NORMATIVITY AND LAW

Paul Markwick

A Thesis Submitted for the Degree of PhD
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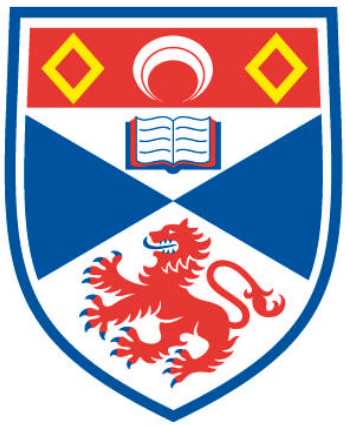
University of St Andrews



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NORMATIVITY AND LAW

P. Markwick

Submitted in fulfilment of the requirements for the degree of Doctor of Philosophy in the School of Philosophical and Anthropological Studies.

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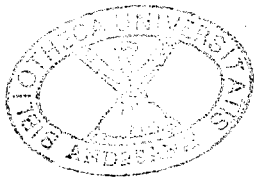

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Abstract

An action's illegality can be irrelevant to a reason not to perform it. A plausible example of a reason not to assault is that assault causes suffering. Since assault is illegal, the reason pertains to a legally proscribed action. Still, assault's illegality is irrelevant in this case: the reason would pertain (assault would cause suffering; we would have reason not to assault) even if assault were not legally proscribed.

On the other hand, it appears that a reason can be one that derives from the interposition of law. This thesis is about reasons of this second type (*legal reasons*). In particular, it is about their formal features. For example, it is about their individuating conditions (when are p and q two legal reasons rather than one?) and about how legal reasons can be second-order rather than first-order (what follows when p is a reason not to have another reason figure in deliberation about action?). Most particularly, however, it is about their identity conditions (if p is a reason, when and only when is p a legal reason?).

I argue against three widely-accepted claims about the nature of legal reasons: (i) p is a legal reason only if p is a content-independent reason (chapters 5 and 6); (ii) if p is a legal reason to ø, p could be a complete reason to ø or a part of a complete reason to ø (chapters 2, 3 and 4); (iii) a legal reason p has a significant formal feature when p is an exclusionary reason (chapter 8). I also argue that one argument to the conclusion that analytical jurisprudence must pay special to attention *moral* legal reasons - an argument seen in recent work by R. A. Duff - is unconvincing (chapter 7).

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Introduction

1. The normativity of law

This thesis is about the normativity of law. It is not about whether the law *is* normative, however. For example, it is not about whether Scotland's criminal code is normative. Instead, the thesis is about what it is for the law to be normative (if in fact it is). In particular, it is about the formal properties of the normativity of law.

The word 'normative' is ambiguous; as such, let me indicate the particular sense I have in mind. In contemporary jurisprudence, 'normative' has three main meanings. According to one, a fact p is normative if p's obtaining affects agents' deliberation and action. On this first meaning, the law would be normative if, for example, an action's illegality meant that certain persons were less likely to perform it. According to a second meaning, the law is normative when agents assert or believe that it supplies reasons to act. Often, the agents in question are legal officials; often, the claim is that the law is 'normative' when those who administer it assert or believe that it is reason-giving. The third meaning is the one I have in mind: a fact p is normative if p is a reason (a reason to act, for example). On this meaning, the law is normative if it actually is reason-giving.

The difference between the first and third meanings is not difficult to see: p could motivate an agent to act even if p is not a reason to act. The contrast between the second and third meanings is no less obvious: p could be asserted or believed to be a reason even if p is not. When I say that this thesis is about the normativity of law, I do not mean it is about how the law does or could motivate

agents to act, or about what it is for the law to be asserted or believed to be reason-giving. I mean the following: the thesis is about what it is (or would be) for the law to be reason-giving.

2. Legal reasons

The subject of this thesis can be expressed in terms of a certain type of reason. Reasons appear to fall into well-recognised types (moral or nonmoral, pro tanto or decisive, and so on), and what we can say is that a reason is *legal* just in case it is a matter of the normativity of law. The thesis, then, is about legal reasons.

More precisely, it is about the formal character of such reasons. For example, it is about their individuating conditions (when are p and q two legal reasons rather than one?) and about how legal reasons can be second-order rather than first-order (what follows when p is a reason not to have another reason figure in deliberation about action?). Most particularly, however, it is about their identity. Above I said that a reason is legal if it is a matter of the normativity of law. But this is vague: it is uncertain when a reason *is* 'a matter of the normativity of law'. Greenawalt refers to reasons which 'derive from the interposition of law'.[1] But what is it for a reason to derive from this? Raz mentions situations in which 'the reason to do that which is required by the law is the very fact that it is so required'.[2] But would it be correct to say that p is a legal reason only if p is the fact that an action is legally required? I shall consider these and similar questions. Overall, I want to answer the following: if p is a reason, when and only when is p a legal reason?

A plausible example of a reason not to assault is that assault causes suffering. Since assault is legally proscribed, the reason pertains to an illegal action. Still, the illegality of assault is irrelevant in this case: the reason would pertain (assault would cause suffering; we would have reason not to assault) even if assault were not legally proscribed. Here is what I want to ask: why is

this reason to act as the law requires *not* a legal reason? Intuitively, the answer is that there is legal reason to act only when 'the law provides reasons for ... actions *because it is the law*, above the reasons that apply to ... actions independently'.[3] But what exactly is it for p to be a reason that does not apply 'independently' of the law? Why is the fact that assault causes suffering not one which the law itself 'provides'?

Appropriately, the answer I give to this question is neutral between competing substantive theories of law: its correctness does not depend on the correctness of one or more of these substantive theories. For example, the answer is neutral in that it does not depend on premises which would be false if formalism rather than instrumentalism were correct.

On the other hand, however, the answer has implications for the correctness of these theories. Let me mention two examples of this. (i) According to the practice theory of legal authority, legal reasons have the distinct formal property of being 'content-independent'.[4] In chapters 5 and 6, I show that legal reasons are not distinctively content-independent; indirectly, I show that the practice theory is incorrect.

(ii) Natural law theory claims that there are 'internal' connections between law and morality. Duff supports this claim by offering an argument which appears to show that moral legal reasons have a certain priority over nonmoral legal reasons. In chapter 2, I show that this argument is unconvincing; indirectly, I show that one reason to accept natural law theory is only apparent.[5]

3. Four claims

Nowadays, it is common to think that 'the provision of an account of the normativity of law is a central task of jurisprudence, if not the central task'.[6] Indeed, some now hold that '[p]hilosophical jurisprudence ... is a branch of practical philosophy ... [that is, a branch of] the philosophy of practical reason'.[7]

As a result, the nature of the normativity of law - the nature of legal reasons - has received sustained and subtle treatment. Since the publication in 1961 of Hart's *The Concept of Law*, three main claims have been made.

The first claim - a claim mentioned in section 2 above - is that legal reasons are content-independent:

> p is a legal reason only if p is a content-independent reason.

By 1994, Schauer was able to describe this claim as 'unlikely to be controversial'.[8] He means it can be accepted by natural lawyers and positivists, and by positivists before and after Hart. Actually, the claim is even less controversial: as far as I can tell, no argument has ever been offered against it.

The second main claim is that legal reasons can fall into one of two types:

> if p is legal reason to ø, p could be a complete reason to ø or a part of a complete reason to ø.

On the one hand, it might appear there are situations in which one has reason to act entirely because of a legal requirement. In these situations, the fact that one is subject to a legal requirement is a 'complete' reason to act (this is Raz's term). On the other hand, it appears there can be situations in which the fact that one is legally required to perform an act is only a part of a complete reason to perform it. In the first case, the reason is legal through and through: to quote Edmundson, I have reason to act 'simply and only because the law to which I am subject says I must'.[9] In the second, it is not: I have reason to ø because the law requires ø-ing *given* that certain other facts obtain (given that I have contracted to act as the law requires, for example). Jurists dispute whether any legal reason actually is complete. That is, they dispute whether I would have reason to ø *just* in virtue of the fact that I am legally required to ø. Still, there is general agreement that, conceptually speaking, a legal reason *could* be more than a part of a complete reason.

The third main claim is about reasons which are 'exclusionary', where, roughly speaking, a reason is exclusionary when it is a reason not to weigh another reason in one's deliberations. An enormous amount of jurisprudential attention has been devoted to the nature of exclusionary reasons. No doubt this is because many jurists follow Shiner in thinking that 'the law *is* a system of exclusionary reasons'.[10] Still, few would claim that p is a legal reason only if p is exclusionary. At most, the claim seems to be:

> a legal reason p has a significant formal feature when p is an exclusionary reason.

There are different views about why it is significant if p is legal *and* exclusionary. At this point, I shall mention only one. This is that the law is obligating only when it supplies exclusionary reasons. Jurisprudence attempts to determine whether the law is obligating, and, if the law is unobligating unless it supplies exclusionary reasons, it is significant - for jurisprudence - when (if ever) legal reasons are exclusionary.

In this thesis, I shall argue against each of the three claims I have mentioned. Since these claims are seen as almost incontrovertible, and given that they have each been argued for at great length, my own arguments will need to be detailed and methodical.

I shall also argue against a fourth claim. Roughly, the claim is that analytical jurisprudence must discriminate between legal reasons according to whether they are moral or nonmoral. This claim is far less widely accepted, but there is a powerful argument for it, an argument seen in recent work by Duff. The first three claims concern the formal character of legal reasons. The fourth claim, as we shall see, does not. The fourth claim differs from the first three in a second respect. The first three can be accepted by both sides in the long-running dispute between legal positivism and natural law theory. On the face of it, the fourth cannot, because - in Duff's words - the argument for it establishes 'an

essential and ineliminable moral dimension to the concept of law'.[11] It appears that only a natural lawyer could accept this conclusion.

4. Overview

My discussion is divided into eight chapters. Chapter 1 sets out my basic claims about legal reasons. It says to whom and with respect to what a legal reason could be a reason, for example, and it distinguishes between reasons in general and legal reasons in particular. In large measure, I intend these basic claims to be uncontroversial. I want the reasons I describe in this chapter to be those to which content-independence and other formal properties have been ascribed.

In chapters 2-4, I argue against the second of the main claims mentioned in section 3 above. This is the claim that, if p is a legal reason to ø, p could be a complete reason to ø or a part of a complete reason to ø. In making this claim, Raz correctly alludes to an important distinction between two types of reason, but I shall argue that his formulation of this distinction faces several problems. In chapter 4, I attempt to offer a less problematic formulation. The distinction I draw - a distinction which figures importantly in chapters 5-8 - is between 'strict' and 'material' reasons.

I should mention that many sections in chapters 2-4 concern the nature of reasons in general rather than the nature of legal reasons in particular. My main question is as follows: when and only when does a fact stand to a person as a reason to act? As it happens, however, many widely-accepted claims about the nature of legal reasons are based on incorrect answers to this more general question.

In chapters 5-6, I argue against the first of the claims mentioned in section 3. That is, I argue against the claim that legal reasons are distinctively content-independent. I begin by distinguishing four different senses of 'content-independent' (unfortunately, use of the term has been ambiguous). Then I argue

as follows. The claim that legal reasons are content-independent is false as it pertains to reasons of this type which are material rather than strict; I argue that, on all four meanings of 'content-independent', a material reason can be legal without having the relevant property. On one meaning of 'content-independent', even strict legal reasons are not content-independent. With respect to the other three meanings, matters are more complex. On three meanings, strict legal reasons *are* content-independent, but - I argue - so is *any* strict reason. The problem is that many jurists assume the contrary: many assume that content-independence is a property which distinguishes legal reasons in particular from reasons in general. What I attempt to show is that we do not learn anything about p's status as a legal reason by learning that p is content-independent.

Chapter 7 is about Duff's argument which I mention in section 3 above. Chapter 1 does not distinguish between moral and nonmoral legal reasons, and what Duff appears to show is that a formal study of law *must* do so. Duff is primarily concerned to demonstrate that a legal requirement is 'defective qua law' if it is seriously immoral.[12] However, Duff's argument has direct implications for the nature of the normativity of law. I describe these implications, and then explain why Duff's argument is uncompelling. As we shall see, it is uncompelling because it turns on a widely-accepted claim which is in fact mistaken. This is the claim that a system of rules is a legal system only if those who administer it assert that it is obligating.

In chapter 8, the final chapter, I argue against the commonplace that legal reasons have an important formal feature when they are exclusionary. This is the third of the claims mentioned in section 3 above. Part of chapter 8 is spent clarifying the nature of exclusionary reasons. This nature has been misunderstood. Consider the common claim that an exclusionary reason defeats the consideration it is a reason to exclude by kind rather than by weight.[13] In chapter 8, I show that this claim is not entirely correct. I also attempt to show

that we are yet to see grounds to accept that the existence of exclusionary reasons means that it is false that

> 'all practical conflicts conform to one logical pattern: [that] conflicts of reasons are resolved by the relative weight ... of the conflicting reasons'.[14]

In the main, however, chapter 8 is *not* about the difference between exclusionary and nonexclusionary reasons. Instead, it is about whether a formal study of legal reasons - a formal study of law more generally - can safely ignore this difference. My main argument is that it can, despite claims to the contrary.

5. Value

We might dispute whether or not '[t]he *first* precept of legal theory is that law is practical, that its essential function is to play a role in its subjects' reasoning about action.[15] In turn, we might doubt whether the '*central* task of jurisprudence is to give a philosophically illuminating account of the distinctive normative character of law'.[16] On the other hand, it seems certain that a general theory of law should include a study of the nature of legal reasons. In this thesis, I hope to make a small contribution towards this study; I hope to expose some of the unclarities that infect existing discussions of the nature of the normativity of law.

I think there is intrinsic value in understanding the nature of legal reasons: legal reasons appear to be an important part of the normative domain, and we have a legitimate concern to discern their properties - formal or otherwise - just for its own sake. But I think there is instrumental value as well. There are questions of clear practical and philosophical significance which might be wrongly answered if we misunderstood the nature of legal reasons. Examples include the following. Is there an obligation to obey the law? Can 'a

judge ... always justify applying sanctions simply because legal rules are violated?'[17] Is a criminal law which is so immoral that it fails to supply moral reasons to conform to it defective qua law?[18]

Take the first of these questions. Many accept that one can show that there is an obligation to obey the law only if one can show that legally required actions are 'dutiful by having the characteristic "ordered by a law"'.[19] That is, many believe it would be insufficient to adduce the fact that 'many acts ordered by the law, such as ... not stealing ... are morally dutiful, regardless of the fact that the law orders them'.[20] If we assume that there is an obligation to ø only when there is moral reason to ø, then it appears that many accept that there is an obligation to obey the law only if there is a reason to obey the law which is both legal and moral. It follows - if this view is correct - that we will know whether there is an obligation to obey the law only if we know when there is legal reason to act. Therefore, it is important to understand the nature of legal reasons: one knows when there is legal reason to act only if one knows when a reason is legal.

Consider the following specific claim about the nature of legal reasons: p is a legal reason only if p is a content-independent reason. If this claim were true, Green would be correct to state that 'the idea of content-independent force is ... necessary ... in any argument purporting to establish the existence of' an obligation to obey the law.[21] This is because there is legal reason to ø only if there is content-independent reason to ø, and if the law is obligating only if it supplies legal reasons to act, then one could show that there is an obligation to obey the law only if one could show that there is content-independent reason to obey it. It follows that it is important to know whether or not legal reasons *are* content-independent. If they are not, it would be a mistake to hold - as Edmundson does - that we should doubt whether there is an obligation to obey the law when we have grounds not to believe that there is content-independent reason to obey it.[22]

6. Theme

Although the following chapters describe and defend a particular conception of the nature of legal reasons, there is no single line of argument running from the first to the last. There are, however, specific issues which directly connect individual chapters. For example, the question of the individuation of legal reasons - when are p and q two legal reasons rather than one? - is addressed in both chapter 4 and chapter 5. As mentioned in section 4 above, legal reasons are often described as being either complete reasons or parts of complete reasons. In chapter 4, I argue that the distinction between complete reasons and parts of complete reasons incorrectly individuates legal reasons. Another claim, also mentioned above, is that legal reasons are content-independent. However, at least one version of this claim also relies on an incorrect individuation of legal reasons. I argue that this is the case in chapter 5.

Another direct connection between chapters concerns the nature of second-order reasons. Second-order reasons are discussed both in chapter 3 and in chapter 8. Some jurists distinguish between 'direct' and 'indirect' legal reasons. Their thought is that a reason is direct if it 'count[s] in favour of or against' performing an action, and that it is indirect if it 'give[s] us reason to believe that there are direct reasons'.[23] An indirect reason is 'second-order' in the sense that it pertains to other reasons. In chapter 3, I argue that the nature of indirect reasons is radically misunderstood.

Some jurists believe that legal reasons can be 'second-order' in a different respect. This is the respect I mentioned above in section 4: these jurists think that a legal reason can be a reason which pertains to the weighing of one or more reasons in a decision. In chapter 8, I evaluate this claim. I also evaluate Raz's argument that a legal reason can have a significant formal feature (it can be a strict rather than a material reason) if it is both a reason to ø and a reason not to weigh reasons against ø-ing.

Although, as already mentioned, there is no single argument uniting the chapters of this thesis, there is a dominant theme. The theme is that standard conceptions of the nature of legal reasons are overly complicated. Hart has legal reasons in mind when he writes the following:

> 'the central concepts of Bentham's ... theory ... are inadequate in the sense that there are important features of law which cannot be successfully analysed in these terms'.[24]

Many follow Hart in thinking that at least two additional concepts must be introduced: that of a content-independent reason, and that of a reason which is exclusionary. Against this, I shall argue that it is unclear why a more minimal conception of legal reasons is inadequate. Consider the claim that Hart and Raz deserve credit for recognising that 'it is a formal or conceptual point about laws that they are *exclusionary* reasons for action'.[25] In chapter 8, I shall argue that p can be a fully fledged legal reason even when p is nonexclusionary.

It is tempting to see my defence of a minimal conception of legal reasons as a defence of an Austinian conception of the normativity of law, since many jurists criticise Austin for not mentioning exclusionary or content-independent reasons. In some chapters, I also appear to offer support for Austinian claims. Austin is famous for saying '[t]he existence of law is one thing; its merit or demerit is another', and in chapter 2 I attempt to undermine an argument to the conclusion that

> 'the concepts of law and legal obligation are *internally* related to moral concepts which provide criteria for the justification and criticism of ... law'.[26]

Again, many jurists argue that it would be a mistake to relate the normativity of law to 'the existence of sanctions for non-compliance'.[27] Often, the argument turns on the following assumption: '[s]anctions provide only ordinary

[nonexclusionary] reasons to act'.[28] Since, in chapter 8, I argue against this assumption, this might be seen as offering support for an Austinian claim. This is because it is commonly thought that Austin claimed that the law is normative exactly because of the existence of legal sanctions.

However, there is a serious problem with thinking of this thesis as a defence of an Austinian conception of the normativity of law. The problem is that Austin appears to make very few claims about the nature of normativity of law. It is possible that Austin would not be unsympathetic to the general line of argument I present in this thesis. Nonetheless, it would be difficult to contend that it is *his* line of argument.

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[1] I take this phrase from Greenawalt 1989 p. 25.

[2] Raz 1979 p. 234.

[3] May 1997 p. 24.

[4] See: Green 1990 pp. 44-8; Hart 1958 pp. 101-4. The theory concerns authority in general.

[5] Of course, natural law theory might still be correct.

[6] I take this remark from Perry 1998 p. 445.

[7] Perry 1995 p. 97.

[8] Schauer 1994 p. 499.

[9] Edmundson 1998 p. 12.

[10] See: Shiner 1992a p. 97; Shiner 1992b pp. 18-19. See also Shiner 1992b p. 6 ('It is an essential feature of legal norms ... that they exclude reasons'.)

[11] Duff 1986 p. 76.

[12] Duff 1986 p. 94.

[13] See, for example: Green 1985 p. 330; Shiner 1992s p. 47.

[14] See Raz 1990 pp. 35, 40.

[15] Raz 1989 p. 1154, emphasis added. Compare Postema 1998 p. 330.

[16] Postema 1998 p. 330, emphasis added. Compare Perry 1998 p. 445 ('[i]t is plausible ... that the provision of an account of the normativity of law is a central task of jurisprudence, if not the central task').

[17] Soper (1996 pp. 22-6) asks this question.

[18] See: Duff 1986 ch. 3; Duff 1980.

[19] I take the phrase from Gans 1987 p. 184.

[20] See, for example, Gans 1987 p. 184.

[21] Green 1988 p. 225.

[22] Edmundson 1998 p. 225. Likewise, we could not follow Edmundson (1998 p. 50) in thinking that the fact that there appears to be content-independent reason not to interfere with the administration of the law is an example of 'doubts about the existence of a general duty to obey the law fail[ing] to carry over when the subject is the duty to comply with administrative prerogatives'.

[23] Postema 1998 p. 346.

[24] Hart 1982 p. 243.

[25] This is a claim entertained by Shiner (1992b pp. 18-19).

[26] Duff 1986 p. 95.

[27] Shiner 1992a p. 92.

[28] Green 1988 p. 118. Compare Raz 1990 p. 161.

Chapter 1 Legal reasons

1. Introduction

We possess an intuitive sense of the contrast between legal and other reasons. Raz expresses this sense when he says a reason to avoid a legal sanction is a reason

> 'to do that which the law requires because it requires it; hence ... [it is] unlike many moral reasons which are reasons to do that which the law requires for grounds not dependent on the fact that the law requires them'.[1]

Intuitively, it seems that a reason is legal - a matter of the normativity of law - only if it depends on the fact that an action is legally required; it seems that one has legal reason to ø only if one has reason to ø 'because' the law requires ø-ing.

May refers to the same intuitive contrast between legal and other reasons. For he mentions the possibility that 'the law provides reasons for our actions *because it is the law*, above the reasons that apply to our actions independently'.[2] Like Raz, May appears to think that it is insufficient for p to be a legal reason that p is a reason to act as the law requires; for May, p must be a reason the law 'provides'.

But what is it for the law to provide a reason? Why are 'many moral reasons' to act as the law requires not legal reasons? In chapter 1, I shall take some preliminary steps towards answering these questions. For instance, I shall consider to whom and with respect to what a legal reason can be a reason. Suppose we grant that a person does not have legal reason to act just because he

or she has reason to act as the law requires. Could a reason be legal *without* being a reason to conform to the law (section 10)? Must a legal reason even be a reason *to act* (section 8)? When there is reason to ø, some or other fact constitutes the reason. But what fact constitutes the reason when the reason is legal (sections 4-7)? For example, must it be the existence of a law (section 6)? How are legal reasons related to the normative pretensions of those who administer the law (sections 9)? I shall attempt to answer these and similar questions.

The main aim of chapter 1 is to set out some basic claims about the nature of legal reasons. Less basic claims - claims about more complicated aspects of the normativity of law - appear from chapter 2. I should mention that I intend chapter 1's claims to meet two constraints. The first is that they are more or less consistent with ordinary beliefs about the nature of (the normativity of) law. I shall attempt to offer a precise statement of the basic character of legal reasons, but I intend the implications of this statement to be more or less intuitive.

The second constraint is that no jurist would count p as a legal reason if chapter 1 implies that p is not a legal reason. Legal reasons have been defined in very different ways. As we shall see, some definitions have been much narrower than others. I intend chapter 1's claims to present a very broad ('inclusive') definition of legal reasons.

2. Reason relata

I shall begin by making some preliminary remarks about the nature of reasons in general (sections 2 and 3). Then I shall turn to the case of legal reasons in particular.

The following statements describe - at least purport to describe - reasons:

(i) 'Her guilt justifies his shame.'

(ii) 'There is reason to believe the testimony.'

(iii) 'You shouldn't be abrupt; otherwise you'll break your promise.'

(iv) 'Since the precept is unbiased, the judiciary ought to implement it.'

(v) 'If something maximises utility, then there is reason to perform it, because it maximises utility.'

Notice that the reasons pertain to different types of object. The first statement refers to a reason pertaining to an affective state, the second to a reason pertaining to a belief. The remaining statements refer to reasons to act.

Implicitly or otherwise, the statements also refer to a subject. That is, the statements refer to a person or persons for whom a reason is a reason. For example, the third says *you* have reason not to perform a certain type of act.

With one exception, the judgements also pick out the relevant reason. Take the fourth. It says the reason for the judiciary to implement a certain precept is that the precept is unbiased. (The exception is the second judgement: it says there is a reason to believe something without saying what the reason is.)

No doubt that which is a reason is a fact: no doubt that which stands to a subject as a reason pertaining to a certain object is some or other fact.[3] Consider the second judgement. If there is reason not to believe the testimony, something constitutes the reason, and the something is some or other fact. For example, it might be the fact that the person offering the testimony has never lied before.

I have introduced the notion of a reason by describing a three-place relation:

p is a reason for x to ø.

Consider 'Her guilt rationalises his shame.' If this statement is true, the fact that she is guilty (p) is a reason for him (x) to feel shame (ø). Consider 'You shouldn't be abrupt; otherwise you'll break your promise.' This says the fact that

you would break a promise by being abrupt (p) is a reason for you (x) not to be abrupt (ø).

Additional relata could be specified. For example, one could mention that there is a certain time t at which p is a reason for x to ø. But, for our purposes, a three-place relation will suffice.[4]

3. Pro tanto reasons

It is widely held that reasons have a dimension of strength. For example, it is widely held that, if p is a reason to evade her, then p is more or less weighty: p counts in favour of evading her *to a certain degree d*. The thought is that some reasons are weak (a reason to avoid a mild discomfort for 4 seconds) and others are strong (a reason to avoid intense pain for 4 hours).

A related view is that reasons can be pro tanto rather than decisive. If p is a decisive reason to evade her, then, if p obtains, what one overall ought to do is evade her.[5] Put differently: when p is a decisive reason to evade her, one ought to evade her even if there are reasons of some or other weight *not* to evade her. An example? Arguably, x has decisive reason to ø if x is morally obligated to ø.

A reason is pro tanto when it is not decisive. For example, if p is a pro tanto reason to evade her, it is possible that what one overall ought to do is *not* evade her, even if p obtains: there is reason to evade her if p obtains, but what one ought to do overall (evade her; not evade her) depends on the weight of reasons not to her evade her, if any.

In this thesis, 'a reason' is always a pro tanto reason (I shall assume that reasons have a dimension of strength, and I shall assume that reasons can be pro tanto or decisive). Therefore, when I say p is a legal reason to ø, it is left open whether one overall ought to ø. Suppose there is legal reason not to assault

Thomas Sutpen. I shall assume it is possible that there are reasons to assault Sutpen which outweigh this and all other reasons not to do so.

Some jurists hint that p is a reason of a particular weight if p is a legal reason. For some say that the law is 'normative' only when it has the special force of being either 'authoritative' or 'obligating', and it is natural to suppose that there is authoritative or obligating reason to ø only if there is a particularly weighty (decisive?) reason to ø.[6]

It is less clear *why* these jurists think this, however. As we shall see in chapter 7, there have been arguments to the effect that p is a distinctively legal reason when p is a moral reason, and it is not implausible that the law is authoritative or obligating only if it supplies a moral reason to conform to it. However, as far as I can see, a reason can be moral without being particularly weighty. Therefore, this argument does not support the view I mention.

I shall simply assume that a reason of any weight can be a legal reason. For example, I shall assume that even a very weak reason could be a legal reason. As far as I am aware, no jurist has offered an argument against this assumption, and I doubt that any jurist would use 'legal reason' as a technical term for a reason having a particular weight.

4. 'Legal reasons'

A legal reason is a pro tanto reason of any weight (section 3). But knowing this is not knowing when a reason is a legal reason. A reason is a fact standing in a certain relation to a person and an action, belief or affective state (section 2). But the question we need to ask is as follows: when is a reason one that 'the law provides'? When does it 'derive from the interposition of law'?

According to some jurists, 'x is legally obligated to ø' means not that x has any sort of moral obligation to ø but that 'x is obligated to ø *from the legal point of view*'.[7] If we accept this view, we accept that

> 'To say that someone has a "legal obligation" is to say that his case falls under a valid legal rule that requires him to do or to forbear from doing something'.[8]

Analogously, some jurists hold that 'a legal reason for x to ø ... mean[s] the same as "Legally x ought to ø"' or "It is the law that x ought to ø"'.[9]

I think this is a unsatisfactory use of the term 'legal reason'. This is because it allows it be true that there is legal 'reason' for someone to do something even when there is no reason for them to do it (that is, even if it is false that they pro tanto ought to do it). It is better to use 'reason' univocally; it is better to use 'there is legal reason to ø' only when one means that there is a fact which actually is a reason to ø.

Of course, some jurists may wish to argue that 'it is the law that x ought to ø' entails 'there is reason for x to ø'. If these jurists are correct, it could not be false that there is reason to ø if there is 'legal reason' to ø. However, the argument would not be that the two statements are equivalent in meaning; as far as I know, no jurist holds that 'it is the law that x ought to ø' *means* that there is reason for x to ø.

In this thesis, a legal reason is an actual reason; it is not just what 'the legal point of view' or anyone *takes* to be a reason. Of course, a legal reason is a reason of a particular type; to use Greenawalt's expression, it is a reason 'which derives from the interposition of law'. Still, it is a reason. So our question is as follows: what makes an actual reason a legal reason?

I believe the suggestion about what 'a legal reason for x to ø' means (see above) hints at the correct answer. For 'legally x ought to ø' is a fact, and a reason is a fact which stands in a certain relation to a person and an object. I think the correct answer is as follows: a reason is legal just in case the fact which is the reason is legal. Think of the three-place relation mentioned in section 2:

p is a reason for x to ø.

Subject to certain minor qualifications, my claim is that, when p is a legal reason, p is a legal fact (a fact like, 'legally x ought to ø') which is a reason.

5. Normative reasons

Coleman says a law is 'normative' if it is a *cause* of action: if the law affects the deliberation and thereby the actions of agents.[10] Shapiro says one way in which 'a rule can give someone a reason to act' is by giving him or her 'motivational guidance' (someone is 'motivationally guided by a legal rule when his or her conformity is motivated by the fact that the rule regulates the conduct in question').[11] Shiner describes the fact that legal norms 'guide ... our conduct' as a matter of 'the existence of law ... [being] ... a reason for action'.[12]

The relationship between motivation and causation is complicated and controversial. However, it would not be overly inaccurate to say that Coleman, Shapiro and Shiner accept the following:

> p is a reason for x to ø if p is a causal antecedent of x ø-ing, when p figured in x's deliberations about whether or not to ø.

In this thesis, I use 'reason' differently. Coleman, Shapiro and Shiner refer to *explanatory* reasons, that is, to facts one might cite to explain why an agent ø-ed, while I am concerned with *normative* reasons. Roughly speaking, a normative reason to ø is something which is a justification for ø-ing.[13]

Consider section 4's suggestion that, if p is a legal reason, p is a legal fact. The suggestion concerns a certain type of normative reason: it says p is a certain type of normative reason only if p is certain type of fact. It is no doubt true that agents sometimes act *because* of the obtaining of a legal fact. For example, it is no doubt true that agents sometimes act on the basis of the belief that a legal fact is normative. However, in this thesis, we are interested in what is true when a

legal fact *actually is* normative; a legal fact is not 'a reason' in our sense just because an agent is motivated by it.[14]

To my mind, it is actually somewhat misleading to say that a legal fact 'is normative' for x just because x's awareness of it leads her to ø; to my mind, it is clearer to say that x acted on the basis of *the (true or false) belief* that a legal fact is normative. However, my linguistic intuitions might be unusual. I mention the distinction between normative and explanatory reasons only because this is sometimes ignored.

It will be useful to see an example of this. Coleman supports his claim that the law can motivate action by appealing to Raz's opposition to the 'no difference thesis' - that is, to Raz's affirmation of the 'practical difference thesis'. Coleman writes that the basic claim of the practical difference thesis is 'that law must in principle be capable of making a practical difference ... [that is] of affecting deliberation and action'.[15]

However, Coleman misinterprets Raz. The practical difference thesis concerns normative reasons, but the thesis Coleman describes concerns explanatory reasons. Raz is interested in how the existence of a law can mean that x *ought* to act in conformity with it; he ignores whether the existence of a law means x *does* conform to it. The no difference thesis is *not* the thesis that agents fail to be motivated by legal requirements; as it applies to authorities, for example, it is

> 'the view that ... There is nothing which those subject to authority *ought to do* as a result of the exercise of authority which they did not have to do independently of that exercise'.[16]

6. Legal requirements as reasons

Section 5 contains a detour: all it says is that our concern with legal reasons is a concern with normative rather than explanatory reasons. Let us return to the suggestion made at the end of section 4. This is the suggestion that p is a legal reason only if p is a certain type of legal fact.

For many jurists, the law is normative just in case laws are reasons for action. Strictly speaking, however, thinking this is a mistake: a law is an object rather than a fact, and only facts are reasons. But the mistake does not seem very serious, since it seems that there is analogous claim that avoids the problem I mention. The analogous claim is that the law is normative just in case the fact that a law exists is a reason. If we accept this claim, we accept that p is a legal reason only if p is the fact that a law exists. Think of driving on the left. The implication would be that there is legal reason to drive on the left only if the existence of a law is a reason to drive on the left.

Actually, I think we should *not* say

p is a legal reason only if p is the fact that a law exists.

Saying this would be overly restrictive. The fact that a law exists is only one type of legal fact, yet - it seems, as we shall see - that a legal reason could be supplied by almost any type of legal fact.

There are other types of legal fact because some legal facts are applied rather than pure.[17] An applied legal fact is one which obtains in virtue of the obtaining of both legal and nonlegal facts. An example is that I am legally required to vacate my house by 1 July 2000. This fact is applied rather than pure because its obtaining depends not only on certain purely legal facts (the fact that a lease is legally valid only if made by offer and acceptable, for example): its obtaining also depends on the obtaining of certain nonlegal facts (the fact that I signed a lease, for example).

I am not objecting to the thought that nonapplied legal facts could be legal reasons. For instance, I accept that 'a lease is valid under English law only if made by offer and acceptance' could be a legal reason. My claim is only that 'I am legally required to vacate my house by 1 June ' could be a legal reason, even though it is not the fact that a law exists.

What of the following, less restrictive, suggestion?

> If p is a legal reason, p is the fact that an action is legally required.

Recall the commonplace that 'a legal reason for x to ø ... mean[s] the same as "Legally x ought to ø"'. Perhaps we could say that there is legal reason for x to ø if and only if the fact that x is legally required to ø is a reason for x to ø.

For several reasons, we cannot say this. One is that not all legal facts concern what is legally *required*. Think of the criminal law. The offences specified by a criminal code are not actions it requires. Quite to the contrary: a criminal code *proscribes* certain actions.

It might seem, however, that what is legally proscribed can always be reformulated in terms of what is legally required. With regard to the illegality of assault, for example, it might seem that the fact that x is legally proscribed to assault is equivalent to the fact that x is legally required *not* to assault. If this is correct, the following slightly more complex definition might seem acceptable:

> If p is reason for x to ø, p is a legal reason for x to ø if and only if x is legally required (not) to ø.

The difficulty is that it is implausible that actions must either be legally required or legally proscribed. It is implausible, for example, that some actions are not designated as legally permitted or authorised instead. No doubt there are certain actions which are neither legally required nor legally proscribed; reading appears to be an example, since reading appears to have no legal status whatsoever.

What I mean, however, is that it is implausible that certain actions do not have the positive legal status of being legally permitted or authorised.

Plainly, many legal facts *do* pertain to what is required ('mandatory', 'non-optional'). Here is an example of what is required of those who administer the law of torts in England: liability for unintentional injury to the person or property of another is to be determined in accordance with the negligence standard of fault.[18] However, it is no less clear that some legal facts do *not* pertain to what is required (not) to occur. Consider, for example, the following: having heard representations from the prosecutor, magistrates in England and Wales are permitted to determine that a certain case is to be committed to the Crown Court for trial.[19]

As mentioned above, there is general agreement that the law is normative if the fact that an action is legally required is a reason to act. I have observed that some legal facts pertain to what is legally permitted rather than to what is legally required because it is difficult to see how one could argue that a reason is nonlegal just because it is the fact that an action is legally *permitted.* Why must we accept that the reason is nonlegal just because the fact which is the reason pertains to an action that is legally required rather than legally permitted?

Consider an example. Given the obtaining of certain other facts, suppose the fact that Caller J is legally permitted to determine that case Z is to be committed to the Crown Court is a reason for her to do so. Why must we accept that this reason is not a matter of the normativity of law? On what grounds must we accept a narrower definition of legal reasons?

7. Legal facts

The previous section suggests that it would be overly restrictive to assume that, if p is a legal reason to ø, p is the fact that ø-ing is legally required or legally proscribed. A natural response to this suggestion would be to think that p must at

least be the fact that ø-ing has a certain legal status (required or proscribed or permitted ...). More precisely, a natural response would be to say the following:

> if p is a reason for x to ø, p is legal reason for x to ø if and only if p is the fact that ø-ing has a certain legal status with respect to x.

I prefer a slightly different definition:

> [A] if p is a reason for x to ø, p is a legal reason for x to ø if and only if p the fact that ø-ing (or some other action, belief or attitude) has a certain legal status.

I shall explain [A]'s advantages in sections 8-11. First I want to say something about the type of legal fact to which [A] refers - facts about the legal status of some or other action.

Difficult questions can be asked about this type of fact. Here are two examples. How are they individuated (for instance, when is a person subject to a legal requirement not to assault rather than to a separate legal requirement not to batter)? How is the fact that a certain action has a certain legal status related to other legal facts and to legal systems (for instance, how does the fact that I am legally required not to assault 'resist formulation, qualification, revision and replacement').[20]

For present purposes, we can ignore these and similar questions. We can also ignore questions of a more metaphysical character. Here are two examples. Is the fact that I am legally required not to assault a fact which supervenes on 'a particular set of justifying principles' applying to a certain type of legal situation? Does it supervene on 'the train of judicial reasoning in one or more precedents'?[21]

In accepting [A], I certainly accept that there are, or could be, legal facts such as the following: Caller J is legally permitted to determine that case Z is to be committed to the Crown Court for trial; defendants are to be held criminally

liable for events or consequences which they intended or knowingly risked. But I deliberately leave the nature of such legal facts open and intuitive: I want my account of legal reasons to be neutral between competing theories of this nature.

Some of these theories are explicitly philosophical. Nevertheless, none denies the claim at issue: none denies that there are (or could be) actions or beliefs or attitudes which have a certain legal status. Consider the dispute between inclusive and exclusive positivists. Inclusive positivism holds that whether or not a particular legal fact obtains can depend on matters of substantive morality. For example, inclusive positivism holds that whether you are legally required to perform a certain action can depend on the moral merits of that action. Exclusive positivism denies this; in short, it denies 'that morality can be a condition of legality'.[22] However, neither theory denies that there are actions which are legally required: the dispute between inclusive and exclusive positivism concerns the conditions under which actions *are* legally required.

Or consider the dispute between formalism and instrumentalism. Formalism argues that 'existing law provides a sufficient basis for deciding all cases that arise'.[23] In other words, it argues that 'the authoritative texts are logically sufficient to decide all cases'. Instrumentalism denies this; in its strongest form, it says 'real law consists only of past judicial decisions, which are ... limited to their specific holdings, without any further binding implications'.[24] But notice that formalists and instrumentalists agree that *there are* facts which constitute existing law. More particularly, notice that they agree that existing law *does* determine whether this or that particular action has a certain legal status.

8. Legal reasons and action

Here is a brief summary of the discussion so far.

A reason is a fact (p) standing in a certain relation to a person (x) and an object (ø-ing) (section 2). A reason p is legal, I claim, only if p is a legal fact (section 4). I also claim that p need not be the fact that a certain law exists (section 6) or even the fact that a certain action is legally required or proscribed (section 6).

[A] defines legal reasons in a way which is consistent with these claims:

> [A] if p is a reason for x to ø, p is a legal reason for x to ø if and only if p the fact that ø-ing (or some other action, belief or attitude) has a certain legal status.

Now I shall explain why [A] should be preferred to some alternative - very commonly accepted - conceptions (sections 8-11). As we shall see, each alternative places a restriction on the person (x) for whom, or the object for which (ø-ing), p could be a legal reason.

Many jurists appear to believe that, if the law is normative, this is because it supplies reasons *for action*.[25] With respect to Anglo-American criminal law, the existence of this belief is unsurprising. With few exceptions, the offences specified in Anglo-American criminal law are actions, and it is natural to think that, if a criminal code is normative, this is because it supplies reasons to conform to it.

Of course, the offences a criminal code specifies are not always actions it requires. In Scotland, for instance, assault is a criminal offence, but Scots law does not *require* assault. Still, it does not follow that there are criminal codes which require non-acts. This is because a criminal offence could be an action a criminal code proscribes rather a non-action it requires (a criminal offence could be an action a criminal code designates as one that should *not* be performed).

The question is whether we should accept that p is a legal reason only if p is a reason to act rather than a reason to believe or feel. Think of [A]. [A] leaves open whether ø-ing is an action, a belief or an affective state. For example, it

leaves open whether there could be legal reason to believe the proposition that I will vacate my house by 1 July. The question is whether it *should* leave open these possibilities.

It is difficult to see why it should not. Suppose the following fact is a reason to believe that English law needs reform: under English law, the maximum penalty for handling stolen goods (14 years) is twice that for theft. It is difficult to see why we must conclude that this reason is not a matter of the normativity of law. One might wish to argue that the reason is nonlegal since it is not a reason which pertains to an object which has a certain legal status (notice that English law does not require or proscribe or authorise us to believe that it needs reform). But then the argument would not be that legal reasons are necessarily reasons for action. Instead, the argument would be that p is a legal reason to ø only if ø-ing has a certain legal status.

This second argument is dubious (see section 11). However, let us ignore this for the moment, since the argument would seem to yield the relevant conclusion - the conclusion that p is legal reason only if p is reason for action - if we could grant the following assumption: ø-ing has a legal status only if ø-ing is an action.

I have already mentioned that it does not follow from the fact that a criminal code requires the non-performance of an act that it requires a non-act (section 6). As a matter of contingent fact, however, non-acts *are* required by Anglo-American criminal law. In English law, for example, x is criminally liable for 'possessing a controlled drug' independently of whether or not there was an act of x acquiring its possession or whether or not there was an act of x maintaining its possession.[26] Now, it might follow from the fact that possessing a controlled drug is legally proscribed that acts of acquiring it are legally proscribed, but it is certain that there is no act x *must* perform (or fail to perform) to be liable for committing the relevant offence.[27] Therefore, we have a counterexample to the claim that that which has a legal status is always an action;

in the case I have described, a certain non-act ('possessing a controlled drug') is legally proscribed.

A likely reply will be as follows: a reason can be for an action, a belief or an affective attitude, but, since the non-acts proscribed by Anglo-American criminal law are not beliefs or affective attitudes, it is uncertain how their illegality could be reason-giving. Consider the English offence mentioned in the previous paragraph. No doubt there could be legal reason not to acquire a controlled drug or to dispose of it, but - the reply would continue - these are actions, and surely there is no belief or affective attitude related to possessing a controlled drug that is illegal.

There are three problems with this reply. The first is that it relies on a premise which is not obviously true, namely, the premise that there could be legal reason to ø only if ø-ing has a certain legal status (see section 11). The second problem is that it is at least arguable that England's criminal code *does* proscribe certain affective attitudes; England's criminal code specifies various inchoate offences, and it is arguable that it thereby proscribes certain intentions.[28]

The third problem is that the reply does not explain why beliefs or affective attitudes could not have a legal status. Perhaps Anglo-American criminal law does not proscribe beliefs or affective attitudes at the minute. But why must we accept that it *could* not? Consider the possibility of Anglo-American criminal law proscribing certain beliefs. Shapiro remarks that 'it is entirely possible for ... [legal] officials to be unconcerned with the reasons why citizens obey the law'. [29] And no doubt he agrees with Raz that it is false

> 'that the law requires conformity motivated by recognition of the binding force, the validity of law. It is a truism that the law accepts conformity for other reasons (convenience, prudence, etc.)'.[30]

But we can accept all this and still maintain that legal officials *could* criminalise certain beliefs.

9. Normative pretensions

Section 8 considered whether p must be a reason for action if p is a legal reason. I argued that it is unclear why it must. My aim was to show that it is appropriate that [A] leaves open whether ø-ing is an action, a belief or an affective state.

I suspect that many jurists will *not* find this appropriate. For example, I suspect that many jurists will doubt that x could have legal reason to believe that English law needs reform, even if they accept the following: (i) x has reason to believe this proposition; (ii) the reason is or includes a legal fact (for example, the fact that, under English law, someone convicted of handling stolen goods may be imprisoned for 14 years). In short, I suspect that many jurists believe that a reason which 'derives from the interposition of law' must be a reason to act.

In this thesis, I shall not assume that this belief is incorrect. That is, I shall not assume that, if p is a legal reason to ø, ø-ing could be something other than an action. Moreover, when I come to offer examples of legal reasons, these will be reasons for action. As mentioned, I fail to see why legal reasons could not be reasons for belief or feeling, but I do not want my arguments in chapters 2-8 to rely on my being correct not to see this.

Some jurists not only claim that the normativity of law pertains to reasons to act in particular. Some also claim it pertain only to the reasons the law itself purports to supply. Raz is one who appears to makes this claim, since he writes that a legal requirement is normative just in case it 'has the normative consequences it purports to have'.[31] Consider a legal requirement which, according to the law, supplies a reason not to assault. It appears that Raz would say that the legal requirement is normative only if it supplies a reason not to assault.

