1

Reason-Giving and the Law

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1. INTRODUCTION

A spectre is haunting legal positivists – and perhaps legal philosophers more generally – the spectre of the normativity of law. Whatever else law is, it is sometimes said, it is normative, and so whatever else a philosophical account of law accounts for, it should account for the normativity of law.[1] But law is at least partially a social matter, its content at least partially determined by social practices. And how can something social and descriptive in this down-to-earth kind of way be normative?[2] This is presumably a problem for any theory of law, but it is especially acute for legal positivism, according to which (roughly speaking) all there is to facts about legality are such descriptive social facts. If this is so, the thought goes, the task of accommodating the law's normativity immediately becomes both more daunting, and more urgent.[3]

For helpful discussions and comments on earlier versions, I am grateful to Mitch Berman, John Gardner, Les Green, Alon Harel, Matt Kramer, Dimitrios Kyritsis, George Letsas, Ofer Malcai, Andrei Marmor, Barak Medina, Serena Olsaretti, Ram Rivlin, Larry Sager, Michael Sevel, Andrew Simester, David Sosa, Kevin Toh, Rivka Weill, Ruth Zafran, Eyal Zamir, two anonymous referees, and audiences at The Hebrew University, The IDC Herzlyia, The University of Texas, and the UK Analytic Legal Philosophy Conference.

[1] e.g.: "An attempt to explain this normative, reason-giving aspect of law is one of the main challenges of general jurisprudence" (Marmor 2008); "The Normativity Thesis: . . . We understand law only if we understand how it is that laws give members of a community, officials and law-subjects alike, reasons for acting" (Postema 1982: 165) And Coleman's (2001) title for the relevant part of his book is "The Possibility of the Normativity of Law". In one place Hart (1982: 262) writes about the need to explain "the 'normativity' of law", scare-quoting the word "normativity". Could it be that he too thought it was a spectre?

[2] For the suspicion that this is a form of alchemy, see Hart (1958: 86) and the reference there.

[3] e.g.: "another important question arises here: how can a conventional practice give rise to reasons for action and, in particular, to obligations?" (Marmor 2008); "How could the sheer

Unfortunately, though, it is entirely unclear what the problem of the normativity of law is supposed to be. Indeed, I suspect that there is no *one* problem here, as different people seem to have in mind different problems when they use this unhelpful phrase.[4] At least one family of issues people seem to have in mind when they talk about the normativity of law is a host of issues pertaining to the reason-giving force of the law. The law, it is sometimes said, gives reasons for action, and a theory of law should accommodate this obvious fact.

But even when we focus just on questions regarding the reason-giving force of the law (and from now on I will restrict myself to just those, leaving other things people may have in mind when they talk about the normativity of law for another occasion), it is still not clear what the problem is. Indeed, my main purpose in this paper is to make some progress in understanding the relevant question here. And my conclusion is going to be somewhat skeptical: Once we are clear on what reason-giving in general consists in, and on what reason-giving powers the law actually has, there is not much by way of a problem here that needs to be solved, not a deep and interesting phenomenon here that theories of law need to accommodate, and that therefore places adequacy constraints on plausible theories of the nature of law. Furthermore, whatever problem does remain in the vicinity here, legal positivism, far from being refuted by it, is actually at a better position than alternative views to solve. Or so, at least, I shall argue.

I feel obliged to warn you, then: This is going to be one of those somewhat tedious papers, where most of the time is spent on understanding and disambiguating a question rather than on offering a novel and insightful answer to it (to what?). But as is often the case, such tedious work will not go unrewarded, because – if successful – it will serve to set aside what many seem to think of as a central problem in general jurisprudence, and one generating important adequacy constraints for philosophical theories of law. If my tedious work succeeds, then, we can stop worrying about the reason-giving power of the law

fact that someone said that *p* or ordered that *p* ever validate a norm?" (Green 1999: 35). And I think something like this problem is the central problem Coleman attempts to solve in his (2001: Lecture 7).

[4] Marmor (2001: 25) expresses a similar suspicion.

(and perhaps also about the normativity of law), and proceed to work on more serious philosophical problems.

My discussion will proceed as follows. In the next section, I discuss reason-giving more generally. In particular, I talk about the different ways in which someone can give another a reason for action. I distinguish between what I call purely epistemic reason-giving, reason-giving in the triggering sense, and robust reason-giving, my main example of which is that of requests. I then proceed to offer a tentative account of how robust reason-giving is possible. This section, then, has nothing essential to do with the law. Indeed, it is a part of my point in this paper that questions about the reason-giving power of the law should be understood in the context of a more general theory of reason-giving. In Section 3 I return to the law. Here I disambiguate several possible meanings of the challenge of accounting for the reason-giving force of the law, and I show how none of them – except the last one in subsection 3.3 – poses an interesting challenge for any remotely plausible theory of law. This exceptional reading of the problem is the one that – so I argue – positivists are in an especially comfortable position to solve.

2. REASON-GIVING[5]

We give each other practical reasons – reasons to act in certain ways – all the time. We draw each other's attention to the normatively significant features of the circumstances, we manipulate these features (sometimes, in order to give each other reasons), and we engage in practices that are even more explicitly about giving each other reasons, like those of requests, commands, perhaps making decisions and promises (thereby presumably giving ourselves reasons for action), and so on. For my purposes here, though, it will be important to distinguish different ways in which we can give each other (normative[6]) reasons.

[5] This section draws heavily on my "Giving Practical Reasons" (2011), where more details on the issues discussed here can be found.

[6] The discussion in this section will be restricted to just normative, or justifying, reasons. I will return to the distinction between normative and motivating reasons in the next section.

2.1. *Three kinds of reason-giving*

I have tentatively decided to tell a colleague exactly what I think of him, and it won't make for a charming scene. You urge me not to. I can then say something like "Give me one reason not to do it!" Suppose you reply by noting the bad effects such a scene will have on the intellectual atmosphere in our department. It seems like you succeeded in giving me a reason not to proceed with my ill-advised plan. What you've done – the thing naturally described in terms of giving me a reason to shut up – is to *indicate* to me, or *show* me, a reason that was there all along, independently of your giving it to me. The giving here is entirely epistemic. Perhaps, in my fury, I hadn't paid attention to the relevant reason, and so your intervention can make a difference. But it didn't make a difference by way of creating a new reason. We can call such reason-giving *purely epistemic*, for the role of the giving here has nothing to do with the reason's existence, and everything to do with my knowing that it is there, appreciating it, and acting in accordance with it.

Now suppose your neighborhood grocer raised the price of milk. It is natural to say that she has thereby given you a reason to reduce your milk consumption. It is, after all, true that you didn't have this reason before her relevant action, that you do after it, and furthermore that you have this reason *because* of her raising the price. In a perfectly ordinary sense, then, she has created this reason, she has given you a reason to buy less milk. But what the grocer did, it seems natural to say, is merely to manipulate the non-normative circumstances in such a way as to trigger a dormant reason that was there all along, independently of the grocer's actions. Arguably, you have a general reason (roughly) to save money. This reason doesn't depend on the grocer's raising of the price of milk. By raising the price of milk, the grocer triggered this general reason, thereby making it the case that you have a reason to reduce your milk consumption. Indeed, perhaps you even had all along the conditional reason to-buy-less-milk-if-the-price-goes-up. Again, this conditional reason doesn't depend for its existence on the grocer's actions. But the grocer can make the conditional reason into an unconditional one, simply by manipulating the relevant non-normative circumstances. And this is what she did by raising the price of milk.

Examples of this triggering case are all around us. By placing his foot on the road, a pedestrian can give a driver a reason to stop,[7] but only because the driver had all along, and independently of the pedestrian's actions, the conditional reason to-stop-should-a-pedestrian-start-crossing. By placing his foot on the road, the pedestrian thus triggers this pre-existing reason, thereby giving the driver a reason to stop. In such central cases of triggering reason-giving, the triggered reason is a conditional reason. And there may be other ways in which manipulating the non-normative circumstances could make it the case that a pre-existing reason applies, ways that need not involve the satisfaction of the condition a conditional reason is conditioned on, like perhaps making an enabling condition of a reason hold, or perhaps by defeating the reason's defeater. I am going to call all of these cases cases of reason-giving *in the triggering sense*, and I will use the triggering of conditional reasons as the paradigm of this more general phenomenon.

But now consider what is arguably a more interesting way in which we can give each other reasons: Suppose, then, that I am writing a mediocre paper on a topic you are not particularly interested in. You don't have, it seems safe to assume, a (normative) reason to read my draft. I then ask whether you would be willing to have a look and tell me what you think. Suddenly you do have a (normative) reason to read my draft. Here, merely by requesting, I manage to give you a reason to read my draft, but my reason-giving seems to be importantly different from the merely triggering reason-giving described above. True, I do here manipulate the non-normative circumstances, but it doesn't seem that I *merely* do that. Rather, I seem to be giving you a reason in some more robust, yet-to-be-specified sense.[8] Requesting that you read my paper seems importantly different from, say, informing you that your reading my paper will cause me pleasure (a case of reason-giving in the purely epistemic sense) or from making non-collegiality a ground for denying tenure (a case of reason-giving in the triggering sense). The kind of reason-giving exemplified in the request example, then, is not *merely* one in which a reason is given in the purely epistemic or in the triggering

[7] See Estlund (2008: 143) for this example.

