

**PhD Program in Political Theory  
Department of Political Science  
Cycle XXIV**

**Authority Rules: Rule-Following and the Incompatibility Thesis**

**Ph.D. Dissertation**

**By**

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**Rome, March 2013**

## *Acknowledgments*

Here I would like to recognize the people who helped me with this work and my development as a scholar. Professor Gianfranco Pellegrino supervised and supported me and deserves special recognition for his efforts. Professor Joseph Raz guided me as I developed the core ideas of this dissertation. It was an honor to work closely with him, and this project is very much a reflection of the conversations we had. Professors Daniele Santoro and Daniele Archibugi have been important figures in helping me develop as a scholar. Professor Sebastiano Maffettone deserves many thanks for his efforts at LUISS, which has been so generous to me. Finally, I want to thank Stearns Broadhead for reading and commenting on the many drafts of this work. This is dedicated to him.

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## *Introduction*

### **1. Beginnings and Endings**

Talking about rules seems simple if only because of their pervasiveness. As many will comment, rules are all around: signage, rules of law, and unwritten rules such as some of those of etiquette. For the scholar, then, questions about rules abound if only because there is a vast array of potential topics to investigate and examine. The same can be said about authority, as not only are there different sorts—experts in particular fields of study, referees of sports, and political authorities—but with them there is a vastness of respective specialized topics as well. When a specific topic related to or about rules and authority is chosen, such bounty makes it especially necessary to clarify the meaning and focus of consideration at the outset. There are too many avenues to follow to allow for loose talk about either subject, unless something like generality fits into the aim of the project. However, this work is not concerned with or aimed at investigating rules and authority in a general way. It ultimately restricts its focus to one rule type—prescriptive rules. They are issued by (legitimate) authorities and sit at the center of a long-standing puzzle that stands to undermine the rationality of following them<sup>1</sup>.

Although prescriptive rules are central to what this work contends, they are neither the only rule type considered, nor are rules (even winnowed down to one kind) its unique topic, at least not in an obvious way. The puzzle identified above is the focus of this work's argument, as is the potential threat its conundrum poses to the rationality of abiding by authorities that issue prescriptive rules. This puzzle of rule-guidance can be described in the following sequence: First, any rule issued by an authority and any action, X, required by the rule is either supported

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<sup>1</sup> As is common practice, incompatibility thesis and puzzle of rule-guidance or rule-following are used interchangeably throughout.

by the balance of reasons or it is not. Second, if the balance of reasons supports action X then X should be performed, but not because X is required by the rule, but rather because agents should always act according to the balance of reasons. Third, if the balance of reasons does not support X then X should not be performed, even it is required by the rule, because agents should never act against the balance of reasons. Finally, and as a consequence of the preceding, rules issued by authorities are either redundant, making no practical difference, or go against the balance of reasons, meaning that they ought to be abandoned as following them would be irrational (McClennen 2004; Raz 1979, 2009; Schapiro 2002, 2005).

This puzzle is used by theorists such Scott Schapiro and Edward McClennen to anchor and support the thesis that there is an incompatibility between authority and rationality. This doctoral dissertation argues against and ultimately rejects the incompatibility thesis and its implications for authorities, rationality, and rules. Without wanting to spoil the ending, this work argues against the incompatibility thesis in accordance with a fundamentally Razian conception of rules and authority. Joseph Raz's service conception of authority is able to rebuff the force of the incompatibility thesis, and sustain the view that following a (legitimate) authority's rules is rational. More prosaically, this project provides a detailed and complex framework of rules and how agents use them, adapts these to the problem posed by the puzzle of rule-guidance, and utilizes Raz's conception of authority in order to show where and how the incompatibility thesis fails. As such, it contributes not only a solution to a specific problem in political philosophy, but also a distinct perspective on the limits and strengths of Raz's account.

## **2. Preliminary Substantive and Methodological Clarifications**

The above presentation succinctly captures the problems and solutions treated in this work, but further clarification of underlying concepts, definitions, and relations between them will prove to be useful. S.I. Benn and R.S. Peters offer some general help with respect to rules when they note

that they may be “classified according to the activities they regulate, how they originate, or their degree of formality” (1965, p.107). These means of classification are applied in this work, but there is yet another method employed; namely, classification in accordance with how agents use and follow rules. In the context of agent-use, rules might be best defined as reasons or guides to conduct (Flathman 1973, p.76). To follow rules, then, is to take them (or their existence) as grounds, reasons, or warrants to act in the respective ways that they direct (Schauer 1991, p.113).

When considering why, how, and on what basis agents act on rules, it is thusly necessary to inquire into the reasons agents have for acting, and then to show how rules fit into these (Ibid, p.42). Reasoning about action (i.e. practical reasoning) is a distinctively normative process. It pertains to what agents ought to do in specific circumstances, all things considered, which depends on the reasons that apply to the agent in that instance (Raz 1975, p.482). In practical reasoning, agents attempt to assess and weigh various reasons for actions which are open to them. In this work, reasons for action are taken to be considerations for or against alternative courses of action (Ibid, p.483).

An agent is said to follow a rule when the agent takes the existence of the rule as a reason to perform the actions stipulated by the rule and performs those actions (Schauer 1991, p.113). Rule-following should be distinguished from rule-guidance, as well as from action which merely conforms to what is required by a rule through coincidence or accident. An agent is said to be guided by a rule when the agent takes the existence of the rules as a reason, but not necessarily a conclusive reason, to perform the action stipulated by the rule (Schauer, *ibid*). In this case the agent may be guided by a rule because the rule provides a reason for action, but since the rule does not provide an all things considered reason to act it may be overridden by other considerations (Ibid). An agent may also comply with a rule because the balance of reasons indicates the same action as the one required by the rule, yet this is not the same as either

following or being guided by a rule; rather, it is acting for other reasons (other than the rule provides) in a way which happens to coincide with the rule (Ibid).

In light of this depiction of method, rule-usage, reasons, and agents, the next matter to introduce more completely is that of authority and its fundamental continuity and connection to these other elements. Authority is a central component of the puzzle of rule-following in that the puzzle does not simply target the rationality of following rules, but of following rules issued by authorities. On this basis and in virtue of the puzzle itself, the kind of authority we are interested in is that which can (read: has the power to) issue rules. This amounts to a *de facto* authority, which contrasts with a legitimate or *de jure* sort (i.e. an authority which possesses the right to issue rules).

A characteristic of both *de facto* and *de jure* authorities is that they claim that they are legitimate; this contrasts with what Raz calls 'naked power' which does not claim to be legitimate (Raz 1990, p.3 & 2006, p.1005-6). This work will take a strong view of authority, which entails the authority's claim to a right to rule corresponding with the agents' obligation to obey<sup>2</sup>. An authority's claim is not always true, as not all *de facto* authorities are legitimate, just as the reverse is possible. The pretense of legitimacy is however always present and with it the claim that agents ought to follow authority's rules (Ibid). The question then is that of understanding how to reconcile the claims of authority with those of the puzzle, and as previously noted the task of this dissertation is not only to reconcile these, but also to explicate the broader conceptual framework in which this opposition appears.

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<sup>2</sup> This correspondence is not always asserted. In particular *see*: Ladenson, R. (1980). "In Defense of a Hobbesian Conception of Law." *Philosophy and Public Affairs* 9, 134–159.

### **3. Structure of This Work**

Now, because of the complexity of the subject matter and the steps taken to deliver on the central argument against the incompatibility thesis, it is helpful from the outset to outline the structure and development of the dissertation's parts and chapters. The aim is not only to introduce the elements here, but also to isolate the problems that the different argumentative moves address. Starting more generally, Part One—titled "Types of Rules"—is composed of three chapters, each of which define, analyze, and at times argue about different rule types. Analysis aims towards developing a conceptual framework that shows how rules enter into the practical reasoning of agents, as well as directs itself towards supporting a key claim in Part Two. The claim is that the only rule type that the puzzle can apply to is the prescriptive one. Part Two—titled "The Puzzle of Rule-Following"—sets out the three-pronged thesis of this dissertation: (1) again, of the philosophically interesting rule types analyzed in Part One, the puzzle of rule-guidance applies only to prescriptive rules; (2) the incompatibility thesis can be rejected by referring back to the nature and structure of prescriptive rules—their content-independence and pre-emptiveness; and, (3) the authority issuing prescriptive rules is legitimate if it adheres to conditions established in the service conception.

In order to further clarify the functions, structures, and aims of the respective chapters, it is necessary to at least provide a brief recapitulation of each before setting off. Chapter one—titled "Constitutive and Regulative Rules"—analyzes constitutive and regulative rules. It does so by using as starting point the debate between Joseph Raz and John Searle regarding the very possibility of distinguishing between the rules. This way of addressing the issue allows not only for a conceptualization of rules generally, including their characteristics and usages, but more importantly it does not simply take for granted or assume straightaway that the two rule types are distinct. By presenting the aforementioned debate, the chapter develops a conception of

constitutive and regulative rules which allows for differentiation. The principal grounds for differentiating between the rules are found in how these rules are used by agents in practical reasoning. Insight is gained into how agents use rules, how rules guide practical reasoning, and ultimately how rule-usage serves as a basis for distinguishing between rules. This begins the proper development of a conceptual framework.

The second chapter, titled "Descriptive Rules," further broadens the conceptual boundaries of rules treated within this work. It does so firstly through analysis of descriptive rules themselves. The principal method for differentiating between rule types used in the previous chapter is extended here. Thus, descriptive rules are distinguished from others through their formalization, usage, and role in practical reasoning. The way in which agents reason with rules points to the rules' capacity for guidance. The lack of normative force of descriptive rules is indication of the particularity of this rule type. Through investigation and example it will be shown, however, that descriptive rules can figure into the formation and justification of rules with guiding capacity.

Chapter Three—"Prescriptive Rules"—analyses prescriptive rules by first distinguishing them from regulative rules and instructions. Differentiation assumes the same general methods employed before. In so doing, a conception is developed of what prescriptive rules are, how they operate, and what relationships they bear to other rule types and concepts. Analysis hits upon the central features of this rule type: content-independence and pre-emption. These two features constitute the basis for deflecting the claims of the puzzle of rule-following in subsequent chapters. In this respect, this chapter bridges the framework developed in Part One, with the thesis and arguments of Part Two.

Chapter Four, called "The Puzzle of Rule-Following and its Applicability," begins the second part of this work. This chapter directly addresses the principal consideration of this

dissertation—the puzzle of rule-following. In so doing, it utilizes and integrates the preceding conceptual groundwork into its arguments. It begins by walking the reader through the previously analyzed rule types and shows how only prescriptive rules are applicable to the puzzle. Next, the chapter shows how prescriptive rules, in virtue of their content-independence and pre-emptiveness, can defeat the incompatibility thesis. This is a preliminary treatment of the solution to the puzzle of rule-guidance, which is the second-prong of the thesis; it is also taken up in the subsequent chapter. In this sense, the argument against the incompatibility thesis spans both this and the next chapter, which is a result of the complex features of the puzzle and its solution.

Chapter Five—"A Legitimate Solution"—provides the ultimate solution to the puzzle of rule-following for those rules to which it applies. The strategy employed here is that of gathering the preceding analysis and argumentation into a conception of legitimate authority capable of buttressing the previous points made about prescriptive rules. The justification of rule-following is offered through Raz's service conception of authority. Firstly, the chapter presents Raz's theory by laying down its fundamental components. Secondly, the chapter reconstructs the main elements presented by way of an example which can aid in elucidating how the theory actually works. Finally, and on the basis of the preceding, the chapter argues for and explicates how the puzzle of rule-following fails for prescriptive rules.

The sixth chapter—"The Service Conception Qualified"—concludes this work by pointing out some of the limitations attending the service conception itself. With the solution to the puzzle of rule-following firmly in place this chapter can now step back to examine grounds for refining Raz's theory. Some of the theory's claims can be clarified and some possible avenues for qualification can be proposed. In so doing, the chapter focuses on one feature of the service conception—its knowability condition. The seeds of doubt regarding the feasibility that the

condition of knowability can be satisfied are planted here. Nonetheless, any adjustments to the service conception considered are far from putting into question the solution to the puzzle of rule-guidance. On the contrary, they can improve our answer by strengthening and clarifying some of its elements.

A final mention should be made about terminology used throughout this work. Not only do such bits of language as 'prescriptive rules,' 'rule-following,' and so forth get implemented differently by various scholars, but in this work I also sometimes rely on and apply shades of meaning that do not always sync with other theorists. The reader will see that *when* and *if* terms are used in less than uniform ways such shifts in usage are duly noted. As such, this work relies on the language of rules developed by Joseph Raz, H.L.A. Hart, Frederick Schauer and others, but departures are identified and explained.

## **Part One: Types of Rules**

## *Chapter 1: Constitutive and Regulative Rules*

### **Introduction**

Constitutive rules constitute and regulative rules regulate. This assertion seems uncontroversial if based solely on the qualifiers 'constitutive' and 'regulative' that are used to distinguish them. Whether there are other, non-linguistic grounds for distinguishing between the two rules has proved to be more contentious. The most pronounced disagreement about these rules is embodied by the opposing positions of John Searle and Joseph Raz. Whereas Searle claims that constitutive and regulative rules represent distinct types, Raz contends that no such differentiation can be made. As this chapter will show, adopting one or the other perspective impacts the sense and use of rules.

It seems to make sense to claim that not all rules are of the same sort, but it is not evident how and which divisions can be made. The dispute between Raz and Searle aids in the revelation of one method for distinguishing between rules. This method centers on the analysis of how agents use rules, how rules guide practical reasoning, and ultimately how rule-usage serves as a basis for distinguishing between rules. Such a method helps to dispel any deep skepticism about rule differentiation generally. It also marks, if broadly, the resolution to the disagreement between Raz and Searle. The immediate aim of the chapter is to provide a way out of the controversy surrounding that dispute. This firstly requires critical analysis of their opposing perspectives.

My position acknowledges the strengths in some of the claims of each camp, not all of which are mutually exclusive. Nevertheless, this chapter stresses that Searle's distinction between constitutive and regulative rules is tenable, but only if certain clarifications and

refinements are made to it. This, then, does not mean that Raz's position is fully refuted, nor Searle's claims fully embraced. My claim is that the criterion by which the differentiation between constitutive and regulative rules should be made is not clearly explicated by Searle. I argue that the distinction is best conceived in terms of the different kinds of relationships that the rules establish relative to their subjects and the actions that they reference. These relationships manifest themselves in: (1) the capacity for guidance of the rules (i.e. whether or not the rules constitute reasons for action for subjects); and, (2) the discrete aims of the rules.

The outcome of this approach is not only the presentation of a particular debate between Raz and Searle, but also the development of a more general framework for identifying how rules work, how they differ from each other, and on what grounds differentiations can be made. As will be seen, this general method extends into the investigation of other rules throughout the first part of this work. This chapter is structured such that the first section highlights the respective claims of Searle and Raz. The second section and its subparts reconsider and resolve their dispute by adjusting aspects of Searle's claims so they can better meet Raz's challenge.

### **1. Constitutive and Regulative Rules: Searle's Distinction and Raz's Challenge**

The distinction between constitutive and regulative rules is most famously associated with John Searle. However, other philosophers have also distinguished between these rules—most prominently H.L.A. Hart (1961), John Rawls (1955), G.C.J. Midgley (1959), Goldman (1970), Warnock (1971) and Max Black (1962). As described by Searle in his book, *Speech acts: An Essay in the Philosophy of Language*, constitutive rules “create or define new types of behavior” (Searle 1969, p.33). They create the very possibility of engaging in certain kinds of conduct (Ibid). For Searle the formal way of thinking about constitutive rules is the following: “X counts as Y in context C” (Ibid, p.35). On the other hand, regulative rules regulate antecedently or

independently existing forms of behavior (Ibid, p.33). They require or permit, certain acts and characteristically take the form of: “Do X” or “If C do X” (Ibid).

According to Searle constitutive rules define or create new forms of behavior (Ibid). Prototypical examples of such rules are rules of games such as: castling in chess, dunking in basketball, hitting a home run in baseball, performing a corner-kick in soccer, and so on. To use one of these examples in Searle’s formula for constitutive rules, we would say that: transferring the king from its original square two squares towards the rook on its original square, then transferring the rook to the square the king has just crossed (X) counts as castling (Y) in a game of chess (C). Notice that while the same conduct may be displayed, for instance someone can move the rook three squares to the left and the king two squares to the right, the conduct will only constitute as castling in a game of chess. Even from this simple example it is easy to notice that a specific constitutive rule may, and often does, depend on other constitutive rules in a system of rules (e.g., the rule that says: the piece that has the shape of a tower with battlements counts as a ‘rook’). Still, what is important for the present purpose is that the rule of castling in chess defines and constitutes castling. So, absent the rules of chess and the rule of castling itself one could never, ever castle.

Regulative rules regulate antecedently or independently existing forms of behavior—that is, behavior that exists without reference to the rule (Searle 1969, p.33; Smith 2003, p.9). As a consequence, the behavior is logically prior to the rule that regulates it (Schauer 1992, p.6; Rawls 1955). Eating etiquette is an example of the sort of behavior that is prior to regulating rules. Consider the following example of such etiquette: "When cutting food, hold the knife in the right hand" (Searle 1969, p.34). Bear in mind that this is a regulative rule because eating itself exists independently of the rules of polite table behavior (Smith 2003, p.9). We may consider yet another example of a regulative rule: “Maximum speed on the highway for all motor vehicles is

90 kilometers per hour”. The possibility of doing 90 kilometers per hour on the highway is not something that the speed rule creates. The speed rule simply regulates that conduct.

In contrast to Searle, Joseph Raz holds that every constitutive rule also has a regulative side<sup>3</sup>. Further, he claims that what follows logically from Searle’s argument is that *all* rules are both regulative and constitutive (Raz 1975, p.109). Raz’s argument starts with the following comparison between two pairs of act descriptions:

	<b>A</b>		<b>B</b>
<b>1</b>	'Giving £50 to Mr. Jones'	And	'paying income tax'
<b>2</b>	'Saying: "I promise"'	And	'promising'

In the above table, column A (1A and 2A) describes actions that do not reference rules. Column B (1B and 2B) describes actions through explicit reference to rules. Raz claims that on a straightforward reading of Searle the fact that the two pairs of act descriptions are available demonstrates that both the law imposing income tax (manifest in 1A and 1B) and the rule about promising (manifest in 2A and 2B) are each both a regulative and a constitutive rule (Raz 1975, p.108-9). Further, Raz claims that there is nothing in Searle's explanations to suggest that the same rule cannot be both regulative and constitutive; there is no claim of exclusivity (Ibid.).