Should [A] be modified to take up this qualification? For example, should we say:

> if p is a reason to ø, p is a legal reason to ø if and only if p is a legal fact which the law correctly claims is a reason to ø?

It is difficult to see why we should, since - as far as I can tell - no argument has been offered to support this view. Moreover, certain considerations count against it.

Greenawalt and Soper have each argued that it is doubtful that legal officials have normative pretensions with respect to every legal requirement they administer. Legal officials certainly use a normative vocabulary, and it is possible - as I explain in chapter 7 - that each asserts that the relevant legal system has certain moral qualities. Nevertheless, Greenawalt and Soper appear to show that those expressing 'the legal point of view' do not assert that there is legal reason to conform to *each and every* legal requirement.[32]

What would follow if Greenawalt and Soper are correct? If [A] were modified in the way suggested above, it would follow that certain legal requirements could not be 'normative' even if their existence supplied reasons to act. This is a counterintuitive implication. Consider a legal requirement to enlist. Suppose the legal point of view does *not* have it that the fact that x is legally required to enlist is a reason for x to enlist. On the other hand, suppose that this fact *is* a reason to enlist. Now ask the following question: is x's reason one which is a matter of the normativity of law? If we modified [A] in the way suggested, the answer would have to be 'no'. However, this seems counterintuitive: whatever the normative pretensions of those who administer the law, many jurists would agree that the reason is one which derives from the interposition of law.

Consider a second example. The first example is directed against the claim that p is a legal reason only if the law correctly claims that p is a reason to ø. The second is directed against the more general claim that the law is normative only if it 'has the normative consequences it purports to have'.

Suppose that the legal point of view has it that Caller J has moral reason not to convict a person of an offence unless that offence was previously declared. Further, suppose that the legal point of view has it that the reason in question is legal. That is, suppose that the legal point of view has it that Caller J has this moral reason exactly because the English criminal code includes a non-retroactivity principle. It turns out - let us further suppose - that this view is incorrect. On the other hand, it turns out - let us also suppose - that the existence of the non-retroactivity principle supplies a prudential reason for Caller J to act; given the obtaining of certain other facts, it turns out that the existence of the principle supplies Caller J with a prudential reason not to convict a person of an offence unless that offence was previously declared.

Here is our question: is this reason a legal reason? If we held that a law is normative only when it has the normative consequences it purports to have, the answer would be 'no'. For, given our supposition, the legal point of view has it that the principle supplies a moral, not prudential, reason.[33] Again, this answer of 'no' is counterintuitive; intuitively, the reason is not one that should fall outwith a study of the normativity of law.

10. For whom is a legal reason a reason?

Perhaps some jurists have a special interest in the normative pretensions of law; perhaps, for instance, some are especially concerned with whether the law lives up to its pretensions (see chapter 7). But it seems uncertain why a *definition* of the normativity of law should be relative to the legal point of view's description of the normativity of law. This is what I argued in section 9. I think many jurists - those I discuss in chapters 2-8, for example - would wish to count p as a legal reason even if: (i) p is not a reason the law purports to supply or (ii) p has normative consequences other than those the legal point of view purports it has. In section 9, I illustrated how [A] has the advantage of respecting this fact.

In section 8, I suggested that p could be legal reason to ø even if ø-ing is not an action. Now I turn to the question of whether there are restrictions on the person for whom p could be a legal reason. A legal reason need not be one that the law purports to supply (section 9). So p could be a legal reason for x to ø even if the legal point of view only has it that p is a reason for y to ø. But - here is what I want to ask - could x be anyone?

According to Dworkin, 'quintessentially *legal* reasons are principles binding upon judges rather than rules directed to the population at large.'[34] However, there is general agreement that legal reasons can pertain to both legal officials and ordinary citizens. Perhaps p pertains to legal officials if p is a quintessentially legal reason; this is arguable. But, as far as I am aware, no jurist has argued that p is a legal reason *only if* p pertains to legal officials.

On the other hand, there is widespread agreement that, if p is a legal reason for x to ø, p must be a fact about ø-ing having a certain legal status with respect to x. Suppose p is the fact that assault is legally proscribed. It is widely-agreed that, if p is a legal reason *for x* not to assault, it is necessary that p has it that *x* is legally proscribed to assault. Or consider the following question: are Denmark's laws reason-giving? Many jurists would say that the following is at least part of the answer: if at all, only for those subject to Danish law. Suppose the fact that Danish law proscribes a certain action is a reason for a certain Finn not to go to Denmark. Since Finns are not subject to Danish law, many jurists would say that the reason could not be a legal reason.

Or think back to the contrast between legal officials and ordinary citizens mentioned above. Some legal facts appear to refer to ordinary citizens only. Here is an example from the English criminal code: it is an offence to enter a building as a trespasser with an intent to steal anything therein.[35] But other legal facts appear to refer to legal officials only. An example mentioned in section 6 is as follows: liability for unintentional injury to the person or property of another is to be determined in accordance with the negligence standard of fault.

According to the view I am describing, p is reason for *legal officials* to act in a certain way only if p is a fact about a certain action having a certain legal status with respect to *legal officials*.

Notice that this view has a natural extension. If p is a legal reason for a certain person to ø only if ø-ing has a legal status for *that person*, then surely p is a legal reason for him or her *to ø* only if p is a fact about *ø-ing* having a certain legal status. Think of a legal reason not to cause another person to suffer financial prejudice. One might think that this reason pertains to x only if x is subject to a legal proscription. But then it would be natural to think that the offence in question must concern the following act-type: causing another to suffer financial prejudice. Surely - it might be argued- a legal fact is a reason to perform a certain action only if the reason is the fact that *this* action has a certain legal status.

To sum up the view under consideration, consider the following passage from Raz:

> 'Many reasons to do that which the law requires have nothing to do with an obligation to obey the law. One has reasons not to kill, assault, rape, or imprison other people which have no connection with the law and depend entirely on the fact that such acts are against the will or interests or (moral) rights of others'.[36]

Raz is contrasting legal reasons with nonlegal reasons. He is emphasising the point that, in his view, there is an obligation to obey the law only if at least a part of 'the reason to do that which is required by the law is the very fact that it is so required'.[37] What the passage suggests is that it is insufficient for p to be a legal reason that p is a reason to act as the law requires. We can ask, however: is it *necessary* for p to be a legal reason that p is a reason to act as the law requires.[38] We can also ask: if p is a legal reason for x to ø, must p be a fact about what the

law requires (or proscribes or permits or ...) of x? These are questions about the acceptability of the following:

> [B] if p is a reason for x to ø, p is a legal reason for x to ø if and only if p is the fact that ø-ing has a certain legal status with respect to x.

11. [A] and [B]

Contrast [A], the more inclusive definition I prefer:

> [A] if p is a reason for x to ø, p is a legal reason for x to ø if and only if p is the fact that ø-ing (or some other action ...) has a certain legal status.

With [A], there is no presumption that p refers to the legal status of the action for which p is a reason. Nor is there a presumption that p refers to the person or persons (x) for whom p is a reason. Let me briefly explain why I prefer [A] to [B]

First, consider the constraint regarding x. Suppose value theory tells us that assault's illegality is a reason for legal officials to subject those who assault to a criminal trial. If the alternative definition is correct, this reason is nonlegal, since p is a reason for *legal officials* to act, yet p (the fact that *ordinary citizens* are legally proscribed to assault) does not refer to legal officials at all. This appears to be an unacceptable result; intuitively, the fact that ordinary citizens rather than legal officials are legally proscribed to assault is irrelevant to the question of whether the reason in question is legal.

Second, consider the constraint regarding ø-ing. According to this constraint, p is a legal reason to ø only if p is fact about ø-ing having a certain legal status. Again, it is unclear why we should accept this constraint. Consider

an example. Raz mentions that 'some people ... take an oath of allegiance, sometimes including an undertaking to keep the law', and he contends that it follows that these individuals have reason to obey the law. Moreover, he contends that at least a part of their reason 'to do that which is required by law is the very fact that it is so required'.[39] Presumably, he believes the reason in question is a legal reason. Now for the example. Suppose x has promised to emigrate if English criminal law includes offences that impose situational liability. As a matter of legal fact, English law *does* include such offences.[40] Raz must conclude that there is reason for x to emigrate. Moreover, he must conclude that at least a part of x's reason is 'the very fact that' certain (situationally liable) actions are legally required.[41]

But is the reason a legal reason? The answer would be 'no' if we accept [B] instead of [A]. This is because the reason pertains to emigrating rather than to the action which the reason-giving fact designates as having a certain legal status (refraining from situationally liable acts). The problem is that x's reason seems no less legal than that of a person who has taken an oath to keep the law. We are yet to see why it matters that the reason does not pertain to an action with a certain legal status. Perhaps there is 'an obligation to obey the law' only if there is reason to act as the law requires. And perhaps this obligation exists only if the reason to act as the law requires is a legal reason. However, as far as I can see, we lack grounds to *define* a legal reason as a reason to act as the law requires.

12. [B] for sake of argument

The problem is that many jurists appear to have strong contrary intuitions. For example, the problem is that it appears that many could accept that x has a legal reason to believe that English law needs reform only if x is legally required to believe that English law needs reform. A second problem is that it is uncertain whether an appeal to intuitions is appropriate in the first place: if 'legal reason' is

a technical term, we could not appeal to our intuitions to settle questions about its application. As far as my intuitions go, x could have legal reason to emigrate if the following condition is met: the fact that some other action has a certain legal status is at least part of x's reason. But, if 'legal reason' is a term of art, this might seem of no consequence.

Given the aims of this thesis, this second problem is particularly serious. As I mentioned in the Introduction, subsequent chapters are directed against the following four claims:

> (i) p is a legal reason only if p is a content-independent reason (chapters 5-6);
>
> (ii) if p is a legal reason to ø, p could be a complete reason to ø or a part of a complete reason to ø (chapters 2-4).
>
> (iii) a legal reason p has a significant formal feature when p is an exclusionary reason (chapter 8).
>
> (iv) analytical jurisprudence must discriminate between legal reasons according to whether they are moral or nonmoral (chapter 7).

As it turns out, many of (i)-(iv)'s proponents implicitly or explicitly accept [B]. If 'legal reason' is being used as a term of art, it follows that I cannot use [A] in arguing against (i)-(iv).

To see this, consider how I might argue against (i). If (i)'s claim is that reasons which satisfy [B]'s condition are content-independent, I could not show that (i) is false by showing that content-independence cannot be attributed to a reason for x to ø when the reason is the fact *that y* is legally required to ø. For then the reason which lacked content-independence would not be a reason which satisfied [B]'s condition.

If our concern is to offer an intuitive definition of reasons which - in Greenawalt's phrase - 'derive from the interposition of law', it is difficult to see

why [A] is inferior to [B]; this is what I argued in section 11. However, I do not want my arguments in chapters 2-8 to rely on the force of this argument. Moreover, as just mentioned, I do not want my arguments against (i)-(iv) to rely on a definition of legal reasons which those who have defended (i)-(iv) could never accept. Given these two considerations, I shall assume the correctness of [B].

13. Conclusion

Holton writes:

> 'Sometimes when we speak of the law being normative we mean that it provides normative reasons for action: that is, we mean that the subjects are justified in obeying the law. At others we say that the law is normative for an agent when the agent believes that there is normative reason for obeying the law. Finally, we might say that the law is normative for an agent when reference to the law figures in an agent's motivating reasons for action: when the law is in some way action guiding for them'.[42]

In this thesis, I am concerned with the first meaning of 'normative'. My main question is as follows: if p is a normative reason to ø, when and only when is p a legal reason to ø? However, it is uncertain whether saying that the law is normative in this sense - saying there are legal reasons - is saying that 'the subjects are justified in obeying the law'. Three considerations count against this. The first is that a legal reason could pertain to a legal official rather than to an ordinary citizen (I take it that Holton means 'ordinary citizens' by 'the subjects'). The second is that it is arguable that a legal reason could be for a belief or an affective state (Holton refers to normative reasons *for action*). The

third is that it doubtful that a legal reason must be to act as the law requires (Holton refers to reasons to obey the law).

A legal reason is a pro tanto reason of any weight (section 3), and a reason is a fact (p) standing in a certain relation to a person (x) and an object (ø-ing) (section 2). A reason is legal, I would wish to claim, when and only when p is a certain type of legal fact (section 4).

However, as we have seen, many jurists conceive of legal reasons far less minimally. Many jurists make one or more of the following claims: p must be the fact that a certain law exists or the fact that ø-ing is legally required or proscribed (section 6); ø-ing must be an action rather than a belief or an affective state (section 8); relevant legal officials must claim that p is a reason for x to ø (section 9); p must be the fact that ø-ing has a certain legal status with respect to x (section 10).

In this chapter, I have argued against each of these claims. In subsequent chapters, I shall argue against claims which are more complicated and substantive. In chapters 5 and 6, for example, I shall argue that we should reject the claim that p is a legal reason only if p is a reason which has the distinct formal property of being content-independent. But - as a starting point - I shall assume it is correct to say:

> [B] if p is a reason for x to ø, p is a legal reason for x to ø if and only if p is the fact that ø-ing has a certain legal status with respect to x.

In chapters 5 and 6, for example, I shall consider whether reasons which satisfy [B]'s condition are content-independent. Other chapters consider whether [B] needs to be complicated in other ways. Should it mention reasons which are second-order in the Razian sense of being 'exclusionary' (chapter 8)? Should it distinguish between moral and nonmoral legal reasons (chapter 7)? Should it require that p be more than 'a part of a complete reason' for x to ø (chapters 2-4)?

[1] Raz 1979 p. 243.

[2] May 1997 p. 24.

[3] I mean 'a fact' in a broad and ontologically neutral sense, where 'the fact that' is simply a device of nominalisation. In this sense of 'fact', it could not be doubted that 'the precept is unbiased' could be a fact. In understanding reasons as facts in this sense, I follow Skorupski 1997 p. 355 fn. 12 and Raz 1990 pp. 17-18.

[4] I shall also assume that p could be a reason for x to ø even if p does not know that it is.

[5] Compare Raz 1990 pp. 27-8 on 'conclusive' reasons.

[6] See, for example: Raz 1979 pp. 134-7, 145, 150, 158-9; MacCormick 1992 p. 109; Perry 1998 p. 450.

[7] See: Schauer 1994 p. 504; Dworkin 1970 p. 29 (describing the claim as a tenet of positivism).

[8] Shapiro 1998 p. 477 (compare Perry 1996 p. 111). This is true, at least, if we can equate 'x is obligated to ø from the legal point of view' with 'x is subject to a valid legal rule which requires x to ø'. I mention this because not all jurists accept this account of legal obligation (see Perry 1995 p. 111).

[9] Raz 1979 p. 65 (but contrast Raz 1979 p. 64).

[10] 1998 pp. 401, 402-3, 424.

[11] 1998 p. 490

[12] 1992a p. 6.

[13] See Cullity and Gaut 1997 pp. 2-3.

[14] Suppose a criminological study showed that fraud occurs less frequently in societies in which fraud is illegal. Then we might entertain a hypothesis about

explanatory reasons - about how recognition of a fact (the fact that fraud is illegal) motivates action. However, the criminological evidence would not show that the action is justified; it would not show that fraud's illegality is 'a reason' in the sense with which I am concerned.

[15] 1998 p. 402.

[16] Raz 1986 p. 30, emphasis added. But compare Raz 1986 pp. 30-1, 49-50.

[17] I borrow the terms applied and pure from Raz 1980 pp. 218-19.

[18] I take this example from Perry 1987 p. 235

[19] See Ashworth 1995 p. 4.

[20] For discussion, see: Perry 1987 pp. 237, 241; Shiner 1992a p. 156; Raz 1979 p. 149.

[21] For discussion, see Perry 1987 pp. 235, 240.

[22] This is Coleman's (1998 p. 413) description.

[23] See Lyons 1992 p. 41.

[24] See Lyons 1992 p. 44. Compare Shiner 1992a p. 31 ('Contrary to what is claimed by legal realism, statutes and common law precedential rules are not sources of law, but the law itself. Contrary to what might be claimed by antipositivism, nothing else but statutes and common law precedential rules comprise the law').

[25] See, for example: Coleman 1998 p. 394; Green 1988 p. 114; Schauer 1994 p. 499.

[26] See Ashworth 1995 pp. 106-7. Compare: Husak 1998 p. 66 (a defendant being liable for 'being found in the United Kingdom'); Ashworth 1995 pp. 103f. On criminally culpable intentions, see Husak 1998 p. 69. English law also allows for 'situational liability' - for x to be convicted for a state of affairs that merely happened to him or her. For both types of offence, it is arguable that there is no action the English criminal code requires or proscribes or permits.

[27] This qualification is important. Suppose English law followed the American Model Penal Code in specifying that x is criminally liable for possession of a controlled drug d if a certain type of omission has occurred (*Model Penal Code* s 2 01 (4); see Ashworth 1995 p. 107). Under this scenario, x would commit the offence if he failed to terminate possession of d after a certain period (on condition that he 'was aware of his control' of d for this period or 'knowingly ... received' d). Then it would be tempting to think that I have failed to provide an example of an English law requiring a non-act. Say x would fail to omit to μ only if x ø-ed, where ø-ing is an action. It would be tempting to think that the fact that English law requires one to omit to μ to be criminally liable for possessing d is a matter of it requiring one to ø.

[28] For discussion, see Husak 1998 pp. 86-90.

[29] 1998 p. 490.

[30] Raz 1979 p. 30.

[31] Raz 1979 p. 153. Compare: Raz 1979 p. 150; Perry 1998 p. 450. For the view as it applies to authority in general, see Raz 1979 pp. 28-9.

[32] Greenawalt 1989 ch. 2; Soper 1996 pp. 229-40.

[33] My assumption is that the legal point of view has it that there is only one reason.

[34] The description of Dworkin's view appears in Perry 1995 p. 130.

[35] Ashworth 1995 p. 392.

[36] Raz 1979 pp. 233-4. Compare Raz 1990 p. 127.

[37] See Raz 1979 pp. 233-4.

[38] I am not suggesting that Raz implies that this *is* a necessary condition.

[39] See Raz 1979 pp. 234, 238-9.

[40] See Ashworth 1995 pp. 104-6.

[41] Consider the reason to believe that English law needs reform mentioned in section 8. This reason would satisfy the constraint only if it referred to the

proposition there is reason to believe (the proposition that English law needs reform). Clearly, however, it does not refer to this; the reason, recall, is that the maximum penalty for handling stolen goods is twice that for theft. Intuitively, this reason is legal. But we could not say that it is if we accepted the alternative definition. Since we lack an independent grounds to accept this definition (as far as I aware, no argument has been offered for it), [A] seems preferable.

[42] 1998 p. 620.

Chapter 2 Indirect and complete reasons

1. Introduction

It is common to divide reasons into types: content-independent or content-dependent; moral or nonmoral: exclusionary or nonexclusionary; pro tanto or decisive; complete or incomplete; and so on. In chapter 1, I set out a certain claim about the nature of *legal* reasons (intuitively, reasons which are 'a matter of the normativity of law'):

> [B] if p is a reason for x to ø, p is a legal reason for x to ø if and only if p is the fact that ø-ing has a certain legal status with respect to x.

Until chapter 5, I shall say little more about the nature of legal reasons in particular; chapters 2-4 concern the nature of reasons in general. Given [B], p is a legal reason not to assault just in case p is a particular type of fact (the fact that assault has a certain legal status). In chapters 2-4, I shall ask: when and only when does a fact stand to a person as a reason? This question pertains to reasons in general rather than to legal reasons in particular. A correct answer will tell us when and only when a legal reason is a reason rather than when and only when a reason is a legal reason.

I should emphasise that the answers I shall consider do not offer *a substantive account* of the relation of being a reason to. All I am looking for is a true biconditional of the form: p is a reason to ø if and only if [...]. We could

possess such a biconditional without fully knowing *what it is* for a reason to be reason.

Overall, my aim in chapters 2-4 is to evaluate the second of the main claims mentioned in the Introduction:

> if p is legal reason to ø, p could be a complete reason to ø or a part of a complete reason to ø.

As we saw in chapter 1, Raz thinks that x has reason to obey the law if x has undertaken an oath to do so. Now suppose that x is legally proscribed to assault. Raz would say - correctly, no doubt - that x has reason not to assault. But what fact constitutes her reason?

On the one hand, it seems that her reason is a legal reason; it seems that her reason is among those Greenawalt refers to when he refers to reasons which 'derive from the interposition of law'. On the other hand, it seems that x's reason is not fully constituted by the fact that she is subject to a legal requirement; it seems that at least a part of her reason is a certain nonlegal fact (the fact that she has made a certain oath). Perhaps x's reason 'includes' the fact that a certain action has a certain legal status. But could we say she has reason to act simply and entirely because of the law?

In chapters 2-4, I want to consider how we should understand the difference between complete reasons and parts of complete reasons. Clearly, this difference is of direct importance to understanding [B]. Given [B], p is a legal reason to ø only if p is the fact that ø-ing has a certain legal status. But - it seems pertinent to ask - could p be a legal reason to ø without being a *complete* reason to ø?

In chapter 2, I shall describe one prominent account of the nature of complete reasons (sections 7-9). My main argument will be that we should reject this account (sections 9-11). I shall begin, however, by discussing so-called 'indirect' reasons (sections 2-6).

2. Indirect reasons

According to Shapiro, a legal 'rule can give someone a reason to act in at least one of two ways'.[1] Our interest is in only one of these - Shapiro calls it 'epistemic guidance'. For Shapiro, there can be situations in which a legal rule informs a 'person of the existence of certain demands made by those in [legal] authority and, as a result, that conformity is advisable'. What is of present interest is that Shapiro believes that these are situations in which a legal rule gives 'someone a reason to act'.

Coleman does not use the phrase 'epistemic guidance', but he follows Shapiro in thinking that a legal rule can be of practical significance when it is of epistemic significance; he writes that a 'law might make a practical difference ... *epistemically* (i. e., by providing information)'.[2]

Postema holds that, within 'the practical domain', reason-giving facts can be direct or indirect. If a reason is *direct*, it 'count[s] in favour of or against doing the action; ... [it] determine[s] what an agent ought to do'.[3] *Indirect* reasons, on the other hand, 'give us reasons to believe that there are direct reasons for acting'. Notice that Postema holds that even indirect reasons pertain to action; he thinks a fact which is an indirect reason is a reason to act, not just a reason to believe there is reason to act (he says that indirect reasons pertain to 'the practical domain').

Which action is an indirect reason a reason to perform? Presumably, it is the action there is reason to believe there is direct reason to perform. Presumably, Postema is saying the following:

> [C] p is a reason to ø (an 'indirect' reason to ø) if p is a reason to believe that there is a direct reason to ø.

Raz appears to hold a similar view. For he says that having reason to avoid a legal sanction means 'having reason to take notice of' what a sanction-

backed law requires, and he is careful to observe that his claim is not just that such a law supplies a reason for belief ('a reason to believe that if the law should be broken a sanction would be applied').[4] On Raz's view, such a law is also a reason for action. This is because

> 'When a fact A is evidence for the occurrence of fact B because it is the cause or the reason for the occurrence of B, and if B is a reason for an action, then we often rightly regard A as a reason for the same action'.[5]

Like Postema, Raz is concerned with the relation between a reason to perform an action and a reason to believe something about a reason to perform it (a fact which is 'evidence for the occurrence of' a reason to perform it). It is uncertain, however, whether Raz would accept [C] as it is presently formulated. There are two reasons. First, [C] refers to a fact which is a reason to believe that there is a reason to ø, but Raz refers to a reason to believe that *a particular* reason to ø obtains.

Second, Raz appears to believe that a fact which is evidence for a reason to ø supplies a reason to ø only if it is also causally related to the reason to ø. He writes of A being '*the cause* or the reason for the occurrence of B', and he describes a sanction-backed law - one he says we have 'reason to take notice of' - as one which 'identifies the action which will result in the infliction of the sanction *and establishes* the sanction'.[6]

At the minute, however, we can put aside these two possible complications; I shall return to them in section 6 below and in chapter 3.

3. Indirect legal reasons

[C] pertains to reasons in general, but it might seem that the following claim would be suitable for legal reasons in particular:

> [D] p is an indirect legal reason to ø if and only if: (i) q is the fact that ø-ing has a certain legal status; (ii) q is a reason to believe that p obtains; and (iii) p is a reason to ø.

However, [D] has consequences [C]'s proponents would be unprepared to accept. According to Raz, a reason to avoid 'the risk of incurring' a legal sanction is

> 'of the right kind ... unlike many moral reasons which are reasons to do that which the law requires for grounds not dependent on the fact that the law requires them'.[7]

Presumably, an example of the 'many moral reasons' is the fact that a particular act of assault would cause unnecessary harm. The reason is a reason to act as the law requires (assault is illegal), but surely it is not a legal reason (it is *not* 'of the right kind'; it is not 'dependent on' the act's illegality).

The difficulty is that [D] implies that this reason *is* legal. Since assault is proscribed by the nonregulatory criminal law, and since an action is proscribed by the nonregulatory criminal law only if - generally speaking - it causes suffering, the illegality of assault is a reason to believe that assault causes suffering. The illegality of assault is at least a weak reason - or a part of a weak complete reason - to believe this. It follows, if we accept [D], that we must accept that this reason is legal.

[D] can be reformulated in a way which avoids this consequence, however. [C] says p is an indirect reason to ø if p is a reason to believe there is

reason to ø. If a fact is a legal reason to ø only if it is the fact that ø-ing has a certain legal status (see chapter 1), perhaps what we should say is:

> [E] p is an indirect legal reason to ø if and only if: (i) p is the fact that ø-ing has a certain legal status; (ii) p is a reason to believe that q obtains; and (iii) q is a reason to ø.

Appropriately, [E] does not have the consequence that the fact that an act of assault causes unnecessary suffering is a legal reason not to perform it. This is because the fact that the act causes unnecessary suffering is not itself a fact of the appropriate type (it is not the fact that the act has a certain legal status).

The *act's illegality* would be a legal reason in this case, however. For it is a fact of the appropriate type, and - as mentioned above - it is a reason to believe that there is reason not to assault: it is a reason to believe that the act causes unnecessary suffering, and the fact that it causes unnecessary suffering is a reason not to perform it.

4. Rejecting [C]

The question we need to ask, however, is whether [C] is acceptable in the first place. [C] offers us a general claim about one type of reason, and [E] applies this claim to the case of legal reasons in particular.

[C] has two unobjectionable implications. The first is that a fact could be a reason even if it is a reason *for belief*. It would be absurd to insist that reasons are necessarily reasons to act.

The second implication is that the proposition a fact is a reason to believe could be a proposition about a reason (for example, the proposition that a particular reason-giving fact obtains). Again, this implication is entirely

unobjectionable: we could not hold that (i) there is reason to believe that q only if (ii) q is not a proposition about reasons.

Nevertheless, we should reject [C]. In general, it does not follow from the fact that there is reason to believe a proposition that this proposition is true. If this *did* follow, it would be impossible to have reason to believe something false. However, one *can* have reason to believe something false. For example, you can have reason to believe that someone is downstairs (you hear a noise; you have the only key; you locked every door and window two minutes ago) even if someone is not (the noise was caused by an orange falling off a shelf).

Now apply this general point to the particular case in which the proposition there is reason to believe concerns a reason to act. If it does not follow from (i) the fact that there is reason to believe a proposition that (ii) the proposition is true, then x could lack reason to ø even if x has reason to believe that there is reason to ø. Put otherwise, the consequence of the more general point is that it is false that

> if there is reason to believe that there is reason to ø, then there is reason to ø.

With respect to [C], the upshot is that it could be false that p is a reason to ø ('indirect' or otherwise) even if p is a reason to believe that there is reason to ø. This could be false because - as we have just seen - it could be true (i) that p is a reason to believe that there is reason to ø yet false (ii) that there is *any* reason to ø.

As noted in section 2, Postema says a fact is an 'indirect reason' if it 'gives us reason to believe that there are reasons for acting'. What I have argued is that we should resist the suggestion that p is thereby a reason for action (that p falls within 'the practical domain', as Postema puts it). We should reject [C] because it does not respect the fact that a reason to ø must be a reason to ø whether or not it is indirect.

5. [C] and rationality

Let me anticipate a likely response.

Section 4's argument relies on the following assumption: x could lack reason to ø even if x has reason to believe that there is reason to ø. [C]'s proponents might deny this assumption; they might claim that, in one sense of 'reason', a person *does* have 'reason' not to assault if he or she has reason to believe there is reason not to assault. Perhaps there are two senses of 'reason', and perhaps all section 4 shows is that [C] is false with respect to one of these.

What are the two senses? [C]'s proponents might adduce Scanlon's contrast between the demands of reason and the demands of rationality. A person can act as the balance of reason requires without acting rationally (without acting as his or her assessment of the balance of reason requires) and vice versa. Here is how Scanlon describes the second possibility:

> 'Irrationality in the clearest sense occurs when a person's attitudes fail to conform to his or her own judgements: when, for example, ... a person fails to form and act on an intention to do something even though he or she judges there to be overwhelmingly good reason to do it'.[8]

Now, if x has reason to believe that there is reason not to assault, then perhaps x has 'reason' not to assault just in the sense that rationality requires x not to assault.

Consider a concrete case. You believe you have decisive reason to hide the gun. But you fail to form the intention to do so (your nerves are shot), and you fail to hide the gun. In Scanlon's sense, you are irrational. [C]'s proponents might argue that there is a sense in which you had reason to hide the gun

(rationality required it) even if your belief was completely misguided - even if we suppose that, in the ordinary sense, you had no 'reason' to hide the gun.

This line of argument is unconvincing. Admittedly, there is a sense in which x has 'reason' to ø if it would be irrational for x not to ø. Moreover, the sense is distinct from the one which pertains when there is reason ø in the ordinary sense of 'reason'; as we might say, it can be unreasonable yet rational, or reasonable yet irrational, to ø. But nothing follows for the type of situation [C] refers to. That is, nothing follows for a situation in which there is reason to believe that there is reason to ø. This is because the situation need not be a situation in which anyone believes that there is reason to ø. On Scanlon's definition, x would be irrational if x believes that there is decisive reason to ø but fails to ø (or, at least, fails to form the intention to ø). However, x could have reason to believe that there is reason to ø even if x does not believe that there is reason to ø.

To see this, think of you and the gun. Given your belief - given that you believed that you had decisive reason to hide it - rationality required you to hide it. But we cannot conclude from this that rationality requires you do something when you have reason to believe you should do it, since you could have had reason to believe you should hide the gun even if you did not believe you should hide it.[9]

6. Rejecting [E]

Scanlon's discussion of irrationality does not support [C]. As I argued in section 5, it does *not* show that there is a sense in which x has 'reason' to ø if x has reason to believe that there is reason to ø. Indeed - as far as I can see - there is *no* obvious sense in which p is a 'reason' to ø just because p is reason to believe there is reason to ø.[10] Actually, it seems intuitive to sharply distinguish

between reasons and evidence for these. Suppose p and q are both reasons: p is a reason to ø; and q is a reason to believe that p (or, if you prefer, a reason to believe that p *is* a reason to ø). It is intuitive to think that q is *not* a reason to ø.[11]

Consider a concrete case. Suppose you have reason to run because God commands this, and suppose you have reason to believe that God commands you to run because your priest tells you that God commands you to run. Intuitively, 'that your priest tells you that God commands you to run' is not a reason for you to run.

Recall Raz's claim that,

> 'When a fact A is evidence for the occurrence of fact B because it is the cause or the reason for the occurrence of B, and if B is a reason for an action, then we often rightly regard A as a reason for the same action'.

It is difficult to see why Raz says this. Suppose q is a reason to believe p (suppose q is 'evidence for' p) *and a cause of p*. Even then it is difficult to see why it would be correct to think that q pertains to the action to which p pertains.

The point has relevance to how we should describe legal reasons. As mentioned, [C] suggests that a legal reason could be 'indirect':

> [E] p is an indirect legal reason to ø if and only if: (i) p is the fact that ø-ing has a certain legal status; (ii) p is a reason to believe that q obtains; and (iii) q is a reason to ø.

Intuitively, a legal reason is one which - in Greenawalt's phrase - 'derives from the interposition of law', and surely a reason does not derive from the law just because some or other legal fact is a reason to believe that it obtains. This seems true even if the same fact is cause of it obtaining (see chapter 3, sections 9-10).

7. Complete reasons

In arguing against [C], I assumed that p could be a 'reason' to perform an action even if it is not a reason to believe that there is a reason to perform it. I said it does not follow from (i) the fact that p is a reason to believe there is reason to ø that (ii) p *is* a reason to ø. But this assumes an independent sense 'reason to ø'; in section 6, I called this the 'ordinary' sense of reason.

Notice, however, that proponents of [C] make the same assumption. This is especially clear with Postema. As we saw in section 2, he says a reason is indirect if it is a reason 'to believe that there are direct reasons for acting'; in Postema's terminology, the assumption is that a reason can be direct rather than indirect.

But when and only when is a reason 'ordinary' ('direct')? As we have seen, Postema says a direct reason is one which 'count[s] in favour of or against doing the action; ... [it] determine[s] what an agent ought to do'. But when and only when does a fact - the fact that an action is legally proscribed, for example - count in favour of an action?[12] The remainder of this chapter describes and assesses a prominent answer to this question. In chapter 4, I propose an alternative.

According to Raz,

> 'Statements of facts which are reasons for the performance of a certain action by a certain agent are the premises of an argument the conclusion of which is that there is reason for the agent to perform the action ... Statements of the form "p is a reason for x to ø" correspond to an inference of which "p" is the premise and "there is reason for x to ø" the conclusion'.[13]

Raz means a *valid* argument; an argument or inference is sound only if it is valid, and Raz makes it clear that the inference from 'p' to 'there is reason for x to ø' must be sound.[14] At certain points, Raz refers to validity by mentioning 'entailment'. For example, he writes that:

> 'the fact stated by any set of premises which entail that there is a reason to perform a certain action is a complete reason for performing it'.[15]

So it seems we could say:

> [F] p is a complete reason for x to ø if and only if p entails that there is reason for x to ø.

Let me make two clarificatory remarks about [F]. The first is that entailment holds between propositions, so [F] should really include 'the proposition that p obtains' and 'the proposition that there is reason for x to ø' rather than 'p' and 'there is reason for x to ø'. To make my sentences easier to read, I shall sometimes ignore this complication. It will always be clear whether I mean to refer to a proposition or to something else.

Now for the second clarificatory remark. I say 'a *complete* reason' because Raz thinks p could be a reason without being complete. Raz writes:

> 'A fact is a reason only it if belongs to a complex fact which is a complete reason, and yet not only the complete reason but its constituent facts as well are reasons'.[16]

Raz thinks we should think of reasons 'as facts, statements of which form the premises of a sound inference' to a certain type of conclusion.[17] Suppose one could validly infer that there is reason for x to ø from the conjunction of p and q. Put differently, suppose there is a valid practical inference to 'there is reason for x to ø' from the premises 'p' and 'q'. Then, for Raz, p is a reason for x to ø, even

if p is not a complete reason to ø - even if p does *not* entail that there is reason for x to ø. To capture this idea, I shall say:

> [G] p is a partial reason for x to ø if and only if: (i) q entails that there is reason for x to ø; and (ii) p is a conjunct of q.[18]

8. Sound practical inferences

To clarify [F] and [G], it will be useful to discuss recent remarks by Postema. According to Postema, reasons

> 'determine what an agent ought to do ... by figuring in sound practical inferences to judgements that certain agents ought to perform the actions for which they are reasons'.[19]

Like Raz, Postema holds that a reason is a fact stated by the premises of a valid practical inference, where a 'practical inference' is an argument to the conclusion that x has reason to ø. Notice, however, that Postema mentions inferences of this kind which have true premises (he mentions '*sound* practical inferences'). One might wonder whether Postema would deny [F] and [G] but affirm the following:

> p is a complete reason for x to ø if and only if: (i) if p were to obtain, there would be reason for x to ø; and (ii) *p does obtain*;
>
> p is a partial reason for x to ø if and only if: (i) if q were to obtain, there would be reason for x to ø; (ii) p is a conjunct of q; and (iii) *q does obtain.*

This is doubtful. I think Postema mentions sound practical inferences because he wishes to direct attention to the special type of situation in which p is a reason to ø *and p actually does obtain.* Compare the following two statements:

> 'Her guilt justifies his shame';
>
> 'Her guilt would justify his shame'

According to the first, she is guilty and this fact is a reason for him to feel shame. The second differs because from the first in that it does not assume her guilt (it does not assume that the reason-giving fact *does* obtain): it only says he would have reason to feel shame if she is guilty.

My suggestion is that Postema wishes to direct attention to the truth conditions of statements like the first. His thought is that a fact could 'determine what an agent ought to do' only if it obtains - only if the relevant premise in the relevant valid practical inference *is true*.[20] Notice, however, that this thought is compatible with accepting [F] and [G]. For Postema could still think that p is a reason to ø, whether or not p obtains, just in case one could validly infer that there is reason to ø from p.

Postema also writes:

> 'The practical inference consisting of the premises necessary and sufficient for a practical judgement is a "complete reason"'.[21]

The reference to sufficiency is compatible with [F]. [F] says that a fact stands to you as a complete reason to ø when it is impossible for you not to have reason to ø if this fact obtains, and this is close to saying that a fact is a reason for you to ø when the obtaining of this fact is sufficient for you to have reason to ø.[22]

But what of Postema's reference to premises that are *necessary* for a practical judgement? Postema appears to want to claim that

> p is a complete reason for x to ø if and only if the proposition that p obtains *and no other proposition* entails the proposition that there is reason for x to ø.

There is a straightforward reason to reject this claim: it implies that there could not be two or more complete reasons to perform an action. Suppose the fact that you are exhausted is a complete reason for you to quit. If we accept [F], we accept that the proposition that you are exhausted entails the proposition that you have reason to quit. If we accept the alternative definition, however, we also accept that you could not have a second complete reason not to quit. For, if there were, 'you have reason not to quit' would be entailed by another proposition (the proposition that another fact obtains). Surely, however, another fact - the fact that you have promised to quit, for example - could be a second complete reason for you to quit.

9. Deducibility

Suppose p is a reason for x to ø. According to chapter 1, p is a legal reason just in case p is the fact that ø-ing has a certain legal status with respect to x. But when is any sort of fact a reason? [F] and [G] express a widely accepted answer to this question: a fact is a reason when it satisfies [F]'s or [G]'s conditions for being a complete or partial reason. Now I shall assess this answer. Until chapter 4, however, I shall direct attention to [F] only.

Since 'entails' is ambiguous, [F] can be interpreted in different ways. According to one meaning of 'entails' - a meaning some jurists see Raz as employing[23] - to say that one proposition entails another is to say that the second can be derived from the first by a valid principle of an existing system of standard logic (by a valid principle of the propositional calculus, for example).[24]

To avoid confusion, I shall write 'deducible from' rather than 'entailed by' when I have this specific meaning in mind. So here is one interpretation of [F]:

> [Fa] p is a complete reason for x to ø if and only if the proposition that there is reason for x to ø is deducible from the proposition that p obtains.

In the remainder of chapter 2, I shall argue that we should reject [Fa]; I want to show that, if [F] is acceptable, 'entails' cannot have the meaning specified in [Fa]. In chapter 3, I shall consider an alternative interpretation of [F], where 'entails' means 'strictly implies'.

Plausibly, you have reason to avoid pain. Suppose you would suffer pain if you left. Then, plausibly, you have reason not to leave. The reason need not be decisive; perhaps you have more reason to leave than not. But the relative weight of your reason is not at issue here; all we need to suppose is that the painfulness of leaving counts against leaving to some degree.

Now ask the following question: what is your reason? The answer seems straightforward. It seems that your reason is:

> (2.1) leaving would cause you pain.

However, we cannot accept this answer if we accept [Fa]. For the proposition that there is reason for you to leave is not deducible from the proposition that leaving would cause you pain. A proposition m is deducible from a proposition n only if m can be derived from n by the principles of existing standard logic, but - as far as I can see - there is no logical system which allows

> leaving would cause you pain |= there is reason for you to leave,

where '|=' abbreviates 'has as a validly inferable consequence'. Consider the principles of the propositional calculus - principles such as, 'any conjunction

entails each of its conjuncts'. None of these allow 'there is reason for you to leave' to be derived from 'leaving would cause you pain'.

The upshot is as follows. Given [Fa], if the fact that leaving would cause you pain is a reason for you not to leave, the reason is partial rather than complete. In other words, the upshot is that an additional fact - a fact like

> (2.2) leaving would cause you pain -> there is reason for you to leave -

must be a constituent of your complete reason ('->' abbreviates 'materially implies'). Think again of the propositional calculus. This system includes a principle allowing 'there is reason for you to leave' to be validly inferred from the conjunction of (2.1) and (2.2).

The difficulty is that the fact that leaving would cause you pain surely *is* a complete reason for you to leave. If [Fa] implies that some other fact - (2.2), for example - is a part of your reason, so much the worse for [Fa].

10. Second example

Consider another example. Suppose you would break a promise by being abrupt. Plausibly, you have reason not to be abrupt; in general, it is plausible that, if a person would break a promise by ø-ing, he or she has reason not to ø. However, if we accept [Fa], the complete reason could not be

> (2.3) you would break a promise by being abrupt,

Some other fact - the fact stated by

> (2.4) you would break a promise by being abrupt -> you have reason not to be abrupt

for example - would be 'a part of' your reason. Surely, however, 'you would break a promise by being abrupt' fully describes your reason.

What would be wrong with saying that your reason not to be abrupt includes (2.4)?

Notice, first of all, that it is intuitive that (2.4) is *not* a part of your reason. Why shouldn't you be abrupt? I admit that it would be unsurprising to receive the following answer. 'Because otherwise you would break a promise, *and you shouldn't break your promises*'. Intuitively, however, 'you shouldn't break your promises' - the principle suggested by (2.4) - is not a description of a reason-giving fact at all; intuitively, it is a statement to the effect that a certain type of fact *is* reason-giving.

At places, Raz appears to agree. As an example of a complete reason 'consisting of one ... reason and of the actions for which they are reasons', Raz gives, '[i]f James has promised to ø then James has a reason to ø'.[25] Crucially, he does *not* give, 'if James has promised to ø, and if James should keep his promises, then James has reason to ø'. This seems appropriate. Intuitively, we do not need to hear 'James should keep his promises' before we have heard the 'complete' reason.[26] At one point, Raz acknowledges exactly this: he writes that mentioning that 'one ought to keep one's promise' is *not* mentioning a 'part of the reason' to keep one's promises.

So what *is* (2.4)? Is (2.4) of normative significance at all?

Raz describes the fact that 'one ought to keep one's promises' as 'a reason for a reason'.[27] However, this is confusing. Every reason pertains to an action, a belief or an affective attitude, but to what does (2.4) pertain? For what is (2.4) a reason? Raz and others accept that, if p is a reason to ø, and p obtains, then there is reason to ø. But, if (2.4) were true, what would there be reason to do or believe or feel? You might answer: actions or beliefs or affective attitudes that have been promised. However, (2.4) could be true even if no promise has been

made, and surely x does not have reason to ø just because there would be reason to ø *if* x were to promise to ø.

(2.4) is certainly a fact *about* reasons. (2.4) describes how certain normative consequences would follow when a certain type of fact obtains. For example, (2.4) describes how you would have reason not to be abrupt if you would break a promise by being abrupt, as is actually the case. But then it follows, I think, that (2.4) could not be a part of your reason not to be abrupt. This is because (2.4) could not be a part of a reason if it is about this very reason; to use Raz's phrase, (2.4) could not be both a part of a reason and a 'reason for' this reason.

11. Operative and auxiliary reasons

To clarify this last point, I shall discuss a contrast Raz draws between 'auxiliary' and 'operative' reasons.

According to Raz, operative reasons are mostly 'values or desires or interests.' For simplicity, I shall discuss values only. Raz's claim is that it is 'a matter of logic' that every value is a reason for action - a reason to perform an action which instantiates the value.[28] To illustrate this point, he writes: 'If respect for persons is a value then there is reason ... to respect persons.' A reason is complete, on Raz's account, only if it contains an operative reason.

In this respect, operative reasons are unlike auxiliary reasons.[29] Consider the following inference:

> Helping him would be valuable (premise 1);
>
> Lending him £400 will help him (premise 2);
>
> Therefore, I have reason to lend him £400.[1]

Premise 2 states an auxiliary reason which 'transmits ... the force' of the operative reason stated by premise 1 to 'the particular act of lending him £400.' Since 'helping him would be valuable' is an operative reason, there is a reason to act - there is reason to perform acts which help him. But Raz writes that the reason to perform the particular action of lending him £400 is 'identified' ('determined') by the fact that lending him £400 will help him. According to Raz, it is only the conjunction of the facts stated by both premises which is the complete reason *to lend him £400*; each 'in isolation is a statement of only a part of a reason.'[30] Raz's thought is that an auxiliary reason contributes to a complete reason just in that it somehow 'specifies' the more particular action to which an operative reason pertains.

There is philosophical disagreement about what it is for something to be valuable, and some of this disagreement concerns the relationship between values and reasons. Nonetheless, it is reasonably clear that your reason to lend him £400 does *not* include the fact that helping him would be valuable. Instead of stating a separate reason-giving fact, premise 1 seems to state that another fact - the one stated by premise 2 - *is* reason-giving. My suggestion is that premise 1 is *about* a reason: it states that the fact that lending him £400 would help him is a reason to lend him £400.