[8] For a similar distinction in the context of commands, see Estlund (2008: 143). Estlund does not develop an account of the difference between (what I call) triggering and robust reason-giving.

sense. It is, rather, a distinct phenomenon, or – if it is a particular instance of one of those – it is an especially interesting particular instance, one with special features that make it worth a separate discussion. Without begging any questions, then, let us call this kind of reason-giving – the one presumably present in cases of request – *robust reason-giving*.

2.2. *Is robust reason-giving possible?*

Initially, then, robust reason-giving – exemplified in requests, and perhaps also commands[9] – seems importantly different from purely epistemic or merely triggering reason-giving.[10] But there is reason for concern that such robust reason-giving is impossible. In this subsection I want to explain this suspicion, and then (in the next subsection) offer an account of robust reason-giving that avoids it. This discussion will take me away from my immediate concerns in this paper, but this detour will be rewarded in Section 3.

Think about my request that you read my draft. We are assuming that before the request you had no reason to read the draft, and after it you do. But this means that the conditional "If I ask you to read the draft, you will have a reason to read it" was true all along, or anyway shortly before – and independently of – my actually making its antecedent true (by requesting that you read the draft). But then it is very tempting to think of this case as yet another triggering case of reason-giving: For all I did here is to manipulate the non-normative circumstances so as to trigger your conditional reason to-read-the-draft-if-I-ask-you-to. Are all cases of robust reason-giving, then, cases of triggering reason-giving – perhaps appearances notwithstanding?

This conclusion would be too quick. As it stands, the argument in the previous paragraph moves too quickly from the truth of the conditional ("If I ask you to read the draft, you will have a reason to read it.") and its independence of my request, to the existence of a conditional reason that's independent of my request. But such conditionals can be read in more than one way, and not all readings license such an inference.

[9] I will say nothing of commands and authority in this section. I briefly return to authority in the next section.

[10] For more support for this claim, see my "Giving Practical Reasons"(2011).

The conditional can be read in at least the following two ways: The normative operator ("you have a reason to") can be understood as having wide scope, ranging over the entire conditional, resulting in, roughly:

Wide Scope: You have a reason to (read the draft if I ask you to read it).

Or it can be read as having a narrow scope, ranging over only the consequent, with the antecedent remaining entirely non-normative, outside the scope of any relevant normative operator:

Narrow Scope: If I ask you to read the draft, you have a reason to read it.

We do not have to engage here with the recent literature on wide-scopism and narrow-scopism.[11] For our purposes here it is sufficient that the narrow-scope is *one* possible reading of the conditional, and indeed one that is perhaps closer than the alternative to its natural-language formulation. Furthermore, the intuitive line of thought presented above – namely, that because you didn't have a reason before I asked you to read my paper, and do afterwards, this shows that the conditional is true – does not support the wide-scope conditional over the narrow-scope one. The availability of this narrow-scope reading of the conditional shows that the truth of the conditional need not entail the existence of the conditional reason. The truth of the conditional itself, then, does not establish the claim that robust reason-giving can only be an instance of triggering reason-giving.

Nevertheless, a worry remains.[12] For it is a natural thought that while the narrow-scope reading does not entail the wide-scope reading, still the only plausible *explanation* of the former is in terms of the latter. After all, requests are special in some normatively relevant way. Had I uttered very different words, had I committed some very different speech act (or had I refrained from committing any relevant speech act at all), I would not have given you a reason to read my paper. Furthermore, our personal relationship is relevant here. Perhaps, for instance, had a complete stranger asked you to read her draft she would not succeed in thereby giving you a reason so to do. My request is

[11] See e.g. Schroeder (2004), and the references there.

[12] The discussion in the rest of the subsection relies heavily on Mark Schroeder's "Cudworth and Normative Explanations" (2005), for which I am much indebted.

special, then, not just compared to other things I could have done (or failed to do) but also compared to (some) others' requests. What is it, then, that explains why my request that you read my draft succeeded in giving you a reason, but all these other possible things would not so succeed? The natural reply seems to be in terms of something like the wide-scope conditional: The normatively relevant uniqueness of requests, and indeed of my request, is precisely due to the truth of something like the wide-scope conditional. The only thing that can explain why my request created reasons here whereas my exclamation "The draft I am working on is really cool!" does not is precisely that you have a prior conditional reason to-read-my-draft-if-I-ask-you, but you don't have a prior conditional reason to-read-my-draft-if-I-say-it's-really-cool. The worry, then, is that the only way the narrow-scope conditional can be *non-mysteriously* true is if the wide-scope conditional explains its truth. And we know that whenever a reason can be robustly given, at the very least something like the narrow-scope conditional must be true. So – in order to avoid the mysteriousness of a brute narrow-scope conditional of this kind – we must conclude that whenever a reason can be robustly given, the wide-scope conditional is true independently of the act of reason-giving (say, the making of the request). And if so, we must conclude that any case of robust reason-giving is really a case of the triggering of a conditional reason.

Schroeder argues – quite convincingly, I think – that the explanatory model underlying this little argument – the one he calls "The Standard Model", according to which the truth of any narrow-scope normative conditional is explained by the truth of some categorical normative statement (for instance, the wide-scope one from the previous section) is *but one* explanatory model, and that there is at least one alternative, the one he calls "The Constitutive Model".

If you are a divine command theorist, for instance, you believe that for any Φ, if god commanded that you Φ, then you are under an obligation to Φ. But this does not mean that you are committed to the claim that there is another, more general obligation, one that does not depend on god's commands, namely the general obligation to do as god commands, or the conditional obligation to-Φ-if-god-commands-that-you-Φ, or any such thing. True, you still owe us an account of how it is that when god commands that you Φ you are suddenly under an obligation to Φ, but when I command (or "command") that you Φ you

often aren't. But the way to explain this is to point to the fact that obligations are (perhaps partly) *constituted* by god's commands (but not, alas, by mine), that being commanded by god to Φ is (perhaps somewhat roughly) *just what it is* to be under an obligation. The same goes, argues Schroeder, for any other perfectly general theory of moral obligation: The conditional capturing any such theory's heart – whenever god commands that you Φ, you are under an obligation to Φ; whenever Φ-ing will maximize utility, you are under an obligation to Φ; whenever parties in some privileged choice-situation require that you Φ, you are under an obligation to Φ; etc. – should be explained according to the constitutive rather than the standard model (on pain of falling victim to Schroeder's "Cudworthy Argument", an instance of which concluded the paragraph before last).

Getting back, then, to reason-giving: The argument attempting to show that any robust reason-giving is really merely the triggering of a pre-existing conditional reason can be resisted if we can offer an explanation of the truths of the relevant conditionals (like "If I request that you read my draft, you will have a reason to do so") along the lines of the Constitutive Model. Can this be done?

Well, in order to do so, one would have to argue that having a reason to read my draft *consists in* my having asked you to read it, that the request *constitutes* the having of the reason, that having been requested to read the draft is (perhaps partly) *simply what it is* to have a reason to read it. But this just seems utterly implausible. Whatever the problems of divine command theory, at least god's unique place in the universe (and in the theory) gives some plausibility to the claim that being under an obligation *just is* being commanded by god. No such plausibility carries over to the case at hand. The suggestion that the relation between requests – worse still, *my* requests – and your having reasons is a constitutive one seems just too much to believe. And it seems even harder to believe that anything like this is going on when we remember that requests give reasons only sometimes, depending on many contextual factors.

Let's recap. The concern was that given the truth of the relevant conditionals ("If I ask you to read the draft, you will have a reason to read it"), and the need to explain them, we would be forced to acknowledge something like a conditional reason (to read-if-I-ask-you-to), and then no distinctive place will be left for robust (rather than triggering)

reason-giving. Following Schroeder, I pointed out that there may be other ways of explaining the relevant conditionals, for instance according to the Constitutive Model. But now I've claimed that for the Constitutive Model to apply to the case at hand some highly implausible propositions would have to be true. So the Constitutive Model – whatever its merits in general – cannot help us here.

Are there, then, any other types of explanations of conditionals of the relevant kind? Schroeder introduces (12) "The Standard-Constitutive Conjecture", according to which the *only* explanations of such conditionals are either in line with the Standard Model, or in line with the Constitutive Model. He introduces it as a conjecture, offering no argument for the claim that it is in fact true. I don't have such an argument to offer either. But I can't think of another possible explanatory model here,[13] and so I am going to proceed on the assumption that none is to be found.[14]

2.3. An account of robust reason-giving

How are we, then – if at all – to make sense of robust reason-giving? My suggestion is fairly simple. Perhaps robust reason-giving *is* after all a particular instance of triggering reason-giving, but perhaps it is a very special particular instance,[15] special enough to fit the intuitive data about the special features of robust reason-giving.

A promising start is to think about the characteristic intentions of the reason-giver (and perhaps also the reason-receiver) in cases of robust reason-giving, compared to cases of purely epistemic and merely triggering reason-giving. Indeed, it does seem like a necessary condition for

[13] In conversation, Mark Schroeder made it clear that neither can he.

[14] John Gardner suggested to me the following helpful way of putting my point here. If we think of reasons with a classical practical syllogism in mind, then epistemic reason-giving amounts to pointing out a full practical syllogism that was available to the addressee all along; triggering reason-giving amounts to bringing about a change in a minor premise; instances of the Constitutive Model are ones where a new major premise is brought about; and the claim that the Constitutive Model does not apply to requests (or indeed to the law) amounts to the claim that requests (and the law) can only bring about changes in minor premises, though in syllogisms with interestingly unique major premises.