In Raz’s example, one can pay one's income tax by giving Mr. Jones, who is the HM Inspector of Taxes, £50 (Ibid.). Also, one can promise (for instance one can promise to pay £50 to Mr. Jones) by saying 'I promise' (in response to Mr. Jones's request to promise to pay him £50)

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<sup>3</sup> Contrast Raz’s position with Bulygin Eugenio’s (1992) in “On norms of competence”. In his paper Bulygin claims that: “Searle's remark that constitutive rules also regulate the activities constituted by them is misleading. One and the same rule cannot be a conceptual rule (a definition) and a norm of conduct (a prescription in von Wright's sense) at the same time. But if we speak of rules of a game, then it is certainly true that there may be in one and the same game not only constitutive rules (defining the game), but also regulative rules. (...) I think therefore that Searle is mistaken when he says that constitutive rules also regulate certain actions. The two categories are logically disjunctive and though among the rules of a game we may find many different types of rules, no rule can at the same time belong to more than one type.” (212-13)

(Raz 1975, p.109). Columns 1A and 2A describe actions that would accord with rules regardless of whether such rules were made explicit (Ibid.). This, in conformity with Searle's account, makes the rules regulative (Ibid.). 1B and 2B describe actions in accordance with the rules in a way which could not be given if there were no such rules (Ibid.). It follows that the rules are constitutive as well. Given that for every rule a similar pair of act descriptions is available, then all rules are both constitutive and regulative (Ibid.).

However, Searle argues that "Regulative rules regulate a pre-existing activity, an activity whose existence is logically independent of the rules. Constitutive rules constitute . . . an activity the existence of which is logically dependent on the rules" (1969, p.34). He illustrates this with the help of the following example: It is possible, he says, for twenty-two men to go through all the physical movements as two teams playing football would go through, but if there were no rules of football, then the twenty-two men would not be playing football (Ibid.). Raz answers to this by making use of the distinction between a normative act description and a natural act description (Raz 1975, p.110).

Normative act descriptions are those for which a complete explanation must include reference to a rule (Raz, *ibid*). By contrast, descriptions for natural acts may be given without reference to a rule (Ibid.). Following an example from the above table, going through the motions of paying income tax (1A) is not paying income tax unless an income tax law exists (Ibid.). This, then, requires a normative act description. However, that does not mean that the rule itself (the tax law) is constitutive. In Raz's conception, while a difference between acts is possible, it does not need to correspond to a difference between types of rules (Ibid.). Further, as Raz says, "every rule regulates action which can be described without presupposing the existence of that rule (though sometimes it regulates only actions done with the intention of invoking the

rule). Similarly every rule “creates” actions which can be described only in ways which presuppose its existence” (Ibid.).

## **2. The Rules’ Capacity for Guidance**

### **2.1. Rules as Reasons for Action**

Searle’s distinction between constitutive and regulative rules has intuitive appeal, even if Raz (rightly) believes it to be misleading. Others have leveled criticisms similar to Raz’s.<sup>4</sup> Nonetheless, distinguishing between different types of rules is important. It may simply be the case, as I suggest, that Searle does not clearly explicate the criterion by which the differentiation between constitutive and regulative rules can be made.

We would do well to return to Searle’s original description in order to source the limitation in his distinction:

Where the rule is purely regulative, behavior which is in accordance with the rule could be given the same description or specification (the same answer to the question "What did he do?") whether or not the rule existed, provided the description or specification makes no explicit reference to the rule. But where the rule (or system of rules) is constitutive, behavior which is in accordance with the rule can receive specifications or descriptions which it could not receive if the rule or rules did not exist. (Searle 1969, p.35)

In order to illuminate the distinction, Searle relies, at least in part, on that which follows from having regulative and constitutive rules (i.e. certain otherwise unavailable kinds of act-descriptions in the case of constitutive rules). As Raz indicates, the problem with that approach is that both rules can bear descriptions according to which they are at the same time regulative and constitutive. In order to make the distinction acute one would need to rely on something else; my claim is that the fact that constitutive and regulative rules stand in different kinds of relationships

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<sup>4</sup> Cf. Warnock (1971); Giddens (1984); Ruben (1997).

relative to their subjects and the actions that they reference can keep this distinction alive while answering to and acknowledging some of Raz's criticisms. The crucial distinction between constitutive and regulative rules is, then, the difference between these relationships: (1) a rule's capacity for guidance; and, (2) the aim of a rule.

Before setting off with the analysis, some more preliminary definitions are in order. First, a rule's capacity for guidance depends on whether the existence of the rule is a normative reason for action for subjects of that rule. Second, for the sake of simplicity, I will be more likely to refer to rules as being reasons for actions when I really mean that the existence of rules is a normative reason for actions.<sup>5</sup> Finally, I take normative reasons for actions to be considerations that count in favor of or against performing a specific action.<sup>6</sup>

The distinction between rule types becomes readily apparent when Searle's formal characterization of constitutive rules—'X counts as Y in C'—is compared with the formal characterization of regulative rules—'If C do X'. In both types of rules, the variable X stands for the action to be performed.<sup>7</sup> However, in constitutive rules X *describes* or *specifies* an action, while in regulative rules X represents an action that is demanded (i.e., do X). Raz is correct in that there are two distinct types of acts that Searle's rules regard, but the rules themselves stand in different kinds of relationships vis-à-vis those acts, which makes them distinguishable.

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<sup>5</sup> Raz also makes this point.

<sup>6</sup> 'Reasons for action' is a fiercely debated topic in the philosophical literature, but I take the definition provided here as generally unproblematic. For more on this see: Anscombe, G. E. M. (1963). *Intention*. 2nd Edition. Ithaca: Cornell University Press; Dancy, J. (2000). *Practical Reality*. New York: Oxford University Press; Darwall, S. (1983). *Impartial Reason*. Ithaca: Cornell University Press; Davidson, D. (1963). "Actions, Reasons, and Causes." Reprinted in (1980). *Essays on Actions and Events*. Oxford: Clarendon Press, 3-19; Hampton, J. (1998). *The Authority of Reason*. Cambridge: Cambridge University Press; Heuer, U. (2004). "Reasons for Action and Desires." *Philosophical Studies*, 121, 43-63; Parfit D. (2001). "Rationality and Reasons." In Dan Egonsson et al. (eds.), *Exploring Practical Philosophy*. Burlington, VT: Ashgate, 17-39; Raz J. (1990). *Practical Reason and Norms*. London: Hutchinson & Princeton: University Press (reprint); Raz, J. (1999). *Engaging Reason: On the Theory of Value and Action*. New York: Oxford; Scanlon, T. M. (1998). *What We Owe to Each Other*. Cambridge MA: Harvard University Press; Sobel, D. (2001). "Subjective Accounts of Reasons for Action." *Ethics*, 111, 461-92.; Sobel, D. (2001). "Explanation, Internalism, and Reasons for Action." *Social Philosophy & Policy*, 18, 218-35; Williams, B. (1979). "Internal and External Reasons." Reprinted in (1981) *Moral Luck*. Cambridge: Cambridge University Press, 101-13; Velleman, J. D. (1996). "The Possibility of Practical Reason." *Ethics*, 106, 694-726; et al.

<sup>7</sup> In the case of constitutive rules, 'X' need not be an action like in the rule: 'This paper counts as money', but in the case of regulative rules 'do X' is, necessarily, an action.

However, the preceding should not be taken to mean a suggestion that constitutive rules are somehow descriptive rules. There is a degree of false passivity in descriptive rules which is simply not present in the case of constitutive rules. The latter does much more than describe how things are in the world (although arguably descriptive rules do more as well).

Consider the constitutive rule of chess called castling: “This is a move of the king and either rook of the same color along the player’s first rank, counting as a single move of the king and executed as follows: the king is transferred from its original square two squares towards the rook on its original square, then that rook is transferred to the square the king has just crossed.” (Article 3.8 in FIDE Laws of Chess 2008), and one so-called regulative rule, a speeding rule that stipulates: “Maximum speed on the highway for all motor vehicles is 90 kilometers per hour”. Looking at how these two rules stand in relation to the action that they reference, it is apparent that the rule of castling is not prescribing castling, meaning that it is not recommending, commanding, or claiming that one ought to castle in a game of chess. But, neither does the content of the speeding rule (as it is formulated above, although it could stand for a clearer normative formulation) include anything like ‘one ought not to drive faster than 90 kilometers per hour on the highway’. However, it is clear that the speeding rule is setting the speed limit for motor vehicles on the highway. This means that, in effect, the rule states that all drivers should keep within this limit. The rule makes clear that one ought not to drive faster than 90 km/hour.<sup>8</sup>

There are multiple ways in which one can both violate and abide by the speeding rule above. Going 50 km/hour is in accordance with the rule. Going 20, going 40, going 89 km/hour and everything in between 0 and 90 km/hour are all in accordance with the speeding rule. By contrast, there is only one precise way (or two) in which a player can castle. The rule that specifies what amounts to speeding, i.e. going over 90 km/hour, puts up a barrier, raises an

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<sup>8</sup> The rule, as it is formulated, allows for different interpretations which can give rise to exceptions to the claim.

obstacle on the range of available legal options of driving on the highway. But the rule that specifies what amounts to castling in chess, does not reign in, does not regulate something that beforehand people were free to do. The rule makes it the case that castling is possible because the possibility of castling (now) exists according to the rule of castling. Further, the rule specifies the exact way in which castling is to be done. However, what the rule does not do is say that a player ought to castle. Note that the rule of castling creates the possibility that players, if they choose to, can castle. Does this mean that the rule is instead permissive, i.e. the rule allows players to castle? I believe such a description would be inadequate for it would be pointless to permit that somebody ‘forshinkles’ when ‘forshinkling’ did not exist. So, the rule of castling creates ‘castling’, thus creating the possibility of castling.

When a subject is faced with a constitutive rule, the performance of actions referenced by the rule depends on the subject’s prior reasons for performing those actions. In this sense, if a subject has prior reasons to castle in a game of chess then she will use the rule of castling in order to castle. However, the rule *qua* rule does not provide the subject with a reason for action (i.e. a normative reason in favor of performing the actions referenced by the rules). The castling rule does not give a subject a new reason to castle, it merely states how the subject would go about castling if she decided to castle. On the other hand, after a decision to castle is made it is no longer optional for the subject to choose how she will castle. The rule governing how to castle is antecedently defined. The same reasoning applies to constitutive rules that are outside the prototypical examples from games. Classic models of constitutive rules from law such as the law about making contracts or wills are not reasons for action for subjects, meaning that they are not normative reasons in favor of making neither wills nor contracts. These legal rules are similar to their relatives from the game examples in that what they do is create the possibility that one can make a contract or a will if they choose to do so.

When a subject is faced with a regulative rule like the speeding law, the performance of actions that are in conformity with the rule is not conditional on the subject's prior reasons to perform the actions, or her evaluation of the content of the rule<sup>9</sup>. Irrespective of the subject's reasons, there is now a normative reason to perform the actions that the regulative rule specifies. This reason is the fact of the existence of the rule demanding the action. This does not mean that a subject has an absolute reason for action as there may be reasons which can defeat the rule. Nevertheless, a subject now has a normative reason where there previously may not have been one. In the speeding example there is a spectrum of available options for subjects, but of course this need not be the case. A regulative rule that says: "Club meetings are held each Friday at 10 a.m." does not allow for a multitude of available actions that conform to the rule.

Joseph Raz's examples of promising and paying income tax are vulnerable to an objection that follows from the above analysis. A law demanding that subjects pay income taxes is a reason for them to pay income tax. Paying the HM inspector fifty Pounds and paying income tax may describe the same action, but the rule about income taxes that stipulates that taxes ought to be paid stands in a peculiar relationship vis-à-vis its subjects. This relationship consists in the fact that the rule itself is a reason for action for subjects, a reason to do as the rule stipulates. On the other hand, the rule about promising is not in itself a reason to start making promises. Raz describes two actions: Saying: "I promise" and Promising. Both of these may be accurate descriptions of the same conduct but there is no relationship between the rule about promises (let's say the rule that says promises are made by saying: "I promise") and its subjects such that the rule is itself a reason for action, a reason why subjects ought to make promises. On the other hand, a rule saying that "promises ought to be kept" constitutes a normative reason for subjects to keep their promises. This is because the latter rule is regulative.

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<sup>9</sup> This is the content-independence characteristic of prescriptive rules. More will be said on this issue at a later time in this work.

One might be tempted to say that the regulative rule “promises ought to be kept” is in fact constitutive of promising. It seems that without such a rule promising does not mean what it typically does (i.e., declaring to undertake a commitment). I don’t think this is accurate. Saying “I promise” constitutes the formal way in which somebody makes a promise, but the normativity of the promise—captured by the rule “promises ought to be kept”—is subject to further conditions. For instance, promises ought to be kept when they are not coerced; when that which is promised is not impossible; or, most importantly, when a promise has actually been made. This means that the regulative rule can only show its force once a promise has been made, and the promise is not annulled by disqualifying considerations. Under these and further conditions, the rule about keeping promises will be in force and will guide that which happens after or once the act of promising is completed. This shows the rule to be regulative since it regulates a previously existing act.

Constitutive rules such as the rules of chess cannot be violated in the same way in which one can violate regulative rules like “promises ought to be kept”. As Searle writes, “it is not easy to see how one could even violate the rule as to what constitutes check mate in chess, or touchdown in football” (1969, p.41). If a player were not to perform the correct actions while playing chess (e.g., the player chose to castle with pieces other than the rook and king) it would not be the case that the castling rule was violated or castling was ill-performed. It would simply be the case that the player, who did not perform the actions in the right way, did not castle. Imagine that a player moved their queen and king attempting to castle. This would not be a violation of the rule of castling; it would, quite simply, not be castling. On the other hand, if somebody made a valid promise which they did not honor, then this would constitute a violation of the rule about keeping promises precisely because a promise had been made.

The castling rule creates the act of castling. “X counts as Y in C” is transposed as: “moving the king two squares towards the rook on its original square and the rook to the square the king has just crossed.” That is, moving the pieces in a certain way (X) counts as castling (Y) in a game of chess (C). Keeping with the formula, if a player moves some other pieces, other than the rook and king, then no X is performed. The rule that says X counts as Y in C is, however, still in place. If no X is performed then no Y is created. Of course, if X had been performed then Y would have been created. Since X was not performed, but instead non-X, which does not count for anything unless otherwise specified, then Y was not created. This effectively means that the rule of castling that says that X (“moving the king two squares towards the rook . . .”) becomes Y (castling) in C (chess) cannot be violated, as doing something which is not X is not a violation of the rule. The rule is inviolable.

The inviolability of constitutive rules is due to their almost tautological nature (Searle 1969, p.34). Furthermore, it is due to the fact that constitutive rules are not reasons for action for subjects. If a rule is not a reason for action for subjects then the rule is not the reason why a subject performs or does not perform an action. The performance or non-performance of the action must be due to other reasons. If a constitutive rule is not a reason to act or refrain from acting, then it never enters the balance of reasons of agents. As such, it neither can win nor lose. This clearly contrasts with the inherent violability of regulative rules.

Regulative rules, of which state laws are prototypical examples, clearly stipulate which actions ought to be performed by subjects. Further, the reasons for performing the actions are the rules themselves, as opposed to their content. A rule that claims it should prevail against other reasons can be violated precisely because it competes against other reasons. If the rule is defeated by some weightier reason then the rule will be violated. This cannot happen to a constitutive rule because the rule is not a normative reason for action.

One more clarification is in order. It should be made clear that constitutive rules may refer to two kinds of acts, to which there correspond different kinds of relations to reasons for action. However, the rule that says “X counts as Y in C” is neither a reason for Y-ing nor for X-ing. We have seen before that the rule cannot be said to be a reason to perform the Y-part of the rule. As to the X-part, if prior reasons to Y exist, then action X is necessary for Y-ing. The fact that X *must* be performed is conditional on a subject wanting to bring about Y. Furthermore, the fact that Y is performed in a certain way, by X-ing, is not a reason to X, it is the only way in which to Y. So, having reasons to Y and intending to Y does not result in a normative reason for X-ing. This is because the rule does not favor performing action X. It states the only way in which one can Y, where X-ing becomes definitional. An agent *must* perform the action referenced by the rule as there are no alternatives to it<sup>10</sup>.

It is tempting to take constitutive rules to be a sort that provide reasons for actions<sup>11</sup>. To use an example, if European football is played with two teams each having eleven players then it seems that, conditional on subjects wanting to play football, subjects will have a reason, which is provided by the constitutive rule regarding the way in which football is played, to form two teams each having eleven players. But, this would be an inaccurate depiction of the constitutive rule of football. The constitutive rule is neither a reason to play football nor a reason to form two teams in order to play football. Forming two teams is simply the only way in which football is played as it is definitional of the sport.

The distinct capacity for guidance of constitutive and regulative rules is an important point of differentiation between them. I have addressed the rules’ capacity for guidance in terms of the existence of the rules providing or not providing reasons for action for subjects. It has been

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<sup>10</sup> For an insightful discussion of the distinction between ‘must’ and ‘ought’ reasons see: Kramer, M. (1999). “Requirements, reasons, and Raz: Legal positivism and legal duties.” *Ethics* 109 (2), 375-407.

<sup>11</sup> This temptation proves too strong for Flathman (1976) who argues, contrary to the above, that constitutive rules are reasons for action (p.76).

shown that both types of rules regard action, but they regard it in different ways. Regulative rules demand that a certain action be performed. As such, they are reasons for action that face other reasons in favor of or against an action on the balance of reasons of an agent. This makes the rules violable as they stand to lose against other reasons. In turn, constitutive rules specify what an agent must do in order to bring something else into existence. As such, they are not considerations in favor of or against that which they create (Y), and they are not considerations in favor of or against acts that they reference or specify (X). Constitutive rules are therefore inviolable as they do not face reasons that might stand against them on the balance of reasons of agents. This is because they are not themselves reasons for action. In this way, the guiding capacity of constitutive rules is presented as a highly specialized function<sup>12</sup>.

## **2.2. The Aims of the Rules**

We have not yet directly addressed all of Raz's contentions against the distinction between constitutive and regulative rules. The challenge is to show how regulative rules can constitute and regulate; how constitutive rules can do the same; and, how these rule types remain distinguishable in spite of such similarities. As detailed above, the distinction survives because regulative rules are reasons for action for subjects, while constitutive ones are not. Their distinctiveness, then, partly arises from their respective capacities to provide reasons.

Raz's criticism is manifold, and the above grounds for the distinction do not address all of its aspects. There is a sense in which the regulative rule of speeding creates actions that could exist only by reference to the rule. That is, speeding on the highway is an action that can be explained only by making reference to the rule that establishes the maximum speed limit on the highway for motor vehicles. This underlies Raz's position that all rules are both regulative and

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<sup>12</sup> Again, the idea is that constitutive rules do not guide agents in the usual way by providing standard normative reasons for action.

constitutive; they give rise to new forms of behavior *and* regulate behavior. If correct, this Razian claim of the dual identity of the rules would make Searle's distinction unfeasible. There is another ground on which the distinction stands; namely, the distinguishability of the aims and consequences of the rules, and the respective categorizations of rules in accordance with these criteria.