No doubt, premise 1 states *more* than this; no doubt it states that there is reason to perform *any* action that would help him, for example. If I am correct, premise 1 implies

ø-ing would help him -> there is reason to ø.

Compare Raz's comments about the value respecting of persons. As we have seen, he writes that '[i]f respect for persons is a value then there is reason ... to respect persons.' My suggestion is that 'helping him would be valuable' means 'there is reason to perform acts which help him'.

If I am correct that premise 1 states that the fact stated by premise 2 is a reason to lend him £400, we can draw two conclusions. The first is that the fact stated by premise 1 is no part of the reason in question. We can draw this conclusion because it is plausible that a fact cannot be 'a part' of a reason if it is about this very reason.

The second conclusion is that the fact stated by premise 2 is not 'incomplete'. We can draw this second conclusion because a reason is surely complete if there would be reason to perform an action if it obtains, and this is exactly what premise 1 implies.

12. Conclusion

When and only when does a fact - the fact that a certain action has a certain legal status, for example - stand to a person as a reason to act? This is the question I have begun to address in this chapter; I shall continue this task in chapters 3 and 4.

One answer is suggested by recent remarks of Shapiro, Coleman, Postema and Raz: p is reason to ø - more precisely, p is an 'indirect reason' to ø - just in case p is a reason to believe that there is reason to ø (see section 2 above). But there is a serious problem with this answer. This is that p could be a reason to believe that there is reason to ø even if there is no reason to ø at all (see section 4 above).

Another answer receives more widespread support. This says that p is a reason for x to ø - more precisely, it says that p is a 'complete reason' for x to ø - just in case 'p' entails 'there is reason for x to ø'. In sections 9-11, I argued that we should not accept this answer if 'entails' is understood in terms of deducibility. But could 'entails' be given a less problematic interpretation? This is the question I shall take up in chapter 3.

[1] 1998 p. 490. At certain places it is unclear whether Shapiro is referring to normative or explanatory reasons.

[2] 1998 p. 403. As with Shapiro, it is sometimes unclear whether Coleman is referring to normative or explanatory reasons.

[3] 1998 p. 346.

[4] See 1990 p. 161.

[5] 1990 p. 161.

[6] 1990 p. 161.

[7] 1979 p. 243.

[8] 1998 p. 25.

[9] Indeed, you would not be irrational if you failed to hide the gun even if you believed you ought to believe you have reason to hide it. In this case, we could impugn your rationality only if you failed to believe that you have reason to hide the gun.

[10] It is difficult to see how 'subjective reasons' (see Cullity and Gaut 1997 pp. 1-2) are normative reasons, for example.

[11] A fact can be a reason for two or more actions (q could be (i) a reason to believe that there is reason to ø and (ii) a reason to ø), but I shall ignore this complication here.

[12] Think of legal reasons in particular. You might lack a legal reason not to assault even if assault's illegality is a reason for you to believe there is reason not to assault (section 6). You would have legal reason not to assault only if some legal fact *were* a reason not to assault. But when *is* a legal fact a reason?

[13] 1990 p. 28. Compare Raz 1990 p. 24 ('the fact stated by any set of premises which entail [from which it can be validly inferred] that there is a reason to perform a certain action is a *complete reason* for performing it'). I shall ignore an alternative formulation which appears only once (1990 p. 24) in Raz's writings.

28 1990 p. 24.

29 Raz 1990 p. 34. I should mention that I will only be concerned with what Raz calls 'identifying' auxiliary reasons. This is the type of reason he pays most attention to, and the type he mentions when discussing the normativity of law.

30 See Raz 1990 pp. 34-5. I adapt this inference from one given by Raz (1990 pp. 34-5). Raz's inference is less plausible, I think, since it is doubtful that 'I want to help him' (Raz's premise 1) could be an operative reason; many now reject Raz's view that desires are operative reasons (see, for example, Scanlon 1998 pp. 41-9).

[14] See, for example, 1989 p. 1155.

[15] 1990 p. 24.

[16] 1990 p. 25.

[17] 1989 p. 1155

[18] Raz would wish to add a third condition: (iii) q would not entail that there is reason for x to ø if p were not a conjunct of q. For Raz realises that, by definition, 'two complete reasons are a complete reason', and he responds by saying, 'We can define an atomic complete reason as a complete reason which would cease to be complete if any one of its constituent parts were omitted' (1990 p. 25). For present purposes, we can ignore this complication.

[19] 1998 p. 346.

[20] How does a fact 'determine what an agent ought to do'? First, by being such that, were it to obtain, there would be reason to perform an action. Postema agrees with Raz that a fact meets this first condition when a practical judgement is validly inferable from a premise stating that it obtains. Second, by obtaining. Postema refers to this second condition when he indicates that the practical judgement must be inferable from *true* premises (when he refers to a *sound*, not merely valid, practical inference).

[21] 1998 p. 346.

[22] For the moment, the exact nature of the impossibility in question can be ignored.

[23] See, for example, Redondo 1999 ch. 3.

[24] For complications (sometimes 'entails' means 'deductively valid by principles already established up to a certain point in the development of a given logical system') which I shall ignore, see Hughes and Cresswell 1996 pp. 204, 209.

[25] 1990 p. 33.

[26] Assuming, of course, that 'James has promised to ø' is reason-giving at all.

[27] 1990 p. 23.

Chapter 3 Complete reasons and determination

1. Introduction

In the main, this thesis is about the formal properties of legal reasons in particular. It addresses questions such as the following. Is a legal reason necessarily content-independent (chapters 5-6)? What is the formal significance of the fact that a legal reason is exclusionary in Raz's sense (chapter 8)? Does a formal theory of law need to distinguish between moral and nonmoral legal reasons (chapter 7)?

In chapters 2-4, however, I am concerned with what is true when something is a reason at all; for the most part, I ignore what is peculiar to legal reasons. Chapter 1 sets out the view that a reason to ø is a legal reason just in case the reason-giving fact is the fact that ø-ing has a certain legal status. In chapters 2-4, I want to ask about the conditions under which a fact - legal or otherwise - is a reason. Raz refers to situations in which 'the reason to do that which is required by law is the very fact that it is so required', and I want to ask: when and only when would

x is legally required to ø,

or any other fact, stand to x as a reason to ø?

It appears that at least a part of the answer must be as follows: if p is a reason for x to ø, then, *if* p obtains *then* there is a reason for x to ø. But what sort of conditional is this? With respect to so-called 'complete' reasons, chapter 2 considers the possibility that the proposition that there is reason for x to ø must

be derivable from the proposition that p obtains by a valid principle of an existing system of standard logic:

> [Fa] p is a complete reason for x to ø if and only if the proposition that there is reason for x to ø is deducible from proposition that p obtains.

As we have seen, some jurists see this answer in Raz's remark that,

> 'the fact stated by any set of premises which entail that there is a reason to perform an action is a complete reason for performing it'.

In chapter 3, I shall consider an alternative answer. This is that p is a reason to ø just in case the proposition that p obtains strictly implies the proposition that there is reason to ø. I shall begin by explaining this alternative answer (section 2) and by indicating one of its advantages (section 3).

2. Strict implication

Here is the proposal I want to consider:

> [Fb] p is a complete reason for x to ø if and only if the proposition that p obtains strictly implies the proposition that there is reason for x to ø.

The thought is that a fact is a reason - one type of reason, at least - just in case its obtaining guarantees that there is reason to act, where the guarantee is understood in terms of one proposition strictly implying another.

The notion of strict implication is extremely complex.[1] For present purposes, however, we can understand it very simply as follows: the proposition that p obtains strictly implies the proposition that there is reason to ø when it is

logically impossible for the first proposition to be true without the second proposition also being true. I shall leave the notion of logical impossibility intuitive.

Suppose that 'you are legally required not to assault' strictly implies 'you have reason not to assault'. Then it is necessary that if 'you are legally required not to assault' is true so is 'you have reason not to assault'. *Is* the fact that you are legally required not to assault a complete reason for you not to assault? Since you *are* legally required not to assault (let us make this assumption), [Fb] tells us that it is not a complete reason if you lack a reason not to assault.

It might be helpful to think of strict implication in terms of what is true at different possible worlds. It would be more or less correct to say that the proposition that p obtains strictly implies the proposition that there is reason to ø when there is no possible world at which the first proposition is true and the second is false. Suppose the proposition that x gets pleasure from ø-ing strictly implies the proposition that there is reason for x to ø. Then there is no possible world at which (i) x gets pleasure from ø-ing and (ii) x lacks reason to ø.

3. [Fa] and [Fb]

One thing counting in favour of [Fb] is that it avoids a serious problem faced by [Fa]. This is the problem described in sections 9-11 of chapter 2.

To see that it avoids this problem, consider your reason not to leave (see chapter 2, section 9). If we accept [Fa], we are forced to accept that the reason must have constituents other than the fact that leaving would cause you pain. This is because it is certainly false that

leaving would cause you pain |= there is reason for you not to leave,

and [Fa] says p is a reason for x to ø only if

p |= there is reason for x to ø.

In effect, we are forced to accept that there must be another part to the complete reason, a fact such as

(2.2) leaving would cause you pain -> there is reason for you not to leave.

Since it is not obviously false that

(3.1) leaving would cause you pain -< there is reason for you not to leave,

where '-<' expresses strict implication, [Fb] has the advantage of not forcing us to accept that your complete reason includes a fact of other than

(2.1) leaving would cause you pain.

Of course, it is possible that 'there is reason for you not to leave' is *not* strictly implied by 'leaving would cause you pain'. But - it might be thought - this is possible exactly because it is possible that the fact that leaving would cause you pain is *not* a complete reason against leaving. In general - it might be thought - the question of whether p is a complete reason for x to ø *is* the question of whether 'p' strictly implies 'there is reason for x to ø'.

To clarify this point, consider the debate over whether morality is 'categorical'. Part of this debate concerns the normative force of moral wrongness; part of it concerns whether one could have decisive reason to ø if it would be morally wrong to ø. But another part of the debate appears to concern whether the fact or facts in virtue of which actions are morally wrong are complete reasons not to perform them.

Take the special case in which x would be morally wrong to ø because x has a moral duty or obligation not to ø.[2] For some in this debate, moral 'duties ...

apply to agents independently of their own aims and interests'.[3] Others deny this; others claim

> 'I ... defeat an ascription of obligation to me ... by pointing out that doing so will serve no aim or interest that I have'.[4]

If the concern is with the relationship between (i) having a moral duty or obligation not to ø and (ii) having reason not to ø, then the question - at least in part - is whether one has reason not to ø *just* because one has a moral duty or obligation not to ø. But then it seems that what is at issue - at least in part - is whether there is a relation of strict implication between the following two propositions: the proposition that an action is immoral (the proposition that an action would violate a moral duty or obligation, for instance); the proposition that there is reason not to perform it. In other words, it seems that part of the debate concerns the status of

> (3.2) ø-ing is immoral (ø-ing would violate an obligation or duty, for example) -< there is reason not to ø.

For it seems that some in this debate would want to argue that to transform (3.2)

> 'into something true we need at least to add some further condition to the antecedent, for example about what the agent desires, or has reason to desire, or what is in his interests'.[5]

4. [Fb] ignores determination

Now I shall explain why [Fb] needs an important modification (sections 4 and 5). The explanation indicates why the question of whether p is a complete reason to ø cannot be equated with the question of whether the proposition that p obtains strictly implies the proposition that there is reason to ø.

If you have reason to ø, some or other fact constitutes your reason. And that you have reason to ø certainly follows from this fact's obtaining; if p is a reason for you to ø, then, *if* p obtains, *then* there is reason for you to ø. However, something else is true if p is a reason for you to ø: it is *in virtue of* p's obtaining that there is reason to ø.[6] So the relation between p and there being reason for you to ø is not fully captured by saying, 'if p obtains, then there is reason for you to ø'. More needs to be said. The fuller story is that, if p is a reason for you to ø, you have reason to ø if *and because* p obtains.

Following Broome, I shall make the point using the term 'determination'; 'because' connotes causation, and I do not have causation in mind (see sections 5 and 6 below). The point is that the relation of being a normative reason to involves determination and not just the truth of the conditional just mentioned. If p is a reason to ø, the proposition that p obtains stands in a certain logical relation to the proposition that there is reason to ø; this relation is one aspect of the relation of being a reason to. But p must also stand in a determining relation: if p is a reason to ø, there is reason to ø if p obtains, and p determines that there is reason to ø.

To see that we can impugn [Fb] because it ignores determination, observe that any proposition strictly implies itself. Say m is the proposition that you have reason to leap out to sea. Since any proposition strictly implies itself, m strictly implies that you have reason to leap out to sea. Now, given [Fb], it follows that the fact that you have reason to leap out to sea is a complete reason for you to do so. But this implication is absurd. Your complete reason could not be the very fact that you have reason to leap out to sea. For, although it is true that, if you have reason to leap out to sea, you have reason to leap out to sea, it is not true that the fact that you have reason to leap out to sea determines that you have reason to do so; in some relevant, non-causal sense of 'because', it is not true that you have reason to leap out to sea *because* you have reason to leap out to sea.

The conclusion I think we should draw is that it a mistake to claim that, if the proposition that p obtains strictly implies the proposition that there is a complete reason to ø, then p is a complete reason to ø. [Fb] makes this mistake. According to [Fb], it is sufficient for p to be a reason to ø that 'p' strictly implies 'there is reason to ø'. The difficulty is that, if p is a reason to ø, something more than this condition must be true; as I have said, it must be true that p determines that there is reason to ø.

5. Legal reasons and determination

It will be useful to see how [Fb] ignores the determination of legal reasons in particular. Let us consider a single example.

Suppose there is a correlation, but no more than this, between acts which are illegal and acts which are painful. Suppose that the correlation is especially strong: suppose every illegal act is painful. In other words, suppose

(3.3) ø-ing is illegal -> ø-ing is painful.

Further, suppose assault is illegal. It follows that assault is painful. It also follows that there is a complete reason not to assault, if we grant the plausible assumption that the painfulness of an act is a complete reason not to perform it. Now, given [Fb], it must be true that

(3.4) assault is painful -< there is reason not to assault.

And, since it is true that the conjunction of

(3.5) ø-ing is illegal

and

(3.3) ø-ing is illegal -> ø-ing is painful

strictly implies

(3.6) ø-ing is painful,

it follows, given [Fb], that the conjunctive fact stated by the conjunction of (3.3) and (3.5) is a complete reason not to assault. (This follows by way of the transitivity of strict implication: if a proposition strictly implies a second and the second strictly implies a third, then the first strictly implies the third.)

This implication of [Fb] is highly counterintuitive. Intuitively, the fact in virtue of which there is reason not to assault - the fact which determines that there is reason not to assault - is

(3.7) assault is painful

and not the fact which is the conjunction of the following:

(3.3) ø-ing is illegal -> ø-ing is painful; and
(3.5) ø-ing is illegal.

Think of the fact that assault is illegal. Surely this is no part of your reason; surely the most that is true is that the fact that assault is illegal is correlated with your reason.

6. Ignoring determination

The difficulty with [Fb] is that it supplies an incomplete account of the conditions under which something is a reason. This is section 4's claim. To say that 'p' strictly implies 'there is reason to ø' is to say that it is impossible for 'there is reason to ø' to be false if 'p' is true. But it is not to say that p *is* a reason to ø. For part of saying this is saying that p's obtaining makes it the case that - p determines that - there is reason to ø.

This objection to [Fb] is far from startling. It is well known that strict implication ignores determination, and it is reasonably obvious that determination is involved in the relation of being a normative reason to. I make the point only because some jurists pay insufficient attention to it.

We can see that they pay insufficient attention to the point by considering how they define reasons (section 6). But we can also see this if we consider the examples of reasons they cite (sections 7-12).

Postema says a fact is a reason 'in virtue of the fact that it figures in a sound, practical inference'; he thinks a fact is a reason when it 'determine[s] what an agent ought to do by figuring in' a valid argument to the conclusion that he or she has reason to perform an action.[7] Postema is correct to emphasise that the relation of being a reason to involves a logical aspect. That is, he is correct to suggest that the following conditional is true if p is a reason to ø: *if* p obtains, *then* there is reason to ø. But he would have done well to emphasise that it involves *more* than this. It is certainly false that it is sufficient for (i) p to be a reason to ø that (ii) the proposition that p obtains strictly implies the proposition that there is reason to ø.

Raz says we can think of reasons

> 'as ... facts, statements of which form the premises of a sound inference to the conclusion that the action ought to be done'.[8]

However, this is only partly correct. It might be true that a statement of a fact which is a reason to ø strictly implies the proposition that there is reason to ø.[9] However, as section 4 explains, it is certainly false that we can conclude from (i) the fact that 'p' strictly implies the relevant conclusion that (ii) p is a reason to ø.

One might doubt whether the remarks I have quoted from Postema and Raz really show that they accept [Fb]. Take Raz in particular. At one point, Raz offers his account of complete reasons after first saying

> 'The problem is not to explain what it means for there to be a reason. We assume that that is understood, and on the basis of this understanding we propose a definition of 'a complete reason'.[10]

So one might think that the more precise claim Raz is making is the following:

> [Fc] if p is a reason for x to ø, then p is a complete reason for x to ø if and only if the proposition that p obtains strictly implies the proposition that there is reason for x to ø.

Unlike [Fb], [Fc] does not ignore determination; since [Fc] assumes that p is a complete reason only if p is a reason, it need not assume that p is a reason to ø if 'p' strictly implies 'there is reason to ø'.

I think more conclusive evidence comes for thinking that Raz and others ignore determination when one considers the examples of reasons they describe. Very often it is clear that the putative reason satisfies [Fb]'s condition (given [Fb], the putative reason is a 'complete reason') without satisfying the determining condition (without the putative reason being a reason at all).

Consider the examples Raz gives to support his claim that it 'is easy to find many examples where the fact that the law requires an act is [a part of] a [complete] reason to perform it'.[11] In each example, the fact that an act is legally required is a conjunct of a fact which satisfies [Fb]'s condition. However, in each example it is reasonably clear that the conjunctive fact does *not* satisfy the determining condition. If it were sufficient for p to be a reason to ø that 'p' strictly implied 'there is reason to ø', then the examples would be examples in which the fact that an act is legally required is a conjunct of a fact which is a reason to perform it. The problem is that it is reasonably clear that Raz has not described examples in which the conjunctive facts *are* reason-giving. As mentioned, the conjunctive facts in question satisfy [Fb]'s condition; what is far less certain is that they are the facts in virtue of which - the facts which determine that - there is reason to perform the legally required act.

7. The first example: Julie paying her tax

Let me describe two of these examples. The first example appears in the following passage. The second is described in section 9.

> 'Consider the case of Julie. She is required by law to pay a certain sum in income tax. Moreover, her employer will sack her if she does not do so, and her ailing father will be greatly distressed to learn that she indulges in tax dodging. The fact that there is a law which requires her to pay is a reason for her to pay. To be more precise, the fact that there is such a law is a part of at least two complete reasons. Her employer's reaction to law-breaking behaviour and her desire to keep her job, together with the existence of the income tax law, are one complete reason for obeying; this might be called a prudential reason. The distress which she causes to her ailing father, together with some suitable value concerning the prevention of suffering and the existence of the law, are another complete reason for Julie to pay her tax; this could be called the moral reason'.[12]

I shall discuss the moral reason only. Raz says this reason has three 'parts': the fact that Julie is legally required to pay her tax; the fact that Julie would cause suffering if she acted illegally; and 'some suitable value concerning the prevention of suffering'. Since it is doubtful that the disvalue of an act is itself a distinct reason not to perform it (see chapter 2, section 11), I shall ignore Raz's reference to 'some suitable value concerning the prevention of suffering'. That is, I shall assume Raz that believes that Julie's moral reason is fully constituted by the following two facts:

> (3.8) Julie is legally required to pay tax;
>
> (3.9) Julie would cause suffering if she acted illegally.

That is, I shall assume that Raz believes that Julie's complete reason is

(3.10) Julie is legally required to pay tax, and she would cause suffering if she acted illegally.

Given [Fb], this belief seems correct. For [Fb] says p is a reason to ø if the proposition that p obtains strictly implies the proposition that there is reason to ø, and it seems true that

(3.11) Julie is legally required to pay tax, and she would cause suffering if she acted illegally -< there is reason for Julie to pay her tax.

That is, it seems true that there is reason for Julie to pay her tax in every possible world in which (i) Julie is legally required to pay her tax and (ii) she would cause suffering if she acted illegally.[13] However, does (3.10) satisfy the determining condition? It seems to follow from (3.10)'s obtaining that there is reason for Julie to pay her tax, but is (3.10) the fact *in virtue of which* she has reason to act?

Admittedly, this is a very difficult question. Even when it is clear that there is a reason to perform an act, it is often difficult to say which exact fact constitutes the reason. (Is my reason to avoid you the fact that you stood on my toe or the fact that you bruised my toe or the fact that you caused me pain?) Still, I think it is reasonably clear that (3.10) is not the fact in virtue of which Julie is pro tanto justified in paying her tax. It is reasonably clear that the fact which satisfies the determining condition is a fact implied by (3.10) rather than (3.10) itself, namely

(3.12) Julie would cause suffering if she didn't pay her tax.

As far as I can see, (3.11) is plausible only because it is plausible that *(3.12)* strictly implies that there is reason for Julie to pay her tax.[14] More generally, (3.11) is plausible only because it is plausible that x has reason to ø in every possible world in which x would avoid causing suffering by ø-ing.

To help lend credence to the view that

(3.10) Julie is legally required to pay tax, and she would cause suffering if she acted illegally

is not of normative significance in itself, I shall add a further detail to Raz's example. As we have seen, Julie's 'ailing father will be greatly distressed to learn that she indulges in tax dodging'. Let us suppose that Julie's father will also be distressed unless she saves for her retirement; imagine that Julie's father is concerned for Julie's welfare in general and that he would suffer if she failed to save for her retirement.

The question to ask is whether Julie's reason to save for her retirement is any different to her reason to pay her tax. Is the fact which is the reason the same or different? There are different actions to which the reason or reasons pertain: there is reason for Julie to *pay her tax* and there is reason for Julie to *save for her retirement.* Still, it does not follow from this that there are different reasons; one can have the same reason to perform two or more different actions.

The reasons would *not* be the same if there were distinct disvalue in causing suffering when the action which causes suffering is also illegal. This is because only one of the two actions is illegal: Julie is legally required to pay her tax, but there is no legal requirement for her to save for her retirement. The problem is that it is difficult to accept that there are reasons not to cause suffering and distinct reasons not to cause suffering by acting illegally. Notice that, if there were both types of reason, then Julie would have two reasons to pay her tax: the fact that she would cause her father suffering if she did not; the fact that she would cause her father suffering by performing an illegal act. I doubt that Raz would wish to accept this. The action Julie has moral reason to perform - her reason to pay her tax - is an action she is legally required to perform, but I doubt that Raz would be prepared to argue that this fact is of special normative significance.

I think it is reasonably clear that Julie's reason to save for her retirement is no different to her reason to pay her tax; in both cases, it seems reasonably clear that the

reason is that a certain action would prevent suffering. But, if this is correct, then Julie's original reason - her reason to pay her tax - is (3.12) rather than (3.10).

8. The significance of (3.8)

Admittedly, there are important relations between (3.10) and Julie having reason to pay her tax. If I am correct, the reason is (3.12), and (3.12) is strictly implied by (3.10). In addition, there is a causal relation. (3.10) is no doubt a cause of (3.12); it is no doubt true that Julie has reason to pay her tax because she is legally required to pay it and because her father would be greatly distressed if she violated the law. But we can admit that there are logical and causal connections between p and it being true that a person has reason to act - and admit that, in ordinary language, it would be common to say that Julie's reason is (3.10) - without admitting that p is a reason. A fact is not a reason just because it implies or causes a fact which is a reason or just because, in ordinary language, we often describe a fact as a reason if it implies or causes a fact which is a reason.

If (3.10) is not Julie's reason, then

(3.8) Julie is legally required to pay tax

is no 'part of' her reason. In the passage quoted above, Raz says 'the fact that there is a law which requires her to pay' is a part of Julie's reason. More generally, Raz sees himself as describing situations in which a part of 'the reason to do that which is required by the law is the very fact that it is so required'.[15] However, if I am correct that Julie's reason is (3.12) rather than (3.10), (3.8) is normatively irrelevant, at least in this case.

On balance, this is an intuitive implication. Since (3.8) is a causal antecedent of (3.12), one might mention the illegality of tax dodging when explaining why Julie has a reason to pay her tax; indeed, one might say that, *unless* (3.8) obtained, Julie

would lack a reason to pay her tax, for one might think that (3.12) would not have obtained if (3.8) had not. Still, it would be counterintuitive to say that Julie's reason is or includes (3.8), unless one thought there is special disvalue in causing suffering *by acting illegally* (see section 7). True, the action Julie has reason to perform is legally required. But it seems that one could fully describe her normative predicament without mentioning this fact; intuitively, the only relevant fact about Julie paying her tax is that this would avoid causing great distress.[16]

9. The second example: Coldfield driving on the left

Now for the second example.

Many jurists accept that a legal fact can contribute to solving a co-ordination problem, since it can contribute to establishing a special type of convention.[17] Some dispute whether the obtaining of a legal fact is ever necessary or sufficient for establishing such a convention.[18] Nonetheless, there is general agreement that a legal fact supplies a reason to act when it at least contributes to solving a co-ordination problem.[19]

More precisely, the agreement is that a legal fact is of normative significance when it contributes to solving a co-ordination problem *as a valuable means*. The *end* is the interests of those for whom the co-ordination problem is a problem; the claim is that a legal fact is at most 'a part of a complete reason', since the complete reason includes 'The ultimate values ... [determined by] ... the common interests of the parties involved'.[20]

Suppose Mr Coldfield would avoid pain if a particular co-ordination problem were solved (call this co-ordination problem 'cp'). Further, suppose Coldfield would contribute to cp's solution by acting as a particular legal requirement requires (call this legal requirement 'l'). Finally, suppose that the action l requires is driving on the left. In this case, no jurist would claim that Coldfield's complete reason is

(3.13) l requires Coldfield to drive on the left.

Instead, the claim would be that Coldfield's complete reason includes (3.13) and two further facts:

(3.14) Coldfield would secure cp's solution by acting as l requires

(3.15) Coldfield would avoid pain if cp were solved.

In other words, the claim would be that the complete reason is the fact which is the conjunction of (3.13), (3.14) and (3.15), namely

(3.16) l requires Coldfield to drive on the left, Coldfield would secure cp's solution by acting as l requires, and Coldfield would avoid pain if cp were solved.

In this example, the fact that an act is legally required is a conjunct of a fact which satisfies [Fb]'s condition: (3.13) is a conjunct of (3.16), and it seems that the proposition that (3.16) obtains strictly implies the proposition that there is reason for Coldfield to drive on the left. Given [Fb], it follows that this is an example in which the fact that an act is legally required is a part of a complete reason to perform it.

It is uncertain whether we should accept this conclusion, however. As mentioned, it seems that the proposition that (3.16) obtains strictly implies the proposition that there is reason for Coldfield to drive on the left: given (3.16), it certainly seems to follow that Coldfield has reason to drive on the left.[21] However, it is uncertain that (3.16) is the fact that determines that there is reason for Coldfield to drive on the left. Raz thinks it 'is easy to find many examples where the fact that the law requires an act is [a part of] a reason to perform it' (see section 6), and it seems that we have reason to act as the law requires when it contributes to solving a co-ordination problem. But is the fact that a certain act is legally required a part of our reason to act as the law requires when it contributes to solving a co-ordination problem?

10. Coldfield would avoid pain by driving on the left

To answer this question, consider the particular scenario I have described: l requires Coldfield to drive on the left; Coldfield would contribute to cp's solution by acting as l requires; Coldfield would avoid pain if cp were solved; there is reason for Coldfield to drive on the left. I would wish to argue that

> (3.16) l requires Coldfield to drive on the left, Coldfield would secure cp's solution by acting as l requires, and Coldfield would avoid pain if cp were solved

is *not* the fact in virtue of which there is there is reason for Coldfield to drive on the left. Given (3.16), Coldfield has reason to drive on the left, but it seems reasonably clear that the reason is a fact implied by (3.16) rather than (3.16) itself. It seems reasonably clear that the reason is

> (3.17) Coldfield would avoid pain by driving on the left.

Let me show that this is the case by describing an alternative state of affairs in which (3.17) obtains but (3.16) does not. In the alternative state of affairs, (3.16) fails to obtain because - although (3.15) obtains - (3.13) and (3.14) do not. Coldfield would avoid pain by driving on the left because (i) driving on the left would contribute to cp's solution and (ii) Coldfield would avoid pain if cp were solved, but - in this alternative state of affairs - it is not because l requires driving on the left that driving on the left contributes to cp's solution. In fact, in the alternative state of affairs, l does not require driving on the left, and Coldfield would not secure cp's solution by acting as l requires; as mentioned, neither (3.13) nor (3.14) obtain.

Notice that (3.17), unlike (3.16), obtains in both the actual and alternative states of affairs: I have stipulated that (3.17) obtains in the alternative state of affairs, and (3.17) must obtain in the actual state of affairs since (3.16) obtains in this and (3.16) implies (3.17). And notice that Coldfield has reason to drive on the left in both

states of affairs: we are assuming that it follows from (3.16) that Coldfield has reason to drive on the left, and (3.16) obtains in the actual state of affairs; (3.17) obtains in the alternative affairs and it is plausible that Coldfield has reason to drive on the left if (3.17) obtains.[22]

Why is it that Coldfield's reason in the actual state of affairs is (3.17) rather than (3.16)? The answer is that (3.16) does not obtain in the alternative state of affairs even though Coldfield's normative predicament seems identical. In both states of affairs, Coldfield has reason to drive on the left; I have mentioned this already. However, it also seems that Coldfield's reason to drive in the left - the fact which supplies a reason of a certain weight to drive on the left - *is the same*: it does not seem as if (3.16) and (3.17) supply distinct reasons to drive on the left.

If the reasons were *not* the same, then Coldfield would have two reasons to drive on the left in the actual state of affairs. If it follows from (3.16) that Coldfield has reason to drive on the left, then he has one reason to drive on the left: (3.16) obtains in the actual state of affairs. But if it follows from (3.17) that Coldfield has reason to drive in the left, and if (3.16) and (3.17) do not supply the same reason, then Coldfield has a second reason: (3.17) obtains in the actual state of affairs as well. This seems incorrect, however. It might follow from (3.16) that Coldfield has reason to drive on the left, but it does not seem that he would have a second reason even if (i) (3.16) implies (3.17) and (ii) it follows from (3.17) that Coldfield has reason to drive on the left. Instead, it seems that if it follows from (3.16) that there is reason for Coldfield to drive on the left, this is because (3.17) is the reason and (3.17) follows from (3.16).

11. The significance of (3.13)

In section 9, I said it is plausible that Coldfield has reason to drive on the left if the following facts obtain: l requires Coldfield to drive on the left; Coldfield would

contribute to cp's solution by acting as l requires; Coldfield would avoid pain if cp were solved. Section 10's argument is that this is plausible only because (i) it follows from the obtaining of these facts that Coldfield would avoid pain by driving on the left and (ii) there is reason to perform an act if performing it would avoid pain.

It might be replied that it follows just from the fact Coldfield is legally required to drive on the left that he has reason to drive on the left. That is, it might be claimed that it is plausible that there is reason for Coldfield to drive on the left if (3.16) obtains exactly because

(3.13) l requires Coldfield to drive on the left

is a conjunct of (3.16). But then the argument would be that Coldfield's reason is (3.13) rather than (3.16). That is, the argument would not be that Coldfield's predicament is one in which the fact that an act is legally required *is part of* a complete reason to perform it.

There is another possible reply. Raz could maintain that there is special value in avoiding pain when (i) the pain depends on the existence of a co-ordination problem and (ii) one contributes to solving this co-ordination problem by acting as the law requires. With respect to (i), the argument would be that it is essential to Coldfield's reason to drive on the left that driving on the left would avoid pain *caused by the existence of a co-ordination problem.* With respect to (ii), Raz would have to contend that Coldfield would have a different reason to drive on the left if driving on the left were not legally required (even if driving on the left would contribute to solving cp, and even if he would avoid pain if cp were solved).

This second reply is not very plausible. Consider (i). Normally we think that the cause of a pain is irrelevant to a reason to avoid it. Suppose you will avoid pain at 7 am by running. Would you have a different reason to run at 8 am just because the pain you would avoid at 8 am would have a different cause? Normally we would say 'no': we would say that your reason would be the same at 8 am ('running would avoid pain').

Consider (ii). It is not very plausible that it matters to Coldfield's reason that it pertains to a legally required act. Driving on the left is legally required, and Coldfield would avoid pain by conforming to the law. However, it seems that, in themselves, these facts lack normative significance: it seems that they are only contingently related to the fact which *is* of normative significance (the fact that Coldfield would avoid pain by driving on the left).

It is important to observe that I accept that there might be a sense in which it would be false to say that Coldfield would have reason to drive on the left even if driving on the left were not legally required. There is not merely *a correlation* between

(3.13) l requires Coldfield to drive on the left

and it being true that there is reason for Coldfield to drive on the left; for all I have said, (3.13) might have been causally necessary for the obtaining of a fact which is a reason for Coldfield to drive on the left. However, I can accept this without accepting that (3.13) is itself of normative significance, since a fact can be a cause of a reason without itself being a reason or part thereof. Suppose I am correct that (3.17) is a reason for Coldfield to drive on the left, and suppose (3.13) is a causal antecedent of (3.17). Why must we conclude that (3.17) is itself a reason?

12. A practical difference

According to [Fb], if p is a complete reason to ø, then so is q if q strictly implies p. For example, if (3.17) is a complete reason for Coldfield to drive on the left, then so is (3.16). For (3.16) strictly implies (3.17), strict implication is transitive, and [Fb] has it that it is sufficient for p to be a reason to ø that the proposition that p obtains strictly implies the proposition that reason to ø.

To my mind, this consequence of [Fb] is highly counterintuitive. It seems that a fact could fail to be a reason even if the proposition that it obtains strictly implies the proposition that a reason-giving fact obtains. In section 11, I observed something very similar: it is counterintuitive to think that a fact is a reason just because it is a cause of a reason.

Just in case this last claim seems controversial, think of a situation in which the causal relation between the obtaining of p and the obtaining of a fact which is a reason is less straightforward than when p contributes towards solving a co-ordination problem. Suppose the fact that an action is painful is a reason not to perform it. Then, if playing hopscotch is painful, there is reason not to play hopscotch. Typically, playing hopscotch is not painful, but it is easy to imagine a situation in which the reverse is the case. Moreover, it is easy to imagine a situation in which playing hopscotch is painful because of the obtaining of a legal fact. Imagine that you are hypnotised with the effect that you feel pain playing hopscotch if you believe that assault is illegal. Since you believe that assault is illegal, you have reason not to play hopscotch, given that playing hopscotch would cause you pain.

Now, if one accepts (i) that p is a reason to ø if p is a causal antecedent of a reason to ø and (ii) that p is a legal reason to ø if p is the fact that ø-ing has a certain legal status, then one would have to accept the counterintuitive consequence (iii) that your reason not play hopscotch is a legal reason. One would have to accept this consequence because the reason-giving fact is a causal consequence of the fact that assault is legally proscribed. Of course, the fact that playing hopscotch would be painful depends on much else. For example, it depends on the fact that you were hypnotised. But one causal antecedent of the reason-giving fact is the fact that assault is legally proscribed: the fact that assault is illegal is a causal antecedent of the fact that you believe that assault is illegal, and the fact that you believe that assault is illegal is a causal antecedent of the fact that you feel pain when playing hopscotch. Therefore, the fact that

you are legally required not to assault would be reason-giving in this case. This is a tremendously counterintuitive consequence. The conclusion to draw is that p could be a cause of a reason to ø without being a reason to ø.

If we accept this conclusion, what follows for the falsity of the 'no difference thesis' (see chapter 1, section 5)? In other words, what follows for the truth of the practical difference thesis? As we saw in chapter 1, the no difference thesis has it that the exercise of authority - for example, the issuing of an authoritative legal directive - 'does not change people's reasons for action'.[23] Raz opposes this thesis, as we saw as well. He argues that a legal requirement can 'make it more likely that a [co-ordination problem-solving] convention will be established' and thereby provide those subject to the problem 'with reasons which they did not have before'. Raz qualifies his claim:

> 'It is true that once a useful co-ordinating convention is established every person has reason to adhere to it, a reason which is independent of the authority, a reason deriving entirely from the existence of the useful convention. The same is true where there is a good prospect that such a convention will emerge. The point of my argument is that sometimes authoritative intervention creates that prospect ... [and] ... [o]nce the directive is issued, individuals have reasons they did not have before'.[24]

But notice that the no difference thesis could be false even if - as I claim - p could be a cause of a reason to ø without being a reason to ø. The no difference thesis is false because a legal fact (for example, the fact that an action is legally required) can be a causal antecedent of a fact which is a reason. As far as I can see, it is only in a *causal* sense that a convention-establishing legal directive can 'change people's reasons for action'.[25]

Think of Coldfield's reason to drive on the left. The fact that Coldfield is legally required to drive on the left could provide Coldfield with a reason he 'did

not have before'. And, since Coldfield's reason is a reason to act, it would not be inappropriate to say that the obtaining of

(3.13) l requires Coldfield to drive on the left

'makes a practical difference'. However, we need not conclude that (3.13) is a reason - even a part of a reason - for Coldfield to drive on the left.

13. Conclusion

The main aim of this chapter has been to show the incorrectness of a certain widely accepted account of the conditions under which a fact is a reason. This is the account expressed by the following:

> [Fb] p is a complete reason for x to ø if and only if the proposition that p obtains strictly implies the proposition that there is reason for x to ø.

As we have seen, [Fb] is one interpretation of Raz's famous claim that 'the fact stated by any set of premises which entail that there is a reason to perform an action is a complete reason for performing it'.

[Fb] is incorrect, I have argued, since it ignores the fact that p is a reason to ø only if p's obtaining *determines* that there is reason to ø. It might be true that p is a reason to ø only if 'p' strictly implies 'there is reason to ø' (but see chapter 4, sections 6-11). However, it is certainly insufficient for p to be a reason to ø that this relation of strict implication holds (sections 4-5, above).

The chapter has had two subsidiary aims. The first relates to Raz's practical difference thesis. This thesis is widely accepted, and I have attempted to show that it is compatible with a rejection of [Fb] (section 12). The fact that an action is legally required might make a practical difference to whether or not a co-ordination problem

is solved, but a fact is not a reason - even a part of a reason - just because it is a causal antecedent of a reason. I have emphasised this while arguing that a fact is not a reason just because it satisfies [Fb]'s condition.

The second subsidiary aim has been to describe purported examples of the contrast between complete reasons and parts of complete reasons. I have argued - and in chapter 4 I will continue to argue - that existing formulations of this contrast are unacceptable. However, it is useful to see examples of reasons which have been taken to illustrate the contrast. This is one reason why I have directed so much attention to Julie's reason to pay her tax (see sections 7-8) and Coldfield's reason to drive on the left (see sections 9-12).

Another reason is that I have wanted to offer evidence for the view that Raz and others accept [Fb]. Raz and others would say that Julie's reason is

> (3.10) Julie is legally required to pay tax, and she would cause suffering if she acted illegally.

Likewise, many would say that Coldfield's reason is the following:

> (3.16) l requires Coldfield to drive on the left, Coldfield would contribute to cp's solution by acting as l requires, and Coldfield would avoid pain if cp were solved.

These claims are plausible if one accepts [Fb]; given [Fb], it appears that (3.10) is a complete reason for Julie to pay tax and it appears that (3.16) is a complete reason for Coldfield to drive on the left. But the claims are not very plausible otherwise, for it seems reasonably clear, I have argued, that the reasons are really the following:

> (3.12) Julie would cause suffering if she did not pay her tax; and
>
> (3.17) Coldfield would avoid pain by driving on the left.

Let me conclude by observing that my arguments for thinking (i) that Julie's reason is (3.12) and (ii) that Coldfield's reason is (3.17) are incomplete. In section 7, I argued that it is reasonably clear that the fact in virtue of which Julie is pro tanto justified in paying her tax is (3.12) rather than (3.10), but I did not explain in detail why we should accept that (3.12) satisfies the determining condition if, as I claimed, (3.10) does not. In section 11, I argued that it would be plausible that Coldfield's reason is (3.16) rather than (3.17) only if it were plausible, as I claimed it is not, that there is distinct value in avoiding pain by ø-ing when ø-ing is legally required. However, I did not explain how we are to decide whether a particular reason is constituted by p rather than q when 'p' strictly implies 'q' (notice that the proposition that (3.16) obtains strictly implies the proposition that (3.17) obtains).

In general, the problem is that I have not explained what I mean by saying that, if p is a reason to ø, then there is reason to ø if p obtains *and p determines that* there is reason to ø. Put differently, the problem is that the arguments I have offered leave the notion of determination intuitive. I think these arguments are compelling; for example, I think it is clear that I have shown that it is not in virtue of (3.10) that Julie has reason to pay tax. But it is important to observe that there is an important respect in which my arguments remain incomplete.

For the purposes of this thesis, however, the incompleteness of these arguments is of little consequence. In fact, it would be of little consequence if *these* arguments lacked cogency altogether. It is important that I have shown that [Fb] is unacceptable. But, as we shall see, it is unimportant whether I have shown that certain facts which satisfy [Fb]'s condition are not actually reasons.

Of course, it is of considerable importance whether the facts many jurists have described as legal reasons are reasons at all. It matters, for example, whether the law is normative when it contributes to solving co-ordination problems. Likewise, it is important whether the law supplies reasons to act and not only reasons to believe there are reasons to act (see chapter 2, sections 2-7). However, for the purposes of this thesis, is actually immaterial whether this or that particular legal fact is reason-giving.

[1] Hughes and Cresswell 1996 pp. 202-4.

[2] To simplify the discussion, I shall assume that the debate's participants agree that it follows from the fact that x is obligated to ø that x has at least a part of a complete reason to ø.

[3] See Brink 1997 p. 256.

[4] Brink (1997 p. 256) affirms the contrary view.

[5] Skorupski 1997 p. 361. Skorupski does not suggest that the debate concerns a conditional involving strict implication. Nor does he mention complete reasons.

[6] Compare Broome 1999 p. 2. Raz indicates that he is aware of this when he writes (1990 p. 24, emphasis added) that 'the truth of statements of the form [p is a reason for x to ø] is *partly* a matter of logic'.

[7] 1998 p. 346 fn. 29.

[8] 1989 p. 1155.

[9] But see chapter 4, section 7.

[10] Raz 1990 p. 23.

[11] Raz 1979 pp. 234-58.

[12] 1990 pp. 155-6. Very similar examples appear in Raz 1979 pp. 233-4.

[13] Would it be an error *of logic* to deny (3.11)? Blackburn (1984 pp. 182-5) observes that 'it does not seems a matter of ... logical necessity that any given total state of a thing gives it some particular moral quality', and he might have in mind the quality of supplying a moral reason to act. However, we can ignore this complication here: nothing in the present discussion - in the discussion in the thesis more generally - turns on it.

[14] Since we are considering the possibility of situations in which the fact that an act is legally required is only *a part of* a complete reason to perform it, I shall ignore the

possibility that (3.11) is plausible because it is plausible that '(3.8)' strictly implies 'there is reason for Julie to pay her tax'.

15 Compare Raz 1979 p. 234.

16 I continue to ignore the prudential reason.

17 See Postema 1986 p. 176 (a regularity 'of behaviour in a community in recurring situations calling for co-ordinated activity, where the need for co-ordination and the fact of general conformity are common knowledge').

18 See, for example, Green 1988 pp. 111-21. There is also dispute about the practical significance of such a reason. For example, there is dispute about whether the legal fact also supplies a 'second-order' reason of the exclusionary type considered in chapter 8.

19 See, for example: Green 1988 pp. 118-19; Raz 1986 pp. 49, 60, 67.

20 Green 1988 p. 100.

21 Of course, (3.16) could not be a reason for Coldfield to drive on the left if this were not the case: in general, it is true that p is a reason for x to ø only if there is reason for x to ø if p obtains (see section 4).

22 In general it is plausible that x has reason to ø if x would avoid pain by ø-ing.

23 Raz 1986 p. 30. At one place (1986 p. 48) it is a substantive thesis about the reasons an authority *should attempt* to supply, but we can ignore this here.

24 1986 p. 50.

25 Some of Raz's remarks are compatible with this point. For example, he says (1990 p. 155) that his interest is in 'what difference the fact that a norm belongs to a legal system in force in a certain country makes', and he could mean a *causal* difference.

Chapter 4 Strict and material reasons

1. Introduction

In chapter 1, we saw that Raz believes that a reason to avoid a legal sanction is a reason

> 'to do that which the law requires because it requires it; hence ... [it is] unlike many moral reasons which are reasons to do that which the law requires for grounds not dependent on the fact that the law requires them'.[1]

Intuitively, a reason is legal only if it 'depends' on the fact that an action is legally required. But must a legal reason depend *entirely* on this? In chapter 1, I set out the following basic claim:

> [B] if p is a reason for x to ø, p is a legal reason for x to ø if and only if p is the fact that ø-ing has a certain legal status with respect to x.

The question is whether p could be a legal reason to ø if p is a reason to ø *only given the obtaining of certain additional facts.* For example, the question is whether p could be a legal reason for x not to assault if p is a reason for x not to assault only given that x would suffer a legal sanction if he or she assaulted.

