre on the strength of reasons is the notion of a defeating reason, which is another familiar item of normativity:

DR: D is a defeating reason in respect of a reason R for me to  $\phi$  iff R is not an absolute reason to  $\phi$ , where an absolute reason is one that cannot be outweighed, and D outweighs R such that I no longer ought to  $\phi$  for R.

In contrast to cancelling facts, a reason that is defeated by a defeating reason does not cease to exist. It is merely outweighed by the defeating reason for the act in question. As Broome observes, the mechanical language of 'outweighing' is metaphorical, but it is not necessary for my purpose to clarify its details.<sup>60</sup> Instead, it will suffice to show that the justification of a prescriptive reason, such as a legal rule, comes neither under the rubric of CF nor DR, which means that it qualifies as a presumptively sufficient reason for the act that is required by the rule itself. If

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<sup>60</sup> Broome, 'Reasons', 37.

I am right, then two implications follow: (i) the rule itself, *pace* Raz, is in fact merely a statement of its justification; and (ii) it is conceptually impossible to obey such a rule. Let me turn to these points now.

### § 3.3.1 Cancelling facts

First we test whether a justification of a rule can be subject to a cancelling fact, which would be a condition of a rule itself being a reason and not merely a statement of its justification. Cancelling facts are typically occasioned by decisions, such as the decision to release someone from a promise, or material changes in the circumstances that pertain to the initial reason, such as a clock that is discovered to have displayed the time incorrectly and which made some reason to arrive at an appointed time no longer relevant. In every case, as I say, the defining effect is that cancelling facts render erstwhile reasons into non-reasons rather than merely reasons that are outweighed by other reasons. Could it ever come to be that the justification of a legal rule is cancelled in this way? It does not seem that it could come by way of a decision, as in the example of being released from a promise. The reason for this is that it would not do for political authority to assert that its directives are to themselves be followed without recourse to their justifications because that is what it would mean for one to obey. It would be artificial to assert a conception of obedience and then require that it not merely override but cancel other reasons for action, even when they are as intuitive as the justificatory bases of

the directives themselves. If the nature of obedience is such that it requires—as a conceptual matter—that justifications are cancelled as reasons for action, then the argument must centre on necessity. And yet such an argument seems implausible as a general matter and, more specifically, most legal positivists today, including Raz, deny that the law entails a general obligation to obey its directives.<sup>61</sup> The notion, therefore, that justifications can be cancelled as reasons for action *because* they are the justifications of legal rules is to be rejected.

On the other hand, one might suggest that material changes in the circumstances that pertain to the relevance of a justification may constitute cancelling facts if we insist upon the opacity of rules. Yet this route is unlikely to be satisfying. The argument for it might rehearse the claims about rules not indicating their evaluative grounds—that the rule to stop at red lights, for instance, reveals nothing about it being a good idea to coordinate traffic, and the like. Suppose, further, that it really were the case that as I approached the red light I did not have the slightest clue about the evaluative bases of the bylaw that directed me to stop. Does my condition constitute the kind of cancelling fact that would terminate the justification as the reason for action? I think that it would not, for it is not the case that my ignorance of the justifications cancels them as reasons for

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<sup>61</sup> The standard view is that the law merely claims that it entails such an obligation. See, for example, J Raz, *The Authority of Law* (OUP 1979) 233ff, who argues that ‘there is no obligation to obey the law ... not even a prima facie obligation to obey it. See also MBE Smith, ‘Is There a Prima Facie Obligation to Obey the Law?’ (1973) 82 *The Yale Law Journal* 950.

action. They retain their status as normative reasons for the act in question even if they are outside of my perspectival ken.<sup>62</sup> Indeed, it is difficult to conceive of possibilities in which such normative reasons would relinquish their status as reasons on grounds of ignorance or changes in other material conditions. And if ignorance is not the relevant marker, it would seem that any other fact which might cancel the justification of a rule would likewise cancel the rule itself as the reason for the act it prescribes. For it seems implausible, even contradictory as a logical matter, to conceive of circumstances in which the justification of a rule that prescribes an act would be cancelled as the reason for that rule *and* that act (by transitivity), and, *furthermore*, for it to nonetheless stand that the rule remains a reason for that act. It is doubtless possible, even likely, that one can have many reasons to do some act, and that some of those reasons can be cancelled as result of shifting circumstances but that others of those reasons would remain material for the same act. However, it is not possible for that condition to arise within the same transitive line of reasoning. For example, I may have two independent reasons to step outside and get some sun at lunch time: one, I have a vitamin D deficiency and have been directed to do so by my doctor; and two, I know that winter is coming, so it is now or seemingly never that I will be able to get some sun. It may turn out that I do not have the vitamin deficiency in question, hence cancelling that reason,

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<sup>62</sup> Perspectivalists would disagree. See G Björnsson and S Finlay, 'Metaethical contextualism defended' (2010) 121 *Ethics* 7. For a defence of objectivism, see PA Graham, 'In defense of objectivism about moral obligation' (2010) 121 *Ethics* 88. See also MJ Zimmerman, *Living with Uncertainty: The Moral Significance of Ignorance* (CUP 2008).

but that winter is still coming. I therefore still have at least one reason to get some sun at lunch time. Notice, however, that the same result is not possible within the same line of reasoning. It cannot be the case that it turns out that I do not have the vitamin deficiency but that I still have a reason to step outside to get some sun because I have a vitamin deficiency. That would be a contradiction unless we commence at the start by denying transitivity, yet that would constitute question begging, for one of the features of this account is that it aspires to set transitivity aside as a result of its understanding of legal reasons.

### § 3.3.2 Defeating reasons

The second challenge to the claim that the justification of a rule retains its status as a presumptively sufficient reason for the same action that the rule prescribes is that the justification might be subject to a defeating reason. Defeasibility in this context has two components that concern us: first, that the reason to be defeated is not absolute, that is to say, it is not such that it is never outweighed by other reasons; and two, that the reason is, in fact, outweighed by another reason. We set aside the possibility of justifications that are absolute in their strength in order to consider more quotidian concerns. Suppose that a new government, riding on a tide of populism, passes a law that requires foreigners to register at local police stations. The law's justification has two components: (i) a factual claim about reducing crime rates by requiring foreigners to so register; and (ii) an evaluative claim about it being

good to have such a policy because it would reduce certain crime rates *and* that it would be well to reduce those crime rates. The factual and evaluative claims are advanced throughout the recent election campaign across the country as well as the subsequent debates in the legislature. Suppose that these claims are challenged by (i) conclusive social scientific evidence that refutes the factual component of the law's justification, as well as (ii) legal philosophical arguments that make a conclusive evaluative case against requiring foreigners being required to register with the police because it would reduce certain crime rates (and that it would be well to reduce those crime rates). The challenges are, we suppose, conclusive and together entail that both components of that particular law's justification are, in fact, to be rejected because they are both false. The question now is not: Does that law exist? The existence of a law, as we say, depends not on its merits but its sources. The real question, however, is: Does that law constitute a reason for action? Namely, is the law that requires that I register at the local police station a reason for action, that is to say, a reason for me to so register, absent its twin justificatory bases?

I suggest that the answer to this question is No. It simply does not follow from the fact that a law exists that it is a reason for the action that it prescribes.<sup>63</sup> To put this another way, existence is not a sufficient condition for a reason for

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<sup>63</sup> I argued for this conclusion at length in Chapter 1, namely, that the fact that something exists does not necessarily make it a possible reason for action for me. Here, I focus on just the legal parameters of the question of possible reasons for action.

action. This principle is sometimes borne out in the law quite clearly in the form of jury nullification, which has a long and fascinating history in common law. In October 1649, the English Leveller John Lilburne was charged under the Treason Acts of 1649 for high treason. The indictment was challenged on the facts—that though Lilburne’s conduct satisfied the definition of treason in the Acts, his conduct was nevertheless not treasonous—as well as its evaluative merits, that is to say, its injustice. The jury returned its verdict after a two-day trial, declaring Lilburne not guilty of all charges. The Treason Act remained unaffected, yet its mandatory rules did not become reasons for action on that day, for its justificatory bases, comprising factual and evaluative aspects, were inadequate on that occasion despite the legal facts before the court. We need not stretch so far back in time to see the principle at work either. In a 2006 case before the Canadian Supreme Court,<sup>64</sup> we read that:

It has since then been well established that under the system of justice we have inherited from England juries are not entitled as a matter of right to refuse to apply the law—but they do have the power to do so when their consciences permit of no other course.

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<sup>64</sup> *R v Krieger* 2006 SCC 47.

Here the emphasis centres on just the evaluative aspect of a law, which illustrates that a mandatory rule can fail to be a reason for action even if the factual, that is to say, non-evaluative aspects of its justificatory bases are cogent.

The principle illustrated by jury nullification is at work in other areas of the law as well, for example, with judicial opinions. The most striking example I can think of is *Woodson v North Carolina*,<sup>65</sup> where the US Supreme Court held that a mandatory death sentence was invalid precisely because it was a mandatory legal rule. The key demerit of a *mandatory* death sentence, the Court opined,

is its failure to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death. ... It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.<sup>66</sup>

The phenomenon of a law failing to be a reason for action on account of having its justification(s) defeated by other reasons, even for legal entities, is not restricted to the courts. Indeed, it is observed to be more widespread with enforcement agencies, especially in cases where policing a law would prove too onerous or otherwise

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<sup>65</sup> *Woodson v North Carolina* 428 US 153 (1976).

<sup>66</sup> *ibid* 303.

absurd, hence rendering the legal rule inert as a reason for the action it prescribes without affecting its existence. It is not necessary to review these other instances except to recognise, by way of summary, that sometimes when the justification of a law is defeated, the law itself—the rule itself—then fails to be a reason for action.

This returns us to the principle of presumptive sufficiency. The question that directed the discussion of the preceding pages was the following: Is the law that requires that I register at the local police station a reason for action, namely, a reason for me to so register, absent its two justificatory bases, namely, the factual component and the evaluative component? I have shown that the law contains the conceptual resources that would allow me to make a reasonable argument to the contrary, that is to say, that the law that requires me to register is no such reason if I could show that its justificatory bases are inadequate.<sup>67</sup> If I am able to demonstrate as much, it is still clear that it would not follow that the law is not a reason simpliciter, or even that it would not be a reason for some action, or that would not even be a reason for the action that it prescribes—yet it *does* follow that it would

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<sup>67</sup> A somewhat similar suggestion occurs in T Endicott, ‘Are There Any Rules?’ (2001) 5 *The Journal of Ethics* 199, 199. In his opening thought experiment, Endicott imagines a situation in which he goes through a red light because he is being chased by assassins. He is then charged by a stubborn police officer for violating the law. Has Endicott broken the law? He is optimistic, he says, that ‘even a very law-abiding magistrate might find the resources in English law to hold that I had not broken the law, even if no lawmaker ever deliberately laid down an exemption for my case’. Endicott’s concern is with the status of the traffic law as a conclusive reason for action, *not* with the status of the traffic law *as a law*. My concern is with the status of the law as a reason for action (not *as a law*) in the absence of its justificatory grounds in certain contexts (such as when one is being chased by assassins).

not be a conclusive reason for the action it prescribes. This may seem like an underwhelming conclusion, but it is not. Its significance is made clearer once we observe that:

- (i) if, by the principle of presumptive sufficiency, the justification of a rule is presumptively sufficient for the reason, then the rule itself is merely a statement of its justification; and
- (ii) if the justification of a rule is defeated by stronger reasons, as in the examples described above, then the rule itself is also, at least sometimes, defeated as a reason for the action that it prescribes.

That is to say, a statement of the rule is a paraphrastic statement of its justification, and the rule itself is not a reason for action—or, at least, not a conclusive reason for the action that it prescribes. Further, it appears that if we follow the logic of presumptive sufficiency to its end, the reflexivity thesis is pushed down to the realm of defeated reasons, where it has no explanatory utility for the distinctness of legal reasons for action.

Some may wonder what the disagreement might be in all this, for if the argument grants, in light of (i) and (ii), that the rule can still be *a* reason for the action it prescribes, though not a conclusive reason for that act, then it appears that matters are left as they stood. This, however, would be an error. It will be helpful to recall that a massive amount of legal philosophical labour has been directed by Raz and others towards establishing the thesis that a rule itself can be a reason for

action and not merely a statement of other reasons, including a statement of its justification. Part of the motivation for these efforts has been to show the distinctness of the law's reasons in a vast sea of other reasons, for all reasons are facts and some facts are possible reasons. Hence, the efforts so directed would not achieve their purported ends if they merely established what we already know, namely, that a legal rule is a fact—that it exists—and is therefore a possible reason for action. That was always obvious, and is surely not to be taken as the objective of Raz's—or anyone else's—research agenda. What was distinctive about Raz's efforts was the attempt to establish that a rule itself can be reason for action and not merely a statement of other reasons (such as its justificatory reasons) *and* that even if the rule's justificatory bases are defeated by other reasons, the rule itself can retain its status as a reason for action in spite of what would otherwise hold under transitivity. Yet we have seen that in the event that the justification of a rule is not defeated by stronger reasons, then the justification is a presumptively sufficient reason for the action that the rule prescribes, thus rendering the rule into a mere statement of its justification. The rule would not be a reason for action in what we can call a *distinctive sense*. This was a conclusion that Raz worked hard to avoid, for it is a thesis that underpins much else in his theory of rules. On the other hand, if the justification *is* defeated, then the rule, at least in some important cases, is no longer a conclusive reason for action—it is merely one datum amongst a virtually infinite number of others, which would not be a thesis worth defending, for it has no explanatory utility. Incidentally, these findings have implications for a number of familiar conversations in contemporary legal philosophy, such as those that are

concerned with content independence and obedience. I leave these to the side, however, to consider a final objection before proceeding to generalise the findings of this chapter to all human-made rules.

### § 3.3.3 No rule, no action

Against my account of presumptive sufficiency, suppose that a sceptic were to say that what is missing from the story is a more detailed theory of what it is for there to be a justification of a rule and what, moreover, the rule justifies in action. An authority, for instance, could issue a rule that indicates that motorists are required to stop at red lights on the basis of the justification that doing so helps coordinate traffic, avoid collisions, and so on. Absent that rule, however, motorists have no reason to stop at red lights—though, depending on the state of their roads and the number of fellow motorists, the motorists might retain the rule’s justificatory reason to coordinate traffic. The sceptic here might urge that what this tells us is that the act of stopping at red lights does not flow in a presumptively sufficient way from the justification of the rule to stop at red lights, which we said was to coordinate traffic. *That* act follows from *that* rule and not the rule’s justification. These considerations give us a strong reason to believe that the justifications of rules are often not presumptively sufficient for the acts that are required by the rules themselves. Let me call this the *no rule, no action objection*. By its lights, the paraphrastic thesis I have been defending is false and the reflexivity thesis is true.

No doubt many of the rules we have in our legal systems—at least many of the positive rules that we have—are like the ones just described under the sceptic's objection. They require actions that we would have no reason to perform in the absence of the rules that require them. If this is true, how could it be that the justifications of these rules are presumptively sufficient for the actions they require of us? In a literal sense, the sceptic's objection seems tempting. Without the rule to stop at red lights, motorists would seem to have no reason to do so. My reply here is twofold.

The first is a quibble that comes from the thought that motorists would not stop red lights in the absence of the rule to do so because it would be unlikely that there would be any red lights in the absence of the rule to stop at them. So, of course, if the rule to stop at red lights is part of a body of law that creates a traffic-coordinating-reality that includes red lights, then that reality will not exist in the absence of the rules that constitute it. Thus we have the result that it is not possible to do as the rule requires in its absence. The rule's prescription is constitutive of the action. Now this quibble reveals the literal sense in which the sceptic's objection seems cogent. But that is as far as the cogency.

The deeper question, however, and this is my second reply, will centre on the way in which we conceptualise actions. For what is the *action* that the motorist performs when they stop at red lights? The answer we give will depend, in part, on what draws our interest. To stop at the light, the motorist will perhaps look behind them to check that it is safe to brake, tilt their heads upwards to check the light,

gently press the brakes with their right foot, and a long line of other actions that together comprise the mechanical and sensory aspects of the literal act of stopping at the red light because it is required by the rule. We may, however, be interested in a different reply to the question of what constitutes the action in the scenario I am describing. It will help to briefly revert to the usual formal representation—namely, that J justifies the rule R that X must  $\phi$ —so that we can put the question abstractly. The question, that is, of: What is  $\phi$ ing? In my view, to point to the mechanical or sensory operations involved in  $\phi$ ing is only part of the answer and, some might say, the relatively uninteresting part of the answer from a philosophical point of view. I will suggest that the literal sense in which the sceptic's objection is true is restricted to *that* part of the answer to the question What is  $\phi$ ing? As I say, it is small wonder that motorists would not stop at red lights absent the rule to stop at them, so to say that the justification of the rule is not presumptively sufficient to stop at red lights in the absence of the rule does not seem to tell us very much that could be of philosophical interest.

A thicker view of this question would reveal something about what is going on when X  $\phi$ s. Doubtless, the phrase 'what is going on' is metaphorical and perhaps a more precise way to put the point would be to speak of the metaphysics of  $\phi$ ing, but I worry that this would entail biting off more than we need in order to grasp that X's  $\phi$ ing comprises more than just mechanical and sensory operations. And, of course, the sceptic would admit as much. For X to  $\phi$  for R is for X to conform to the law, and 'conform to the law' is not principally a sensory or mechanical effect.

It is, in an important sense, abstract because it refers to a kind of relation between an action and an idea, namely, the idea of  $X$  doing as the law requires. Seeing this, we edge closer to the understanding that, contrary to the objection of the sceptic, it is possible for it to be the case one can do as a rule requires in the absence of the rule. But we are not yet there. All that is established so far is that actions can stand in relation to ideas and thus far we have just the idea of conforming to the law. Absent the rule to  $\phi$ , it is not possible for  $X$  to conform to the rule to  $\phi$ . Yet what is it that the law *really* requires? What are the law's *deep requirements*?

The next step is to recall the significance of transitivity. If  $X$   $\phi$ s for  $R$ , it follows that  $X$  has also  $\phi$ ed for  $J$  if  $J$  is the justificatory basis of  $R$ . If one resists this point by arguing that it ought to be possible to  $\phi$  for  $R$  and not  $J$  by, for example, having  $R$  as one's motivating reason, my reply is that that is fine only insofar as it explains the possibility of what  $X$  is doing from a first-person perspective. But the first-person perspective is not the beginning and the end of the story and, what is more, one can explain anything one wants from a first-person perspective, yet that does not always change the facts. Further, if the justification of the rule that I must not park my car in a way that obstructs an accessibility ramp is that doing so would unjustly impede wheelchair users from accessing the sidewalk, then nothing stands in the way of that justification being presumptively sufficient as a reason for action for not parking my car in such a location. To put this back into its formal form, it is indeed possible for  $J$  to be presumptively sufficient for  $X$  to  $\phi$  when  $J$  is the basis for  $R$  requiring that  $X$  ought to  $\phi$ . In this example,  $\phi$ ing is not merely not parking

my car in front of this or that accessibility ramp. It is, instead, not unjustly impeding wheelchair and other accessibility ramp users from safely accessing sidewalks. To go back to the example about red lights, what would it mean for the justification of the rule about stopping at red lights to be presumptively sufficient? If the justification is that avoiding collisions is valuable, then it appears that the actions that flow from that justification are all possible with or without the rule *unless* the rule generates conditions—that is, produces a reality—that would not exist without it *and* on which  $\phi$ ing would depend. Yet not all rules are like that. Not all rules create their own realities. Some merely attempt to regulate existing reality and, at least in those cases, the arguments about presumptive sufficiency that I have advanced are cogent. With the red light, I do not doubt that I cannot stop at it in the absence of the rule that requires me to do so, and the reason for this is that we would have no red lights absent the body of rules that stand behind putting up red lights at intersections (unless, by extraordinary coincidence, it somehow came to be that we would have such lights even in the absence of our current traffic laws). But, on my view, it does not follow from that observation that I cannot have a presumptively sufficient reason to do as that law requires of me. In that case, *that* law is merely a statement of the presumptively sufficient reason that I already have.

What about the claim that *all* rules create their own realities that are distinctly legal? If this were true, would it not also be true that in the absence of rules, there could be no actions for which their justifications in turn could be presumptively sufficient? Would it not be, then, that one could not do as a rule

required in its absence? For that, one might say, is the essence of following rules—to have them guide our actions. The first point to note here, as elsewhere, is that no legal philosopher, to the best of my knowledge, holds that legal rules require compliance in this way. That is, no one is of the view that I must do as a legal rule requires me to do because the rule requires me to do it. At the limit, some philosophers have argued that compliance must only be a conceptual possibility of legal rules, for without it it would be impossible to obey the law (according to the orthodox understanding of obedience),<sup>68</sup> while others have argued that compliance also underpins the theory of justification in the normative domain.<sup>69</sup> Now if the sceptic's objection against my arguments about presumptive sufficiency is that, in the absence of rules, I am not able to use them as my motivating reasons in doing as I do, then, of course, the objection is granted. I cannot follow something that does not exist. But surely that is not the thrust of the objection. If the no rule, no action objection has bite, its challenge is about the status of  $\phi$ ing. It holds that the justification of the rule that requires that I  $\phi$  is not presumptively sufficient to  $\phi$ , and its premise for this claim is that the metaphysical status, if one could call it that, of  $\phi$ ing is that it is constituted by the rule. The rule, in other words, determines what counts as  $\phi$ ing. Let me now take this formal story and apply it to the example in which a rule requires that I do not park my car in a way that obstructs accessibility

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<sup>68</sup> Green, 'Legal Obligation and Authority'.

<sup>69</sup> The point about justification, for example, is Gardner's view; see his *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (OUP 2007) 91ff.

ramps, the justification for which is that parking in that way would unjustly impede the mobility of wheelchair and other accessibility users. Now the question is: What is  $\phi$ ing? What is the act that the rule requires? For the no rule, no action objection to succeed, it must be the case that the action required of me by the rule cannot flow in a presumptively sufficient way from the rule's justification, because the objection is determined to show that the rule determines what counts as  $\phi$ ing. Now is it possible for this to be the case? I have already set aside the suggestion that the no rule, no action objection is that in the rule's absence, I cannot use it as a motivating reason. So it cannot be the case that 'not parking in a way that obstructs accessibility ramps because the rule requires it' is the act that is required by the rule. *That* act is not our  $\phi$ , for otherwise the objection would be trivial and, moreover, it would run against the grain of what many legal philosophers believe about the limits of what legal rules require of us (namely, that they do not obligate compliance). The other possibility is that  $\phi$ ing is simply 'not parking in a way that obstructs accessibility ramps' and this, clearly, is an act for which the justification that 'it would unjustly impede the mobility of wheelchair and other accessibility users' is presumptively sufficient. On this line of thought, the question 'What is  $\phi$ ing?' is answered with 'an act that is in conformity with the justification of a rule', which I have argued is possible in the absence of the rule itself.