The aim of the speeding rule is not to create the offence of speeding, it is to regulate driving. It is true the rule against travelling more than 90 km/hour on highways makes such actions into speeding offences. This is a new form of behavior, but it would be a mistake to conclude that creating a new kind of behavior is the rule's aim. It is incidental to the rule that speeding as offence is created. The offence aims to regulate and, in this case, limit driving speeds. To claim otherwise would be to miss the point of the rule.

In contrast to the above, the aim of a constitutive rule is to create a new form of action. Remember that the point of the rule of castling is to create the possibility of castling. Constitutive rules will often specify how their aims are to be achieved; this can be regarded as regulative only in a special and limited sense. The special regulative aspect of constitutive rules is limited to achieving the aim of the rule. If the aim of the (constitutive) castling rule is to create or provide for an action known as castling, then any regulative component it has will be restricted to a 'how-to' of achieving that aim. In this way, constitutive rules provide indications for the things that they aim to create.

Regulative aspects of constitutive rules do not provide subjects with reasons for or against performing actions that are referenced by the rules. Rather, the actions define the new form of behavior that the rules create. A regulative rule, like the one about speeding, regulates the activity of driving not by stipulating the 'how-to' of regulating driving, but by normatively specifying the desired conduct on the highway. One consequence of the speeding rule is the

creation of speeding as an offense. The aim of the rule is not the creation of the offence, but the regulation of driving conduct on the highway. By contrast, the aim of the rule of castling is to create the possibility that players *can* castle (also distinct from ‘may castle’ that suggests permission) in a game of chess.

One could object to the above interpretation by asserting that the aim of a legal rule, like the speeding rule, can be described as making a specific undesired act count as illegal. In fact, this seems to be an appropriate description of some laws. For instance, one can describe a maximum speed law for all motor vehicles on the highway as making driving above the established limit illegal. So, it can be argued that the aim of the law is to make certain acts count as illegal, a trademark of constitutive rules. If this is so, then the distinction between rule types in terms of aims and consequences above seems pacified. I think, however, that the discrete aims of the rules provide an appropriate and meaningful ground for distinction.

The description of the aim of a legal rule as being that of making a particular act an offence is tenable only if one does not probe any deeper into the matter. Making something into an offence cannot be the aim of a law, lest that law be at best arbitrary and at worst nonsensical. Behind making something into an offence (e.g. rape, gambling, speeding, etc.) are reasons that justify the establishment of that offence. (Whether they are good reasons is quite another matter). Behind the rule that creates the offence of driving above 90 km/hour is its aim. It seems plausible for the aim to be increasing safety on the road, but there may be others. On the other hand, in the case of constitutive rules there is no further object beyond the creation of a new form of behavior. In general, constitutive rules do not require further justifications. For instance, there is no further reason why we ought to play chess with two players as opposed to three other than that this is the way that chess is played.

The source of confusion lies in the fact that regulative rules may be constitutive of new forms of behavior as a consequence of their existence, but not as their aim. Furthermore, constitutive rules while clearly aiming to give rise to new forms of behavior may be limitedly regulative as a consequence of their existence. This is because in many instances the way in which constitution occurs will require (regulative) steps. Raz picks on this confusion and draws the conclusion that there is no way of distinguishing between these types of rules. I have tried to show that with these further refinements in place, capacity for guidance and discrete aims, the distinction between constitutive and regulative rules is feasible.

## **Conclusion**

As the dispute between John Searle and Joseph Raz illustrates, determining which types of rules a subject faces is not a straightforward or simple matter. Although John Searle's distinction between constitutive and regulative suffered from limited explication of core features of rule types, it nevertheless remains defensible on grounds that the rules function differently with respect to the guidance they provide. Rule guidance very roughly amounts to whether rules in and of themselves provide reasons for action. Such provision of reasons represents a core ground for distinguishing between regulative and constitutive rules.

Rule guidance is only one component used to differentiate the rules. The structure of the aims and consequences of the respective rule types prove crucial to distinguishing between them. More obviously, these differences illustrate that rules can be separated according to their unique, non-transitive traits. This undermines any general push against distinguishing rules from each other, but it also highlights a basic propriety of John Searle's position. Although Joseph Raz offers arguments in favor of the indistinguishability of regulative and constitutive rules, his

position ultimately misapprehends the narrow scope and speciality of constitutive rules' regulative capacities.

It is worth recapitulating in greater detail the differences noted. Again, regulative rules are reasons for action for subjects (i.e. normative considerations in favor of or against performing the actions referenced by the rules). Regulative rules claim that some action should be performed by a subject. Their capacity for guidance is the reason why subjects can follow or violate them. In contrast, constitutive rules do not claim that an action ought to be performed by a subject. In turn, they specify how it is that a subject can perform certain actions. This means that they are not normative reasons for action for subjects. Consequently, constitutive rules are inviolable. The aims of the two types of rules are also distinct. In the case of constitutive rules the aim is that of creating the possibility of engaging in new forms of behavior for subjects through a transformation of their acts. On the other hand, in the case of regulative rules the aim is that of regulating the behavior of subjects through introducing new normative reasons for action in the balance of reasons.

Analysis of the dispute between Searle and Raz also advances a more general aim; namely, the initial development of a framework for distinguishing between rules. The key point here is that according to traits such as usage and aims, rules can be distinguished and categorized. This represents an approach that continues throughout the first part of this work, but also feeds into its central argument. A central argument that concerns not just rules, but also whether subjects should abide by them. Raz and Searle's disagreement about constitutive and regulative rules not only helps in seeing how rules can matter to subjects and how they are used, but also in identifying distinctions that will greatly impact later arguments. For now, it might be enough to say that however much constitutive and regulative rules might appear to be the same, there are clear reasons to take Searle's position as the ruling one.

## *Chapter 2: Descriptive Rules*

### **Introduction**

Constitutive and regulative rules guide agents in specific ways, but they are not the only types of rules worthy of consideration. The guiding force of rules has, so far, proven fertile ground for distinguishing between various rule types and this focus will be extended to the following discussion of descriptive rules. Identifying the normativity (or lack thereof) of descriptive rules will help to provide a clearer view of their meaning, use and role. Provisionally, descriptive rules can be defined as rules that state an empirical regularity or a generalization (Von Wright 1963; Schauer 1991, p.1). The standard conception holds that this rule type is used to reflect and describe the world rather than apply pressure to it (Schauer, p.2).

It is perhaps striking that descriptive rules appear to lack guiding power if only because normativity seems intimately linked to the concept of rules itself. Nonetheless, determining whether in all cases descriptive rules are non-normative requires both deeper analysis and comprehensive accounting of the full range of their traits and applications. As such, the first aim of the following chapter is to define descriptive rules in a more comprehensive manner. Not only will this help to broaden the conceptual boundaries of rules treated within this work, but it will also serve as the basis for an examination of the relationships between descriptive rules and normativity. As will be shown with greater refinement, descriptive rules impact the world in a different way than constitutive, regulative, or prescriptive rules. While guiding force is not a constant feature of descriptive rules, it can be a consequence of their existence. In other words, under certain circumstances descriptive rules can figure into the balance of reasons of agents in a limited way.

One desired outcome of the analysis below is a more complete view of what descriptive rules are and how they are used. This helps frame the domain of rules generally. Another consequence is that the presentation of normativity and its relationship to rules is deepened. The structure of the chapter is as follows. Section one contends with the definition and analysis of descriptive rules. In this, it not only reconstructs the classic interpretation of these rules, but also examines the contrasts between descriptive rules and other types. Section two narrows focus to the relationships between normativity and descriptive rules. It addresses these through the extensive use and development of a hypothetical, which helps to draw out the ways in which descriptive rules can enter into an agent's balance of reason. Section three concludes this work.

### **1. Exploring the Contours of Description**

Descriptive rules can be provisionally defined as rules that state an empirical regularity or a generalization (Schauer 1991, p.1). They are often contrasted with prescriptive rules. Whereas descriptive rules state how the world is, prescriptive rules state how the world ought to be. In that, descriptive rules seem to lack any kind of normativity; they simply mirror or reflect a state of affairs (Ibid, p.2). The latter statement may prove less stark by the end of this chapter, but for now focusing on the archetypal usage of descriptive rules should clarify this rule type and distinguish it from the general array of rules.

Different statements can be categorized as descriptive rules and still accord with the above provisional definition. Laws of nature, logic, and mathematics all fit under the rubric, and so do habits, generalizations or stereotypes. Some examples of the first sort are Newton's law of gravitation; 'planets within this solar system follow elliptical trajectories'; Law of Large Numbers; and,  $y = mx+b$ .<sup>13</sup> Representative usages of the latter sort are: "As a rule, Mexican food

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<sup>13</sup>For more on laws of nature see: Armstrong, D.M. (1983). *What is a Law of Nature?*. Cambridge: Cambridge University Press; Cartwright, N. (1983). *How the Laws of Physics Lie*. Oxford: Oxford University Press; Dretske, F.

is spicy"; Paul smokes two packs of cigarettes a day; and, "As a rule, it snows in December in Budapest" (Ibid). The distinctive trait of all descriptive rules is their reflective or mirroring capacity of regularities. As such, the empirical repetition described by these rules falls on a continuum that comfortably includes social and personal practices, as well as universal laws of mathematics.

The above can be expanded in order to better isolate the general characteristics constitutive of descriptive rules. Descriptive rules display the following general traits: (1) they are empirically verifiable; and, (2) they are either true or false (von Wright 1958, p.12). These two substantive traits stand to unify all descriptive rules. However, some descriptive rules do not have the character of being true in perpetuity. The truth stated by a rule of logic is unvarying or constant. This compares with a rule about personal or social habits, which might exhibit a higher degree of changeability. Furthermore, the necessary truth of certain laws contrasts with the contingent truth of others (Ibid, p.15). Thus, although descriptive rules can stand united in principle by displaying the two characteristics above important differences among them remain.

The two traits of descriptive rules listed can be sharpened through contrast with some other rule types. While the truth value of descriptive rules functions as a means of determining their worth or utility for a user, regulative and (the sub-type) prescriptive rules depend on

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(1977). "Laws of Nature." *Philosophy of Science*, 44, 248–268; Earman, J. (1978). "The Universality of Laws." *Philosophy of Science* 45, 173–181; Mumford, S. (2004). *Laws in Nature*, London: Routledge; Pietroski, P. & Rey, G. (1995). "When Other Things Aren't Equal: Saving Ceteris Paribus Laws from Vacuity." *British Journal for the Philosophy of Science* 46, 81–110; Popper, K. (1959). *The Logic of Scientific Discovery*. New York: Basic Books; Ramsey, F. (1978). *Foundations*. London: Routledge and Kegan Paul; Schiffer, S. (1991). "Ceteris Paribus Laws." *Mind* 100, 1–17; Sober, E. (1988). "Confirmation and Lawlikeness." *Philosophical Review* 97, 93–98; Strawson, G. (1989). *The Secret Connexion: Causation, Realism, and David Hume*. Oxford: Oxford University Press; Swoyer, C. (1982). "The Nature of Natural Laws." *Australasian Journal of Philosophy* 60, 203–223; Tooley, M. (1977). "The Nature of Laws." *Canadian Journal of Philosophy* 7, 667–698; — (1987). *Causation*. Oxford: Clarendon Press; van Fraassen, B. (1987). "Armstrong on Laws and Probabilities." *Australasian Journal of Philosophy* 65, 243–259; Ward, B. (2002). "Humeanism without Humean supervenience: A projectivist account of laws and possibilities." *Philosophical Studies* 107, 191–218.

justification<sup>14</sup>. To illustrate consider some examples of prescriptive rules: "Thou shalt not steal", "No vehicles in the park" or "During sleep hours you ought to keep quiet". These rules contain normative semantic content and possess normative force (Schauer 1991, p.1). They are used to guide, control, or change the behavior of agents with decision-making capacities (Ibid.). Consequently, prescriptive rules are not truth-apt, meaning that they do not possess truth-value (von Wright 1958, p.12).

In contrast, descriptive rule are typically devoid of such normative content. As descriptive statements they communicate that something "is" the case. Consequently, verifiability is the appropriate test for their (potential) continual existence, with truth and falsehood as possible results. This works in the following way. Descriptive rules capture an empirical regularity, but they neither normatively specify it nor causally determine it. Thus, the descriptive rule stating that 'the sun sets in the west and rises in the east' (quite obviously) does not control or affect the regular action itself. The rule describes the regularity and does not attempt to change, guide, or otherwise control the action, behavior or other ordering depicted therein. That which is verifiable with respect to descriptive rules, then, is the regularity that they identify, which within the bounds of the rules lacks any normatively-charged feature or function.

From the above, another trait can be identified; namely, patterns exist prior to their formalization in descriptive rule form. This matter of temporal sequence sets descriptive rules apart from the constitutive rule type. Whereas constitutive rules give rise and establish new forms of behavior, descriptive rules portray regularities that already exist. So, prior to there being a regularity a descriptive rule cannot be formulated. When the regularity ceases the rule should

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<sup>14</sup> Prescriptive rules are properly differentiated from regulative ones in the next chapter. In a nutshell, I take prescriptive rules to be a sub-type of the larger regulative category. The difference is that prescriptive rules have a clear issuing source.

be abandoned as it has no use (other than perhaps a heuristic function). Consequently, regularities captured by descriptive rules are logically prior to the rules themselves.

The apparent absence of normativity along with the truth value of descriptive rules results in their inviolability. Since a descriptive rule is either true or false, then any deviation from its content is either an exception to the rule or proof that the rule is mistaken. As non-normative statements, descriptive rules do not benefit from the possibility of contravention. In this sense, they do not arrange a state of affairs in a manner distinct from their factual content. However, if such content proves to be erroneous or false, then their status as descriptive rules falters. Consider the sample descriptive rule that "most kittens enjoy milk." The example provides a generalization about most kittens' enjoyment of milk. Some kittens do not enjoy milk, which proves to be an exception to the rule. If exceptions are allowed by the rule's formulation then these do not, on their own, jeopardize its truthfulness.

Without the provision for exceptions, any rule so formulated can be falsified by counter-examples or verification demonstrating otherwise. Take, then, the rule that "the sun revolves around the earth". This was most famously proven false. Note that regularities which are incongruous with the rule's content do not violate the rule, because the rule is not the reason for the regularity. This brings us into normative realms. It has been noted that descriptive rules do not state how things ought to be, but rather how they are. In other words, descriptive rules do not provide normative reasons for action; they lack normative force<sup>15</sup>. As such, they do not enter into the balance of reasons. Because they cannot enter into practical reasoning about what action ought to be taken they cannot be violated. This again contrasts with the case of regulative or prescriptive rules whose aim of guiding action creates myriad avenues for violation.

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<sup>15</sup> Another aspect of descriptive rules, pointing to their lack of normative force, is an absence of evaluative meaning. Descriptive rules are not evaluative in the sense that they do not point to anything good in their content, nevertheless, 'good' can be descriptive. However, the descriptive meaning of 'good' is secondary to its evaluative meaning. For a discussion of this see R.M. Hare's *The Language of Morals* (1952).

The preceding paragraphs have identified the core, common characteristics of descriptive rules. This account remains whetted to standard depictions of such rules, which come from Von Wright, Hare, as well as Schauer. In spite of the traits treated above, there remains a central issue about descriptive rules that has yet to be addressed; namely, whether their apparent lack of normative force holds in all cases. This matter motivates the next section.

## **2. Normativity and Description**

This section more thoroughly investigates the relationships between descriptive rules and normativity. As discussed above, the standard depiction of these rules shows that they do not exert normative force. However correct, descriptive rules can contribute to the creation of normative reasons for action, and potentially to the development of regulative and prescriptive rules. In this respect, a more complete picture of rules generally can acknowledge the broader developmental role that the descriptive type can play. While they mirror and formalize pre-existing regularities, they also have the potential to lead to normative attitudes because and in virtue of the rules themselves. It is the second clause of the preceding sentence that will be at issue in the following section. As such, the analysis below identifies a way in which the rules, and the regularities captured by them, can lead to and establish expectations that then engage (normative) claims about what agents ought to do (or refrain from doing).

Consider a hypothetical where agents engaged in practices that can be formulated by way of descriptive rules become grounds for normative claims about the actions and attitudes of the agents. Three friends, Kenny, Johnnie, and Rosie, meet every Sunday for a movie night. As a rule, Kenny purchases the movie tickets, Johnnie buys treats at the cinema snack bar, and Rosie buys drinks for all of them afterwards. Suppose that Kenny, Johnnie and Rosie did not explicitly

decide on or agree to the arrangement that the rule identifies<sup>16</sup>. Things started in this manner and simply continued in the same way.<sup>17</sup>

The preceding describes a regular event and set of actions for these three agents. The regularity of behavior observed is captured by way of a descriptive rule. Regarding Kenny, the descriptive rule might take the form of: "As a rule, Kenny buys movie tickets every Sunday". His behavior exhibits a regularity that has been acquired over time. This might not look as tidy as rules of mathematics, but it nevertheless qualifies as an example of a descriptive rule that reflects the friends' system for contributing to movie nights. It conforms to the standard definition already set out.

One of the ways of determining the nature of any rule is by attempting to depart from its stated content. The attempt of an agent to depart from a rule can be conscious, when the agent knows that a rule exists, or unconscious, when the agent does not know that a rule is in place. In the latter case, the agent can become aware of the rule's existence due to the resistance that she is likely to face upon attempting to act in a way that is different from the rule's stipulations. Take a departure from the rule associated with Kenny and his friends: Before going to movies with his pals, Kenny calls Rosie and asks if he should purchase the tickets. Rosie is mystified, and wonders why Kenny would ask this since he always buys the tickets. In response to his query, Rosie says: "Well, you've always been the one to buy the tickets so I assumed you had already purchased them. Is something the matter?"

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<sup>16</sup> This is an important note because had the friends decided on these matters, their decision would have counted as a personal rule.

<sup>17</sup> Questions might still linger as to whether the statement "as a rule, Kenny purchases movie tickets for his friends (...)" can be properly thought of as a descriptive rule. Notice that it conforms to the definition and conception of descriptive rules above. Again, descriptive rules are used to state an empirical regularity or generalization (Schauer 1991, p.1). The statement about Kenny and his friends describes or reflects just such an empirical regularity. That which is specific to this rule is the agent component. This is a descriptive rule that generalizes some of Kenny's actions.