This question is commonly expressed in terms of a distinction between complete reasons and parts of complete reasons. Could the fact that an action has a certain legal status be a legal reason to perform it if this fact is only a part

of a complete reason to perform it? According to a strict view, p is a legal reason to ø only if p is fully constituted by the fact that ø-ing has a certain legal status. Consider Raz's description of Julie's moral reason to pay her tax:

> 'The distress which she causes to her ailing father, together with some suitable value concerning the prevention of suffering and the existence of the law, ... [constitute a] complete reason for Julie to pay her tax' (see chapter 3, section 7).[2]

According to the strict view, Julie's reason would not count as a legal reason, since - if Raz is correct - her complete reason includes more than the fact that she is legally required to pay her tax. For example, it includes the fact that she would cause her father distress if she acted illegally.

According to a less strict view, a reason to ø is legal if at least a part of the complete reason is the fact that ø-ing has a certain legal status. According to this view, Julie's reason *would* count as a legal reason. For, assuming that Raz's description is correct, '[t]he fact that there is a law which requires her to pay is ... a part of ... [a] complete' reason'.[3]

How exactly are we to understand the contrast between complete reasons and parts of complete reasons? In chapter 4, I shall round off my discussion of existing accounts of this contrast. In chapters 2 and 3, the concern was with complete reasons. In chapter 4, I shall consider a widely accepted account of the nature of reasons which are only parts of complete reasons (section 4). My argument will be that we should reject this account (section 5). But the main aim of chapter 4 is to introduce a distinction between 'strict' and 'material' reasons. Roughly speaking, this distinction corresponds to Raz's formulation of the distinction between complete reasons and parts of these, but - as we shall see - it avoids certain problems faced by this formulation.

2. Determination

A fact is a reason to ø only if its obtaining determines that there is reason to ø. Jurists sometimes ignore this, as we saw in chapter 3. Sometimes they suggest that p is a reason to ø just in case the proposition that p obtains strictly implies the proposition that there is reason to ø. Perhaps p is a reason to ø *only if* 'p' strictly implies 'there is reason to ø' (but see section 7 below). However, this condition is certainly insufficient for p to be a reason to ø.

In chapter 3, I also said that, if p is a reason to ø, then (i) if p obtains, there is reason to ø and (ii) p determines that there is reason to ø. Here is one possible interpretation of the conditional expressed in (i): if p is a reason to ø, 'p' *strictly implies* 'there is reason to ø'. I shall shortly consider another. What, though, are we to make of (ii)? If p is a reason to ø, and p obtains, then p determines that there is reason to ø, but when *does* a fact determine that there is reason to ø? For example, when is it true that

(3.12) Julie would cause suffering if she did not pay her tax

rather than

(3.10) Julie is legally required to pay tax, and she could cause suffering if she acted illegally

determines that Julie has reason to pay tax?

This is an extremely difficult question. Indeed, Scanlon might be correct that

> 'Any attempt to explain what it is to be a reason for something ... lead[s] back to the same idea: a consideration that counts in favor of it. 'Counts in favour how?' one might ask. 'By providing a reason for it' seems to be the only answer'.[4]

Thankfully, I have no need to answer this question here. For the purposes of this thesis, I can assume that we already know what is true when it is in virtue of p that there is reason for x to ø. Arguments in chapters 5-8 certainly rely on certain claims about what is true when p is a reason to ø, and these are claims I explain and defend in chapters 2-4. However, they leave the notion of determination intuitive. What they do *not* leave intuitive - what they *do* rely on - are certain claims about the conditional expressed in (i). As we shall see, it is on the basis of these claims that a distinction can be drawn between strict and material reasons.

3. Strict reasons

Suppose you have reason to evade her. Some or other fact constitutes your reason: some or other fact makes it the case that you pro tanto ought to evade her. The relation between the obtaining of this fact and it being true that you pro tanto ought to evade her is not contingent: given the obtaining of this fact, you pro tanto ought to evade her. I mean there is a sense in which it is true that, if p is a reason to ø, then, *if* p obtains, *then* there is reason to ø.

What sort of conditional is this? [Fb], discussed in chapter 3, suggests an obvious answer:

> p is a reason to ø only if 'p' strictly implies 'there is reason to ø'.

However, this answer is overly demanding. As we shall see in section 7, p could be a reason to ø even if the relation between the proposition that p obtains and the proposition that there is reason to ø is other than that of strict implication. Still, the answer is correct - I think - for one important type of reason. I call them 'strict reasons':

[G] p is a strict reason to ø = Df (i) p is a reason to ø and (ii) the proposition that p obtains strictly implies the proposition that there is reason to ø.

Think of legal reasons in particular. You have a strict legal reason to ø only if the proposition that ø-ing has a certain legal status strictly implies the proposition that you have reason to ø. Suppose the illegality of assault is a strict reason for you not to assault. Then, since assault *is* illegal, it is logically impossible for you not to have reason not to assault. In different terms: in every possible state of affairs in which you are legally proscribed to assault, you have reason not to assault.[5]

4. Is any legal reason strict?

It is doubtful whether many jurists believe there actually are strict legal reasons. As we have seen, Greenawalt refers to situations in which a reason to act 'derives from the interposition of law', but Greenawalt need not have strict legal reasons in mind. This is because a reason to ø could 'derive from the interposition' of p even if it did not derive *solely* from p.

Actually, it seems unlikely that Greenawalt has strict legal reasons in mind. For he qualifies his remark by saying:

> 'At least in a society with a decent political and legal order, the law's requirements of certain behaviour may be a significant moral basis for engaging in that behaviour'.[6]

Greenawalt's claim seems to be that it could follow from the fact that an action is legally required that there is reason to perform it *if* the society in which the action is legally required has a decent political and legal order. But then he is not claiming that the proposition that an action is illegal strictly implies the proposition that there is reason not to perform the action.

On the other hand, some jurists do seem to think that there are legal reasons which are strict. Consider Schauer's reference to situations in which one has reason to act '*just* because of the law'.[7] Since 'p' strictly implies 'there is reason to ø' only if there would be reason to ø in any state of affairs in which p obtains, and since 'x just because y' could be interpreted as 'x in any state of affairs in which y', Schauer could well have strict implication in mind.

Schauer also refers to situations in which a reason to perform a legally required act is 'the *very* fact that it is so-required'; in such situations, he says, there is reason to conform to 'the law *qua* law', to 'the law *simpliciter*'.[8] This suggests that Schauer is not thinking of situations in which it follows from the obtaining of a legal fact *and others* that there is reason to act. Instead, this suggests he is thinking of situations in which I have reason to act 'simply and only because the law to which I am subject says I must'.[9]

For our purposes, it is actually immaterial whether any legal reason *is* strict. Overall, our aim is not to describe the actual character of the normativity of law. For example, our aim is not to determine whether Scotland's criminal code is normative or whether this or any other criminal code supplies strict reasons to conform to it. For present purposes, only two considerations are of importance. The first is that it is conceptually possible for a reason - legal or otherwise - to be strict. The second is that some jurists have believed that there are strict legal reasons.

5. Partial reasons

Could p be a legal reason *without* being a strict reason? Is p a reason to ø only if p is a strict reason to ø? The remainder of chapter 4 addresses these questions. I shall begin by considering the claim that a reason can be 'partial' rather than 'complete'. I first mentioned this claim in chapter 2 when I noted Raz's belief that

> 'A fact is a reason only if belongs to a complex fact which is a complete reason, and yet not only the complete reason but its constituent facts as well are reasons'.[10]

If p is a complete reason to ø just in case the proposition that p obtains strictly implies the proposition that there is reason to ø, it is tempting to say

> [Ga] p is a partial reason for x to ø if and only if: (i) 'q' strictly implies 'there is reason for x to ø'; and (ii) 'p' is a conjunct of 'q'.

However, this definition is unacceptable, for - as with [Fb] - the definition ignores the fact that, if p is a reason to ø, then, if p obtains, p *determines* that there is reason to ø. The upshot is that [Ga]'s conditions could at most account for only one component of what is true when p is a partial reason to ø. In other words, the upshot is that it is not sufficient for p to be a reason that it satisfies [Ga]'s conditions.

But one might think that p is a certain type of reason *only if* it satisfies these conditions. One might think that we could claim

> [Gb] p is a partial reason to ø only if (i) 'q' strictly implies 'there is reason to ø' and (ii) 'p' is a conjunct of 'q'.

Recall Raz's thought that

> 'Statements of facts which are reasons for the performance of a certain action by a certain agent are the premises of an argument the conclusion of which is that there is reason for the agent to perform the action'.[11]

[Gb] suggests we could say that a fact is a partial reason for x to ø only if the conclusion that there is reason for x to ø is strictly implied by a statement of this fact plus one or more additional statements.

6. [Gb] and the conditional

If p is a reason to evade her, and p obtains, then it must somehow follow that you have reason to evade her. That is to say, there is a sense in which the following is true if p is a reason for x to ø: *if* p obtains, *then* there is reason for x to ø. This is a point I have made several times. The question I want to consider is whether [Fb] captures this point.

Unfortunately, it does not. The problem is that p could be a partial reason to evade her even in a situation in which p obtains and there is no reason to evade her. Suppose p is a conjunct of q, and suppose 'q' strictly implies 'there is reason to evade her'. In this case, p could be a partial reason to evade her (it satisfies [Gb]'s condition). Now, if q obtains, it follows that you have reason to evade her. But we cannot conclude that, *if p obtains*, you have reason to evade her, for q might not obtain even if p does obtain. (Notice that p is only a conjunct of q). Imagine that p obtains but q's other conjuncts do not. Then it is open question whether, given p, you have reason to evade her. However, if this is an open question, then the conditional under scrutiny, namely

if p obtains, then there is reason for x to ø,

has not been satisfied.

To see this more clearly, consider a more concrete example. You hear a fire alarm, and you take yourself to have reason to leave the building. You do not take the sounding of the fire alarm to be a complete reason to leave, since you admit that the reason-giving force of this fact depends on the obtaining of others (the fact that there is a fire, for example). Still, you take yourself to have reason to leave; you take yourself to have a *partial* reason to leave. But do you have a reason to leave at all? Not necessarily, since p is a reason to ø only if there is reason to ø if p obtains, and you could lack reason to leave even if (as is the case here) the fire alarm sounds. It might follow from the sounding of the alarm that you have reason *to believe* you have

reason to leave. But it need not follow from the sounding that you actually have reason to leave - for, obviously, there may be no fire.

7. Material reasons

Our question is whether p could be a reason without being a strict reason (see section 5). Raz's remarks about reasons which are less than complete suggest that the answer is 'yes'. They suggest that a reason could be partial. Section 6 argues against this suggestion. If p is a reason to ø, then, if p obtains, it follows that there is reason to ø. However, p could satisfy [Gb]'s condition for being a partial reason even when this conditional is not satisfied.

Nonetheless, I think 'yes' is certainly the correct answer. In my view, a reason can be other than strict because the implication expressed in 'if p obtains, then there is reason to ø' need not be strict. If p is a reason to ø, then, *if* p obtains, *then* there is reason to ø, but I see no justification for thinking that the conditional in question must involve strict implication.

The alternative conditional I have in mind is material implication:

> if p is a reason to ø, then p is a material reason to ø if p materially implies that there is reason to ø.

If one proposition strictly implies a second, then the first also materially implies the second. So, given the definitions given above, if p is a strict reason to evade her, p is also a material reason to evade her. However, notice that this does not count against thinking that the answer to our question is 'yes', since p could be a material reason to ø without being a strict reason to ø (a proposition can materially imply another without strictly implying it).

That said, it will be useful to have a sharp contrast between strict and material reasons. Therefore, I shall prefer to say:

[H] p is a material reason to ø = Df (i) p is a reason to ø; (ii) the proposition that p obtains strictly implies the proposition that there is reason to ø; and (iii) the proposition that p obtains does not strictly implies the proposition that there is reason to ø.

This means a reason is either strict or material but not both.

Material reasons differ from partial reasons in an important respect. If p obtains, there might not be reason to ø even if p is a partial reason to ø (see section 6). But this impossible if p is a material reason to ø: if p is a material reason to evade her, and p obtains, then there is a sense in which it *follows* that there is reason to evade her.

Of course, material reasons also differ from strict reasons. Consider a reason to evade her. If p is a material reason to evade her, you have reason to evade her, if p obtains. More is guaranteed if p is a strict reason. If p is a strict reason, you would have reason to evade her even if the actual state of affairs were very different. In fact, you have reason to evade her in every possible world in which p obtains. The contrast corresponds to the contrast between material and strict implication. When 'p' materially implies 'q', 'q' is true if 'p' is true; but, when 'p' strictly implies 'q', then there is a sense in which 'q' is true if 'p' is true *whatever else is true.*

Think back to the debate over whether morality is categorical (chapter 3, section 3). Plausibly, the fact that an act would cause unnecessary suffering is a reason not to perform it. Now, is it a strict reason? Suppose it is false that moral 'duties ... apply to agents independently of their own aims'.[12] More precisely, suppose that an agent has reason not to perform an act if it causes unnecessary harm, but only on the proviso that he or she has the aim of not causing unnecessary harm. Then the fact that an act causes unnecessary suffering is *not* a strict reason against performing the act. This is because there are possible states of affairs in which an act causes unnecessary harm but the relevant agent lacks a reason not to perform it (there are possible states of affairs in which the agent does not have the aim of not causing

unnecessary harm). On the other hand, it is plausible - even if morality is not categorical - that the fact that an act causes unnecessary suffering is a *material* reason for certain agents not to perform it. This is because, as things turn out, certain agents *do* have the aim of not causing unnecessary harm.

8. Material legal reasons

Section 7 describes the contrast between strict and material reasons in general terms. In section 8, I shall discuss how this contrast pertains to reasons which are legal reasons.

P is a legal reason to ø only if p is the fact that ø-ing has a certain legal status (see chapter 1). When p is a strict reason to ø, there is reason to ø in every possible world in which p obtains. This is not true if p is only a material reason. Suppose the illegality of assault is a material reason for you not to assault. Then, since assault is illegal, you have reason not to assault. But there are nonactual worlds in which you lack reason not to assault even when assault remains illegal.

Recall Raz's suggestion that a reason to avoid a legal penalty is a reason

> 'to do that which the law requires because it requires it; hence ... [it is] unlike many moral reasons which are reasons to do that which the law requires for grounds not dependent on the fact that the law requires them'.[13]

Raz appears to be expressing the view that a reason to avoid a legal penalty is a legal reason; he appears to be saying that 'many moral reasons' to act as the law require are nonlegal, *unlike* a reason to avoid a legal penalty. Suppose Shreve is legally proscribed to speed. Further, suppose he would suffer a legal penalty by acting illegally. Raz is not thinking of situations in which the proposition that Shreve is legally proscribed to speed strictly implies the proposition that Shreve has reason not

to speed. Instead, he is thinking of situations in which Shreve has reason not to speed since speeding is illegal *given* that Shreve would suffer a legal penalty if he acted illegally; plausibly, Raz is thinking of situations in which the illegality of speeding is a *material* reason not to speed. It is only a material reason because there are worlds in which Shreve is legally proscribed to speed even though he lacks a reason to speed. This is because there are worlds in which Shreve would not suffer a legal penalty even if he acted illegally.

The difference between material and strict legal reasons is brought out by thinking about the controversy regarding whether morality is categorical. Some believe it follows unconditionally from the fact that an action is immoral (that it would cause unnecessary harm, for example) that there is reason not to perform it. They accept:

> (3.2) ø-ing is immoral (ø-ing would violate an obligation or duty, for example) -< there is reason not to ø.

Some who deny that morality is categorical reject (3.2). As we have seen, some argue that (3.2) would be transformed into something true only if a condition referring to desire or interests were added to the antecedent.

Denying that morality is categorical is like denying that there are strict legal reasons. Someone denying the former can reject (3.2). Likewise, someone denying that there are strict legal reasons can reject

> (4.1) ø-ing is legally required -< there is reason to ø.

To deny that morality is categorical is to believe that one has reason not to act immorally only if acting immorally is not only immoral (only if acting immorally is also something you desire not to do, for example).[14] Likewise, to deny that there are strict legal reasons is to believe that the fact that an action is legally required does not in and of itself guarantee that there is reason to act. At least, it is to believe that it guarantees this only in the actual world, where certain other facts obtain. Think of

Shreve's reason not to speed. Since speeding is illegal, Shreve has reason not to speed. This logical connection is guaranteed, but only, or at least, in the actual world. This is because our assumption was that, *in the actual world*, Shreve would suffer a legal penalty by speeding.

9. Material reasons and determination

When p stands to x as a reason to ø, the following conditional is true: if p obtains, then there is reason to ø. Section 3 mentions one possible understanding of this conditional. When p is a strict reason to ø, 'p' *strictly implies* 'there is reason to ø'. Section 6 mentions another. When p is a material reason to ø, 'p' *materially implies* 'there is reason to ø'. Section 8 explains how the distinction between material and strict reasons pertains to legal reasons in particular. In sections 9 and 10, I shall anticipate a likely objection. It says p is a strict reason if p is a reason at all, since no reason is material. The objection applies to reasons in general, but, to simplify discussion, I shall consider it as it pertains only to legal reasons.

Raz holds that a reason to avoid suffering a legal penalty is a reason 'to do that which the law requires because it requires it'.[15] I shall continue to assume that he means to claim that a reason to avoid suffering a legal penalty can be a legal reason. How could this claim be true? That is, how could a legal fact be a reason for you to ø if you would suffer a legal penalty if you failed to ø? I think part of the answer must be as follows: when you are liable to suffer a legal penalty for ø-ing, a legal fact could be a *material* reason for you to ø. To see this, consider the example mentioned in section 8. Shreve is legally proscribed to speed, and he would suffer a legal penalty by acting illegally. Raz could say that, in this example, the fact that Shreve is legally proscribed to speed is a material reason. Why is this fact only a material reason? Because Shreve could lack a reason not to speed if an additional fact (the fact that Shreve would suffer a legal penalty if he acted illegally) failed to obtain.[16]

Now I shall contrast recent remarks by Duff and Shiner. This will bring out the objection I want to consider. Duff says legal officials do not make a demand of obedience which is a 'normative' demand if 'the only reasons for obedience' they offer 'are the harms ... [the legal system] threatens against disobedience'.[17] A claim about the harms threatened against disobedience could certainly be 'normative' in one sense, for it could certainly be a claim about reasons. Obviously, it could be a claim about prudential reasons for obedience. So when Duff writes that the demand would not be 'normative', I take it he means it would not be a demand about *legal reasons*. That is, I take it that Duff means that the demand would be 'normative' only if it were about the normativity of the relevant legal system itself. If I am correct, it follows that Duff thinks a reason to avoid suffering a legal sanction is not a legal reason.[18]

Shiner says Austin's theory leaves 'law without genuine normative force'.[19] Austin sets criteria for a norm to count as legal (it must emanate from a body 'to whom others are in the habit of obeying and who is ... [itself] not in a habit of obedience to any human superior').[20] But Austin believes that 'what it is for ... [a] norm to be a reason for action can be stated without reference to' these criteria. According to Shiner, this is because

> 'The norm's force as a reason is derived from the fact that ... the norm-subject will be visited with evil if he or she does not comply with the command',

and 'the connection between the evil and its source is causal and contingent, not conceptual'.[21] Shiner is making two claims. First, that a reason is a legal reason (a matter of the 'genuine normative force' of law) only if its connection to law is conceptual rather than causal and contingent. Second, that a reason to avoid a legal penalty does not meet this necessary condition. So, like Duff, Shiner appears to believe that a reason to avoid a legal penalty is not a legal reason.

What could justify this view? On what grounds could Duff and Shiner doubt that the illegality of speeding is a material reason not to speed? Neither Duff nor

Shiner answer these questions, but I suspect that the underlying thought is that, if p is only a material reason to ø, p does not *determine* that there is reason to ø. Consider Shreve's reason not to speed. I suspect that Duff and Shiner would wish to argue that Shreve has reason not to speed *but not in virtue of the fact that speeding is illegal.* Since p is a reason to ø only if p determines that there is reason to ø, the upshot would be the illegality of speeding is *not* a reason against speeding, material or otherwise.

Doubtless, Shreve has reason not to speed. Therefore, some or other fact constitutes Shreve's reason. But which fact is this exactly? My suggestion is that Duff and Shiner might say that it is the fact that, by speeding, Shreve would suffer a penalty. Suppose the penalty in question is 4 years imprisonment. Raz might say that the fact that speeding is illegal is a material reason for Shreve not to speed, given that Shreve would be imprisoned for 4 years if he acted illegally. But Duff and Shiner could counter as follows. Shreve's reason is really a fact implied by the conjunction of:

(4.2) Shreve is legally proscribed to speed; and

(4.3) Shreve would be imprisoned for 4 years if he acted illegally.

That is, they could counter by saying that Shreve's reason is really

(4.4) by speeding, Shreve would be imprisoned for 4 years,

a fact which is a strict, and not a material, reason.

It is true that, if Shreve sped, he would act illegally. But the suggestion is that Duff and Shiner might wish to claim that this fact is incidental to Shreve's normative predicament. That is, the suggestion is that Duff and Shiner might wish to argue that all that matters is that Shreve would be imprisoned for 4 years if he sped. According to this line of reasoning, it is (4.4) rather than the (4.2) or (4.3) or their conjunction that determines that Shreve has reason not to speed.

To support this line of reasoning, they might argue that Shreve's normative predicament would be unchanged if speeding were not illegal. Think of a situation in

which Shreve would be imprisoned for 4 years if he sped, but not because speeding is illegal. (For example, think of a situation in which (4.4) fails to obtain although a group of evangelists would imprison Shreve for 4 years if he sped.) In this situation, it might seems that Shreve would have exactly the same reason not to speed.

Of course, (4.2) might be of *causal* significance. There might be a causal relation between Shreve having reason not to speed and the fact that speeding is legally proscribed. In actual fact, this seems likely: it seems likely that (4.2) is a causal antecedent of (4.4). However, the line of reasoning I am describing has it that (4.2)'s significance is *wholly* causal. Using Shiner's phrase, the line of reasoning has it that the connection between the fact which is the reason and law is 'causal and contingent, not conceptual'.[22]

10. The conjunction of (4.2) and (4.3)

In section 10, I shall explain why the objection described in section 9 is not entirely convincing. I shall begin by considering Shreve's reason not speed. Then I shall consider the objection more generally.

The objection turns on the claim that it is not in virtue of

(4.2) Shreve is legally proscribed to speed

that Shreve has reason not to speed. On the view section 9 describes, the only fact which is of normative significance is

(4.4) by speeding, Shreve would be imprisoned for 4 years.

To lend credence to this view, I referred to an alternative state of affairs in which (4.2) does not obtain even though Shreve would be imprisoned if he sped. The suggestion was that, if Shreve's normative predicament would be unchanged in this alternative state of affairs, then his reason in the original state of affairs could not be (4.2).

The difficulty with the objection is that it is arguable that Shreve's normative predicament *would* be changed in the alternative state of affairs. Why must we accept that all that matters to Shreve's normative predicament is that he would be imprisoned for 4 years if he sped? The objection depends on the claim that it is (4.4) rather the conjunction of (4.2) and

(4.3) Shreve would be imprisoned for 4 years if he acted illegally

that determines that Shreve has reason not to speed, but it is difficult to see why we need to accept this.

It is true that Shreve would be imprisoned for 4 years for speeding if (i) he would act illegally by speeding and (ii) he would be imprisoned for 4 years if he acted illegally. However, it does not follow from this that the fact in virtue of which Shreve is pro tanto justified in not speeding is (iii) the fact that he would be imprisoned for 4 years if he sped rather than (iv) by speeding, Shreve would be imprisoned for 4 years *for acting illegally*. More briefly: (4.4) is implied by the conjunction of (4.2) and (4.3), but it does not follow that the fact which determines that Shreve pro tanto ought not to speed is (4.4) rather than the conjunction of (4.2) and (4.3).

This last point *would* follow if there is no special disvalue in suffering a penalty when this is imposed for violating a law. But it is arguable that there is special disvalue in suffering a penalty when this is imposed after the special type of formal, public process involved in a criminal trial. Likewise, it is arguable that one has reason not to ø if ø-ing would violate the law since there is a special type of disvalue or harm called 'defiance of the law'.[23]

To show that (iv) is not a possibility, to show that the relevant property of speeding *must* be the one mentioned in (iii), Duff and Shiner would need to defend a substantive claim in the theory of value. I do not have an argument to show that (iv) *is* a possibility, and I do not wish to suggest that Duff and Shiner could not defend the substantive claim to which I refer. My point is merely that the argument described in

section 9 is incomplete: we are not forced to the conclusion that (4.2) is not a conjunct of a fact which determines that Shreve should not speed.

11. The argument in general

Let us consider the argument in a more general form, since this will serve to further explain my response to it.

In the more general form, the argument is that p is a strict legal reason if p is a legal reason at all, since no legal reason is material. As in the less general form, the argument assumes that, if p is reason, p is either a strict reason or a material reason. Let us grant this assumption.

Now for the argument itself. If there is legal reason to ø, the fact which is the reason is the fact that ø-ing has a certain legal status (see chapter 1). Call this fact 'l'. If 'l' were a *material* reason to ø, then l's force would depend on the obtaining of one or more additional facts. (This is because it is true in general that, if p is a material reason to ø, then the proposition that p obtains materially but not strictly implies that there is reason to ø.[24]) Call the fact which is the conjunction of these additional facts 'q'. What the argument claims is that, if l is a material reason to ø only given q, then l is not really the reason. According to the argument, the reason is not even q or the conjunction of l and q. The argument states that the reason is really a fact implied by the conjunction of l and q.

Think of Shreve's reason not to speed. The argument states that, if

(4.2) Shreve is legally proscribed to speed

is a 'reason' for Shreve not to speed only given

(4.3) Shreve would be imprisoned for 4 years if he acted illegally,

then the reason is not (4.2) or (4.3), or the conjunction of (4.2) and (4.3), but a fact implied by the conjunction of (4.2) and (4.3).

The difficulty with the argument is that it is uncertain that we must accept that, if l's normative force depends on the obtaining of q, the fact in virtue of which there is reason to ø is a fact implied by the conjunction of l and q. Why think that the reason could not be the conjunction of l and q itself? Perhaps we sometimes confuse reasons with facts which merely imply or cause reasons; perhaps we sometimes say that the fact that an action has a certain legal status is a reason when it is only a conjunct of a fact which implies a reason or only a fact which is a causal antecedent of a reason. However, we need not accept that the fact that an action has a certain legal status *cannot* partly constitute a reason.

Since some jurists have argued at length that the disvalue of performing of a disvaluable act has a special character when the act is also illegal (for example, since some have argued that a harm has distinct disvalue when it is combined with 'a contempt for law'), we cannot simply assume that the illegality of an action can at most be a conjunct of a fact which implies a reason-giving fact.[25] In chapter 3, I expressed scepticism about whether the character of one's reason to act in a way which contributes to solving a co-ordination problem depends on whether the action that contributes to the solution is legally required. Similarly, I said it is doubtful that a person has a reason to avoid

causing distress to her ailing father by acting illegally

which is distinct from her reason to avoid

causing distress to her ailing father.

However, I see no way of justifying the general assumption that the legal status of an action is *never* of normative significance.

12. Conclusion

Many jurists hold that is sufficient for an action to have a legal status that appropriate legal officials have undertaken certain purely technical activities. (For example, many jurists hold that it is sufficient for an act to be legally required that certain legal officials deem the act to fall under the scope of a mandatory rule which the same officials take to have 'correct institutional pedigree'.[26]) If this view were correct, it might seem implausible that there are strict legal reasons: is there reason to ø in every possible world in which ø-ing has correct institutional pedigree?

Similarly, it might seem implausible that there are strict legal reasons if it is sufficient for an act to have a legal status that appropriate legal officials have certain beliefs or attitudes about the act. Consider the actions that legal officials are themselves legally required to perform. If a person has a duty to ø only if he or she has a reason to ø, then we might wish to follow Postema in asking the following:

> 'How is it that the fact of the behaviour, beliefs, and attitudes of officials generate genuine duties for those officials? .... Why should the fact that *other* officials follow the rule, and think *he* ought to follow it, give him any reason to do so?'[27]

Suppose it *is* implausible that there are strict legal reasons. Then it is important to know whether reasons can be less than strict. For, if they cannot be, no reason would be one which, in Greenawalt's phrase, 'derives from the interposition of law'. According to a plausible view, a reason to ø is a legal reason just in case the reason-giving fact is the fact that ø-ing has a certain legal status (see chapter 1). However, if the fact that ø-ing has a certain legal status could not be a strict reason, could it be a reason at all?[28]

In sections 7-11, I proposed an account of how p could be a reason without being a strict reason. It is a very simple account: p is a reason to ø, but not a strict reason to ø, when p is a reason to ø and the proposition that p obtains materially but

not strictly implies that there is reason to ø. For many jurists, what is puzzling about the normativity of law is that it is unclear how I could have reason to act '*simply and only* because the law to which I am subject says I must'.[29] My suggestion is that there is no puzzle if legal reasons, like reasons in general, can be material rather than strict. My thought is that it is reasonably clear how I could have reason to act since the law to which I am subject says I must, *given the obtaining of other facts.*

It is important to observe that I have not argued that there actually are material legal reasons to act. For example, it is important to observe that I have not argued that Shreve's reason not to speed is (i) the fact that he would be imprisoned for 4 years *for acting illegally* rather than (ii) the fact that he would be imprisoned for 4 years for speeding. Likewise, it is important to observe that I have not argued that the fact that an action has a certain legal status *is* a strict reason to perform it.

My aim has been to introduce and illustrate a distinction between two possible types of legal reason. As we have seen, it is widely held that

> if p is legal reason to ø, p could be a complete reason to ø or a part of a complete reason to ø.

My aim has been to show that the contrast between complete reasons and parts of complete reasons is less problematic when understood in terms of the contrast between strict and material reasons. Whether there *are* strict and material legal reasons is another question.

[1] 1979 p. 243

[2] 1990 pp. 155-6.

[3] See Raz 1990 pp. 155-6

[4] Scanlon 1998 p. 17.

[5] If p is a strict reason to ø, is it a mistake *of logic* to doubt that there is reason to ø when p obtains (for discussion on related issues, see Blackburn 1984 pp. 182-4)? Unfortunately, I shall have to ignore this question.

[6] 1987 p. 25. See chapter 2, section 7.

[7] 1994 p. 502. Schauer's primary interest (on p. 502, at least), is with situations in which agents *believe* there is reason to act 'just because of the law'.

[8] 1994 pp. 501-8.

[9] I take this phrase from Edmundson 1998 p. 12.

[10] 1990 p. 25.

[11] 1990 p. 28. Compare Raz 1990 p. 24.

[12] Brink 1997 p. 256.

[13] Raz 1979 p. 243.

[14] Of course, one may have reason not to perform an immoral act which is unrelated to the fact that it is immoral.

[15] 1979 p. 243.

[16] Of course, a single fact could supply *two* reasons: a material reason to ø and a strict reason to ø. Here I shall ignore this complication.

[17] 1998 pp. 260-1.

[18] Compare: Postema 1986 p. 186 ('sanctions do not create, or constitute, the normative force of ... [legal] rules'); and Schauer 1994 pp. 498-9 (it 'is unlikely to be controversial' that '"normativity" designates the phenomenon by which agents take ...

the norms of the legal system to *be* reasons ... independent of the sanctions consequent upon disobedience'.

19 1992a pp. 259-60.

20 1992b p. 2. Compare Shiner 1992a p. 22.

21 Shiner 1992a p. 22. Compare: Shiner 1992a pp. 43, 48; Shiner 1992b pp. 2-3.

22 Consider another example. Raz (1978 pp. 16-7) writes: 'That the room's temperature is approaching 0 degrees is a reason for switching on the central heating. So is the fact that people suffer in such low temperatures. So is the fact that I want to test whether the central heating is still in working order. Assume that all these facts obtain, do I have three distinct reasons for switching on the central heating? Clearly not. I have two distinct reasons. The low temperature in the room and the fact that people suffer in such temperatures somehow belong together and make but one reason, each being merely a part of a reason'. One might think that

(4.5) the room's temperature is approaching 0 degrees

is a material reason to turn on the central heating, given the obtaining of:

(4.6) people are suffering because the room's temperature is approaching 0 degrees; and

(4.7) the room's temperature would cease to approach 0 degrees if the central heating were turned on.

Notice, however, that the objection I am considering suggests the following reply. The first fact is not a reason, material or otherwise, to turn on the central heating, since it does not determine that you have reason to perform this act. The reason, which is strict, is really a fact implied by the conjunction of the three facts mentioned, namely,

(4.8) people would cease to suffer if the central heating were turned on.

[23] For discussion, see: Duff 1997 pp. 156-9; von Hirsch 1986 pp. 78-81.

[24] See section 7. If the proposition that l obtains strictly implied the proposition that there is reason to ø, then l's force would not depend on the obtaining of one or more additional facts: there would be reason to ø in every possible state of affairs in which l obtains. However, since our supposition is that l is only a material reason, the first proposition only materially implies the second. The upshot is that, if certain additional facts did not obtain in the actual would, it would not follow from l that there is reason to ø.

[25] For discussion, see: Duff 1997 pp. 157-9; von Hirsch 1986 pp. 78-80.

[26] For recent discussion, see: Coleman 1998 p. 382; Brian Leiter 1998 p. 535; Shiner 1992a pp. 38-9, 68, 250, 256.

[27] 1982 p. 171.

[28] Notice that, if the answer is 'no', it could not the 'central task of jurisprudence is to give a philosophically illuminating account of the distinctive normative character of law' (Postema 1998 p. 330; compare Perry 1998 p. 445). For the law would not be normative at all.

[29] Edmundson 1998 p. 12.

Chapter 5 Content-independence: the first and second meanings

1. Introduction

This thesis is about the formal character of reasons which - in Greenawalt's phrase - 'derive from the interposition of law'. I call such reasons 'legal reasons'. Chapters 1-4 set out my basic claims about their character. In chapter 1, for example, I set out the following basic claim:

> [B] if p is a reason for x to ø, p is a legal reason for x to ø if and only if p is the fact that ø-ing has a certain legal status with respect to x.

In chapters 2-4, I noted that we can distinguish between reasons - legal or otherwise - according to whether they are strict or material:

> [G] p is a strict reason for x to ø = Df (i) p is a reason to ø; (ii) the proposition that p obtains strictly implies the proposition that there is reason for x to ø.

> [H] p is a material reason for x to ø = Df (i) p is a reason to ø; (ii) the proposition that p obtains materially implies the proposition that there is reason for x to ø; (iii) the proposition that p obtains does not strictly imply the proposition that there is reason for x to ø.

In chapters 5-8, I shall set out some more complex claims. In large measure, I shall be arguing that legal reasons do *not* have certain formal features, notwithstanding claims to the contrary.

Proponents of the claims I shall be arguing against accept [B]. This means I can continue to assume that [B] correctly defines legal reasons. When I argue that legal reasons do not have the property of being content-independent, for example, I can assume that what is at issue is whether content-independence can be attributed to reasons which satisfy [B]'s condition.

The same jurists also recognise the distinction between strict and material reasons. They do not recognise the distinction exactly as [G] and [H] express this. Instead, they follow Raz in distinguishing between complete reasons and parts of complete reasons. As we saw in chapters 2-4, however, [G] and [H] are formulated on the basis of the distinction between complete reasons and parts of complete reasons. A strict reason roughly corresponds to a Razian complete reason, and a material reason roughly corresponds to what Raz sees as a reason which is only 'a part of' a complete reason. Moreover - as we also saw in chapters 2-4 - there are strong grounds to think that the distinction between complete reasons and parts of complete reasons is better understood in terms of the distinction between strict and material reasons.

2. Outline

In chapters 5 and 6, I shall consider the widely accepted claim that legal reasons are content-independent.[1] Nowadays, this claim is not only 'unlikely to be [taken as] controversial'; its truth is also taken to have a number of significant implications.[2] My main aim in chapters 5 and 6 is to show that the claim is false.

A major difficulty I must face is that the claim has had a variety of very different meanings. On some meanings of 'content-independent', it is actually *true* that

if p is a legal reason to ø, p is a content-independent reason to ø.

However, on these meanings, *any* reason is content-independent; as we shall see, the difficulty is that many jurists assume that content-independence is a property which distinguishes legal reasons in particular from reasons in general. My argument will be that, on these particular meanings of 'content-independence', we do not learn anything about p's status as a *legal* reason by learning that p is content-independent.

For sake of completeness, I shall assume that the claim that legal reasons are content-independent is intended to apply to both strict and material legal reasons. My argument will be that the claim is false (or uninformative) as it applies to either type. For sake of argument, I shall also assume that there actually are strict and material legal reasons. Take the case the strict legal reasons. I shall assume that the proposition that ø-ing has a certain legal status strictly implies the proposition that there is reason to ø.

In sections 3, 4 and 11 below, I describe one meaning of the claim that legal reasons are content-independent. As we shall see, the claim has appeared in weaker (section 11) and stronger (section 4) forms. The remaining sections of chapter 5 argue against the claim on this meaning. Some sections argue that legal reasons contingently lack the relevant property (sections 6 and 11). Other sections argue that legal reasons are exactly *not* content-independent (section 12). In chapter 6, I shall consider two further meanings of the claim that legal reasons are content-independent.

3. Distinctively content-independent

Reasons appear to fall into well-recognised types: moral or nonmoral, pro tanto or decisive, and so on. Since Hart, many have claimed that reasons can be distinguished according to whether or not they are content-independent, and many facts have been described as supplying content-independent reasons.[3] An important assumption has been that some reasons are *not* content-independent; for jurists, an important assumption has been that content-independence is a property which distinguishes legal reasons from certain others.

This assumption is often explicit.[4] It appears, for instance, when jurists have attempted to characterise the most obvious reason not to commit obvious mala in se. Consider assault (roughly, 'purposely, knowingly, or recklessly causing bodily injury to another human being'). It is widely recognised that the most obvious reason not to commit assault - the fact that assault is independently immoral - is nonlegal; it is widely recognised that '[w]e ought to refrain from assaulting people even if it were not a crime'.[5] But why exactly is this reason nonlegal? Frequently, part of the answer given is that the reason is content-dependent rather than content-independent.

For many jurists, the assumption that not all reasons are content-independent is far from redundant. Take those who argue that one can show that the law is obligating only if one can show that it supplies a content-independent reason to conform to it (those who hold that 'the idea of content-independent force is ... necessary ... in any argument purporting to establish the existence of' an obligation to obey the law).[6] If *every* reason were content-independent, proposing this necessary condition would be without point.

In section 2, I said that this chapter is about the claim that legal reasons are content-independent. Now we see that this is not exactly true. It is more accurate to say that it is about whether legal reasons are *distinctively* content-independent. I shall consider whether legal reasons are content-independent

(sections 6, 7, 11 and 12), but I shall also consider whether content-independence is a property which distinguishes legal reasons in particular from reasons in general (sections 8 and 9).

4. What is content-independence?

Green writes that a reason supplied by a legal requirement is content-independent because it 'does not depend on the nature of the action prescribed'. For Green, the 'core idea' of content-independence is that the fact that an action is legally required is of normative consequence 'independently of the nature and merits of that action'.[7]

Recent remarks by Duff suggest what 'independently' could mean here. Duff says that a person has content-independent reason to obey a set of legal rules if he or she 'should obey these rules, *whatever* their content may be'.[8] He also says that a legal system purports to supply a content-independent reason to act if it claims to bind persons '*whatever*' demands it makes, '*whatever* their content'.[9]

Green and Duff could be understood as claiming the following: if there is content-independent reason to perform a particular act-type, this reason would pertain even if the act-type had different qualities (even if its 'nature and merit' were different). In this chapter, I shall consider a different, more prominent, meaning of 'content-independent'. Green and Duff suggest this second meaning as well, and it is more plausible than the first, as we shall see in chapter 6.

Consider the claim, mentioned above, that a legal requirement would be binding irrespective of its content. This could be the claim that a legal requirement would supply a reason to act as it requires even if it required an act-type other than the one it actually does require. It might be doubted that a legal requirement could sustain a change in the act-type it requires; for example, it

might be doubted that a requirement not to assault would be the same requirement if it were a requirement not to batter. So I shall put the claim as follows: a legal reason is a reason to perform a particular act-type, but it is content-independent since there would be a reason to perform a different act-type if a different act-type were legally required.

Compare the alleged content-independence of a reason to fulfil a promise. Green says a reason to fulfil a promise is content-independent because a promise derives its normative 'force from the fact that a promise has been made, the content of which [that is, the action promised] could have been different.'[10] According to Raz, a promise is content-independently reason-giving since 'regardless [of] what you promise ... to do you have reason to do it'.[11] It is not difficult to see an analogous claim for legal reasons: a legal reason is content-independent, since regardless of what you are legally required to do, you have reason to do it.

Or compare the alleged content-independence of a reason supplied by an authoritative command. Here the reason is content-independent since the command could be a reason

> 'for any number of actions, including ... for contradictory ones. A certain authority may command me to leave the room or to stay in it. Either way, its command will be a reason'.[12]

The analogous claim for legal reasons would be as follows. The fact that one is subject to a legal requirement could be a reason for any number of actions. A person might be legally required to perform one action or another. Either way, there will be a reason.

The remarks I have quoted suggest the following definition:

> [I] If ø-ing's F-ness is a reason to ø, this reason is content-independent if and only if, for any other act-type μ, there would be reason to μ if F were a property of μ-ing.

Consider the claim about the content-independence of a reason to fulfil a promise. Suppose the fact that Sutpen has promised to marry Miss Coldfield is a reason for Sutpen to do so. Is Sutpen's reason content-independent? (The action in question, the action for which Sutpen's reason is a reason, is marrying Miss Coldfield, and the relevant property of this action is that it would fulfil Sutpen's promise.) [I] tells us that the answer is 'yes' only if there would be reason for Sutpen to avoid Jefferson if he would fulfil a promise by avoiding Jefferson.

It is possible that [I] needs certain qualifications. For example, it is possible that some jurists would wish to argue that the quantifier in [I] should be existential rather than universal (that 'there exists an act-type μ' should replace 'for any other act-type μ') (see section 10). At the minute, however, we can ignore this. For present purposes, it is sufficient that *some* accept [I].

5. Strict and material reasons

Do legal reasons satisfy [I]'s condition?

I shall answer this question after re-drawing the distinction between strict and material reasons. Chapter 4 describes this distinction at length, and also defends it. In chapter 5, I shall simply assume that the distinction is a valid one, but my argument would stand even if the distinction could not be made. For example, it would stand even if p is a legal reason to ø only if p is a strict reason to ø.

In general, if p is a reason to ø, one consequence is that, if p obtains, then there is reason to ø. The conditional expressed by 'if p obtains, then there is

reason to ø' is partly logical, and it can come in weaker or stronger forms. First, the stronger form.

If p is a *strict reason* to ø, one consequence is that the proposition that there is reason to ø is strictly implied by the proposition that p obtains. Say p is the fact that Sutpen would fulfil a promise by marrying Miss Coldfield. Is p a strict reason for Sutpen to marry Miss Coldfield? The answer, roughly speaking, is as follows: only if 'there is reason for Sutpen to marry Miss Coldfield' could not be false if p obtains, whatever else is true.

Now consider the weaker form of the conditional. Suppose Rosa would please God by agitating Sutpen. Plausibly, Rosa has reason to praise Mississippi, since praising Mississippi would agitate Sutpen (in general, it is plausible that the fact that a person would please God by performing an act is a complete reason to perform it). The fact that Sutpen would be agitated if Rosa praised Mississippi is of normative consequence in this case, but not as a strict reason.

To see that it is not a strict reason, say m is the fact that Sutpen would be agitated if Rosa praised Mississippi, and say n is the fact that God would be pleased if Rosa agitated Sutpen. If m were a strict reason, the proposition that m obtains would strictly imply the proposition that Rosa has reason to praise Mississippi. But this is not strictly implied: Rosa could lack reason to praise Mississippi even if m obtains (think of a state of affairs in which m obtains but n does not).

Intuitively, the idea is that m is only 'a part of' Rosa's complete reason - the reason constituted by the conjunction of m and n. According to Raz, however, m would be a reason nonetheless:

> 'A fact is a reason only if it belongs to a complex fact which is a complete reason, and yet not only the complete reason but its constituent facts as well are reasons'.[13]

As mentioned, p is a strict reason to ø only if the proposition that p obtains strictly implies the proposition that there is reason to ø. How could p be a reason without meeting this necessary condition? As in chapter 4, I shall say that, if p is *material reason* to ø, then the proposition that p obtains materially but not strictly implies the proposition that there is reason to ø. Notice that m meets this necessary condition. For m materially implies that Rosa has reason to praise Mississippi, given that n obtains.

6. [I] and material legal reasons

The distinction between strict and material reasons has an important consequence for chapters 5 and 6. This is that the claim that legal reasons are content-independent could pertain to (i) legal reasons which are strict or to (ii) legal reasons which are material. For sake of completeness, I shall assume the claim is intended to pertain to both; what I shall argue is that the claim is false as it pertains to either. I shall begin by considering the case of material legal reasons.

If there is legal reason to ø, the fact which is the reason is the fact that ø-ing is legally required (or has some other legal status).[14] But, if this fact is only a material reason, it would not be a reason at all if certain other facts did not obtain; in effect, the normative significance of this fact would rely on the obtaining of certain others (see section 4).

Consider an example. Suppose that Sutpen has promised to abide by any legal requirement which proscribes an injurious action. It follows that Sutpen has reason not to assault, since assault is both legally proscribed and injurious (this follows, at least, if we suppose that the fact that a person would violate a promise by performing an action is a complete reason not to perform it).