[15] In the context of a discussion of authority – plausibly a particular instance of robust reason-giving – Raz (2005–6: 1012–13, 1020) clearly thinks that the reason-giving involved is an instance of (what I call) triggering reason-giving. It is not clear to me whether he thinks this is *merely* such a particular instance, or one that can be special in roughly the way I proceed to suggest.

something to qualify as a request that the person making the request intends to thereby give a reason to the addressee (something like this necessary condition also seems to hold for the case of commands). And notice that this condition is *not* necessary for many cases of purely epistemic and merely triggering reason-giving. One can, for instance, indicate that there is a reason inadvertently, or anyway without intending so to do. And one can certainly trigger a conditional reason without intending to do so, as the grocer example clearly shows. So insisting on this intention does seem like a step in the right direction.

But this intention is not a sufficient condition for robust reason-giving, because there are cases where this intention is present but the relevant reason-giving is not robust. Consider an example I take from David Estlund (2008, 118; Estlund himself gives the credit for this example to John Deigh): The son of a brutal dictator "orders" you to perform some action. He is, of course, not authorized to issue such an order, not even according to the rules his dictator father accepts. But if you don't do as the child says, his father will become very angry, indeed angry to the point of brutalizing some innocent people. In this case, it seems you now have a reason (indeed, an obligation; but for my purposes a reason would do) to do whatever it is the dictator's son ordered you to do. The dictator's son has succeeded in giving you a reason for action. And indeed, this is exactly what he intended to do. But, of course, this is not a case of robust reason-giving. It is merely a case of a triggering reason-giving: You have a standing reason to prevent horrible disasters from befalling innocent people, and the dictator's son has successfully manipulated the non-normative circumstances so that this general reason will imply a more specific one to do as he says.

To make some progress, compare threats and warnings. The two seem to be identical in their reason-giving force. When all other things are equal, if a threat ("If you don't Φ, I will kill you!") gives you a reason to Φ, so would the relevantly similar warning ("If you don't Φ, Bad Guy will kill you!"). The intention of the one issuing the threat to give you a reason for action – though very much a part of what makes the threat a threat – still in this way drops out of the normative picture.[16] A benevolent person issuing a warning, or indeed a non-person indicator

[16] Perhaps this is roughly what Estlund has in mind when he says (about the dictator's child example): "the command itself drops out of the set of reasons for action" (2008: 118).

of the imminent danger, would do just the same in terms of your reason to Φ.

Now consider requests again, and consider the following two cases. In the first one, I ask you to read my paper, and you go ahead and read it because, well, I asked you to. In the second case, you could not care less about me and my requests. But you've noticed that our department chair heard me asking that you read the paper, you know that she thinks you should do as I ask, and you recognize your general, standing reason to keep her happy. You proceed to read the paper merely in order to avoid a conflict with the department chair. There seems to be an important difference between the two cases. While you have done as I asked in both cases, in the latter the request did not function in the way I intended it to function. So what is important for the case of successful reason-giving in the case of requests is that the reason-giver not only intends to give a reason, but also that she intends the giving of the reason to depend on the reason-receiver recognizing that very intention, and indeed on this recognition playing an appropriate role in the reason-receiver's practical reasoning. There is nothing, then, which stands in the same relation to requests as warnings do to threats: A threat treated by the addressee merely as a warning is a fully successful threat. A request treated by the addressee merely as an incentive is not a fully successful request.

These considerations[17] support, then, the following account, which it will be convenient to present first as an account of *attempting* to robustly give a reason, then adding the relevant success conditions:

One person A attempts to robustly give another person B a reason to Φ just in case (and because):[18]

[17] And there are more. Again see my "Giving Practical Reasons" (2011).

[18] I briefly discuss the relation between this suggested account of requests and (one version of) Grice's account of sentence-meaning, as well as the relevance of deviant causal chains, in my "Giving Practical Reasons" (2011).

For a somewhat similar understanding of requests see Cupit (1994: 450): "To request is to attempt to affect another's actions, by doing no more than presenting those wishes in a form which constitutes an attempt to affect action." Similarly, Raz (1975: 83) writes: "A person who makes a request intends his making the request to be a reason for the addressee to comply with it." In the context of a discussion of promises, commands, and obligation, Owens (2008) seems to draw a distinction close to the one I put in terms of merely triggering and robust reason-giving, and to characterize robust reason-giving in terms of the reason-giver's intentions. See Hart (1982: 251) for an explicitly Gricean account of commands, and for the claim that

(i) A intends to give B a reason to Φ, and A communicates this intention to B;
(ii) A intends B to recognize this intention;
(iii) A intends B's given reason to Φ to depend in an appropriate way on B's recognition of A's communicated intention to give B a reason to Φ.[19]

The third condition can be understood as a generalization of such natural thoughts as that when I ask you to Φ, I intend that your reason for Φ-ing be *that I asked you to*; that when I command that you Φ, I intend that your reason for Φ-ing be *that I said so*, etc.[20]

There are two kinds of success conditions necessary for robust reason-giving. The first kind is non-normative: For A's attempt to robustly give B a reason to Φ to succeed, B must recognize A's above specified intentions, and furthermore B must allow these intentions to play an appropriate role in his practical reasoning. Notice that this condition is not necessary for the attempt to succeed in amounting to a robust reason-giving, but rather for it to succeed in having the intended kind of effect in the world. The second necessary success-condition is a normative one: the attempt must make it the case that a reason to Φ really does emerge (in the appropriate way). And we already know that whether this procedure will result in there being a reason to Φ here will depend on there being an independent reason that is triggered by this procedure[21] – roughly, a reason (for B) to do as A intends that B have a reason to do. In the dictator's child example, there is no general reason to do as the child "commands", and so even if he has the

something like this account can be generalized also to requests and to several other phenomena, and Sciaraffa (2009), (though Sciaraffa offers this as an account of what content-independence comes to, a suggestion I do not find convincing).

[19] Strictly speaking, (ii) may be redundant here. In typical cases, it will be subsumed in (iii), for the typical way in which A's intentions may play a role in B's practical reasoning is by first being communicated to B. If there are non-typical cases in which someone can have the intention in (iii) without the one in (ii), that should suffice, it seems to me, for robust reason-giving. But adding (ii) does not seem too misleading, it makes things somewhat more conspicuous, and preserves the structural similarlity with Grice's account of sentence-meaning.

[20] All of this is consistent, of course, with A also wanting (and perhaps even intending) B to Φ for other reasons as well. Nothing in my analysis suggests that *because I asked you to* need be the only relevant reason here. But if this reason is *not* at all intended, then, I contend, we do not have a case of a genuine request.

[21] Unless the Constitutive Model does apply. In such cases – as Dimitrios Kyritsis noted – the normative success condition is trivially satisfied.

reason-giving intentions, and so attempts to robustly give reasons, he cannot succeed in doing so. But when I ask you to read my paper, presumably there is this general reason (to do as I ask, within limits, in a certain context, etc.), one that I presumably succeed in triggering by making the request. It is in this way, then, that the suggested account of robust reason-giving is a particular instance (but an importantly unique one) of triggering reason-giving.[22]

We now have, then, an initial general account of the giving of practical reasons. Some such reason-givings are purely epistemic, they merely indicate the existence of an independently existing practical reason. Some such givings are cases of merely triggering reason-givings, they merely manipulate the non-normative circumstances in a way that (roughly) triggers a pre-existing conditional reason. And some reason-givings are robust, and are themselves best understood as particular instances of triggering reason-giving, that are characterized by the special intentions and the two success conditions above. And of course, there may be cases in which the reason-giving involved has features of some or all of these kinds. Many requests, I suspect, are precisely like this: They have an epistemic dimension (drawing the addressee's attention to needs or wants of the person making the request); they merely trigger reasons (with subtle promises of reciprocity, say); but even taken together, these two features do not exhaust their reason-giving force, and so we are led to the conclusion that they also give reasons robustly. With this general understanding of reason-giving at hand, we can at last return to the law, and to how it gives reasons for action.

3. HOW THE LAW GIVES REASONS FOR ACTION

When philosophers of law talk about the reason-giving force of the law they often fail to distinguish between very different claims. But now, in order to critically evaluate the claim that the law gives reasons for action, and the adequacy constraints this fact places on a theory of law, we

[22] I hope to offer a general discussion of authority – plausibly a particular instance of robust reason-giving – on another occasion. Let me just quickly note here that the point in the text is where discussions of the justification of authority come in: In the framework of the suggested account of robust reason-giving, for instance, Raz's service conception of authority (e.g. Raz 2005–6) is best seen as an account of which prior conditional reasons exist, and so which attempts at robust reason-giving (in the special authority way) can succeed.

cannot afford such nonchalance. We must distinguish, in particular, between the claim that the law gives *legal* reasons for action and the claim that the law gives (genuine, unqualified) reasons for action; we must distinguish between the law giving reasons – whatever reasons the law provides – as a matter of necessity, or rather as a contingent matter (so that in some legal systems, with some legal texts, in some circumstances, the law provides reasons, but not necessarily in others); we must take care to distinguish between the claims that the law *does* and that it *can* give reasons for action; and we must distinguish between the claim that what is characteristic of law is its ability to actually give reasons or rather its *claim* to have such power. The main part of this section consists, then, in a discussion of many of the resulting options, all theses very different from each other, though all sometimes grouped under "the" thesis that law is reason-giving (or indeed that law is normative).