One can see why Rosie may be confused in this case. Her expectation is that Kenny has already purchased the tickets—an action consistent with his past conduct—yet there is nothing in the descriptive rule itself that entails any reason for Kenny to purchase tickets. The rule does not, on its face, indicate even the more minimal claim that he should buy the tickets. Still, Kenny has *always* bought the movie tickets, and this regularity might serve to ground normative claims about his actions and their continued performance. The regularity of Kenny's actions is now taken by his friends as an indication (rightly or wrongly) that Kenny will continue to follow the same pattern. The fact of Kenny's habitual actions gives his friends a reason to believe that the pattern will persist just like it has. To be sure, this speaks of patterns generally and not of Kenny's friends in particular.

Patterns of behavior or simply repeated acts tend towards normalization, routinization, and establishment as *status quo*. Uncertainty or confusion when the *status quo* is altered or questioned, as when Kenny asked Rosie about buying tickets, indicates the potential for normative attitudes vis-à-vis descriptive rules. Rosie's normative attitude is rooted in the belief that the pattern, captured by the descriptive rule, will continue. This gives rise to expectations about Kenny's future actions on her part. Furthermore, Rosie relies on those expectations when making her own decisions and plans. It should be noted that the example is merely set up in this fashion, but the assumptions which underpin it seem reasonable.

At this point a seemingly peculiar question can be posed; namely, *should* Kenny continue to purchase movie tickets because his friends have come to rely on him doing so? The peculiarity is that thus far Kenny and his friends have merely acted with such regularity that the pattern can be formalized by a descriptive rule. Still, acting with such regularity has, per the example, spawned expectations on the part of Kenny's friends. These expectations have impacted the treatment and consideration that Rosie and Johnnie give to movie night, and the respective

fixity of the friends' roles in making it happen consistently and without problems. The question above, then, interrogates the core trait of descriptive rules—their non-normativity. It asks whether because of expectations surrounding it, the descriptive rule has come to carry normative weight or force.

Before answering the above question directly, it is necessary to address at least briefly some tangential, substantive problems. The first problem pertains to the difference between the descriptive rule and the empirical regularity it captures. On its face, it looks like the problem resolves itself as soon as the conditions for definition are remembered. The pattern reflected by the rule predates the rule, and as such it is requisite for the rule's formation. The formation of the rule as a representation of the verifiable regularity marks a difference between it and that which it formalizes. Nonetheless, formalization alone does not capture every significant aspect of the content that descriptive rules respectively reflect. Descriptive rules can, in certain cases, add to the content that they capture.

For instance, descriptive rules may add to the content that they reflect their status as rules. This may seem a bit ambiguous, but the idea behind it relies on what has already been established. If an empirical regularity is recognized as a rule then the regularity is formalized. The status as rule lends more weight to an observed or verified regularity that is now recognized as such. To see how this works, consider that in some cases people may no longer feel that it is needed to verify that a rule's content is correct. If a rule about a pattern is established then it is natural to assume that that pattern is true. This, of course, may not always be the case as some descriptive rules will capture content that is true only contingently. Nevertheless, this can explain why some descriptive rules may stay in place longer than the regularity that they seek to reflect.

To return to the example, the descriptive rule: “As a rule, Kenny buys movie tickets for his friends” states an empirical regularity in Kenny’s behavior. The rule cannot exist

independently of Kenny's actions. When normative attitudes about this descriptive rule come into the fore and result in expectations (the expectations of people with whom Kenny stands in special relationships), one could think that these expectations are not about the rule itself, but merely about its content, which reports on Kenny's actions. However, such expectations typically arise when an observed empirical regularity can be formalized by way of a descriptive rule, in other words, when the pattern has gained the status of rule.

The fact that the empirical regularity in Kenny's behavior has been recognized as a rule can give rise to reasonable expectations on the part of Kenny's friends that this regularity will persist. Both the rule and the expectations which surround it contribute to why it is that Kenny may now have a new reason to buy movie tickets for movie night. The expectations regarding Kenny's actions are based on the fact that there is a rule about his actions. In this way, due to the fact that Kenny's repeated actions in the past can be formalized by way of a descriptive rule it is possible for his friends to infer that in the future he will continue to act similarly and on this basis expect that he will do just that. The descriptive rule as detailed can in this sense be verified by observing Kenny habitual action of buying the movie tickets.

The existence of a descriptive rule and the expectations of people with whom Kenny stands in a special relationship, are apt to give Kenny a reason to go along with the pattern. Rosie and Johnnie have come to rely on their pal continuing to do as he has in the past<sup>18</sup>. They have grounds to criticize Kenny if he fails to meet their expectations. Kenny may not have realized that this would happen, but upon attempting to act differently from the descriptive rule he has encountered resistance and pressure. It is true, however, that if the expectations which rose on

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<sup>18</sup> This need not be the case. The hypothetical explores the possibility that reasonable expectations develop in order to explore relations between descriptive rules and reasons for action.

the basis of the rule were not the expectations of friends then it might be hard for Kenny to accept normative claims about him continuing his habit.<sup>19</sup>

In spite of these complications and complexities, it should be stressed that descriptive rules are not normative in themselves. They do not prescribe, allow, permit, or prohibit actions. However, when certain conditions are present (reasonable expectations, special relationships, desires, etc.), they can be the basis for or the background against which reasons for action get created. The example illustrates a case where normative attitudes developed around a descriptive rule, the special relationship between agents being such that normative reasons for action could be born.

In addition to the above, and in spite of the fact that descriptive rules cannot be reasons for action in and of themselves, this rule type can fulfill an explanatory function. Descriptive rules, such as habits, can be explanatory reasons for action for agents. What this means is that while the rules may not provide reasons that can justify action, they can sometimes explain it. Consider one illustration. The fact that Jane has a habit of smoking may explain her continuing to smoke, but it does not justify her doing so. The existence of a habit explains an action consistent with it, but, on its own, it is not a consideration in favor of it. A justifying reason would need to point to some good the action for which it is a reason would bring<sup>20</sup>.

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<sup>19</sup> One possible criticism of this position holds that the status of the rule only manages to establish that an agent has reason to predict that a pattern will be maintained (Gilbert 2006, p.193). Margaret Gilbert advances this line of critical analysis and calls it 'entitlement to predict performance' as opposed to the more expansive view above, which she titles 'entitlement to expect.' She presents an example where members of a group G may have reason to believe that other members of G will continue to do X in C in the future based on the existence of a pattern of action. So, the argument could be that each member of G has a claim on other members of G to perform X in C. Gilbert's position is that there is a big difficulty with such an argument. Gilbert writes: "From the premiss that members of G have reason to believe that..., it follows that they are 'entitled to expect' performance only in the sense that they are entitled to predict that performance will be forthcoming. Such an entitlement, however, is not in itself sufficient to ground a claim on others to their performance."(Ibid). Gilbert is right about this, but in those cases where special relationships are pre-existent, predictions can become an appropriate basis for expectations. Members of G may only be entitled to predict performance because no prior obligations exist between them which could ground criticism when they fail to conform to the prediction.

<sup>20</sup> The simplest way of distinguishing between explanatory and justifying reasons is by resorting to evaluative considerations. In a nutshell, if there is nothing that points to the good in one's explanatory reason for X-ing then it

Consequently, the role of descriptive rules remains limited as compared to other rules which factor prominently in the balance of reasons of agents. Nevertheless, these rules can help make sense of our world.

## Conclusion

The preceding firstly defined descriptive rules in line with standard accounts of this rule type. The definition and analysis provided in the first section conceptualized descriptive rules and contrasted them with other types. Descriptive rules were singularized, but also included in the variety of rules encountered by agents. The account presented descriptive rules as almost passive in their role and use. Yet, this did not undermine their relevance. Verifiability and truth-aptness were identified as core traits of this rule type. The logical priority of empirical regularities helped distinguish descriptive from constitutive rules. On the other hand, the absence of normative content helped distinguish descriptive from regulative and prescriptive rules.

Section two explored though the use of an example the relationship between descriptive rules and normative reasons for action. The lack of normativity characteristic of descriptive rules remained firmly rooted, but normative attitudes developed around and from the rules. Although descriptive rules typically depict how things are they can also play a role in how things ought to be. The limited role that this type of rule plays as either a basis for the development of normative

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does not count as a justifying reason in favor of X-ing. A normative justifying reason for action may also be explanatory, but an explanatory reason need not be normative. For much more on the distinction between explanatory and justifying reasons see: Baier, K. (1958). *The Moral Point of View*. Ithaca: Cornell University Press; Dancy, J. (2000). *Practical Reality*. Oxford: Clarendon Press; Darwall, S. (2003). "Desires, Reasons and Causes." *Philosophy and Phenomenological Research* 67, 435–443; Davidson, D. (1980). "Actions, Reasons and Causes." In *Essays on Actions and Events*, Oxford: Clarendon Press, 3–21 (First published 1963); Korsgaard, C. (1996). *The Sources of Normativity*. Cambridge: Cambridge University Press; Cf. Parfit, D. (1984). *Reasons and Persons*. Oxford: Clarendon Press; Scanlon, T.M. (1998). *What We Owe to Each Other*, Cambridge, MA: Harvard University Press; Williams, B. (1981). "Internal and External Reasons." *Moral Luck*, Cambridge University Press, 101–113; Woods, M. (1972). "Reasons for Action and Desires." In *Proceedings of the Aristotelian Society, Supplementary Volume* 46, 189–201.

reasons, or as explanatory reasons for action was identified and clarified. The next chapter will delve into the matter of prescriptive rules and their role in practical reasoning.

### *Chapter 3: Prescriptive Rules*

#### **Introduction**

The previous two chapters distinguished constitutive rules from regulative rules, and then analyzed descriptive rules. Investigation of these respective rule types focused on the way that agents use and reason with rules. The following chapter extends this general method and applies it to prescriptive rules. In contrast to the preceding chapters, emphasis on this rule type aims not simply to contribute to a more general depiction of rules, but also to a more argumentative conceptual framework. In this respect, the chapter provides grounds for objections to theorists such as Scott Shapiro and Joseph Raz. It does so primarily by beginning to identify the way in which prescriptive rules enter the balance of reasons of agents.

It is worth noting at the outset some terminological distinctions that make for clearer conceptualization of rules in this chapter. There are questions about the appropriateness of distinguishing between regulative and prescriptive rule types. To clarify, this work takes prescriptive rules to be similar to regulative rules. Again, regulative rules are typically used to control, direct, change or guide the actions of agents with decision-making capacities (Schauer 1991). The core difference between regulative and prescriptive rules is that the latter do not merely prescribe, but are also prescribed. The working definition of prescriptive rules is that they are directives issued by a presumptive authority. On the other hand, regulative rules need not be backed by an issuing authority. Consider examples of regulative rules such as rules of etiquette or polite table behavior. These rules do not have a clear source, and it would be a stretch to point to an issuing authority. Examples of prescriptive rules distinguish themselves by having an authoritative source (in addition to regulating roles): traffic rules, penal and civil codes, pharmaceutical directions for use, and so on.

With this clarification in mind, the following chapter analyses prescriptive rules by first distinguishing them from instructions. Instructions provide an interesting contrast in that they seemingly possess all the traits of regular prescriptive rules. In fact, in many ways they are an ideal type of prescriptive rule (a point clarified later). They are distinguishable however and they ought to be distinguished as differences between these rule types are pertinent to the puzzle of rule-following. Section two addresses the matter of content-independent reasons. As claimed in this section, well-formulated prescriptive rules provide normative content-independent reasons for action for their subjects. Section three presents and offers a critical analysis of prescriptive rules and their pre-emptive qualities. Here, Joseph Raz's conception will be the main focus and his account of prescriptive rules as pre-emptive or exclusionary reasons for action will be explicated. In so doing further enhancement to the general argumentative framework of this work is provided. A short conclusion ends the chapter.

### **1. Contrasting Rules: Instructions and Prescriptive Rules**

Prescriptive rules typically take the form of "Do X" or "If C do X". Rules of this type prescribe that a certain action should be, must be, or ought to be performed (Raz 1975, p.49).<sup>21</sup> This puts prescriptive rules in the larger class of regulative rules; however, they stand apart from regulative rules, which do not have a clear issuing source, and from other prescriptive rules such as instructions (Schauer 1991, pp. 3-6). Instructions provide an interesting contrast to prescriptive rules inasmuch as the two share similar traits: they claim that certain actions ought to be performed and they are typically issued by authorities. The core difference between the two rules is that instructions prove optional in a way that prescriptive rules are not (Ibid). Unlike

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<sup>21</sup> For a dissenting position see Matthew Kramer (1999). He argues that the imperative "must" is different from the "ought" of legal rules in the sense that the "must" kind of rules do not necessarily provide subjects with reasons for action nor do they presuppose reasons for action for them (Kramer 1999).

instructions, prescriptive rules provide subjects with content-independent reasons for action (Hart 1982). Recall that a reason for action is defined, at its most straightforward, as a consideration that counts in favor of or against performing an action (Dancy 2000, Parfit 2001, Raz 1975, Velleman 2000). Content-independent reasons will be the focus of analysis in section two of this chapter.

Instructions are rules that constitute directions for the accomplishment of a result. A primary way that instructions differ from prescriptive rules is that they are optional (Ibid). This feature of optionality manifests itself in at least two ways. Not only do instructions apply or get put to use by agents with prior reasons for following them, they also matter to an agent if they lead to their desired result. As a consequence, instructions give rise to subjective content-dependent reasons for action. The subjectivity of instructions (or subjectivity of reasons provided by instructions) comes from the fact that they depend on an agent's prior subjective reasons for accomplishing the result that they are meant to help achieve. The content-dependence of reasons provided by instructions comes from the fact that their normative force is inextricably linked to their capacity to help achieve a desired result.

To help illustrate the above, consider the following instruction: "To turn the computer on, press the power button". This instruction prescribes that the power button ought to be pressed in order to turn on the computer, but it does not command that an agent press the power button. It expresses a conditional that depends on an agent's desire or reasons for wanting a result to be effectuated in action. It provides a (proper) course of action for accomplishing an outcome. It is in this sense that instructions give rise to subjective normative reasons. If an agent has prior reasons to turn on the computer, for example, then she will follow an instruction about how to turn it on. However, without such prior reasons she has no use for engaging the rule. In this way,

instructions are optional in that their normativity arises only in conjunction with an agent's reasons that would motivate her to abide by them.

In order for instructions to be able to provide agents with reasons for action—what will be called their normative force—they need to lead, in fact, to the desired result. Thus, the normativity of instructions is constrained by whether performing the action that the rule prescribes actually leads to the outcome they would help to achieve (Ibid). For example, if the way to turn on the computer was not by pushing the power button, but rather by banging it on the table a couple of times, then any addressee of the instruction would abandon the rule in order to proceed banging (Ibid). Notice that this adds another aspect of meaning to the optionality of instructions: abiding or ignoring them depends on whether they assist in the accomplishment of the result. What differentiates this sense of optionality from the one above is that the content of the rule as it is effectuated is the source of reasons for embracing or rejecting it. In essence, the agent has established that the instruction's aim is a reason for her, but the normative force of the rule only holds sway if its aim can be accomplished by following it.

Now, prescriptive rules can also appear to be optional. This is an appearance that should be dispelled. Take a sign stating "No parking on Mondays" posted in plain view above a certain section of a street. Barring a physical impediment to parking, an agent might disregard the rule and park her vehicle on Mondays. The rule is not strictly speaking inviolable, which makes it seem optional. The subject can choose to disobey the rule on the basis of her reasons. If the subject chooses to disobey the rule then she will most likely have to face some form of penalty. A noteworthy feature of prescriptive rules is that they attach sanctions to their contravention. This represents a key distinction between prescriptive rules and instructions.

Sanctions alone do not efface the trait of optionality that also seems to be a part of prescriptive rules. Sanctions may actually highlight the fact that an agent has a choice because

the rule expressly accounts for the circumstance when the subject disobeys the rule. This makes the case for prescriptive rules as either/or propositions—“either obey the rule or suffer the penalty”—that apparently preserves the feature of optionality. Unlike instructions, however, prescriptive rules provide new reasons that attempt to override subjective normative ones. While the capacity of instructions to provide reasons for action was dependent on an agent’s prior subjective reasons for engaging with the instruction, prescriptive rules provide agents with new reasons for action that are objective.

Prescriptive rules provide new reasons for action because their existence constitutes a fact counting in favor of performing the action required by that rule. An agent might have prior reasons for not parking on Mondays on a certain part of a street; nevertheless, the rule “No parking on Mondays” still provides her with a new reason not to park. The rule can make a practical difference because an agent's prior reasons for not parking might not win out on the balance of reasons without the rule, or they might otherwise be inconclusive. Or, perhaps the reasons that an agent has for not parking are not the right ones (e.g. the agent might be under false beliefs), and the rule provides her with the right kind of reason. In the case when the agent has competing reasons that are in favor of parking, the agent will act in accordance with her balance of reasons.

Isolated instances when prescriptive rules are disobeyed do not make those rules any less prescriptive. However, there are cases when a rule will be disobeyed to such an extent that it will lose its normative force. There seems to be a critical point of disobedience that is reached when enough people disobey a rule (what counts as 'enough people' is basically impossible to generalize) which seems to render that rule powerless. As an example, consider that a 19th century law against Parisian women wearing trousers has only been completely overturned as of February 2013, although evidently the rule had lost any kind of effectiveness long before then.

Absent this kind of level of mass or habitual disobedience, the fact that some subjects disobey a prescriptive rule does not affect its nature. This is because the rule's essential characteristics are not affected by isolated acts of disobedience.

Prescriptive rules give agents normative objective reasons to obey them. The objectivity of the reasons comes from the fact that their normativity is not conditional upon an agent's personal set of desires, beliefs, or reasons (Moore 1991, Broome 2000 & 2004, Dancy 2000). The normativity of the "No parking on Mondays" rule does not depend on whether or not a subject has any reasons not to park on Mondays. In contrast, the normative force of instructions depends entirely on the subjective reasons of the addressees. In this sense, instructions about how to make apple pies have normative force only to the extent that an agent wishes to make an apple pie.

The distinction between prescriptive rules and instructions has been drawn through a focus on the kinds of reasons that the rules respectively provide (i.e. the guiding or normative force of the rules). The kind of reasons that instructions provide are conditional on the reasons that an individual already has. The kind of reasons that prescriptive rules provide are in turn objective unconditional reasons that do not depend on the reasons of the agent to whom they apply. In this way, the feature of optionality present for instructions is absent for prescriptive rules. With the core distinction between instructions and prescriptive rules outlined, further analysis of the most relevant definitional features of prescriptive rules can proceed.