Moreover, Sutpen has *legal* reason not to assault, for the fact that he is legally proscribed to perform an action is a reason not to perform it.[15]

However, notice that the reason in question is material rather than strict. In the example, 'Sutpen has reason not to assault' is not strictly implied by 'Sutpen is legally proscribed to assault'. The second proposition is inferable - if it is inferable at all - only given the obtaining of 'Sutpen is legally proscribed to assault' and two further facts: the fact that Sutpen has made a certain promise; the fact that assault is injurious. Were these facts not to obtain, 'Sutpen is legally proscribed to assault' might not be of normative consequence at all.

There is an important implication of the fact that a material legal reason is of normative significance only given the obtaining of certain additional facts. This is that there is no guarantee that a material legal reason will satisfy [I]'s condition. If there is a material legal reason to perform a certain action, these additional facts certainly obtain. But there is no guarantee from this that there would be a material legal reason to perform another action if another action were legally required, since it is an open question whether appropriate additional facts would obtain for there to be reason to perform it.

To see this, consider Sutpen's reason not to assault. Suppose Sutpen is legally proscribed to perform a different action. For example, suppose Sutpen is legally proscribed to emigrate. If Sutpen's reason satisfies [I]'s condition, it would follow that Sutpen would have partial legal reason not to emigrate. However, this does not follow. Recall that Sutpen has promised to abide by a requirement if it proscribes an *injurious* action. Since - let us suppose - emigrating would not be injurious, it would not follow from (i) the fact that this action is legally proscribed that (ii) Sutpen would have a material legal reason to refrain from performing it.

I am not claiming that material legal reasons fail to satisfy [I]'s condition as a matter of course. (Imagine that Sutpen had promised to abide by the law *in general.* Then he would have reason not to emigrate even though emigrating

would not be injurious.) Instead, my claim is that it is false that it follows from (i) the fact that a reason is legal that (ii) it is content-independent in [I]'s sense. The counterexample I have described shows that it is contingent whether a material legal reason satisfies [I]'s condition; it shows it is only *possible* that, if there is a material legal reason to perform an action, there would be material legal reason to perform a different action if a different action were legally required.

[I]'s proponents might respond as follows: 'since Sutpen's reason is "assault is legally proscribed *and injurious*" rather than "assault is legally proscribed", it is not a reason of the type we had in mind when we claimed that the law supplies content-independent reasons'. They might add that, accordint to their view, the law is normative, strictly speaking, only when it supplies strict reasons to act - only if there would be reason to conform to the law even if one had not promised to do so, for example. Or they might add that, according to their view, the law is normative, strictly speaking, only if there is reason to conform to *all* of its requirements - only if there is reason to refrain from an illegal act whether or not it is injurious, for example.

To accommodate this response, we need to consider whether strict legal reasons are content-independent. For example, we need to consider whether 'assault is legally proscribed' would satisfy [I]'s condition if it were a strict reason for Sutpen not to assault. I take up this task in section 7.

7. [I] and strict legal reasons

As it pertains to material legal reasons, the claim that legal reasons are content-independent is false (section 5). The claim is false, at least, if [I] correctly defines content-independence. Now I shall allow for the possibility that the claim is intended only to pertain to strict legal reasons.

Do strict legal reasons satisfy [I]'s condition?

Notice that section 6's argument does not answer this question. This is because this argument exploits the fact that a material reason is of normative significance only given the obtaining of certain additional facts. (With respect to Sutpen's reason not to assault, for example, it exploits the fact that 'Sutpen is legally proscribed to assault' is of normative significance only given that assault is injurious.) The normative significance of a strict legal reason is not conditional in this way. If assault's illegality were a complete reason not to assault, for example, 'there is reason not to assault' would follow directly from 'assault is legally proscribed' (section 4).

Here is one response to the question: since no legal reason is strict, the answer is irrelevant. Nowadays, many jurists accept the antecedent of this response; roughly speaking, few believe I can have reason to perform an action 'simply and only because the law to which I am subject says I must'.[16] For sake of argument, however, and since some jurists do *not* accept the antecedent, I shall not.

Here is another response to the question: strict legal reasons do not satisfy [I]'s condition, because no reason does. This is a response a particularist like Dancy might offer, for, according to particularism,

> 'a property F of one action may be a reason ... to do that action, even though the F-ness of another action may be ... indifferent or even count as a reason against doing it'.[17]

I shall not adopt this response here, since particularism is controversial. For sake of argument, I shall assume the truth of a position which is consistent with [I]. In fact, I shall assume that any strict legal reason satisfies [I]'s condition. Suppose the illegality of assault is a strict reason not to assault. I shall assume that, for any other act-type μ, if μ-ing were illegal, there would be reason not to μ.

8. Is any strict reason content-dependent?

But to assume that any strict legal reason satisfies [I]'s condition is not to accept the claim at issue. Fully spelt out, the claim is that legal reasons are content-independent, *unlike certain others* (section 3). I have admitted that a strict reason is content-independent in [I]'s sense if it is legal, but could a fact be strict reason *without* being content-independent?

Arguments to doubt this have been supplied by particularism's opponents. However, I shall not rely on these arguments here, since their force is disputed. Nor shall I attempt to offer a general argument to the effect that, if a reason is strict, it satisfies [I]'s condition.

I shall argue three things. First, that reason-types taken to be strict and content-dependent satisfy [I]'s condition (section 8). I consider one in each of (i) and (ii) below. Since [I]'s condition is intended to be sufficient for content-independence, they should *not* satisfy this condition. Second, that at least one argument for thinking that legal reasons are saliently different from one of these reason-types is unconvincing (section 9). Third, most importantly, that satisfying [I]'s condition does not determine that a strict reason is content-independent (section 11).

(i) A plausible example of a reason not to perform an action is that it would be immoral in the following regard: it would cause unnecessary suffering. Many jurists appear to think that this is a strict and content-dependent reason. However, if [I] correctly defines content-independence, the second part of this claim appears to be false.

To see this, suppose the fact that you would cause unnecessary suffering by committing violent disorder is a reason for you not to commit violent disorder. Then it appears that you would have reason not to commit affray if

committing affray would cause unnecessary suffering. In general, it appears that, if the fact that a certain action is immoral (if it causes unnecessary suffering, for instance) is a strict reason not to perform it, then there would be reason not to perform a different action if *this* were immoral (would cause unnecessary suffering).

(ii) As far as I determine, only one other type of reason has been described as both strict and not content-independent: a reason to perform an act when performing it would maximise utility.[18]

Suppose you would maximise utility on an occasion if you performed a legally proscribed act - if you took a conveyance without consent in Boston at noon on 1 June 1860, for example. Plausibly, it follows that you have a strict reason to perform it. But is your reason content-dependent?

It appears not: your reason to take a conveyance without consent appears to pass [I]'s test for content-independence. It appears that, if a different act were to maximise utility (if you would maximise utility by committing burglary 20 minutes later, for example), then there would be reason to perform *that.* Put differently: if there is reason to take a conveyance without consent if and entirely because this would maximise utility, then it appears there would be reason to commit burglary if and because *this* would maximise utility.

9. '*any* kind of content can be law'

It might appear, however, that there is a salient difference between strict legal reasons and the reason-type mentioned in section 7 (i) above. Some have argued that a legal requirement is not a legal requirement in virtue of it requiring the action it does, but because it has correct institutional pedigree.[19] It might be thought to follow that

> '*any* kind of content may be law. There is no human behaviour which, as such, is excluded from being the content of a legal norm'.[20]

A reason not to act immorally - the reason-type mentioned in section 8 (i) - might seem relevantly dissimilar, for it might seem that not just any action could be immoral. Perhaps any action could be immoral in the regard that it causes unnecessary suffering (perhaps it is contingent whether or not a particular act-type causes unnecessary suffering), but it is arguable that certain actions could not be immoral, by their nature. For example, it is arguable - some deontologists in fact do argue - that an act could not be immoral if it is performed with a certain type of intention.

Consider Duff's remark that a person has content-independent reason to obey a set of legal rules if he or she 'should obey these rules, *whatever* their content may be' (section 3). Duff could mean the following: the fact that there is a legal rule requiring an action could be a reason to perform it, and a legal rule could require *any* action. One might think that this interpretation preserves the thought that legal reasons are *distinctively* content-independent, for one might think that, although the immorality of an action could be a reason not to perform it, it is false that *any* action could be immoral.[21]

There are two difficulties with this line of argument. I describe the less obvious difficulty in the Appendix. The more obvious difficulty with the argument is that it fails to demonstrate anything about the content-independence of *reasons*. The argument indicates a possible difference between legal and moral requirements, but it does not indicate a difference between reasons supplied by them.

Think of a reason not to act immorally. If only certain actions can be immoral, there is a sense in which morality is content-dependent rather than content-independent. This is because there is a sense in which morality's

'content' is a matter of the actions it proscribes. However, we do not see that a *reason supplied by* an action's immorality is content-dependent just by seeing that there is a respect in which *morality* is content-dependent. We would see that an action's immorality is a content-dependent reason not to perform the act only by seeing that the normative significance of this fact is content-dependent.

Or think of legal reasons. If Kelsen is correct that 'any kind of content can be law', there might be a sense in which a legal requirement is 'content-independent'.[22] But nothing follows for a reason supplied by the fact that a person is subject to a legal requirement - for the way in which this fact stands to a person *as* a reason to act. The *reason* would be content-independent only if the normative significance of this fact (the action to which the reason pertains, for example) were independent of the action that is legally required. Actually, exactly the reverse is the case, as we shall see in section 13.

10. Weakening [I]

Sections 8 and 9 argue that reasons commonly taken to be strict and *not* content-independent appear to satisfy [I]'s condition. If [I] correctly defines content-independence, this argument supplies reason to doubt the claim at issue: the claim that strict legal reasons are *distinctively* content-independent.

The argument does not supply a decisive reason to doubt the claim, however. A particularist would be correct to observe that all I have shown is that [I]'s proponents have failed to supply examples which support their claim.

The remainder of this paper argues against [I] in a more direct fashion. Section 11 distinguishes between singular reasons and sets of these, and argues that a singular complete reason is not content-independent even if it satisfies [I]'s condition. Section 12 argues that [I] reveals two important respects in which legal reasons are exactly *not* content-independent. Given these arguments, we

can ignore the possibility that not all strict reasons pass [I]'s test for content-independence. There is an additional reason to offer these arguments. We have seen that a material reason can be legal without satisfying [I]'s condition (section 6), but it appears that any material legal reason satisfies a very similar condition:

> [J] If ø-ing's F-ness is a reason to ø, this reason is content-independent if and only if there exists another act-type μ such that, if F were a property of μ-ing, there would be reason to μ.

Sutpen's reason to assault, for example, which is a material legal reason, fails to satisfy [I]'s condition: it is false that, if *any* action were legally proscribed, there would be material legal reason not to perform it (section 5). But notice that the reason appears to satisfy [J]'s condition: there is certainly *some or other* act-type such that, were it legally proscribed, Sutpen would have reason not to perform it. Boxing is an example. If Sutpen were legally proscribed to box, he would have reason not to box, since boxing is injurious. (Recall that Sutpen would fulfil a promise by abiding by any legal requirement which proscribes an injurious action.)

The additional reason for offering these arguments is that they show that a legal reason is not content-independent even if it satisfies [J]'s condition. This additional reason is weighty, since some who claim that legal reasons are content-independent are committed to [J] rather than to [I]. I refer to those who hold that 'reasons generated by the fact that one is subject to a ... valid rule of law are simply extinguished' if the legally required action is of a certain type.[23] I refer to Green, for example. He entertains the view that

> 'Content-independence is a matter of degree .... A very content-independent reason is ... one which is valid for a large set of contents; a slightly content-independent reason is valid only for a small set'.[24]

Green might claim that Sutpen's reason not to assault could be content-independent even if - as I argued in section 6 - Sutpen would not have reason not to emigrate if emigrating were legally required. For Green might claim that, in this case, Sutpen's reason would just be *less rather than more* content-independent.

The exact meaning of this claim is difficult to determine. One wants to ask: what is it for a reason to range over wider and narrower domains of content, and how are different contents to be individuated?[25] But, for sake of argument, let us ignore this. Can we offer a direct argument against [J]?

11. Reasons singular

Think of a situation in which there is legal reason to ø, and in which there would be reason to μ if μ-ing were legally required. It is irrelevant whether the reasons are strict or material, and also whether the reason to ø satisfies [I]'s rather than [J]'s condition: think of whichever type of reason you prefer.

Now ask the following question. Does it follow that the reason to ø is content-independent?

At first blush, it seems so, for it seems that the reason to ø would sustain a change in 'the content' of what is legally required. The reason to μ would concern a different action; obviously, it would be a reason to μ rather than a reason to ø. Still, it seems that this reason and the reason to ø would be the same; it seems that, in both cases, the reason would be the fact that some or other act-type is legally required.

However, it does not follow that the reason to ø - this singular reason - is content-independent. Actually, nothing follows for this reason. This is because the reason to μ would be a different reason rather than the reason to ø with a different 'content'. The reason to μ might be equally weighty, pertain to the

same person, and so on. Nonetheless, it would a different reason: it would be 'μ-ing is legally required' rather than 'ø-ing is legally required'. Since it would be a different reason, no property of *the reason to ø* is observed by observing that there would be reason to μ if μ-ing were legally required. It follows that the content-independence of this reason is not being observed. Since the reason to μ would be a different reason, it is not as though the reason to ø has revealed itself to have a property it would not have if the following were false:

there would be reason to μ if F were a property of μ-ing.

Consider a concrete case. Suppose blackmail's illegality is a strict reason not to blackmail. Further, suppose there would be reason not to smoke if smoking were illegal. Does it follow that the first reason is content-independent? Nothing follows for the character of this reason, since the reason not to smoke would be a different reason, rather than the reason not to blackmail with altered content: it would be 'smoking is legally proscribed' rather than 'blackmail is legally proscribed'.

There appears to be a single reason only because 'blackmail is legally proscribed' and 'smoking is legally proscribed' are facts of the same type. Since they are both facts about what is legally proscribed, it seems that 'some or other act-type is legally proscribed' would be the reason in both cases. In turn, this is why it seems that the fact that there would be reason not to smoke if smoking were illegal shows something about the reason not to blackmail.

Actually, 'some or other act-type is legally proscribed' does not constitute the reason in either case. Consider the reason not to blackmail. If 'some or other act-type is legally proscribed' were the reason, we could validly infer 'there is reason not to blackmail' from it, for in general it is true that, if p is a strict reason to ø, the proposition that p obtains strictly implies the proposition that there is reason to ø (see section 4). However, we cannot validly infer this. This is because blackmail might not be legally proscribed even if it is true that some or

other act-type is legally proscribed, and there would be a strict legal reason not *to blackmail* only if *blackmail* constituted an offence.

Proponents of [I] and [J] might respond to my argument as follows. Even if singular legal reasons are not content-independent, it does not follow that sets of these are not. They might admit (i) that one cannot show that a particular reason to ø is content-independent by showing that there would be reason to μ under different circumstances, but argue (ii) that we should not conclude that content-independence cannot be a property of reasons *plural.*

I accept this response. I could avoid doing so if I could assume that a set of reasons must lack a certain property if each member of this set lacks it, but I see no way of justifying this assumption.

Some proponents of [I] and [J] could not respond in the way I have described, for some appear to take that content-independence to be a property of singular legal reasons.[26] On the other hand, it appears that some jurists *could* respond in this way. Take Duff. Duff refers to situations in which a person 'should obey ... [a set of legal] rules, *whatever* their content may be', and it is possible that Duff is thinking of how a set of rules could supply a set of reasons, and of how *this set* would be content-independent.

Or take Hart. He writes:

> 'Content-independence of [authoritative] commands lies in the fact that ... the actions commanded may have nothing in common, yet in the case of all ... the commander intends his expression ... to be taken as a reason for doing them.'[27]

If we set aside the reference to what is *intended* to be the case, then Hart's claim appears to be that a set of reasons supplied by an authority is content-independent in that (i) it includes reasons to perform different act-types yet (ii) a fact about each act-type (namely, the fact that it is authoritatively commanded) is the reason in each case.[28] It is not difficult to see a parallel claim for legal

reasons. A set of legal reasons is content-independent in that (i) it includes reasons to perform different act-types even though (iii) a fact about each act-type (the fact that it has a legal status) is the reason in each case.

The difficulty is that it remains unclear how content-independence is a property which distinguishes legal reasons in particular from reasons in general; the difficulty is that *any* set of reasons of one kind will satisfy an analogous pair of conditions. Think of a set of reasons not to cause unnecessary suffering (plausibly, the fact that an action causes unnecessary suffering is a reason not to perform it). And suppose that this set includes reasons pertaining to different act-types (plausibly, different act-types cause unnecessary suffering). This set is content-independent in exactly the sense Hart mentions, for (i) it includes reasons to perform different act-types even though (iv) a fact about each act-type (the fact that is causes unnecessary suffering) is the reason in each case.

Or think of a set of reasons to maximise utility. Suppose that the reasons pertain to different act-types (different act-types will maximise utility on different occasions). Hart must attribute content-independence to this set, for (i) it includes reasons to perform different act-types even though (v) a fact about each - the fact that it maximises utility - is the reason in each case.

12. Depending on content

Section 11 offers an argument against thinking that reasons which satisfy [I] or [J] are (distinctively) content-independent. Now I shall offer a second. According to this second argument, [I] and [J] indicate important respects in which legal reasons are exactly *not* content-independent. As with the argument in section 10, this argument applies to both strict and material legal reasons.

In section 8, we saw that Kelsen and others claim that any act-type whatsoever could be legally required. Would the truth of this claim demonstrate

that legal reasons are content-independent? It would, I have argued, only if the character of the reason supplied by the fact that a person is subject to a legal requirement were independent of the particular action it requires. In two respects, however, their character *does* depend on this: (i) and (ii) as follows.

(i) If a legal reason were content-independent, the particular act-type to which it pertained would not depend on whether this or that particular act-type were legally required (that is, on 'the content' of the relevant legal requirement). However, it is obvious that the action to which a legal reason pertains *does* depend on this. If the reason is a reason *to ø,* this is because *ø-ing*, rather than some other act-type, is legally required.

Think of the special case in which there would be reason to ø only if ø-ing were legally required - only if a legal requirement had ø-ing as a content. In this special case, it is obvious that the reason to ø depends on the fact that it is *ø-ing* that is legally required. If μ-ing rather than ø-ing were legally required, for example, there would not be reason to ø at all.

Or think of Sutpen's reason not to assault (section 6). This is content-*dependent*, since it is a reason not *to assault* given by the fact that *assault*, rather than some other particular action, that is illegal. The very fact that there could be legal reason to perform a different act-type if a different action were legally required - the very fact that Sutpen could have reason not *to box* if *boxing* were legally proscribed - reinforces this point. It indicates that there is a relation, not independence, between what there is legal reason to do and what is legally required.[29]

(ii) If a legal reason were content-independent, the reason-giving fact itself would not depend on whether this or that particular act-type were legally required. However, it does depend on this. If a legal reason is a reason *to ø,* the reason is the fact that ø-ing is legally required, rather than another fact (the fact that μ-ing is legally required, for example), which is reason-giving.

Consider Sutpen's reason not to assault. If Sutpen were subject to a legal requirement with a different 'content' (if he were legally proscribed to box, for example), and if Sutpen would nonetheless have reason to act (if he would have reason not to box), then the fact which stood to him as a reason to act would be different. It would be 'Sutpen is legally proscribed to box' rather than 'Sutpen is legally proscribed to assault'.

Plainly, the content of a legal requirement could not supply a legal reason to act. When there is legal reason to ø, it is the fact that ø-ing *is legally required* which is the reason, and not another property of ø-ing. Still, the reason-giving fact essentially refers to a particular action, as we have seen. Again, then, there is an important respect in which legal reasons are content-dependent rather than content-independent.

13. Conclusion

In section 12, I did *not* argue that legal reasons would be content-independent only if what there is legal reason to do is unrelated to what is legally required. Arguing this would be a mistake, since it is possible that proponents of [I] and [J] would not wish to contend that a reason is content-independent just in case there is *no* relation between it and 'the content' of the relevant reason-giving act.

Section 12's argument was that there are two crucial respects in which the character of a reason supplied by a legal requirement depends on the particular action it requires. Kelsen might be correct that 'any kind of content can be law' (see section 8), and it might be true that, if there is a strict legal reason to ø, then there would be legal reason to μ if μ-ing were legally required (see section 7). However, given section 12's argument, it is doubtful that it is correct to conclude that legal reasons are content-independent. Marmor and Raz say a reason is content-independent when 'there is no direct connection' between

it and the content of the relevant reason-giving fact.[30] My aim in section 12 was to show that there are two respects in which legal reasons fail to satisfy this condition.

The aim of the chapter 5 more generally has not been to show that there is *no* sense in which legal reasons are content-independent. The claim that legal reasons are content-independent - more precisely, the claim that they are distinctively content-independent - is false *under two interpretations*. This is all I have argued. In chapter 6, I shall consider whether the claim is more plausible under alternative interpretations.

I should mention that I shall say nothing about what would follow if legal reasons are *not* (distinctively) content-independent. There are arguments - some of great practical significance - which assume that legal reasons are (distinctively) content-independent, but I shall not investigate whether these arguments could be reformulated in a way which omits reference to content-independence, for example. The aim of chapters 5 and 6 is entirely analytical: the aim is to clarify our understanding of the nature of the normativity of law.

Appendix

14. Let me reformulate the argument to which section 9 responds. It is more complex than it may at first appear.[31] In section 15, I shall explain why the argument remains unconvincing.

The following conditional might be true: if the fact that a certain action is morally required is a strict reason to perform it, then there would be reason to perform a different action if a different action were morally required.[32] However, in certain cases, the truth of the embedded conditional ('there would be reason to perform a different action if a different action were morally required') is merely tautological. Consider, for example:

if it were morally required to exploit the hungry, then there would be reason to exploit them.

Arguably, the antecedent of this conditional is necessarily false; arguably, there are no possible states of affairs which are the same as the actual one except in that it is morally required to exploit the hungry. For sake of argument, let us suppose that the antecedent is necessarily false. Then it follows that the conditional is true. In this case, however, the conditional's truth is tautological. Since the antecedent is necessarily false, the conditional says nothing informative about our normative predicament.

It might seem that there is a relevant contrast with legal reasons. Given [I], the following is true if legal reasons are content-independent: if the fact that a particular action is legally required is a reason to perform it, there would be reason to perform a different action if a different action were legally required. This time, however, it seems that the embedded conditional is never tautologically true, for it seems that it is never necessarily false that a certain action is legally required. Consider, for example:

if reading were legally required, there would be reason to read.

Presumably, the antecedent of this conditional is not necessarily false; presumably, there are possible states of affairs which are exactly like this one except that there is a legal requirement to read. It follows that this conditional is informative, if true: if true, it describes the reasons that pertain in a certain nonactual state of affairs.

The most important assumption of this argument - the assumption that certain actions could not be immoral - is controversial. According to some moral theorists, for example, even 'it is morally required to exploit the hungry' is not necessarily false. However, I shall ignore this here. I shall also ignore the possibility that certain actions could not be legally required.

15. Why is the argument unconvincing?

The argument relies on the following disanalogy between morality and law: any action could be legally required but not just any action could be morally required. As I mentioned in section 9, this disanalogy does not show that legal reasons differ from reasons given by the fact that an action is morally required. In itself, all the disanalogy shows is that there is a sense in which legal *requirements* are content-independent, unlike the requirements of morality. But notice that the argument draws an implication from this disanalogy. The implication is that an important component of [I] - namely,

there would be reason to μ if F were a property of μ-ing -

is informative when F is the property of being legally required but uninformative because tautological when (i) F is the property of being morally required and (ii) μ-ing is an action that could not be morally required (for example, when μ-ing is exploiting the desperately hungry).

Admittedly, this implication can be drawn. But what does it show? When F is the property of being legally required, and ø-ing's F-ness is a reason for x to ø, are we informed about x's *reason to ø* when we learn that x would have reason to μ if μ-ing were legally required? We are informed about something regarding x's normative predicament in a certain nonactual state of affairs; obviously, we are informed that, in a certain nonactual state of affairs, x would have reason to μ. But the question is whether we would be informed about x's *reason to ø*. This is because, according to [I], a reason to ø given by ø-ing's F-ness - *this very reason* - is content-independent when there would be reason to μ if F were a property of μ-ing.

I would argue that we do *not* learn about x's reason to ø. As I explained in section 11, the reason to μ would be a distinct reason, rather than the reason to

ø with a different 'content'. Since it would be a different reason, it is not as if the reason to ø has revealed itself to have a property it would not have if the following conditional were false:

there would be reason to μ if F were a property of μ-ing.

Why does it matter if we do not learn something about x's reason to ø when we learn that this conditional is true? Because the argument we are considering relies on a contrast between cases in which the conditional is informative and cases in which it is not. As we have seen, the argument assumes that the conditional can be uninformative only when F is the property of being morally required. What I have observed is that the conditional is uninformative even when F is the property of being legally required.

[1] For recent claims about content-independence, including its relevance to legal reasons in particular, see: Duff 1998 p. 247; Green 1988 pp. 40-62, 225-6; Hart 1982 ch. 10; Himma 2000 pp. 26-7; Postema 1998 p. 349; Raz 1986 pp. 35-7 and 1990 p. 70; Schauer 1991 p. 125 and 1994 p. 499; Shiner 1992 pp. 52-3.

[2] See, for example: Duff 1998 pp. 245-9; Edmundson 1998 pp. 12-13, 50, 52-3; Green 1988 pp 41-6, 112-14, 225-6; Hart 1982, above n 3 pp. 18, 255-62; Marmor 1995 pp. 345-9; May 1997 pp. 21, 25; Shapiro 1998 pp. 492-3. I take the phrase 'unlikely to be controversial' from Schauer 1994 p. 499. Notice that Schauer does not think that it is sufficient for p to be a legal reason that p is a content-independent reason. He writes: 'Normativity is what happens when legal norms [guide] their subjects by providing those subjects with content-independent reasons for action *by virtue of the inclusion of those norms within a legal system*' (1994 p. 499, emphasis added).

[3] Here is a sample: the fact that an action would fulfil a promise or request; the fact that one would suffer a penalty if one failed to perform an act; the fact that an authoritative command has been issued.

[4] See, for example: Green 1988 pp. 49, 56-7; Raz 1986 p. 35.

[5] Green 1988 p. 225. For the description of assault, see *Model Penal Code* §1.13(9) (material elements) and §2.02 (culpability elements). Arguably, the immorality of an action is not itself a reason not to perform it; arguably, it would be more correct to say that the most obvious reason not to assault is the fact or facts in virtue of which assault is immoral. For present purposes, we can ignore this complication.

[6] Green 1988 p. 226. Edmundson (1998 p. 50) believes that the fact that there appears to be a content-independent reason to conform to the law's administrative prerogatives is an example of 'doubts about the existence of a general duty to obey the law fail[ing] to carry over when the subject is the duty to comply with administrative prerogatives'.

[7] Green 1988 p. 225.

[8] Duff 1998 p. 247.

[9] Duff 1998 p. 247, emphasis added.

[10] Green 1988 p. 41.

[11] Raz 1990 p. 70.

[12] Raz 1986 p. 35. Compare Shiner 1992 pp. 52-3.

[13] Raz 1990 p. 25.

[14] To simplify expression in chapters 5 and 6, I shall assume the legal status in question is always that of legal *requirement.*

[15] An anonymous referee for *Oxford Journal of Legal Studies* observed that it is doubtful whether legal reasons can be partial; in his or her view, for example, it is unclear whether Sutpen's reason is legal since the complete reason is 'assault is legally proscribed *and injurious*' rather than 'assault is legally proscribed'. If this view were correct, I would only need to consider whether content-independence is a property of strict legal reasons. For sake of completeness, however, and since many jurists appear to have the contrary view (many jurists appear to believe that a reason could be legal even if the 'complete' reason includes facts other than the fact that an action is legally required), I shall not assume that this view is correct.

[16] Edmundson 1998 p. 12.

[17] Dancy 1993 p. 56. In the passage quoted, Dancy is concerned with moral reasons in particular. But some statements of particularism refer to reasons in general; see, for example, Cullity 1997 p. 117 fn. 37.

[18] See, for example, Green 1988 pp. 56-7, 225-6. Green mentions reasons of this type while considering whether acting on content-independent reasons will 'indirectly produce conformity with content-dependent reasons'. It is possible that Green is

attempting to answer this question without assuming that *it is true* that the fact that an action would maximise utility is a complete reason to perform it.

19 For recent discussion, see: Coleman, 1998 p. 382; Leiter 1998 p. 535; Shiner 1992 pp. 38-9, 68, 250, 256.

20 Kelsen 1967 p. 198.

21 I continue to ignore the possibility that the immorality of an action is only a fact in virtue of which there is a reason not to perform it (see footnote 5 above).

22 In fact, some jurists (see, for example: Green 1988 pp. 42-3; Shiner 1992 pp. 250, 256, 318) appear to attribute content-independence to legal requirements and not only their normative significance, without recognising the difference.

23 Postema 1987 p. 91. Compare: Green 1988 p. 47; Raz 1986 p. 36.

24 Green 1988 p. 51.

25 Green (1988 p. 51) recognises the need to ask such questions.

26 See, for example, Green 1988 pp. 40-1.

27 Hart 1982 p. 254.

28 Two minor qualifications need to be made. First, it is unclear whether Hart believes that the fact that x is authoritatively commanded to ø could be a *strict* reason for x to ø. Second, I shall assume that the authoritative commander commands different act-types.

29 Notice that the relation is not merely co-variance. In the situation described in section 9, Sutpen would have reason to box if *and in part because* boxing is legally proscribed.

30 Marmor 1995 p. 345. Compare: Raz 1986 p. 35; Shiner 1992 p. 52.

31 I thank David Archard, John Skorupski and an anonymous referee for *Oxford Journal of Legal Studies* for describing the argument in this form.

Chapter 6 Content-independence: the third and fourth meanings

1. Introduction

It is very widely held that legal reasons have a certain distinctive property - content-independence. Chapter 5 argued that, on two interpretations of 'content-independence', this view is mistaken. The obvious reply to my argument is that it is possible that I have misunderstood the nature of formal property in question. I have explicated two senses in which a legal reason could be content-independent, but the reply would be that I have simply ignored the sense used by those who claim that legal reasons are content-independent.

In chapter 6, I shall examine two further senses in which a legal reason could be said to be content-independent. According to one, a legal reason to ø is content-independent since there is an extrinsic relation between the reason-giving fact and ø-ing (see sections 3-7). According to the other sense - a sense mentioned in section 4 of chapter 5 - p is a content-independent reason to ø just in case there would be reason to ø, if p obtained, even if ø-ing did not have certain properties (see sections 8-15). Overall, my argument will be that the claim that

> p is a legal reason to ø only if p is a content-independent reason to ø

is either false or uninformative. If it is false, this is because - in one sense of 'content-independent' - legal reasons (contingently) lack the relevant property (sections 7, 11 and 13). If it is uninformative, this is because - in another sense

of 'content-independent' - *any* reason fails to lack the relevant property (sections 10 and 14).

2. U- and m-reasons

No jurist contends that legal reasons are uniquely content-independent. Still, as we saw in chapter 5, an important part of the claim at issue is that content-independence is a property which distinguishes legal reasons in particular from reasons in general. It will be helpful if I mention two types of reason which have been described as *not* content-independent: (i) and (ii) below.

(i) Suppose you would maximise utility on an occasion if you performed a legally proscribed act. Some would claim that the fact that the act would maximise utility is a reason for you to perform it (some hold that x has a reason to ø if and because x would maximise utility by ø-ing). And, according to some, reasons of this type - let us call them *u-reasons* - are content-dependent rather than content-independent.[1]

For sake of argument, I shall assume that there actually are utility reasons. That is, I shall assume that the fact that x would maximise utility by ø-ing *is* a reason for x to ø. Our question shall be: would a legal reason to perform the same act differ in any content-independent respect from your u-reason?

(ii) Jurists frequently observe that criminal codes include offence definitions which describe obvious male in se. It is also observed that the fact that these actions are independently immoral (the fact that they cause unnecessary harm, for instance) is a reason not to perform them. Take assault. It is observed that '[w]e ought to refrain from assaulting people even if it were not a crime' and that the

'norm [of conventional public morality] that supports the offence definition of assault provides goods reasons ... to refrain from violating the assault statute'.[2]

Let us call a reason of this type an *m-reason*, and let us accept that these exist. That is, let us accept that x has reason not to ø if and because ø-ing is immoral (if and because ø-ing causes unnecessary harm, for instance). According to many, an m-reason is not a legal reason, even if it is a reason to conform to the law. Why is it not? Part of the answer many give is that an m-reason is content-dependent, unlike a legal reason.[3]

3. The third meaning

What is content-independence?

Postema says content-independent reasons are

'reasons the practical force of which is dependent on something extrinsic to the action that is required, i. e., on some accidental property of the action'.[4]

With respect to the content-independence of a reason supplied by an authoritative command, Raz writes that '[t]he reason is ... the apparently "extraneous" fact that someone in authority has said' to perform an action.[5] And Marmor says a reason is content-independent when 'there is no direct connection between' the reason and the action for which it is a reason.[6]

These remarks suggest various possible definitions of content-independence. The most obvious, I think, is captured by the following:

[K] If p is a reason to ø, p is a content-independent reason to ø if and only if p is extrinsic to ø-ing.

I take [K]'s 'extrinsic' from Postema; I might have used 'accidental' or 'extraneous' or 'not directly connected' instead (Postema, Raz and Marmor use these terms as well - see above). Postema et al. do not say what they mean by these terms. Accordingly, it is difficult to assess their claim. Unfortunately, we cannot appeal to the philosophy of action to provide an obvious or uncontroversial meaning of 'extrinsic'. Philosophers of action do not only dispute which facts (properties, etc.) are extrinsic to which actions; they also dispute the very conditions under which a fact is extrinsic to an action.

In what follows, I shall interpret 'extrinsic' in [K] in an intuitive manner. My contention is that, if [K] correctly defines content-independence, the claim that legal reasons are content-independent is false, but I shall not attempt to justify this contention by arguing that Postema et al. have misunderstood what it is for a fact to be extrinsic ('accidental', 'extraneous' or 'not directly related to') to an action. Instead, my argument will be that the claim is false on an intuitive understanding of these terms. If Postema et al. wish to dispute my contention, they will need to describe an alternative meaning of 'extrinsic'.

4. A problem for [K]

It is initially plausible that legal reasons satisfy [K]'s condition. This is because, if there is legal reason to ø, the reason is the fact that ø-ing has a certain legal status, and it is initially plausible that there is only an extrinsic relation between an action and the fact that it has a certain legal status.

To see this, consider a legal reason not to rape. The fact that rape is legally proscribed is the reason in this case, yet it appears that this fact is extrinsic to rape. Think of the dispute preceding the recent criminalisation of marital rape.[7] No one denied that marital rape *is* rape; no one claimed that marital rape would be rape only if it constituted an offence. Instead, the dispute

concerned the merits of proscribing *a particular kind* of rape. Rape is certainly illegal, and the fact that it is illegal is a reason not to perform it; this is our assumption. Nonetheless, it seems that the illegality of rape is extrinsic to the action there is legal reason not to perform.

Consider a second example. Suppose the following fact is a reason for Rosa not to assault:

(6.1) Rosa is legally proscribed to assault.

Intuitively, (6.1) is extrinsic to assault; intuitively, the question of whether Rosa has assaulted is independent of whether she has acted illegally. Accordingly, it seems that Rosa's reason satisfies [K]'s condition. Notice that the reason is legal, just like the reason not to rape. So we appear to have a second case in which a legal reason is content-independent.

Whether a fact is extrinsic or intrinsic to an action is actually more complicated than I have suggested. This is seen once we distinguish between an act-type and its tokens, and once we realise that what is extrinsic to an act-token under one description can be intrinsic to it under another. [K] says p is a content-independent reason to ø only if p is extrinsic to ø-ing, but we must ask the following: extrinsic to ø-ing under which description of ø-ing's tokens?

We must ask this question because, if p is a legal reason to ø, p is surely intrinsic to ø-ing's tokens under at least one description of these token. Here is the description I refer to: 'act-token p is a reason to perform'. Think of Rosa's reason not to assault. If (6.1) is a reason for Rosa not to assault, the act-tokens for which (6.1) is a reason are of the following type: act-tokens (6.1) is reason not to perform. And, with respect to tokens of *this* type, (6.1) is surely of intrinsic rather than extrinsic significance.

The upshot is that it would be false to claim that (6.1) is extrinsic to the acts Rosa has reason to refrain from *under every description of theseacts*. More generally, the upshot is that [K] would be implausible if we read it as follows:

[Ka] When p is a reason to ø, p is a content-independent reason to ø if and only if p is extrinsic to tokens of ø-ing under every description of these tokens.

5. The legal description

Can [K] be given a more plausible interpretation?

It appears so, for it appears that the fact that an act-token is legally required or proscribed is always extrinsic to a particular description of that act-token. The description I refer to is the one that the law itself provides.[8] Recall that, if p is a legal reason to ø, p is the fact that ø-ing has a certain legal status. What seems to be the case is that this very fact is extrinsic to the act-token *under its legal description.*

Consider Rosa's reason not to assault:

(6.1) Rosa is legally proscribed to assault.

(6.1) is a reason not to assault, so it seems that it is a reason not to perform the particular act-token named by the following phrase: 'Rosa's punching Mr Coleman in Jefferson on 19 August 1897 at noon'. Roughly speaking, the description the law itself provides of assault is 'purposely, knowingly, or recklessly causing bodily injury to another', and it seems that with respect to *this* description, (6.1) is extrinsic to the act-token in question.

In general, it seems we can identify any legally required or proscribed act-token without reference to its legal status, and then add the further, independent fact that the act-token fitting this description is legally required or proscribed. If this is correct, perhaps we should interpret [K] as follows:

[Kb] When p is a reason to ø, p is a content-independent reason to ø if and only if p is extrinsic to tokens of ø-ing *under ø-ing's legal description.*

There is one obvious problem with [Kb]: reasons which are traditionally taken to be content-dependent rather than content-independent satisfy its condition. Consider, for example, u-reasons. Suppose

(6.2) Rosa would maximise utility by taking a conveyance without consent.

Then Rosa has a reason to take a conveyance without content. (Our assumption, recall, is that the fact that an action maximises utility is a strict reason to perform it.) U-reasons are supposed to be content-dependent, but, given [Kb], Rosa's reason is content-independent: under its legal description, (6.2) is extrinsic to 'taking a conveyance without consent'. Indeed, this description - roughly, 'taking a conveyance, driving a conveyance that has been taken, or allowing oneself to be carried in a conveyance that has been taken' - does not even mention utility.

However, I shall ignore this problem here. For it certainly seems that *some* reasons fail to satisfy [Kb]'s condition, and [K]'s proponents might only be committed to thinking that not *all* reasons are content-independent.

6. Should we accept [Kb]?

Now I shall explain why [Kb] is unacceptable. My argument shall be that a legal reason is not content-independent even if it satisfies [Kb]'s condition.

Legal reasons appear to be 'content-independent', because their relationship to the actions they are reasons to perform appears to be 'extrinsic, 'extraneous', 'not direct' (section 3). But the following question arises: the relation between legal reasons and tokens of these actions under which

description of these tokens (section 4)? Section 4 argued that 'every description' is an unacceptable answer. 'The legal description' is the answer proposed by [Kb]. It is better than 'every description', because it is difficult to think of situations in which the fact that ø-ing has a certain legal status is intrinsic to ø-ing's legal description (section 5). But a question remains: is 'the legal description' the *correct* answer?

I believe not. The correct description is 'action there is reason to perform'. [K] is supposed to be a definition of the content-independence of *reasons*. Therefore, if p is a content-independent reason to ø, p should be extrinsic to ø-ing qua action p is a reason to perform. Think of Rosa's reason not to assault:

(6.1) Rosa is legally proscribed to assault.

And think of (6.1) as it pertains to the act-token named by, 'Rosa punching Mr. Coleman in Jefferson on 19 August 1897 at noon'. Surely one could not show that Rosa's reason satisfies [K]'s condition by showing that (6.1) is extrinsic to this act-token under its legal description. What one must show is that (6.1) is extrinsic to the act-token *there is reason perform* - to the act-token under *this* description. Otherwise one would fail to show anything about (the content-independence of) Rosa's *reason*.

I admit that there are likely to be contexts in which 'the legal description' is exactly the description with which we should be concerned. Suppose our interest was in whether legal *requirements* are content-independent.[9] Then it might be entirely legitimate to be concerned with the relationship between (i) an act-token under its legal description and (ii) the fact that it is legally required. Is the legal requirement for Rosa not to assault content-independent? A correct answer might be: 'yes, because the fact that it is legally proscribed is extrinsic to its legal description ("a purposive, knowing or reckless causing of bodily injury to another")'.

In the present context, however, 'the description provided by the law itself' is *not* the relevant description. The claim at issue is that *legal reasons* are content-independent. According to [K], they are content-independent because they are extrinsic ('extraneous', 'not directly connected', etc.) to the actions for which they are reasons. It follows, I claim, that the relevant description of a legally required or proscribed act-token is 'an act there is legal reason to perform'.

7. No reason satisfies [K]

If I am correct about this, it follows, moreover, that no reason satisfies [K]'s condition. This follows because, as indicated in section 4, if p is a reason to ø, p is surely *intrinsic* to ø-ing's tokens under the following description: 'act-token p is a reason to perform'.

Think of legal reasons in particular. When p is a legal reason to ø, p is the fact that ø-ing has a certain legal status. Imagine that, in a particular case, p is the fact that ø-ing is legally required. Then, if p satisfied [K]'s condition, p would be extrinsic to the act-tokens for which it is a reason. However, surely the opposite is the case. Each of these act-tokens is legally required, and the fact that they are legally required is the reason to perform them. So, under the relevant description, p is *intrinsic* to ø-ing's tokens.

Or think of Rosa's reason not to perform the act-token named by, 'Rosa punching Mr. Coleman in Jefferson on 19 August 1897 at noon'. This act-token bears numerous descriptions. Under some of these, the reason in question -

(6.1) Rosa is legally proscribed to assault -

is of extrinsic rather than intrinsic significance, as we have seen. However, (6.1) is surely *intrinsic* to the act-token under the description, 'act-token (6.1) is reason

to perform'. Indeed, it is exactly in virtue of (6.1) that Rosa has reason not to perform this act-token.

8. The fourth meaning

The claim that legal reasons are content-independent has had a variety of meanings. In chapter 5, I considered two of these meanings. They share the thought that ø-ing's F-ness is a content-independent reason to ø if the following conditional is satisfied

there would be reason to μ if F were a property of μ-ing.

In sections 3-7 above, I described a third meaning of the claim. According to this meaning, a legal reason to ø is content-independent if the fact which is the reason - the fact that ø-ing has a certain legal status - is extrinsic to ø-ing. In the remainder of chapter 6, I shall describe (sections 8-12) and evaluate (sections 13-5) a fourth meaning.

According to Shapiro, Able's request gives Baker a content-independent reason since '[i]t is the fact *that* Able asked, rather than *what* he asked, which gives Able a reason to act.'[10] Shapiro appears to assume that the fact that a person is requested to ø is a strict reason for that person to ø. For sake of argument, let us grant this assumption. Then Shapiro's claim seems plausible. That is, it seems plausible that Baker's reason is the fact that Able requested Baker to ø rather than some independent fact about ø-ing (some fact about '*what*' ø-ing is).

Postema offers a similar characterisation of content-independence. He says the recognition of content-independent reasons 'in no way depends on an assessment of the desirability or moral merits of the actions for which they are reasons'.[11] Suppose the action Able requested Baker to perform is

independently desirable. Postema would claim that Baker's reason to ø (the reason given by the fact that Able has requested Baker to ø) is content-independent because one could recognise it without determining whether or not it had independently desirable qualities.

Shapiro and Postema are inspired by a famous claim made by Hart. This is the claim that a reason supplied by an authoritative command is content-independent since it is intended to 'function independently of the nature or character of the action[s] to be done'.[12] Let us ignore the fact that Hart only refers to what is *intended* to be true of the reason. Then Hart's claim is that an authoritative command to ø is content-independent because it is a reason to ø which is independent of those qualities of ø-ing which constitute 'its nature and character'.

An analogous claim for legal reasons is not difficult to see: a legal reason to ø is content-independent because it is independent of qualities of ø-ing which constitute its nature and character. Green appears to make exactly this claim. He says that laws supply content-independent reasons because they have a normative force 'which does not depend on the nature of the action prescribed'. For Green, '[t]he core idea' of content-independence is

> 'that the fact that some action is legally required must itself count in the practical reasoning of the citizens, independently of the nature and merits of that action'.[13]

Presumably, this a matter of 'content-independence' because 'the nature and merit' of a legally required action is to be equated with its 'content': a legal reason is independent of the requirement's 'content' if it is independent of 'the nature and merit' of the required action. I think Postema indicates this same sense of content-independence when he refers to the possibility of 'formally valid laws, in virtue of their existence alone and not in virtue of their content' being reason-giving.[14]

Edmundson also indicates this sense, although he directs his attention to the special case in which there is a *duty* to conform to the law. According to Edmundson, a duty to conform to the law is content-independent when its

> 'existence and weight should be determinable without reference to the character or consequences of the [relevant] actions'.[15]

Like Postema, Edmundson holds that, if x has a content-independent reason to ø, x could identify this without identifying certain facts about ø-ing. Edmundson adds two complications, however. First, he mentions that x could identify the reason *and its weight*. Second, he divides the identifiable facts about ø-ing into those about ø-ing's character and those about ø-ing's consequences.