But I want to make two more general preliminary points here. The first is that my topic throughout this section is different senses in which the law may be said to give *normative* reasons, rather than motivating ones. Normative reasons are the reasons that justify action, that render it the rational thing to do, or perhaps the thing to do. Motivating reasons, on the other hand, are the things that motivate people, that bring them to action. There are, of course, many questions here, perhaps most famously about purported necessary connections between normative and motivating reasons. But these need not concern us, for regardless of their connections, we can distinguish conceptually between them at least initially, and this will suffice here. Discussions of the reason-giving force of the law are sometimes confused on this point,[23] but it is nevertheless clear[24] that the relevant questions are not psychological (for instance, why are judges motivated to rule in accordance with the rule of recognition?) but rather conceptual and normative (how is it that the rule of recognition gives judges a normative reason to rule a certain way, or justifies them in so doing?). And so I too will focus on normative reasons alone.

[23] When Shapiro (2001: 176) introduces his "practical difference thesis", for instance, he talks in motivational terms, though it seems to me what he has in mind is really that the law must be able to make a normative difference. And for a similar unclarity regarding the distinction between motivating and normative reasons, see Green (1999: 40).

[24] See e.g. Coleman (2001: 71–2).

Second, discussion of law's reason-giving force, or of law's normativity, often comes hand in hand with discussions of the authority of law, or its force to generate obligations. But for the most part I want to abstract from talk of authority and obligations. It seems to me that we can reserve those for another occasion, and settle here for just talking about reason-giving. Restricting the discussion in this way still leaves enough to be discussed that is of interest. There is a worry, of course, that by abstracting from authority and obligations I in effect abstract away from the most important part of the phenomenon of the normativity of law, and so that I'm already here getting us off in the wrong direction. But I don't think that this is so: if the discussion that follows shows that there is no serious problem to account for the reason-giving force of the law, then – given some very close relations between reasons and obligations, and between the power to give reasons and authority – it becomes prima facie plausible that an account of the authority of law is not too far away either. Be that as it may, here I will for the most part avoid all talk of authority and obligations. (I hope to address the relations of authority and reason-giving on another occasion.)

What, then, does the reason-giving force of the law come to? And what adequacy constraints does the need to accommodate this phenomenon pose for a theory of law?

3.1. Necessarily, the law gives legal reasons

One thesis in this general neighborhood is that the law succeeds in giving legal reasons. Whenever, in other words, the law requires that you Φ, you thereby have a legal reason to Φ. Notice that here the talk is of *legal* reasons, rather than moral reasons, or indeed the most general, unqualified, real, rationality-reasons.

It does seem likely that the law necessarily gives legal reasons in this way. And there may be jurisprudential problems in the vicinity here,[25] so I do not want to suggest that there is nothing of interest about this phenomenon.[26] But this phenomenon is, it seems to me, merely a

[25] See e.g. Scott Shapiro's (2001: 149) chicken-egg problem (regarding the relations between legal authority and legal reasons and norms).

[26] I do not care, remember, about how the term "the normativity of law" is used (and I'm pretty sure it is not uniformly used). So it's quite possible that the phenomenon in the text is the one at least some people use this term to pick out.

particular instance of a much more general phenomenon, and therefore accommodating it cannot be a very demanding, unique task for the philosophy of law. After all, the rules of chess presumably manage to give chess-reasons, the rules of etiquette presumably give etiquette-reasons, the rules of machismo honor presumably give one machismo-honor-reasons, and so on. And in all these cases, it remains an open question whether the practice-qualified reasons are also real, genuine, unqualified reasons: I understand, one may ask, that I have a chess-reason not to move my king into a checked position, but do I have a reason to do so? I understand that I have an honor-related reason to challenge him to a duel, but do I really have a reason to do so? But similar questions may arise with regard to legal reasons as well. I understand, one may ask, that I have a legal reason to follow my officer's order, but do I really have a reason – a real, normative, justifying reason – to do so?[27] It may be an important question what the relations are between legal reasons and genuine reasons (indeed, some of the next subsections can be seen as attempts to give a partial answer to this question). But it's clear enough that the inference "A has a legal reason to Φ; therefore, A has a reason to Φ" is just as invalid as the inference "A has a machismo-honor-reason to Φ; therefore, A has a reason to Φ".[28] (There is a relevant complication here, though, and it will be addressed in the next subsection.)

[27] None of this means, of course, that legal reasons only apply to those who want to be guided by the law, or some such. We should distinguish, following Foot (1972), between two kinds of categoricity: legal reasons or rules can be like those of etiquette – categorical in that we do not avoid applying them to someone just because that person doesn't care about them, but not categorical in that they do not entail genuine and unconditional reasons or obligations.

[28] "... judicial statements of a subject's legal duties need have nothing directly to do with the subject's reasons for action" (Hart 1982: 267). Notice that here Hart is claiming not just the point in the text (no entailment from legal reasons to reasons), but also the further claim that judges need not believe in any such entailment, not even with the help of some auxiliary premises. I don't have a view on this further point.

So the word "legal" in "legal reason" functions like the word "imaginary" in "imaginary friend": An imaginary friend is, in a way, a kind of a friend, but from the fact that I have an imaginary friend it does not follow that I have a friend. It does follow, of course, from the fact that I have a *tall* friend that I have a friend, because a tall friend is a friend, but an imaginary friend is not. Analogously, then: A legal reason is, in a way, a kind of a reason, but from there being a legal reason to Φ it does not follow that there is a reason to Φ. It does follow, of course from the fact that I have a *strong* reason to Φ that I have a reason to Φ, because a strong reason is a reason, but a legal reason is not necessarily a reason.This point is closely related to Raz's (1975: 175–7) talk of legal statements as being made from a point of view, without the necessary endorsement of the speaker.

But – one may object – there just *are* no machismo-honor reasons. Perhaps – depending, that is, on how exactly we are to understand talk of such qualified reasons. One thing one may plausibly say is that the machismo-honor practice does give one machismo-honor reasons, but that these do not imply real reasons; another thing one may plausibly say is that machismo-honor practice does not succeed in even giving us machismo-honor reasons, maintaining a necessary connection between machismo-honor reasons (had they existed) and real reasons. These two ways of putting things are, as far as I can see, mere terminological variants. The choice between them amounts to a decision about how to use such locutions as "machismo-honor reasons". And so, as is always the case with such terminological choices, nothing of substance depends on this choice. Whether you decide to maintain a necessary connection between the law and legal reasons, thereby rendering contingent the tie between legal reasons and real reasons, or to maintain a necessary connection between legal reasons and real reasons, thereby rendering contingent the tie between the law (or the social practices underlying it – I return to this distinction shortly) and legal reasons, makes no real difference. The important point is that talk of legal reasons cannot do the substantive work of bridging the gap between the law and real reasons[29] (a point to which I return).

The law is special, of course, in its power to generate legal reasons, but it is not at all unique as a practice that can generate that-practice-related reasons (which may or may not be genuine reasons). It is unlikely, then, that studying this phenomenon will teach us something significant specifically about the law. Nevertheless, it is interesting to see how the general account of reason-giving (from Section 2) nicely applies to legal reasons, and indeed, to other practice-qualified reasons as well. For arguably, legal norms can give legal reasons either according to the triggering model or according to the Constitutive Model (they can also give reasons epistemically – a possibility I do not discuss in what follows). If a court orders you to Φ, you now (typically) have a legal reason to Φ. Arguably, this is because you've all along had the conditional legal reason to do as the court tells you, or to-Φ-if-the-court-orders-you-to-Φ. If so, the court's order gives you a legal reason to Φ by triggering the

[29] Kramer (1999: ch. 4) also insists that there are no necessary connections between legal reasons on one side, and moral and also unqualified reasons on the other.

conditional legal reason that was there all along. But plausibly, not all cases of legal-reason-giving can be thought of along these lines. Perhaps, for instance, a sufficiently *basic* legal norm[30] can give you legal reason without triggering a pre-existing conditional legal reason – perhaps, for instance, the constitution does that. If so, if the constitution requires that you Φ, but there is no legal norm in your legal system that requires that you do as the constitution says you ought to do, then the constitution gives you a legal reason without triggering a reason. But then the plausible thing to do seems to me to be to apply the Constitutive Model from Section 2: For plausibly, to have a legal reason to Φ *just is* to be required by the constitution (or by an institution authorized by the constitution) to Φ.

Be that as it may, the need to accommodate the fact that the law gives – necessarily, perhaps – *legal* reasons does not seem to place any significant adequacy constraints on a theory of law. In particular, it does not count – not even initially – against any version of legal positivism I can think of.

3.2. Necessarily, the law gives (real) reasons

But aren't claims about the normativity of law supposed to be claims about the relations between the law and real, genuine, non-qualified reasons? And doesn't the claim that law is normative come down to the claim that law necessarily gives *real* reasons?