## **2. Content-independence and Prescriptive Rules**

The idea of content-independent reasons or justifications was introduced by the legal philosopher H.L.A. Hart in his seminal work, *Essays on Bentham* (1982). There, Hart treats content-independence as it manifests in the case of commands issued by authorities (Hart 1982, pp.254–

5). In accordance with his conception, an authority can issue different commands and the actions commanded may have nothing in common with one another (Ibid). However, in the case of all of them the authority intends her expression of intention to be taken as a reason for performing the actions commanded (Ibid). Consequently, the commands issued by an authority function as reasons for action independently of the nature or character of the actions that are to be performed (Ibid).

Hart claims that an authority "intends her expression of intention to be taken as a reason" for performing whatever it is that she commands (Hart 1982, p.254). Taking the expression of intention to be a prescriptive rule, the authority intends for this rule to be taken as a reason for action. Thus, the claim is that that which makes the rule a reason for action need not have anything to do with the content of the rule but with the fact that the authority has intended it.<sup>22</sup> The orthodox reading of Hart is that commands and rules, examples of 'expressions of intention', issued by an authority are content-independent reasons for action. This means that they are reasons not in virtue of their specific content, but because of their source (Green 1988, Raz 1986, and Schapiro 2002).<sup>23</sup> So, content-independence consists in the fact that the same reason (e.g. the source of the rule) is a reason for a host of actions that may have only their point of origin in common.

Hart's original depiction refers specifically to commands issued by authorities, but the concept applies to prescriptive rules as well. Although lacking the feature of generality, commands possess traits that are similar to rules (Raz 1985). Most relevant among these: commands prescribe that certain actions ought to be performed; they are issued by authorities; and, they provide content-independent reasons for actions to their subjects (Ibid). It should be

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<sup>22</sup> It is a bit troubling that many authorities are not individuals but rather collective bodies and, at least according to some theories, these lack the capacity to form intentions. That being said, this doubt must be set aside as it is outside of our scope here.

<sup>23</sup> For a non-orthodox reading see Sciaraffa (2009).

noted that this latter feature is not restricted to commands and rules. Promises, agreements, decisions, but also credible threats and requests all provide content-independent reasons for action (Hart 1982; Raz 1986 & 2002).

Hart juxtaposes content-independent reasons for action with standard ones. He claims that in the case of standard reasons there is a connection of content between action and reason (Hart 1982, p.254). For Hart, action is a means to some valued or desired consequence, which in turn counts as the reason for performing the action. As an illustration, take shutting a window to keep out the cold (Ibid). The reason for shutting the window is to keep the cold from entering (Ibid). The desired consequence counts as the reason for performing the action which is a means to it.

Standard reasons for action are directly linked to their goodness (Raz 2009, p.208). If something is good (or valuable) then the fact of its goodness is a reason for action (Raz 1975, 2009). In spite of standard reasons being linked to the goodness of their actional outcome, which demarcates their *content-dependence*, some rules also possess a dependent feature. The preceding section highlighted instructions as examples of rules that provide standard reasons for action. Again, the normative force of instructions derives from the likelihood that they will help achieve some valued goal. This stands in contrast, then, to rules and reasons that derive their normative force from their source rather than their content.

Another way of framing standard reasons, distinguishable from the good they help to achieve, is by reference to the transitivity of their justification. Take an example of transitivity as it appears in standard reasons: If the fact that a movie is fresh is the reason to watch the movie and the reason why the movie is fresh is because of its cool special effects then the fact that a movie has cool special effects is a reason to watch the movie (Raz 2009, p.209-11). The preceding follows the standard account of transitivity, which is described as 'if P is a justification

for Q which is a justification for R then P is a justification for R' (Raz 2009, p.210). This transitive relationship of elements P, Q, and R underscores a direct connection between action and the reason's content. In other words, performance of an action provided by a standard reason follows from the content of the reason itself.

Whereas standard reasons are transitive, content-independent ones by contrast are not. This is a view articulated by Joseph Raz, who writes that the breakdown in transitivity for content-independent reasons, which are provided by prescriptive rules, constitutes their key trait.

As he writes:

"The justification of a rule is not, in and of itself, a justification for performing the action which the rule requires. It justifies giving the makers of the rule power to make the rule, and not more. Of course, indirectly it justifies the action the rule requires, as being an action in accordance with a rule which is thus justified. But, unlike content-dependent justifications, it does not justify the action without these additional mediating premises." (Raz 2009, p.210)

The absence of transitivity means that the reasons for the validity of a prescriptive rule are not in themselves reasons to perform the act that the rule requires (Ibid). Put it another way, the grounds for a rule justify the existence of that rule. So, a valid source provides the justification for a prescriptive rule. However, the performance of the actions required by the rule is not justified directly: "The justification of a rule is not, in and of itself, a justification for performing the action which the rule requires" (Ibid). The breakdown in transitivity for prescriptive rules is marked by an exception; namely, those cases when following a prescriptive rule are valuable in itself.

For Raz, indirect justification for prescriptive rules allows for a *normative gap* (Ibid, p.208). This is defined as a divide between what one ought to do, which is the normative force of a reason, and what is good about doing it, which is the value of an action. In the case of rules, the normative gap points to a difference between the normative force of the rule and the value of having the rule (Ibid). Nonetheless, for Raz normativity is ultimately based on evaluative

considerations (Raz 2009, p.209). In the case of rules, agreements, and promises there exists the potential for a normative gap that allows for the mediating role of authorities. This points to the shift in justification for why something counts as a normative reason for action—from content to source.

Raz's depiction of the breakdown in transitivity, which ultimately explains his conception of content-independence, can be clarified by an example. Having an authority that has the power to issue prescriptive rules is, let us assume, a good thing. The justification for having an authority is based then on evaluative considerations. The authority issues a prescriptive rule that stipulates X-ing. X-ing may be good or bad, but evaluative considerations about X-ing do not bear on its justification. The fact that the authority has issued the rule to X is a reason to X because having the authority is good.<sup>24</sup> This is an indirect justification of the action required by the rule.

Establishing that an authority is "good" amounts to being able to provide a case for the authority's legitimacy, even if an underdeveloped one. For Raz, evaluative considerations are the ultimate bearers of justification. It can be helpful to represent this in a slightly different, non-Razian formulation. If authorities are evaluated as being legitimate, then the fact of their legitimacy establishes a sort of *prima* rule.<sup>25</sup> A rule of this kind states, in essence, that all rules originating from a legitimate authority should be obeyed. This is a rule about rules. If valid, a *prima* rule justifies the act of following all rules that meet its conditions. In turn, the rules that meet the conditions will justifiably prescribe other actions. This barely hints at the sort of normative framework required to support Raz's conception. Even in an abbreviated depiction like

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<sup>24</sup> There seems to be a problem with this way of framing the content-independent justification of prescriptive rules in as much as it allows for the possibility of both contradictory rules and very bad rules. Raz is aware of this problem and his service conception of authority is a possible solution. Chapter five of this work will include a detailed analysis of the service conception where these issues will be addressed further.

<sup>25</sup> This is similar to the master rule ("Let Lex decide") described by Larry Alexander and Emily Sherwin (2001) in *The Rule of Rules*, p.53; however, the *prima* rule as identified here lacks their Hobbesian back-story.

this one, it can still provide some insight into the structure of rules and justifications that might underlie content-independent prescriptive rules.

With or without the inclusion of an explicit *prima* rule, the conception of content-independence centers on the source of the rule as the (normative justifying) reason for following it. Untethered from certain constraints of content, an agent responds to a (prescriptive) rule because it comes from an authority. This broadly describes the breakdown of transitivity. Not only does this look different from the already-contrasted example of instructions, but it also underscores a unique and more generalized identifier of prescriptive rules. It indicates the capacity of an authority to provide rules as reasons that ought to be abided by because they come from an authority. It requires further explication to address a long-standing problem of political theory; namely, whether rules issued by legitimate authorities that are flatly immoral should still be followed. The preceding analysis cannot in and of itself be taken as an endorsement of the view that legitimate source alone justifies abiding by (substantively) bad rules. However, the more immediate relationship between content-independence and prescriptive rules need not delve into that territory just yet. The core relationship is that of content-independent reasons as expressed by prescriptive rules, and such rules being used by (ostensibly legitimate) authorities and agents.

### **3. Pre-emptive reasons and Prescriptive rules**

The final part of the conception of prescriptive rules to be considered here is that of pre-emptive reasons for action. The relationship between such reasons and prescriptive rules, as well as the connection to content-independence, will be the primary focus of this section. In keeping with the general methodological approach, the following presents a Razian account of pre-emption

with emphasis placed on rule-usage.<sup>26</sup> By way of preliminary definition, pre-emptive reasons for action can be taken to be reasons which displace other reasons (Raz 1986, p.42). Expanding upon this and outlining the practical boundaries and relations of pre-emptive reasons will not simply provide an abbreviated if substantial picture of Raz, but perhaps more importantly it will further delimit the role that prescriptive rules can play in the balance of reasons.

If a prescriptive rule is a content-independent consideration which counts in favor of an action then how does that rule measure up to other considerations or normative reasons against or in favor of that action? This question is manifold as an answer to it needs to address reasons for and against the issuance of the rule, reasons for and against the action prescribed by the rule (from the authority's standpoint), as well as subjective reasons for and against the rule and the action prescribed by the rule (from the agent's standpoint). The following will not attempt to provide answers to all of these questions. Rather, these are the starting points for consideration of answers provided by Raz to some of these matters.

An authority issues a prescriptive rule when reasons in favor of issuing the rule defeat reasons which go against it. Underlying prescriptive rules are reasons that have counted in favor of issuing the rule, reasons in favor of the action prescribed by the rule, as well as reasons that were defeated in the process. An authority will balance the pros and cons of a particular action, but also the pros and cons of regulation (e.g. of behavior) in the first place. The crowning jewel of these considerations will be a prescriptive rule (e.g. All Ss should X in C).

The above captures very roughly the process of issuing prescriptive rules from the point of view of a presumptive authority. The next step is to take the agent's perspective. The issue to be considered regards the role of prescriptive rules in the balance of reasons of an agent. Taking

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<sup>26</sup> The focus here is on pre-emptive reasons for action as they are essential to any complete analysis of prescriptive rules. Furthermore, pre-emptive reasons for action are the bedrock of Raz's service conception of authority onto which such concepts as exclusionary and later (in his work) protected reasons for action are erected.

a presumptive subject S of a prescriptive rule R, which prescribes an action X in circumstances C, the challenge is to comprehend the way in which S ought to reason with R. A case has been made for regarding R as a content-independent reason for X-ing in C, but the question pertains to the position or strength of R relative to other reasons for or against X-ing.<sup>27</sup>

In *The Morality of Freedom* Raz writes: "When considering the weight or strength of the reasons for an action, the reasons for the rule cannot be added to the rule itself as additional reasons. We must count one or the other but not both. (...) To do otherwise is to be guilty of double counting" (1986, p.60). The urge is then to think of a prescriptive rule before its issuance by an authority. Ideally, an authority will assess a particular situation by weighing the reasons for and against issuing a rule. An authority will take into account all relevant considerations and issue a verdict in the form of a rule. The rule is meant to replace those reasons that were considered by the authority prior to the rule's issuance. Without this pre-emptive or exclusionary quality the rule would fail to meet its purpose (Raz 1975, p.62).

The reasons underlying a prescriptive rule are those reasons which provide the justification for the rule. They are content-dependent first-order reasons in favor of the rule and the action prescribed. A prescriptive rule does not add to the first-order reasons in its favor, instead it replaces those reasons. Thus, the rule, if it is to function properly, will preempt agents from recounting those reasons that have already been counted by the authority<sup>28</sup>. It will not,

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<sup>27</sup> Reasons for regulating take a subject perspective too. The Razian answer is the Independence Thesis. Basically, S has a reason to follow R when the independence condition is met; in other words when it is not more important that S decide for herself rather than follow the directives of an authority.

<sup>28</sup> There is great debate and ambiguity in the literature with regards to whether or not preemptive or exclusionary reasons are to be understood as second-order reasons not to act on first order reasons, second order reasons not to act on and/or consider first order reasons, as well as other aspects of pre-emption (Cf. Edmundson, W. (1993). "Rethinking Exclusionary Reasons: A Second Edition of Joseph Raz's Practical Reason and Norms." *Law and Philosophy* 12, 329; Flathman, R. (1980). *The Practice of Political Authority: Authority and the Authoritative*. Chicago: University of Chicago Press, 109–125; Hurd, H. (1991). "Challenging Authority." *Yale Law Journal* 100, 1611; Moore, M.S. (1989). "Authority, Law, and Razian Reasons." *Southern California Law Review* 62, 827; Perry, S. (1989). "Second-Order Reasons, Uncertainty and Legal Theory." *Southern California Law Review* 62, 913; Regan, D. (1989). "Authority and Value: Reflections on Raz's Morality of Freedom." *Southern California Law Review* 62, 995; Schauer, F. (1991). *Playing by the Rules*. Oxford: Clarendon Press, 88–93).

however, exclude reasons that are in favor of the directive even though those may not have been counted by the authority (Raz 2007, p.1022). It will exclude those reasons which militate against it (Ibid).

The picture of preemptive reasons painted above may appear to depict these as closer to Hartian pre-emptory reasons (i.e., reasons not to re-deliberate), rather than Razian preemptive or exclusionary reasons (i.e., second-order reasons not to act on some first-order reasons). Scott Shapiro criticizes the Razian account of preemption on the grounds that Raz ignores a crucial aspect of deliberation—it is essential that deliberation is action-guiding—one who deliberates does so in order to form an intention to act on the results of deliberation (Shapiro 2002, p.407). Thus, to claim that an agent can deliberate, but is not to form an intention to act on the basis of her deliberation (when the agent faces an exclusionary reason), does not seem fully consistent (Ibid.).

A way to reconcile Raz's and Shapiro's positions is by taking preemptive reasons to be reasons which exclude other reasons from deliberations undertaken with the intention to act. This will not exclude idle considerations. Deliberation appears intimately linked to action when one considers, like Shapiro, deliberations about how to act. However, deliberation does not necessarily concern action. One can deliberate or consider in a thorough manner all sorts of things without having the intention to act on such deliberation. One can deliberate about the appropriateness of a question without thereby withholding to answer it if the question is deemed inappropriate and one can deliberate about the appropriateness of the same question without being either its addressee or addressor, or one can deliberate about whether or not a cake is good. In all these cases the final aim of deliberation need not be action, but, for example, forming an opinion on a certain matter. In this way, an agent can also deliberate about a rule's underlying justifications without making her actions conditional to the result of deliberation. Most likely,

however, agents will find it fruitless or risky to engage in deliberation when they are barred from acting on it (Hurd 1999, p.1626). Contrastingly, from the authority's standpoint, it makes no difference whether agents deliberate or not as long as acting on the basis of their deliberation is limited (Ibid).

At this point, I want to draw a connection between the issue of content-independence and that of preemption. Content-independence pointed to the fact that a rule is a content-independent reason for action—a reason to do what the rule prescribes not because of the merits of the action prescribed, but rather in virtue of the fact that there is a rule prescribing it. The merits of an action are on this account not the reasons for performing the action. They are, however, the justifying first-order reasons that an authority considers before issuing a rule. The rule replaces these reasons by incorporating them. As such, agents no longer have direct access to the first-order reasons which justify a rule and that were considered by the authority. Agents only have access to the rule. It is in this way that prescriptive rules are reasons for action *qua* rules.

The issue of why pre-emption is necessary to a proper understanding of prescriptive rules may still be unclear. For Raz, pre-emption can explain the way in which rules function. For rules to be the efficient error-eliminating, coordinating and time-saving devices that we normally take them to be, it makes sense that agents should follow them directly and not through recourse to the underlying reasons which justify them (Raz 1975, p.62). To do otherwise would be to double the work, re-deliberate, and count twice the same reasons which justify rules in the first place.

The justification of rules in terms of efficiency (saving both time and labor) and error elimination is the one preferred by Raz (Ibid). Generally speaking this way of justifying rules is also the least controversial (Ibid). In light of these, the argument is the following: unless prescriptive rules are treated as giving rise to exclusionary reasons then the rules will not be serving their true purposes (Ibid). This way of arguing for the pre-emptiveness of prescriptive

rules is in line with Raz's writings although not nearly as complex. Further, it has yet to say anything about the role of authorities. Only through a conception of legitimate authority can the concepts above be properly delimited and curtailed. I take it, however, as sufficient, for now, to provide a sketch of preemption and prescriptive rules.

To conclude, through the concepts of preemption and exclusion Raz changes the way we normally think about reasons for action. Reasons are typically weighed or balanced against one another with the weightier reasons prevailing over weaker ones (with the caveat that this kind of balancing is possible only for commensurable reasons). Raz assesses conflicting reasons, when one of those reasons is a prescriptive rule, in a different manner. Because of the rule's special standing it will not go through the same processes as standard or first-order reasons for action. Rather, the rule will incorporate the process of deliberation and adjudication already performed by an authority. Thus, the concept of preemption provides for an understanding of prescriptive rules by accounting for the special role they hold in the balance of reasons. The above only scratches the surface of an important conception of rule-following and authority provided by Raz which will be discussed further in subsequent chapters.

## **Conclusion**

We might recall what this chapter has aimed to do; namely, to show what prescriptive rules are, how they operate, and what relationships they bear to other rule types and concepts. While instructions mark a contrastive example because of their optionality, they nevertheless share traits with prescriptive rules. In this respect, the positive and distinguishing characteristics of both kinds of rules contribute to a more complete depiction. Beyond the mere development of a conceptual framework, differentiation of prescriptive rules from instructions hit upon the central feature of content-independence. Here, the rule's source was shown to be fundamental to its

justification, and this in turn highlighted the way in which an agent's own reasons could be supplanted by the issuing authority's directive or rule. While content-independence was detailed by reference to its conceptual history starting with Hart, it is ultimately the conception advanced by Raz that serves as this work's focus on the matter. This Razian account dovetailed into the final if brief reconstruction of pre-emptive reasons and their relationship not just to content-independence, but more pertinently to prescriptive rules. The core findings about content-independence (i.e., its meaning and functioning) undergird the pre-emptive capacity of prescriptive rules.

Here, we might step back even further and adopt a slightly broader perspective on what the preceding chapters have accomplished. By presenting rule types, debates about them, and distinctions between them, a general framework of rules has been established. Such a framework enables the sensible use of terminology, but it also highlights what rules do and what, at least *prima facie*, makes them important. Focus on rule usage in the practical reasoning of agents has captured a more narrow sense of the importance of rules: the importance that different rule types may have in guiding agents to act or not act in one way or another. In this respect, the notion of the normativity of rules has been delimited. As the discussion of rule types shows, such normativity is more or less evident depending not just on an agent, but also on the nature of the rule. Descriptive rules might mirror and reflect empirical regularities and as such be limited with respect to normative force. Constitutive rules may serve a narrow and specialized normative function only inasmuch as they guide inwardly towards the aims enclosed by their formulation. By comparison regulative rules and prescriptive rules have a strong guidance function for agents, and can do so without the inclusion of agent-specific reasons. Finally, for prescriptive rules authority becomes the decisive factor in determining the rule's position in the balance of reasons, as well as its guiding force.