Given certain important qualifications (see section 12), I believe Shapiro, Postema, Hart, Green and Edmundson would accept the following definition:

> [L] When p is a reason to ø, p is a content-independent reason to ø if and only if p is independent of certain facts about ø-ing, facts other than p.

9. Explaining [L]

[L] is vague because it includes the phrase, 'certain facts about ø-ing'. I actually intend [L] to be vague in this respect, since Shapiro et al. do not offer a uniform account of the attributes of ø-ing that a reason to ø would have to be independent of in order to be content-independent. Postema refers to the action's 'desirability and moral merits', but Hart refers to its 'nature and character'; Edmundson refers to the action's 'character or consequences', but Shapiro refers to '*what*' ø-ing is.

Let me make [L] less vague. First of all, notice that 'certain facts about ø-ing' cannot mean '*every* fact about ø-ing'. It cannot mean this because at least one fact about ø could be p, and p *is* the reason. Since p is the reason, and since,

presumably, something cannot be independent of itself, it follows that 'certain facts about ø-ing' can at most mean 'every fact about ø-ing except p'. This is why [L] includes the phrase 'facts other than p'.

I mention that 'every fact about ø-ing except p' is one possible meaning of [L]'s 'certain facts about ø'. The remarks quoted in section 3 suggest three others: (i)-(iii) as follows.

(i) The first meaning is 'facts which are in some sense intrinsic to ø-ing'. This meaning of 'certain facts about ø-ing' is seen in the reference to the 'nature and character' (Hart), 'character' (Edmundson) and 'nature' (Green) of the action there is reason to perform, and in the reference to '*what*' this action is (Shapiro).

(ii) The second is 'facts about the moral or other value of ø-ing'. I see this meaning when I read reference to the 'desirability or moral merits' (Postema) or 'merits' (Green) of the action there is reason to perform.

(iii) The third is 'facts about the consequences of ø-ing'. This meaning can be seen in Edmundson's reference to the 'consequences' of the relevant action.

I intend [L]'s 'certain facts about ø-ing' to cover exactly these four possibilities. Let me offer an illustration of what I mean. Suppose the following fact is a strict reason for Rosa not to assault:

(6.1) Rosa is legally proscribed to assault.

This would satisfy [L]'s condition if (6.1)'s obtaining and weight are independent of (i) facts intrinsic to assault, (ii) facts about the moral or other value of assault, (iii) facts about the consequences of assault, or (iv) every fact about assault except (6.1).

Now, since [L] includes the word 'independent', [L] is vague in a second respect. To see this, think of the fact that

(6.3) assault is harmful.

In [L]'s terms, (6.3) surely counts as a 'certain fact about' the action Sutpen's reason is a reason not to perform. For (6.3) is surely intrinsic to assault, for example (to use Hart's expression, (6.3) is surely a fact about the 'nature and character' of assault). [L] is vague because it is uncertain how (6.1)'s obtaining and weight would have to stand in relation to (6.3) for Rosa's reason to satisfy [L]'s condition.

The point can be made more generally. According to [L], a legal reason is content-independent just in case its obtaining and weight are independent of certain facts about the action there is reason to perform. But 'independent' in what sense?

10. Epistemic independence

One possible sense is 'epistemically independent'. Edmundson suggests this sense when he writes that, if there is a content-independent duty to ø,

> 'that duty's existence and weight should *be determinable* without reference to the character and consequences of the actions *available to the actor* at the time she acts'.[16]

Postema also suggests this sense when he says that a content-independent reason to ø is one we can '*recognise*' without assessing 'the desirability or moral merits' of ø-ing.

For three reasons, however, I shall understand [L]'s 'independent' in nonepistemic terms. The first reason relates to the fact that part of the claim at issue is that certain nonlegal reasons (u- and m-reasons, for example) are *not* content-independent. If 'independent' in [L] means 'epistemically independent', this part of the claim would be implausible; it appears that the obtaining and

weight of a reason of *any* type might be 'determinable' without reference to certain facts about the action it is for. At the very least, it appears that whether or not a reason is of a type typically taken to content-independent is a matter which is irrelevant to whether or not its obtaining and weight can be 'recognised' without reference to certain facts about the action for which it is a reason.

The second reason is that many of [L]'s proponents clearly do *not* believe that content-independence is an epistemic matter. Recall Shapiro's remark that Able's request gives Baker a content-independent reason to act since '[i]t is the fact *that* Able asked, rather than *what* he asked, which gives Baker a reason to act'. Shapiro's claim is not about Baker's ability to make certain correct judgements about his reason to fulfil Able's request; clearly, Shapiro's claim is about the nature of the reason itself.

The third reason is that Edmundson's and Postema's remarks admit a nonepistemic interpretation. Edmundson says that the existence and weight of a content-independent duty to ø can be determined without reference to the character or consequences of ø-ing. However, for all Edmundson says, the existence and weight of a content-independent duty to ø can be determined because the duty's existence and weight *are* independent of the character and consequences of ø-ing. Postema says a content-independent reason to ø is one we can recognise without assessing the desirability or moral merits of ø-ing. For all Postema says, however, this is because the reason *is* independent of the desirability and moral merits of ø-ing.

As mentioned, I shall understand [L]'s 'independent' in nonepistemic terms. I can think of only two possibilities. One is 'causally independent'. According to this meaning, Rosa's reason would satisfy [L]'s condition just in case (6.1) is causally independent of 'certain facts about' assault. I shall assess this meaning of [L] in section 11. Section 12 considers the other meaning, which is more complicated.

11. Causal independence

Given [L], the claim at issue is that legal reasons satisfy [L]'s condition, while certain nonlegal reasons (u- and m-reasons, for example) do not. In section 11, I shall argue that, if 'independent' in [L] means 'causally independent', the first part of this claim is false.

With respect to strict legal reasons, the first part of the claim is that any strict legal reason satisfies [L]'s condition. But consider Rosa's reason not to assault. This is a strict legal reason (let us make this assumption), yet it fails to satisfy [L]'s condition. To see that it fails to satisfy this condition, we need to make four credible assumptions about the following fact:

(6.3) assault is harmful.

The first assumption is that (6.3) is intrinsic to assault (that is: that Green and Hart would agree that assault's harmfulness is a matter of the 'nature' of assault; that Edmundson and Green would accept that it is matter of assault's 'character'; that Shapiro would say that assault's harmfulness is about '*what*' assault is).

The second assumption is that (6.3) is a fact about the (moral) value of assault (that is, that Postema and Green would accept that whether or not an action is harmful is a question about its 'desirability or moral merits').

The third assumption is that (6.3) is a fact about assault's consequences (Edmundson, recall, refers to the 'consequences of the actions' there is content-independent reason to perform).

The fourth assumption is that (6.3) was a cause of

(6.1) Rosa is legally proscribed to assault.

This final assumption is more plausible than it may seem at first. (6.1) is a consequence of assault's more general illegality, and it is plausible that assault's harmfulness was a cause of the illegality of assault in general. This is plausible

because it is plausible that assault was legislated against in part because it is harmful (that is, it is plausible that legislators were motivated by (6.3), amongst other things).

Rosa's reason fails to satisfy [L]'s condition because it causally *depends* on a relevant fact about the action to which it pertains. Given the first three assumptions, (6.1) satisfies all four possible meanings of [L]'s 'certain facts about ø-ing'. Since (6.1) satisfies all four of these meanings, Rosa's reason will satisfy [L]'s condition only if (6.3) is not one of (6.1)'s causal antecedents. But, given the fourth assumption, (6.3) *is* a causal antecedent of (6.1). It follows that Rosa's second reason is a counterexample to the claim that a reason satisfies [L]'s condition if it is a strict legal reason.

Now I shall show that p can be a *material* legal reason yet fail to satisfy [L]'s condition. Again, I shall provide a single counterexample. The example comes from section 6 of chapter 5. Suppose the following three facts obtain:

(6.4) Sutpen is legally proscribed to assault;

(6.5) Sutpen has promise not perform injurious illegal acts;

(6.6) assault is injurious.

Then it seems that Sutpen has reason not to assault. As in chapter 5, I shall assume that (6.4) is a material reason for Sutpen not to assault. Obviously, (6.4) is also a legal reason: (6.4) is the fact that an action has a certain legal status, and a fact which is a reason to ø is a legal reason if it is the fact that ø-ing has a certain legal status (see chapter 1).

Here is our question: does (6.4) satisfy [L]'s condition for content-independence? To see that the answer is 'no', we need to make four credible assumptions about the following fact:

(6.3) assault is harmful.

Here are the assumptions: (6.3) is 'intrinsic' to assault; (6.3) is a fact about the 'desirability or moral merits' of assault; (6.3) is a fact about assault's consequences; (6.3) is a cause of (6.4).

Given these assumptions, (6.4) is *not* causally independent of 'certain facts about' assault: as we have just seen, (6.3) is a causal antecedent of (6.4) (the fourth assumption), and (6.3) satisfies all four meanings of [L]'s 'certain facts about' assault (the first three assumptions). It follows that Sutpen's reason is a counterexample to the claim that it follows from (i) the fact that p is a material legal reason that (ii) p is content-independent in [L]'s sense.

12. Logical independence

If 'independent' in [L] refers to causal independence, [L] does not support the claim at issue - the claim that legal reasons, strict or material, are content-independent. This is what I argued in section 11. In section 12, I shall describe a non-causal meaning of 'independent'. I shall also modify [L] in an important respect. I think the modified definition is one that Shapiro, Postema, Hart, Green and Edmundson are more likely to accept.

Consider the unmodified definition:

> [L] if p is a reason to ø, p is a content-independent reason to ø if and only if p is independent of certain facts about ø-ing, facts other than p.

[L] says it is p that must be independent of certain facts about ø-ing if p is to be a content-independent reason to ø. However, perhaps this is not exactly correct. If p is a content-independent *reason* to p, perhaps what needs to be true is that there is no relationship between certain facts about ø-ing and the fact that p *is* a reason to ø.

Think of Rosa's reason not to assault:

(6.1) Rosa is legally proscribed to assault.

[L] says (6.1) is a content-independent reason for Sutpen not to assault only if (6.1) is independent of certain facts about assault. But since we are interested in whether (6.1) is content-independent *as a reason*, perhaps we need to say: (6.1) is a content-independent reason only if the fact that (6.1) is a reason for Rosa not to assault is independent of certain facts about assault.

Or think of Shapiro's discussion of Able's request. The request is said to supply a content-independent reason since Baker's reason is

(6.7) Able requests Baker to ø

rather than another fact about ø-ing. Shapiro's thought might be as follows: (6.7) is a content-independent reason since (6.7)'s status as a reason - rather than some other property of (6.7) - is independent of certain other facts about ø-ing. Or recall Edmundson's reference to the weight of a content-independent duty. He suggests that (6.7) would be a content-independent reason only if (6.7)'s weight *as a reason* is independent of certain other facts about ø-ing (ø-ing's 'character and consequences').

In brief, perhaps [L] should become:

> [La] If p is a reason to ø, p is a content-independent reason to ø if and only if the fact that p is a reason to ø is independent of certain facts about ø-ing.

But what does [La]'s 'independent' mean? I think it is possible that Shapiro et al. have in mind a certain sort of logical independence. Suppose p is a reason for you to evade her. I think Shapiro et al. might say that p is a content-independent reason to evade her just in case it would follow *just* from p that you pro tanto

ought to evade her. In other words, I think they may say that there would be reason to evade her, if p obtained, whatever else is true of evading her.[17]

Consider the passage section 8 quotes from Edmundson:

> 'if there is a content-independent duty to ø, that duty's existence and weight should be determinable without reference to the character and consequences of [ø-ing]'.

Edmundson's claim might be as follows: if there is a content-independent duty to ø, there would be this duty, and this duty would have its particular weight, even if the character or consequences of ø-ing were different.

Or consider Green's remark that 'the fact that some action is legally required' is content-independently reason-giving if it is reason-giving 'independently of the nature and merits of that action' (see section 8). Green might claim that Rosa's reason -

> (6.1) Rosa is legally proscribed to assault -

is content-independent since it follows just from (6.1) that Rosa has reason not to assault. For example, my suggestion is that Green might wish to point out that Rosa would have a reason not to assault even if assault were not harmful. Of course, assault *is* harmful (indeed, it could be that x is an act of assault *only if* x is harmful). Moreover, the fact that assault is harmful could well be *a cause* of (6.1). However, Green might wish to point out that (6.1)'s status as a reason, and as a reason of a certain weight, is logically independent of this.

If this is correct, we can reformulate [La] more carefully, as follows:

> [Lb] If p is a reason to ø, p is a content-independent reason to ø if and only if there would be reason to ø, if p obtained, whether or not certain other facts about ø-ing obtained.

As with [L], [Lb]'s reference to 'certain facts ... facts about ø-ing' should be interpreted in the way described in section 9. That is, the phrase should be interpreted to mean one of the following: (i) 'every fact about ø-ing except p'; (ii) 'facts which are intrinsic to ø-ing'; (iii) 'facts about the moral or other value of ø-ing'; (iv) 'facts about the consequences of ø-ing'.

13. [Lb] and material legal reasons

Do legal reasons satisfy [Lb]'s condition?

First, consider the case of material legal reasons. Here is our question: could p be a material legal reason to ø without being content-independent in [Lb]'s sense?

If there is legal reason to ø, the fact which is the reason is that ø-ing has a certain legal status. However, to simplify discussion, I shall assume - slightly inaccurately, as chapter 1 explains - that it is the fact that ø-ing is legally required.

Now, if the fact that ø-ing is legally required is only a material reason to ø, it would not be a reason at all if certain other facts did not obtain; in effect, the normative significance of this fact would rely on the obtaining of certain others (see chapter 4, section 6).

Consider the example given in section 6 of chapter 5. Sutpen has promised to abide by any legal requirement which proscribes an injurious action. Plausibly, it follows that Sutpen has reason not to assault, since assault is both legally proscribed and injurious. Moreover, Sutpen has *legal* reason not to assault, for the fact that he is legally proscribed to perform an action -

(6.4) Sutpen is legally proscribed to assault -

is a reason not to perform it.[18] This reason is only a material reason, however. In the example, a proposition stating the obtaining of

(6.8) there is reason for Sutpen not to assault

is not strictly implied by the proposition that (6.4) obtains. The first proposition is implied - it is materially implied - given the obtaining of two other facts:

(6.5) Sutpen has promised not perform injurious illegal acts; and

(6.6) assault is injurious.

There is an important implication of the fact that a material legal reason is of normative significance only given the obtaining of certain additional facts. This is that a material legal reason need not satisfy [Lb]'s condition.

Actually, Sutpen's material legal reason is an example of one that shows this. If (6.4) satisfied [Lb]'s condition, there would be reason for Sutpen not to assault, if (6.4) obtained, whether or not 'certain other facts' about assaulting obtained. Clearly, however, Sutpen *could* lack reason not to assault, even if (6.4) obtained. Imagine, for instance, that (6.6) failed to obtain. Sutpen has reason not to assault only because assault is illegal *and injurious*.

Notice that the fact that assault is injurious - (6.6) - counts as a 'certain fact' about the action there is reason not to perform. First, it is distinct from (6.4). Second, it is intrinsic to assault; surely (6.6) is fact about the 'nature and character' of assault. Third, (6.6) is a fact about moral or other value of assault. Fourth, the injuriousness of an act of assault is a fact about that act's consequences.

Consider Postema's remark that 'formally valid laws, in virtue of their existence alone and not in virtue of their content', are reason-giving (see section 8). With respect to (6.4), this claim seems false. (6.6) is a fact about the content of the law requiring Sutpen not to assault (part of assault's legal definition is

'purposely, knowingly, or recklessly causing bodily *injury* to another'); however, Sutpen could lack reason not to assault if (6.6) failed to obtain.

I am not claiming that material legal reasons fail to satisfy [Lb]'s condition as a matter of course. (Imagine that Sutpen had promised to abide by the law *in general*. Then, for example, he could have reason not to an action whether or not it is injurious.) Instead, my claim is only that it is false that it follows from (i) the fact that a reason is legal that (ii) it is content-independent in [Lb]'s sense. The counterexample I have described shows that it is contingent whether a material legal reason satisfies [LB]'s condition; it shows it is only *possible* that, if there is a material legal reason to perform an action, there would be reason to perform it if it had different properties.

14. [Lb] and strict legal reasons

As it pertains to material legal reasons, the claim that legal reasons are content-independent is false (section 13); it is false, at least, if [Lb] correctly defines content-independence. Now I shall allow for the possibility that the claim is intended to pertain only to strict legal reasons.

Do strict legal reasons satisfy [Lb]'s condition?

Notice that section 13's argument does not answer this question. For this argument exploits the fact that a material legal reason is of normative significance only given the obtaining of certain additional facts. (With respect to Sutpen's reason not to assault, for example, it exploits the fact that (6.4) is of normative significance only given the obtaining of (6.6).) The normative significance of a strict legal reason is not conditional in this way. If assault's illegality were a strict reason not to assault, for example,

(6.8) there is reason for Sutpen not to assault

would follow from the obtaining of (6.4) independently of the obtaining of *any* other fact. If p is a strict reason to ø, then the proposition that p obtains strictly implies the proposition that there is reason to ø, and this means that there is reason to ø in every logically possible state of affairs in which p obtains (see chapter 4).

Therefore, I actually accept that, if p is a strict legal reason to ø, p satisfies [Lb]'s condition for content-independence. But this does not mean I accept the claim at issue. Fully spelt out, this claim is that legal reasons are *distinctively* content-independent (see section 2 above). I admit that a legal reason is content-independent in [Lb]'s sense if it is strict. The difficulty is that *any* strict reason satisfies [Lb]'s condition.

When p is a strict reason to ø, and p obtains, it follows unconditionally - in every possible world - that there is reason to ø. If p is a reason to evade her, for example, and p obtains, then it follows unconditionally that there is reason to evade her. Now, according to [Lb], a reason is content-independent if it is independent of certain facts about ø-ing, facts other than p. But, as just noted, *any* strict reason to ø is independent of *every* fact about ø (every fact other than p, of course). With regard to any reason to ø, the only non-independent fact - the only fact which must obtain - is p. However, if no fact other than p needs to obtain, then no fact about ø other than p needs to obtain. It follows that *any* strict reason satisfies [Lb]'s condition.

The point can be put more intuitively. Recall Shapiro's claim that Able's request gives Baker a content-independent reason to act since '[i]t is the fact *that* Able asked, rather than *what* he asked, which gives Able a reason to act.' It would be as true to say the following: for any strict reason, it is the fact which is the reason, rather than any other fact (rather than any other fact about the action, for example) which is the reason.

15. U- and m-reasons satisfy [Lb]'s condition

Section 2 observes that u- and m-reasons are taken to be content-dependent rather than content-independent. I will lend credence to my claim that any strict reason passes [Lb]'s test for content-independence (see section 14) if I can show that u- and m-reasons do so.

Suppose

> (6.2) Rosa would maximise utility by taking a conveyance without consent.

Then Rosa has a u-reason to take a conveyance without content. (Our assumption, recall, is that the fact that an action maximises utility is a strict reason to perform it.) U-reasons are supposed to be content-dependent, but, given [Lb], Rosa's reason is content-independent. This is because (6.2) is independent of 'certain facts about' taking a conveyance without consent. For example, it is independent of the fact that this action would involve a conveyance, a fact which is surely intrinsic to taking a conveyance without consent.

As we saw in section 8, Hart holds that an authoritative command to ø is content-independent if it is a reason to ø which is independent of the 'nature and character' of ø-ing. My observation is that Rosa's reason is independent of the 'nature and character' of the action for which it is a reason. The fact that taking a conveyance without consent involves a conveyance is surely a matter of the action's 'nature and character'. However, since Rosa's reason is strict, it is independent of this fact: Rosa has reason not to perform the action in virtue of a single fact about the action in question (obviously, the fact that performing it would maximise utility).

Now the case of m-reasons. The illegality of assault is irrelevant to the most obvious reason not to assault. The most obvious reason, an m-reason, is

the fact that it causes unnecessary suffering, and many take this reason to be content-dependent (see section 2). Clearly, however, it satisfies [Lb]'s condition for content-independence. If the fact that assault is immoral (for example, the fact that assault causes unnecessary suffering) is a strict reason not to assault, then it is a reason not to assault which is independent of every fact about assault - except that fact that it causes unnecessary suffering, of course.[19]

To see this, recall Shapiro's remark about the content-independence of requests. Shapiro says '[i]t is the fact *that* Able asked, rather than *what* he asked, which gives Able a reason to act.' We could also say: it is the fact *that* assaulting would be independently immoral (the fact that assault would cause unnecessary suffering), rather than some other fact about assault (the fact that it involves bodily movement, for example), which gives one reason not to assault.

16. Conclusion

In sections 9-15, I argued that, if [L] or [Lb] correctly define content-independence, the claim at issue - the claim that legal reasons are distinctively content-independent - is false. If [L] refers to the *causal* independence of legal reasons, then it is false that any strict or material legal reason is content-independent (section 11). With [Lb], things are less straightforward. It certainly does not follow from (i) the fact that p is a material legal reason that (ii) p satisfies [Lb]'s condition (see section 13). However, if p is a *strict* legal reason, p does satisfy this condition. The problem is that *any* strict reason satisfies it; that is, the problem is that it is false that strict legal reasons are *distinctively* content-independent (see sections 14-5).

[L]'s proponents will likely respond as follows: 'you have not shown that the fourth meaning of the claim at issue is false because the adjective "independent" in [L] could be given some noncausal and nonlogical

interpretation'. I accept the force of this response, and I admit that work now needs to be done to see whether an alternative interpretation can be given.

Here is a more general response to my arguments in chapters 5 and 6: 'you have not shown that the claim that legal reasons are content-independent is false because you have only considered four possible meanings of this claim'. Again, I accept that this response has considerable force: perhaps there is *some* sense in which legal reasons are distinctively content-independent, a sense which I have failed to consider. I also accept that is possible that I have failed to identify the sense in which *it has been claimed* that legal reasons are 'content-independent'. I have tried to offer an accurate statement of the views to which I have been responding, but it is possible that I have not fully captured these views.

That said, I would want to claim that we now have considerable evidence for thinking that the commonplace that

> p is a legal reason to ø only if p is a content-independent reason to ø

needs re-assessment. It should now be clear, for example, that 'content-independent' has had a variety of very different meanings. Moreover, it should be clear that, on some of these meanings, p can be a legal reason *without* being content-independent.

We have also seen that, on other meanings, the commonplace is correct. Take the view that ø-ing's F-ness is a content-independent reason to ø if, for any other act-type μ, there would be reason to μ if F were a property of μ-ing (see chapter 5, section 4). Subject to certain minor qualifications, we have seen that strict legal reasons satisfy the relevant condition. Yet we have also seen that, according to these other meanings, the claim that legal reasons are content-independent is uninformative - that is, we have seen that the claim does not distinguish legal reasons in particular from legal reasons in general. The

following might be true: p is a legal reason to ø only if p is a content-independent reason to ø. However, given the meanings of 'content-independent' I refer to, this is true only because p is a legal reason to ø only if p is reason to ø.

[1] Green 1988 pp. 56-7, 230. Green mentions u-reasons while discussing whether or not acting on content-independent reasons will 'indirectly produce conformity with content-dependent reasons of the ordinary sort'. It is possible that Green is attempting to answer this question without presupposing that *it is true* that a person has reason to ø if and because ø-ing would maximise utility.

[2] Green 1988 p. 225; Schopp 1998 p. 28.

[3] See, for example: Green 1988 p. 225 (using assault as an example); Schauer 1994 p. 499 (referring to agents taking 'the norms of the legal system to *be* reasons for action ... independent of the reasons ... supplied by the intrinsic moral worth of the norm itself').

[4] 1998 p. 349.

[5] 1986 p. 36.

[6] Marmor 1995 p. 345. Compare: Raz 1986 p. 35; Shiner 1992 p. 52.

[7] See Ashworth 1995 pp. 339-40.

[8] I thank Antony Duff for this suggestion.

[9] As mentioned in chapter 5, some jurists *are* concerned with whether or not content-independence is a property of legal requirements (see, for example: Shiner 1992a pp. 250, 256; Shiner 1992b p. 20). When the object is legal requirements, a typical claim is that a legal requirement is not a legal requirement in virtue of it requiring the action it does but because it has correct institutional pedigree. The action a legal requirement requires is thought of as its 'content', and the claim, roughly, is that legal status is a matter of valid institutional procedure rather than content. Sometimes the claim is particularly strong; sometimes the claim is that *any* kind of content may be law (see chapter 5, section 9): 'There is no human behaviour which, as such, is excluded from being the content of a legal norm' (Kelsen 1967 p. 198). Famously, this stronger claim

is more controversial. For example, Duff (1980 p. 86 fn. 49) doubts whether a legal requirement can have a seriously immoral content.

[10] Shapiro 1998 p. 493.

[11] Postema 1987 p. 86. Compare: Green 1988 p. 113; Duff 1998 p. 247.

[12] 1982 p. 254. Citing Hobbes, Green (1988 pp. 40-1, 225) agrees; he says the reasons supplied by commands 'function in a way independent of what they are commands to do'; the reason 'seems to have nothing at all to do with the merits of' the actions commanded.

[13] 1988 p. 225.

[14] 1987 p. 97.

[15] Edmundson 1998 p. 13. Compare: Edmundson 1998 pp. 52; and Schauer 1991 p. 125.

[16] 1998 p. 52, emphasis added.

[17] No doubt Edmundson would wish to add that the p's weight as a reason does not depend on this either.

[18] As in chapter 5, here I assume that (6.4) satisfies any relevant determining condition.

[19] As I mentioned in chapter 5, it is arguable that the immorality of an action is not itself a reason not to perform it; arguably, it would be more correct to say that the most obvious reason not to assault is the fact or facts in virtue of which assault is immoral. For present purposes, we can safely ignore this complication.

Chapter 7 Duff and moral legal reasons

1. Introduction

It is a commonplace that analytical jurists since Hart deserve credit for recognising that legal reasons are more complex than Bentham or Austin allow. I mentioned this in the Introduction. Bentham and Austin are criticised for not describing how legal reasons are (i) distinctively content-independent and how legal reasons can be (ii) moral and (iii) second-order in the Razian sense of being 'exclusionary'. Chapters 5-8 aim to challenge this commonplace. In chapters 5 and 6, I argued that it is uncertain whether legal reasons are distinctively content-independent. In chapters 7 and 8, I shall consider whether we should accept that analytical jurisprudence must pay special attention to legal reasons which are moral rather than nonmoral or exclusionary rather than nonexclusionary.

Many jurists give special emphasis to *moral* legal reasons. For instance, Perry writes that '[t]he essence of the problem of the normativity of law' concerns whether or not the 'law *obligates*'.[1] Presumably, a law obligates only if it supplies a moral reason to act (a moral reason to conform to it, for example). So Perry's claim is that the essence of the problem of the normativity of law concerns whether or not there are *moral* legal reasons to act.

No doubt Perry thinks that the problem concerns more than this, for it is widely accepted that x is obligated to ø only if there is moral reason to ø *of a special significance or weight.*[2] Still, Perry would not say that one could solve

the problem of the normativity of law by adducing the fact that there are nonmoral reasons to act as the law requires.

In chapter 7, I shall consider an argument which appears to show that analytical jurisprudence must give special attention to *moral* legal reasons. According to this argument - an argument which appears to vindicate Perry's claim - it is part 'of the concept of law itself' that law supplies moral reasons to act. I shall attempt to show that this argument is unconvincing. Overall, my aim is to defend the view that we can understand the nature of the normativity of law without distinguishing between moral and nonmoral reasons.

2. 'Immoral law defective *as law*'

A distinctive claim of natural law theory is that there are non-contingent ('necessary', 'logical') connections between law and morality. It is while defending this claim that Duff offers the argument I want to consider in this chapter. I shall begin by clarifying the meaning of this claim.

Many interpret the claim as follows: even if a legal requirement has the correct institutional pedigree (even if it was correctly enacted by the appropriate legislature, for example), it is not a law - it is not in fact a *legal* requirement - if it is seriously immoral. This is Raz's interpretation; he believes that a natural lawyer

> 'cannot say of a law that it is legally valid but morally wrong. If it is wrong and unjust, it is also invalid in the only sense of validity they recognise'.[3]

This is also Hart's interpretation. Hart says the 'Thomist tradition of Natural Law' maintains 'that man-made laws which conflict with ... [certain moral] principles are not valid law.'[4]

Thus interpreted, the claim that there is a necessary relationship between law and morality seems problematic. This is because it seems undeniable that some laws *are* seriously immoral. Lyons is one of many to make this point. He says, '[w]hat seems distinctive about Natural Law ... is ['plainly'] false' since 'law can be, and much too often is, bad and unjust'.[5]

Lyons, Raz and Hart do not mean to *assume* that there are seriously immoral legal requirements, however. The observation that there are seriously immoral legal requirements (for example, the observation that 'law can be ... bad and unjust') carries an objection with it. The objection is that the natural lawyer's position is inconsistent with our pre-philosophical practice of recognising something as a legal requirement even when it is seriously immoral. Of course, a presupposition is that an account of a legal requirement's identity conditions *should* be consistent with this practice. But some are willing to make this exact presupposition. Raz, for instance, writes the following:

> 'It is ... because such obvious[ly immoral] laws are ruled out as non-laws by the [Natural Law] theory that it is incorrect. It fails to explain correctly our ordinary concept of law which does allow for the possibility of laws of this objectionable kind'.[6]

This response might be appropriate, but no theorist has made the claim to which it is a response. That is, no natural lawyer has argued or assumed that it follows from (i) the fact that a seriously immoral law is no law at all that (ii) law and morality are necessarily connected.[7] Indeed, Duff and many others who affirm

the natural law claim to which I refer allow that a legal requirement can 'fail to satisfy any ... set of moral standards'.[8]

So what *is* the claim? Duff's claim is that a seriously immoral legal requirement is not law in the 'fullest sense' ('Unjust law may still be law: but it is necessarily defective or perverted *as* law').[9] Duff believes this is how we should understand a phrase which is frequently attributed to Aquinas - 'lex iniusta non est lex'. Duff says Aquinas's claim is that

> 'law which fails to accord with the ideal standards which are part of its "ratio" ... is not so much not law at all as a *perversion* of law ... an *abuse* of law ... or *spoilt* law'.[10]

Aquinas's *argument* for this conclusion is quite unlike Duff's, however. As we shall see, Duff's argument is that a seriously immoral law is defective qua law according to our existing concept of law. The argument is descriptive (an exercise in 'the analytical task of explicating the concept of law') rather than normative (an exercise in 'the censorial task of arguing ... for a particular conception of what law ought to be').[11] Aquinas, on the other hand, eschews any desire merely to explicate the concept of law: he has no wish merely to describe how we in fact conceive the relationship between a formally valid requirement and its morality.[12]

3. Morality and the law

Duff believes he can establish that a seriously immoral legal requirement 'is defective or perverted *as* law' (see section 2). I shall refer to this conclusion as the conclusion that a seriously immoral legal requirement is *formally defective.*

Duff believes that to establish this conclusion is to establish that there is a 'necessary' ('non-contingent', 'logical', 'internal') connection between morality and the law. As he says, it is to establish

> 'an essential and ineliminable moral dimension to the concept of law: to see a ... rule as law is necessarily to see it as requiring a certain kind of moral justification, and as subject to certain moral demands'.

So Duff's conclusion has two components. The first component states that a seriously immoral legal requirement is formally defective. The second states that a formally defective legal requirement is *morally* worse in these terms. This second component explains why there is a certain type of relation between law and *morality*. For Duff, a seriously immoral legal requirement is morally worse according to a standard measurable by the concept of law itself; his argument is that the concept of law is '*internally* related to moral concepts which provide criteria for the ... [moral] criticism of positive law'.[13]

Arguments of a similar form appear in Lon Fuller's *The Morality of Law*.[14] A central claim of this work is that the concept of law implicitly includes standards for evaluating law. According to Fuller, one such standard is 'followability'. The law includes this standard, he argues, since law is a functional kind and because it is the function of legal rules to guide behaviour. From the fact that followability is a standard set by the concept of law, Fuller concludes that an unfollowable legal requirement - one that requires an impossible action, for example - is defective qua law. He also argues that it is a *moral* failing if a legal requirement is defective in this respect.

Notice that there are at least two parallels with Duff's argument. First, like Duff, Fuller holds that a legal requirement can be judged according to criteria set by the concept of law itself. For Fuller, a legal requirement fails to

satisfy one of these criteria if it is unfollowable. For Duff, a legal requirement is formally defective - it fails to satisfy one such criterion - if it is seriously immoral.

Second, Duff follows Fuller by holding that the criteria set by the concept of law include *moral* criteria. For Fuller, an unfollowable legal requirement is morally worse for the fact, since, for example, its existence causes persons to be punished for acts they could not fail to perform. The crucial part of the claim is that it is morally worse according to the concept of law itself. Here is how Lyons summarises Fuller's argument:

> 'It is precisely because ... [a particular] requirement is unfollowable and hence defective that penalizing someone for failing to meet it is unjust. So it appears that a moral claim about the injustice of such treatment is warranted by standards implicit in the law'.[15]

Likewise, Duff's claim is that a seriously immoral legal requirement is worse in *moral* terms, and terms which are determined or recognised by 'the logic' or 'the grammar' of law; Duff is arguing against 'a complete separation of law and morals' on the grounds that

> 'the concepts of law and legal obligation are *internally* related to moral concepts which provide criteria for the justification and criticism of positive law'.[16]

4. The argument

Duff is not alone in arguing that seriously immoral legal requirements are formally defective. According to MacCormick, for instance, we 'have to

acknowledge that there is ... a necessary connection between law and morality' because

> 'laws we judge unjust ... are on that very account laws that we judge essentially deficient examples of the genus to which they belong'.[17]

In this chapter, however, I shall restrict my attention to Duff's argument. This is because Duff's argument is uniquely concerned with the normativity of law. Sections 4-5 describe this argument. Later I shall explain how it appears to lead to the conclusion that analytical jurisprudence must give special attention to *moral* legal reasons (section 8). Then I shall argue that Duff's argument is not convincing (sections 9-13).

Duff's argument is a based on a widely-accepted claim about the identity of legal systems. This is the claim that

> [M] a system of requirements or rules ls is a legal system only if those administering ls (ls's officials) assert that ls's requirements are obligating.

The assertion in question pertains to an actual moral obligation, and, for Duff, a person is morally obligated to perform an action when he or she has 'an authoritative, though not necessarily overriding, [moral] reason' to perform it.[18] The nature of moral obligation is controversial, but - for sake of argument - let us accept Duff's account. That is, let us accept:

> x is obligated to ø if x has authoritative, though not necessarily overriding moral reason to ø.

Duff does not explain what he means by 'authoritative', but this is of little consequence at present: we will be able to understand Duff's argument without

knowing what he means. As we shall see, what *is* of consequence is that, in Duff's terms, x can be 'obligated' to ø even if, overall, x has most reason *not* to ø (even if x does not have 'overriding' reason to ø).

The assertion mentioned in [M] is not just that there is an obligation to act as ls's requirements require. The assertion is that the *requirements* are obligating. I presume that the thought is that relevant officials must assert that there is 'authoritative' moral reason to ø *because* ls's requirements require ø-ing. Take a particular requirement not to assault. I take it that Duff would say that the assertion must be that the fact that assault is required by a requirement of ls is a moral reason of a certain ('authoritative') order not to assault.

Now, according to Perry,

> 'Most people subject to a modern ... legal system would probably identify as central to their experience of law the law's claim ... to place us .. under obligations we would not otherwise have .... The idea that the law purports to bind us ... is thus very plausibly regarded as an element of the concept of law'.[19]

Duff would agree with Perry that the assertion mentioned in [M] is an element of the concept of law. According to Duff, however, it is not just that many people have witnessed this assertion; Duff claims that, without this assertion, ls would not be a legal system at all.[20] Many support Duff in this. For instance, Raz says

> 'No system is a system of law unless it includes a claim of legitimacy, of moral authority. That means that it claims that legal requirements are morally binding, that is that legal obligations are real (moral) obligations arising out of the law'.[21]

Assume, for the moment, that Duff and Raz are correct about this. What follows? In particular, what could be the connection between [M] and a seriously immoral legal requirement being one that is formally defective?

Duff's argument is that a seriously immoral legal requirement is *logically* inferior because, given [M], it lacks a property necessarily attributed to it; a seriously immoral legal requirement is not merely contingently worse since it fails according to a standard connected to what it is for something to be a legal system at all. The underlying assumption appears to be as follows:

> [N] If ls is a legal system only if ls's officials assert a certain proposition q, then ls and ls's requirements are formally defective unless ls's officials *truly* assert that q.

Duff writes that his argument shows that, 'to see *a system or* a rule as law is necessarily to see it as ... subject to certain moral demands'.[22] This is why [N] refers to legal systems and not just to legal requirements. In what follows, however, I shall continue to direct attention to the case of legal requirements in particular. This is because the conclusion with which we are centrally concerned - the conclusion that an analytical jurist must pay special attention to *moral* legal reasons - will be brought out more clearly.

5. The common good

Section 4 summarised Duff's argument. Now I shall consider the argument in greater detail (sections 5-6). I shall also explain why it leads to an unanticipated conclusion (section 9).

Duff certainly affirms [M], but he also affirms the following:

[Ma] ls is a legal system only if ls's officials offer, or are prepared to offer, an intelligible justification for the assertion mentioned in [M][23]; and

[Mb] ls is a legal system only if ls's officials (would) invoke the notion of the common good while offering the justification mentioned in [Ma].[24]

[Ma] and [Mb] add complications to Duff's argument. Take [Mb]. If a legal requirement is formally defective when it lacks a property necessarily attributed to it, and if those who administer it necessarily offer, or are prepared to offer, a *common good*-based justification for this claim, then it seems that a legal requirement could be seriously immoral without being formally defective. This is true because a legal requirement could be seriously immoral in a way which is unrelated to the common good. Therefore, it seems that Duff's argument only shows that a legal requirement which is seriously immoral in a particular respect - a respect related to the common good - is formally defective.

In defence of [Mb], Duff adduces three facts. (i) The first is 'the extent and nature of the authority over citizens' lives and conduct claimed by the law, that is, the fact that the law 'imposes sometimes arduous ... [requirements] on its members'. (ii) The second is 'the respect which it [the law] must accord to the citizen as a rational agent'. (iii) The third is that 'the law claims authority over the whole community', given that citizens are legally bound as members of a community (that 'the law is binding on individuals as members, whether permanent or temporary, of the particular community whose law it is').[25] Duff's claim is that the justification mentioned in [Ma] could respect these three facts only if it relied on the notion of the common good.

I think Duff's claim is unconvincing. Consider the first and third facts. One might mention these if one thought that a legal system's requirements are obligating only if they are obligating with respect to all or most citizens (the third fact) and obligating with respect to each citizen quite extensively (the first fact).[26] But it is uncertain why we should accept that the different obligations (obligations for different persons; obligations for a single person to perform different actions) must be explained with respect to a single moral value - 'the common good', however widely understood.[27] It is also uncertain why we should accept that the value of the common good is uniquely placed to offer such a general explanation.

Consider the second fact. Few would dispute that a legal requirement is morally worse if it somehow fails to respect an agent's rationality. However, it is uncertain why we must accept that an agent could not have an obligation to conform to a legal requirement if it were morally worse in this regard. Even if we must accept this, it would still be uncertain why we must accept that a legal requirement is obligating *only if* it serves the common good. Why is it impossible for a legal requirement to pay due respect to agents' rationality while serving some *other* moral value?

But notice, in any case, that it is irrelevant whether or not a justification in terms of a moral value other than the common good *could in fact* justify the assertion mentioned in

> [M] a system of rules or requirements ls is a legal system only if those administering ls (ls's officials) assert that ls's requirements are obligating.

Given [Ma], Duff's claim is only that a legal system's officials must offer an *intelligible* justification for this assertion. The question of whether the

justification is *valid* - indeed, the question of whether the assertion mentioned in [M] is true - is beside the point. Therefore, it is beside the point whether or not a certain type of justification would be inconsistent with the three facts mentioned.

6. Mere assertion

What Duff needs to establish is that it would be *unintelligible* to justify [M]'s assertion without reference to the common good.[28] He cannot establish this by showing that a justification given in terms of a different moral value would be inconsistent with the three facts mentioned, even if it followed from this that such a justification would be invalid (see section 5).

Could a legal system's officials offer the intelligible justification mentioned in [Ma] *without* referring to the common good? Certainly. Suppose ls's officials argue that ls's requirements are obligating because every person subject to ls has consented to ls's operation and also because ls exists as a matter of divine right. Suppose that ls's officials argue this without invoking any notion of the common good. Surely ls's officials have offered an intelligible justification for the assertion that ls's requirements are obligating. The justification might be invalid, of course. For example, it might be false that every person has consented to ls's operation and false that ls exists as a matter of divine right. However, a justification can be invalid without being unintelligible, and intelligibility is all that is required.

Notice that, at this point, Duff is still able to affirm

> [Mb] ls is a legal system only if ls's officials (would) invoke the notion of the common good while offering the justification mentioned in [Ma].

I have shown that ls's officials could offer an intelligible justification for their assertion without invoking the notion of the common good. However, I have not shown that ls's officials could do so when ls is a *legal* system, and [Mb] is supposed to state a necessary condition for legal systems.

One consideration counting against [Mb] is that it has the following counterintuitive consequence: legal systems are less common than we presently think they are. Public officials in early medieval Europe did not attempt to justify their rule by appeal to any conception of the common good.[29] So, if we accept [Mb], we have to accept the counterintuitive consequence that no legal system existed in early medieval Europe.

It is possible, however, that Duff is willing to accept this consequence. And, if he were not, he could still affirm [Ma]. That is, he could still maintain that ls is a legal system only if ls's officials attempt to justify their assertion that ls's requirements are obligating. This is because ls's officials could attempt this without invoking any notion of the common good. (Notice that mentioning our intuition that there were legal systems in early medieval Europe would not challenge *this* claim. For public officials in this period certainly did more than *assert* that ordinary citizens have legal obligations.[30])

In what follows, I shall give no more direct attention to [Ma] and [Mb]. The main reason is that the truth of [Ma] and [Mb] depends on [M], and I am able to show that [M] is false. The intelligible justification mentioned in [Ma] and [Mb] is one given for the necessary assertion mentioned in [M]. But, if there is no necessary assertion (this is what I shall argue), there is no necessary justification (intelligible or otherwise; common good-based or otherwise). In other words, it could not be necessary for ls's officials to offer a intelligible justification if there is no necessary assertion for which it is a justification.[31]

7. Seriously immoral but non-defective

For the moment, however, let us suppose that [M] is true. Let us also suppose that [N] is true. Here is the question I want to ask: must we accept the first component of Duff's conclusion? In other words, does it follow from [M] and [N] that a seriously immoral legal requirement is formally defective ('spoilt law', not law 'in its fullest sense')?

We will be better placed to answer this question if we know what Duff means by a legal requirement which is 'seriously immoral'. Duff refers to legal requirements which are 'unjust' and which 'breach the most fundamental principles', but when is a legal requirement unjust?[32] When does it breach the most fundamental principles? Duff appears to have three conditions in mind:

(i) The first is when a legal requirement requires a seriously immoral act. Duff says his argument challenges the positivist claim that morality and law are merely contingently related, and it is commonly recognised that, according to a positivist, 'there is no necessary connection between morality and *the content* of law.'[33]

(ii) The second condition is when a legal requirement is applied solely for the benefit of those who administer it. Duff says that 'there is something *logically* amiss with' legal requirements which have moral content but 'for the wrong kind of reason', and he has in mind a legal system which has requirements 'whose sole aim is ... to further' the interests of the system's officials.[34]

(iii) The third condition is when a legal requirement has seriously immoral consequences. Duff refers to legal requirements which are 'cruel and

oppressive', and a legal requirement could have cruel and oppressive consequences when it is applied - for example, it could lead to massive suffering - even if it does not have an immoral content and even if it is not applied solely for the benefit of those who administer it.[35]

So the question I wish to ask can be put as follows. Does it follow from [M] and [N] that a seriously immoral legal requirement (for example, a legal requirement which satisfies one of the conditions mentioned in (i)-(iii) is one that it is formally defective?

I believe that this does not follow. Duff's argument is that a legal requirement is formally defective if it lacks a property those who administer the requirement necessarily attribute to it. But, according to [M], ls's officials necessarily assert that ls's requirements are *obligating*. Duff does not contend that ls is a legal system only if ls's officials assert that ls's requirements are *not seriously immoral*. So Duff cannot invoke [N] to show that a seriously immoral legal requirement is formally defective.

Duff could invoke [N] only if one could equate a seriously immoral legal requirement with one that is not obligating. The problem is that these cannot be equated: a legal requirement can morally obligate a person to perform an act even if it is seriously immoral. This is true because, for Duff, one can have 'an obligation' to ø without having a decisive reason to ø (see section 4 above).

Plausibly, there is reason *not* to conform to a seriously immoral legal requirement. Consider a legal requirement which satisfies condition (i). If a legal requirement requires a seriously immoral act, and there is reason not to perform seriously immoral acts, then there is reason not to conform to the legal requirement in question. Indeed, one could have an *obligation* not to conform to a seriously immoral legal requirement. Consider condition (iii). Plausibly, one

has an obligation to violate a legal requirement if conforming to it would contribute to causing 'cruel and oppressive' consequences.