Before I conclude, let me summarise the no rule, no action objection and restate why it was important to meet its challenge. Throughout this chapter, I have argued that the reflexivity thesis is false and the paraphrastic thesis is true. That is

to say, it is not possible for a rule to itself be a reason for action in a distinctive sense and not merely a statement of reasons that we already have. The no rule, no action objection sought to show that some rules define what counts as the actions they require and that, if this is true, then the justifications of these rules would not be presumptively sufficient for the actions they require in at least some cases because, in the absence of these rules, the actions they require would not be possible. The example of this was the rule to stop at red lights. In the rule's absence, it would be unlikely that there would be any lights at all for me to stop at. My reply to the objection was twofold, both of which focused the argument on the question of 'What is  $\phi$ ing?' First, the no rule, no action objection cannot intend to mean that the required actions are mechanical, that is to say, that  $\phi$ ing is merely a set of mechanical movements, for that would be trivial; and second, if the objection does not mean to emphasise the mechanics of conformity, then more abstract considerations about what it is to  $\phi$  obtain, chief amongst these is conformity with the justificatory grounds of rules—the so-called deep requirement of the law. The challenge of the no rule, no objection was important to meet because it presented a route to what looks like the hard-line view that rules are constitutive of the actions they require. Blocking that route, in turn, gives us a broader, truer view of rules, one in which the presumptive sufficiency of their justificatory bases entails the conclusion that rules are merely statements of reasons that we already have. That is the only sense in which legal rules are possible reasons for action.

#### § 4 Rules in General

The official focus of this chapter has been mandatory legal rules. The motivation has been to work out what kind of reasons it is possible for this important class of reasons to be, and I have endeavoured to show that one kind of thing that it is not possible for mandatory legal rules to be is reasons for action themselves. They can only ever be statements of reasons that we already have. The arguments that have advanced that end have entailed a constriction of the range of possible reasons, which is a manoeuvre that works against—in line with the undercurrent of motivation which runs throughout the entirety of this thesis—an idealised view of practical reason. In the case of mandatory legal rules, it is the idealised view in which such rules are endowed with a *causa sui* force through which they are, without reference to anything else beyond themselves, reasons for us to act. I have argued that that view is mistaken and that the more humdrum, non-ideal account of such reasons is that they are merely statements of other reasons. Now in this penultimate section of this chapter, I will try to say a little bit about the possibility of generalising the lessons of the arguments I just rehearsed to all human-made rules, including personal moral rules, such as telling the truth and keeping our promises, which we use to guide our lives. A good place to position this query is alongside Rawls' classic paper 'Two Concepts of Rules', for it treats many of the same questions that have preoccupied us in this chapter but with a focus on non-legal human-made rules, as well as Hodgson's work on utilitarianism, which

provides useful corrections of Rawls.<sup>70</sup> I will survey these philosophers now and then turn to the task of seeing what, if anything, can be extracted from them for the purpose of generalising the claims of this chapter.

Rawls' motivating question in the essay I mentioned will appear familiar to us: Are rules to be understood as being 'merely generalisations of and logically posterior to' certain sets of actions (what he calls the 'summary' conception of rules) or are rules instead constitutive of and hence logically prior to certain sets of actions (the 'practice' conception of rules)?<sup>71</sup> What is at stake in the question is the distinction between the justification of a practice as a general matter, such as the social practice of promise-keeping, and the justification of a particular instance of that practice, such as a promise to meet you somewhere for lunch—or, as Rawls

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<sup>70</sup> Rawls and Hodgson will be my focus, but the debate on the summary and practice conceptions of rules which I will treat in this section has many other important contributors. I have already mentioned in the Introduction of this chapter David Lyons' book *Forms and Limits of Utilitarianism*, which is part of the debate with Hodgson, but there are others. To take a small sample: Moore, 'Authority, Law, and Razian Reasons' (Moore argues that rules cannot exclude motivating reasons, though agents may circumscribe their motivating reasons in light of the rules); DH Regan, 'Authority and Value: Reflections on Raz's *Morality of Freedom*' (1989) 62 *Southern California Law Review* 995 (Regan argues that conscientious agents have reasons to follow rules most of the time but do not have reasons to treat them as being opaque); HM Hurd, 'Challenging Authority' (1991) 100 *Yale Law Journal* 1611 (Hurd argues that rational agents cannot take rules as exclusionary reasons for action); and L Alexander and E Sherwin, 'The Deceptive Nature of Rules' (1994) 142 *University of Pennsylvania Law Review* 1191, 1196.

<sup>71</sup> I am quoting J Fieser, 'Is Hume A Moral Sceptic?' (1989) 50 *Philosophy and Phenomenological Research* 89, 97 fn 22, from an analogous summary of Hume's view of natural and artificial virtues and Rawls' analysis of the summary and practice conceptions of rules. For Hume, actions pertaining to natural virtues, which are virtues whose approval is independent of social conventions, are virtuous insofar as they are useful individually, whereas artificial virtues, which arise from social conventions, are virtuous insofar as they are useful as rules.

puts it, between ‘justifying a practice as a system of rules’, which is sometimes enforceable (as in a game of chess), and ‘justifying a particular action which falls under these rules.’<sup>72</sup> Once a promise has been made, for instance, Rawls thinks that it would be an error for the promisor to subsequently weigh the reasons for and against keeping the promise because to do so, that is to say, to allow the promisor deliberative discretion, would be to miss the point of the practice of promising itself: ‘the point of the practice’, he says, ‘is to abdicate one’s title to act in accordance with utilitarian and prudential considerations in order that the future may be tied down and plans coordinated in advance.’<sup>73</sup> That ‘point’ is supported by a defence of various utilitarian advantages of having practices that either deny participants or require that participants deny themselves recourse to questioning those advantages when the game, so to speak, is in play. It would be a mistake, on this account, to think that just because the justifications of the practice were settled on utilitarian grounds in the first place that it follows that every instance of that practice is to be, or ought to be, subject to utilitarian analyses.<sup>74</sup> For Rawls and

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<sup>72</sup> Rawls, ‘Two Concepts of Rules’, 5. Throughout his essay, Rawls oscillates between discussing enforceable and unenforceable systems of rules. Sometimes the distinction matters. For example, the rules of chess as a system are enforceable when one plays chess (a breach of the rules would constitute a breach in the game itself such that one would no longer be playing the game correctly—or at all), whereas the practice of promise-keeping has no referees or ombudsmen and is unenforceable except under special circumstances. I will return to this distinction later in the discussion of this section.

<sup>73</sup> *ibid* 16.

<sup>74</sup> *ibid* 18 fn 21, where Rawls identifies GE Moore as being amongst the first to erroneously assume that judgments about the goodness of a particular action can be settled on the basis of general utilitarian considerations. For the Moore reference, see GE Moore, *Principia Ethica* (T Baldwin ed, rev edn, CUP 2000) 197: ‘the assertion “I am morally bound to perform this action” is identical with the assertion “This action will produce the

others who accept this view, it is the very purpose of the practice to deny that general liberty to deploy utilitarianism at will: ‘The promisor is bound because he promised: weighing the case on its merits is not open to him.’<sup>75</sup>

Now all of that may sound more austere than it actually turns out to be, for it does not follow from the above considerations that an agent who participates in, for instance, the custom of promise-keeping is barred from deliberating about whether or not they should keep their promise. Those deliberations, however, if they are to occur, should pertain to ‘the various excuses, exceptions and defenses, which are understood by, and which constitute an important part of, the practice’ and the question of whether one’s case falls within the category of exceptions provided for by the practice itself.<sup>76</sup> So could one object to this story by maintaining that one did not do as one promised because one reasoned that that would be best on the whole rather than by recourse to the set of validated exceptions indicated by the practice? The answer, for Rawls, is pretty clear:

If a child were to use this excuse one would correct him; for it is part of the way one is taught the concept of a promise to be corrected if one uses this

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greatest possible amount of good in the Universe”); and see also Moore’s discussion in his ch 1, § 7. For an early discussion of this aspect of Moore, see D Ross, *The Right and the Good* (P Stratton-Lake ed, CUP 2007) 9ff.

<sup>75</sup> Rawls, ‘Two Concepts of Rules’, 16.

<sup>76</sup> *ibid* 17.

excuse. The point of having the practice would be lost if the practice did allow this excuse.<sup>77</sup>

Having said that, Rawls acknowledges that it is an essential part of utilitarianism to allow for one to excuse oneself from a practice if the consequences of abiding by it are ‘extremely severe’ and that a practice, as a general matter, relies in part on ‘people’s good sense’, the prospect of providing concessions with ‘hard cases’, and an understanding of the ‘background of circumstances’ that provides the context for the practice but which nevertheless cannot be fully specified; in particular, judgments about the extreme severity of conformity to practice, or changes in the background circumstances, do not, however, transform into a ‘general option to weigh each particular case on utilitarian grounds’.<sup>78</sup> The view that does allow for that general option, namely, to directly apply the utilitarian principle in particular cases, is the one that Rawls calls the ‘summary’ view of rules because, as he sees it, it imagines rules as being ‘summaries of past decisions’, where every decision is a result of a deployment of the utilitarian principle.<sup>79</sup> Rawls rejects that view in favour of the practice conception of rules, which he argues is able to retain the distinction between the justification of a rule as a general matter on the one hand, and the justification of an instance of that rule’s applicability on the other.

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<sup>77</sup> *ibid.*

<sup>78</sup> *ibid* 17f.

<sup>79</sup> *ibid* 19.

The key point of the practice conception is that the rules are constitutive of the practice over which they preside and that those who engage the practice must recognise the rules' constitutive feature. But there are a few further clarificatory remarks which need to be added to that essential statement. On this conception, participants of a practice do not merely behave as though they are acting in accordance with the rules, but must instead, if they are to be understood as being participants, obey them.<sup>80</sup> An essential requirement for rules to be treated definitively in this way is that they need to be publicly regarded as constituting a coherent practice. And so, by these lights, rather than being summaries or generalisations of particular cases and associated decisions from the past, rules are logically prior to such instances because for such instances to be understood as being instances of the practice, those instances need to be conceptualised through and

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<sup>80</sup> *ibid* 24 and 27. We have already worked with this conception of obedience—that one must  $\phi$  *for* the reason that requires it if one is to obey that reason—in § 3.2.1 of this chapter. This conception stands, as we have seen, in contrast to conformity, which requires no such congruence between the reasons one uses to  $\phi$  and the reason that requires one to  $\phi$ . I provide an extended treatment of conformity and compliance in Chapter 3, §§ 3.1 and 3.2. In the context of games, one might wonder whether this conception of obedience, which seems to be important to Rawls' view of the rules of games, is appropriate. The player who does not take the rules of a game as their motivating reasons to strike the ball at a particular moment in the game or even throughout the game (but takes, instead, some other set of reasons because that is their fancy) is still going to be regarded by everyone else as playing the game, are they not? Rawls does not think that that would be right, for what settles the question for him is the first-person perspective: 'if a person is engaged in a practice, and if he is asked why *he* does what *he* does, or if he is asked to defend what he does, then his explanation, or defense, lies in referring the questioner to the practice. He cannot say of *his* action, if it is an action specified by a practice, that he does it because he thinks it is best on the whole' (*ibid* 27). Hodgson's example of the 22 avowed act-utilitarians who are not 'really "playing cricket"' but who are enjoying themselves and entertaining others just as much as if they were falls along the same line of thought; Hodgson, *Consequences of Utilitarianism*, 26.

defined by the practice first. The logical priority of the rules that constitute the practice implies that it is impossible to partake in, or perform the actions that are a part of, the practice itself, and that going through the motions of the actions, absent the rules, would be described as being something other than the practice in question. The example that Rawls likes to use to illustrate this point is baseball: one can swing a ‘peculiarly shaped piece of wood’ in the manner it is swung in baseball all one likes, and one can go through the motions of sliding into a bag of sand, too, but one will not be ‘batting’ in the first instance nor ‘stealing a base’ in the second unless one is, in fact, playing the game of baseball (at particular times of the game).<sup>81</sup> Thus, the terms that are used to describe these actions will not make sense without referring to the logically prior rules that constitute them, and the actions themselves will likewise not fall under the rubric of baseball unless one is, in fact, playing by those rules.

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<sup>81</sup> Rawls, ‘Two Concepts of Rules’, 25. Here is John Searle putting it similarly with another sports analogy, but bringing out the relation between a rule being constitutive and being analytic: “A touch-down is scored when a player has possession of the ball in the opponents’ end zone while a play is in progress”. If our paradigms of rules are imperative regulative rules, such non-imperative constitutive rules are likely to strike us as extremely curious and hardly even as rules at all. Notice that they are almost tautological in character, for what the “rule” seems to offer is part of a definition of ... “touchdown”. That, for example, a [touchdown] is achieved in such and such a way can appear now as a rule, now as an analytic truth based on the meaning of [“touchdown in football”]. That such statements can be construed as analytic is a clue to the fact that the rule in question is a constitutive one.’ JR Searle, *Speech Acts – An Essay in the Philosophy of Language* (CUP 2011) 34. An important forerunner to the idea of a constitutive rule is Wittgenstein’s concept of a language game in *Philosophical Investigations*.

As Hodgson notes, however, switching the sporting analogy now to *cricket*, avowed act-utilitarians could reasonably claim to be playing the game of cricket in full view of the game's rules but nevertheless conclude that the acts required by the rules are also the ones with the best consequences in light of their circumstances (eg, 22 people on a warm, sunny day in the right state of mind and with suitable paraphernalia). That conclusion would enable them to do as cricketers do, and so '[e]ven if they were not really "playing cricket", there seems no reason why they should not enjoy themselves and entertain others just as much as if they were.'<sup>82</sup> When one is engaged in a practice such as cricket, one usually views the governing rules as one's reasons for action but, Hodgson argues, there is nothing logically necessary about this; for though it may seem unusual, one could do as the 22 act-utilitarian cricketers do and claim that the actions involved were done because they would have the best consequences overall in light of the circumstances.<sup>83</sup> But Rawls rejects that logical possibility, for the acts involved, if they are to count as the acts of cricketers, are specified by the rules of the game rather than the principle of utility. Now notwithstanding the fun that the 22 avowed act-utilitarians might have in their circumstances, Hodgson argues that there are certain good consequences that some practices have but which could not be promoted in the way imagined by the faux cricketers. I will return to this particular argument from Hodgson shortly. For now, we may note that the sporting analogies by Rawls and Hodgson prompts

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<sup>82</sup> Hodgson, *Consequences of Utilitarianism*, 26.

<sup>83</sup> *ibid.*

a further feature of the practice conception of rules, namely, that one's authority to question the rules is itself restricted and defined by the rules. A baseball player who thinks they can have four strikes instead of three would, in Rawls' view, be confused about the game of baseball, for if one wants to play the game, one cannot treat its rules as mere guides or suggestions about what to do in particular circumstances but must instead see that there is no way to play the game except by obeying its rules.<sup>84</sup> The player may want to lobby the relevant society for altering the rules of the game but cannot, without not playing the game or incurring the reprobation of the referee, disobey the rules when the game is being played

To take these matters out of the language of games and back into the language of justification—and the role of justification, indeed, is what is truly at stake throughout all of the foregoing reflections—we could say that the distinction between the summary and practice conception of rules for Rawls is as follows. On the summary view, rules are construed as guides that each of us is meant to deploy alongside our own rational methods in deciding what it would be best to do in the circumstances to which the rules are meant to apply. Thus, with the summary conception, the utilitarian principle that directed us in setting up the practice as a general matter remains directly active in our engagement with the particular cases

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<sup>84</sup> One might wonder about this austere view of games that one finds in Rawls, for is it not part of the playfulness of games, at least some games, to tolerate and sometimes encourage, within the bounds of good sense, the breach of their rules? For peripheral reading on this subject, see FC Kew, 'Game-Rules and Social Theory' (1992) 27 *International Review for the Sociology of Sport* 293.

which the rules are to govern such that one has, as Rawls put it, discretion to ‘use the guides or to discard them as the situation warrants without one’s moral office being altered in any way: whether one discards the rules or not, one always holds the office of a rational person seeking case by case to realize the best on the whole.’<sup>85</sup> With the practice conception of rules, however, when one’s role is defined by a practice, one’s actions are judged by reference to the practice’s constitutive rules, and that questioning or otherwise attempting to redefine those rules entails adopting a different role, we might say a second-order role, through which one does the questioning, redefining, reforming, and so on of the rules.

Now some readers will have noticed that the summary conception of rules that Rawls labours to dismiss from our minds sounds similar to what I have called the paraphrastic thesis. I have defended that thesis against its antagonist, the reflexivity thesis, which to some readers may also sound eerily similar to the practice conception of rules. To refresh our minds, the paraphrastic thesis is that legal rules are merely statements of other reasons and, moreover, that that is the only sense in which such rules can be reasons. The reflexivity thesis, on the other hand, is that legal rules are themselves reasons for action and not merely statements of what we have reason to do. I rejected the reflexivity thesis on account of it falling at two hurdles: first, the thesis does not comport with certain important features of rule-making and, second, the thesis is defeated by the principle of presumptive

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<sup>85</sup> Rawls, ‘Two Concepts of Rules’, 28.

sufficiency. So, now the question: If Rawls' practice conception of rules shares the relevant features of the reflexivity thesis, and if I am right about the reflexivity thesis, does it follow that the practice conception falls at the same two hurdles as the reflexivity thesis? What is at stake in the question is this: If the practice conception goes down with the reflexivity thesis for the same reasons, then that will count against the practice conception's purpose of trying to explain how all practice-based human-made rules are meant to work.

I can take up the question of my last paragraph by first setting out the most obvious way that the practice conception mirrors the reflexivity thesis, which is that, on the practice conception, as with the reflexivity thesis, the rules that constitute a practice are themselves reasons for action, and that these rules do not take their justificatory force from the utilitarian principles that were used to establish the practice in the first place.<sup>86</sup> In other words, as with the reflexivity thesis, there is a disruption to the transitivity of relations between the justificatory reasons behind the rules, the rules themselves, and the actions the rules require, so that if one is to partake in the practice, the justificatory grounds are not eligible grounds for one's actions. For Rawls, an important part of the story about justification is that, insofar as rules can be said to be constitutive of a practice, the acts that are so constituted

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<sup>86</sup> The reflexivity thesis does not entail the view, reflected in the practice conception, that the rules of a practice are constitutive of the practice. Leaving this issue and other differences aside, I will attend just to the similarities between the two for now, for that will be sufficient for the question of whether both fall at the same hurdles.

by those rules can only be done, from a logical point of view, by reference to the rules. That was the point in his baseball example. Batting, stealing base, and so on were all things that were impossible, from a logical point of view, except by reference to the game of baseball. Their justifications could also only be understood by reference to the game's rules. That logical argument was an essential component of Rawls' manoeuvre in trying to show that the direct application of the principle of utility cannot be used to justify instances of a practice. Thus, on this view, the general utilitarian argument for retaining the practice of promise-keeping, for example, cannot be used to justify the keeping of particular promises. As in the reflexivity thesis, the reason for action is to be found in the rule itself and not the rule's justification.

Some might think that that view pushes the justificatory reasons of a rule too far away from the action and that it need not be this way. Hodgson, for instance, agrees that, though Rawls is correct in saying that promise-keeping cannot, as a logical matter, be justified *without* reference to the practice of promise-keeping, that is as far as it goes.<sup>87</sup> That view, Hodgson says, is correct only insofar as a particular kind of description of that act is concerned, namely, as being a promissory act, meaning that that act cannot be understood as being promissory except by reference to the practice of promise-keeping—*but*, he continues,

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<sup>87</sup> Hodgson, *Consequences of Utilitarianism*, 31.

[t]o understand a description of an act is, of course, only a beginning to justifying it; and, unless one is only interested in whether the act is justified *within* the practice, there is no reason at all, much less a logically compelling one, why the rules of the practice alone can justify the action. The keeping of a promise cannot be justified without *reference* to the rules defining the practice of promising, but this does not mean that it can be justified only *by* those rules.<sup>88</sup>

This move by Hodgson rightly, in my view, expands the scope of justificatory reasons significantly but leaves in place an essential lesson: an act that belongs to a practice can be justified within it only by reference to its rules. Yet whether the justification of an act that a practice produces through its rules is necessary and / or sufficient for the justification of the act in question is another matter altogether.<sup>89</sup>

Those persuaded by Rawls' stricter view about which grounds are eligible justifications for an act that is specified by a practice might object to Hodgson's move, but they would be wrong to do so.<sup>90</sup> Suppose that Hagrid has a personal set of rules about productivity that together constitute his practice of productivity.

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<sup>88</sup> *ibid*, emphases belong to Hodgson.

<sup>89</sup> *ibid* 32.

<sup>90</sup> To be clear, Rawls' point about justification is about *logical* justification, but Hodgson's criticism still stands. Here is Rawls restating his strict view: 'It is simply that where a form of action is specified by a practice there is no justification possible of the particular action of a particular person save by reference to the practice. In such cases the action is what it is in virtue of the practice and to explain it is to refer to the practice.' Rawls, 'Two Concepts of Rules', 32.

Without those personal rules, he would not have that particular practice of productivity because those particular rules are constitutive of that practice. One of the rules that Hagrid has is that he should wake at the crack of dawn. Assume, *arguendo*, that that rule is a sufficient reason for him to wake up at the crack of dawn. Now how many sufficient reasons does Hagrid have in respect of that act? Possibly many, for if he is a committed admirer of morning dew, then, other things being equal, that might also be a sufficient justification, or perhaps he needs to catch a train, or do something else that is especially important for his wellbeing at that particular time of the day. As far as his practice of productivity goes, it is not at all in doubt that his rule is what justifies getting up at dawn when the terms of one's consideration of Hagrid's habits are restricted to his practice. Yet clearly there are other reasons which might be just as good as his practice-derived ones for the purpose of justifying what he does, and some of those other reasons may even preempt his practice-derived ones on account of being presumptively sufficient for the same act.

The committed Rawlsian may object that if the rules of a practice define what it is for an action to count as  $\phi$ ing, then the only way to  $\phi$  is 'by reference to the rules of the practice' even if one can meticulously go through the same motions and, like Hodgson's avowed act-utilitarian cricketers, appear to be  $\phi$ ing. As we have already seen thanks to Hodgson, that line of argument is not going to work. Furthermore, not all practices are concerned with the motives of their participants or about making sure that their participants are acting *with reference* to the rules of

the game so long as they are, *in fact*, acting *in accordance with* the rules of the game. Imagine that Vader is sitting across the chessboard from Luke and moving the pieces in accordance with the rules of chess. Someone comes along and asks Vader, ‘What are you doing, playing chess?’ Vader replies, ‘No! I’m *waging war* on Luke!’ So, is Vader playing chess? It is not clear how one could reasonably say No, especially since he is so intent on defeating Luke, whom he hates, by utilising the rules of chess. Now in this context, could Rawls say that he is making a *logical* point to the effect that Vader’s actions at the chessboard must be described by reference to the game of chess if his actions are to constitute playing chess? It is hard to see why one must go along with Rawls on this or, indeed, what the theoretical upshot would be in this line of thought for personal rules, such as keeping one’s promises or telling the truth, especially once we reintroduce into this story, as I will shortly, the role of presumptively sufficient reasons.