As a final send-off of the preceding analyses of rules, we can anticipate some of the core dilemmas that lie in wait. Underlying the above is the implicit and intuitive, but by no means fully explicated view that rules matter to agents. The spectrum of rules shows that what matters depends on what reasons an agent or authority has, and how the rules might be implemented and applied. This roughly drawn perspective that rules are important sits at the seat of a major challenge. As already indicated, this is the puzzle of rule-guidance, or alternatively the view that following rules is either redundant or irrational. Although definition, distinction, and analysis of rule types offers evidence against claims that rule following is irrational or redundant, the real challenge is to use this evidence to build a strong argument in favor of the importance and necessity of rules for agents. This kind of argument is what follows.

## **Part Two: The Puzzle of Rule-Following**

## **Introduction**

The preceding three chapters analyzed some of the more philosophically relevant rule types. The kinds of rules considered were distinguishable through their varying capacities for guiding subjects, as well as their uses and aims. With this broader view of rule types and their role in practical reasoning we can move on to the principal consideration of this work—the puzzle of rule-guidance (also referred to as the incompatibility thesis). The puzzle of rule-guidance presents a philosophical dilemma steeped in skepticism. The rationality of following rules is in question as the puzzle suggests that regardless of what rules might stipulate it is irrational to obey them.

Although already identified in the introduction of this work, recall what the puzzle of rule-guidance is and what it pertains to: any rule issued by an authority (A) and any action (X) required by the rule is either supported by the balance of reasons or it is not (McClennen 2004; Raz 1979, 2009; Schapiro 2002, 2005). If the balance of reasons supports X then X should be performed (Ibid). This means that X should be performed *not* because it is required by the rule; rather, X should be performed because agents ought always to act according to the balance of reasons (Ibid). On the other hand, if the balance of reasons does not support X then X should not be performed as that would be irrational (Ibid). Agents should never act against the balance of reasons even if a rule demands it (Ibid). As a consequence, rules issued by authorities are either redundant—making no practical difference—or go against the balance of reasons, in which case they ought to be abandoned (Ibid).

Although it might seem too obvious to mention, the focus of the puzzle of rule-guidance is rule-following and rule-guidance. This point is less trivial than it might seem as rule-following ought to be distinguished from rule-guidance as well as from actions which only coincidentally conform to rule specifications. To this, an agent is said to follow a rule when the agent takes the existence of the rule as a reason to perform the actions stipulated by the rule and performs those actions (Schauer 1991, p.113). An agent is said to be guided by a rule when the agent takes the existence of the rules as a reason, a not necessarily conclusive reason, to perform the action stipulated by the rule (Ibid). In this case the agent may be guided by a rule because the rule provides her with a reason for action, but since the rule does not provide an all things considered reason to act it may be overridden by other considerations (Ibid). Finally, an agent may also comply with a rule because the balance of reasons indicates the same action as the one required by the rule, yet this is not the same as either following or being guided by a rule; rather, it is acting for other reasons (other than the rule provides) in a way which happens to coincide with the rule (Ibid).

To follow rules, then, means to take them as reasons for action, i.e. be guided by them, and comply with their indications (Ibid). In order to determine or decide what the agent should do in a particular circumstance or context the agent consults rules which are relevant to or applicable in that context<sup>29</sup>. The rule-following bar is set so high as to be met only when agents act in virtue of there being a rule and in accordance with it. This conception of rule-following is at the root of the puzzle and the conclusions the puzzle derives from it are unattractive.

The dilemma captured by the puzzle is devious and starts like this: either a rule dictates what is right in that it accords with the balance of reasons, or it commands what is wrong and

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<sup>29</sup> I ignore complications related to interpreting rules and questions such as how agents come to know that particular rules are relevant or applicable to their situation for practical reasons. I will say however that typically it is the case that the scope of the applicability of a rule is either implicitly or explicitly part of its formulation.

conflicts with the balance of reasons. On these grounds, it is concluded that rules can never be reasons for action. Notice that if a rule gives the right result then it is irrelevant, and if it gives the wrong result then following the rule is unreasonable (Shapiro 2002, p.391). The conclusion is that rules can never be followed on pain of acting irrationally.

In order to rescue rule-following from the claim of irrationality, this chapter confronts the incompatibility thesis in two continuous ways. First, while the puzzle indiscriminately applies to all rules, I claim that its applicability is in fact limited to only one rule type—prescriptive rules. Much of the incompatibility thesis' force is diminished by showing that the scope of the puzzle is restricted to one rule type since the purported irrationality of rule-following can only be sensibly claimed about one sort of rule. Such a point may seem inconsequential initially, but as analysis develops its full impact will become apparent. By narrowing the domain of the puzzle to the appropriate prescriptive rule types only, some of the deep skepticism surrounding rule-following generally is contained and deflected. Second, as a matter of fact, rules are employed by agents in decision-making processes and issued by authorities with the power to do so. If the puzzle is correct then these actors are either under some delusion or they intentionally engage in irrational action. This conclusion goes against intuitions and, as a matter of understatement, seems odd.

In its formulation the puzzle of rule-guidance appears to target all rules indiscriminately, at least those rules which have an authoritative source. Having glimpsed at a couple of important distinctions from the literature on rules the incompatibility thesis's lack of sensitivity to the diversity of rule types is both an oversight and a source of confusion. In order to rectify this problem, the following shows that the puzzle of rule-guidance or incompatibility thesis is restricted in scope. This reduces the strength of the puzzle by at least vindicating some of the rules analyzed in this work— descriptive, regulative, constitutive rules and instructions. Note

that all of these types of rules are formally targeted by the puzzle inasmuch as they are rules which are typically issued by authorities.

The structure of the chapter is as follows. The first section argues that constitutive rules, although formally targeted by the puzzle's formulation, escape its grasp. This is a major rule type and defense against the puzzle requires relying on some of the previous analysis. In the first chapter, the regulative capacity of constitutive rules was in question and although the rules were distinguished from regulative ones they were granted to possess specialized normative force. Section two shows firstly that descriptive rules also stand outside of the puzzle's scope. Then, the discussion moves on to prescriptive rules and instructions. The latter are a distinguishable rule type and due to their particularities it will be shown that, when it comes to these rules, the puzzle loses its appeal. Finally, the section addresses prescriptive rules. In so doing, it will be shown that prescriptive rules remain the sole targets of the incompatibility thesis. Moreover, a sketch of how prescriptive rules may deflect the puzzle is presented. This paves the way for the next chapter, where the complete solution to the puzzle is gathered and offered.

### **1. The Puzzle of Rule-Guidance: Constitutive Rules**

Constitutive rules were discussed in the first chapter of this work in contrast with regulative rules. As presented before, constitutive rules give rise to new forms of behavior (e.g. scoring a touchdown in football, making a will or testament) and typically take the form of: "X counts as Y in context C" (Searle 1969, p.35). The potential regulating force of constitutive rules was presented as a point of contention between Raz and Searle. The two positions were reconciled through an allowance of a specialized regulative role for this rule type.

Constitutive rules possess a guiding force narrow in scope inasmuch as it is restricted to the achievement of the rule's aim. The specialty of these rules is apparent in that actions

referenced by constitutive rules must be performed as they are a 'how-to' of constituting in the first place. In support of this, consider this generalizable example: the guiding force of rules about making marriage contracts are constrained to establishing how it is that agents can make such contracts. As opposed to being a reason in favor of creating such a contract, the rule is definitional of what it takes to make a marriage contract if agents have prior reasons to do so.

The aim of constitutive rules is then that of creating something which previously was not and, in doing this, regulating is just a means towards this end. Consequently, constitutive rules do not prescribe *what* ought to be done, but, at most, *how* it ought to be done. Furthermore, the 'how' part of constitutive rules, which is their regulative side, is constrained by an agent's prior reasons and further provides agents with a kind of blueprint for constituting. It is important for the precise understanding for these rule types that they not be construed as reasons which favor the performance of actions referenced in their content. Instead, the more accurate view is that the rules provide definitional guidelines to which there is no alternative. In this way, constitutive rules do not provide agents with standard normative reasons for action.

The above analysis focuses primarily on the guiding power of constitutive rules and leaves out some other key aspects previously discussed. But, where does it leave the puzzle? Constitutive rules (e.g., rules of games and laws) are often issued by authorities. For instance, rules of chess are issued by FIDE's World Chess Federation, while rules concerning marriage contracts, wills and testaments, legislating or resolving find their source in law (Ross 1968, p.56). The puzzle of rule-guidance takes umbrage with authoritative rules (rules issued by authorities) generally and constitutive rules constitute one such type. Although constitutive rules may not prescribe action in orthodox ways, they do guide it in the special ways previously explained.

To input a constitutive rule into the puzzle's formula would amount to the following: any constitutive rule issued by an authority (A) and any action (X) required by the rule is either supported by the balance of reasons or it is not. When the action is supported by the balance of reasons the constitutive rule is superfluous. When the action is not supported then it is irrational to perform it. Take the constitutive rule to be 'Doing X counts as Y in C'. The puzzle claims that there is some action, identified as X in our example, which is required by the rule. The puzzle claims then that performing X, because the rule demands it, is either a matter of redundancy or irrationality.

However, a constitutive rule does not appear to prescribe action X (nor for that matter Y). The rule is better interpreted as: 'If one wants to Y then they must X because X-ing is the action that is required for Y-ing'. Consequently, the rule is a guide for agents when agents have prior reasons to Y. We have said before that constitutive rules do not provide reasons for action, something which is manifest in their inviolable character. To start, an agent must have prior reasons to use the rule as a guide. Once those reasons prevail then the agent has no choice but to do as the rule stipulates. Inasmuch as a claim to do as the rule stipulates exists (the narrow regulative or 'how-to' side of the rule), the puzzle fails because what the rule does is simply stipulate the only means available for an agent's ends. As such the rule is not a standard reason for action in the way that the puzzle requires for its purposes.

Consider a simplified example which aims to illustrate the above. The soccer player must place the ball in one of the corners of the field so as to perform a corner-kick. Following this soccer rule (constitutive of corner-kicking) cannot be a matter of either redundancy or irrationality. Rather, following the rule is the only settled way in which one can perform a corner-kick. Reasons in favor or against the actions stipulated by the rule are muted. One cannot have conflicting reasons or otherwise about something which prior to the rule did not exist. Thus,

when reasons make it the case that a corner-kick ought to be performed in a game of soccer, the only (accepted) way is the one that the rule states.

The balance of reasons cannot favor the performance of different actions than the ones stipulated by the rule for the performance of the Y-part of the rule. Neither can the balance of reason favor the performance of the same actions. This is because whatever the agent has to do in order to perform the Y-part of a constitutive rule is not up for debate or consideration by the agent. There is no alternative to what the rule demands (as long as the agent has prior reasons for Y) and as such, there are no reasons to either favor or go against the action which nevertheless must be performed by the agent.

The above shows that the puzzle of rule-guidance is inapplicable for the case of constitutive rules. This rule type occupies a peculiar place both among rules generally and relative to the balance of reasons of agents. Their peculiarity results in a high level of specialty allowing this important authoritative rule type to escape the puzzle. Nevertheless, or perhaps even more so because of this special use, constitutive rules remain one the most important tools employed by both authorities and subjects.

## **2. The Puzzle of Rule-Guidance: Descriptive Rules, Regulative Rules and Sub-types**

### **2.1. Descriptive Rules (in brief)**

Recall that the key characteristics of descriptive rules—lack of normative force, truth-aptness, and verifiability—mean that they are not used, nor do they apply for guiding agents in a normatively-charged way. Although the application of descriptive rules as a ground for developing normative constraints and guidance was reservedly posited in chapter two, the standard analysis of descriptive rules sets them outside the purview of the puzzle of rule-guidance. The puzzle of rule-guidance pertains ultimately to rules that guide behavior, not ones

that simply describe it. To this end, descriptive rules identify a regularity rather than cause or regulate it. The rules are bearers of the truth or falsity of a pattern of action that is or is not empirically demonstrable, as opposed to being indicators of rational or irrational action to be undertaken by agents. As such, the use of descriptive rules falls outside of the domain of the incompatibility thesis. With this delimitation, it is possible move onto an examination of prescriptive rules and the puzzle without having glaringly omitted a major rule type (i.e. descriptive rules) from consideration.

## **2.2. Regulative Sub-type: Instructions**

Prescriptive rules were analyzed in chapter three and situated in the larger category of regulative rules. Note that regulative rules generally, which are not prescriptive in the sense advanced, lie outside of the puzzle's scope in its strict formulation. The reason for this is that the main targets of the incompatibility thesis are those rules which have been issued by authorities. Prescriptive rules are the only sort or sub-type in the larger regulative category that clearly fulfills the condition of being authority-issued and action-guiding. Instructions, however, walk a fine line between regulative and prescriptive rules. Although similar to prescriptive rules in that they too prescribe actions and are issued by authorities, instructions stand apart from the latter because of their previously analyzed features of optionality (Schauer 1991).

One aspect of their optionality arises because their guiding force is dependent on whether or not they yield the right result (Ibid). Instructions ought to be followed only when what they prescribe is the right action. In other words, the rules are simply abandoned when they are wrong (i.e. when what they prescribe is different from what the balance of reasons all things considered indicates). This view of the normative force of instructions is consistent with that provided by the puzzle on the second horn, albeit for all authoritative rules.

The nature of the puzzle is that it presents two equally unappealing and unavoidable options: either following rules makes no practical difference or it is irrational. However, following an instruction when the action it prescribes diverges from the balance of reasons is already granted as being irrational. Instructions do not level claims of obedience in all cases. Agents are not bound to follow instructions *qua* instructions meaning that they are free to take them or leave them as they see fit (Ibid). This feature of instructions renders the puzzle ineffectual precisely because the dilemma it poses (i.e., the either/or of unacceptable options) is not present. This can be described in a slightly different way: in order for the puzzle to apply to rules it must be true that an agent would otherwise be bound to follow them, but instructions do not bind agents in this way because of their optionality trait. As such, they are inapplicable candidates for inclusion within the scope of the puzzle.

The claim to obedience is essential to any type of rule to which the puzzle applies. The tension between rule-following and the incompatibility thesis is revealed only for those instances where the rules demand that they ought to be followed in all cases, something which the thesis claims is an irrational action. In the case of instructions this tension never surfaces. There remains a lingering doubt, perhaps, as to whether or not following instructions is redundant, per the first horn of the dilemma. I will attempt to dispel this claim by sketching below an argument that is however more far-reaching, in the sense that it does not apply solely to instructions.

The first horn suggests that there is an instance of over-determination, rather than determination, of the right course of action when the rules point to the result anyway indicated by the balance of reasons. The claim is that following rules in this instance makes no practical difference, as an agent would perform the same action if she followed the balance of reasons instead. At least one answer against this claim is available to us almost immediately. Although the agent performs the same action by following a rule which indicates the same result as the

balance of reasons, she does so for a different reason; namely, because there is a rule which demands this action (or an instruction which points to it).

To explicate, consider a putative authority A which purports to create a normative reason for subjects (S) to X by creating a rule that says in C all S ought to X (if the authority actually creates a reason for action is precisely what the puzzle aims to deny). This particular reason created by the rule (which is the rule itself) did not exist before the rule was issued. Absent the rule, on the balance of reasons, S would have X-ed anyway. However, it would not have been because of the rule that stipulated all S must X in C. The rule may look redundant because S would have performed the same action, but it is not redundant because S would not have X-ed for the same reason. Hence, the result may look the same, which gives rise to the claim of redundancy, but the process of getting to that result is distinct. Whether this difference matters should be considered.

One may be of the mind that it does not matter since what is crucial is not *why* the rules are obeyed, but rather *that* they are obeyed. Along this line, what matters is not the why of performing a correct action but that that action is performed. Although an authority may not care why its subjects are following its rules (so long as they follow them), from the point of view of subjects things look radically different. Conforming to rules for the reason that they are rules, rather than because these point to the right action in a particular case means that subjects will engage in a different decision-making process. In this respect, subjects will not need to consult the balance of reasons if they simply accept a rule and follow it. They save on deliberation costs (e.g., time and energy) by operating in this manner. However, taking rules at face value and accepting their claims means that subjects risk acting against the balance of reasons.

The above is a take on one of the most straightforward ways of arguing in defense of rule-following—the argument from efficiency. However, there are problems with this and

similar arguments<sup>30</sup>. Efficiency for efficiency's sake may not be a good thing. If agents make faster decisions but ones that are wrong, then it is hard to see that anything is gained. The principal fault of the argument from efficiency is that it involves a risk that agents will perform the wrong action because they will not consult the reasons which directly apply in their circumstance.

In the case of instructions the risk of error, assessed in terms of the probability that agents will not perform the correct action, is assuaged. This is because of the expertise of the authority which, in typical cases, sources instructions. The high level know-how of issuing authorities means that the likelihood that their rules will point agents towards action divergent with the balance of reasons is reduced. Consider as illustration the prevalent example of instruction manuals issued by producers of technologically advanced products (such as vehicles, appliances or computers); because of their expertise these authorities are more likely than not to point to the best courses of action for agents.

It is interesting to see that regardless of an assumed peril of getting it wrong by following rules directly (as opposed to consulting the balance of reasons), if we restrict our attention to the redundancy claim then the efficiency argument is successful without further caveats. The puzzle claims that rules are redundant *when they are right*, but clearly a gain in efficiency does make a difference. In those instances when the rule dictates the right result, following it makes a difference because it is more efficient to follow rules than it is to consult the balance of reasons. Since we are not concerned with instances when rules indicate the wrong result (we are assuming

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<sup>30</sup> For more problems related to the efficiency argument and other arguments prevalently used in defense of rule-following see Schauer's *Playing by the Rules* (1991) Ch.7.

the rightness of action), the efficiency argument is sufficient for answering the first-horn of the puzzle<sup>31</sup>.

The above line of argumentation can be applied to instructions, but also to other rule types. With or without it however it has been established that instructions are not the central type of rules to which the puzzle can apply. To drive this point home the above relied on the optionality feature of instructions. Because of this the tension which normally feeds the dilemma is simply not present.

### **2.3. Regulative Sub-type: Prescriptive Rules**

To see that the puzzle of rule-following targets prescriptive rules one need only to consider that the puzzle targets all action-guiding authoritative rules. Thus, the puzzle specifies from the start its subjects as: (1) "any rule issued by an authority" and (2) "any action required by the rule" (Schapiro 2002). Subject specification of this sort identifies the salient features of the rules that the puzzle addresses. As such, only prescriptive rules fulfill the domain conditions it sets forth. The preceding analysis of other rule types showed these to be outside the puzzle's scope. The definition and earlier conceptualization of prescriptive rules underpins the claim about the puzzle's applicability. By first revisiting some of the key features of my previous account, the scope of the puzzle can be exacted.