Still, it does not follow that a seriously immoral legal requirement is unobligating, since reasons can be pro tanto rather than decisive (see chapter 1). Remember that Duff makes it clear that the reason x has to ø when a legal requirement obligates x to ø is 'not necessarily overriding'. As a result, there is no inconsistency between the fact that x has a reason (even an obligation) not to conform to a seriously immoral legal requirement and the fact that x is obligated to conform to it.

8. Formally defective because unobligating

It is important to see that a legal requirement can be seriously immoral without being unobligating because it follows that Duff has failed to establish the first component of his conclusion. That is, it follows that Duff has failed to establish that a seriously immoral legal requirement is formally defective. Duff argues that a seriously immoral legal requirement is formally defective because it lacks a property which is necessarily attributed to it. But, as [M] makes clear, the property in question is being obligating, and a legal requirement can be obligating *and* seriously immoral (see section 7). Therefore, a legal requirement can be seriously immoral without lacking the property necessarily attributed to it. In light of [N], the upshot is that a legal requirement can be seriously immoral without being formally defective.

However, it seems that not all is lost. [M] and [N] appear to establish an unanticipated conclusion, namely, that an *unobligating* legal requirement is formally defective. If ls is a legal system only when ls's officials assert that ls's

requirements are obligating, it appears, given [N], that ls's requirements are less than 'law in the fullest sense' when they are unobligating.

It is this unanticipated conclusion which appears to show that analytical jurisprudence must give special attention to *moral* legal reasons. This is seen once we follow Duff in holding that 'to say that someone has an obligation is to say that there are ... *reasons*, of some appropriate kind ... to act'.[36] Given [M] and [N], a legal requirement is non-defective only if it is obligating. But, since the 'appropriate kind' of reason Duff refers to is a *moral* reason, [M] and [N] imply that a legal requirement is defective unless it supplies a *moral* reason to act. Duff's argument does not show that a requirement is a legal requirement only if it supplies a reason to act. Nor does it show that p is a legal reason only p is a moral reason. But it does appear to show that a legal requirement is formally defective if it fails to supply a moral reason.

Think of a particular legal requirement not to assault. Suppose there is only a single legal reason to act as this requirement requires, and suppose that the reason in question is nonmoral. It follows that the legal requirement is unobligating; according to Duff's plausible claim, a legal requirement is obligating only if there is *moral* legal reason to act as it requires. Assuming the truth of [M], it also follows that the requirement not to assault lacks a property which those who administer the requirement necessarily attribute to it: the requirement lacks a property it would not lack if this necessary assertion were true. It also follows, given [N], that the requirement is formally defective. No doubt Duff would say that it is inferior according to 'the concept of law itself'. For he holds that [M] is a component of this concept, and - with respect to the legal requirement in question - the assertion mentioned in [M] is false. It could be true only if there were *moral* legal reason to act as the legal requirement requires.

9. Rejecting [M]

Duff's argument does not establish that a seriously immoral legal requirement is formally defective (section 7). At best, as we have seen, his argument shows something about unobligating legal requirements (section 8). Now I shall argue that the argument is unconvincing even with respect to this second object. The argument is unconvincing, I shall argue, because [M] is false.

Few would disagree with Postema that, '[t]he court regards, and insists that all others regard, its decisions and actions as authoritative, having special weight'.[37] More generally, few would disagree that, 'legal systems are self-consciously normative: ... legal officials make unabashed, if implicit, claims about citizens' obligations'.[38] And I agree that, as a matter of empirical fact, legal officials very often assert that the legal requirements they administer (adjudicate, legislate, etc.) are obligating.

I agree, then, that legal officials very often make the assertion to which [M] refers. Whether or not they make this assertion with respect to every legal requirement on every occasion is less certain. In fact, it is doubtful whether a legal requirement to ø is always even a *demand* that certain persons ø.[39] Nonetheless, I am willing to grant that investigation could reveal that the assertion mentioned in [M] is more or less ubiquitous in legal systems.

Notice, however, that the question of whether or not [M] is true is of a conceptual rather than empirical order; as Duff repeatedly says, his argument turns on analysis of ('the logic' or 'grammar' of) 'the concept of law itself'. Others who affirm [M] agree. Coleman, for instance, describes [M] as 'a conceptual truth: ... a truth about what it means for something to be law'.[40] Therefore, it is

of no consequence that it is empirically obvious that the assertion mentioned in [M] is frequently made.

I shall attempt to show that Duff is incorrect to think that ls would not be a legal system if ls's officials failed to assert that ls's requirement are obligating (section 10). I am prepared to admit that ls would be an extremely unusual legal system if ls's officials did not make the assertion mentioned in [M]; I accept that the assertion is an entrenched feature of legal culture. I am even prepared to admit that the officials of every known legal system have made the assertion mentioned in [M].

10. The argument for [M]

In support of [M], Duff asks his readers to consider two imaginary scenarios. In one, Jones is indicted on the grounds that, by riding her motor-cycle without a crash-helmet, she has acted contrary to section 32 of the Road Traffic Act 1972. The other scenario concerns a tyranny in a place called 'Doulia'. In this scenario, the tyrants ('the Oligarchs') coercively enforce their will over the Doulians. In both scenarios, those administering a purported system of law effectively admit that its requirements are not obligating. Jones's judge observes that the existence and enforcement of the Act owes everything to the judiciary's pursuit of their own self-interest, and the Oligarchs openly admit that the rules which they enforce exist entirely for their benefit.[41] Duff takes these admissions to have a serious implication: that the requirements in question are not *legal* requirements.

Consider the scenario involving Doulia. Duff believes it follows that the Oligarch's rules are not legal rules because it follows that no legal system exists in Doulia:

> 'The Oligarchs avowedly follow and enforce their rules for the sake of their own interests: but they cannot then claim to be operating a system of law. For they cannot claim these rules impose, as law must purport to impose, obligations on the Doulians, since they cannot intelligibly claim that 'serving the Oligarchs' interests' gives the Doulians good reason to obey these rules'.[42]

Through the use of coercive force, the Oligarchs could claim to *oblige* the Doulians; in this sense, they might say the Doulians 'ought' to obey the rules they enforce. However, they cannot claim that these rules are *obligating*; their 'ought' is merely an expression of their 'power to make obedience the most prudent course of action'.[43]

I accept that it is plausible that no legal system exists in Doulia. In general, it is plausible that an unashamed tyranny cannot institute a legal system. This is because legal systems necessarily have moral pretensions. In saying this, I affirm a very common view: many jurists have claimed that it is a necessary condition for something to be a legal system at all that those who speak on its behalf describe it as having certain morally valuable characteristics.[44]

As mentioned, I agree with Duff that Doulia lacks a legal system. I agree because the Oligarchs do not make moral claims about the rules they enforce, and because I believe that a legal system necessarily makes such claims. Nonetheless, I can consistently deny [M]. This is because I can disagree with Duff concerning the nature of the moral claims a legal system's officials must make. Like many others, Duff believes they must amount to the claim that the system's requirements (the Oligarch's rules) are obligating. I would argue that moral claims need not amount to this: I would argue that ls could be a legal system as long as x's officials make *other* moral claims about ls.

Consider an imaginary system of rules I shall call 'Hundred'. Hundred has both primary and secondary rules in Hart's sense. It also has every other feature contemporary legal theory says is necessary and sufficient to be a legal system. For example, Hundred's rules are general standards rather than situation-specific orders, Hundred is generally effacious in the community to which Hundred pertains, Hundred's officials claim that the system is comprehensive (for instance, they claim that Hundred could require or proscribe any action), and Hundred specifies sanctions for noncompliance with its requirements and proscriptions.[45]

Actually, it is not quite true that Hundred has *every* feature that contemporary legal theory says is necessary for Hundred to be a legal system. There is a single exception: Hundred's officials do not assert that Hundred's requirements and proscriptions are obligating. They *do* make moral claims about Hundred. They assert that the actions they perform in their official capacity - subjecting those who have violated a requirement to a trial; punishing those who have been convicted of committing an offence; specifying certain actions as offences - are morally justified. Hundred's officials also claim that these actions are morally justified because of the content of the rules they administer. They claim, for example, that they are justified in punishing those who have been convicted of an offence because the actions Hundred proscribes are independently immoral.

In sum, Hundred's officials make two moral claims about Hundred. The object of the first is the actions they perform on behalf of Hundred: the officials claim that these actions are licensed or required by morality. The object of the second is the actions Hundred requires and proscribes: with respect to this object, the officials claim that these are independently moral (actions required) or immoral (actions proscribed). I think it is fair to say that this second claim is a

claim about Hundred, because what is claimed concerns the content of Hundred's rules. And I think it is fair to say that it is a *moral* claim. For what is claimed is that this content is moral, that is, that the actions Hundred requires or proscribes are actions there is *moral* reason (not) to perform.

I submit that Hundred could be a legal system. In particular, I submit that Hundred satisfies any requirement concerning a legal system necessarily making certain moral claims. My contention is that Hundred could be a legal system - that we will 'see' or 'recognise' Hundred as a legal system - even though Hundred's moral pretensions do not concern the obligatoriness of Hundred's rules.

11. Moral and nonmoral reasons

If I am correct that Hundred could be a legal system, [M] is false. And, if [M] is false, Duff's argument - the argument described in section 8 - fails to show that an unobligating legal requirement is formally defective. This is because, if [M] is false, an unobligating legal requirement need not be one that lacks a property the officials who administer it necessarily attribute to it. It also follows that we are yet to see grounds for believing that *moral* legal reasons deserve special attention. Moral legal reasons would have a certain conceptual priority over nonmoral legal reasons if it were true that an unobligating legal requirement is formally defective. This is true, at least, if Duff is correct to claim that an obligating legal requirement is necessarily one there is *moral* legal reason to conform to. However, we are yet to see that an unobligating legal requirement *is* formally defective.

Suppose I am correct that ls is a legal system only if ls's officials make moral claims with regard to ls's requirements. Suppose, for instance, that ls's officials must assert that there is independent moral reason to act as ls requires and that the actions they perform in their official capacity (for example, subjecting those who fail to act as ls requires to a trial) are morally justified. Given [N], it would follow that a legal proscription of ls (call this 'lr') would be formally defective if (i) legal officials were not morally justified in their administration of lr (for example, not morally justified in punishing those who violate lr) or if (ii) there were no independent moral reasons against performing the action lr proscribes.[46]

Notice, however, that the respects in which such a legal requirement would be formally defective are not a matter of the *legal* reasons it supplies. Take the claim about the independent moral reasons not to perform the action that lr requires. These are pretensions exactly concerning nonlegal reasons; the reasons are 'independent' precisely because they are not supplied by the fact that the action that lr requires is required by lr.

Take the claim about the administration of lr. Ls might include requirements for official action. For example, it might include a requirement that ls's officials punish lr's violators. This means there might be legal reason for ls's officials to punish lr's violators; the fact that a person is legally required to punish lr's violators might be a material or strict reason for that person to punish lr's violators. Still, we need not think that the claim about the administration of lr must be a claim about *legal* reasons for officials to act.

To see that we need not think this, consider the legal requirement just mentioned: the requirement that ls's officials punish those who violate lr. The claim we are imagining would have two objects. The first object would be the independent moral reasons to punish those who fail to perform the action lr

requires; the claim would be that legal officials have these reasons. But then the claim would not concern *legal* reasons; as mentioned, the moral reasons in question are exactly those which are *independent* of the law.

The second object would be the moral reasons there are for ls's officials to administer the relevant requirement. For example, the object would be the moral reasons they claim to have to punish those who fail to punish violators of lr. Notice, however, that this second claim need not concern legal reasons: the claim might be that the independent immorality of violating the requirement (the independent immorality of not punishing those who do not punish those who violate ls's requirements) gives them moral reason to punish those who violate the requirement not to punish ... In other words, they could assert that they are morally justified in administering the requirement without asserting that the fact that they are legally required to administer it is (a part of) the justification.

12. A necessary connection?

Duff believes his argument establishes that certain legal requirements are formally defective *and* that there is a necessary connection between morality and the law (see section 3). According to Duff, the second component of his conclusion follows from the first. He believes that by showing that a seriously immoral legal requirement is 'spoilt law', 'a perversion of law', he shows that morality and the law are necessarily connected. He believes the latter is shown because it is shown that the concept of law sets standards for the *moral* evaluation of law.

I have argued that Duff has not established that a seriously immoral legal requirement is formally defective even if he has established the truth of [M]

(section 7). My claim is that establishing the latter could only establish that an *unobligating* legal requirement is formally defective (section 8).

What of the second component of Duff's conclusion? Would this follow if it were true that an unobligating legal requirement is formally defective? In my view, Duff has *not* shown that an unobligating legal requirement is formally defective. Duff's argument turns on [M], and [M] is false (sections 9-10). But let us ignore this for the moment; for sake of argument, let us grant the truth of [M] and any other premise Duff would need to show that an unobligating law is formally defective. Would it follow that Duff is correct to claim that 'to see a ... rule as law is necessarily to see it as requiring a certain kind of moral justification, and as subject to certain moral demands'?

If the legal point of view necessarily portrays legal requirements as obligating, we might agree that an unobligating law is formally defective. And since there is *moral* reason to conform to an obligating legal requirement (Duff makes this assumption), we might also agree that it is defective in lacking a moral attribute. The point can be made in terms of a legal system's necessary claims: since these are *moral* claims, the attribute which allows these claims to be true is a matter of morality. Hence, there is a sense in which Duff is correct that his argument would show that 'moral notions are essentially ... related to the existence of law *as law*' (see section 2).

The implication Duff wishes to draw is stronger than this, however. The implication he draws is that the concept of law sets standards by which a formally defective legal requirement is morally worse for the fact. According to Duff, a legal requirement is morally inferior if it is formally defective, and the claim that there is a necessary connection between law and morality is established by showing that the requirement is morally inferior according to the concept of law itself (see section 3).

I believe this stronger implication cannot be drawn. To judge that an unobligating legal requirement fails to live up to a standard which 'is internal to the concept of law itself' (to a standard that is connected to a necessary condition for something to be a legal system at all) is not itself to make a moral judgement. To judge that a legal requirement lacks a property necessarily attributed to it - to judge that an unobligating legal requirement is formally defective - is not to judge that it is morally inferior. It is only to judge that a certain claim is false. It follows that the standards set by the concept of law are not moral standards in the strong sense Duff intends. An unobligating legal requirement might lack a *moral* attribute which its legal system necessarily claims for it, but to say that a legal requirement lacks a moral attribute is not to make the judgement that it is morally inferior.

In response, Duff might wish to point out that to judge that a legal requirement is formally defective is to at least *imply* a moral judgement. The argument would be as follows: to judge that a legal requirement is unobligating is to condemn it, for unobligating legal requirements *are* morally inferior.

But are they morally inferior? Admittedly, we can imagine situations in which they are. Imagine you suffer two legal penalties. One is for performing an act which is independently immoral (an act there would be moral reason not to perform even if it were not illegal). The other is for violating the law. Now imagine that the illegality of the act did *not* obligate you not to perform it; you were legally required to ø, but imagine it was not the case that, given *this* fact, you had 'an authoritative, though not necessarily an overriding, reason to' ø. Now, it is plausible that the situation would have been less immoral if you had been legally obligated to ø, holding all else equal. For then there could have been a justification for the second penalty. In this particular case, then, it is tempting to say that the legal requirement is morally inferior because it is

unobligating. What one would mean is that the legal requirement had immoral consequences - consequences it would not have had if it had been obligating.

But I can admit the possibility of such situations without accepting Duff's conclusion. Duff's conclusion is about a *noncontingent* connection between morality and a formally defective legal requirement. His argument should show that it follows from the fact that a legal requirement is unobligating that it is morally worse. As far as I can see, however, this does not follow. Whether an unobligating legal requirement is morally worse for the fact (whether it has immoral consequences, for example) is a contingent matter. It depends on contingent facts such as whether those making the claim suspect or know that it is false, whether those subject to the legal requirement are caused to believe that they are obligated, whether anyone is ever convicted or punished for not acting as the requirement requires, and so on. Take the example described in the previous paragraph. The legal requirement might not have had immoral consequences at all if you had not received the second penalty.

Since an unobligating legal requirement need not be morally worse for the fact, Duff's argument fails to show that there is an 'internal', 'logical' connection between morality and the criminal law. For then he has not shown that the judgement that a legal requirement is formally defective implies a moral judgement; he cannot say that to judge a legal requirement to be unobligating is to condemn it.

13. Conclusion

In this chapter, I have considered one argument to the conclusion that analytical jurists should give special attention to *moral* legal reasons. Presumably there are

both moral and nonmoral legal reasons.[47] However, according to this argument, moral legal reasons have a certain priority over nonmoral legal reasons, since an unobligating legal requirement - a legal requirement which fails to supply a moral legal reason - 'is not so much not law at all as a *perversion* of law' (see sections 4 and 8).

I have argued that there are several problems with this argument. The most serious is that it relies on a premise - the premise that a system of rules is a legal system only if those who administer it claim that the rules in question are obligating - which is false (see sections 10 and 11). Perhaps a legal system's officials must claim that the system has certain moral qualities; perhaps *that* is conceptually necessary. However, the officials need not claim that there is legal reason to act as the rules require. It follows that they need not claim that the system's rules are obligating.

I believe Lyons is entirely correct to observe that

> Judges and others who speak for the law typically contend that what they do in its name is justifiable and just.[48]

He is also correct, I think, that '[t]he claim invites the demand that law live up to its moral pretensions'. It is important to notice, however, that we should not conclude that our interest in a legal system's moral qualities is limited to an interest in whether or not its moral pretensions are justified. Suppose a particular legal system contends that its requirements are obligating because they stand in a certain relation to the common good. Should we conclude that Duff is correct to think that it 'must ... be justified (and thus also be assessed and criticised) to its citizens in terms of some conception of "the common good"'?[49]

If the common good is a moral value at all, it is trivially true that the system's relation to the common good is of moral concern. However, the legal

system will be related to other moral values, and these could deserve equal attention. It is certain, at least, that we need not take the values evident in a legal system's own claims as the only or best ones by which it should be evaluated. With respect to the legal system just mentioned, for example, it is certain that we need not believe that its requirements are unobligating *if and only if* they lack a certain connection to the common good.

[1]1998 p. 450.

[2] See: Raz 1979 pp. 234, 244; Greenawalt 1987 p. 165.

[3] 1974 p. 100. Raz (1990 p. 162) defines natural lawyers as those 'who think it is a criterion of adequacy for theories of law that they show ... that it is a necessary truth that every law has moral worth'. On this interpretation of natural law theory, see Finnis 1980 p. 26.

[4] 1994 p. 156.

[5] 1993 p. 1.

[6] Raz 1990 p. 164. For discussion of this claim, see Finnis 1980 p. 278.

[7] At one point (1980 p. 86 fn. 49), however, Duff at least entertains a different view. On the natural law view, see Finnis 1980 pp. 50, 276, 278, 294, 363 and Lyons 1993 pp. 43-4, 70-1.

[8]1980 p. 64.

[9] Compare Shiner's (1992a p. 13) argument that 'a legal rule without the content necessary for being an exclusionary reason is a legal rule in name only.'

[10] See Duff 1986 p. 94. I say 'attributed' to Aquinas in awareness of the fact that some (for example, Bix 1995 pp. 475-6) claim Aquinas never uses the phrase. Aquinas's view is discussed in Kretzmann 1988 pp. 99, 102-3.

[11] 1986 p. 95.

[12] According to Finnis (1980 p. 278), Aquinas's account is of how this *should* be conceived.

[13] 1986 p. 95.

[14] I rely on Lyon's (1993 ch. 1) explication of this argument.

[15] 1993 p. 7.

[16] 1986 p. 95.

17 1992 p. 113.

18 1998 p. 241.

19 1998 p. 445. Compare Postema 1982 p. 197 ('The court regards, and insists that all others regard, its decisions and actions as authoritative, having special weight').

20 See, for example, 1986 pp. 78, 87.

21 Raz 1984 p. 131. Compare Shiner 1992a p. 276 ('For something to be recognised as law, laws must claim to be (or be believed to be) morally authoritative').

22 1986 p. 76, emphasis added.

23 See, for instance, Duff's (1986 p. 89) claim that the law's demands for a citizen's 'obedience must be ... *justified to* her in moral terms' (compare: Shiner 1980 p. 64; Shiner 1986 pp. 92). For 'prepared to offer' rather than 'offer', see 1980 p. 84.

24 1986 p. 91: 'If we are, as observers, to identify a system as a system of law, we must show that those who enforce and profess to accept its requirements are prepared to justify those requirements in' terms of the common good. Compare Shiner 1992a p. 260.

25 1986 p. 89. Compare Duff 1986 pp. 90-1.

26 Perry (1998 p. 455) agrees with Duff that the law claims authority over every person. Compare Coleman and Leiter 1996 pp. 241, 247-8.

27 Unfortunately, Duff does not indicate what would be needed for a legal requirement to be 'justified by reference to moral considerations which apply to them [members of a community] as members of a community' or why it is true that citizens *are* legally bound as members of communities. I should mention that Duff has a very wide interpretation of 'the common good'. He says (1986 p. 89) that he does not mean to set 'very tight constraints on the particular ends or values which the law must claim to serve; it need not, for example, be understood in Utilitarian or egalitarian terms as the harmonious satisfaction of the interests of all members of the community'.

[28] Compare 1980 p. 77. This is a point he sometimes ignores; see 1986 pp. 29, 76, 82.

[29] See Kelly 1992 pp. 91-6.

[30] Again, see Kelly 1992 pp. 91-6.

[31] Another reason is that [Ma] and [Mb] are unnecessary to Duff's main argument. The conclusion of this argument is that a seriously immoral legal requirement is formally defective. Now, if [M] is true, a legal requirement is formally defective if it lacks a property there is a necessary *assertion* that it does not lack. As far as I can see, nothing would be added if it were also true that a certain type of justification was necessarily given for this assertion.

[32] Duff 1980 p. 63

[33] Perry 1998 p. 427, emphasis added. Perry is referring to a type of positivism he calls '[s]ubstantive legal positivism'. I suspect Duff would agree with MacCormick (1991 p. 113) that '[l]aws which penalize innocent conduct are ... necessarily perversions of law'.

[34] See Duff 1986 pp. 83-4, 87.

[35] 1986 p. 94.

[36] 1998 p. 249

[37] 1982 p. 197. Compare Raz pp. 134-5.

[38] See Soper 1996 p. 216.

[39] See Greenawalt 1987 ch. 2.

[40] 1998 p. 402.

[41] 1986 p. 81.

[42] 1986 p. 87.

[43] 1986 p. 78.

[44] See, for example: Shiner 1992a pp. 136, 259; Alexy 1989 pp. 167-83; Marmor 1995 p. 352. I would only wish to add a minor qualification. This is that what is necessary

might only be that a legal system's officials have moral pretensions with respect to its *criminal* code. At the very least, I am unconvinced that ls could be a legal system only if ls's officials have moral pretensions regarding *every* aspect of ls. Suppose ls specifies certain purely regulatory offences, and suppose that ls's officials assert that the only value in not committing these is prudential. Must it follow that ls is not a legal system, even if ls's officials make moral claims regarding every other offence ls specifies? However, this qualification is of little present importance: an unashamed tyranny - the tyranny in Doulia, for instance - has *no* moral pretensions.

45 For discussion of some of these conditions, see: Raz 1990 p. 149-62; Raz 1980.

46 This would seem to follow, at least, if the necessary claim concerned each of its requirements, not just the system taken as a whole.

47 How is a moral legal reason different to a nonmoral legal reason? Duff's argument implies that jurists must pay special attention to the moral legal reasons, but when is a legal reason moral rather than moral? Is a strict legal reason a moral reason? For lack of space, I have not attempted to answer these questions.

48 1993 p. ix.

49 Duff (1980 p. 81) draws this conclusion from his argument.

Chapter 8 Exclusionary reasons

1. Introduction

Discussions about the normativity of law frequently focus on the nature of reasons which are 'exclusionary' (in a sense to be explained). In fact, some jurists would agree with Shiner that 'the law is a system of exclusionary reasons' or that 'it is a formal or conceptual point about laws that they are exclusionary reasons for action'.[1] Therefore, it might seem surprising that the main claim made in chapter 1 -

> [B] if p is a reason for x to ø, p is a legal reason for x to ø if and only if p is the fact that ø-ing has a certain legal status with respect to x -

does not mention exclusionary reasons at all. In chapter 8, I shall explain why [B] does not include any reference to exclusionary reasons. Overall, my aim will be to challenge the commonplace that we would fail to understand the formal character of legal reasons if we ignored the existence of reasons of this type which are exclusionary.

Another commonplace is that it would be a mistake ('crude') to relate the normativity of law to 'the existence of sanctions for non-compliance'.[2] In this chapter, I shall challenge this as well. I shall not attempt to defend the Holmesian view that 'quintessentially legal reasons ... are ... prudential reasons created by legal institutions to which a bad man ... would attend'.[3] Nor shall I argue for 'Kelsen's ... view that sanctions are part of the concept of law'.[4] My

aim is more modest. I want to show that we have yet to see why an analytical jurist must attend to the nature of reasons other than those supplied by legal sanctions.

In relation to this aim, I should mention that many have argued that Raz deserves credit for correcting Austin's bias toward the normative consequences of 'a coercive command'. For instance, I should mention that many have agreed with Shiner that

> 'By distinguishing first-order from exclusionary reasons, and by identifying a legal system as a system of exclusionary reasons, Raz opens up the possibility of genuinely distinguishing law as a reason for action from a coercive command as a reason for action, since a coercive command, as Hart rightly saw, can only be a first-order reason for action'.[5]

Actually, it is uncertain whether Austin *is* biased towards the normative consequences of a coercive command (see sections 5 and 8). But part of this chapter's argument is that this bias would be problematic only if Austin's project were something other than analytical. I shall argue, for instance, that it is uncertain why an analytical jurist cannot simply ignore the distinction between exclusionary and first-order reasons.

2. Exclusionary reasons

I need to begin by explaining the nature of exclusionary reasons (sections 2 and 3). It is important to observe that 'exclusionary' is a technical term, introduced by Raz, and that my explanation of the nature of exclusionary reasons depends entirely on that of Raz. I should acknowledge from the outset, however, that I have found aspects of Raz's explanation very difficult to interpret. I shall attempt

to represent Raz's view with complete accuracy, but I admit it is possible that I will fail to do so.

Reasons take different objects (see chapter 1, section 2). For example, a reason can pertain to an action, a belief, or an attitude. The object of an exclusionary reason is an action.[6] More precisely, an exclusionary reason is a reason *not* to perform an action; in other words, it is a reason *against* performing an action. The action in question figures in practical deliberation itself: an exclusionary reason is a reason not to weigh one or more reasons in one's deliberations. As Raz puts it, an exclusionary reason is a reason not to have certain reasons 'figure in one's reasoning'.[7]

Suppose p is a reason to ø. Then, if q is a reason not to have p figure in one's deliberations about whether to ø, q is an exclusionary reason. It is 'exclusionary' in the sense that it is a reason to exclude consideration of q.

It will be helpful if I describe an example. Suppose you would maximise utility if you ran, and suppose this fact is a reason for you to run. Further, suppose you have promised to disregard considerations of utility when deciding what to do, and suppose the fact that you have promised to perform an action is a reason to perform it. In this example, you have two reasons: the reason for you to run (call this 'the utility reason'), and the reason for you to exclude consideration of this reason ('the promise reason'). What should you do? That depends on whether there are additional reasons. There might be reasons for you *not* to run, and these might outweigh the utility reason. Or there might be reasons for you to weigh the utility reason, and these might outweigh the promise reason. If there are no other reasons, however (let us suppose that there are not), then what you ought to do overall is (i) run but (ii) ignore the utility reason when deciding whether or not to run.

In this example, the promise reason is an exclusionary reason, for it is a reason to exclude consideration of the utility reason. P is the fact that you would

maximise utility if you ran, and q - the exclusionary reason - is the fact that you have promised to disregard considerations of utility when deciding what to do.

However, it is not entirely correct to say that an exclusionary reason is a reason not to consider one or more reasons while deliberating. An exclusionary reason only requires that certain reasons are not weighed in one's decision. It is permissible to think about the reasons to be excluded as long as one does not allow them to contribute towards the determination of what one does. Here is how Raz puts the point:

> 'Think of John, who is subject to an ... exclusionary reason. Let us assume that ... the action indicated by the balance of all ... [nonexclusionary] reasons is different from the action indicated by the balance of the unexcluded reasons only. John ... 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.*'[8]

Think about your decision about whether or not to run. If the promise reason is an exclusionary reason, this is because you have grounds not to treat the fact that you would maximise utility by running as a consideration in favour of running. It *is* a consideration in favour of running: the utility reason is a reason to run. However, given the promise reason, it should not figure in your decision about whether or not to run, holding all else equal.

3. Second-order reasons

Raz describes exclusionary reasons as 'second-order' reasons. In one regard, this seems entirely apt. There seems to be a straightforward sense in which a reason is 'second-order' if it concerns other reasons, and an exclusionary reason

concerns the reason or reasons it is a reason not to weigh. Consider the example described in section 2. The promise reason concerns the utility reason, since the promise reason is a reason not to have the utility reason figure in your deliberations, and this makes the promise reason a second-order reason. The utility reason is only a first-order reason because it does not pertain to (the weighing of) other reasons; as we saw in section 2, it is only a reason to run.

In another regard, however, the term 'second-order' is misleading. It will be important to see why. Raz thinks that an exclusionary reason is second-order because (i) exclusionary and first-order reasons conflict and (ii) this conflict takes a special form. He is at pains to emphasise that an exclusionary reason is not a first-order reason because 'exclusionary reasons do not compete in weight with the reasons they exclude; rather they always win in such conflicts'.[9] Raz wishes to make a critical point. He states that it is common to think that conflicts between reasons are always 'resolved by the strength of competing reasons' - that is, to think that

> 'all practical conflicts conform to one logical pattern: conflicts of reasons are resolved by the relative weight or strength of the conflicting reasons'.[10]

Here is Raz's critical point: it is a mistake to think that all practical conflicts conform to one logical pattern because the conflict between certain reasons - the conflict between a first-order reason and a second-order exclusionary reason - is

> 'resolved not by the strength of the competing reasons but by a general principle of practical reasoning which determines that exclusionary reasons always prevail'.[11]

I find this line of argument unconvincing; as far as I can see, exclusionary reasons are *not* second-order in this second sense. The problem is that there is an

important respect in which exclusionary and first-order reasons do not compete at all. Let me explain.

In so far as a fact is an exclusionary reason, it does not pertain to the same action as that to which the excluded reasons pertain. Instead, it pertains to an action involved in deliberating *about* this action. It follows that an exclusionary reason does not conflict with the first-order reasons that it is reason to exclude. For, it seems, two reasons conflict ('compete') only if they pertain to the same object.

Consider the utility and promise reasons mentioned above. The utility reason is the fact that you would maximise utility by running, and the promise reason is the fact that you have promised to disregard considerations of utility while deciding what to do. Clearly, the utility and promise reasons pertain to different actions. The utility reason pertains to running (it is a reason for you to run), but the promise reason does not (it is not a reason to run, and it is not a reason not to run). Instead, the promise reason pertains to a certain deliberative action; it pertains to the action of weighing the utility reason in your deliberations. While it is true that the deliberation concerns whether or not to run, the promise reason does not pertain to running itself. It pertains to an action involved in reasoning *about* running. It follows that, strictly speaking, the utility and promise reasons do not conflict. They could conflict only if they pertained to the same action.

Raz is correct that an exclusionary reason does not 'compete in weight with the reasons' that it is a reason not to weigh. However, he is incorrect to think that the explanation of this fact challenges the thought that 'all practical conflicts ... are resolved by the relative weight ... of the conflicting reasons'. Put differently: Raz is incorrect to think that the explanation supports the claim that exclusionary reasons 'exclude the reasons they defeat by kind'.[12] To see this, suppose p is a reason to ø, and suppose q is a reason not to weigh p in deliberations about whether or not to ø. P and q do not compete in weight simply

because p and q pertain to different objects. Because two reasons compete in weight only if they pertain to the *same* object, it is unremarkable that an exclusionary reason does not compete in weight with the reasons it excludes.

Raz would be entirely correct to claim that *deliberation* about practical conflict should not conform to single logical pattern: no doubt there are situations in which it would be a mistake to resolve what one ought to do by weighing all the relevant considerations. My objection is only to a stronger claim (a claim that it is not difficult to interpret Raz as making). This is the claim that there can be situations in what one overall ought to do is not determined by the relative weight of the relevant conflicting considerations.

4. Second-order reasons: Scanlon

The nature of this stronger claim will be further brought out if we consider the following passage by Scanlon:

> 'reasons can conflict in a practical sense when they are reasons for ... incompatible things. ... But reasons can be related to one another in more complex ways. I may, for example, judge one consideration, C, to be a reason for taking another consideration, D, not to be relevant to my decision whether or not to pursue a certain line of action. In this case the relation between the reason-giving force of C and that of D is not merely practical conflict .... The conflict is deeper. The reason-giving force of C not only competes with that of D; it urges that D lacks force altogether ...'.[13]

We can ignore the fact that Scanlon refers to what agents *judge* to be the case about certain reasons; presumably, Scanlon is also thinking of situations in which the 'relation between the reason-giving force of C and ... D' is not that of mere

practical conflict. For example, with regard to reasons for belief, think of Scanlon's suggestion that 'reasons for belief do not ... simply count *for* a certain belief with a certain weight, ... [that is, that correctly] deciding what to believe is not in general simply a matter of balancing such weights.'[14]

Doubtless, Scanlon is correct that two reasons can be related to one another even when they do not pertain to the same action. The example described in section 2 shows that this. On the one hand, the utility and promise reasons are related: the promise reason is a reason to disregard the utility reason. On the other hand, the two reasons are not reasons for incompatible things; it is not as though the utility reason is a reason to run and the promise reason is a reason not to run.

Moreover, Scanlon is correct that a reason could pertain to whether or not another reason is relevant to a decision 'to pursue a certain line of action'. Think of the promise reason. There is a sense in which this reason is a reason to take the utility reason as not relevant to whether or not you should run. The utility reason *is* relevant: it is a reason of a certain weight to run. However, given your promise, you have grounds to ignore this while deciding what to do. Following Scanlon, we might want to say that the promise reason 'urges' that the utility reason 'lacks force altogether'.

The question is whether we should conclude that Scanlon is correct in stating that there is 'practical conflict' between two reasons if one is a reason to take the other as not relevant to a decision. Imagine that D is a reason to ø and that C is a reason to ignore D when deciding whether or not to ø. The question is whether we should conclude that 'the relation between the reason-giving force of C and that of D is not merely practical conflict'.

I believe we should not. If C is not also a reason against ø-ing, there is no practical conflict *at all*. As we have seen, Scanlon says the conflict between two reasons is especially 'deep' when one of the two reasons is a reason to take the other as not relevant to a decision about whether to pursue a certain line of

action. The problem is that conflict would exist at all only if the two reasons pertained to the same line of action - or if, alternatively, the two reasons pertained to what was relevant to the decision about whether to pursue it.

Consider reasons for belief. Admittedly, 'deciding what to believe is not in general simply a matter of balancing' conflicting reasons. It is possible that certain reasons should not be considered in the balance; it is possible that one would deliberate correctly only if one did *not* take into account every reason that pertained. However, it does not follow - as Scanlon seems to think it follows - that 'reasons for belief do not ... simply count *for* [or against] a certain belief'. All that follows is that there can be reason not to a consider a reason for or against a belief.

Or consider Raz's claim, mentioned above, that not 'all practical conflicts ... are resolved by the relative weight ... of the conflicting reasons'. The relative weight of the conflicting reasons *does* determine whether a person ought to perform an action. This is true even if a person ought to decide whether or not to perform the action without considering all the reasons that determine whether or not she should perform it. As we have seen, Raz seeks to establish that not 'all practical conflicts conform to one logical pattern'. My claim is that he has only shown that there can be situations in which *deliberation about* a practical conflict should not conform to one logical pattern; by introducing the notion of an exclusionary reason, all he has shown is that, in some situations, one might lack decisive reason to weigh all conflicting considerations.[15]

The distinction I mention between practical conflict and deliberation about practical conflict helps to solve an alleged 'puzzle' about exclusionary reasons. McClennan and Shapiro have claimed that exclusionary reasons are problematic because it is puzzling how 'one can be justified in not acting according to the balance of reasons'.[16] The apparent puzzle can be brought out by again considering the promise and utility reasons (see section 2). Since you have one reason to run and no reasons not to run, it seems certain that, on

balance, you ought to run. Yet it also seems that, on balance, you ought not to run. This is because you have reason to exclude consideration of your only reason to run, yet no reasons not to exclude consideration of this reason. Therefore, as McCennan and Shapiro might say, you would be justified in not running even though it is certain that what you ought to do is run.

I do not see a puzzle here. There *can* be situations in which x has decisive reason not to weigh a reason to ø even though this reason counts decisively in favour of ø-ing. It follows that there can be situations in which x can deliberate correctly and decide not to ø even though x ought to ø, all things considered. But there is no puzzle here, because the decisive reason not to weigh the reason to ø is *not* a reason to act against the balance of reasons: there is no puzzle since the exclusionary reason is not a reason *not to ø*. The exclusionary reason *is* a reason. However, it pertains to an action other than the one there is decisive reason to perform; it pertains to an action related to deliberating about the decisive reason.

Recall your decisive reason to run: you would maximise utility by running. Earlier I said that, what you overall ought to do is (i) run but (ii) ignore the utility reason when deciding whether or not to run. But there is no puzzle here: I have not described a case in which a person is justified in not acting according to the balance of reasons. With respect to whether or not you should run, you would be unjustified in not running; with respect to *this* action, this is what you have most reason to do. Nonetheless, you are justified in deliberating about whether to run in a way which could justifiably lead you *to decide* not to run. Overall, what you ought to do is ignore the utility reason. It follows, since you have no other reasons for or against running, that you would not be unjustified in deciding not to run. Furthermore, after deciding not to run, rationality might require you not to run; it might be true that, if x decides or intends not to ø, then x would be irrational if he or she ended up ø-ing (see chapter 4, section 9). However, in the sense with which we are concerned, it

would not follow that you would be 'justified' in not running; it would not follow that you had decisive *reason* not to run.

5. When agents act

An exclusionary reason is a reason not to weigh one or more reasons in one's deliberations: if p is a reason to ø, and q is a reason not to weigh p in deliberating about whether or not to ø, then q is an exclusionary reason (section 2). We have seen that, in one obvious sense, exclusionary reasons are 'second-order' (section 3). We have also seen that, in another sense, they are not second-order. An exclusionary reason is not weighed with the reasons it is a reason to exclude. But, I have argued, it does not follow from this that an exclusionary reason has special - 'second-order' - force (sections 3 and 4).

Many jurists have claimed that one must understand the nature of exclusionary reasons to properly understand the nature of the normativity of law. This is the claim I want to undermine in this chapter. I also want to undermine the related claim that 'sanctions do not create, or constitute, the normative force of ... [legal] rules'.[17] I shall begin by considering a common objection to Austin; as we shall see, this objection relies on both of the claims I want to undermine.

Shiner criticises Austin for his inability to account for the fact that ordinary citizens and legal officials sometimes act on the basis of the belief that the law supplies exclusionary reasons. According to Shiner, Austin is unable to account for this fact because (i) he pays exclusive attention to reasons to avoid legal sanctions and (ii) such reasons are never exclusionary.[18]

Ordinary citizens and legal officials no doubt *are* motivated by the existence of legal sanctions. Consequently, Shiner's line of reasoning could not show that a study of the normativity of law should *exclude* a study of the existence of sanctions for non-compliance. All it could show is that a theory of

law is worse to the extent that it ignores how agents act for exclusionary *or nonexclusionary* legal reasons.

However, I believe it is doubtful that it even shows this. This is because it is doubtful that a theory of law should attempt to describe the different types of reasons for which agents see themselves acting. It is particularly uncertain that an *analytical* theory of law - a theory like the one presented by Austin - should do so. In the sense with which Shiner should be concerned, a 'theory of law' is not an exercise in descriptive sociology; Austin is not trying to capture how agents respond to the existence of different types of legal fact. Therefore, it seems irrelevant that ordinary citizens or legal officials act on the basis of the belief that the law supplies exclusionary reasons.

Shiner claims that

> 'law cannot be understood without attention being paid to the point of view of those [ordinary citizens or legal officials] who deem law to present genuine ... non-coercive'

reasons for action. At first, this claim appears to have special significance for a study of the normativity of law. The claim appears to imply that we could understand the normativity of law only if we knew how certain agents understood this to be - for example, only if we knew that they sometimes understand this to be 'non-coercive'.

The difficulty is that, if Shiner's claim is true at all, it is true only with respect to certain types of understanding of the law. The fact that ordinary citizens 'deem law to present genuine ... non-coercive reasons' might be relevant to understanding law as a social phenomenon. For example, it might be relevant to understanding how the fact that an action is legally required can lead ordinary citizens to perform it. The question at issue is whether the fact that ordinary citizens deem law to supply non-coercive reasons could be relevant from the perspective of analytical jurisprudence. A criminological theory of law might

need to determine whether or not legal officials take the law to supply exclusionary reasons, but why does *Austin*'s theory need to do so?

For the purposes of the present study, the important question is whether the formal character of legal reasons would be misrepresented if we failed to recognise that agents sometimes see legal reasons as exclusionary. Would we, for example, misunderstand their identity-conditions? It is difficult to see that we would. At the very least, it is uncertain how we could conclude from (i) the fact that certain agents take legal reasons to be exclusionary that (ii) legal reasons actually are exclusionary. Likewise, we could not conclude from the fact that no agent has acted or ever will act on an exclusionary reason that a study of legal reasons should *not* include a study of exclusionary reasons. The question would remain open.

6. Law's claims

In section 5, I said that an analytical jurist can ignore how ordinary citizens and legal officials understand the normativity of law. For example, I said that Austin can ignore whether or not these agents take the law as exclusionary.

Many would see this as incorrect, since many accept the following:

> [N] a system of rules ls is a legal system only if ls's officials take ls to supply exclusionary reasons.[19]

Given [N], an analytical jurist *cannot* ignore whether legal officials take the law as exclusionary, because one task of analytical jurisprudence is to describe a legal system's identity-conditions.

Let me make two minor qualifications about [N]. The first is that few jurists express [N] in the stark form given above. It is more common to observe

that ls is a legal system only if ls's officials take x to be 'authoritative' and then to offer the following qualification regarding authoritativeness:

> ls is authoritative only if ls supplies exclusionary reasons to act as ls requires.

The second qualification is that there is disagreement concerning the actions for which, and agents for whom, ls must be taken to supply exclusionary reasons. Some jurists believe that a system of rules ls is a legal system only if ls's officials take themselves to have exclusionary reasons not to weigh reasons against conforming to those rules of ls which 'specify the ways in which primary [non-core] rules [of ls] ... may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined'.[20] But other jurists believe that the exclusionary reasons must be seen to pertain to ordinary citizens and to ordinary ('primary') laws.

But should we accept [N] in the first place? Shiner criticises Austin for ignoring how legal officials must have an 'internal point of view' toward the rules they administer. He then argues that an agent has this point of view if he or she acts on the basis of exclusionary reasons. But is it really true that a system of rules is a legal system only if those who administer it take it to supply exclusionary reasons?

I would argue that this is not true. In chapter 7, I argued that ls could be a legal system even if ls's officials do not assert that ls's requirements are obligating. Now I wish to add that a system of rules ls could be a legal system even if ls's officials do not act on the basis of the belief that ls supplies exclusionary reasons.

Think again of the imaginary system of rules chapter 7 calls 'Hundred'. Hundred has both primary and secondary rules in Hart's sense. It also has every other feature contemporary legal theory says is necessary and sufficient to be a legal system. For example, Hundred's rules are general standards rather than

situation-specific orders, Hundred is generally effacious in the community to which Hundred pertains, Hundred's officials claim that the system is comprehensive (for instance, they claim that Hundred could require or proscribe any action), and Hundred specifies sanctions for noncompliance with its requirements and proscriptions.[21] Moreover, Hundred's officials assert, believe, and act on the basis of the belief that there are moral reasons for ordinary citizens to conform to Hundred's requirements on action and for Hundred's officials to conform to Hundred's rules about how these requirements are to be administered.

My claim is that Hundred could be a legal system even if Hundred's officials failed to take Hundred as supplying exclusionary reasons. I mentioned that Hundred's officials act on the basis of the belief that Hundred supplies moral reasons. My claim is that the belief need not concern *exclusionary* moral reasons. If I am correct about this - if I am correct that it is conceptually possible that Hundred is a legal system - then [N] is false.

7. Obligating and authoritative laws

If a reason to avoid suffering a legal sanction is never an exclusionary reason, why would it be a mistake ('crude', as Shiner puts it) to relate the normativity of law to 'the existence of sanctions for non-compliance'? In sections 5 and 6, I rejected the following answer: ordinary citizens and legal officials sometimes act on the basis of the belief that legal reasons are exclusionary. Now I shall consider a second answer. As we shall see, this answer assumes that at least some legal reasons *are* exclusionary.