Leaving Vader aside, the earlier example about Hagrid’s rules and the remark about the looming possibility of presumptively sufficient reasons brings us back within reach of the central arguments of this chapter. Recall that the principle of presumptive sufficiency holds that a reason is presumptively sufficient—which is to say that it provides good-enough grounds for an action—whenever it determines what must be done absent facts that cancel the reason or absent other reasons that outweigh it. I have already put the principle formulaically by reference to Raz in § 3.3, but let me restate it now to refresh our minds:

PS: P is a presumptively sufficient reason for X to  $\phi$  under two conditions: (i) if there does not exist another reason to  $\phi$  or  $\neg\phi$ , then it is justified for X to  $\phi$  for P; and (ii) if X believes that P and only P applies, then for X to  $\neg\phi$  for P is a case of akrasia.<sup>91</sup>

In the context of mandatory legal rules, I used the principle to put forward two arguments. First, that if by the principle of presumptive sufficiency the justification of a rule is presumptively sufficient for the reason, then the rule itself is merely a statement of its justification, and, second, that if the justification of a rule is defeated by stronger reasons, as in the examples I provided in § 3.3.2, then the rule itself is also, at least sometimes, defeated as a reason for the action that it prescribes, reducing it to one datum amongst others. These and other arguments from that section of this chapter contributed to the conclusion that a statement of a rule is a paraphrastic statement of its justifications. I argued that that conclusion should not be taken lightly even if it retained the view that a legal rule can be *a* reason for action since it, that conclusion, namely, has important implications for one of the central legal philosophical projects of Raz and others, which has been to explain, as I put it, the distinctiveness of the law's reasons in a vast sea of other reasons. That central project, however, would fail to achieve its ends if it merely established what we already know: that a legal rule is a fact, that it exists, and therefore has a claim

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<sup>91</sup> Raz, *From Normativity to Responsibility*, 46ff. For extended descriptions of cancelling facts and defeating reasons, see §§ 3.3.1 and 3.3.2 of this chapter respectively.

to being a possible reason for action. What I took to be distinctive about Raz's project was, as I say, the attempt to defend the thesis that a rule can itself be a reason for action and not merely a statement of other reasons (such as its justificatory reasons) *and* that even if the rule's justificatory bases are defeated by other reasons, the rule itself can retain its status as a reason for action in spite of what would otherwise hold by the transitivity of relations (that is, in spite of the usual chain of implications, which would be that when a justification loses its force, so too does the rule it justifies). As I showed, however, if the justification of a rule is presumptively sufficient for the action that the rule prescribes, then the justification is presumptively sufficient for that action (thus the rule would be rendered into a mere statement of its justification, in harmony with the paraphrastic thesis). On the other hand, if the justification of the rule *is* defeated by other reasons, then the rule itself in certain important cases is merely one datum amongst a virtually infinite number of others, which would be a claim without any explanatory value in the context of describing the distinctiveness of the reasons of the law.

Those arguments, in any case, were the ones I defended in the context of mandatory legal rules. Versions of them can also be deployed in the space opened up by Hodgson's criticism of Rawls' strict view of the range of possible justifications for actions required by rules in the context of practices. I will present one version which I draw from one of Peter Singer's early papers on act-utilitarianism, but let

me first quickly restate what I take to be the main moves in the debate thus far so that we are all on the same page.

On Rawls' version of the practice conception of rules, the only eligible grounds of reference for an action that is specified by the rules of a practice, be it for the purpose of description or justification, are the rules themselves. Hodgson criticises, correctly, in my view, Rawls for unduly restricting the eligible grounds of justification, but still comes out in favour of the practice conception by arguing that that conception secures certain desirable outcomes ('the best consequences') that are not possible under the summary conception. That is to say, for Hodgson, as with Rawls, conceptualising rules as reasons for actions themselves and not merely statements of other reasons is conducive to doing better overall. For my purposes, what needs to be done is to test to see if the practice conception is vulnerable to the same attacks stemming from presumptive sufficiency as the reflexivity thesis.<sup>92</sup> In the context of the practice conception, however, the principle of presumptive sufficiency does slightly different work. In the case of the reflexivity thesis, the application of the principle showed that (i) the justification of a rule is presumptively sufficient for the action required by the rule itself (hence reducing the rule to a mere statement of its justification) or that (ii) if the justification of a

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<sup>92</sup> Just to recall, my attack on the reflexivity thesis was on two fronts: its inability to comport with certain features of rule-making; and its being defeated by the principle of presumptive sufficiency. In what follows, I will focus on just the presumptive sufficiency principle, since the element of rule-making is not always relevant to personal rules (such as telling the truth or keeping one's promises).

rule is defeated by other reasons, then the rule itself is reduced to merely one datum amongst a virtually infinite number of others. But in the case of the summary conception, the principle of presumptive sufficiency shows that whatever benefits can be adduced from the practice conception of rules can be adduced first by taking rules to be merely summaries of other reasons. To set the scene for that argument, consider again the case of promise-keeping.

On the practice conception of rules, the justification for keeping a promise on any particular occasion rests with the justification of the practice of promise-keeping as a whole. With the summary conception on the other hand, according to its critics, keeping a particular promise would need to be justified on the grounds that, for instance, the promisee made contingent plans, has certain expectations, and so on, and that these things are sufficiently valuable on the balance of utility, which includes the consequences of breaking the promise. If, however, the promisee is aware that *those* are the reasons on which the promisor will act, then they will also know that the promisor will not keep their promise unless it has the best consequences.<sup>93</sup> Promises, according to the critics of the summary conception, would become pointless because the fact that a promise is made would add no

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<sup>93</sup> P. Singer, 'Is Act-Utilitarianism Self-Defeating?' (1972) 81 *The Philosophical Review* 94, 96. In that paper, Singer criticises Hodgson's thought experiment of a society in which everyone 'accepts the act-utilitarian principle as his only rule, and attempts to act in accordance with it' (Hodgson, *Consequences of Utilitarianism* 38f). Singer rejects Hodgson's claim that acting upon the act-utilitarian principle would lead to worse consequences than acting on the basis of more specific moral rules. In my discussion, I will focus just on the aspects of the debate that I take to pertain to the principle of presumptive sufficiency.

further reason to the balance of utility to do as one promised to do than in the absence of the promise being made.<sup>94</sup> Again, according to the critics of the summary view, the same considerations that pertain to promise-keeping also apply to truth-telling. Here is how Singer describes the situation:

Imagine that *A* tells *B*: ‘*X* is *Y*.’ In an act-utilitarian society, *B* would have good reason to believe *A* only under the following conditions. If *X* were *Y*, it would, in *A*’s belief, be best to tell *B*; if *X* were not *Y* it would, in *A*’s belief, not be best to tell *B* that *X* is *Y*. These conditions will hold generally only if *B* is likely to take the information conveyed as true, for only then will the utilitarian benefits which come from the conveying of true information—such as the possibility of making arrangements based on the information—be possible. But as *B*’s taking the information to be true rather than false is a condition precedent of *A*’s having good reason to tell *B* the truth, the situation is precisely similar to that of promise-keeping.<sup>95</sup>

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<sup>94</sup> In the context in which this discussion occurs, Singer and Hodgson are concerned with a vicious loop: ‘The fact that the act was promised will not lead to its performance having greater utility than it would have had, had it not been promised, unless the promisee will, because of the promise, have a greater expectation of its being performed than he would otherwise have had. The promisee will have good reason for this greater expectation only if he believes that the promisor believes that the act will be expected by him, the promisee, with greater expectation than it would have been, had it not been promised, but merely mentioned. The promisor will know this, and the promisee will know that he knows, and so on. A spiral has been set up which cannot be cut across.’ Singer, ‘Is Act-Utilitarianism Self-Defeating?’, 96.

<sup>95</sup> *ibid.*

The breakdown of promise-keeping and truth-telling described in this excerpt and the preceding remarks are taken to count quite seriously against the summary conception. Indeed, Hodgson thinks that the implications are so grave that ‘there could be no human relationships as we know them.’<sup>96</sup>

Now there are a few ways to address Hodgson’s gloomy assessment of the summary conception. Singer points out a few that are of special interest. First, in a context in which everyone has as their personal rule the principle of act-utilitarianism, then people would not act upon motives, such as self-interest, malevolence, pride, and others that typically lead people to make false promises or tell lies.<sup>97</sup> So the argument that act-utilitarian agents would break promises and tell lies on the basis of the view that doing so on some particular occasion would bring about the best consequences, but without specifying how such agents would actually bring about the best consequences by lying and breaking promises, relies not on the existence of reasons to tell lies and break promises but instead on the absence of presumptively sufficient reasons for one to tell the truth and keep one’s promises. Consider this observation in the context of Singer’s Struggling Cinema example. Suppose that you are walking down the street when someone comes up to you and says: ‘There’s a very good film on at the local cinema this week.’ How is one to take

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<sup>96</sup> Hodgson, *Consequences of Utilitarianism*, 45: ‘It seems likely that whatever criteria of value one accepted, this bad situation would outweigh any good consequences which would result from the universal and rational (even correct) application of act-utilitarianism.’

<sup>97</sup> Singer, ‘Is Act-Utilitarianism Self-Defeating?’, 97.

this remark? Is it possible that the person who approached you is thinking about the wellbeing of the local cinema owners, whose business is at risk of closing down unless enough people buy tickets this week, and that the disutility of this possibility outweighs the possibility of, say, people sitting through a bad film? But it would be unnecessary for this person to lie to you about the true justification of their recommendation that you buy a ticket. The facts, if they are truly facts, and other things being equal, already constitute a presumptively sufficient reason for you to buy the ticket (enabling you, as a further utility, to skip sitting through a bad film). That is to say, the justification for the practice of truth-telling, from a rational point of view, is doing all of the work in producing the reason for one to tell the truth on any particular occasion. So, the justification of conventional personal rules about truth-telling is presumptively sufficient for the relevant action in much the same way as the justification was presumptively sufficient in the case of mandatory legal rules.<sup>98</sup>

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<sup>98</sup> These remarks might predispose one to the opinion that, if the justifications of rules are doing all the work from a rational point of view, then rules are rationally unnecessary. That opinion, at least in the context of the law, would be a serious error, even from a strictly rational point of view, but I will not have the space to address this issue in this work. For a discussion of what is sometimes called the society-of-angels argument, see: Raz, *Practical Reason and Norms* 157–61; L Green, ‘The Forces of Law: Duty, Coercion, and Power’ (2016) 29 *Ratio Juris* 164, 165–67 (‘We all know that even a “society of angels” would need rules, if only to help them coordinate their altruistic activities ... [the thought experiment of the society of angels] does not assume away rational conflicts. Angels may reasonably hold different views about what is appropriate in certain circumstances, and a reasonable view is one on which there is a reason, *pro tanto*, to act.’); and LL Fuller, *The Morality of Law* (rev edn, Yale University Press 1964) 55f (‘If angels can live together and accomplish their good works without any rules at all, then, of course, they need no law. Nor would they

Consider now the above reasoning in respect of promises. In a certain sense, a promise is a statement of intention, which means that all of the reasoning that showed that one has a presumptively sufficient reason to tell the truth will also yield the conclusion that one has a presumptively sufficient reason to make true statements of intention. Suppose, however, that the practice of promising implies both (i) a statement of intention and (ii) a recommendation to the recipient of that statement to make contingent arrangements, to have certain expectations, on the basis of the statement of intention. But what independent, rational work does the practice of promising do when (ii) is derived from (i)? A firm statement of intention, it seems, is, as Singer puts it, ‘just as useful as, if it is not equivalent to, a promise.’<sup>99</sup> In the event that the person who issued the firm statement of intention

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need law if the rules on which they acted were tacit, informal, and intuitively perceived. But if, in order to discharge their celestial functions effectively, angels need “made” rules’).

<sup>99</sup> Singer, ‘Is Act-Utilitarianism Self-Defeating?’, 101. No doubt the claim that a promise is, even just in a certain sense, a (firm) statement of intention paired with a recommendation will strike some readers as a misguided way of thinking about promises. A gangster could say to me, ‘I firmly intend to break your kneecaps if you do not deliver the money by Friday, so I recommend that you arrange accordingly.’ But that is no promise; it is a threat. If the gangster insists that it is a promise, they are being cute, for a promise imposes an obligation on the promisor to do as they promise to do and conveys a right to the promisee to expect that the promisor will do as they promise. None of that will follow, however, from the gangster’s statement of intention, no matter how firm it is, and their recommendation, however spirited, that I arrange my affairs accordingly. One might think that, in some cases, stating an intention and recommending that plans are made accordingly can be equivalent to a promise, but *only if* stating the intention and recommendation makes it wrongful for the promisor to do otherwise and makes it the case that a right is conferred to the promisee in respect of what the promisor said they would do. But notice that these matters are contingent, for it is not always wrong to break a promise. Perhaps breaking my promise to meet you for lunch was the only way I could have taken my friend to the emergency room. In that case, breaking my promise was the right thing to do. What explains this situation is that, just as a rule of law is not opaque to its justification, the promise is not opaque to its justifications.

is unsure as to whether doing as they said they would do would have the best consequences, then they must take into account the recommendation that was implied in their statement of intention and the subsequent contingent arrangements that have arisen as a result of their statement. If, however, taking all of that into account, one is rationally required not to act upon one's statement of intention because that would have the best consequences, then that is an implication one should welcome, for it counts in favour of bringing about the best consequences, which include consequences for the recipient of one's statement of intention.<sup>100</sup> All of this is to say, in other words, that the justification of the practice of promise-keeping—which is to bring about the best consequences—is doing all of the work in bringing about the best consequences because it, the justification, other things being equal, is presumptively sufficient for those consequences.

That concludes my view of the general applicability of the arguments of this chapter to the case of non-legal human-made rules. Versions of the presumptive sufficiency principle can be brought to bear in such cases, as the examples from

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<sup>100</sup> The treatment of promises reflected here is broadly in line with act-utilitarianism, support for which includes: J Bentham, *A Comment on the Commentaries and A Fragment on Government* (JH Burns and HLA Hart eds, Athlone Press 1977) 1-1-6 and H Sidgwick, *The Methods of Ethics* (7th edn, Palgrave Macmillan 1962) ch 6 (however, Sidgwick argues that though act-utilitarianism could specify what would best, he argued that people, as a practical matter, would better approximate what is best by following general moral rules; on this, see his *Methods of Ethics* 413, where Sidgwick writes, 'the doctrine that Universal Happiness is the ultimate *standard* must not be understood to imply that Universal Benevolence is the only right or always best  *motive* of action.' This is also why Derek Parfit thought that act-utilitarianism might be 'self-effacing' rather than 'self-defeating', see D Parfit, *Reasons and Persons* (OUP 1984) 40).

Singer showed, with the effect that, from a rational point of view, the justificatory bases of the practices of telling the truth and keeping one's promise are presumptively sufficient for the actions that these practices require. As I alluded to in a footnote,<sup>101</sup> however, that conclusion should not encourage the reverse application of these arguments to mandatory legal rules in the law. For whatever one might think of the presumptively sufficient force of the justificatory reasons of non-legal human-made rules, and how such reasons sometimes render certain practices rationally unnecessary for the consequences they intend to promote, there remain other necessary reasons for mandatory rules in the context of the law (even in a society of angels). Following up on that topic, however, is beyond the brief of this section, which has been to test the applicability of my arguments to non-legal rules, so I will leave it for another day.

## § 5 Conclusion

Let me conclude by briefly restating the argument of this chapter and then describing some of its implications for the possibility of reasons. In the main, the concern of this chapter was with the possibility of *legal* reasons. To get a grip of the matter, I focussed on the puzzle of the opacity of rules, which reflects two

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<sup>101</sup> See n 98.

opposing views of rules as a reason for action, that is, the reflexivity and paraphrastic theses. I advanced two main lines of argument against the reflexivity thesis.

First, I argued that rules are only superficially opaque. It is the nature of selection that it necessarily involves evaluative judgment. If a rule is deliberately made, then we know that the relevant authority at least believed that it would be good, from an evaluative point of view, to have that rule rather than some other rule (or no rule at all). This indicates that the opacity is formally superficial. The opacity is practically superficial, too, for in cases such as Donald Trump's travel ban, to take one glaringly obvious example, it is no mystery what in fact constituted the rule-maker's evaluative judgments.

The second line of argument centred on the principle of presumptive sufficiency. I argued that the principle of presumptive sufficiency is fatal for the reflexivity thesis. The reflexivity thesis is important for Raz's work in particular, especially in his attempt to solve the puzzle of the opacity of rules—the puzzle, namely, that a rule can itself be a reason in spite of the fact that it reveals nothing of its evaluative grounds. Unlike transitivity, presumptive sufficiency is not a principle that philosophers are at liberty to discard in the theory of practical reason, for it does important work on many fronts. Yet it appears that it, too, like transitivity, causes problems for Raz in particular, for it entails the view that either: (i) the justification of a rule is presumptively sufficient for the act that the rule prescribes—in which case the rule is a statement of its justification; or (ii) the justification is defeated by other reasons and it is not presumptively sufficient for

the act that the rule prescribes, yet in that case, necessarily, the rule itself is no longer a reason that would be of interest any more than any other fact. In light of the difficulties prompted by the implications of presumptive sufficiency, I suggest that the way forward is not to add it to the list of rules of classical logic that we cannot accommodate in the theory of practical reason but, instead, to reconsider any theory of practical reason that requires us to discard so much.

I close by briefly tying the main arguments of this chapter to the concern of this thesis more generally, namely, the concern with what is it for a reason to be possible. According to one influential account of rules, it is possible for rules themselves to be reasons for action and not merely statements of reasons that we already have, such as the reasons that constitute a rule's justificatory grounds. I have argued against that possibility. If rules are to qualify as possible reasons, then their qualifications stand in relation to the reasons they paraphrase. *No reason, no rule*, we might say of rules that paraphrase no reasons.

# Chapter 3

## The Methods of Normativity

### Abstract

This chapter is an examination of the relationship between phenomenology and analytic method in the philosophy of law. It proceeds by way of a case study, the requirement of compliance in Raz's theory of mandatory norms. Proceeding in this way provides a degree of specificity that is otherwise neglected in the relevant literature on method. Drawing on insights from the philosophy of art and cognitive neuroscience, it is argued that the requirement of compliance is beset by a range of epistemological difficulties. The implications of these difficulties are then reviewed for method and normativity in practical reason more generally. Part of the payoff at the general level is a specification of a certain way of doing conceptual analysis that produces impossible reasons, which are no reasons at all. A topology of normativity emerges nearer the end of the chapter, followed by a brief examination of how certain normative categories must satisfy distinct burdens of proof.

### § 1 Introduction

Analyticity does not inspire the same confidence today in philosophy and mathematics as it did in the early and mid-twentieth century. Today there are prominent mathematicians who deny basic principles of logic such as the law of excluded middle<sup>1</sup> and equally prominent philosophers who likewise doubt that

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<sup>1</sup> For discussions, see G Priest, *In Contradiction: A Study of the Transconsistent* (2nd edn, OUP 2006) and T Williamson, 'Conceptual Truth' (2006) 80 *Aristotelian Society* 1.

analytic claims can successfully underpin logical ones.<sup>2</sup> In the philosophy of law, however, the analytic still does a lot of foundational work for concepts such as authority, reasons, and norms. And many philosophers of law believe that the analytic nature of these claims places them not just beyond the reach of any subsequent empirical observations but is indeed their very basis.<sup>3</sup> If an analytic claim about the law is invalid, it is invalid because it is incoherent at the level of its logic and not because it is incongruent with some observation about the way in which the law is experienced. This, in any case, is an influential—if not the most influential—way of looking at things in the philosophy of law today, the predominant current of which is called *analytic* jurisprudence. The matter at heart is an epistemological one about how we can come to know things about the world and centres on a question which might be formulated in this way: What is the relationship between logic and empirical observation? But one need not undertake this kind of groundwork in order to query a subsidiary question about analytic methodology in contemporary legal philosophy, one that preoccupies this final chapter and which could be put this way: What is the relationship between phenomenology and analytic method in the philosophy of law?

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<sup>2</sup> See, eg, D Parfit, *On What Matters* (OUP 2011) 490ff. For an earlier but important discussion, see I Hacking, 'What is Logic?' (1979) 76 *Journal of Philosophy* 285.

<sup>3</sup> For recent statements of this position, see J Gardner, *Law as a Leap of Faith* (OUP 2012) ch 11, 270ff; L Green, 'Introduction' in HLA Hart, *The Concept of Law* (3rd edn, OUP 2012) xlv–xlvi.

To make the question practicable, I will restrict the work to follow to a case study, namely, the requirement of compliance in Raz's theory of mandatory norms as it concerns reasons for action. One 'complies' with a reason for action when one acts *for* it in doing as it requires, rather than for some other reason (or for no reason). The *requirement* in Raz's theory is that it must be possible, as a theoretical matter, to comply with mandatory norms.<sup>4</sup> I will explain the requirement in greater detail throughout this chapter. For now, I note that it is an ideal candidate of study because, one, it is vital to the operation of the normative system that emerges from Raz's philosophy and, two, this normative system is arguably the most influential one in contemporary legal philosophy. If it can be shown that compliance is implausible because it rests on faulty methodology, then we will have a case study in which the relationship between phenomenology and analytic method can be described with a standard of specificity otherwise neglected in the legal

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<sup>4</sup> Some readers will be aware that Raz's requirement of compliance has an obvious cognate in Kant's moral philosophy—the thesis, namely, that actions are good only if they are done for the right reason. It is also possible to read what follows as bearing upon moral reasoning more generally and the question of whether there should be constraints on how we construct, as a theoretical matter, normative requirements such as compliance. But for greater precision I will restrict the focus of my arguments to Raz's theory of mandatory norms and will try to be strict in this chapter by not extending the implications of my arguments to other areas of philosophy, however obvious the connections might appear. For a further example of the use of a Kantian compliance-like idea in the legal philosophical literature, see J Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (OUP 2007) 91ff. Gardner argues that justification requires what he calls a correspondence between guiding and explanatory reasons, where the former indicate reasons that apply to one (regardless of whether one applies them) while the latter indicate reasons that one in fact applies (or uses to explain one's actions).

philosophical literature. Just as importantly, we will also get clearer on one kind of methodology that produces impossible reasons.

I will begin in § 2 with an account of analyticity in philosophy more generally and then in the philosophy of law more specifically. Then § 3 describes certain features of mandatory norms before narrowing the analysis further to the requirement of compliance. Drawing on insights from the philosophy of art and cognitive science I will argue that compliance is beset by a range of epistemological difficulties. The implications of these difficulties for method and normativity in practical reason more generally are then reviewed in § 4. I offer a topology of normativity and thereafter examine the burdens of proof that any normative theory must satisfy. The broader objective of what follows is to offer a description of how products of conceptual analysis—such as compliance—interact with and are susceptible to revision by extra-logical considerations in a non-question-begging way. The entirety of this chapter, in fact, can be read as an examination of the relation between what is *logical* and what is *extra-logical* in the domain of normativity. The importance of these terms means that they should be given working definitions right away.

I will say that a claim is ‘logical’ if it can be shown to be true, false, or indeterminate by analysing just the rules of the system to which the claim belongs. Axiomatic systems, such as classical logic or even chess, are logical in this sense. A more relevant example can be drawn from any theory of normativity that permits first- and second-order reasons. It is standardly regarded as a logical truth of such

systems that second-order reasons have priority over first-order reasons by kind and not weight. Raz often uses the phrase ‘logical strength of norms’ in this way to refer to relations between norms and I adopt this usage here. He contrasts ‘logical strength’ with ‘phenomenological strength’, by which he means ‘everything else’. I sometimes substitute this with the less mysterious synonym ‘extra-logical’ and will use it to describe claims whose truth, falsity, or indeterminacy cannot be shown by logic alone. The objective of this chapter as part of the larger project of this thesis is to show that the logical construction of normative concepts, such as compliance, without attending to the relevance of extra-logical considerations, can result in a certain kind of impossibility. The simplest way to put this is to say that normative concepts, like many other kinds of concepts that are relevant to human action (for example, intention), must pass the tests of both validity (logical possibility) and soundness (extra-logical possibility). The concept of compliance, as I see it, passes the test of the former but not the latter. A central argument of this chapter is that the reason for this failure is the methodology that posits compliance as a strictly logical construct. None of this is to suggest that the conceptual analysis does not have an important role to play in the development of a theory of reasons. It is just to say, rather modestly, that it is not sufficient for that development. I will suggest that advancing this argument through a case study of compliance in the legal philosophical literature is useful because it pinpoints the insufficiency in an especially precise way.