As before, prescriptive rules ("Do X", "If C do X" or "All Ss ought to X in C", with the latter formulation capturing the generalizing character of the rules) are defined as authoritative directives claiming that a certain action or actions must, should or ought to be performed (Raz 1975, p.49). The guiding force of prescriptive rules is captured in their normatively charged

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<sup>31</sup>One remaining issue, which nevertheless does not affect this argument as solution to the first horn, is that without directly consulting the reasons applying in particular cases agents risk not being able to distinguish between cases when they are acting rightly or wrongly.

language (the use of 'should' or 'ought'). Thus, the rules state what agents ought to (or ought not to) do, should (or should not) do, what is forbidden, allowed or prescribed. The rules are used to guide the actions of subjects in defined circumstances through normative specification of the action to be taken by them.

The claim (implicit or explicit) of prescriptive rules is that they should be followed in all relevant cases to which they apply (Alexander and Sherwin 1994). Recall that the justification for following the rules is a content-independent one, which is grounded in their legitimate issuing source (i.e. an authority). The clash with the rule-guidance puzzle is evident: while prescriptive rules provide content-independent reasons for action for subjects, the puzzle states that rules can never be reasons for action at all.

Having identified by virtue of its own conditions that the puzzle pertains only to authority-issued rules requiring some action to be performed, and having established in preceding analysis that prescriptive rules possess the two requisite elements—guiding force and authoritative source—it follows that the puzzle applies to prescriptive rules. Further, having shown that the puzzle does not apply to other kinds of rules under consideration in this work (constitutive, regulative, descriptive rules and instructions), it follows that the puzzle's scope remains restricted to prescriptive rules only. The following will show, however, that even though the puzzle addresses this rule type, it is still undermined by their features of content-independence and pre-emption.

The conception of prescriptive rules advanced in the previous chapter was rooted in Hartian and Razian accounts. Two features at the core of this rule type were highlighted: (1) content-independence, and (2) capacity for pre-emption. In accordance with the accounts of both theorists, it was posited that prescriptive rules provide agents with content-independent pre-emptive (or in different words, exclusionary) reasons for action. The following will rely on the

analysis from before to show that by advancing the above two traits of prescriptive rules the puzzle can be defeated for the central rule type to which it applies. Briefly, recall some of the key points regarding these two features.

The first, content-independence, suggests that the guiding force of prescriptive rules is derivative from the authoritative source which issued them (Hart 1982). As such, a variety of actions prescribed by the rules, the merits of which may range dramatically, are to be carried out for the same reason, their authoritative source (Ibid). This relates to what has been called the breakdown in the transitivity of reasons, which is really a breakdown in rule-following justification (Raz 2009). In essence, a content-independent justification of rule-following takes two steps: the existence of a prescriptive rule is justified because it has been issued by a legitimate authority and in turn, the rule justifies the performance of the action which it prescribes (Ibid). Consequently, the justification for performing actions required by the rule is indirect because what is justified is performing actions which are in accordance with a justified rule (Ibid).

The second feature, pre-emption, suggests that reasons provided by prescriptive rules will dislodge those reasons that go against the action prescribed by them, reasons considered by the issuing authority before the rule's issuance (Raz 1986, 2006). This works in the following way. Underlying prescriptive rules are reasons which justify the actions the rules prescribe (Ibid). These (background) reasons are considered by an authority prior to issuing a rule (Ibid). Once issued, however, a rule replaces all of these reasons (Ibid). The rule incorporates the considerations it is based on and stands above them as a result (Ibid). Most importantly for our purposes, the rule replaces those reasons which go against the rule's content and that have been defeated in the process of issuing the rule.

If these two features of prescriptive rules are successfully defended through anchorage in a conception of legitimate authority the puzzle is solved for prescriptive rules (this will be considered in the next chapter). To see how the puzzle can be solved consider the following. The normative content and guiding use of prescriptive rules reflects in their typical formulation: "All Ss ought to X in C". In accordance with the puzzle of rule guidance, action X is either supported by the balance of reasons or it is not. If X is supported by the balance of reasons then X will be performed because the balance of reasons indicates X-ing. The rule is redundant in this case. If X is not supported by the balance of reasons then X ought not to be performed as to do so would be irrational. The rule should be abandoned.

The puzzle of rule-guided action is at odds with the conception of prescriptive rules from above. To understand this we must recognize the underlying assumptions which operate as background for the puzzle. The first, what counts in the decision-making process of an agent, when he or she is deciding to perform or not to perform a certain action, is how the reasons for or against the action fare on the balance of reasons. The second, rules are no different from other considerations that may be taken into account by an agent. It is because of these two underlying propositions that following rules becomes paradoxical. What content-independence and preemption achieve as features of prescriptive rules is to construct an alternative view of rules where these assumptions are denied. By affirming these features then we are able to avoid the puzzle's conclusions.

To start, if a prescriptive rule is a content-independent reason for action then the rule will not be followed in virtue of its stated content. Counter-intuitively, the merits of performing action X required by a prescriptive rule are not the reasons which justify performing it. The justification instead is two-parted. X ought to be performed because there is a rule which demands the action and because that rule has been issued by a legitimate authority. This type of

rule-following justification denies the underlying assumptions of the puzzle. The agent's performance of X does not depend on whether or not the balance of reasons supports X-ing in the way conceived by the puzzle. The balance of reasons may indicate that X ought to be performed, but the reasons which favor X-ing (on the balance of reasons) are not the reasons which justify the rule about performing X, which in turn justifies X-ing.

The rightness of the action prescribed by the rule can be confirmed or denied by the balance of reasons. This however is not what counts for an agent when deciding whether or not to follow a given rule. Because of content-independence (but also pre-emption), actions prescribed by a rule should be performed simply because they are so prescribed (Raz 2009). What matters is that the rules are issued by a legitimate source. Content-independence switches focus from correct content to legitimate authority (Raz 2009).

Moreover, because rules give rise to preemptive (exclusionary) reasons, the weighing process by which one determines whether or not to perform the action prescribed is barred. In issuing rules, authorities consider reasons for and against the rule's prescriptions. Because of double counting it is inefficient for subjects to reconsider the merits of the actions prescribed by the rule (Raz 1986). This means that, at least on practical grounds, agents will not consult the balance of reasons as it applies in particular cases.

Furthermore, since prescriptive rules are exclusionary reasons, it means that the rule is a second-order reason *not* to act on reasons which go against it (Ibid). This functions as a denial of the puzzle's second assumption. The rule is not another standard reason for action to be considered by agents. The rule operates in such a way as to exclude all reasons which do not favor it (and were considered by the authority). Because the balance of reasons is emptied of reasons which go against following the rule, the only remaining reasons are those which favor it

plus the rule itself (Raz 2006). Consequently, as indicated by the balance of reasons, the rationality of following prescriptive rules is secured.

To restate, given preemption and content-independence the puzzle can be solved. In essence, this is because the depiction of prescriptive rules from above runs counter to the one assumed by the puzzle of rule-guidance. On the basis of the balance of reasons agents normally decide whether or not an action ought to be performed. In our view, however, the justification for rule-following is content-independent and pre-emptive. The two features combine to deliver a conception of rules as reasons which is hierarchical, where prescriptive rules issued by legitimate authorities are positioned higher up on this reasons' ladder (Schapiro 2002, p.409). The picture is yet incomplete because while we have said a lot about rules themselves and how they operate we have yet to say much about the authorities which issue them.

Ahead is the challenge of providing a conception of legitimate authority that can, in virtue of legitimacy, sustain the rationality of rule-following in the ways described. We have achieved to shift the problem from one about the rationality of following rules to one about the rationality of following rule-issuing authorities. Thus, the justification for following rules, whether right or wrong in their stated content, must arrive now from their source.

## **Conclusion**

In accordance with its aim, the preceding showed that the puzzle of rule-guidance does not apply to constitutive, descriptive, or regulative rule types. The specificities of these rule types together with the puzzle's strict formulation indicate that the incompatibility thesis cannot gain traction. In showing this, the chapter narrowed and refocused the scope of the puzzle by showing why and on what grounds other rule types can be disqualified from consideration. This demarcation of the puzzle's scope undermines deep skepticism about the rationality of following rules generally.

Further, such analysis proves to be prerequisite for attempts to defend those rules which remain within the puzzle's scope, prescriptive rules.

The fundamental approach to rescuing prescriptive rules relies on the properties of the rule type itself. The traits of content-independence and pre-emption work to undermine the puzzle's force by showing that the source of prescriptive rules makes them (ultimately) above the claims of redundancy and irrationality. Still, certain implications of content-independence and pre-emption remain problematic. Dependent as they are on authority, some means of establishing an authority's legitimacy is necessary. (The established assumption connected to this is that only such authorities that are legitimate may legitimately issue commands—prescriptive rules—to be followed by agents because the rules are legitimate). Therefore, if content-independence and preemption can be supported through a solid conception of legitimate authority then the solution to the puzzle is fully articulated. The following chapter presents Raz's service conception of authority as the answer to the puzzle of rule-guidance.<sup>32</sup>

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<sup>32</sup> Other possible answers to the rule-following dilemma will not be considered in this work largely because of time and space constraints. The fine differences and complexities between accounts prevent me from listing all possible answers. The most noted however are: the compatibilist, revisionist, and constraint positions. Here is a succinct description of them. Compatibilists claim that rational agents should always perform the action supported by the best reasons. Further, they claim that rule-guidance can be very relevant to instrumental practical reasoning (McClennen 2004). The compatibilist denies that if the rule gives the right result, then the rule is irrelevant or redundant (Ibid). However, if the allowance of some rule to guide choice is not supported by the balance of reasons, then it would be irrational to be guided by the rule (Ibid). Revisionists deny that if the rule gives the wrong result it would be irrational to follow it. This is Joseph Raz's argument which is considered here. There is a compatibilist response to Raz's perspective. This states that an exclusionary reason of the sort Raz proposes could be treated as a very weighty first-order reason (Ibid). The constraint position (Levi, Shapiro) regards the commitment to rules as a volitional act that alters the feasible set of future alternatives (Ibid). Thus, making a commitment is to be understood as causally leading an agent to no longer consider certain actions as feasible (Ibid). A primary problem for this approach is how it is possible to explain what has to be regarded as a special sort of feasibility—how to account for the rational agent coming to regard, by an act of will, certain logically feasible (and attractive!) alternatives as no longer practically feasible. For a more in-depth discussion of these issues *see*: McClennen, E. (2004).

## *Chapter Five: A Legitimate Solution*

### **Introduction**

Having determined the scope of the puzzle of rule-guidance, it is time to show how the puzzle can be ultimately defeated for those kinds of rules to which it applies—prescriptive rules. That is, the puzzle will be shown to have no merit to the only rules it can apply to, and thus the theoretical dilemma it poses is effectively moot. The features of content-independence and pre-emption were shown to be able to succeed in achieving this. In keeping with what has preceded, then, prescriptive rules should not be followed because of their content but because of their source. With this, we have moved from a content-based justification of rules to one that is source-based. Such a shift lies at the heart of the puzzle's solution; it indicates why agents should act on (authority's) rules, and why they could not have acted on their own reasons in a comparable way. The argument made in the following seeks to shore up this source-based account by detailing the conditions of legitimate authority, and ultimately showing that if an authority is legitimate following its rules is justified. For this last step, the Razian solution is advanced.

The question we face, then, is the following: How can it ever be justified to follow a rule simply in virtue of its source (i.e. the issuing authority) and independent of its content? Joseph Raz's service conception of authority answers this question by providing what has become one of the most complete and influential accounts of legitimate authority. His conception attempts to make sense not only of what authority is, but also of why and how an individual could regard an authority as legitimate. Through a conception of legitimate authority the possibility of arriving at a source-based justification of rule following becomes possible. Before any of this is laid out,

however, the boundaries of Raz's account need delimitation. This will be one major pursuit in the following chapter: outlining and analyzing through a hypothetical the core concepts of Raz's service conception of authority.

Before setting off, I want to give an overview of this chapter's structure. Part one offers a brief account of the main ideas of the service conception of authority. The aim here is to introduce the basic concepts and principle questions that shape this account. Some concepts will be familiar to the reader only this time their functioning will be explained as part of the service conception as a whole. Part two relies on the main ideas already introduced, but reconstitutes them in the form of an example. The aim is to clarify and concretize the more formal exposition of the service conception provided in part one. This will prepare the ground for critical analysis. Part three returns to the puzzle of rule-guidance and provides a solution to it on the basis of the Razian elements presented before. Part four concludes this chapter by compressing some of the crucial points made.

### **1. Authority in Raz: Core Elements**

In offering a conception of authority that shows when and how an authority can be regarded as legitimate, the service conception seeks to provide solutions to two problems—one moral and the other theoretical (Raz 2009, p.134). The moral problem can be put in the interrogative; it asks 'how can an individual have a duty to subject his or her own judgment and will to that of another?' Of the theoretical problem, Raz says: "in exercising authority we impose on others duties that they did not have before, and we do so simply by expressing an intention to do so" (Raz 2006, p.1012). The theoretical problem, then, concerns how reasons (for action) and obligations can be imposed simply by communicating the intention to impose them (Raz 2006, p.1012). Raz provides solutions to both issues.

The service conception seeks to solve the moral problem by means of two conditions, which are called conditions of legitimacy (Raz 2006, p.1017-18). The first is the Normal justification thesis or NJT. The condition of legitimacy captured by it stipulates that when the NJT is met a subject would better conform to reasons that apply to her anyway if she intends to be guided by an authority's directives than by following those reasons directly (Raz 2006, p.1014). In other words, NJT holds that, "authorities are legitimate only if their directives enable their subjects to better conform to reason" (Raz 2006, p.1014, p.1018). The second condition is the Independence condition or IC. It says that matters concerning which the first condition is met are such that with respect to them it is better to conform to reason than to decide for oneself without the aid of the authority (Raz 2006, p.1014).

Again, Raz claims that the above two conditions answer the moral problem. Here is a succinct way of formulating his solution: an individual (subject) may have a duty to subject her will and judgment to that of another if she would better conform to reasons that apply to her anyway if she intends to be guided by the authority's directives (Raz 2006, p.1014). The two conditions are not always sufficient to establish legitimacy and other normative, moral considerations may have to be taken into account (Raz 2010, p.298). Nonetheless, the two conditions of legitimacy aim, among other things, to provide a test by which a subject can differentiate between types of authority (i.e., legitimate or otherwise).

In responding to the theoretical problem, Raz claims that a person may be said to have authority over another if and only if there are sufficient reasons for the latter to be subject to duties at the say-so of the former (Raz 2006, p.1013). While this assertion seems probable, Raz himself acknowledges that it does not say much about whether it is ever possible for someone to have sufficient reasons. Furthermore, it does not indicate when or if a person may have authority over another (Raz 2006, p.1013-14).

With these two problems and connected conditions outlined, focus can turn to another element of the service conception—the Dependence thesis or DT. Raz formulates it as such: “All authoritative directives should be based on reasons which already independently apply to the subjects of the directives and are relevant to their action in the circumstances covered by the directive” (Raz 1986, p.47). Raz qualifies the thesis by suggesting that basing authoritative directives on reasons that apply independently to subjects may take circuitous routes; nonetheless, on the whole authorities should act primarily for dependent reasons (Raz 1986, p.47).

The Preemption thesis, referred here as PT, forms another core element of the service conception. It stipulates that authoritative directives preempt those reasons that are against required conduct, dependent reasons that were meant to be taken into consideration prior to issuing the directive (Raz 2006, p.1018). In describing this thesis, Raz employs the legal doctrine of *res judicata* (Raz 1999, p.121).<sup>33</sup> In effect, the authority can be said to act as a judge considering opposing reasons from different parties. These opposing reasons will be replaced by the authority’s judgment in the form of a verdict, or in keeping with jargon, by an authoritative directive.

Raz’s service conception also details exclusionary reasons. These are among the most debated elements of the service conception.<sup>34</sup> Raz writes that a binding authoritative directive

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<sup>33</sup> It is defined as a matter that has been adjudicated by a competent court and which therefore may not be pursued further by the same parties; the fact that a particular matter falls into this category (The Oxford English Dictionary, 3rd Ed., 2010).

<sup>34</sup> Much discussion of the Razian model of practical authority has focused on this part of his theory. Various positions on the existence of exclusionary reasons have been taken. They range from a complete denial of valid exclusionary reasons to claims that the very concept of exclusionary reason is incoherent. Thus, among others, M.S. Moore (1989) and Richard Flathman (1980) take critical attitudes towards the idea of exclusionary reasons and claim its deficiency. Ronald Dworkin says:

We do not treat even those laws we regard as perfectly valid and legitimate as excluding and replacing the background reasons the framers of that law rightly considered in adopting it. We rather regard those laws as creating rights and duties that normally trump those other reasons. The reasons remain, and we sometimes need to consult them to decide whether, in particular circumstances, they are so extraordinarily powerful or important that the law’s trump should not prevail (2002, p. 1672).

provides “a reason for behaving as it directs, as well as an exclusionary reason” (Raz 2006, p.1022). An exclusionary reason is defined as “a second order reason to refrain from acting for some reason” (Raz 1990, p.39). Raz conceives of second-order reasons as always prevailing over the balance of first-order reasons—“winning not by weight but by kind” (Raz 1975, p.46).

At the core of these claims sits the idea that reasons provided by the directives of authorities should not simply be added to other reasons. These reasons are different from standard ones because they possess exclusionary force. Within their jurisdiction, exclusionary reasons can overrule even the weightiest of reasons of one kind. However, outside of their jurisdiction they will not exclude even the most trifling of reasons of a different kind (Raz 1979, p.22-4). Raz walks a middle ground, conceiving these reasons to be conclusive within their scope yet, *prima facie* outside of their jurisdiction. Most importantly, however, exclusionary reasons aim to secure an obligation on the part of subjects by way of exclusion. The conjunction between a first-order reason to act and a second-order reason not to act (on competing reasons) constitutes a protected reason to act (Raz 2009, p.216).

Having enumerated the basic parts of the Razian conception of authority, we can now consider how they operate. That is, how they come together to create a coherent account. Not only can an example more fully explicate the answers to the moral and the theoretical problems already discussed, but they can also help to pinpoint potential problems of the service conception. The core elements above are at the foundation of Raz's service conception of authority, but they can be applied through example to give a better sense of what and how they function.

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Frederick Schauer (1991) takes an intermediary position about rules as having only presumptive force, i.e. sometimes but not always excluding considering all the reasons, which ground the exclusion (p.88-93).