According to Raz,

> '[t]he fact that a law ... provides for a sanction is no doubt a reason for action, but it is a reason of the wrong kind. .... [I]f some laws are

> mandatory norms then they are exclusionary reasons ... But the fact that a law is backed by a sanction is never an exclusionary reason'.[22]

Let us say that the reasons to which Raz refers are 'sanction reasons'; Raz's claim is that sanction reasons are 'of the wrong kind' because, amongst other things, sanction reasons are never exclusionary.

Raz says that they are of the wrong kind given our wish to explain 'what justifies the normative terms [ordinary citizens and legal officials use] to describe the law'.[23] It is an empirical fact that ordinary citizens and legal officials describe the law as 'obligating'. It might seem to follow, if sanction reasons are never exclusionary, that the existence of sanction reasons cannot explain what justifies the use of one important normative term that ordinary citizens and legal officials use to describe the law. This would seem to follow, at least, if Raz is correct that there is an obligation to obey a law only if this law supplies both a first-order reason to conform to it and a reason not to weigh reasons against conforming to it.

A similar line of reasoning appears in Green. According to Green, a 'sanction-based theory of legal duty ... explains how the law guides action, but it explains it in the wrong way.' It explains how law guides in the wrong way because '[s]anctions provide only ordinary reasons to act', not exclusionary reasons.[24] Like Raz, Green is not merely interested in how agents understand the normativity of law. He writes:

> 'Given ... fear of sanctions, it would be surprising if judges and citizens were not motivated by the law. The point is that ... this ... does not *justify* treating law as authoritatively binding'.[25]

Green believes a law is authoritatively binding only if it supplies a reason to exclude one or more reasons not to conform to it. His critical claim is that 'a

sanction-based theory of legal duty' fails to explain how the law is authoritatively binding since it fails to consider exclusionary reasons.

A similar line of reasoning also appears when Shiner responds to Austin's remark that,

> '[b]eing liable with evil from you if I do not comply with a wish you signify, I am bound and obliged by your command, or I lie under a duty to obey it'.[26]

Hart's celebrated response to this remark is that Austin conflates (i) being obliged to perform an action with (ii) being obligated to perform it. Shiner understands Hart's response as follows: since Austin pays exclusive attention to sanction reasons, he cannot account for the fact that laws obligate, and do not merely oblige.[27] Shiner believes this is a significant problem; he says that a theory of law is 'inadequate' if it 'cannot show how laws create obligations, but only how they oblige'.[28]

The connection to exclusionary reasons is as follows. Like Raz, Shiner believes a person is obligated to ø only if he or she has reason not to weigh one or more reasons against ø-ing.[29] It follows, if sanction reasons are never exclusionary, that a person cannot be obligated to obey the law if his or her only reason to obey it is a sanction reason. Moreover, if a theory of law is 'adequate' only if shows how laws obligate, and if sanctions reasons are never exclusionary, it also follows that a theory of law is adequate only if it shows how laws supply reasons other than sanction reasons.[30]

8. Sanctions and exclusionary reasons

In sections 8 and 9, I shall assess the argument described in section 7. The conclusion of this argument is that it would be a mistake to relate the normativity

of law to the existence of sanction reasons. More precisely, the conclusion is that a theory of law should attend to reasons other than sanction reasons. There are three premises: a theory of law should account for the fact that the law sometimes obligates or authoritatively binds; law is obligating or authoritatively binding only when it supplies exclusionary reasons; sanction reasons are never exclusionary.

Let me begin by observing that it is misleading of Shiner to write that, for Austin, a legal norm's

> 'force as a reason is derived from the fact that ... the norm-subject will be visited with evil if he or she does not comply with the command'.[31]

As far as I can determine, Austin does not claim or imply that all legal reasons are sanction reasons. Austin certainly says that,

> '[b]eing liable with evil from you if I do not comply with a wish you signify, I am bound and obliged by your command, or I lie under a duty to obey it'.

However, he does not mean that a person has a reason or an obligation to act as the law requires if and only if she has a sanction reason to do so. Austin is making a point about the identity-conditions of legal requirements; assuming that the remark says anything at all about reasons to act, all it says is that

> x is legally required to ø only if there is sanction reason for x to ø.

As mentioned, Austin does not say that every legal reason is a sanction reason. Moreover, it seems consistent with what he does say that some legal reasons are exclusionary and even that some laws are obligating or authoritatively binding. For sake of argument, however, let us suppose that

Austin *does* argue that p is a legal reason only if p is a sanction reason. Would it then follow that he could not claim that the law supplies exclusionary reasons?

I do not think so. For it seems that the widely held view that 'the fact that a law is backed by a sanction is never an exclusionary reason' is mistaken.[32] An exclusionary reason is a reason not to weigh certain other reasons in one's deliberations, and it seems that 'the existence of sanctions for non-compliance' *can* mean that one has reason not to weigh certain other reasons. Let me show this using two examples: (i) and (ii) as follows.

(i) Suppose that those who administer and enforce the legal requirements to which you are subject know when you are deliberating about whether to act illegally. Further, suppose that these legal officials would cause you to suffer a penalty if you deliberated about whether to act illegally. Presumably, you have reason to avoid the penalty (Raz, Green and Shiner do not deny that 'the fact that a law is backed by a sanction' can be a reason - they only deny that the fact can be an *exclusionary* reason.) However, it follows that, in this situation, you have reason not to weigh certain reasons: you have reason not to deliberate at all. Therefore, a sanction reason - the fact that you would suffer a legal sanction if you acted illegally - is an exclusionary reason.

(ii) Now for a more realistic example (in the actual world, you are far less transparent to legal officials, and you are not subject to a legal penalty if you deliberate about whether to act illegally).

Suppose you have the following psychological feature: when you deliberate about whether or not you should perform a legally required act, you are caused to be anxious. Suppose, more precisely, that you are caused to be anxious if you would suffer a legal sanction if you acted illegally. Plausibly, a person has reason not to perform an action if the action would cause her anxiety. Therefore, it is plausible that the fact that you are liable to suffer a sanction if you fail to ø is a reason for you not to deliberate about ø-ing.[33] However, if you

have reason not to deliberate about ø-ing, you have reason not to weigh reasons for and against ø-ing. It follows that the type of situation I have described is plausibly one in which 'the fact that a law is backed by a sanction' is an exclusionary reason.

9. Analytical jurisprudence

Since sanction reasons *can* be exclusionary (section 8), the argument described in section 7 needs to be modified: Raz, Shiner and Green might be able to establish that a theory of law must attend to exclusionary reasons, but they cannot argue that it follows that a theory of law must attend to reasons other than sanction reasons.

Now I shall question whether the argument even shows that a theory of law must attend to exclusionary reasons (sections 9-15). For sake of argument, I shall assume that Raz and Green are correct about the relationship between exclusionary reasons and an authoritatively binding or obligating legal requirement. That is, I shall assume it is true that:

> x is obligated or authoritatively bound to act as a legal requirement requires only if x has reason not to weigh one or more reasons against acting as it requires.

Though Raz has given substantive arguments in favour of this claim, many still find it difficult to accept - but I shall ignore this here.[34]

A premise of the argument is that a theory of law should account for the fact that the law sometimes obligates or authoritatively binds; as we have seen, Shiner's thought is that Austin's theory of law is problematic because it does *not* account for this fact. The difficulty is that it is not at all obvious that every type of theory of law must account for this. More precisely, the difficulty is that it is

not obvious that an *analytical* theory of law - Austin's theory, for instance - must be able to account for the fact that the law is obligating or authoritatively binding. Perhaps it is true that

> 'any adequate *general* theory of law must give a satisfactory account of the normative ... character of law'.[35]

Since a normative theory of law attempts to determine whether the law is obligating, perhaps a normative theory of law should account for the incidence of exclusionary reasons. However, an analytical theory of law cannot be criticised for failing to address a question in normative jurisprudence.[36] My claim is that we should not accept that an analytical jurist fails 'philosophically' if he or she does not 'attempt to account for the normativity of law'. Of course, it might be true that an analytical jurist should account for the nature of the normativity of law, that is, for what it is for law to be normative, assuming that it actually is (see sections 10-11). My claim is only that he or she need not account for the fact that the law *is* normative.[37]

Consider the analytical aims of the present thesis. For this thesis, what matters is whether the formal character of legal reasons would be misrepresented if we failed to acknowledge that there are exclusionary legal reasons. (For example, one question is whether we would misrepresent their identity-conditions.) I do not think that this is possible. Perhaps it is true that 'law is a practical phenomenon that systematically creates reasons for action', and perhaps the reasons in question are sometimes exclusionary.[38] Nonetheless, a formal study of legal reasons could be complete without describing the legal reasons which there actually are. For example, a formal study of legal reasons could be complete without saying whether this or that particular law supplies a reason of this or that particular order to conform to it.

10. Formal features

Raz says that 'the problem of the normativity of law' has two aspects. The first is to explain how the law is reason-giving (to explain 'what justifies the use of normative terms to describe the law').[39] The second is 'to explain what precisely is meant by saying that legal rules are ... reasons for action'.[40]

In section 9, I argued that an analytical jurist need not address the first aspect of Raz's problem: legal rules might be justifiably described as 'obligating', and it might be true that x is obligated to ø only if there are reasons not to weigh reasons against ø-ing; however, analytical jurists need not account for this fact.

Now I shall turn to the second aspect of Raz's problem. Legal reasons can be characterised according to their possible formal features: strict or material, content-independent or content-dependent, and so on. Perhaps what Shiner et al. would wish to argue is that analytical jurists would do well to recognise that it is *possible* for a legal reason to be exclusionary; perhaps they would wish to argue that a formal study of legal reasons should account for the different possible properties of legal reasons.

In light of the objection raised in section 9, this argument would not presume that legal reasons *are in fact* sometimes exclusionary; instead, it would rely on the fact that legal reasons *can* be exclusionary. The argument's assumption would be that legal reasons can fall into different formal types and that a complete study of their formal character would describe each of these types. Consider Perry's suggestion that a jurist fails 'philosophically' if he or she does not 'attempt to account for the normativity of law'. Perhaps Perry would say that an analytical jurist should account for the ways in which the law could be normative.

At this point, we need to consider whether legal reasons have a formal feature when they are exclusionary. If Austin misrepresents the formal character of legal reasons by failing to observe that they can be exclusionary, it must be the

case that a legal reason p has a certain formal feature when p is an exclusionary rather than a nonexclusionary reason. Our question is whether or not p *does* have a formal feature when it is exclusionary.

The answer to this question would certainly be 'yes' if an exclusionary reason were one that had the type of 'second-order' significance which means that it is not 'to be thrown into the balance of reasons'.[41] As we saw in section 3, Shiner, Raz and Green *do* think that an exclusionary reason has this special type of normative significance. They think:

> 'Conflicts between first-order ordinary reasons and second-order exclusionary reasons are resolved, not by the relative strength of the two competing reasons, but ... by a general principle of practical reasoning which determines that exclusionary reasons always prevail'.[42]

If they were correct to think this, it would seem to follow that a legal reason p *does* have a formal feature when p is an exclusionary reason. For it seems that the nature of a reason's normative significance - whether or not it defeats other reasons by kind rather than by relative strength - is a matter of its formal character.

Exclusionary reasons, however, do not defeat first-order reasons 'by kind'. As we have seen, there is an important respect in which exclusionary and first-order reasons do not even conflict (see sections 3 and 4). True, an exclusionary reason does not compete in weight with the reasons it excludes. However, this is not because it is false that 'all practical conflicts ... are resolved by the relative weight ... of the conflicting reasons'.[43] As we have seen, the explanation is less dramatic: two reasons can conflict in weight only if they pertain to the same action, and an exclusionary reason pertains to one action while the first-order reason it excludes pertains to another (see section 3).

As far as I can see, to recognise that a reason can be exclusionary is to only recognise that a reason can pertain to a certain type of act; it is only to recognise that a reason can pertain to the act of weighing a reason in one's deliberations. However, if this is correct, it is doubtful that a reason has a formal feature just because it is exclusionary. This is because it is doubtful that a reason's formal character is determined by the type of act to which it pertains. That is, it is doubtful that p and q would differ in some formal respect just because p pertains to one type of act and q pertains to another. The conclusion to draw, I believe, is that an analytical jurist has no real need to account for the fact that legal reasons can be exclusionary. An analytical theory of law could offer a complete account of the formal character of legal reasons without describing all of the actions which a legal reason could be a reason to perform.

11. Exclusionary and strict legal reasons

In section 10, I rejected one argument for thinking that a legal reason p has a formal feature if p is exclusionary rather than nonexclusionary. According to this argument, an exclusionary reason has a special sort of normative significance ('that exclusionary reasons always prevail' over the reasons it is a reason to exclude).[44] In the remaining sections of this chapter, I shall consider a second argument. This concerns the possibility that legal reasons can be strict rather than material.

According to Raz, the fact that a law requires an action can be a 'complete ... reason'.[45] Since p is a strict reason to ø if it is a complete reason to ø (see chapters 2 and 3), Raz implies that the fact that a law requires an action can be a strict reason to perform it.[46]

It is possible that Raz is committed to an even stronger claim. For he says that a law requiring an action is a 'mandatory norm' and he holds that the

fact that a mandatory norm is prescribed is a complete reason.[47] It is possible that Raz believes that the fact that a law requires an action is *always* a strict reason. In the following sections, however, I shall be concerned with the weaker claim. For our purposes, this claim is interesting enough. Moreover, there are grounds to doubt that Raz is committed to the stronger claim.[48]

The weaker claim is interesting because many jurists reject it. Few jurists doubt that an action's illegality can be a *material* reason to refrain from it. However, it seems that very few are able to accept that a legal reason can be a strict reason (see chapter 4).[49]

I shall begin by clarifying Raz's claim (section 12) and by describing Raz's argument for it (sections 13). Then I shall attempt to show that this argument is unpersuasive (sections 14-5). I should mention from the outset that I have found Raz's claim and argument very difficult to interpret. The interpretation I shall offer of the claim is highly plausible, and I shall present the argument in the most convincing form of which I am aware. Nevertheless, I admit that I may have misinterpreted Raz's view.

12. Raz's claim

As mentioned, Raz argues that the fact that an action is legally required can be a strict reason to perform it because the legal requirement can be an exclusionary reason (section 11). Here, however, 'can' is very important term: Raz does not claim that it follows from the fact that q is a reason not to weigh one or more reasons not to ø that q is a strict reason to ø.[50] He thinks three additional conditions must be met: (i)-(iii) as follows.

(i) Raz's argument concerns situations in which the fact that an action is required is 'a reason not only to disregard other reasons but also to perform' the action.[51] The first condition is that there must be 'a systematic combination of a

reason to perform ... [an] act ..., and an exclusionary reason not to act for certain reasons'. In other words, q must be a reason not to weigh one or more reasons against ø-ing *and a reason to ø*.[52]

(ii) There might be several reasons not to ø. The second condition is that q must be a reason not to weigh each of these reasons.

(iii) It does not follow from the fact that q is a reason not to weigh p that what one ought to do overall is not weigh p. Obviously, there could be reason *to* weigh p. (Recall your decision about whether to run (see section 2 above). You have reason not to weigh the utility reason in your deliberations. However, since there could be stronger reasons *to* weigh this reason, it could turn out that what you overall ought to do is (a) run and (b) take the fact that you would maximise utility by running into account when deciding whether to run.) The third condition is that q must be a reason which outweighs each and every reason to weigh reasons not to ø. Put differently, the third condition is that q must be a decisive reason not to weigh each and every reason not to ø.

Given these three conditions, we arrive at the following claim:

> [O] If q is a decisive reason not to weigh each and every reason not to ø, then, if q is a reason to ø, q is a strict reason to ø.

According to Raz, q is not a strict reason just because q excludes one or more reasons not to ø: according to Raz's argument, q must exclude any such reason (the second condition). Moreover, if there are reasons *not* to exclude these reasons, q must outweigh these reasons (the third condition). Finally, q must be a first-order reason to ø (the first condition). However, when these conditions are met, q is a strict reason to ø. This seems to be Raz's claim.

13. Raz's argument

In section 13, I shall describe Raz's argument for this claim.

Plausibly, a reason's weight matters only if there are reasons to weigh against it. Suppose p is a reason for you to vault, and suppose there are no reasons for you not to vault. Then p's weight is irrelevant to determining what you overall ought to do. For instance, you overall ought to vault whatever p's weight; you overall ought to vault even if p is a very weak reason, for instance.

Raz believes that a reason's weight can be irrelevant even if there are conflicting reasons. Specifically, he believes a reason's weight can be irrelevant when there is decisive reason not to weigh these conflicting reasons; if there is decisive reason to exclude the conflicting reasons, 'we need not be concerned with the weight of the conflicting reasons affecting the case'.[53]

To see Raz's claim more precisely, let us consider a concrete example. Imagine that the following fact is a reason for MacCannon not to evade liability:

(8.1) MacCannon is legally proscribed to evade liability

And imagine that MacCannon has only one reason *to* evade liability:

(8.2) MacCannon would become very rich if he evaded liability.

It follows that whether or not MacCannon should evade liability depends on whether (8.1) or (8.2) is the stronger reason. Suppose, however, that MacCannon has promised to ignore money when making decisions, and suppose that this fact gives him a decisive reason not to weigh (8.2) in his deliberations about whether to evade liability. It now seems that MacCannon can ignore (8.1)'s weight and still deliberate correctly. That is, it seems that MacCannon can decide what he ought to decide by weighing the reasons he ought to weigh without considering (8.1)'s weight; as Raz would say, 'the weight of the reason ... does not arise'.[54]

I have described the first step of the argument: a reason's weight can be irrelevant to determining what one ought to do even if there are conflicting reasons, as long as there is decisive reason not to weigh these conflicting reasons. Now for the second step of the argument: when a reason's weight is irrelevant to determining what one ought to do, the facts which determine its weight are irrelevant. Consider your reason to vault. You overall ought to vault whatever p's weight; you could deliberate correctly without considering p's weight. It also appears you would deliberate correctly without realising that it is some other fact, r, which determines p's weight.

Or consider MacCannon's decision about whether or not to evade liability. Suppose (8.1) is a *material* reason for MacCannon not to evade liability. It is a material reason rather than a strict reason, let us suppose, because it is of normative significance only given the obtaining of the following fact:

(8.3) MacCannon would suffer a legal penalty if he acted illegally.

(8.3) appears to (partly) determine (8.1)'s weight; it appears that it is (partly) in virtue of the fact that MacCannon would suffer a legal penalty if he acted illegally that (8.1) has whatever degree of normative significance it does. If (8.1) is a very weighty reason, for example, this is at least partly because MacCannon has a very weighty reason to avoid suffering a legal penalty.

Nonetheless, it seems that MacCannon can ignore (8.3) without deliberating incorrectly. This is true because MacCannon can deliberate correctly without knowing (8.1)'s weight - because he can deliberate correctly without knowing that (8.3) determines (8.1)'s weight.

The third step of the argument is closely connected to the second. The third step is as follows: the fact or facts which determine a material reason's weight can be the facts which must obtain if the reason is to have normative significance at all.[55] MacCannon's predicament shows this, since (8.1) is of

normative significance only given the obtaining of (8.3), and it is (8.3) that determines (8.1)'s weight.

Let me summarise the argument so far. A reason's weight can be irrelevant. It can be irrelevant even if there are conflicting reasons, if there is decisive reason not to weigh these conflicting reasons. If a reason's weight is irrelevant, the facts which determine its weight are irrelevant, and the facts which are irrelevant might be those which must obtain if the reason is to be a reason at all.

Now for the final step in the argument. If the facts which must obtain for a reason to be a reason are irrelevant, the reason is strict rather than material. Suppose p is a reason. If p were a material reason, p might not be a reason at all if other facts did not obtain. However, this is just to say that, if p were a material reason, the obtaining of other facts would be relevant to whether p is a reason. Since a reason is either strict or material, it follows that, if the obtaining of other facts is irrelevant to whether p is a reason, p is a strict reason.

To clarify this last step in the argument, consider MacCannon's predicament. If (8.1) were a material reason for MacCannon not to evade liability, the obtaining of facts other than (8.1) would be relevant to determining whether MacCannon should evade liability if (8.1) obtains. For example, the obtaining of (8.3) would be relevant. However, as we have seen, the obtaining of other facts is *not* relevant. This is because, as we have also seen, MacCannon could deliberate correctly without considering facts other than (8.1). Since a reason is either strict or material, it follows - or so it seems - that (8.1) is actually a strict reason.

14. Deciding and acting

In section 13, I described Raz's argument for

[O] If q is a decisive reason not to weigh each and every reason not to ø, then, if q is a reason to ø, q is a strict reason to ø.

If this argument were sound, it would show that a formal study of legal reasons should attend to exclusionary reasons; it would show that, under certain special circumstances, an exclusionary legal reason has the important formal feature of being strict.

But is Raz's argument sound? Has Raz shown that, if q is a decisive reason not to weigh each and every reason against ø-ing, then, if q is a reason to ø, q is a strict reason?

The main difficulty with the argument is that it confounds what there is reason to do with what there is reason to do in deliberating about what to do. It is true that one can deliberate differently if there is decisive reason not to weigh one or more conflicting reasons. For example, it is true that one can deliberate correctly without considering what determines the weight of unexcluded reasons. However, nothing follows for what does or does not determine what one ought to do; it does not follow, for example, that something *does not* determine the weight of an unexcluded reason.

Raz is correct that whether or not a certain fact is relevant to one's deliberations - whether or not one could deliberate correctly without considering the fact - depends on whether or not there is decisive reason not to weigh conflicting reasons. However, he is incorrect that it follows that whether or not a certain fact is relevant to what to do depends on whether there is decisive reason not to weigh conflicting reasons.

To see this, think again of MacCannon's decision about whether to evade liability. The obtaining of (8.3) could be irrelevant to MacCannon's *deliberations about* whether he should evade liability even if it were not irrelevant to whether he should evade liability. It turns out that MacCannon could deliberate correctly without realising that (8.1) would not be a reason

against evading liability if (8.3) did not obtain. Nonetheless, it does not follow that (8.3) *is* irrelevant to whether MacCannon should evade liability: it does not follow that (8.1) would be a reason if (8.3) did not obtain.

It should be clear that I am re-emphasising a point first made in sections 3 and 4 above. The point is about the respect in which exclusionary reasons are second-order reasons. For Raz, an exclusionary reason 'always prevail[s]' over the reasons it is a reason not to weigh. At first blush, Raz's view seems entirely correct: if q is a reason to ø and also a decisive reason not to weigh each and every reason against ø-ing, it seems that q has a special priority over each and every reason not to ø. More precisely, however, all that is true is that q should have a certain priority in one's *deliberations about* whether or not to ø. Whether or not one should end up ø-ing *is* determined by the comparative weight of the conflicting first-order reasons. I have argued that this is the case even if one ought to decide whether or not to ø without considering all of the reasons that determine whether or not one ought to ø.

15. Following the law

To further bring out my argument, let us suppose that Raz's argument shows that what MacCannon overall ought to do is ignore

(8.3) MacCannon would suffer a legal penalty if he acted illegally.

Raz's argument only shows that MacCannon can ignore (8.3) in deciding what to do, but - for sake of argument - let us put this aside. Further, let us suppose that the argument shows that the only fact MacCannon should consider is

(8.1) MacCannon is legally proscribed to evade liability.

Actually, the argument only shows that MacCannon has decisive reason not to weigh reasons which conflict with (8.1). However, let us make the stronger supposition that the only fact MacCannon should consider is (8.1). In sum, then, let us assume that the argument shows that what MacCannon overall ought to do is to take (8.1) as a strict reason not to evade liability.

Even if we grant this assumption, we need not accept that Raz has shown that the fact that an action is legally required can be a strict reason to perform it. He would only have shown that there can be situations in which one has decisive reason to act *as if* the fact that an action is legally required is a strict reason.

It is important to see this distinction.[56] Consider the following passage from Raz. The passage states that we can come to understand how a rule is a reason by understanding what is true when a person follows a rule. This claim is related to the more general point - which Raz also accepts - that we can come to understand what it is for a fact to be a reason by understanding what it is to take it to be a reason.

> 'To explain what rules are one must do more than explain what it is to follow a rule. One must ... explain what it means for a ... [rule] to be valid [reason-giving]. But the analysis of following a rule provides the clue to the analysis of "a valid ... [rule]". For a ... [rule] is valid if, and only if, it ought to be followed'.[57]

It is true that, if the fact that a rule requires you to ø is a reason for you to ø, then you ought to follow it, holding all else equal. This is true, at least, if one follows a rule requiring ø-ing just in case ones ø-es. The difficulty is that it is uncertain that this is all Raz means by 'following a rule'. For he writes that a rule 'is valid [reason-giving] if, and only if, ... [those subject to it] are justified in guiding their behaviour by it'.[58] Plausibly, a person 'guides' his or her behaviour by a rule if he or she weighs the fact that the rule pertains. And it is plausible that a person

is 'justified' in weighing a fact if he or she has decisive reason to do so. Therefore, it is plausible to think that Raz is claiming the following:

> [P] the fact that a rule requires ø-ing is a reason to ø if there is decisive reason to weigh the fact that the rule requires ø-ing.[59]

Now, if [P] were true, we could see why Raz might think that, if MacCannon has decisive reason to take (8.1) as a strict reason not to evade liability, (8.1) *is* a strict reason. However, [P] is *not* true: it does not follow from (i) the fact that there is decisive reason to weight p as a strict reason that (ii) p *is* a strict reason. To weigh p in one's deliberations about whether or not one ought to perform an action is one action; to perform the action one is deliberating about is another. Whether p is a reason to perform one of the two actions is logically independent of whether it is a reason to perform the other.

16. Conclusion

Many jurists praise Hart for recognising that analytical jurisprudence should attend to reasons other than sanction reasons, that is, for recognising that it would be a mistake to relate the normativity of law 'to the existence of sanctions for non-compliance' (see section 1). Many go on to praise Raz for recognising that the difficulty with sanction reasons is that they are never exclusionary (see sections 1, 5, and 7).

Actually, sanction reasons *can* be exclusionary (see section 8). Moreover, it is uncertain why an analytical jurist must pay attention to exclusionary reasons in the first place (see sections 10-15). According to Shiner, 'it is a formal or conceptual point about laws that they are exclusionary reasons for action', and he believes '[i]t is an essential feature of legal norms ... that they

exclude reasons' (see section 1). However, the arguments that have been offered for this view are unconvincing. This has been my main claim. I have not attempted to show that a *general* theory of law can ignore the nature of exclusionary reasons. If a general theory of law should capture the attitudes of law-followers, then I accept that a general theory of law might need to account for how ordinary citizens and legal officials sometimes act on the basis of the belief that the law is exclusionary (see sections 5 and 6). For all that has been argued to date, however, nothing follows for an *analytical* theory of law; in particular, nothing follows for a study of the formal character of legal reasons.

[1] See: Shiner 1992a p. 97; Shiner 1992b pp. 18-19; and Shiner 1992b p. 6 ('It is an essential feature of legal norms ... that they exclude reasons').

[2] Shiner 1992a p. 92.

[3] Perry 1995 p. 112.

[4] Green 1983 p. 315.

[5] Shiner 1992a p. 47.

[6] At this point, I might disagree with Edmundson (see 1998 p. 66); Edmundson appears to think that, for Raz, an exclusionary reason is a reason to believe that there is reason to act (or to believe something about a reason to act).

[7] At places, Raz writes that an exclusionary reason is a reason not to 'act for' a reason (a reason not to 'comply' with a reason) (see Raz 1990 pp. 183-4; compare Green 1985 p. 330). But I shall take it that, for Raz, an exclusionary reason is a reason relating to an action in a deliberative process (I follow Schauer (1991 p. 89) in thinking that, for Raz, '[e]xclusionary reasons ... mandate for those who accept them that certain otherwise applicable reasons will be excluded from the decision-making process'). For clear evidence of this second interpretation of the claim, see, for example, Raz 1980 p. 229 (Raz says the law claims to supply exclusionary reasons because '[i]t holds ... the duty to be the only legitimate reason determining the decision').

[8] Raz 1990 p. 185.

[9] Raz 1990 p. 189. Compare Green 1985 p. 330.

[10] See Raz 1990 p. 35.

[11] Raz 1990 p. 40. Compare Scanlon 1998 pp. 50-3.

[12] Green 1985 p. 330 (compare Shiner 1992a p. 47).

[13] Scanlon 1998 p. 51.

[14] Scanlon 1998 p. 52. It is not entirely impossible that Scanlon is not thinking of exclusionary reasons at all. For example, it is possible that Scanlon is thinking of what many moral philosophers have called 'silencing conditions' (for discussion of the related idea of 'cancelling conditions', see Raz 1990 pp. 27-8).

[15] In some passages, it appears that this is exactly the point Raz wants to make. I accept that the point is valid one: I accept that there can be situations in which deliberation should not involve the weighing of all conflicting considerations. My objection is only to the suggestion - a suggestion which one can easily read Raz as making - that first-order and second-order reasons directly conflict.

[16] McClennan and Shapiro 1998 p. 365. McClennan and Shapiro mention Moore 1989 and Schauer 1991 to support their case.

[17] Postema 1986 p. 186. Compare Schauer 1994 pp. 498-9.

[18] Shiner 1992b p. 3. Shiner contrasts Austin with Hart. He says Hart is correct to realise that 'law cannot be understood without attention being paid to the point of view' of those who take the law to supply 'genuine ... non-coercive' reasons for action (1992a pp. 43-4). According to Shiner, Hart's error is to hold that the reasons must be taken to be 'simple, first-order reasons' (reasons 'to be weighed in the balance'), rather than exclusionary reasons (1992b p. 3-6). Notice that Hart took up the notion of exclusionary reasons as early as 1982 (see 1982 ch. 10).

[19] See, for example: Green 1985 pp. 342-3; Green p. 118; Raz 1980 p. 229; Raz 1979 pp. 28-33; Shiner 1992a pp. 46, 51.

[20] See, for example: Perry 1987 pp. 235, 240-1; Postema 1987.

[21] For discussion of some of these conditions, see: Raz 1990 p. 149-62; Raz 1980.

[22] Raz 1990 p. 161.

[23] 1990 pp. 154-5.

[24] 1990a p. 118.

25 Green 1990 p. 120, emphasis added.

26 1954 p. 16.

27 I shall leave aside the question of whether Shiner correctly interprets Hart

28 Shiner 1990 p. 84, emphasis added.

29 Shiner 1992a pp. 45-54

30 At places, Shiner expresses the stronger claim that the law supplies exclusionary reasons if it is normative at all ('the law is a system of exclusionary reasons; it is not simply a reason of a good first order sort' (1992a p. 97); 'it is a formal or conceptual point about laws that they are exclusionary reasons for action' (1992b pp. 18-9); 'It is an essential feature of legal norms ... that they exclude reasons' (1992b p. 6)). However, since he offers no argument for this view, I shall ignore it here.

31 Shiner 1992a p. 22.

32 See, for example: Green 1998 p. 118, 1985 pp. 337, 343; Shiner 1992b p. 7.

33 Of course, you might have reasons *to* deliberate as well.

34 See: Raz 1977; Raz 1986 chs. 2-3.

35 Postema 1982 p. 165.

36 Schauer (1994 pp. 503-9) makes a similar point against Shiner. Schauer argued that an analytical jurist such as Austin cannot be criticised for failing to show that there is an obligation to obey the law. In support of his case, Schauer mentions that it is controversial that there is such an obligation. However, mentioning this seems beside the point: Austin could not be criticised even if this were not controversial.

37 Perry 1998 p. 455.

38 Perry 1995 p. 105. Compare Postema 1982 p. 165 ('Law is a form of practical reasoning; like morality ... it defines a general framework for practical reasoning').

39 Raz 1990 p. 155.

40 1990 p. 155.

41 Shiner 1992a p. 23.

42 Shiner 1992a p. 47.

43 See Raz 1990 pp. 40, 35

44 Raz 1990 p. 40. Compare Scanlon 1998 pp. 50-3.

45 Raz 1990 p. 161. Here I ignore several complications. For instance, I ignore how Raz is careful to observe that it is the fact that a legal rule exists, rather than the legal rule itself, which is the reason.

46 Here I assume that Raz's remark that 'the fact stated by any set of premises which *entail* that there is a reason to perform a certain action is a complete reason for performing it ' (Raz 1990 p. 24) can be interpreted as referring to a relation of strict implication (see chapter 3 above).

47 At places, Raz appears to want to explain why agents *believe* that certain facts are strict reasons rather than why they actually are. For example, he says (1990 p. 79) that he wants to determine whether the fact that we take certain facts as complete reasons '[m]ust ... be accepted as a brute fact about our use of language or does it reflect an aspect of [our] practical reasoning?', and '[p]ractical reasoning' might refer to how agents happen to reason about action rather than how they should. Compare 1990 p. 78: 'we do in common discourse use "norm", "rule" ... as components of singular expressions referring to objects'.

48 Notice, for example, that he writes (1990 p. 73; compare 1990 p. 77) that not all mandatory norms are reasons. But contrast: 1990 pp. 51, 53 56, 58.

49 1998 p. 12.

50 At one point (1992b p. 6), Shiner appears to ignore this.

51 1990 p. 77.

52 1990 p. 191.

53 Raz 1990 p. 79.

54 1990 p. 80.

55 Raz (1990 p. 79) writes: 'norms have a relative independence from the reasons which justify them. In order to know that the norm is valid [reason-giving] we must know that there are reasons which justify it. But we need not know what these reasons are .... The reasons for the norm determine its weight ... as a first-order reason. But ... its weight is not in question. It prevails in virtue of being an exclusionary reason'. This is a very difficult passage to interpret, since it is unclear what 'reasons which justify norms' or 'reasons for the norm' are. My assumption is that they are the facts in virtue of which the fact that an action has a certain legal status is a material reason (as we saw in chapter 4, it is true in general that, if p is a material reason to ø, 'p' implies 'there is reason to ø', but only given the obtaining of certain other facts). I make this assumption because I see no other way of making Raz's claim (the claim that, if q is a decisive reason to exclude each and every reason not to ø, then, if q is a reason to ø, q is a strict reason) plausible.

56 It is unclear whether Cullity (see 1997 p. 105-6, 115, 132), in arguing for particularism, recognises this point.

57 Raz 1990 p. 73. Elsewhere (1990 p. 51), Raz acknowledges that it is the fact that a law requiring an action exists (the fact that an action is legally required) which could be a reason rather than the rule itself.

58 Raz 1990 p. 80.

59 I shall ignore the claim about the necessary condition.

Conclusion

1. Summary

I shall conclude by reviewing the main conclusions for which I have argued, and by indicating some of the respects in which my study of the nature of the normativity of law has been less than complete.

Plausibly, the fact that assault causes unnecessary suffering is a reason not to assault. Since assault is illegal, it is a reason to act as the law requires. For many jurists, however, the reason is not one which could be said to derive from the interposition of law. Following Raz, many jurists would argue that the reason is not a reason 'to do that which the law requires because it requires it'; for example, they would argue that it is unlike a reason to avoid a legal sanction (see chapters 1 and 4). In the preceding chapters, I have taken some preliminary steps towards saying what would have to be true if this view were correct. In other words, I have begun to explain the difference between reasons in general and legal reasons in particular.

The basic thought has been that a reason to perform a particular act is legal only if the reason-giving fact is the fact that this act has a certain legal status (chapter 1). If this thought is correct, a reason not to assault is not a legal reason when the fact which is the reason is the fact that assault causes suffering; in this case, the reason-giving fact would have to be the fact that assault has a certain legal status.

A widely-accepted claim is that legal reasons can be distinguished from reasons in general by the fact that they have the formal property of being

content-independent. Under several different interpretations, however, this claim is false. This is what I argued in chapters 5 and 6. If the claim were false, we could not say that a difference between the two reasons mentioned in the paragraph before last is that one is content-independent and the other is not.

The concern has been not only been to discriminate between reasons in general and legal reasons in particular. It has also been to consider the nature of different types of legal reason. In chapter 8, for example, I argued that there are respects in which the nature of *exclusionary* legal reasons has been misunderstood. One of these respects relates to the commonplace that 'the fact that a law is backed by a sanction is never an exclusionary reason'.[1] I argued that this view is mistaken. Another respect relates to whether a legal reason has an important formal feature when it is an exclusionary reason. I argued that arguments which have been offered to support this view - arguments frequently directed against Austin - are unconvincing.

For many jurists, a legal reason to ø can be a complete reason to ø or a part of a complete reason to ø. Consider for example, a reason to avoid suffering a legal sanction. Many jurists would say that, if this reason were a legal reason at all, it would be constituted only partly by the fact that an action has a certain legal status. According to Raz,

> 'A fact is a reason only if it belongs to a complex fact which is a complete reason, and yet not only the complete reason but its constituents as well are reasons',

and it is widely held that there are many situations in which a legal reason - a reason given by the fact that an action has a certain legal status - is only a constituent of a complete reason.[2] In chapters 2-4, I argued that the distinction between complete reasons and parts of complete reasons is problematic in several respects. My main argument was that the contrast at issue is better understood in terms of a distinction between strict and material reasons. This is

a distinction I introduced in chapter 4. When p is a strict reason to ø, there is reason to ø in every possible state of affairs in which p obtains. When p is a material reason to ø, however, the proposition that p obtains only materially implies the proposition that there is reason to ø.

In chapters 5, 6 and 8, I illustrated the importance of the distinction between strict and material reasons. In chapters 5 and 6, for example, I showed that the plausibility of the claim that legal reasons are content-independent turns on whether the claim concerns strict rather than material legal reasons.

2. Incompleteness

The formal character of legal reasons is a broad subject, and it has received a great deal of careful treatment. The chapters of this thesis focus on only a few main topics within this subject. The result is a very incomplete account of the nature of the normativity of law.

There are at least two topics to which a more complete account would attend. I describe these in (i) and (ii) below.

(i) The first topic has been called 'systematic validity'. According to a standard definition, a legal norm - a legal requirement not to assault, for instance - is systematically valid just in case it is reason-giving 'on grounds which depend on its belonging to a certain ... [legal] system'.[3] Part of the idea is that a legal requirement can derive its normative force from its relation to a legal system's core norms. According to one view, for instance, the reason-giving force of legal 'norms in ... [a legal] system is transmitted from top to bottom, from more general to particular norms', that is, from norms which determine the legal validity of others to those that do not.[4]

Several questions present themselves. What is it for normativity to be 'transmitted'? One might wish to say that any particular legal requirement -

normative or otherwise - is necessarily related to more general ('top', higher) norms in a legal system. Following Hart, for example, one might wish to say that a requirement is a legal requirement only if it is appropriately related to a legal system's 'rule of recognition'.[5] But what would be the case when a legal requirement is normative in virtue of its relation to the norms which determine its legal validity? In addition, there are questions about the relationship between systematic validity and the reasons I have termed 'legal reasons'. Is a legal reason nothing more than a reason supplied by a systematically valid legal requirement?

(ii) A more complete account of the normativity of law would also attend to the normativity of legal *rules*. The law is rule-like, and much jurisprudential effort has been devoted to explaining the consequences of this fact. In this thesis, however, I have all but ignored it. Consider the general claim about legal reasons outlined in chapter 1:

> [B] If p is a reason for x to ø, p is a legal reason for x to ø if and only if p is the fact that ø-ing has a certain legal status with respect to x.

Many jurists would wish to observe that I have ignored the difference between (a) 'the fact that there is a legal requirement or proscription or permission to ø' (the fact that a legal rule exists) and (b) 'the fact that ø-ing is legally required or proscribed or permitted' (a fact about the application of a legal rule).[6] For example, many jurists would wish to observe that [B] fails to respect the difference between

> (c) there is a law that Sutpen should not to handle stolen goods

and

> (d) Sutpen is legally required not to handle stolen goods.

According to some jurists, the difference between (a) and (b) is crucial to understanding the normativity of law.[7] It would be too strong to say that I have failed to acknowledge the existence of this view. This is because chapter 8 is directed to the nature of exclusionary reasons, and this view claims that one understands the normativity of legal rules only if one understands how they supply exclusionary reasons to act. Even so, it would be correct to say that I have paid insufficient attention to this view.

3. Implications

Although I have offered an incomplete account of the nature of the normativity of law, I have indicated some important areas for future research. For example, consider chapter 7's argument that Duff has failed to establish that a seriously immoral legal requirement is formally defective (that is, 'defective qua law', 'not law in its fullest sense'). Duff relies on thinking that he *has* established this when accounting for 'the meaning and purpose of a criminal trial' in his important book *Trials and Punishments*.[8] He relies on it, for example, while arguing that a criminal trial and its verdict should be seen as a formal analogue of a process of moral criticism and blame.[9] An important area for future research will be to determine whether it is correct to see a criminal trial and its verdict in this way, if a legal requirement can be seriously immoral without being formally defective.

Or consider my argument in chapters 5 and 6 that we have grounds to doubt whether legal reasons are (distinctively) content-independent. The claim that legal reasons have this formal property is not only widely accepted; its truth is also taken to have a number of significant implications. With respect to analytical jurisprudence, the implications are said to concern (i) the theory of statutory interpretation, (ii) a legal system's identity-conditions and (iii) the

formal character of legal authority.[10] For normative jurisprudence, the implications are said to concern (iv) whether laws are obligating and (v) whether laws contribute to solving co-ordination problems.[11] An important area for future research concerns what would follow if these implications could not be drawn. For example, if legal reasons are *not* (distinctively) content-independent, what follows for the theory of statutory interpretation?

As we saw in chapter 5, some jurists argue that one can show that the law is obligating only if one can show that it supplies a content-independent reason to conform to it. I mentioned that some follow Green in thinking that 'the idea of content-independent force is ... necessary ... in any argument purporting to establish the existence of' an obligation to obey the law.[12] But what follows if some reasons are not content-independent (or if legal reasons are not distinctively content-independent)?

The most obvious area for future research concerns whether the law *is* normative. Previous work on this topic has proceeded on assumptions which include the following: (i) the normativity of the law can be 'indirect', to use Postema's term, since the law can supply reasons to believe that there are reasons to conform to it (see chapter 2); (ii) the normativity of law cannot be related to the existence of sanctions for noncompliance (see chapter 8); (iii) the law supplies a complete reason to ø if the proposition that ø-ing is legally required is strictly implied by the proposition that there is reason to ø (see chapter 3); (iv) a reason supplied by the law is content-independent rather than content-dependent (see chapters 5 and 6); (v) it is, as Shiner has claimed, 'a formal or conceptual point about laws that they are exclusionary reasons for action' (see chapter 8).[13] If I have been correct to argue that each of these assumptions needs re-assessment, then it is doubtful that we should trust existing work on whether the law is normative. New work needs to be done on the basis of more plausible assumptions.

Take Raz's claim that '[i]t is easy to find many examples where the fact that the law requires an act is a reason to perform it'.[14] This claim would be plausible if we could follow Raz in thinking that

> 'the fact stated by any set of premises which entail that there is a reason to perform an action is a complete reason for performing it'.[15]

However, as we saw in chapters 2-4, it is very uncertain that we *should* follow Raz in thinking this. An important question for future research concerns whether a more adequate account of 'complete' reasons - for example, an account drawing on the contrast between strict and material reasons (see chapter 4) - will allow us to draw the conclusion that there are many situations in which the fact that ø-ing is legally required is a complete reason to ø.

My own view is that a more adequate account will *not* allow this. In fact, I suspect that the law does not even supply *material* reasons to act. Perry expresses a common view when he says

> 'It is plausible ... that the provision of an account of the normativity of law is a central task of jurisprudence, if not the central task'.[16]

However, I suspect that the law is not normative at all. Of course, the obtaining of a legal fact might be a cause of a fact which is a reason to conform to the law. Therefore, there is an obvious sense in which the law might make 'a practical difference' (see chapter 3). However, it is another question whether the legal status of ø-ing is ever a reason to ø.

In this thesis, I have not addressed this question. My aim has been only to clarify what this question asks. I have offered a series of arguments against a small number of specific claims about the nature of the normativity of law. We now need to see how these arguments connect with substantive debates about the relationship between normativity and law.

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[1] Raz 1990 p. 161.

[2] See Raz 1990 p. 25 and 1979 pp. 233-49.

[3] Raz 1990 p. 127. Compare: Coleman 1998 p. 402; Green 1988 p. 43; Hart p. 206; Schauer 1994 p. 499; Shiner 1992 p. 133.

[4] Green 1988 p. 43. Compare See Coleman and Leiter 1996 p. 247.

[5] See Hart 1994 ch. 6.

[6] For discussion of this difference, see Raz 1970 ch. 4.

[7] See, for example: Raz 1970 pp. 209-38; Raz 1990 chs. 2 and 5.

[8] 1986 p. 75. Compare 1986 p. 98.

[9] 1986 p. 75.

[10] See, for example: Duff 1998 pp. 245-9; Green 1988 pp. 41-5; Hart 1982 pp. 255-6; Marmor 1995 pp. 345-6; May 1997 pp. 19, 21, 25; Shapiro 1998 pp. 492-3.

[11] See, for example: Edmundson 1998 pp. 12-3, 50, 52-3; Green 1988 pp. 112-4, 225-6.

[12] Green 1988 p. 226. Edmundson (1998 p. 50) believes that the fact that there appears to be a content-independent reason to conform to the law's administrative prerogatives is an example of 'doubts about the existence of a general duty to obey the law fail[ing] to carry over when the subject is the duty to comply with administrative prerogatives'.

[13] See: Shiner 1992a p. 97; Shiner 1992b pp. 18-9; and Shiner 1992b p. 6 ('It is an essential feature of legal norms ... that they exclude reasons').

[14] 1979 p. 234.

[15] 1990 p. 24.

[16] Perry 1998 p. 445. Compare Postema 1998 p. 330.

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