## § 2 Concepts of Normativity

Now as I say, some philosophers who work primarily at the conceptual level think that their arguments are largely impervious to empirical intervention. Some of the concepts involved in their work are normative and can be acted upon. A good example is a promise. When agent  $X$  makes a promise to  $\phi$  then, other things being equal,  $X$  ought to  $\phi$  because  $X$  promised to do so, that is to say, to  $\phi$  with the motive of keeping the promise.<sup>5</sup> As far as the promise is concerned, the promisor should not  $\phi$  due to some subsequent prudential reason related to the advantages of  $\phi$ ing. If  $X$   $\phi$ s because of a subsequent prudential reason or for whatever reason other than the brute fact that  $X$  promised to  $\phi$ , then  $X$  has not engaged in promissory behaviour.  $X$  has done something else, and the rightness or wrongness of the new grounds of action can be judged on its own merits. It may well be the case that it would be good to violate a promise or perhaps do the thing promised because of a reason unrelated to the promise itself or the fact that the promise was made. But the point in these separate cases is only that  $X$  has not engaged in

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<sup>5</sup> The exception to this are nonstandard reasons, which require that one do as they require one to do but necessarily not for the reason that they require it. Promises can sometimes be nonstandard reasons. For instance, if  $A$  promises  $B$  to take care of  $B$  out of love for  $B$ , then  $A$ 's promise is not satisfied if  $A$  takes care of  $B$  because  $A$  promised to do so (or, on some accounts, even if  $A$  takes care of  $B$  out of love for  $B$ ). The promise (and the love, on some accounts) must necessarily 'stay in the background' of the agent's mind in order to be satisfied. On this topic, see J Raz, *From Normativity to Responsibility* (OUP 2011) ch 3, 36–59. Some doubt that nonstandard reasons are single reasons at all. Sceptics say that a reason is nonstandard is to say that it comprises two reasons: one that is a reason for action and a second that is a reason for a certain kind of attitude.

promissory behaviour.<sup>6</sup> According to the standard taxonomy in the philosophical literature, it is a conceptual truth that promises work like this.<sup>7</sup> That is to say, the conceptual analysis of a promise shows that an act falls under it—is a promissory act—only if a certain motive is present in the mind of agents and is responsible for the agents’ doing as they promised. The ‘certain motive’ is the fact of the promise itself. On this view, one can also say that it is an analytic fact that to make a promise is to convey an intention to give oneself a reason for action such that acting for it constitutes promissory behaviour. This is what is meant by the analyticity of promises. From this it follows that acting for some other fact here constitutes non-promissory behaviour. What makes this so is the analyticity of promises.

One might summarise this idea by saying that a promise has constituent features. Only these features constitute a promissory action. Actions without these are not of the promissory kind. This, in short, is also what it means for a sentence

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<sup>6</sup> This description of actionable concepts guards against the intuitive but incorrect interpretation that an action can be caused by a concept. The modest claim, put more abstractly, is that for an action to be Y-type, it needs to be done for Y. The reader sceptical of this construction, however, is in sympathetic company as will become clear in the sections to follow.

<sup>7</sup> See eg, T Scanlon, ‘Promises and Practices’ (1990) 19 *Philosophy and Public Affairs* 199. The relation between conceptual and analytic truths is complex. For an overview (albeit in the context of another topic), see the classifications in T Nagel, ‘The Psychophysical Nexus’ in PA Boghossian and Christopher Peacocke (eds), *New Essays on the A Priori* (OUP 2000) 434. There are, moreover, different ways to classify the relation between conceptual truth and analyticity. Williamson prefers to reserve the term ‘conceptual truth’ for thoughts like ‘every vixen is a female fox’ while keeping the term ‘analytic’ for the corresponding sentence (see Williamson, ‘Conceptual Truth’, 5).

to be analytic: its truth is directly implied by the meaning of the words at hand.<sup>8</sup> The idea of a promise is analytic in this same sense. The reader will notice that there is nothing special in this regard about the word ‘promise’. One may be tempted to say that employing definitions just is an analytic affair. Arguments from definitions, however, lead us to suspect at least two missing premises in respect of analyticity in the domain of normativity.

The first would be a definitional decree or customary understanding that a promise is a norm which has the features just described, namely, that it requires one to do the act promised because it was promised and not for some other reason. I will call this the definitional premise and I will use the term ‘congruence’ when referring to the relationship between (a) the norm as a reason for action (the normative reason) and (b) the agent’s reason for action (the motivating reason). If

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<sup>8</sup> To be clear, contemporary analytic philosophy, as I have it in mind in this chapter, deploys a type of analyticity that is essentially formal rather than, for example, linguistic and psychological. In the main, this type of analyticity proceeds by providing descriptions of the logical relations that exist between concepts, such as the concept of a promise or the concept of obedience. There are other accounts of analytic method in contemporary philosophy as well. For the linguistic variety, see: A Ambrose, *Essays in Analysis* (George Allen and Unwin 1966) esp ‘Linguistic Approaches to Philosophical Problems’; MJ Charlesworth, *Philosophy and Linguistic Analysis* (Duquesne University Press 1959); and PMS Hacker, ‘Analytic Philosophy: Beyond the Linguistic Turn and Back Again’ in M Beaney (ed), *The Analytic Turn: Analysis in Early Analytic Philosophy and Phenomenology* (Routledge 2007). For analyticity as it emerged through Carnap and logical positivism, see: S Soames, *Philosophical Analysis in the Twentieth Century* (Princeton University Press 2003) esp part 3; AJ Ayer (ed), *Logical Positivism* (Free Press 1959); M Friedman, *Reconsidering Logical Positivism* (CUP 1999). For an influential defence of ‘modest’ analyticity, see: F Jackson and D Chalmers, ‘Conceptual Analysis and Reductive Explanation’ (2001) 110 *The Philosophical Review* 315; WG Lycan, ‘Serious Metaphysics: Frank Jackson’s Defense of Conceptual Analysis’ in I Ravenscroft, (ed), *Minds, Worlds and Conditionals: Essays in Honour of Frank Jackson* (OUP forthcoming); and SP Stich and J Weinberg, ‘Jackson’s Empirical Assumptions’ (2001) 62 *Philosophy and Phenomenological Research* 637.

the motivating reason is the same as the normative reason, the form of congruence is called compliance. If the motivating reason is different from the normative reason but the agent still does the act prescribed by the normative reason, then the form of congruence is called 'conformity'. Extended descriptions of compliance and conformity will follow in § 3 but for now it will suffice to say that the definitional premise shall specify which form of congruence a normative reason requires. A second missing premise specific to the role of analyticity in normativity would be that one ought to invoke and employ one norm and not some other in the first place in order for it to be relevant to action. These premises granted, the rest of the work is said to be analytic. That is to say, the normative implications are derivable from the logic of the concept of promise itself without reference to anything that might be external to it, such as its justificatory grounds, the reasons for which a promise was initially made, and so on. It will not come as a surprise that these premises are not—or at least should not be—easily granted, if at all.

What, then, is the analytic programme and how is it relevant for the law and its mandatory norms? It will be of use to first remember Frege on the issue of the analytic as he sought to demonstrate the analyticity of arithmetic.<sup>9</sup> He wrote that

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<sup>9</sup> The discussion of analyticity that follows is drawn from Hacking, 'What is Logic?'.

[t]he problem becomes, in fact, that of finding the proof of the proposition, and of following it up right back to primitive truths. If in carrying out this process we come only on general logical laws and on definitions, then the truth is an analytic one.<sup>10</sup>

The point at issue is the one about the general laws of logic and the various definitions that either attempt to capture their functions or indeed generate them. The idea is much older than Frege, foreshadowed as it was by Leibniz's thesis that all necessary truths are traceable back to logical identities through finite analysis.<sup>11</sup> According to Ian Hacking, there is discord in the ranks as to whether the analytic programme can work in this way and so underpin all necessity. While Leibniz insisted that necessary truths are those that can be derived from identities by pure logic through a finite number of steps, Frege argued that necessary truths, such as those which comprise Euclidean geometry, are synthetic and not analytic, grounded in what Kant called intuition.<sup>12</sup> Whatever we might think of this kind of dissension

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<sup>10</sup> G Frege, *The Foundations of Arithmetic* (JL Austin tr, 2nd edn, Harper 1960) 4.

<sup>11</sup> Hacking, 'What is Logic?', 286–89.

<sup>12</sup> *ibid.* Intuition, which forms a vital component of the argument of the first *Critique*, is the conduit through which we understand objects in the world. Space and time, for instance, are intuitions since they are *a priori* conditions of human sensibility. The notion of intuition is described by Kant as follows: 'In whatever way and through whatever means a cognition may relate to objects, that through which it relates immediately to them, and at which all thought as a means is directed as an end, is **intuition**. This, however, takes place only insofar as the object is given to us; but this in turn, <at least for us humans,> is possible only if it affects the mind in a certain way. The capacity (receptivity) to acquire representations through the way in which we are affected by objects is called **sensibility**. Objects are therefore **given** to us by means of sensibility, and it alone affords us **intuitions**; but they are **thought** through the understanding, and from it arise **concepts**.' I Kant,

amongst logicians, it appears that ‘the analytic programme as a whole has run into sand’—Fregean-type confidence about what we claim to know of the basic laws of logic has long been shaken by Russell’s paradox,<sup>13</sup> and, what is more, diverging axiomatic set theories have undermined the idea that we can make universal claims about even the foundational rules of mathematics.<sup>14</sup> The result has been that the old positivist slogan that ‘mathematical [or analytic] truths are true in virtue of the words that express them’ can today only be used in what Hacking calls a ‘light-hearted way’.

In the face of all this, one might remain undeterred. Legal philosophers may find encouragement in the possibility that though logicians have not met with success in grounding mathematics on firm analytic footing, it may still be the case that analyticity is worth keeping for foundational tasks in other areas of inquiry, such as those which concern the more abstract foundations of law: language and practical reason especially. As Hacking puts it, ‘drilling at mathematics with Frege’s tools, we hit impermeable matter, but that, one might feel, is no reflection on the

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*Critique of Pure Reason* (P Guyer and A Wood trs, CUP 1997) A19/B33. Boldface emphases are Kant’s.

<sup>13</sup> Russell’s paradox is a logical (or set theoretical) paradox that is a feature naïve set theory, which is a formal system that uses natural language (rather than formal language and axioms) to describe logical and mathematical systems. The paradox results from considering the set of all and only sets that do not contain (or are not members of) themselves. The paradox is that this set contains (or is a member of) itself if and only if it does not contain (or is not a member of) itself. For a discussion, especially in relation to analyticity, see M Godwyn and AD Irvine, ‘Bertrand Russell’s Logicism’ in N Griffin, *The Cambridge Companion to Bertrand Russell* (CUP 2003) esp 180ff.

<sup>14</sup> Hacking, ‘What is Logic?’, 286–89.

tools' for it may well just show that 'mathematics cannot be fully embedded in logic'. Insofar as analyticity showed this to be the case it was a worthwhile investigative idea. But the story does not end there. Hacking reports that as early as 1936 Quine was commencing his demolition of definition, synonymy, meaning, and analyticity, and that by the mid-1960s most philosophers had come to the conclusion that the Fregean drill 'would hardly make it through a bar of soap'. Quine's critique was an attack on two fronts.<sup>15</sup> It will help to briefly retell this story now and explain how it relates to legal philosophical work today. I hurry to add, however, that none of what I have to say at any point will depend on the cogency of Quine's views about analytic method. Yet I still think that it is useful to the tenor of the discussion to come if we recalled the general thrust of the Quinean attack.

First Quine denied the distinction between analytic claims, which are said to be true by definition or to be such that their truths are derivable from what they mean independent from matters of fact, and synthetic ones, which are grounded in empirical facts. He argued that analytic sentences such as 'All bachelors are unmarried' do not actually mean anything if they are not bound to something empirical because otherwise they reduce to synonymy, which like analyticity is too obscure to be explanatory by itself. To make such sentences meaningful we need to read them synthetically, meaning that we need to register their synthetic components even when they are unstated. The claim was that 'All bachelors are

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<sup>15</sup> WV Quine, 'Two Dogmas of Empiricism' (1951) 60 *The Philosophical Review* 20.

unmarried’ would mean almost nothing were it not for the referent which underwrites the meanings of both ‘bachelor’ and ‘unmarried’, where ‘referent’ refers to the ontology of the objects which we designate with the words ‘bachelor’ and ‘unmarried’. Here the meaning of the definiendum (‘bachelor’) is inextricable from the actual referent or definiens (‘an unmarried person’). Reference becomes object-dependent and in turn loses its analyticity because it presupposes an empirical understanding of the actual object to which the word ‘bachelor’ refers. And insofar as empirical observations are never necessarily true, the kind of analyticity which ‘All bachelors are unmarried’ is meant to represent collapses. The second front which Quine advanced targeted meaning. Drawing on the work of Pierre Duhem, in what was soon called the Duhem–Quine thesis in a related debate, Quine argued that no single sentence could be verified for its truth or falsity individually.<sup>16</sup> The truth or falsity of a claim—any claim, logical or empirical—could only be established in conjunction with other claims and presuppositions which comprise the same epistemic set, that is to say, the same system of belief. For example, the proposition ‘All bachelors are unmarried’ does not refer to bachelors of arts. We could not be certain of this if we did not have empirical clues, such as the fact that

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<sup>16</sup> Numerous examples, some formal, others empirical, support the Duhem–Quine thesis. See, eg, Edward H Adelson’s Checker-Shadow Illusion: Edward H Adelson, “Lightness Perception and Lightness Illusions” in M Gazzinga, ed, *The New Cognitive Neurosciences*, 2nd ed (Cambridge: MIT Press, 2000) at 339. The claim that no single sentence could be verified for its truth or falsity individually was accepted even by the mid-1930s, before Quine started writing (or at least it was accepted that *almost* no single sentence could be so verified). Carnap, for his part, accepted this by the mid-1930s.

it is a famous proposition in the history of philosophy or that it is related to the institution of marriage.

Taken together, Quine's twin arguments against analyticity helped generate what eventually came to be a holistic theory of logic and meaning around which has developed since the 1950s an entire system of philosophy.<sup>17</sup> At the heart of post-Quinean logic sits an idea which maintains that all claims are determined in part by the epistemological nexus in which they are embedded and so the truth or falsity of a given claim likewise depends on what one might call its epistemic neighbours, the various presuppositions and related claims that underwrite its truth or falsity. Writing in the last year of his life, Wittgenstein might have summarised this new understanding thus: 'Our knowledge forms an enormous system. And only within this system has a particular bit the value we give it.'<sup>18</sup>

Needless to say, these extraordinary developments in philosophy and logic have not swayed every one of the analytic tradition's active workers. In recent years especially, some have attempted to show that Quine's critique was not as devastating as what initially seemed to be the case and that we would do better to

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<sup>17</sup> Hacking, 'What is Logic?', 287.

<sup>18</sup> L Wittgenstein, *On Certainty* (GEM Anscombe and GH von Wright trs, Blackwell 1975) § 410. Though, of course, Wittgenstein unlike Quine accepted the distinction between the analytic and synthetic. Quine and Wittgenstein constitute starting points and therefore no rigorous defense or elaboration of their positions will be offered in this chapter.

reinterpret his work as affecting only some elements of analyticity.<sup>19</sup> Yet it was not to be expected that the matter of the analytic–synthetic discussion in its entirety would be settled in one fell swoop and so end all philosophy which implied that the distinction was vital to its work. But it is incumbent on those of us who employ the tools of analyticity at the foundations of our work to engage the very serious doubts that have been raised in respect of the tools’ competence. The alternative is to hope that the struggles over philosophical method which are occurring in other areas of the field will resolve in favour of analyticity. Of course that will not do.

But what, returning to our initial question, have philosophers of law made of this history of analyticity? A good way to start the query is again with the name of Quine, whose frequency is a reasonable barometer of sensitivity to analytic method in contemporary philosophy. It never occurs in the work of HLA Hart, the analytic tradition’s most important philosopher of law.<sup>20</sup> This doubtless is for obvious reasons given both the nascent stage of contemporary legal philosophy’s formation in the mid-twentieth century and the fact that Hart and his interlocutors were interested in a very different set of questions. Notwithstanding his forays into

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<sup>19</sup> For a recent discussion, see A Lugg, ‘WV Quine on Analyticity: “Two Dogmas of Empiricism” in Context’ (2012) 5 *Dialogue* 231.

<sup>20</sup> This may also have had something to do with geography and the ocean separating Oxford and Harvard. According to Dan Goldstick, for example, in the Oxford of Hart’s day, Quine’s ‘Two Dogmas of Empiricism’ was taken to have been completely refuted by HP Grice and PF Strawson’s ‘In Defence of Dogma’; and in the Harvard of Quine’s day, the analytic/synthetic distinction at the centre of much of Oxford philosophy was likewise seen to have been completely refuted by ‘The Two Dogmas of Empiricism’. HP Grice and PF Strawson, “In Defense of Dogma” (1956) 65 *The Philosophical Review* 141.

the philosophy of language, Hart's engagements with analytic method were subsumed almost entirely into the debate about the formal relationship between law and morality.<sup>21</sup> And his notorious remarks about *The Concept of Law* being an essay in descriptive sociology,<sup>22</sup> which might have firmly bound the logic of law to its phenomenology, reveal no links in his mind to the severe combustions which were occurring at the foundations of analytic method right through the 1950s, the decade preceding the publication of his major book. Oddly enough, Joseph Raz would come to criticise Hart for his commitments to naturalism and empiricist epistemology and would fault these commitments for Hart's shortcomings in relation to the problems associated with the explanation of responsibility, the nature of rights and duties, and the relations between law and morality—'none of them', Raz claims, 'was solved nor their solution significantly advanced by the ideas borrowed from philosophy of language'.<sup>23</sup> For Raz, Hart was too close to empiricist epistemology and naturalism, and this in turn hamstrung some of his efforts in jurisprudence.

In his own writings, vast and edifying as they are, Raz mentions Quine just once. It occurs in his essay 'The Relevance of Coherence', where Quine is

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<sup>21</sup> See eg, HLA Hart, 'Positivism, and the Separation of Law and Morals' and 'Jhering's Heaven of Concepts and Modern Analytical Jurisprudence', both in HLA Hart, *Essays in Jurisprudence and Philosophy* (OUP 1983) esp 66ff, discussing 'formalism', in the former essay and 271ff discussing the linguistic methods of 'analytical jurisprudence' in the latter essay.

<sup>22</sup> HLA Hart, *The Concept of Law* (3rd edn, L Green ed, OUP 2012) vii.

<sup>23</sup> J Raz, *Between Authority and Interpretation* (OUP 2009) 53.

mischaracterised for his ‘dual rejection of empiricism (with its belief in incorrigible foundations for all justified beliefs) and the analytic–synthetic distinction’.<sup>24</sup> Quine of course did not reject empiricism.<sup>25</sup> His target was logical empiricism, also known as logical positivism (unrelated to legal positivism), and the main recipient of his critical energies was none other than Carnap. For Quine to be misread in this way, however, might be thought revealing. Philosophers of law more generally have undertaken their analytic projects in general jurisprudence with an unusual unfamiliarity with the foundational literature in logic and elsewhere on analytic method—not even the literature which has sought to salvage analyticity, such as Grice and Strawson’s famous essay ‘In Defense of Dogma’ or Kripke’s *Naming and Necessity*.<sup>26</sup> There are exceptions. Timothy Endicott offers an instructive discussion of Quine (and Williamson) in *Vagueness in Law* in relation to the issue of bivalence in logic but not in relation to analytic method generating legal concepts.<sup>27</sup> Another exception is Nicos Stavropoulos, who writes that ‘[a]nalytic truths should not be that important, ever since Quine’s famous critique of the analytic–synthetic distinction’.<sup>28</sup> From there the discussion moves away from the relevance of analyticity’s collapse for the basic conceptual units of law, such as mandatory norms.

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<sup>24</sup> J Raz, *Ethics in the Public Domain* (rev edn, OUP 1996) 278.

<sup>25</sup> WV Quine, *Word and Object* (MIT Press 2013) 61, see esp fn 7.

<sup>26</sup> Grice and Strawson, ‘In Defense of Dogma’, 18; S Kripke, *Naming and Necessity* (Harvard University Press 1980) (though Kripke’s essay was not aimed at saving analyticity). See also PA Boghossian, ‘Analyticity Reconsidered’ (1996) 30 *Noûs* 360.

<sup>27</sup> T Endicott, *Vagueness in Law* (OUP 2003) 79, 134–35.

<sup>28</sup> N Stavropoulos, *Objectivity in Law* (OUP 1999) 40ff.

Andrei Marmor also offers some commentary on Quine in various works, the most relevant being the acknowledgement that '[c]oherence and holistic theories of knowledge have received increasing philosophical attention since the publication of Quine's "Two Dogmas of Empiricism" in 1951,<sup>29</sup> noting further that the philosophical revolution so instigated was completed with Kuhn's work on scientific paradigms (1962) and Rawls' epistemic commitments to reflective equilibrium in *A Theory of Justice* (1971).

These writers aside, the most sustained attention to the implications of Quine for the philosophy of law occurs in the work of Brian Leiter and some of the critical commentary his writings have generated.<sup>30</sup> Leiter has acquired notoriety for his view that much of jurisprudence as we find it today is 'epistemically bankrupt' because of its reliance on the 'analyses of concepts and appeals to intuition', particularly in its theoretical treatment of adjudication.<sup>31</sup> But there is much else in general jurisprudence today that is vulnerable to basal criticisms of method besides what has been covered in the writings of Leiter and his critics. Raz's account of mandatory norms is an important case in point, specifically those that are

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<sup>29</sup> A Marmor, *Interpretation and Legal Theory* (Hart 2005) 47ff.

<sup>30</sup> See B Leiter, *Naturalizing Jurisprudence: Essays on American Realism* (OUP 2007). For critical commentary, see, eg, J Dickson, 'On Naturalizing Jurisprudence: Some Comments on Brian Leiter's View of What Jurisprudence Should Become' (2011) 30 *Law and Philosophy* 477.

<sup>31</sup> Leiter, *Naturalizing Jurisprudence*, 175. Quine is doubtless important to Leiter's critique of analytic method in contemporary legal philosophy as he sees it, but it is to be observed that Quine, for his part, at least favoured appeals to intuition.

deliberately made and which require conduct unconditionally or at least almost unconditionally.<sup>32</sup> In the sections to follow (§§ 3 and 3.1) I will describe such norms as they occur in Raz's works and shall do so by focussing specifically on the requirement of compliance. Then I will offer some arguments in § 3.2 to show that the way in which analytic method is used in the construction of the concept of compliance makes the concept impractical.

### § 3 Mandatory Norms

Insofar as they apply to action, mandatory legal and moral norms can be expressed abstractly as 'X must  $\phi$ ', where X is the agent and  $\phi$  the required act (or omission). The deontic operator 'must' can be replaced by words such as 'ought', 'should', and other cognates; and a more complete specification would also say something about the source which issues the norm and the conditions under which the norm is relevant. A norm is 'normative' in that it derives its force from logic, which means that it requires the action that it prescribes in a particular way because of its formal structure and the relation that structure has to others norms, rather than on grounds of, say, prudence. In § 3.2, under a doctrine I call 'localism', I will say something about the differences that sometimes arise between responding correctly to legal

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<sup>32</sup> Not all such norms are deliberately made; the mandatory norms of customary law, for example.

and moral reasons for action. For now, I suggest that to speak of the formal structure of a norm is to specify the kinds of reasons which can be used to do the thing the norm requires.<sup>33</sup> The specification moreover occurs at the second-order level because it is a regulation of other reasons, namely, those which one ought to use in order to do the norm's prescribed act.<sup>34</sup> An easy example again is that of a promise. It is a formal requirement of promises that to engage in promissory behaviour one must do the thing promised because it was promised and not for some extraneous reason.<sup>35</sup> This is just what the word 'promise' means. It is in this limited sense analytic. How it comes to have this meaning and why on reflection it ought to continue regulating our usage in language in this very specific way are questions which likely comprise the norm's most important aspects. At the moment, however, it is enough to note the use of the deontic 'must'. It expresses the idea that a norm such as a promise has certain formal requirements and that *if*

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<sup>33</sup> Strictly speaking, the formal structure of a claim refers to the relations between its placeholders (or variables). A logical sentence *S* is true iff its variables (ie, the aspects of it that are not logical operators) allow of certain instances such that every such instance entails that *S* is true. The same is true of normative sentences. The formal structure of a normative sentence *N* refers to the logical relations between the *kinds* of reasons that feature in *N*.