This thought may be motivated by either of the two following lines of thought (I will mention a third way of motivating it later in this subsection): First, an analogy with morality may be doing some work here. For with regard to morality, there is much plausibility in the idea that necessarily, when one is morally required to Φ one has a reason to Φ. That idea, sometimes referred to as (one version of) internalism,[31]

[30] I do not intend any implicit reference here to Kelsen's *Grundnorm*, nor do I intend to deny similarities with this complex idea. (I just do not know enough about Kelsen to be committed here one way or another.) At least according to Raz's (1979: 130–1) interpretation of Kelsen ("Kelsen's Theory of the Basic Norm"), Kelsen ignored the possibility of the Cosntitutive Model, and perhaps this is why he thought something like his basic norm was needed.

Hart (1958: 87) is rather clearly employing (what I call) the triggering model. Though he does not seem to have in mind anything like the Constitutive Model in this context, he could easily incorporate it into his theory.

[31] The kind of internalism relevant in the text is (a kind of) *existence* internalism, postulating a necessary condition for *the truth* of a moral judgment. It is distinguished from different

sometimes as moral rationalism, is controversial, to be sure, but it is certainly not without appeal. And this idea may be thought to capture the normativity of morality. If so, a natural thought would be that the normativity of the law is captured by the analogous thesis, namely, that necessarily, when one is legally required to Φ, one has a (real) reason to Φ. The second way of motivating this idea starts from the rather trivial point about the law giving *legal* reasons, and conjoins it with the simple-sounding (but most certainly not trivial) claim that legal reasons are genuine reasons.

I am spending some time on the motivations for the claim that law necessarily gives reasons for actions, because the most striking thing about this thesis, it seems to me, is that it is so clearly false. Obviously, sometimes when the law requires that you Φ, it thereby succeeds in giving you a reason to Φ (and in the next section I discuss the implications of this obvious fact). But just as obviously, sometimes this is not the case – think about exceptionally stupid or corrupt laws, perhaps in exceptionally stupid or corrupt legal systems. Remember, we are now dealing with a thesis about what is *necessarily* true of law, presumably as a matter of conceptual necessity. But then all that has to be shown to establish the falsehood of the suggested reading of the claim about the normativity of law is one conceptually possible case where the law – *any* law – requires that you Φ and yet you do not thereby acquire a reason to Φ.[32] And I don't see how it can seriously be doubted that there are such (at least conceptually possible) cases. In terms of the motivations from the previous paragraph – the law is just unlike morality in the relevant ways, and legal reasons need not be genuine reasons.

Now, there is a fairly big jurisprudential debate I have to address here, with the hope of being able to bypass it. For it may be argued that at least *some* legal statements are necessarily reason-giving, or that at least

kinds of *judgment* internalism, postulating necessary conditions for a judgment to qualify as a moral judgment. I return to analogies between law and morality that are more closely related to judgment internalism below.

[32] I am here speaking directly about the relations between the law and reasons. One could start by speaking of the relations between the law and morality, and then ask about the relations between morality and reasons. But I prefer the way in the text, because I do not want to worry here about moral rationalism, because I don't think it can be ruled out a priori that the law sometimes gives reasons that are not moral reasons, and mostly because if the law does give reasons for actions, it seems to me of little interest whether these (real) reasons should further be classified as moral ones.

when made by certain people or in a certain way those making them necessarily endorse their reason-giving force, or some such. This would be a plausible reading of Hart's insistence on the nature of internal legal statements, and it is a point arguably made explicitly by Raz when he insists (1979, 150) that the proper notion of validity as applied to legal rules and other standards is "the natural law view on the meaning of 'validity'", according to which a rule is valid if it is justified, or – perhaps roughly – if it is supported by reasons, and so gives reasons. And it is not as if endorsing this understanding of validity is without a philosophical motivation (and this is the third motivation, hinted at above, for believing that the law necessarily gives genuine reasons): For it may be argued that it is an obvious feature of legal discourse that (at least most, or perhaps the most important) utterances of legal statements incorporate a kind of endorsement, a kind of normative (if not necessarily moral) commitment. An account of legal discourse that ignores this feature will thus be grossly inadequate.[33]

There is much that needs to be said in order to evaluate these claims. Indeed, there is much that needs to be said if we are even to *have* at hand full, clear, evaluable claims. For now, though, let me settle for the following rather quick points.

First, it is not at all clear to me that there is some fairly clearly defined class of legal statements (or is it utterances?) that have this feature. I do not think, for instance, that judges, or officials, or practitioners, or anyone, really, are such that when they make a legal statement (about their own jurisdiction) they necessarily endorse it in the relevant way[34]. This is just (a perhaps stronger version of) Raz's (1979, 153) familiar point about detached legal statements. But Raz thinks that detached legal statements are in some important sense necessarily parasitic on those that are not so detached (and so that do involve this normative commitment). I am not even sure that *this* is so, certainly not as a matter

[33] Indeed, some understand the problem of the normativity of law as just the problem of accounting for the normative terms legal discourse routinely incorporates. See e.g. Raz (1979: essays 7–8) and Green (2001: 516). And this, by the way, is the claim that is the jurisprudential analogue of (one version of) judgment internalism about morality.

[34] Of course, if we stipulatively define internal legal statements as those made with endorsement, then the thesis that endorsement necessarily accompanies internal legal statements becomes true. I take it, though, that this claim is not supposed to be as trivial as this stipulation makes it to be.

of conceptual necessity. Perhaps there cannot be a legal system without its officials in some sense endorsing it, but they can endorse it in a contingent way, because of many reasons external to the law, and only sometimes. Of course, perhaps in the legal systems we are familiar with this is not the case, perhaps in them officials are committed in something like the way suggested here, and if so, this is presumably something a full theory of law will have to accommodate, but not as a conceptually necessary point about law or legal validity.[35]

Second, even if it is a necessary truth about law that at least committed individuals or officials normatively endorse *some* legal statements, it is most certainly not a necessary condition that they endorse *all*. So that even from the mouths of the committed (those making internal legal statements, perhaps, or those endorsing the legal point of view as their own, or some such) there is no contradiction in saying that the law requires that you Φ, but you don't have any genuine reason to Φ. Now, this observation is consistent with a weaker thesis about a (still necessary) connection between legal and real reasons:[36] For it may be argued that, necessarily, when you have a legal reason to Φ, you have a real reason to ψ, when Φ and ψ need not be the same action. In other words, it may be argued that law necessarily gives one real reasons, though not necessarily the reasons that correspond most naturally to the legal reasons it seems to give. I am not sure what to say of this suggestion – I cannot rule it out, but it seems to me highly unmotivated.

[35] Let me note here a weaker, and more interesting, claim (I do not know whether it captures what Raz has in mind when he speaks of detached statements being parasitic): One may argue that even though there is no necessary connection of the kind discussed in the text between legal reasons – or even the mental states expressed by legal judgments – and real reasons, or even endorsement, still the cases that do satisfy some such relation are explanatorily privileged, they are the ones without understanding of which we do not have a proper understanding of the nature of legal concepts, even as used in detached statements. This claim – though vague – sounds to me both plausible and interesting. And it may even be one thing people mean – or at least should mean – by speaking about the normativity of law. But it is not in tension with anything I say in this paper, nor is it unique to the law. Arguably, one does not understand the use of concepts associated with machismo-honor without understanding the role they play in the statements of those committed to these values. And one may want to capture this point by noting that a theory of machismo-honor practice must be sensitive to the fact that it's a normative practice. I thank Kevin Toh for making me see that there is this interesting issue in this neighborhood.

[36] I am indebted to George Letsas for making me see that there is room in logical space for this position.

Why expect such a necessary relation, if there is no necessary relation between having a legal reason to Φ and having a real reason to Φ?

Third, it is quite possible that the normative flavor of internal, committed legal statements is not a part of their semantic content, but rather a part of their pragmatic features. Indeed, that this is so is strongly suggested by the thought that detached and non-detached legal statements behave logically as if there is no semantic difference between them: When a committed official says "R is legally valid" and a non-committed outsider says "R is legally invalid", they seem to be genuinely disagreeing with each other, indeed contradicting each other, not talking past each other; furthermore, the outsider can report the official's view by saying "Official said that R is valid" – and it's not clear how this can be so if there is a genuine difference in the semantic content of such locutions when uttered by the official and the outsider. So perhaps "legally valid" functions here somewhat like "fashionable" – "fashionable" has a descriptive semantic value. But in some circles, it has a normative flavor. Insiders (of those circles) never declare something to be "fashionable" without endorsing it in some way. And there may even be an important way in which "committed" statements about the fashionable are prior to detached ones.[37] But it seems like the right thing to say about "fashionable" is that as a matter of semantics it has only the descriptive content (this is why a fashion-aficionado and a fashion-epicurean can contradict each other when one pronounces a dress fashionable and the other says that it isn't). Rather, what distinguishes the "internal point of view" here is a *further* commitment – one that is not a part of the term's semantic value, but that may be pragmatically implicated in some circles – to, say, going for what is fashionable. Perhaps, then, we should say the same about "legally valid", demoting its (supposed) normative flavor to pragmatics.[38] If so, there is clearly no entailment from "The law requires that you Φ" to "You have a reason to Φ" (though in some circles there is a pragmatic aversion to

[37] Perhaps, for instance, the point about explanatory priority from footnote 35 above applies.

[38] But let me not pretend that anything here is simple or obvious. For a survey of attempts at adequate semantic accounts of pejoratives – of which "fashionable" seems a close cousin – see Hom (2010). And for some further discussion – and for the suggestion that "legally valid" should be understood to capture a thick concept – see Enoch and Toh (manuscript).

asserting the former without being willing to commit oneself to the latter).