<sup>34</sup> For the main text on second-order reasons and how they compete against each other by weight and against first-order reasons by kind, see J Raz, *Practical Reason and Norms* (OUP 2002) chs 1 and 2. The critical commentary is extensive. For recent offerings, see C Essert, 'A Dilemma for Protected Reason' (2012) 31 *Law and Philosophy* 49; S Darwall, *Morality, Authority, and Law* (OUP 2013) ch 9, 151.

<sup>35</sup> In ordinary English, to engage in promissory behaviour is just to promise and do as one promised. What is more, one could not be sued in law for a contractual performance lacking the right spirit for morality, ie, not as promissory behaviour. The usage I am considering, however, is a technical stipulative sense that is restricted to the formal requirement of the concept of a promise which holds that for an act  $\phi$  to be promissory, it needs to be done for the reason of the promise to  $\phi$ .

one is to do as that norm requires correctly, then one *must* comport oneself with those formal requirements. A mandatory norm in the law is therefore mandatory or at least aspires to be mandatory at a few separate levels. In the first and most intuitive sense a norm can be mandatory because its breach has the potential to entail adverse practical consequences. Legal sanctions follow breaches of mandatory legal norms. But the discussion here does not focus on this more directly consequential aspect of law's normativity. What is to be examined instead is the formal substratum,<sup>36</sup> focussing on the claim that if a norm requires compliance, the agent who merely conforms has reasoned in error. The notion of 'formal substratum' refers to the properties of concepts and, in our case, it is the properties of a normative concept, such as the promissory norm, that helps establish the requirement of compliance.

The sensitivity to formal structure also enables an amendment to the foregoing formulation of promises and promissory behaviour. I stated that to behave in a promissory way one must do the thing promised because it was promised and not for some other reason. This is imprecise insofar as it situates the form of the reason for action in the fact that the promise was made rather than the fact of the promise itself. The distinction is observed if we note that the mandatory character of the norm itself is a different thing from the act which made the norm

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<sup>36</sup> Michael S Moore seemed to have a similar investigation in mind when he described Raz's project as an exercise in 'analytical' moral philosophy. See MS Moore, 'Authority, Law, and Razian Reasons' (1989) 62 Southern California Law Review 827, 841–45.

relevant. Therefore, the normative requirement is that one do the thing that one promised to do on the grounds that the thing promised occurs under the rubric of the idea of a promise. This is a prolix way of saying that the norm's logical structure and not its genealogy (the act from which it was begotten) is what makes it mandatory in a particular way. The promise-keeping norm, in other words, precedes the act that engages it. From formal modes of analyses, we derive more epistemic requirements at the level of intention, querying more exactly about the reasons that were actually used by the agent to engage the norm, the emphasis here being on the word 'actually'. Was the thing promised done by the doer for the sake of the promissory norm, or was the thing done because of another set of reasons? Was the deed, the performance, consciously done at all as a promised thing?

I remarked that a norm's logical structure and not its genealogy or extra-logical properties is what makes it mandatory in a particular way. The distinction between the logical and extra-logical in the domain of normativity is important, so it will be useful to make it clearer. We can do this by specifying what it means to have something be mandatory by virtue of its extra-logical properties. This will make it easier to isolate the aspects of mandatoriness that stem just from a norm's logical properties. I have said that a claim is 'extra-logical' if it cannot be shown to be true or false with logic alone. One intuitive way to advance the explanation of the extra-logical is to ask whether a norm is mandatory because it is so treated by the society in which it obtains—that is to say, because certain things are socially demanded. One can say that a norm is mandatory because of certain social practices,

the breaches of which are so widely decried that the norm comes to be recognised as ‘mandatory’. But sociality is a vast, vague, and mostly unhelpful category. It can be linguistic in that it might track language usage and the effects such usage has on behaviour; it can be political in that might say something about power differentials between disparate groups; or, amongst other things, it can be legal in that it might hinge on converging practices, legislative acts, judicial opinions, and so on. The point in all of these social domains is that the norm takes the form that it does—it becomes meaningful—as a matter of conduct. However, nothing is inherently mandatory about a norm when it is rooted in conduct. Conduct changes and so, too, do the things that are considered mandatory in this way. And yet one might reply that conduct takes the form that it does because of very good reasons, such as the political and legal advantages of construing a norm as requiring action in a particular way. These consequentialist arguments, however, are just that: consequentialist. Many if not all considerations of this sort rest on accidental phenomena for, as with conduct, the consequences of any given act can change often radically between different spaces and different times. An act which was salubrious in its consequences a century ago may well be dreadful today. The norm that makes this so is therefore mandatory as a result of circumstantial phenomena.

Mandatory legal norms might be understood in the way just described. But since the 1970s, in what has been called the age of discovery in the philosophy of

normativity,<sup>37</sup> some philosophers such as Raz have sought to further our understanding of norms beyond the basic awareness that different norms are called mandatory in different places and at different times. Normative theory today is grounded in the ‘logical strength of reasons’ rather than their ‘phenomenological strength’.<sup>38</sup> This means that in addition to whatever consequentialist considerations or, indeed, whatever other kinds of consideration might bear upon the mind of the agent, a mandatory norm also has an independent strength embedded in its logical structure and, moreover, in the logical relations it has with other norms. It does not follow that it is logic that gives a norm its force or that one must do what logic requires. It would be a major error to infer this. Values give norms their force, not logic. Yet once the evaluative grounds are granted, the relations between norms themselves and between norms and agents are, in part, logical relations. In the domain of normativity, that is what the term ‘logic’ means. A clear illustration of this is the relation between orders of reasons, for example, first- and second-order reasons. And so, in deciding to  $\phi$  because a norm R requires it, X is now understood to be acting correctly only if X is attentive to the logical requirements of R in respect of X  $\phi$ ing, as the example of the promissory norm showed. Insofar as the primacy of the logical over the phenomenological in this regard is concerned, not much has

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<sup>37</sup> This description is taken from J Broome, ‘Reasons’ in RJ Wallace and others (eds), *Reason and Value: Themes from the Moral Philosophy of Joseph Raz* (OUP 2006) ch 2, 28. Broome, in turn, cites Parfit as his source. For a less well-known discussion, see A Duncan-Jones, *Butler’s Moral Philosophy* (Pelican 1952) 77–86.

<sup>38</sup> Raz, *Practical Reason and Norms*, 25.

changed in the literature since Raz's codification of reasons and normativity in *Practical Reason and Norms*. The same basic methods (ie, logical rather than phenomenological priority) and the same basic conceptual apparatus (eg, content independence, first- and second-order separations, operative and auxiliary reasons, etc) which Raz used to advance his project remain at the centre of the philosophy of normativity today.<sup>39</sup>

In light of this consistency, it will be well to ask about the method that establishes this particular relationship between logic and phenomenology in normativity. I have said that I would proceed in this respect with an examination of the requirement of compliance in Raz's theory of mandatory norms. Compliance is arguably amongst the most basic analytic units of legal normativity and yet there is disagreement about its place in Raz's system. Some think that compliance is not, in fact, a relevant normative requirement and that all that is ever argued for by Raz and others in the context of mandatory norms is mere conformity. If this interpretative objection is true, then a critique of normativity that takes compliance as its case study is a non-starter. But the objection is false and disarming it is important for the following reasons. First, the demand for compliance rather than mere conformity is what gives mandatory norms their 'logical strength' and also what makes them work in the Razian system as a set of reasons that is distinct from

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<sup>39</sup> See eg, T Macklem and J Gardner, 'Reasons' in JL Coleman, KE Himma and SJ Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2002) 440.

the set of reasons we may already have to do the action required by the norm, reasons that are independent of the norm. And yet if the requirement of compliance rests on flawed methodology, then the theory of normativity to which compliance is essential will in turn fail in important ways. To show this will first require that I show that compliance is indeed a requirement in Raz's theory. The reader who needs no convincing in this matter may skip ahead to § 3.2.

### § 3.1 Compliance or conformity

Before I proceed to show that the requirement of compliance is a necessary component of Raz's theory of mandatory norms, it will be important to dispel a lurking suspicion that may have arisen on the part of the reader. No part of my argument should be read as intending to land Raz with the implausible view that one violates the law whenever one does not comply with its mandatory norms. The requirement of compliance is not that. No part of the law is violated when one merely conforms to it. Rather, as mentioned at the outset, the requirement is that it must be possible to conform to the law by complying with it. It is, as one can see, a matter for pure theory. Yet the issue at hand is no less significant. For it stands that if it is impossible to comply, then the theory that needs the requirement in order to explain the things it purports to explain will, as I say, need to be modified.

It will be helpful to first restate that compliance and conformity are both categories of congruence. Recall that congruence refers to the type of relation that

obtains between (a) the norm as a reason for action (the normative reason) and (b) the agent's reason for action (the motivating reason). Whenever the agent acts upon the norm as a reason to do the required deed, we have the congruence of compliance; whenever the agent uses some reason other than the norm to do the deed required by the norm, we have the congruence of conformity. The examination of congruence is an ancient one which preoccupied at one point or another almost every major philosopher from Socrates onwards, their labours roughly centring on what Hegel described as the 'moral element' of a deed. In the *Philosophy of Right*, he wrote that

the motive [Beweggrund] of a deed is more precisely what we call the moral element, and this [...] has two meanings—the universal which is inherent in the purpose, and the particular aspect of the intention. In recent times especially, it has become customary to enquire about the motives of actions, although the question used simply to be: 'Is this man honest [rechtschaffen]? Does he do his duty?' Now, we seek to look into people's hearts, and thereby presuppose a gulf between the objective realm of actions and the inner, subjective realm of motives.<sup>40</sup>

The requirement of compliance takes on this presupposition and hinges on the 'inner, subjective realm of motives'. It obtains when X decides to  $\phi$  because R says

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<sup>40</sup> GWF Hegel, *Elements of the Philosophy of Right* (AW Wood ed, HB Nisbet tr, CUP 2002) § 121.

that  $X$  should  $\phi$  and not because it would, say, be beneficial for  $X$  to  $\phi$  on some other grounds. On this view, when it comes to following a legal rule proscribing homicide, the motive as far as compliance is concerned must be ‘because it is the law’ and not because murder is immoral. The requirement of compliance in respect of a rule can be expressed formally by interrupting what would otherwise hold under the principle of transitivity. Where  $J$  is the justification of  $R$  and where  $R$  refers to the rule that requires  $\phi$ , then the transitive relation, call it  $T$ , is  $((J \rightarrow R) \wedge (R \rightarrow \phi)) \rightarrow (J \rightarrow \phi)$ . The arrow indicates justifying grounds such that  $J$  justifies  $R$  in the first bracket,  $R$  justifies  $\phi$  in the second, and  $J$  justifies  $\phi$  in the third. Compliance under Raz’s normative theory represents an interruption of this relation such that  $T'$ :  $((J \rightarrow R) \wedge (R \rightarrow \phi)) \rightarrow (R \rightarrow \phi)$ . The move from  $T$  to  $T'$  enables  $R$  itself to imply  $\phi$  without reference to  $J$  or for that matter any other reason to  $\phi$  but  $R$ . For the purposes of practical reason, it means that even if there is a justification—perhaps even the only meaningful justification—that would allow  $X$  to  $\phi$ , compliance requires that  $X$  should  $\phi$  on the basis of  $R$  rather than  $J$ .  $T'$  represents congruence as compliance between the motivation of  $X$  and the reason for action represented by  $R$  itself. The existence of  $R$  becomes the reason for the action. This is also part of the story of how Raz argues for the idea that a mandatory norm, *when it is a legal rule*, is itself a reason for action and not merely a statement of a reason or reasons that an agent may already have for doing the thing required by the rule—but we need not revisit this topic from Chapter 2 here. It suffices for the purpose of this chapter to note that it follows from the foregoing framework that, as far as

compliance is concerned, the mandatoriness of a legal rule requires the motive to do as the law requires because the law requires it.

Conformity on the other hand is different. Under conformity there is no requirement that the mandatory norm must be the agent's reason for action. X might  $\phi$  for whatever reason or perhaps for no reason at all (as in the case of an accident) and all will still be well as far as the norm is concerned. Accidental conformity or conformity on grounds unrelated to the norm itself does not constitute a breach of the norm. An example of the foregoing is as follows. Conformity to a mandatory legal rule requiring drivers to stop at red lights would involve a situation where a driver stopped at a red light because, say, their passenger requested that they do so; here there is conformity to the law's requirement to heed red lights but no compliance; instead, there is compliance with the passenger's wish and mere conformity to the law's requirement. Had the driver stopped at the red light for the reason that that was what the law as law required, there would be compliance with the law's requirement and conformity to the passenger's wishes. In both cases there is a form of congruence.

Such is the distinction between compliance and conformity, and some readers will recognise that it vaguely tracks a much older conversation about command and counsel that goes back at least to Hobbes. Hobbes in *Leviathan* (part II, chapter 25) and then Locke in *The Second Treatise* (§ 87) were concerned about the ways in which authority could rightly claim to displace the judgement of an

autonomous agent,<sup>41</sup> and Raz would extend this discussion to encompass why the displacement of judgement must also involve an exclusion of even the justificatory reasons of a mandatory norm.<sup>42</sup> This exclusion is essentially what compliance demands. So which does Razian theory require for mandatory norms, compliance or conformity?<sup>43</sup> *Practical Reason and Norms* was written in 1975 but the distinction between the two kinds of congruence did not really come to the fore of the difficulties until Raz's critics prompted him to write the postscript to the second edition of the book in 1990. The analysis that occurs in the postscript oscillates between the two possibilities, suggesting that Raz may have struggled to firmly locate the requirements of mandatory legal norms under the heading of one or the other. Indeed it is unlikely that the interpretative issue can be resolved through either just the postscript or the text of *Practical Reason and Norms*. Sense must be made of the distinction in light of the broader normative theory that has emerged from Raz's system and especially perhaps through the 2001 essay 'Reasoning with Rules'. What is at stake with this important interpretative difficulty is vital to the link between compliance and analyticity. This is why it is necessary to settle the

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<sup>41</sup> For a discussion, see L Green, *The Authority of the State* (OUP 1988) 37ff.

<sup>42</sup> Raz, *Ethics in the Public Domain*, 210.

<sup>43</sup> One may observe that the intuitively straightforward answer from a moral philosophical perspective is that a mandatory norm is likely to be best understood as prescribing compliance but being sufficiently satisfied through conformity. The straightforward answer, however, is not the one under consideration here. The point instead is to determine the requirements that necessarily attend mandatory norms in Raz's legal philosophical theory of practical reason. Once this determination is made, it can be considered alongside the intuitively straightforward view just described.

question of interpretation regarding the place of compliance and conformity before turning to the more serious trouble over analytic method and normativity.

The question which instigates the deliberations on congruence in the postscript to *Practical Reason and Norms* is clear enough: ‘Is there anything wrong with mere conformity?’ If one lends support to a friend who is in need for reasons unrelated to the fact that the friend is in need and has asked for the kind of support that one could lend, has one failed in any normative way? Whatever shortcoming may or may not be at issue, it will not centre on the fact that support was given to the friend who asked for it. The support was given, so there is conformity to the norm to help a friend who is in need. The question is whether the friend who lent a hand in this way failed in other regards. Raz puts it like this:

The issue goes deep into our understanding of reasons for action. Do they aim at action, so that if the action occurs all is as well as it should be? Or do they aim at one’s reasoning as well, so that they demand, as it were, to figure in one’s reasoning and/or in one’s motivation? The view that reasons for action are always reasons for compliance fits well with the idea that practical reasons are guides to action. If one is not guided by them, then one is failing to behave as one should. If reasons for action are understood as reasons for conformity, then one may still talk of reasons for action as guides for behaviour, but only in the sense that, other things being equal, it is legitimate [...] for them to figure in one’s reasoning or motivation. They

are guides in the sense that the Michelin guide to Paris is a guide. I may use it, but I do not have to.<sup>44</sup>

There is a good case to make for either possibility. In favour of understanding reasons for actions as requiring compliance, one might say that a failure to comply is tantamount to a failure of sensitivity, where the insensitivity could be legal, moral, political, aesthetic, or from whichever other plane that generated the reason for action. If, for example, the normative reason for action is aesthetic but one does the required deed for political reasons, then there are grounds to allege bad faith.<sup>45</sup> Examples are easy to come by. Should one express appreciation for an aesthetic artefact such as a poem because, say, it would impress one's peers or save one's life or somehow advance a laudable political project, then one might argue that the act's demerit—that is to say, the demerit of the expression of appreciation for the artefact—is an aesthetic one even if, for instance, there are good grounds to claim social or political merit or even just the merits of staying alive for the same act. The actual content of the expression of appreciation is not the difficulty: whether for instance the poem reflects this or that thought. The issue is that the reasons used

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<sup>44</sup> Raz, *Practical Reason and Norms*, 179.

<sup>45</sup> I take bad faith to mean more than just a moral failing, which is perhaps the commonsensical way to understand it. Bad faith is at least here to be understood as indicating a failure of having the right motive, where 'right motive' is in turn to be stipulated by the setting in which the judgment of bad faith occurs. Bad faith in the legal domain is sometimes legally cognisable; for example, in American contract law one may bring suit under the doctrine of implied covenant of good faith and fair dealing. For a discussion, see P MacMahon, 'Good Faith and Fair Dealing as an Underenforced Legal Norm' (2015) 99 *Minnesota Law Review* 2051.

to act, that is to say, the reasons to express appreciation, are incorrect on formal rather than substantive grounds because they fail to engage by kind in an apples-and-oranges way. On this account, one may argue that compliance ensures that an agent engages the distinct modalities or means of reasoning correctly in such a way that aesthetic reasons for action are engaged aesthetically, legal reasons for action legally, and so on. Whether compliant congruence is a good normative requirement returns us to the question of bad faith, but as the example of staying alive showed, sometimes bad faith is a very good thing. The example showed that an aesthetic demerit of an act can be overridden by the same act's merits in respect of, for example, staying alive, assuming that (a) staying alive itself is a good thing that is better than aesthetic sincerity and (b) staying alive is itself not an aesthetic act. But this model of thinking about reasons for action—and the nature of reasons more generally—may well be wrong at its foundations, a point to which I will return in § 3.2.

To make sense of mere conformity on the other hand is a much more straightforward affair since it does not demand any *epistemic* congruence (as in the case of compliance) between the norm and the reasons an actor might use to do the thing that the norm requires. X could  $\phi$  for any reason unrelated to the norm which requires X to  $\phi$ . Raz argues that 'reasons for action are, barring special circumstances, merely reasons to conform' and that 'what matters is conformity

with reason'.<sup>46</sup> This no-one disputes. The point though is that mandatory norms fall exactly into the so-called 'special circumstances' which he has in mind.<sup>47</sup> This is for two reasons. First, if mandatory norms in Raz's system did not require compliance, then they would fail to be more than 'merely statements of what we have reason to do',<sup>48</sup> which are reasons for conformity. The 'merely' is an implication that Raz wants to avoid but which cannot be avoided unless there exists a class of reasons that require compliance. The second reason is that insofar as mandatory norms include exclusionary reasons in their formal structures, they constitute 'reasons for not being motivated in one's action by certain (valid) considerations',<sup>49</sup> and sometimes this amounts to compliance whenever the scope of exclusion is large enough to encompass possible conforming reasons. Exclusionary reasons, remember, occur at the second-order and are negative, which means that they proscribe acting on the bases of certain first-order reasons.<sup>50</sup> For these reasons, it appears that compliance will have to be a necessary component of Raz's normative machinery. That at least is what Raz implies of mandatory legal

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<sup>46</sup> Raz, *Practical Reason and Norms*, 180ff, 190. For a discussion, see B Celano, 'Are Reasons for Action Beliefs?' in LH Meyer, SL Paulson, and TW Pogge (eds), *Rights, Culture, and the Law: Themes from the Legal and Political Philosophy of Joseph Raz* (OUP 2003) 40.

<sup>47</sup> For a discussion, see Moore, 'Authority, Law, and Razian Reasons', 875ff.

<sup>48</sup> Raz, *Ethics in the Public Domain*, 207.

<sup>49</sup> Raz, *Practical Reason and Norms*, 185.

<sup>50</sup> In the language of set theory, if the set of excluded reasons expands sufficiently to include conforming reasons, then what remains at the end of this function is the set of compliant reasons, upon which the exclusionary set cannot intrude without rendering the norm to which it belongs self-contradictory.

norms in *Practical Reason and Norms* in 1975 and the postscript in 1990, specifically in respect of those legal rules that are deliberately made and which ‘require conduct unconditionally’.<sup>51</sup> The 2001 essay ‘Reasoning with Rules’ makes this clearer still where he argues that mandatory norms, such as rules, necessitate a rupture in the principle of transitivity in such a way ‘that even *the justification* of rules does not bear on the desirability of the actions for which they are reasons’.<sup>52</sup> Even the justifications of a rule—to say nothing of other non-competitive and valid reasons—do not bear as grounds of action, for here the rule itself is a reason for action and not just a statement of what we may or may not have reason to do. One can summarise this by saying that compliance is necessary to what makes mandatory norms work as a distinct system of reasons for action in Razian normativity, that is to say, distinct from the set of valid reasons for action that we may already have to do the thing the mandatory norm requires, which is the set of reasons for *conformity*. From these observations follow a sense of scepticism about the possibility of whether a norm can be mandatory when all it requires is conformity. We may address part of this scepticism by positing an account of mandatory norms in which they require one to identify *some* reason to do as they require. We could then say that such norms would constitute what are called second-order positive reasons for

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<sup>51</sup> Raz, *Ethics in the Public Domain*, 206.

<sup>52</sup> *ibid* 211.

action, namely, reasons to act for other reasons. The details of this theory need not be elaborated in the current work.

### § 3.2 Compliance incoherent

The question before us is now clear enough. What, if anything, is wrong with the notion of compliance? To this we may add a second. What can the requirement of compliance tell us about phenomenology and analytic method in the philosophy of law? I remarked previously that the requirement may well be unsound in its epistemology. I have said that compliance is a form of congruence between the reason for action that constitutes the norm and the reason for action used by the agent to do the act the norm requires. The cognitive model of reasoning that underpins compliance is as follows. There exists a set of reasons  $S$  for  $X$  to  $\phi$  such that for the purpose of  $X$  undertaking  $\phi$ ,  $X$  can mentally separate  $S$  from adjacent sets of reasons and act only upon  $S$  for the purpose of  $\phi$ ing.  $S$ , in other words, is made disjoint from all other sets in  $X$ 's universe of discourse for the purpose of  $\phi$ ing. The epistemology that could enable this model of reasoning is not obvious and without some kind of elaboration its use is question-begging by Raz at several levels. Let me examine two such levels: the logical and the cognitive. The questions that will show the way are easy to formulate because we can derive them from the principles of normative necessity and actual possibility presented in Chapter 1. First, is the foregoing model of practical reason logically possible? That is to say, is

it possible to have a disjoint set in a universe of discourse which has properties such as the ones that comprise, say, classical rules of reasoning? And second, is the model cognitively possible? That is to say, can our brains even do the kind of work this model requires—can we think in terms of reasons which operate in isolation from all other reasons and subsequently get ourselves to act exclusively in terms demarcated by such a reason?

For ease of reference I will call the foregoing model of reasoning to which my questions are directed *localism* and I will advance two lines of argument to show why it is unworkable. The first will come by way of some preliminaries from the philosophy of art and the second by way of some harder proofs drawn from cognitive neuroscience. If it can be shown that the described epistemology is faulty, then, as far as compliance is concerned, there will be trouble. Any normative theory that postulates compliance as a foundational concept will need to be adjusted accordingly. It will help to first set out some terms and then restate the argument.

### § 3.2.1 Terms and argument

Whenever a reason is said to belong to just one particular domain of discourse, I will call it a local reason. Thus we might say that a legal reason is local to the law, an aesthetic reason local to art, and so on. Local reasons will be said to have instances whenever they are sufficiently specific. What I mean by ‘sufficiently specific’ will be clear from the context in which it occurs. Instances are specific

reasons within a local domain (or locale), and the rules of reasoning therein constitute the modality. We may therefore speak of a specific law as being an instance of the locale of law, whose modality is legal reasoning; and a specific aesthetic judgment as being an instance of the locale of art, whose method is aesthetic reasoning. None of this is to say that the rules of logic alter between modalities but only that some instances of reasons may be peculiar to the locale in which it obtains and immaterial to others. Part of what I will try to show with the preliminaries from aesthetics and the studies from cognitive neuroscience is that neither modalities nor the instances which occur within and across domains are independent of one another. Disjoint sets are impossible or at best unworkable and the implication shall be that compliance as a construct of conceptual analysis is an epistemological non-starter. Its model of mind, in other words, is unsound because it does not sit in harmony with certain facts about how we reason. I will suggest that the source of the error is a misapplication of analytic methodology—that is, constructing concepts, such as compliance, and positing them as requirements of a system of reasoning without duly attending to the question of whether or not the concepts are sound and practically viable.

As an aside, localism and analyticity are not to be confused. ‘Localism’ is a term I will use for the set of epistemological presuppositions which hold that a reason that is specific to a particular domain (eg, aesthetics) and that its associated mode of reasoning (eg, aesthetic reasoning) can be independent of other reasons in other domains and also independent of other modes of reasoning in other domains.

To put it differently, localism is the view that the instances of reason and the modality of reasoning which hold in one domain can be independent of other instances and modalities. I will suggest that localism is untenable as a logical and extra-logical matter. Analyticity is the doctrine which holds that certain claims are true in virtue of the meaning of the words they contain. My claim as regards analyticity is simply that its deployment in the domain of practical reason must satisfy the demands of both logical *and* extra-logical examination. Localism and analyticity are related in the sense that both presuppose the idea of self-containment—either in the form of a sentence whose truth does not depend on things outside of it (analyticity) or in the form of a domain of discourse which does not depend on other domains of discourse (localism). The distinction between analyticity and localism in hand, I turn now to the philosophy of art.

### § 3.2.2 Aesthetics and practical reason

Aesthetic failure is far less difficult to theorise than aesthetic success.<sup>53</sup> Consider the various failures of a poem that valorises something morally objectionable such as racism. A useful example in this regard is Kipling's 1899 piece 'The White Man's Burden'. The overriding idea of the poem is that the 'white man' has a moral

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<sup>53</sup> See, eg, P Montague, 'Learning Aesthetic Concepts and Justifying Aesthetic Judgments' (1979) 13 *Journal of Aesthetic Education* 45.

obligation, from which he ‘dare not stoop to less’, to colonise non-whites, those ‘new-caught sullen peoples, Half-devil and half child’, and ‘Fill full the mouth of Famine And bid the sickness cease’. The effort, we learn, is thankless because once the ends are near the colonised subject’s ‘sloth and heathen Folly Bring all your hopes to nought’. Some interpreters have charitably read the poem as encouraging Victorian philanthropy and not colonialism of the straightforward racist variety and others have claimed to find irony in it but the poem is clear enough and Kipling’s other writings on colonialism make the standard reading pretty credible. The point, in any case, is that one cannot understand this poem as an aesthetic artefact without also understanding it as a moral one. A reader who purports to understand the poem but engages it on terms restricted to its iambic trimeter or imagery, to take two so-called formal aesthetic elements, we would say has simply failed to get it. Form, as philosophers of art have long pointed out, is constitutive of content—in the case of poetry: tone, rhythm, rhyme, metre, syntax, assonance, grammar, punctuation, and other so-called formal elements must be understood, if a poem is to be understood at all, as being ‘generators of meaning, not just containers of it’ and that ‘to modify any one of them is to modify meaning itself.’<sup>54</sup> ‘In literary art’, as Victor Erlich puts it, ‘ideological battles are often acted out on the plane of the

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<sup>54</sup> T Eagleton, *How to Read a Poem* (Blackwell 2007) 67 (see generally ch 3 ‘Formalists’ and 4 ‘In Pursuit of Form’).

opposition between metaphor and metonymy, or metre and free verse',<sup>55</sup> a point which is true of an artefact's 'structural aspects' as well:

A neoclassical poem which exploits the order, symmetry and equipoise of the heroic couplet; a naturalistic drama which is forced to gesture off-stage to realities it cannot credibly bring into view; a novel which garbles its time sequence or shifts dizzyingly from one character's viewpoint to another: all these are instances of artistic form as itself the bearer of moral or ideological meaning.<sup>56</sup>

What can we learn from the theoretical progress concerning form and content in the arts? More specifically, what is the relation between form and content and the thesis that neither modes of reasoning, nor instances within and across each mode, are independent of one another? Erlich points out that it would be a failure of understanding to mark out a fundamental distinction between the formal and non-formal aspects of an aesthetic artefact such as a poem. The reason for this, put simply, is that form is content. The aesthetic is the moral and the moral is the aesthetic in works like Kipling's poem, where 'aesthetic' is typically taken to refer to 'formal' qualities. Aesthetic reasoning, as a mode of reasoning concerned with such qualities, cannot generate a competent understanding of an aesthetic artefact

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<sup>55</sup> V Erlich, *Russian Formalism – History and Doctrine* (4th edn, Mouton De Gruyter 1980) 206ff.

<sup>56</sup> T Eagleton, *The Event of Literature* (Yale University Press 2012) 46–47.

because every formal device is imbued with meaning, some of which might be moral, and would require moral reasoning, some of which might be political, and would require political reasoning, and so on. Insofar as one mode of reasoning must perforate other modalities in order to get at competence (that is to say, to understand the thing that one is reasoning about), since none exists in a vacuum, so too are the instances of one modality interlocked with those of others. These are the kinds of reasons that could enable a critic to argue that it would be an *aesthetic* failure for a poem to valorise something morally deplorable like racism.

Nevertheless, for practical purposes it is often the case that one has good reason to attend exclusively to just the aesthetic or just the morality or even just the legality of an act or artefact. These practical purposes can be myriad: in a court of law, the aesthetics of, for instance, rape are irrelevant because aesthetic valuation is not, as the trials of Oscar Wilde showed, an accepted mode of legal argumentation;<sup>57</sup> in moral philosophy, the lawfulness of a socially accepted practice is also often beside the point because we legally do all sorts of things as a society that we really ought not to; and in aesthetic theory, one often has reason to set aside other modalities such as moral reasoning or political reasoning in order to strike at other depths—as one might, for instance, by bracketing Wagner’s nationalism in

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<sup>57</sup> Wilde’s trial, of course, was unrelated to rape.

order to learn what we can from his conception of totalism in the arts,<sup>58</sup> or by bracketing Fragonard's reverence for aristocracy in *The Swing* in order to learn what we can from its sensitivity to social narrative. But in all these cases, the bracketing of other modalities (eg, moral reasoning) and other instances (eg, a moral reason) into separate locales of engagement is a tactical decision that is made on a balance of reasons that centres on what is considered useful or appropriate in a disciplinary way. As far as epistemology is concerned, the kind of localism just described holds no water. No mode of reasoning and, by extension, no single piece of reason is ever unadulterated by other modes and other reasons. Cross-contamination between the different modes of reasoning is an ineradicable fact of reasoning. This is why aesthetic theorists are often committed to the view that 'the art critic is committed to totalize',<sup>59</sup> meaning that one's work must be done with a cognisance of its various epistemic and contextual contingencies. It is also why Frege argued that 'the meaning of a word must be asked for in the context of a proposition, not in isolation', and also why Wittgenstein would extend this contextualist principle to sentential and logical utterances more generally. It is too innocent, then, to think that one's attempt at something like an aesthetic or legal judgment can be cleanly aesthetic or legal or cleanly anything.

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<sup>58</sup> See R Wagner, *The Artwork of the Future and Other Works* (W Ashton Ellis trans, University of Nebraska Press 1993); A Finger and D Follett (eds), *The Aesthetics of the Total Artwork: On Borders and Fragments* (Johns Hopkins University Press 2011).

<sup>59</sup> A Britton, 'In Defense of Criticism' in B Keith Grant (ed), *Britton on Film: The Complete Film Criticism of Andrew Britton* (Wayne State University Press 2009) 386.

### § 3.2.3 Cognitive science and practical reason

There are good empirical grounds for the persistently gestaltist view of the modalities of reasoning. Much of the support in recent years has come from experimental psychology and studies that investigate the neural bases of reasoning.<sup>60</sup> Writing in 2008 on the psychology of moral reasoning in particular, Monica Bucciarelli and her colleagues found that ‘no simple criterion exists to tell from a proposition alone whether or not it concerns morals as opposed to some other deontic matter, such as conversation, a game, or good manners’.<sup>61</sup> Admitting the absence of this ‘simple criterion’ or ‘simple defining property’ enables the search for other non-atomic indicators which could, among other things, contribute to the generation of one’s reasons for action. The investigators in this particular study put their fingers on the ‘specific knowledge of your culture’, a rather vague way to say that one’s reasoning and so one’s bases for action are complicated and never unitary.

The findings from Bucciarelli correspond nicely to an earlier negative result from brain-imaging studies by Joshua Greene and Jonathan Haidt in 2002, which

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<sup>60</sup> I am grateful to Robin Dunbar, Mark Buckley, Steve Fleming, Christopher Summerfield, and Nick Yeung from the Department of Experimental Psychology at Oxford for their help in orienting my reading of the neuroscientific research on human reasoning and informing the discussion in this section.

<sup>61</sup> M Bucciarelli, S Khemlani, and PN Johnson-Laird, ‘The Psychology of Moral Reasoning’ (2008) 3 *Judgment and Decision Making* 121, 135ff.

showed that ‘there is no specifically moral part of the brain’ and their joint conclusion that:

morality is probably not a ‘natural kind’ in the brain. Just as the ordinary concept of memory refers to a variety of disparate cognitive processes (working memory, episodic memory, motor memory, etc.), we believe that the ordinary concept of moral judgment refers to a variety of more fine-grained and disparate processes, both ‘affective’ and ‘cognitive’.<sup>62</sup>

This conclusion is consistent with neuroimaging work by Vinod Goel, whose fMRI studies of deduction—essentially the principle of transitivity with which we have been preoccupied—showed that reasoning with sentences that had semantic content (eg, ‘All apples are red; all red fruit are sweet; therefore all apples are sweet’) as well as those without or, at least, with less semantic content (eg, ‘All A are B; all B are C; therefore all A are C’) show engagement with both linguistic and spatial systems in the brain.<sup>63</sup> The vast spread of reasoning processes Goel describes coincides with a related argument from a further study he conducted with Jordan Grafman, which held that ‘reasoning does not stand alone as a cognitive process’ and that it is instead caught up with numerous other cognitive tasks, such as

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<sup>62</sup> JD Greene and J Haidt, ‘How (and where) does moral judgment work?’ (2002) 6 *Trends in Cognitive Science* 517, 523. See also J Moll and others, ‘Functional networks in emotional moral and nonmoral social judgments’ (2002) 16 *NeuroImage* 696.

<sup>63</sup> V Goel and others, ‘Dissociation of mechanisms under syllogistic reasoning’ (2000) 12 *NeuroImage* 504.

forming metaphors, developing plans, and navigating our various social and non-social circumstances.<sup>64</sup>

These studies in cognitive neuroscience have a number of implications for the way in which we understand the actual processes of reasoning that animate practical reason and normativity. The first is that categories such as moral reasoning do not operate atomically, meaning that both the mode of reasoning (eg, moral) and the specificity of the content such reasoning produces (eg, ‘ $\phi$  is good’) are plaited with other modes and so other specificities: what, in other words, was at the crux of the prior argument against localism. What is more, moral reasoning may refer to a set of other ‘more fine-grained and disparate processes’, compounding further the problems associated with localism. ‘Moral reasoning’ here is a placeholder. What can be said of it can be said of legal reasoning as well. Not because legal reasoning is a kind of moral reasoning (it is not) but instead because, and at least insofar as, both imply or rely on normative injunctions (eg, ‘X should  $\phi$ ’). All of this lends support to the idea that every mode of reasoning and every

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<sup>64</sup> J Grafman and V Goel, ‘Neural Basis of Reasoning and Thinking’ in L Nadel (ed), *Encyclopedia of Cognitive Science* (Wiley 2006) 875, 879. There are extensive studies on the inextricably interdependent processes of reasoning. See esp: J Baron, *Thinking and Deciding* (4th edn, CUP 2008); M Coltheart, ‘What has functional neuro-imaging told us about the mind so far’ (2006) 42 *Cortex* 323; E Heit and others, ‘Relations between memory and reasoning’ in BH Ross (ed), *Psychology of Learning and Motivation* (Academic Press 2012) 57–101; D Kahnemann, *Thinking, Fast and Slow* (Penguin 2012); RJ Dolan and P Dayan, ‘Goals and Habits in the Brain’ (2013) 80 *Neuron* 312; ND Daw and others, ‘Model-based influences on humans’ choices and striatal prediction errors’ (2011) 68 *Neuron* 1204; and J Mikhail, ‘Emotion, Neuroscience, and Law: A Comment on Darwin and Greene’ (2011) 3 *Emotion Review* 293.

specific reason is bound up with a nexus of other modalities of reasoning and specificities of reason from which it is inextricable. If this is true, we never have atomic reasons for action, atomic in the sense of a single reason or a single mode—hence the inappropriateness of localism as an expectation in any theory of practical reason.

Of course, practical reason cannot be reduced to the study of the brain. But it does not follow from this truism that the study of the brain does not entail insights for—or, as I argue, restrictions upon—theories of practical reason. If, for instance, a particular model of practical reason requires us to reason about a norm *R* by way of a model of practical reason *M*, it follows that *M* requires us to use our brains in certain ways in respect of *R*. Whether our brains can accommodate *M* by thinking in the way that *M* requires is a question that falls under the remit of the theory of possibility I advanced in Chapter 1, in particular the principle of actual possibility. It is a question that we as philosophers can engage more fruitfully by importing empirical knowledge from other fields of what our brains can and cannot do. Now the concern that our theories of practical reason must comport with the limits of our minds is an obviously vital one. Discussing Raz's requirements for moral reasoning, Michael Moore ventures a similar observation. 'It would be an odd and unfair morality', he says, 'that gave us objective reasons which we, because of our psychological equipment, could not incorporate into our practical reasoning

processes'.<sup>65</sup> The philosophical instinct behind this thought, which is that normative requirements must be sensitive to our species' cognitive hardware if they are to be of use to practical reasoning, is reflected in key areas of the law. In the landmark case *Roper v Simmons*, for example, the US Supreme Court held that adolescents are less morally culpable than adults and that it would therefore be unconstitutional to impose capital punishment on them for crimes committed before the age of eighteen.<sup>66</sup> Part of the reasoning for this decision depended on neuroscientific evidence which reflected the observation that the areas of the brain that are responsible for decision-making and controlling impulses are not as well-developed in adolescents as they are in adults.<sup>67</sup> The Court recognised that the practicability of the law's normative requirements would be diminished if it were not able to accommodate essential facts about the cognitive capacities of not just human brains generally, but adolescent human brains specifically. The Court's narrowing of the relevant measurement of possibility is noteworthy and it is reflected in my argument that the theory of reasons must likewise accommodate considerations that demarcate what is and is not possible for human cognition. As far as localism is concerned, I have argued that it is a further example of what we can

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<sup>65</sup> Cf Raz, *Ethics in the Public Domain*, 204ff on 'domain-specific reasoning'. See Moore, 'Authority, Law, and Razian Reasons', 843. For related reading, see LA Perez Miranda, 'Deciding, Planning, and Practical Reasoning: Elements towards a Cognitive Architecture' (1997) 11 *Argumentation* 435.

<sup>66</sup> *Roper v Simmons* 543 US 551 (2005).

<sup>67</sup> JJ Knabb and others, 'Neuroscience, Moral Reasoning, and the Law' (2009) 27 *Behavioral Sciences and the Law* 219, 223 citing JD Aronson, 'Brain imaging, culpability and the juvenile death penalty' (2007) 13 *Psychology, Public Policy, and Law* 115.

rule out on account of its impossibility—or, at least, exceptional impracticality—in the domain of practical reason.

Now if the abandonment of localism can be sustained, then the idea that one can even have compliance, as a theoretical matter, runs into difficulty. Compliance, remember, specifies that the reason or set of reasons one uses to do as the norm requires must be no other reason or set of reasons than those which constitute the norm itself. I take this as an application of localism to normativity. Compliance, moreover, requires that an agent not act upon excluded reasons which would otherwise be valid as reasons for action, even valid as reasons for the same action required by a norm. Remember also that an excluded reason refers to a reason that is eliminated from the field of valid *rational motivations* that an agent can rightly use to do the thing that a norm requires. Put more technically, an exclusionary reason is a negative second-order reason, which means that it is a reason not to act upon an excluded first-order reason to  $\phi$  or not- $\phi$ . This involves not being motivated in one's actions by reasons that are not explicitly stipulated by a norm when that norm is relevant. But the things one might do and the things one might say cut across a range of categories because they respond to a nexus of reasons, the constituent parts of which are inextricable from one another. Every reason is bound up with other reasons: with other modes of reasoning and other instances of reason. The requirement of exclusion under compliance, however, amounts to an intransigent denial of this fact about the nature of reasons. The idea that one can isolate some reasons, exclude others, and then neatly beget a set of

motivational considerations to which one can rightly resort as reasons for action is as incredible as the demand that one ought to view the world monochromatically when one's visual apparatus is in fact set up to see colour. Neither formal reasoning nor our cognitive processes work like that even if, for practical purposes, we make tactical decisions to treat reasons and their sets in isolation, as we might in an art gallery or a court of law. But these are disciplinary decisions and not descriptions or features of the structure of practical reason.<sup>68</sup>

The foregoing considerations from cognitive neuroscience may appear for some readers entirely irrelevant to our theories of normativity. One might even claim, rightly, in my view, that psychologists and neuroscientists can make mistakes about some of the questions they ask about their subject of study as a result of paying insufficient attention to certain philosophical insights. Further, even if it is true that no human being can ever respond to just one isolated fact in their practical reasoning, there are certain ways of responding to reasons that are pertinent just to philosophers—for example, making sense of the relation between first- and second-order reasons, the exact relations between premises in complex arguments about what to do, and so on. What could the brain sciences teach philosophers on these and other matters that are chiefly conceptual? And, just as importantly, what lessons can philosophers share with brain scientists in their empirical investigations of practical reasoning? These questions, metaphilosophical in spirit, have attracted

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<sup>68</sup> I take up the case of disciplinary reasons again in §3.2.4 of this chapter.

the attention of a number of writers in the growing literature on the intersection of neuroscience and normativity, so it will not do to try to provide answers *ex nihilo*.<sup>69</sup> What I would like instead is to say something about some of the more important takeaway lessons from that literature in relation to certain purported requirements of practical reasoning, such as the one that has figured centrally in this thesis, namely, the requirement of compliance in the theory of mandatory legal rules.<sup>70</sup> A good way to drawing out the lessons is to first highlight what cannot be gleaned from neuroscience for the study of practical reason, and to then specify the remaining ways that neuroscience can be significant for some of the staple conceptual distinctions in the study of practical reason.

In light of everything I have said so far in this thesis about the importance of adopting a hardnosed view of reasons, I may as well say right away what I think the wrong approach is to structuring the interdisciplinary exchange. The simplest way to put it is that no amount of correlational data from neuroscience's fMRI studies is going to be able to tell us what we ought to do from a moral point of view.

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<sup>69</sup> The literature is so vast that I will name just one excellent starting point: M Bennett, D Dennett, P Hacker, and J Searle, *Neuroscience and Philosophy: Brain, Mind, and Language* (Columbia University Press 2007). For a more specific treatment of the relevance of neuroscience to the philosophy of action, see JD Runyan, *Human Agency and Neural Causes* (Palgrave Macmillan 2014).

<sup>70</sup> As before, it is vital in thinking about this purported requirement not to take it to mean that Raz or other legal philosophers hold that compliance is a requirement of mandatory legal rules. The requirement, instead, is the possibility of an agent complying with mandatory legal rules. Some of the arguments of this thesis have aimed to reject *that* possibility, and not to reject the claim, made by no one today, that mandatory legal rules require compliance.

This puts me in opposition to psychologists such as Joshua Greene and his collaborators, including Peter Singer, who think that their fMRI studies count in favour of certain theses in moral philosophy, such as consequentialism, and against certain other theses, such as deontological ethics.<sup>71</sup> On those substantive questions, the role for neuroscience is at best indirect. And yet I do think that cognitive neuroscience can help produce important insights about what we can reasonably expect from the human brain (a question of empirical possibility) and, by virtue of such insights, can help demarcate the boundaries of human rationality and, derivatively, the reasons, moral or otherwise, that apply to us as human beings in light of our actual capacities. This talk of demarcating the boundaries of human rationality and actual capacities will by now be familiar. Many of the central arguments of Chapter 1 of this thesis, particularly those that advanced and defended the actual possibility principle and its empirical calibration theorem, were about opening up the theoretical space in the study of practical reason for empirical insights.

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<sup>71</sup> See, for example, JD Greene, LE Nystrom, AD Engell, JM Darley, and JD Cohen, 'The Neural Bases of Cognitive Conflict and Control in Moral Judgment' (2004) 44 *Neuron* 389; Greene, 'From Neural "Is" to Moral "Ought"'; P Singer, 'Ethics and Intuitions' (2005) 9 *The Journal of Ethics* 331; JD Greene, 'The Secret Joke of Kant's Soul' in W Sinnott-Armstrong (ed), *The Neuroscience of Morality* (vol 3, MIT Press 2007); JD Greene, SA Morelli, K Lowenberg, LE Nystrom, and JD Cohen, 'Cognitive Load Selectively Interferes with Utilitarian Moral Judgment' (2008) 107 *Cognition* 1144; and JD Greene, 'Beyond Point-and-Shoot Morality: Why Cognitive (Neuro)Science Matters for Ethics' (2014) 124 *Ethics* 695.

So, the above remarks, which are admittedly somewhat speculative, reflect my general view of how the interdisciplinary exchange should go between philosophy and neuroscience. To add detail to these claims, let me defend myself by first making a case for why the arguments of Greene and Singer about the significance of neuroscience for normativity are unpersuasive. That will mark out one trajectory of interdisciplinarity which I do not think is helpful or even relevant to the study of practical reason. Then I will turn to making a positive case for a different kind of interdisciplinarity in our study of practical reason, one which I will predictably claim should centre on the empirical calibration of our philosophical toolsets.