Fourth, if one does want the supposed normative flavor of "legally valid" to be a part of its semantic content (perhaps as in the case of some racist derogative terms, or of thick concepts more generally), then it is anything but simple to come up with a satisfactory semantics for them. Some problems have already been mentioned, and as can be seen from the metaethical literature on expressivism – and in particular, on hybrid expressivism, the family of views according to which moral statements incorporate both descriptive and expressivist meaning – there are others, depending on the precise details of the suggested account.[39]

The suggested view – according to which internal or non-detached legal statements or utterances really do entail genuine reasons – faces serious challenges, challenges which to the best of my knowledge have yet to be seriously addressed in the jurisprudential literature. But I do not want to pretend that anything here is clear-cut (it is even not completely clear to me how to understand what Hart and Raz say on these matters, and which if any of the points in the previous paragraphs are points they need to reject[40]). So I do not want to reject this suggested view out of hand. Rather, I think I can largely bypass this issue now, by offering the following dilemma. Either the suggested view – whatever its exact details – entails that any statement of the schema "The law requires that you Φ, but you do not have a reason to Φ" is contradictory, or not. If it does, then for reasons already mentioned this very implication of the suggested view is reason enough to reject it. If it does not have this implication, then my main point in this subsection – that it's not true as a matter of necessity that the law gives genuine reasons – stands. Either way, then, the discussion can proceed without spending more time on this suggested view. And this, indeed, is what I shall do.

[39] For an excellent review of the recent literature in this direction, and for many challenges facing it, see Schroeder (2009). For Raz's characterization of Hart as a hybrid-expressivist (though not in those terms), see Raz (1993: 148). And again see Hom (2010) for a survey of some of the philosophy-of-language related issues here.

[40] Raz's example (1979: 156) of the Catholic giving an orthodox Jew expert advice about Jewish Rabbinical law using normative language ("You ought to so-and-so"), seems to suggest that Raz agrees that there is no inconsistency in claiming both "You are legally required to Φ" and "you have no reason to Φ", for this is what the Catholic would probably say in Raz's example: "You are required – as a matter of Jewish Rabbinical law – to Φ, but because Catholicism is the true religion and Jewish orthodoxy false, you have no reason to Φ."

Let me emphasize that the thesis that the law necessarily gives reasons for action is just as false when restricted to just *the rule of recognition* giving reasons to just *officials*. Here too, it seems to me, there are possible cases where the rule of recognition doesn't give any (real) reason to anyone, officials included. Perhaps – the point is controversial, of course – it is a necessary condition for the existence of a legal system that some of its officials *treat* its rule of recognition as supplying real reasons (this is one possible reading of Hart's requirement that the officials accept the rule of recognition from the internal point of view).[41] But even if this is a necessary condition for law, it is by no means a necessary condition that the officials so treating the rule of recognition do so rightly.

If a theory of law had to accommodate the fact that law necessarily gives reasons for actions, this probably *would* place serious adequacy constraints on an admissible theory of law. And it is hard (for me) to see how a positivist theory would be able to satisfy it. But no theory of law has to accommodate such a fact, because there is no such fact.

Perhaps this point needs to be qualified in the following way: If, say, the content of any legal norm necessarily overlaps (to an extent, at least) with the content of some moral norm (and assuming moral rationalism), then it would follow that, necessarily, when the law requires that you Φ you thereby acquire a reason to Φ. But I don't think we need to worry about this here, for the following two reasons: First, in order to render this claim true, the version of a natural law theory that would have to be true is an extreme, highly implausible version of such theory. Second, even if we are to assume such a theory, the claim that law necessarily gives reasons, though true, would be one we are justified in

[41] I think that this is one of Toh's (2008) major points. Even thus understood, the claim seems to me to be false. To repeat a point from the previous paragraph in the text: I don't see why a legal system cannot exist where its officials think that the laws – or perhaps the rule of recognition – only give them reasons contingently (though pretty often). For a related point, see Shapiro (2001: 172).

In Hart's discussion of these matters (1982), two relevant points are very clear. First, he insists on the distinction between the (purported) necessary condition being that the law *actually gives* (peremptory, content-independent) reasons, and that it is *regarded* as giving such reasons (e.g. 1982: 264). And second, that he thinks even officials need only be committed to the law thus giving *legal* (as opposed to real) reasons (e.g. 1982: 267).

And see Raz's (1979: 134) distinction between "justified normativity" and "social normativity" (roughly, the phenomenon of giving rise to real reasons, and the phenomenon of being regarded as giving rise to real reasons, respectively).

holding only *because* of our (hypothetical) commitment to that version of natural law theory. It would not be a phenomenon we believe in pre-theoretically, in a way that places adequacy constraints on plausible theories of law. (And needless to say, invoking this move in an argument against legal positivism would be a clear case of begging the question.[42]) But it was in this context that we are here interested in claims about the reason-giving force of the law. So we can safely ignore the complication discussed in this paragraph.

3.3. Often, the law gives reasons

Of course, one may concede that the law doesn't – as a matter of necessity – give reasons for action, but nevertheless insist that often enough, at least in basically decent and effective legal systems, the law does give reasons for action. And it does seem rather undeniable that often, in a decent legal system, when the law requires that you Φ you thereby acquire a (real) reason to Φ. So this is a phenomenon a theory of law must accommodate. How is it, it may be asked, that the law often enough succeeds in giving you reasons for action, reasons you would not have had without the law's requirement, and that you have precisely *because* of the law's requirement? Especially if positivists are right about the nature of law, this power of the law may seem mysterious.

But we are now in a position to see that there is really no mystery here at all. For we already know – this was the point of subsection 2.2 above – that all relevant cases of reason-giving are cases of triggering reason-giving, cases where the giving of the reason amounts to a manipulation of the non-normative circumstances in a way that triggers a pre-existing conditional reason. (In subsection 2.2 I also mentioned the

[42] In the context of defending an argument against positivism, Greenberg (2006: 115) says that he wants to avoid assuming that legal facts are normative, because making this assumption would amount to begging the question against the positivist. I'm not sure I understand where Coleman (2001) stands on these matters. At times he seems to think that law itself is normative, so that laws necessarily give reasons for actions. Only in this way can I understand his surprising reply (2001, 159–60) to the accusation that positivists commit the naturalistic fallacy. Instead of saying that they don't because they only claim that the law is often normatively significant, not that it is necessarily normative, he proceeds to say that it's not clear that the naturalistic fallacy is indeed a fallacy, and to relegate the task of dealing with it to metaethicists. At other times (2001, p. xviii), though, he seems to think about the normativity of law in terms of the law's putative claim to legitimate authority, roughly those discussed in subsection 3.5, below.

Constitutive Model, but in the context of the reason-giving power of the law applying this model is no more plausible than in the case of requests – for surely, it's just false to say that being required by the law to Φ is even partly just what it is to have a reason to Φ.[43]) And we also know – this was the point of the-price-of-milk example – that just about anything can play this role. For something to play this triggering role, in other words, it need not *be* normative; rather, it suffices that it is *normatively significant*, that is, that there is some (true) normative judgment that is sensitive to whether that thing obtains. And of course, there is nothing at all mysterious about the law playing this minor role.[44] Indeed, it is so easy for something to play this triggering role, that the fact that the law also does places absolutely no constraints on a theory of the nature of law. In particular, legal positivists should have no problem with this unthreatening claim: Surely, even they can allow the social facts that make up the law to be as normatively potent as the price of milk.

This should suffice, I think, to demystify the thought that the law – social though it may be – succeeds in giving reasons for action. But I want to note a further point here, one that will demystify this phenomenon even further. For once we see that we're in the territory of contingent triggering reason-giving, we see that there is no reason to expect any *uniformity* in the explanation of how it is that the law gives

[43] In subsection 2.1 I also mentioned purely epistemic reason-giving. And it seems to me clear that the law sometimes gives reasons in this epistemic sense – indicating that I have a reason, the existence of which does not depend on the law so indicating. But I don't think that the law's power to give reason in this epistemic way is either central or problematic, and so in the text I ignore it.

Another complication left behind (after quickly mentioned) in Section 2 was that there's more to triggering than mere activation of conditional reasons. There is also, for instance, the role played by *enabling* reasons. (I stipulatively characterized the triggering relation to include these as well). And I am sure that the law sometimes enables reasons as well. This too, I think, is not a point we should spend much time on in our context.

[44] Green (2008) notes this point (or something very similar to it) in the context of responding to Fuller's objections to Hart. Christiano and Sciaraffa (2003: 511) write (in criticizing Coleman's positivism) "explaining how legal reasons . . . are genuine reasons is generally problematic for a positivist like Coleman." But if I am right, Coleman does not have to claim that legal reasons *are* genuine reasons, only that very often one has genuine reasons in virtue of having legal reasons (because the relevant legal norms trigger other, conditional yet genuine reasons). (This is not necessarily a criticism of Christiano and Sciaraffa, because Coleman lends himself – by talking about legal reasons being genuine reasons – to this kind of attack.)

(that is, triggers) the reasons it does in fact give.[45] Had it been a necessary truth about law that it gives reasons, perhaps a uniform account of law's reason-giving force would have been called for. But we already know that the law only sometimes does – and sometimes does not – give reasons, and we know that when it does, it does so by triggering reasons. So it's quite possible – indeed, quite expectable – that the reasons triggered by the law will be many and varied. At times, when the law requires that you Φ it manages to give you a reason to Φ because of its threat of a sanction; at times, because it allows you to do something (enter a contract) you have independent reasons to do, or perhaps because it enables reasons; at times, because it solves a coordination problem; at times, by creating expectations that you Φ, thereby triggering the general reason you have not to frustrate people's expectations; at times, by making Φ-ing the fair thing to do, because of the nature of the decision procedure that led to the collective decision to Φ (or perhaps the collective decision to Ψ, where the way for you to take part in the collective's Ψ-ing is by Φ-ing). And so on. Many of these explanations have come under attack, of course. But they have come under attack when presented in a *much* more ambitious manner, as an account of *the* normativity of law. But the possibility of a legal system in a society of angels – which arguably defeats Austin's sanction-based account of the normativity of law[46] – does nothing to defeat the claim that *sometimes* the law gives you reasons for actions by triggering the general reason you have to avoid certain sanctions. And even those critical of the possibility of coordination-conventions supplying a comprehensive explanation of *the* normativity of law need not reject the much more modest claim that sometimes the law gives us reasons by solving coordination problems, thereby triggering the general reasons we have (when we do) to act in coordinated ways.[47] And similar points apply, I think, to many other local explanations of how it is that some laws, some of the time, give reasons to some of the relevant people. Thus, when these – and other – stories are offered merely as accounts of

[45] I am not sure, but I think that Green (1999: 39) hints at a similar point, as does Marmor (2001: 32–3), though in the more specific context of a discussion of conventions.

[46] Raz (1975: 159).

[47] Green (1999) – a central critic of the story of solving coordination problems as accounting for the full phenomenon of the normativity of law – is quite explicit about accepting such modest claims.

how it is that sometimes, in fairly decent legal systems, the law manages to contingently trigger reasons for action, they are quite unobjectionable.[48] And when we pull the explanatory resources of all these stories, there remains, I submit, nothing at all mysterious in the fact that the law often gives reasons for actions.[49]

It is sometimes thought that there is something especially problematic – or at least especially important – in the fact that the law gives *content-independent* reasons for action,[50] reasons that – to an extent, at least – depend merely on the relevant norm being legally valid, not on its content. So it's important to note that everything said in this subsection applies to such reasons as well. The giving of content-independent reasons is also a particular instance of triggering reason-giving; the explanation of how it is that the law manages to (sometimes) give content-independent reasons need not be uniform; and the explanations sketched in the previous paragraph – just like many others – all apply to those as well. Content-independence may be of interest in many contexts, but not, it seems to me, in ours.

But in the general discussion of reason-giving in Section 2, you will recall, I also suggested an account of *robust* reason-giving, the kind presumably involved in requests and commands. And isn't it plausible

[48] Marmor (2001: ch. 2) is very clear on the work that legal conventions do in giving reasons being an instance of (what I call) triggering reason-giving.

[49] In the context of criticizing Hart's positivism, Greenberg (2006b: 273) writes: "Hartian dispositions for a rule do not *in general* make the rule binding on anyone or provide *any* reason for acting in accordance with the rule" (first italics added). Greenberg is right that Hartian dispositions do not *in general* do that. He's wrong, though, in suggesting that this is problem for Hart's positivism.

Christian Piller and John Gardner have suggested to me that Raz's (1975: 33–5) distinction between operative and auxiliary reasons can do some work here, perhaps because what is important is that the law manages to give operative, not merely auxiliary reasons. But I do not see that this distinction helps here, partly because of its unclarity. I fail to see how any way of understanding it can generate another option in the logical space already occupied by triggering, robust, and constitutive reason-giving together with their psychological analogues (taking something to trigger a reason, to robustly give it, or to constitute it).

[50] This way of speaking originates – I think – in Hart's "Legal and Moral Obligation" (1958). And here's Coleman (2001: 86) claiming that there is a serious problem in accommodating such reasons: "What we need is an account of how social rules, which purport to be reasons for action independently of their content, can nevertheless be bona fide reasons." (But see also 2001: 120.) If I am right, though, we don't need anything of the sort. All that we need, rather, is to show that legal reasons can trigger bona fide reasons.

Again see Sciaraffa (2009) for an attempt to use something very similar to my account of robust reason-giving as a way of making sense of the idea of content-independence.

to suppose that the law manages to give reasons in this more robust sense as well? After all, the relations between law and authority are not a mere coincidence, and authorities seem paradigmatically suited to robust reason-giving. Can the law, then, robustly give reasons for action? And if it can, what if anything does this tell us about the nature of law?

My suggested account of robust reason-giving was in terms of the rather complex intentions of the reason-giver. And this means that only creatures with rather complex intentions are capable of robust reason-giving. And this in turn means that if law is to robustly give reasons for actions, this must be due to the complex intentions of the legislature. This is surely possible – for instance, an Austinian monarch legislature can surely form the intentions needed for robust reason-giving. So there is nothing here to prevent her laws from (sometimes) giving reasons robustly (not a huge surprise, of course, seeing that commands are a paradigm of robust reason-giving, and that Austin thinks of laws a kind of command). But we already know that Austin's jurisprudence is false, and that not all legislatures look like Austinian monarchs (even Austin knew *this* much). So what can we say in general about the law's ability to give reasons robustly?

I am not sure what exactly to say here, partly because I am not sure whether the law – the bureaucratic complicated thing that law in modern societies usually is – actually *can* give reasons in this robust kind of way. There is something personal about robust reason-giving, and modern law is usually anything but personal. But I do not have a settled view on this issue, and would not want to beg any controversial questions here. So let me settle for the following conditional: *If* the law sometimes robustly gives reasons for action, *then* this must be in virtue of the complex intentions of the legislature, and this would entail that the legislature *must* be the kind of thing that can have such complex intentions. Conversely, if there is no legislature to which such intentions can be ascribed, or if we're talking about a piece of law that does not originate from an intentional legislature (like perhaps some forms of customary law), then law can only give reasons in the mere-triggering sense, not robustly.

This may already be an interesting result. But it comes also with an ironic twist: The question – how does the law give reasons for action – was presented above, following the literature here, as posing an especially serious challenge for legal positivism. But we now see that the situation may be the precise opposite, at least if we take the law to give

reasons also in the robust sense. For it can only do that, I've just argued, if it originates from a legislature, and furthermore a legislature capable of having the complex intentions necessary for robust reason-giving. To put it differently, in order to robustly give reasons for action, law must be *posited*, and furthermore, posited in a certain way.[51] And this is a result that strengthens positivism, not weakens it.

I do not want to overstate my point here. For one thing, the dialectical advantage just mentioned is available to positivism only if the law *does* robustly give reasons, a point about which I remain agnostic. For another, this dialectical advantage is not available to all kinds of positivism, but rather only to those that invoke a rather personal legislature capable of forming those complex intentions. (Collective bodies may be able of forming and having such intentions – this is another issue I cannot seriously discuss here.) Third, the non-positivist may retort that *some* laws can robustly give reasons, but others cannot, and the validity of those other ones does not depend only on social facts. This reply would save her non-positivism, but by offering it she would incur the commitment to explain in a non-ad-hoc way the distinction she's drawing between the reason-giving force of different laws. And fourth – and quite obviously – this whole line of thought depends on my suggested account of robust reason-giving. So nothing here is clear-cut. But the irony remains, I think. If we think about the reason-giving power of the law as the power to robustly give reasons, then positivism – far from facing an especially serious challenge here – gains significant plausibility points.

At this point, the following objection may be raised:[52] On my account of robust reason-giving, customary law arguably cannot, as a matter of conceptual necessity, give reasons robustly. But on a common positivist picture, the Rule of Recognition is a customary rule. So this picture entails, when in conjunction with my theory of robust reason-giving, that the Rule of Recognition cannot (not just *does* not, *can*not) give reasons robustly. This already may sound bad enough, but things get worse: For on this common picture, the legal validity of all legally

[51] Non-positivists – natural law theorists, indeed – can insist, of course, that some kind of promulgation is a necessary condition for legal validity. But promulgation in one thing, and being posited in the way mentioned in the text is another.

[52] And I thank Les Green for actually raising it.

valid norms depends in some important way on the Rule of Recognition. So if even it cannot give reasons robustly, neither can any legal norm. Far from remaining agnostic on the question whether the law can give reasons robustly, I in effect argue (if this rule-of-recognition picture is right) that it's conceptually impossible for the law to do so. And this may sound like the beginning of a compelling *reductio*.

I agree that if the Rule of Recognition is customary, then it cannot give reasons robustly. This is not, it seem to me, an implausible result, at least not when we remember that this result is consistent with the many ways in which the Rule of Recognition can trigger reasons. But I want to note that from this it does not follow that no legal norm can give reasons robustly, even if we accept that all legal norms owe their validity to the Rule of Recognition. For this to follow we would need to use something like a robust-out-robust-in principle, according to which nothing can confer on something the power to give reasons robustly unless that first thing had that power itself. But there is no reason to accept such a principle, at least not if my analysis of robust reason-giving is on the right track. If robust reason-giving was this sui-generis normative phenomenon, the robust-out-robust-in principle would have been well-motivated: For how, we would be entitled then to ask, can legal norms have that magical power if it was not conferred on them by something that already had that magical power? But I have suggested – and argued for – an understanding of robust reason-giving as a particular instance of triggering reason-giving. And clearly, the Rule of Recognition *does* possess the power to trigger reasons. In some circumstances it may give you (by triggering) a reason to take someone's reason-giving intentions into account in the appropriate way in your practical reasoning. When the Rule of Recognition does that, it confers robust-reason-giving-power, without ever possessing it itself.