Our brains, argue Greene and his colleagues, reflect two subsystems that underpin our moral judgments. The first produces deontological judgments through automatic cognitive neural processes, and the second produces utilitarian or consequentialist judgments through controlled cognitive neural processes.<sup>72</sup>

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<sup>72</sup> Just so that we are all on the same page about these terms, their meanings in the context of Greene's theory are exactly what we think they mean: roughly, deontological theories hold that certain actions can never be justified by their consequences, however great such consequences may seem, whereas utilitarian theories judge the goodness of actions on the basis of their consequences (and though utilitarianism is a subclass of consequentialism, the terms are interchangeable in this discussion). 'Cognitive', for Greene, is taken to reflect 'inherently neutral representations' that 'do not automatically trigger particular behavioural responses or dispositions' and are slow, flexible and used for abstract reasoning, problem solving, and so on; 'cognitive' contrasts with 'emotional', which do entail such automatic triggers, and are typically rapid responses on the basis of limited information (Greene, 'Secret Joke of Kant's Soul', 40). Greene and others typically use scare quotes around 'cognitive' to specifically refer to non-emotional processes, in contrast to cognitive (without scare quotes) to refer to information processing more generally. The details of these distinctions are unimportant for Greene's argument, which is principally

Greene pairs these two claims with a second pair: automatic cognitive neural processes are associated with emotions; and controlled cognitive neural processes are associated with cognition (reasoning). The two pairs then combine to give us what Greene calls the Dual-Process Hypothesis (DP), which holds that (i) deontological judgments are a product of emotional processes, (ii) consequentialist judgments are a product of cognitive processes, and (iii) that (i) and (ii) are in competition for our moral judgment. Or, as Greene puts it, '[c]haracteristically deontological judgments are preferentially supposed by automatic emotional responses, while characteristically consequentialist judgments are preferentially supported by conscious reasoning and allied processes of cognitive control.'<sup>73</sup> So far, DP reflects the old idea that morality is a conflict between reason and passion, or the Combat Model, as Christine Korsgaard calls it.<sup>74</sup> Though DP reflects that model, however, it also inverts the standard associations that are made about reason and the passions, since deontological judgments are usually associated with reason and consequentialist judgments with the passions.<sup>75</sup>

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conceptual, so I will leave these as-is in order to focus on the conceptual moves, which I will discuss shortly.

<sup>73</sup> Greene, 'Beyond Point-and-Shoot Morality', 699 and 717.

<sup>74</sup> C Korsgaard, 'Self-Constitution in the Ethics of Plato and Kant' (1999) 3 *Journal of Ethics* 1, cited in S Berker, 'The Normative Insignificance of Neuroscience' (2009) 37 *Philosophy and Public Affairs* 293, 301. 'Nothing is more usual in philosophy, and even in common life,' said Hume in the *Treatise* (2.3.3), 'than to talk of the combat of passion and reason.'

<sup>75</sup> Berker, 'Normative Insignificance', 303f.

To support DP, Greene and his colleagues ran experiments with subjects who had to respond to (a) about 20 personal moral dilemmas, (b) about 20 impersonal moral dilemmas, and (c) about 20 nonmoral dilemmas, all the while being inside fMRI machines. These machines use magnetic properties of oxygenated haemoglobin to track areas of the brain that exhibit greater neural activity, which is the case when they are firing more rapidly, and hence require more oxygen, as a result of, say, watching a film versus not watching a film (other things being equal). Greene and his colleagues found that when subjects were responding to personal moral dilemmas, the areas of the brain that are associated with emotional processes exhibited greater neural activity, and when they responded to impersonal moral dilemmas, the areas of the brain that are associated with ‘cognition’ exhibited greater neural activity.<sup>76</sup> Further, they found that subjects responding to questions that tracked deontological judgments exhibited greater neural activity in brain regions associated with emotional processes and, conversely, when the questions tracked consequentialist judgments, brain regions associated with ‘cognitive’ processes exhibited greater neural activity.<sup>77</sup>

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<sup>76</sup> The areas of the brain associated with emotional processes included the medial prefrontal cortex, the posterior cingulate/precuneus, the posterior superior temporal sulcus/inferior parietal lobe, and the amygdala, whereas the areas associated with ‘cognition’ included the dorso-lateral prefrontal cortex and the parietal lobe; citing Berker, ‘Normative Insignificance’, 304, citing JD Greene, R Brian Sommerville, LE Nystrom, JM Darley, and JD Cohen, ‘An fMRI Investigation of Emotional Engagement in Moral Judgment’ (2001) 293 *Science* 2105, 2106f and Greene et al, ‘Neural Bases’ 391f.

<sup>77</sup> To track consequentialist judgments, subjects were presented with versions of the Trolley Problem whose answers are intuitively consequentialist (ie, the version of the problem where flicking a switch saves five lives and ends one); whereas to track

My summaries of the steps and measurements of the studies that Greene and his colleagues conducted have no doubt simplified many of the intricate details of the experiments and fMRI results, but the general argument they make is as follows. They say that the ‘morally inept’ areas of our brains (ie, the areas responsible for automatic and intuitive emotional processes) light up when we make deontological judgments, and the ‘morally adept’ areas of our brain (ie, the areas responsible for manual ‘cognitive’ processes) light up when we make consequentialist judgments. As Greene puts it:

To promote efficiency, our brains have point-and-shoot automatic settings in the form of intuitive emotional responses ... [and] we should not expect them to perform well in the face of peculiarly modern problems, ones with which we have inadequate genetic, cultural, and individual experience.

Many of the most important moral problems we face may be of this kind.<sup>78</sup>

Greene and his colleagues take these considerations and the correlations that produce them to suggest that consequentialist ethical theories are the products of our reasoning processes and are hence relatively trustworthy, whereas deontological

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deontological judgments, subjects were presented with versions of the Footbridge Dilemma, whose answers are intuitively deontological (ie, the version of the problem where pushing a large man onto the tracks and to his death saves five lives). See Greene et al, ‘An fMRI Investigation’ 2105.

<sup>78</sup> Greene, ‘Beyond Point-and-Shoot Morality’, 726.

theories, such as Kant's, are the products of emotional processes, which cannot be trusted as much as our reasoning processes, at least, in matters of morality.<sup>79</sup>

These are no doubt extremely bold claims that invite protest on several fronts. For one thing, it will not do to just dismiss the possibility that emotions can constitute an important way of discerning moral truths without providing any substantive arguments.<sup>80</sup> Those arguments, to be sure, are not going to be neuroscientific either. But a more significant observation is that identifying which parts of the brain light up is not an exercise that is going to be able to tell us anything about what actually constitutes reasoning. The question of something counting as a piece of reasoning is settled by an assessment of whether the claim or thought at hand reflects certain schemata specified by a system of logic. Greene

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<sup>79</sup> As Greene puts it, 'There are good reasons to think that our distinctively deontological moral intuitions (here, the ones that conflict with consequentialism) reflect the influence of morally irrelevant factors and are therefore unlikely to track the moral truth' ('The Secret Joke', 69f). Berker rejects this finding, even if true, as being inconclusive: 'Suppose we deem some of the features triggering deontological intuitions to, intuitively, be irrelevant ... [t]his is a strike against deontological intuitions. However, we can only conclude that consequentialist intuitions should be privileged over deontological intuitions if a parallel case cannot be made against consequentialist intuitions. Moreover, it is open to the defender of deontology to reply that, intuitively, the faculty eliciting consequentialist reactions is also responding to morally irrelevant factors, or failing to respond to morally relevant ones. For example, a deontologist could contend that the neural processes giving rise to consequentialist judgments are failing to respond to morally relevant factors by ignoring the separateness of persons [or other anti-consequentialist intuitions]'. Berker, 'Normative Insignificance', 324f.

<sup>80</sup> Berker, 'Normative Insignificance', 316, calling the attempt to dismiss such theories as the 'emotions bad, reasoning good' argument, and noting further that many philosophers have defended the prospect of emotions revealing truth; for example, M Nussbaum, *Upheavals of Thought* (CUP 2001) and B Helm, *Emotional Reasons: Deliberation, Motivation, and the Nature of Value* (CUP 2001).

neglects this important truth, which leads him down bizarre lines of thought, such as when he claims that Kant was ‘not, for the most part, actually engaged in moral reasoning’ on account of his deontological ethics.<sup>81</sup> Now it is true that when our thoughts track logical schemata, the parts of our brain that are associated with reasoning exhibit greater neural activity, but the relation is not that neural activity in certain brain regions causes reasoning. Rather, and as the evidence suggests, the relation is the other way around—namely, when our thoughts track logical schemata (‘reasoning’), certain brain regions exhibit greater neural activity.<sup>82</sup> And what is more, the relation between reasoning and brain regions is correlational and not causal,<sup>83</sup> so the best they can do is inform our very basic *prima facie* reception

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<sup>81</sup> Greene, ‘Beyond Point-and-Shoot Morality’, 718, where he presents what he calls the ‘Secret Joke of Kant’s Soul’, whose purpose is to provide an illustration of deontological judgments being, for the most part, emotional rationalisations: ‘Kant, being an uptight eighteenth-century Prussian, is uncomfortable with masturbation, but he’s not content simply to voice his distaste. He wants to prove *from first principles* that masturbation is immoral, and he’s got a pretty clever idea about how to do it: masturbation is wrong because it involves *using oneself as a means*. We today find this bit [of] rationalization amusing because we no longer share Kant’s sexual repression, but if I’m right, this passage is in fact representative of his general approach to ethics.’ Emphasis in the original. Needless to say, the rationalising of fashionable moral sentiments cuts across the deontological–consequentialist divide in the history of philosophy.

<sup>82</sup> The three major groups of theories that explain the neuroscience of reasoning—mental models, causal, and force composition models—all support the view that neural activity in certain brain regions is an epiphenomenon of reasoning (defined as the process of drawing conclusions from certain premises according to logical schema). For a survey of these models, see JT Operskalsi and AK Barbey, ‘The Cognitive Neuroscience of Causal Reasoning’ in MR Waldmann (ed), *The Oxford Handbook of Causal Reasoning* (OUP 2017); see also JE Shuren, ‘The Neurology of Reasoning’ (2002) 59 *Neurological Review* 916.

<sup>83</sup> Neuroscientists working on logical reasoning point this out all the time with respect to the various brain regions they investigate. See, for example, H Ye, S Chen, D Huang, H Zheng, Y Jia, and J Luo, ‘Modulation of Neural Activity in the Temporoparietal Junction with Transcranial Direct Current Stimulation Changes the Role of Beliefs in Moral Judgment’ (2015) 9 *Frontiers in Human Neuroscience* 69, 69: ‘Prior neuroimaging studies have found that mental state (eg, beliefs, intentions) attribution for moral judgment

of deontological and consequentialist judgments.<sup>84</sup> But therein lies the clue about how this type of neuroscientific evidence could possibly be helpful if it is deployed in the right way. If Greene and his colleagues show that using deontological judgments, for the most part, activates those areas of our brain that are principally involved in emotional processes *and* that when such processes are involved we are *more likely* to make mistakes in our reasoning (and hence make it less likely to strike at moral truth), then we have reason to believe that we should be *especially careful* when we deploy deontological arguments in our moral theories.<sup>85</sup> But that is as far as the argument could possibly go and, it appears to me, that does not go very far at all. Greene's subjects were not trained philosophers, so their deontological intuitions were less likely to be careful than, say, Kant's,<sup>86</sup> and, what is more, one

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involves a complex neural network that includes the temporoparietal junction (TPJ). However, neuroimaging studies cannot demonstrate a direct causal relationship between the activity of this brain region and mental state attribution for moral judgment.' See also the collection of essays in V Goel, G Navarrete, IA Noveck, and J Prado (eds), *The Reasoning Brain: The Interplay Between Cognitive Neuroscience and Theories of Reasoning* (Frontiers of Human Neuroscience 2017).

<sup>84</sup> In addition to these brief critical remarks, Greene and his colleagues have been criticised at length in the philosophical literature. I have already mentioned Berker, 'Normative Insignificance', but here are a few others: G Kahane, 'On the Wrong Track: Process and Content in Moral Psychology' (2012) 27 *Mind and Language* 519; P Königs, 'On the normative insignificance of neuroscience and dual-process theory' (2018) 11 *Neuroethics* 195; and J Driver, 'The Limits of the Dual Process View' and S Darwall, 'Getting Moral Wrongness into the Picture' both in SM Liao (ed), *Moral Brains – The Neuroscience of Morality* (OUP 2016).

<sup>85</sup> For similar remarks, see Berker, 'Normative Insignificance', 327ff who calls this the 'best-case scenario', though he concludes that even this limited, indirect role for neuroscience is speculative and should not lead us to privilege certain moral intuitions over others, a view which I think is entirely right.

<sup>86</sup> The speculative thought here is that an individual trained in an activity will have better hunches about the various aspects of that activity than someone who underwent less or no training.

would hope that intuitions reflect the beginning and not the end of our engagements with moral dilemmas. Thus, insofar as philosophers can remind themselves to be especially careful in deontological settings, they will bask in as much light as the cautionary note entailed in these neuroscientific studies could hope to shed.

Having said all that, my view is that there is more to the neuroscience than the salutary reminder to proceed with caution in matters of normativity. No doubt that view will not come as a surprise. Throughout this thesis, I have argued for a constriction of the domain of reasons on the basis of the claim that impossible reasons are no reasons at all. Neuroscience can assist in that project by specifying the limitations of our neural hardware and hence our actual reasoning capacities and, as I have argued, getting clearer on our actual capacities will also enable us to get clearer on the reasons that apply to us. A few remarks follow from this view. First, although neural activity in certain brain regions is the epiphenomenon of reasoning, it is still obviously true that we need the requisite neural hardware to do any reasoning. But the question of whether a claim or a thought constitutes a piece or datum of reasoning, as I say, is to be answered by assessing the datum, and not the hardware. Second, some of the philosophical apparatus necessary for incorporating neuroscientific data into the study of practical reason has already been defended in this thesis. I have in mind the principle of actual possibility and its empirical calibration theorem from Chapter 1, which together enable a way to get as specific as we like about how much neural data we would like to include in

specifying our actual capacities. Let me restate the principle and its calibration theorem again now and then suggest one application of the pair in the context of the neuroscientific studies I have cited in this chapter.

Actual possibility (AP):

R is a normative reason for the actual X to  $\phi$  only if the actual limits of X's capacities do not prevent X from  $\phi$ ing for R.

Empirical calibration (EC):

For every idealised element  $i$  that corresponds to an actual phenomenon  $a$ ,  $a = i - f_1 \dots f_n$ , where ' $f_1 \dots f_n$ ' is an iterative process of factual calibration.

To see AP and EC in action, consider the view which I have argued is reflected in the neuroscientific evidence, namely, that it is not humanly possible to ever act upon a single, isolated fact (as one must with the requirement of compliance). One can already see where we can go with this. For any idealised conception of reasoning  $i$ , calibrate it downwards with the weight of the just-mentioned neuroscientific evidence by subtracting from  $i$  the possibility of acting upon a single, isolated fact. Reiterate that process with the relevant set of empirical data, and you have, in the end, a fact-sensitised conception of an actual phenomenon that can be plugged into AP's 'actual limits of X's capacities'. To put this more explicitly, suppose that we want to determine if I have a moral reason to act upon a single motivation.

According to AP, and other things being equal, I have that moral reason to act upon that single motivation only if the actual limits of my capacities do not prevent me from acting upon that single motivation. Now to determine the actual limits of my capacities, we deploy EC. First we suppose the idealised view found in the moral theory that maintains that I have the reason I am describing, namely, the reason to act upon a single motivation. We take that idealised view and pare it down with the empirical data that is relevant to human reasoning and our abilities to act upon our motivation. If the empirical data shows that human brains cannot facilitate acting upon a single motivation, then, other things being equal, that fact prevents me from acting upon a single motivation. That fact, which we would plug into EC's  $f_i$ , is now partly constitutive of a fact-sensitised conception of my actual limits (ie,  $a$ ). With this insight in hand, I can return to AP with a ready answer to its conditional element. A necessary condition of me having the reason to act upon a single motivation is that my actual capacities do not prevent me from acting upon a single motivation. And yet that necessary condition cannot, according to  $f_i$ , be satisfied, yielding the conclusion that I have no reason to act upon a single motivation.<sup>87</sup>

What is controversial about AP, but which I will not defend again here,<sup>88</sup> is that it allows for an individualisation of the iterative process of empirical

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<sup>87</sup> The missing but obvious step in this bit of reasoning is connecting AP's *actual limits of X's capacities* with EC's *actual phenomenon*.

<sup>88</sup> See Chapter 1, §§ 3.2.1 and 3.3.

calibration because it refers not to the class of agents *X* but, instead, to an actual *X*, namely, an actual me, or an actual you, and so on. The implication of this is that the relevant set of empirical data that can be plugged into EC is not restricted to what we know about, say, the human brain generally, but also about what we know about, say, my brain or yours. So the reach of the possibly relevant set of neuroscientific data is both broad in that it ranges across what we know about ourselves as a species, and also deep in that it can reveal and factor in specific things that are knowable about the actual limits of specific individuals. One important upshot of this conclusion is that it has the potential to line up nicely with the admission readily made by some philosophers—and I am sorry to bring this up again—that daffodils do not answer to reasons because they do not have the requisite capacities. But, as I suggested in Chapter 1, as soon as we make this admission, we prompt the question of whether this is because ‘requisite capacities’ is a binary sort of thing (you either have it or do not, and daffodils do not) or a spectrum sort of thing (some things, some people have more or less of the requisite capacities, as specified by EC, and are answerable to more or fewer reasons, but daffodils still have none, as far as we can tell, and are answerable to no reasons). If we accept the spectrum model, which is plausible, then the flexibility of AP and EC becomes especially attractive.

### § 3.2.4 Disciplinary reasons

So, as I argued in the preceding section, it would be an error to think that certain considerations from neuroscience are irrelevant to the study of practical reason. To drive this point home, consider a further example. Suppose that Seuss, from Chapter 1, is still keen to obey the law whenever he can. When the law requires that he stops at red lights, the sceptic about the neuroscientific evidence might admit that, of course, there is lots going on in Seuss' head when he stops at red lights. But how could it be that we are still not entitled to say that 'Seuss acted for a single, simple reason?' or simply that 'Seuss obeyed the law'? Is it not the case that Seuss has a presumptively conclusive reason for stopping at the light and that he and others could cite that reason as *the* reason for his action? Is it not, moreover, that the conclusive reason comes packaged with an exclusionary reason not to act for other reasons that pertain to stopping? Strictly speaking, the answer to the sceptic is that the narrative about conclusive and exclusionary reasons and about acting on the simple reason that the law gives Seuss is, in effect, a way of speaking about legal obligations and how we understand our actions when we are responding to authority. The vital observation, however, is that this way of thinking about Seuss' reason to stop at the light because the law requires it is disciplinary. It is about the discipline of the law. It is not to be understood as an accurate reflection of the structural properties of practical reason, which I have argued do not accommodate, for reasons explained in part by the neuroscientific evidence, the kind of localism and analyticity that compliance needs. There is nothing wrong

about speaking in a disciplinary way—‘Seuss obeyed the law’ or ‘Seuss acted for the reason of the law’—as long as we are clear that our quantification of reasons in this way is a manner of speaking. It does not describe the nature of practical reason but may, with certain modifications, help us describe legal reasoning and the say-so view of responding to authority. The nature of practical reason is, in part, demarcated by the neuroscientific hardware of actual practical reasoners. In Chapter 1, I specified the demarcation in more abstract terms by way of the principle of actual possibility. This chapter adds to the abstract work by supplementing it with empirical findings.

Now the foregoing discussion of disciplinary reasons may seem as though something more real is underlying such reasons, which may in turn provoke metaphysical scepticism about what I have had to say about practical reason. To be clear, I do not think that some reasons are more *real* than others. If they are reasons, then they are all equally real, for facts do not sit in a hierarchy in which some are more real than others. They are all real. So let me set out what I think this scepticism could be about before trying to address its worries.

The sceptic might begin by admitting that the evidence from neuroscience and the philosophy of art may seem, at least to me, to indicate a deepening of our understanding of the structure of practical reason. On the basis of that evidence, I have claimed that it is not possible for us to bracket a subset of reasons in a way that would allow us to act just for a single reason, such as a legal rule. When we do act for a single reason it is in what I have called a disciplinary way. Now the sceptic

of this view may point out that if we think that what we are doing when we act on a single reason in a so-called disciplinary way we think that we are doing so in a non-disciplinary way, and that we go about our lives thinking about practical reasoning as though we can indeed act on single reasons, which helps us get through the world and so on, then in what sense can that state of affairs be called *just* disciplinary? Why should we think that this folksy approach to understanding practical reason and our self-understandings when we are engaged in practical reasoning in this way is not, in fact, practical reasoning *itself*? If that self-understanding appears in our everyday practical reasoning, if it is the way in which we can demarcate our roles such that we can be good jurors when we follow just the laws of evidence, or a good art critic when we hone in on the aesthetic merits of an artwork, and so on in all our separate roles, then why is that way of reasoning not practical reasoning itself and thus not the right object of enquiry? Now suppose further that the sceptic were to invoke Raz and say that even if Raz were to admit, just for the sake of argument, that the evidence adduced from neuroscience and other sources show that we cannot, in fact, ever take a single reason as our reason for action, what bearing does that have on our self-understanding of how we reason? Raz's object of enquiry, the sceptic might say, is people's self-understanding and in light of which one would think that the so-called disciplinary forms of reasoning constitute practical reason itself and not some exercise that does not *really*

reflect the deep structure of a more fundamental conception of practical reason.<sup>91</sup> The sceptic may insist, by way of summary, that the self-understanding of people when they think they are engaged in practical reasoning is, in fact, constitutive of practical reasoning itself.<sup>92</sup> So it will not do to shift the argument to the metaphysical plane in an attempt to try to locate the so-called true form of practical reasoning as separate from its use, for the practice of practical reasoning must be constitutive of even that metaphysical account. In other words, there is no sustainable division between disciplinary reasoning at one level and practical reasoning at the allegedly deeper level. The investigation of the nature of practical reason, the sceptic might conclude, is to be undertaken at the level of its use and with an eye to the self-understanding of reasoners.

In view of the foregoing objection from the sceptic, can the distinction between what I call disciplinary reasoning and practical reasoning be sustained? I

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<sup>91</sup> Recall, for instance, Raz's example of Jeremy the soldier in *Practical Reason and Norms* (38ff and 186ff). Jeremy is ordered by his commanding officer to appropriate a van that belongs to a tradesman. Jeremy's friends urge him that to do so would be wrong, but Jeremy replies that orders are orders even if what his friends say about it being wrong to appropriate the van are true. The nature of authority, he would say, is that, barring special circumstances, such as orders to commit an atrocity, it is not for him 'to decide what is best'. And though, Raz says, '[s]ome may feel that Jeremy is wrong, ... we are not trying to judge him, only to understand his line of reasoning; and it cannot be denied that it is a relatively common way of reasoning' (42). In the next paragraph, he warns against 'disregarding Jeremy's own conception of the situation'.