My response to the suggested *reductio* thus consists in two claims: The claim that the Rule of Recognition (if there is one, and if it is customary) cannot give reasons robustly does follow from my view, but is not implausible. And the claim that it's conceptually impossible for any legal norm to give reasons robustly is indeed highly implausible,[53]

[53] Some legal norms seem to be rather paradigmatic cases of robust reason-giving – I have in mind the specific norms of authoritative personal commands ("pull over!"), and the like. I do not want to remain agnostic on the possibility of those giving reasons robustly. But this fact is of little

but it doesn't follow from my view (unless we endorse a robust-out-robust-in principle, which is entirely unmotivated if anything like my view of robust reason-giving is right).

3.4. Necessarily, the law can give reasons

In the previous subsection, the phenomenon to be explained was a contingent one – the law sometimes gives reasons for action. The move to this contingent explanandum was called for because of the observation from subsection 3.2, that it's just false that the law *necessarily* gives reasons for action. But perhaps the way to weaken that implausibly strong claim is different. Perhaps there is here something that is necessarily true of the law, perhaps even as a matter of *conceptual* necessity. But perhaps what is true of the law as a matter of necessity is not that it *does* give reasons for action, but rather that it *can* do so?[54]

This may be so, but not much that is of interest follows regarding the nature of law. Given the discussion in the previous subsection, we can afford to be quick here. If we're talking about the possibility of the law giving reasons by merely triggering reasons, then we're saying very little here, because just about anything can play this triggering role (including, as we've seen, a change in the price of milk). If, however, we're talking about the possibility of the law robustly giving reasons for action, then in order to be able to do that, the law must have a legislature with the complex intentions necessary for robust reason-giving. And then the discussion from the last few paragraphs of the previous subsection applies. Either way, then, the possibility that the law gives reasons for action does not teach us anything of significant value about the nature of the law, and in particular does not count against (and perhaps counts somewhat in favor) of legal positivism.

3.5. Necessarily, the law claims the power to give reasons

But perhaps what is important about the law is not that it does, or can, give reasons for action, but that it *claims* or *purports* to do so? Perhaps

interest in our context, for the possibility of such cases of robust reason-giving does not count in favor of positivism in the modest way suggested earlier in the text. The non-positivist can happily help herself to the considerations in the text here, claiming that even if the law in general cannot give reasons robustly, it can empower police officers to give reasons robustly.

[54] I think that Christiano and Sciaraffa (2003: 501) are not careful about the distinction between the law always giving reasons and the law always being able to do so.

this is true of the law as a matter of necessity, and perhaps this is the phenomenon that places interesting constraints on a plausible theory of law?

This Razian mantra – that the law claims the power to give reasons for action[55] – is much more often recited than explained. But it is badly in need of explanation,[56] for as it stands it is unhelpfully anthropomorphic. The law, after all, is not a person, and it is not at all clear that it can literally *claim* or *purport* to do or have anything. Raz (1979, 30) himself is both explicit about the mysterious-sounding nature of this claim, and helpful in offering a fairly precise – and non-mysterious – understanding of it. According to Raz, the fact that the law claims the power to give reasons amounts to the fact that if the law requires that you Φ, then the mere fact that the balance of reasons (not including those purportedly given by the law) calls for not-Φ-ing is not enough to legally exempt you from Φ-ing. This does not mean that the law requires that you act against reason. Rather, it means that the law takes itself to change the balance of reasons. We can imagine normative systems that do not have this feature – normative systems that treat the balance of reasons (that do not depend on that normative system itself) as sufficient to justify any action, even in terms of that normative system itself. And about such systems, says Raz, it is natural to say that they do not claim the power to give reasons. But the law is not like that, perhaps as a matter of necessity.

This way of putting things does succeed in giving a fairly precise meaning to thoughts about the law claiming to give reasons for actions. And Raz is right, at the very least, in claiming that the legal systems we are familiar with do satisfy this condition. I am not completely sure, though, that Raz is right that this is true of law as a matter of necessity.[57] Think about those normative systems imagined in the previous paragraph, systems that do not satisfy this condition. Is it a conceptual

[55] The mantra is just as often put in terms of the law claiming authority, or the power to generate obligations, as in terms of the power to give reasons, as in the text. But I here focus, as you recall, on reason-giving. And Raz (1979: 30–3) himself starts his account of the law's claim to authority in terms of the law's claim to give reasons.

[56] Himma (2001) notices this point, and tries to understand better what the Razian mantra comes to.

[57] Himma (2001) raises similar doubts, but he understands the claim-to-authority somewhat differently, and so the thesis he rejects is different from the one I am doubting in the text here.

impossibility for any such system to be a legal system? I am not sure. Perhaps more interestingly, if this is how we understand the point about the law claiming to give reasons for action, then this phenomenon is much broader than may be thought. In *this* sense, for instance, the rules of chess also claim to give reasons for action (because even if the balance of non-chess reasons falls in favor of castling in a case where your king is checked, still the rules of chess prohibit castling).[58] With the claim to give reasons thus understood, then, it is a much weaker claim than is often supposed. And notice that thus understood, the law's claim to provide reasons, or to make a normative difference, is consistent with my earlier point about the relevant reason-giving being of the triggering kind. The law's claim to make a normative difference is to be understood as its claim to trigger general conditional reasons.

But most important for my purposes here is not the *strength* of the phenomenon (law claiming to give reasons) or of the adequacy constraints it places on theories of law, but rather the *nature* of these constraints. For if we understand law's claim to give reasons in the way Raz suggests, then this places a constraint on the *content* of a normative system if it is to count as law. Such a system cannot render legally permissible any action that is supported by the balance of independent reasons (because it is so supported). But assuming we have an account of legal content, we do not have here an additional constraint on the *nature* of law. To repeat, I am not sure that this *is* plausibly considered a conceptually necessary condition for legality, but whether or not it is, this can be accommodated by just about any theory of law I can think of.[59]

[58] Let me remind you that Raz proceeds to argue also that the law claims authority, and so not just the power to give reasons, but also the power to give exclusionary reasons. *This*, of course, may not be true of the rules of chess, though I am not sure about this.

[59] You may think that positivists cannot believe in any conceptual restrictions on the content of law. But this is false. Consider, for instance, exclusive positivists' rejection of inclusive positivism. They do not, of course, deny that there can be a statute using language seemingly referring to morality as a criterion of legal validity. What they deny is that such language can give rise to a valid legal norm with this content. Similarly, Raz need not deny the possibility of a statute that goes something like "Whenever the law requires that you Φ, it is always a valid legal defense to show that the balance of non-legal reasons falls on the side of not-Φ-ing". He need only deny that this language can actually give rise to a valid legal norm with roughly the same content.

But of course, Raz may be wrong in his understanding of what it is for the law to claim the power to give reasons. Raz (1979: 33) is clear on his suggestion being an attempt at an interpretation of a "common notion", and his attempt may not be ultimately successful. Some of the considerations above may be thought of as reasons to suspect that this is so (think about the chess analogy again), and there may be other reasons for such suspicion as well. And it remains a possibility that some other understanding of law's purporting to give reasons for action does succeed in placing significant adequacy constraints on a theory of the nature of law. But I cannot think of such an interpretation, and I do not know of one in the literature.[60]

Let me conclude this subsection with the following, by now somewhat familiar, suspicion: Perhaps the anthropomorphism (in speaking about the law claiming certain powers) is not entirely metaphorical. Perhaps, in other words, the best understanding of such talk is quite literal. If so, the law can claim the power to give reasons only if it – or perhaps the legislature – can make claims. Notice that if this is so, then law must originate from a rather mentally complex legislature. This *would* be an interesting jurisprudential result. But not, of course, one that legal positivists should be worried about.

4. CONCLUSION

We should not be impressed, then, with claims about the law's reason-giving powers, and with thoughts about how these powers place adequacy constraints on acceptable theories of the nature of law, and in

[60] The account in the text of the claim to authority is not even the only one Raz gives. In his "Authority, Law, and Morality" (1994: 215) he seems to offer a different account, in terms of the language the law uses, and the opinions expressed by its officials. It is not clear what Raz thinks about the relation between this account and the earlier one discussed in the text (he does not explicitly retract the earlier one). Nor is it completely clear to me what the account suggested here precisely is, and whether and why it should be believed to be an adequate account of the law's claim to authority or to the power to give reasons. Nor is it clear to me that the law's claim to authority – understood in either of the two ways Raz suggests, or indeed any other plausible way – can support the inference Raz uses it for, namely, entailing that it's possible for the law to be authoritative (for a sketch of this argument, and the meaning of "possible" here, see Raz (1994: 216–17)). Let me just note here, though, that accounting for law's claim to authority *thus understood* does not seem more problematic – for anyone, positivist or otherwise – than accounting for the claim to reason-giving power discussed in the text.

particular how they pose a serious explanatory challenge for legal positivism. Once we are clear about the nature of reason-giving in general, and once we disambiguate talk of law's reason-giving powers (and unless there is some other way of understanding such talk, one that is not covered in the previous section), then, I conclude, not much remains of such thoughts. And whatever may survive, may actually count (modestly) *for* legal positivism, rather than against it.

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