<sup>92</sup> Cf L Wittgenstein, *Philosophical Investigations* (GEM Anscombe tr and R Rhees ed, Blackwell 1953) 43: 'For a large class of cases of the employment of the word "meaning"—though not for all—this word can be explained in this way: the meaning of a word is its use in the language' (43). 'Don't think, but look!', says Wittgenstein, and the correct places to look are particular cases rather than abstract generalisations (61).

think that it can. Now I do not have the space to do justice to the full force of the scepticism without significantly digressing from the main concern of this chapter, but let me propose a few lines of thought that will suggest that it is at least plausible to retain the distinction between disciplinary and practical reasoning that I have in mind. First, as a general matter, we have good reasons to be sceptical of the claim that the investigation of the nature of practical reasoning begins and ends with an account of the way in which agents actually engage reasons about actions. Consider, for example, that we make mistakes in our reasoning all the time, yet we would not say that those mistakes are constitutive of reasoning itself. Even if my mistakes were in some fashion integral to my self-understanding, and even if all my friends and colleagues in my discipline were making all the same mistakes, even then I do not see how that could be an essential part of an account of reasoning except as a sort of cautionary tale of common errors. It would be puzzling to view the general circulation of errors in reasoning in some discipline's population as having a say in what constitutes reasoning itself even in that discipline. In such cases, at least, it is not clear how usage could be constitutive, even when such usage is important to—even constitutive of—a population's understanding of itself. A further observation to bear in mind is that pointing out the errors of any process, *reasoning or otherwise*, requires a point of reference that would have the resources to enable accurate judgments about what constitutes right and wrong. Whatever that point of reference is, it will not be restricted to usage as we find it, for otherwise, as a conceptual matter, one can never go wrong in one's practice and one can never get one's understanding of oneself wrong either. So there must be something that

enables us to distinguish practice and self-understanding on the one hand, and whether that practice and self-understanding is correct or accurate on the other.

Now as regards the interpretive issue about Raz's view, the matter is complicated by the fact that he oscillates between, as the sceptic would put it, describing an agent's *self-understanding* and, as he puts it elsewhere, providing a descriptive account of practical reasoning *when it is done correctly*. Consider, for example, one of Raz's arguments against what he calls the natural law theorist's definitional view of law. This view 'consists in defining law by a set of properties one or more of which are openly moral properties, for example, that every law is morally valid, or conforms to the precepts of justice or is laid down by a morally legitimate authority'.<sup>93</sup> The definitional view, says Raz, has to explain the fact that many laws are very obviously immoral, such as those that are racially discriminating, and yet even those laws are part of '*our ordinary concept of law* which does allow for the possibility of laws' that are morally objectionable.<sup>94</sup> The preceding emphasis, which is mine, reflect the sceptic's claim about the significance of self-

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<sup>93</sup> Raz, *Practical Reason and Norms*, 164. For the natural law reply, see J Finnis, *Natural Law and Natural Rights* (OUP 1980) 276–78: 'not only does my definition "allow for the possibility"; it also is not advanced with the intention of "explaining correctly our [sc. the ordinary man's] ordinary concept of law." For the truth is that the "ordinary concept of law" (granting, but not admitting, that there is such a concept) is quite unfocussed. It is a concept which allows "us" to understand lawyers when they talk about sophisticated legal systems, and anthropologists when they talk about elementary legal systems, and tyrants and bandits when they talk about the orders and customs of their Syndicate. There is no point in trying to explain a common-sense concept which takes its meanings from its very varied contexts and is well understood by everyone in those contexts.'

<sup>94</sup> Raz, *Practical Reason and Norms*, 164, my emphasis.

understanding, for the 'ordinary concept of law' is that which would be familiar to any reasonably aware denizen of a legal system. Elsewhere in the same work, however, Raz's object of enquiry centres on practical reason itself as separate from the self-understanding of any agent. Indeed, he is concerned even with correcting that self-understanding when it goes awry:

Think of John, who is subject to an (undefeated) exclusionary reason. Let us assume that it affects the outcome of his deliberations, ie that the action indicated by the balance of all first-order reasons is different from the action required by the balance of the unexcluded reasons only. John, I have argued, is acting correctly only if he disregards the excluded reasons in his deliberations. I do not mean that he must not think of them, only that he must not base his action on them. He must not act *for* those reasons. From his perspective before he acts, the right action to take is the one which is indicated by the unexcluded reasons.<sup>95</sup>

By my lights, it seems clear that the account of practical reason that is being described is essentially normative, which means that you and I can get it wrong. And when we do get it wrong, that is to say, when we are reasoning about our actions incorrectly, the point of reference that enables the verdict that we have got it wrong is an account of the nature of practical reason itself. It is not, *pace* my

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<sup>95</sup> Raz, *Practical Reason and Norms*, 185. Emphasis belongs to Raz.

sceptical critic, the fact that our self-understanding is constitutive of the thing we are trying to understand.

#### § 4 Method and Normativity

It is now time to ask again about method. Here it will be vital to retain the separation between, first, the basic justification for regarding mandatory norms as requiring one to reason about one's actions in a particular way and, second, the way in which such norms require one to reason about one's particular actions once the justification is in place. With this in mind, we ask: how exactly does one arrive at the idea of compliance—that is, the notion that one must do as one is required to do for the reason that one is required to do it—in explaining the distinctiveness of the reasons for action which mandatory norms are meant to occasion? Observe that the following two claims are compossible, that is to say, they can be joined with a conjunction:

- (1) The *requirement* of a norm for one to reason in particular ways (for example, by complying) in doing as the norm prescribes can be *justified* on instrumentalist grounds.
- (2) That *requirement*—the mental act of reasoning about the norm and the action it requires—can *operate analytically*, as in the case of compliance or promising.

Observe further that it is not possible to run the following two claims together:

- (3) The justification of a norm can be analytic, by which it is meant that if one is to understand and act upon the norm correctly, one must understand the norm analytically (again, as in the case of compliance or promising).
- (4) The reasoning in respect of that norm can operate on the basis of what is instrumentally worthwhile.

Notice that if claim (3) is true and that the correct way to reason about a norm is analytically, then it is irrelevant to that conclusion whether it is *useful* for such a norm to be viewed analytically. To reuse the example of the promise, the tension between claims (3) and (4) centres on the compliance requirement of promises on the one hand and the definitional violation of the concept on the other were one to do the intended action of the promise for some reason other than the one represented by the plain fact of the promise itself. It is possible to put this differently by saying that the bifurcations at stake—between claims (1) and (2) and between claims (3) and (4) are about segregating the *justification* of the norm, a matter which turns on ‘why’, from its *modality*, which is about ‘how’. The segregation, that is to say, of (i) why one should accept that something is a mandatory norm and (ii) how that thing operates in one’s practical reasoning once it is regarded as being justified. And yet it seems that both halves of these separations—call them the justificatory and modal branches of normativity, respectively—turn on method. If, for instance, the justification of a norm is instrumentalist, ie, to maximise efficiency in respect of reasons that one already has, then one must query whether it is worthy of belief,

that is to say, one must scrutinise the method of arriving at that conclusion. If the justification for regarding a norm as mandatory in a particular way is empirical, then the debate will turn on the data. Without the right data, the moderate way to put the ensuing objection would be to point out that the claims being advanced are at best as good as their speculative inversions. On the other hand, if the justificatory reasons are analytic, then we are in the peculiar (or perhaps impossible) position of having tried to advance an instrumentalist argument, which is necessarily contingent on extra-logical claims, through analytics.

The justificatory and modal divisions of normativity are often neglected in Raz's theory of mandatory norms and this has had knock-on effects for methodological clarity in Raz's work. Part of the reason for this neglect is that much is made of a similar but different distinction between the prescriptive and evaluative grounds of a norm. The difference, that is to say, between the question that asks whether a rule is binding and the one that asks whether a rule is justified.<sup>96</sup> The space between the prescriptive and evaluative—the so-called 'normative gap' and associated 'opaqueness of rules'—is meant to describe the space between a rule's value and its prescriptive force.<sup>97</sup>

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<sup>96</sup> See eg Raz, *Ethics in the Public Domain*, 208; Gardner, *Law as a Leap of Faith*, ch 6.

<sup>97</sup> Gardner, *Law as a Leap of Faith*, ch 8.

## § 4.1 Topology of normativity

The distinction captured by the normative gap, as important as it has been for legal philosophy as a whole, is not the relevant one for the current examination. As I say, the focus of *evaluation* is (A) ‘Why is X’s  $\phi$ ing for R good?’, while the focus of *prescription* is (B) ‘Why should X  $\phi$  for R?’. The distinction between evaluation and prescription is the classical focus of legal philosophy. The former concerns value or goodness (‘ $\phi$ ing is valuable because it promotes communal wellbeing’), whereas the latter indicates instructions for action (‘the law requires that X must  $\phi$ ’). However, the distinction with which I am concerned—namely, between justification and modality—is both different and also serves other critical ends. Under justification and modality, the respective questions are (C) ‘Why is R, the norm that requires X to  $\phi$ , good?’ and (D) ‘How does R regulate X’s reasoning in relation to  $\phi$ ?’

(A) Evaluation Why is X’s $\phi$ ing for R good?	$\leftrightarrow$ Normative Gap $\leftrightarrow$	(B) Prescription Why should X $\phi$ for R?
(C) Justification Why is R good?	(D) Modality How does R regulate X’s reasoning in relation to $\phi$ ing?	

*Table – Topology of normativity*

Notice that (C) is sometimes reducible to (A) for the reason that R being good is often derivable from the good of X  $\phi$ ing for R. This reduction of justification (C)

to evaluation (A) is no surprise. For a norm to be justified the action it requires should also be worthwhile on evaluative grounds. In this case, however, the deontic 'should' in the preceding sentence is not 'robust' since it is possible for an action to have no evaluative merits on its own at all and yet be made worthwhile by virtue of the norm which requires it, in which case justification (C) cannot be derived from evaluation (A) in a non-question-begging way. Examples abound, contractual obligations perhaps being the most intuitive. Contracts often require actions that would otherwise bear no value. Such actions are made good by the fact that they are required by contract. For present purposes, the more interesting division in the topology of normativity in the above table is modality (D), which is not reducible to or derivable from its seeming cognate under prescription (B). The reason for this is that it is one thing for something to be a prescriptive reason, such as 'X ought to  $\phi$ ', and another thing altogether to stipulate the way by which X ought to reason their way to  $\phi$ ing through R's formal structure (for example, by way of compliance). Nor is modality (D) moreover derivable from justification (C), for the claims that fall under the latter do just that: they justify but do not stipulate the means, that is to say, with a certain motive present in one's practical reasoning, by which the norm is meant to operate or bear upon one's reasons for actions. It is one thing for a norm to require that 'X must  $\phi$ ', which is a prima facie prescriptive reason (B), and another thing entirely for an additional claim to stipulate that 'X must  $\phi$  by means of compliance', which falls under the rubric of modality (D).

Under modality, we must bear in mind what has already been said about compliance throughout § 3. And here the difficulty is clear enough. If the analytic project of Razian legal philosophy stipulates that it must be possible for X to  $\phi$  by way of compliance, then this amounts to a requirement that modality in turn work by way of analyticity, a requirement which I have argued is like the demand that one view the world in black and white when one's visual apparatus is set up to see colour. And yet if compliance is jettisoned as a normative requirement because it relies on implausible models of reasoning and human cognition, philosophers of law will need to grapple once more with the so-called puzzle of the opaqueness of rules, the puzzle, that is to say, which derives from the claim that 'rules, some rules, are themselves reasons, and not merely statements of what we have reason to do'.<sup>98</sup> For if compliance is eliminated as a modality of normative behaviour such as rule-following, then a norm such as a rule cannot be a reason for action itself and not just a statement of extant reasons, since it will always rely on grounds that are external to itself—grounds that an agent may well employ to do the action required by the norm at hand irrespective of the fact that the norm requires it. In such a case, the norm cannot but be a statement of extraneous reasons which one might already have or at least be able to acquire independently of the norm. The trouble with the puzzle about the opaqueness of rules, at any rate, is just one further implication of

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<sup>98</sup> Raz, *Ethics in the Public Domain*, 207.

the breakdown of compliance as a normative requirement in an explanation of mandatoriness.

#### § 4.2 Burdens of proof in normative theory

It will be well to demonstrate as a final move how Raz might navigate the topology of normativity described in the preceding section. Remember that Raz is of the view that mandatory norms must be regarded through the prism of exclusionary reasons because otherwise they would not serve their purposes as mandatory norms.<sup>99</sup> Such purposes in turn are grounded in various justifications of mandatory norms, two of which Raz takes from Mill's *A System of Logic* and a third which he derives therefrom as well:

By a wise practitioner, therefore, rules of conduct will only be considered as provisional. Being made for the most numerous cases, or for those of most ordinary occurrence, they point out the manner in which it will be least perilous to act, where time or means do not exist for analysing the actual circumstances of the case, or where we cannot trust our judgment in estimating them.<sup>100</sup>

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<sup>99</sup> Raz, *Practical Reason and Norms*, 62.

<sup>100</sup> JS Mill, *A System of Logic* (8th edn, Harper and Brothers 1882) 655.

Two justifications then from Mill: first, to save time; second, to reduce risk of error; and then a third, which Raz appends to Mill's, namely, to save on labour. These are not the only possible justifications available, there are others and Raz notes as much. It is moreover not important here whether these are good justifications for something as legally and morally important as a mandatory norm—though as an aside one may note that they very well might not be the kinds of reason one would want regulating mandatory conduct. What matters instead is that they are instrumentalist, and the point to bear with such justifications of what is mandatory is that some if not all of them are open to empirical testing. This prompts a torrent of enquiries about method. If the claim is that rules so conceived—that is to say, conceived as constructs of conceptual analysis that require that an agent's action be regulated by reasons in a particular way, say, by means of compliance—will save on time and labour and also reduce risk of error, then it is a straightforward task to test what are clearly empirical claims about actual human reasoning and behaviour. We can test to see whether a norm whose justification is offered as an error-reducing device actually serves the purpose of error reduction when its modality is governed by compliance. What is more, the tests and the resultant evidence must stand in comparison to what might have happened with different modalities. The weight of the argument for constructing norms with some modality, such as compliance, must accordingly be regarded as relative to arguments for different modalities. The reason for this is that a norm may well reduce error when it is constructed as one that requires compliance and which works by way of exclusionary reasons but it will remain an open question what the point of reference is and how mandatory norms

so conceived compare against other formulations that entail different modalities. The point in any case is about the weight of the evidence before us. As I say, if no evidence is advanced to buttress empirical claims of this kind, then the claim is at best as good as its inverse. In respect of mandatory norms, *pace* Raz, no such evidence is on offer. And the issue, to be clear, is not that Raz does not give empirical evidence for something like the labour-saving facility of rules. This is quite important. Nowhere does Raz say, as a general proposition, that one should obey rules because they save labour or anything like that. If he did say that, he would have to support it by showing how much labour they save, and so on. Yet Raz is careful to insist that there is no general reason to follow rules and no general reason to follow the law. However, the evidentiary burden does not end there. As I say, the burden extends to claims about what the correct modality is for following certain kinds of reasons for action, for example, ones for which the requirement of compliance is pertinent.

It is instructive that there is no empirical evidence for the empirical justifications that underpin the processes of modality in Razian normativity. In Raz's theory of normativity, we are required to reason about norms in certain ways (by way of compliance) *because* it is better to do so as a matter of consequences. Yet no evidence has ever been offered that to reason in the way Raz advocates in fact results in the good consequences that are claimed for it or that it produces better outcomes than reasoning about norms differently. And yet the story does not end there. One might draw in one's horns and argue that evidence need not be

empirical. And one might think that this may especially be the case if the matter at hand centres on the logical strength of norms rather than their phenomenological strength.<sup>101</sup> Two remarks follow.

First, we must leave untested the grounding assumption that logic need not answer to observation as otherwise even the most formal systems will require some empirical premises. Even if this assumption were false, its implications for legal philosophy and practice would be uninspiring. Few philosophers of law and even fewer lawyers would dispute the suggestion that legal concepts at least need some empirical premises.<sup>102</sup> So the assumption about the structural separation between logic and observation we need not touch.

Second, and more to the point, it is to be emphasised that the burden of empirical proof obtains for each of the categories of normativity indicated in the foregoing Table: (A) Evaluation, (B) Prescription, (C) Justification, as well as (D) Modality. What is of special interest in the current context is modality but it will be well to quickly state why the preceding three categories require not merely foundational empirical premises but ongoing empirical examination. Consider again the basic mandatory norm R that states that it must be possible for X to  $\phi$  for R (ie, by way of compliance).  $\phi$ ing constitutes the norm's prescription and compliance its modality. Asked about its justificatory grounds, the Razian theorist

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<sup>101</sup> Raz, *Practical Reason and Norms*, 25.

<sup>102</sup> The priority of these premises is contested. See, eg, Green, 'Introduction', xlvii.

might cite Mill and say that  $\phi$ ing for R is justified because it reduces error. Asked about its evaluative grounds, they may say that it is good to reduce error because, for instance, it allows us to more efficiently conform to reasons that apply to us, assuming thereafter that no further regress is desirable or possible. And so when the objection is made that evidence need not be empirical, the response—now that there is a workable topology of normativity—is to ask about the normative category at issue. Is it that the evaluative claim cannot or need not be empirically examined? This would be strange. If  $\phi$ ing is said to ultimately maximise some kind of good, such as efficiently satisfying one’s normative reasons, then surely we can examine whether this is so at least in the context of the law and legal policy. Or is it that the justificatory grounds are impermeable to empirics? This too would be strange. If a rule is justified on the ground that it reduces error, then we can test whether it actually reduces error. So, too, I have said with modality. If a modality is chosen because it is claimed that the rule in question would otherwise not serve its purpose (found under its justification),<sup>103</sup> then three questions follow. One, is the modality so chosen fit for the purposes set out by the rule’s justification, that is to say, does it in fact do something like reduce error? If the answer is yes, then the matter is still, as described, a comparative one. Two, is the modality formally possible? I argued in § 3.2.2 that compliance at least is not. And three, is the modality cognitively possible? In respect of compliance, I showed in § 3.2.3 that there is

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<sup>103</sup> Raz, *Practical Reason and Norms*, 62 and 74.

good scientific evidence to show that it is not. Indeed, the burdens of proof are manifold—they trace the topology of normativity drafted in the Table and it is submitted that they remain unsatisfied in Razian legal theory.

### § 5 Conclusion

This chapter has sought to contribute to the conversation on method in the philosophy of law by way of a case study, that of the requirement of compliance in an influential theory of mandatory norms. Elsewhere in philosophy, perhaps especially in logic and the foundations of mathematics, philosophers are generally cautious of the lingering enthusiasm for analyticity's explanatory power. In 1936, AJ Ayer could proclaim that

there is nothing mysterious about the apodictic certainty of logic and mathematics. Our knowledge that no observation can ever confute the proposition '7 + 5 = 12' depends simply on the fact that the symbolic expression '7 + 5' is synonymous with '12', just as our knowledge that every oculist is an eye doctor depends on the fact that the symbol 'eye-doctor' is synonymous with 'oculist'. And the same explanation holds good for every other a priori truth.<sup>104</sup>

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<sup>104</sup> Hacking, 'What is Logic?', 33, citing AJ Ayer, *Language, Truth and Logic* (2nd edn, Gollancz 1946) 85. Strictly speaking, confidence in the sharpness of the analytic–synthetic

Even in 1975 Ian Hacking reported that '[n]o one would dare say such a thing any more'.<sup>105</sup> But some 40 years later in the philosophy of law, the old maxim that 'necessary truths are true in virtue of the meanings of the words used to express them' endures.<sup>106</sup> In directing sceptical attention to compliance I have tried to show that at least insofar as that analytic requirement is concerned, we have good formal and empirical grounds to refrain. The immediate implications of course are limited. Compliance will become unworkable. The theory of mandatory norms to which it belongs may need to be modified also. Beyond that, however, the more general cautionary remarks about analyticity are by now famous.

Now one might feel that a methodological critique of legal philosophers such as Raz is uncharitable because it entails inadequately engaging with them on their own terms. Or, worse, it put us at risk of speaking past one another. What, after all, is the relevance of art or neuroscience to the legal philosophical conversation about the role of compliance? Why not just engage with that conversation at its own level? These queries occasion an opportunity to emphasise a key concern of this thesis, which is to specify the conditions of the possibility of reasons. Wherever reasons arise, this thesis will raise its head to ask about their

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distinction was admittedly waning throughout the 1930s and 40s, even by Carnap. Earlier sceptics included neo-Hegelians like Harold H Joachim, who wrote of the union of synthetic–analytic processes in our mental activity (what he called 'synthetic analysis'). See HH Joachim, *Logical Studies* (LW Beck ed, OUP 1948) esp 38–55.

<sup>105</sup> *ibid.*

<sup>106</sup> Hacking, 'What is Logic?', 85.

possibility. And whenever *impossible* reasons arise, this thesis will raise its head higher to point out why. In the case of compliance, which is a concept that purports to regulate the manner in which we reason about reasons, the impossibility is partly a product of a certain methodology. That is why it has been important to examine compliance at the methodological level. If the problem of impossibility that beset compliance were unrelated to methodology, then this thesis would likewise have avoided the methodological examination. Now in the course of that examination, the worry about the sources of one's evidence is an important one, too. I am inclined to think that the issue is, in part, one of taste. Some philosophers like the interdisciplinary mingling, while others do not. When they do not, it may have something to do with the difficulties that are prompted for assessment, for it might be thought unreasonable to expect a single reader to have competence in such disparate fields. No doubt this is a fair concern, but I think it is one that attends any interdisciplinary venture. This inherent demerit, it is hoped, is offset by the payoff of importing fresh insights into a maturing debate about normativity that some philosophers now regard as ineradicably interdisciplinary.<sup>107</sup>

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<sup>107</sup> 'It is not profitable for us at present', observed Anscombe in 1958, 'to do moral philosophy; that should be laid aside at any rate until we have an adequate philosophy of psychology, in which we are conspicuously lacking.' GEM Anscombe, 'Modern Moral Philosophy' (1958) 33 *Philosophy* 1.

## Conclusion

I would say that the account of the possibility of reasons that emerges from this work is one that is essentially hardnosed. In Chapter 1, normative possibility was in the end firmly grounded in a defined and testable conception of actuality. In Chapter 2, the abstract ambition that sought to pitch rules as possible reasons themselves was set aside. In Chapter 3, one of the methodological sources of impossible reasons was made to face up to certain empirical and theoretical facts. Now in closing, I would like to say a bit about what I think the possibility of reasons ends up being as a more general matter and also what I had in mind when I paired *possibility* with *force* in the title of this work.

By eliminating impossible reasons from the realm of reasons, we are left with just possible ones. This may seem cryptic until it is recalled that impossible reasons are no reasons at all, at least as far as action is concerned. We can call them something else when we are talking about practical reason—maybe ‘normative imaginings’—so that we do not suggest to ourselves that even impossible reasons are still active members of the theory of reasons. None of what I have had to say about the impossibility of these normative imaginings for practical reason is a reflection of their value. No doubt they can have great value. But values are neither reasons nor are they coextensive with reasons, and this is especially worth bearing in mind in the context of practical reason. The elimination of normative imaginings

from practical reason is a development that reveals something instructive about the reasons that remain. It tells us not just that they are *all possible* but also that *all of them have force*. That is to say, they have force in the sense that they can *actually* guide us to do what we have reason to do. On the account of reasons that I have rejected, the reasons that I have been calling impossible still qualified as reasons for action. But a puzzling feature of that account was that such reasons had no force because they had no chance of guiding our actions—that is to say, guide us in such a way that would not inevitably end in our failure to do as they required. Yet how could a reason have no force? The account of reasons in this thesis terminates that puzzle. We are left with the much neater view that the possibility of reasons is coextensive with the force of reasons. We could even say that possibility is force.

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