## **2. Authority in Raz: A Reconstructive Account**

This section offers a reconstruction of the core elements from above. This allows for a re-enactment of some of Raz's main arguments and principal claims by way of an example, which can illuminate the complexities and interpretative difficulties of the service conception of authority. Among other things, the example emphasizes the possibility of justifying rule-following through source rather than content. The hypothetical is inspired by Raz's 'Mastergame Chess Club' example, and the explanation by and large comes from his book chapter "Reasoning with Rules" (2009).

Let's say there is a putative authority. Let's say a subject wants to know if it is legitimate. In order to determine this, Raz would claim that it must be tested in accordance with the two conditions for legitimacy. So, a putative authority is legitimate if the subject is likely to comply better with reasons that apply to her anyway if she accepts the directives of the authority as (authoritatively) binding, and tries to follow them rather than try to follow the reasons that apply to her directly (Raz 1986, p.53). However, and this is the second condition, the preceding is valid only in those instances when it is not more important for the subject to act without the aid of authority. These are the conditions presented above. But how do they in fact play out? Let's construct the example.

Take the board of trustees of the Pamphlet Club. The members of the Pamphlet club go out every Saturday morning and hand out various types of literature in pamphlet format. (You may wonder why they do this. For our purposes it does not matter, but let's say it is because handing out pamphlets makes the club's members feel a warm glow inside). Assume that one of the many functions of the board is to issue rules concerning the functioning of the club. Before testing whether the board meets the legitimacy conditions, the board should be regarded only as a

putative authority. In order for it to gain legitimacy it must satisfy the Normal justification and Independence conditions.<sup>35</sup>

Consider the first condition. The board of trustees of the Pamphlet Club should help members of the club achieve better conformity with reasons that apply to them anyway. We can assume that a member is interested in the club running well and everything that this might entail. In this respect, a member takes the interests of the club are by and large also her own interests. It can be asked, does Raz's account necessitate an identity of interests between authority and those subject to it? To this, the dependence thesis provides the answer. The authority may pursue interests that are not also the subjects, at least not in a direct way (e.g., considerations arising out of the needs of bureaucracies) but, as DT specifies, it should act primarily for dependent reasons, i.e. reasons which independently apply to the subjects of the directives (Raz 1985, p.127).

Let's go back to the rules issued by the board of the Pamphlet Club. According to Raz, rules such as these state what subjects ought to do. However, they do not state why they ought to do it by reference to any kind of good that will come to them if they do so. That is to say, the rules do not state what is good about doing this or that, but only that subjects ought to do this or that (Raz 2009, p.207). Thus, we spell out the difference between normative statements and evaluative ones. In order to explain why rules have normative force we must rely on evaluative considerations, but in a way that allows for a normative gap (i.e., between their value and their normative force) (Raz 2009, p.209).

The problem appears when some rules themselves become reasons for subjects to do something and not just statements about what they have reason to do (Raz 2009, p.207). Raz asks: "How can it be that rules are reasons when they do not point to a good in the action for

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<sup>35</sup>Again, the two conditions are not always sufficient to establish legitimacy and other normative, moral considerations may have to be taken into account (Raz 2010, p.298). Nonetheless, they are as close as we come to having conditions of legitimacy.

which they are reasons?” This is captured more succinctly in what he calls “the opaqueness of rules”. A reason is opaque if a complete statement of it fails to show what is good about the action for which it is a reason (Raz 2009, p.205).

Let’s say that the rules of the Pamphlet Club stipulate that members can only be accompanied by one guest at club meetings. One can imagine how a member may not care about bringing guests, whether one, five, or fifty. As above, there needs to be a justification that the rule is a reason for members to act as it prescribes. Since the member is indifferent to bringing guests to club meetings, making the matter an unimportant one, the Independence condition is easily met in this case. It is less important for a member to decide for herself about how many guests to bring along than it is to improve her conformity with right reasons by following authority (Raz 2006, p.1014). Now, if the member was not indifferent, but rather wanted to bring more than one guest (and this was a personal decision that was important for the member’s exercise of independence), the Independence condition might not have been met.

The Normal justification condition would have it that if subjects follow authority they are more likely to comply with reason. As before, members may be basically indifferent about the number of guests they can bring, in which case they may have no reasons “that apply to them anyway” to *better* follow (with the aid of the authority). However, while the content of the rule may be inconsequential to them, the affairs of the club in general presumably are not. In deference to H.L.A. Hart, this is an instance of what Raz calls a content-independent justification (Raz 2009, p.210):

A reason is content-independent if there is no direct connection between the reason and the action for which it is a reason. The reason is in the apparently “extraneous” fact that someone . . . has said so, and within certain limits his saying so would be reason for any number of actions, including (in typical cases) for contradictory ones. (Raz 1986, p.35)

The distinction between ordinary reasons and authoritative reasons rests squarely on the fact that it is not necessary to inquire into and calculate the merits of an action prescribed by an authority in order to decide whether or not to perform it. The considerations that establish whether or not the rule is binding do not bear primarily on the desirability of the act prescribed (Raz 2009, p.210). The rule may be binding because it is *better* for the affairs of the club to be governed by its board of trustees than to be organized some other way or left in chaos (Raz 2009, p.209). This reasoning, however, can justify a whole variety of rules, not just the one related to how many guests members can bring. It can even justify contradictory rules (e.g., a rule that says “no family members at meetings”, and another rule that says “family members are required to attend meetings”) (Raz 2009, p.210). This is an obvious problem.

Raz says: “For a content-independent justification to be possible there must be reasons for an agent to behave in a certain way other than the value of the behavior in question” (Raz 2009, p.212). There are no specific reasons that Raz provides. Instead, the key to understanding the content-independent justification of rules lies in a specific explanation of how they and practical authorities function through the use of exclusionary and protected reasons. Here we come to the Preemption thesis.

In the example, the board of trustees of the Pamphlet Club provides its members with a protected reason for bringing one guest. The rule is not only a reason for action but part of a structure of inter-related reasons (Raz 2009, p.216). It is, firstly, a reason for the action prescribed and, secondly, a reason not to act for other competing reasons (i.e., it is an exclusionary reason) (Raz 2009, p. 216). Reasons that members may have had with respect to bringing two, five, or fifty guests are now preempted and excluded. They are replaced with the rule stating no more than one guest. This latter point may be said to be an instance of *res judicata*. The board has (ideally) already considered the possible relevant reasons that all those

subject to this rule may have (reasons for and against), and has replaced them with the current rule.

The preceding paragraph resolves some of the nagging questions about rule following. The NJT justifies following the directives of the authority because it is by following these that subjects improve their conformity with reasons which apply to them anyway. The authority is placed in a better position to assess background reasons which justify the rule. We can see how the problem of justifying rules as being reasons for action is solved by adopting the service conception. In spite of opaqueness and content-independence, a rule is a valid reason for acting because it has attained a protected status. This protected status means that a rule is now a reason to do what it prescribes (i.e., a first-order reason to act) and a reason not to act on those reasons that rival it (i.e., an exclusionary second-order reason).

The binding nature of the rule does not come from its content, but because of a legitimate source which provides protected reasons for subjects. The board of trustees having had the opportunity to weigh the benefits and demerits of establishing the one-guest rule has issued the one-guest rule (Raz 2009, p.216). This rule is now a reason for subjects not to act on the reasons for or against bringing more than one guest. The rule displaces the reasons that the board was meant to consider (Raz 2009, p.216). Typically, ordinary reasons are added to pre-existing reasons and their relative weight is assessed. However, the rule is a valid reason for action not because it has won (by weight) against other reasons that a member may have had. The mark of the authoritative reason (i.e., the rule) is that it works through exclusion (winning by kind) and not addition.

The example of the Pamphlet club is meant to elucidate the workings of the service conception. In following some of Raz's main arguments, focus was placed on arriving at an explanation for the possibility that authoritative directives (in our case, prescriptive rules) can

constitute valid reasons for action for subjects. In the section below, armed with knowledge of these concepts and how they operate, the aim will be to finally achieve what we have long sought after—the dismantlement of the puzzle of rule-following.

### **3. The Solution Spelled-Out**

To face the paradox of rule-following head on, assume that a legitimate authority issues a prescriptive rule. The rule requires that an agent perform some action that is already supported by the balance of reasons. Now, since we have assumed that this is a legitimate authority, it means that the authority meets the first condition— the NJT. On the basis of the satisfaction of the NJT, obeying the authoritative rule will result in improved conformity with reasons already possessed by subjects. Therefore, following the prescriptive rule will make a difference to subjects because by performing the action required by it they will be more likely to conform to background reasons instantiated by the rule. The improvement in conformity with reasons is due to the fact that the authority is in a better position to evaluate and weigh the dependent reasons which apply in virtue of its expertise and coordinating abilities. In this sense, if the subjects followed their own reasons directly then there would be a greater chance of them committing an error. By following the prescriptive rule then subjects improve their chances of conforming to the balance of reasons on the whole.

On the second horn of the dilemma, if the action required by the prescriptive rule is one that is unsupported by the balance of reasons then subjects will still be justified in following the rule. This is because the rule is issued by a legitimate authority, which means that the prescriptive rule has achieved protected status. The rule gives rise to content-independent preemptive or exclusionary reasons to: first, act as it requires and second, not to act on the basis of reasons which go against its stated content. This means that those reasons considered by the authority and which went against the action prescribed by the rule have been displaced. As such,

the only reasons left to be considered by subjects, when consideration regards deciding how to act, are those provided by the rule. The balance of reasons remaining will thus support rule-following.

All of the core elements of the service conception presented in the first section and reconstructed in the second, play crucial roles in this depiction of the solution to the rule-guidance puzzle. A legitimate authority can provide a justification for following its rules in virtue of its legitimacy. To be legitimate an authority must pursue those reasons that independently apply to its subjects but in a way which is improved. In doing this the authority will serve its subjects' interests better than if they were doing it themselves. Nevertheless, the authority will only use its superior resources in the service of agents and not as an excuse to trample their autonomy. When matters that are important to a subject's identity or personal growth arise and make it the case that following reasons directly without the aid of an authority is more valuable than otherwise a subject is allowed to do so.

The pre-emptive nature of authorities largely accounts for the success of the service conception in doing away with the incompatibility thesis. According to the theory, pre-emption is part and parcel of the nature of legitimate authorities (Raz 2009, p.141). Without it, an authority could not succeed in improving subjects' conformity with background reasons; and this is precisely what gives an authority its legitimacy, that it, *in fact*, achieves this (Ibid, p.141-2). Ultimately this means that authorities will sometimes indicate actions that are different from what subject would do without them (Ibid, p.141). But either way, the legitimate authority will make a difference to subjects.

On the basis of the preceding we can finally assert that not only have we identified the two features of prescriptive rules, which are capable of diffusing the puzzle of rule-guidance, but also that we have identified the conditions for legitimacy when these two features hold. The

Normal Justification thesis is the first condition. It is also a statement of the benefits that legitimate authorities bring to subjects. Following the rules issued by legitimate authorities improves conformity with background dependent reasons (reasons which subjects already have). Such improvement makes a practical difference to subjects. The second condition, of Independence, ensures that the autonomy of individuals is not completely sacrificed in the process of reaping these benefits.

We might step back and consider why these conditions of legitimate authority and features of prescriptive rules diffuse the force of the puzzle. In simplest terms, it is because there are sound reasons to abide by rules issued by legitimate authorities. This can be considered in greater detail in the ways shown above. The service conception's answers to the dilemma however do not exhaust the possibilities. Although a powerful reply, this account has had its share of criticism. The following chapter will address a new angle for critique and refinement.

## **Conclusion**

The above is a strong answer to the puzzle of rule-guidance, where both horns of the dilemma are resolved in the ways explained. The two conditions for regarding an authority legitimate make it the case that when they obtain the problems attending the puzzle of rule-guidance disappear. In presenting this solution to the incompatibility thesis the chapter focused on some of the core elements of Joseph Raz's account of legitimate authority. In initially isolating the basic but central features of the service conception, this chapter made them more perspicuous through example and reconstruction. In addition to providing a solution to the incompatibility thesis, this chapter also prepared the ground for further analysis and criticism of the service conception.

## *Chapter 6: The Service Conception Qualified*

### **Introduction**

Although the service conception of authority provided the last piece in the solution to the incompatibility thesis, we can nevertheless step back and examine some potential grounds for refinement to the service conception itself. Some of the theory's claims can be clarified and some possible avenues for qualification can be proposed. In so doing, this chapter focuses on one feature of the service conception—its knowability condition. The adjustments to the service conception tendered below are far from putting into question the solution to the puzzle of rule-guidance. Rather, they can improve the solution by strengthening and clarifying some of its elements.

It is necessary to note at the outset a minor shift from focus on reasons for action, which occupied the considerations in the preceding parts of this work, to an inclusion in our consideration of reasons for belief. Again, reasons for action are facts which constitute a case for or against the performance of a certain action (Raz 2009, p.37). Reasons for belief are epistemic reasons. They are reasons to believe in a proposition by being facts that are part of a case for the belief in the truth of a proposition (Ibid). In other words, reasons for belief are truth-related considerations regarding some proposition (Ibid).

Joseph Raz's service conception aims to provide answers to what it means to have authority and to be a subject to it (2006, p. 1006). In doing this, Raz answers questions about how an individual can regard an authority as legitimate. These were detailed at length before, but it is necessary to note again here that certain epistemic conditions exist which enable the recognition of an authority. Another way of saying this is that an authority must be knowable to

subjects. As the following will illustrate, knowability is a crucial piece in Raz's overall account. It is also an area for refinement of Raz's theory because aspects of his presentation of this condition make it appear that the way of establishing the legitimacy of authorities is perhaps too demanding.

To support the above claim, the following chapter identifies in its first section the knowability condition as such and it also positions it within Raz's larger theory of legitimate authority. Section two offers a critical analysis of the condition. In so doing, it casts doubt on the feasibility of satisfying it. Three grounds for concern are identified. One, meeting the first condition of legitimate authority, the Normal Justification Thesis (NJT) implies acceptance of and not belief that an authority is in fact legitimate. Two, given the incommensurability of values, it is difficult to establish when the second condition, the Independence Condition (IC) is met. Three, because of the vagueness and under-specification which surrounds the idea of 'right reason' the incommensurability problem is aggrandized. In turn, this makes the satisfaction of the knowability condition less likely. Together, the identification of these problem areas of the service conception constitutes the basis for a call for refinement of Raz's theory. A conclusion touches briefly on some of the implications of the previous points and brings this work to a close.

## **1. The Condition of Knowability**

In the previous chapters I have set out and explained the operation of the core elements of the service conception of authority. I now want to turn to a crucial feature underlying Raz's conception: knowability. The importance of the knowability condition will be established through a cursory presentation and clarification of its placement in Raz's account. The aim here is to put forward the idea of knowability as it appears in the service conception so that later, on the basis of it, the feasibility of meeting this condition can be questioned.

In Raz's words, the condition of knowability stipulates the following:

Someone or somebody can be an authority only if the fact that the two conditions [NJT and IC] are met can be known to its subjects. . . . If one cannot have trustworthy beliefs that a certain body meets the conditions for legitimacy, then one's belief in its authority is haphazard, and cannot . . . be reliable. . . . The only reliable way of conforming to authority is through having a reliable belief that it is an authority, and therefore should be obeyed. (Raz 2006, p.1025)

This is the place that the knowability condition occupies in Raz's account of authority. The entire conception seems predicated on its realization.

In accordance with the passage above, the knowability condition of the service conception of authority stipulates that the satisfaction of the two conditions which establish the legitimacy of practical authorities, the Normal Justification Thesis (NJT) and the Independence Condition (IC) must be knowable to subjects. That is, subjects must be able to know through reasonable inquiry that the two conditions are met. A central question follows from this depiction; namely, is it ever possible to know that an authority meets the two conditions?

Raz assumes that "whenever one can form reliable beliefs that the conditions for legitimacy are met, one can also have knowledge that they are met" (Raz 2006, p.1025). Note, then, at the foundation of knowability is being able to form reliable beliefs. In this sense, asking about the feasibility of knowability is asking about the possibility of belief formation. Rephrasing the question so as to take this qualification into account: Is it possible to form reliable beliefs that the conditions of legitimacy are met (given Raz's premises)? The answer to this is a starting point for doubt.

## **2. The Knowability Condition Challenged**

### **2.1. Knowability and the Normal Justification Thesis**

Raz claims that in order for an authority to be legitimate the two conditions for legitimacy (the NJT and the IC) must be met. Of course, there may be cases when the fact that the authority meets the two conditions is not sufficient to establish legitimacy; but, in general we can affirm

that, according to Raz, a legitimate authority ought to meet the two conditions for legitimacy. Further, and this will be considered below, subjects must be able to know that these conditions are in fact satisfied by the authority so that it is justified to obey its directives.

In the following, I want to disentangle some of the claims above and show what they mean when applied to (hypothetical) authorities and subjects. To start, I want to detail a bit of what it takes for an authority (call it A) to meet the two conditions for legitimacy:

If A meets the first condition for legitimacy—the NJT—then it has been shown that: its subjects are likely better to comply with reasons which apply to them if they accept its directives as authoritatively binding (Raz 1986, p.53).

If A meets the second condition for legitimacy—the IC—then it has been shown that: it is better for subjects of A to comply with reasons than to decide for themselves (Raz 2006, p.1014).

In order to reveal the problems surrounding the two conditions and the way in which they relate to knowability I want to take the perspective of a (would-be) subject (call him S) of A.

As revealed above, according to the knowability condition, S must believe that A is a legitimate authority, otherwise her obedience is haphazard (Raz 2006, p.1025). According to Raz, the way in which S comes to form the belief that A is a legitimate authority is by believing that A satisfies the two conditions for legitimacy. Further, S must also believe that satisfying the two conditions amounts to establishing the legitimacy of A. I want to focus on this latter point. One can wonder if satisfying the two conditions constitutes sufficient, reliable reason for belief. Further, and the following will show this to be a weak point in the service conception, one can wonder whether or not the fact that S believes that A passes the two conditions can be considered a reliable reason for S to believe that A is a legitimate authority. It seems doubtful.

The reason for doubt is that meeting the two conditions does not (necessarily) establish belief. This can be restated as such: believing that the NJT and IC have been satisfied can provide S with a reason to act *as if* A were a legitimate authority, but not necessarily with a reason to believe that A *is*, in fact, a legitimate authority. Of course, S may just happen to believe that A is a legitimate authority without justifiable support, but this would not satisfy the condition of knowability. The idea is that it does not necessarily follow from meeting the two conditions for legitimacy, which are the Razian grounds for establishing legitimacy, that S has sufficient, reliable reason to believe that A is a legitimate authority.

A distinction between belief and acceptance that Raz himself employs can help reveal the extent of the preceding problem<sup>36</sup>. That is, satisfying the two conditions for legitimacy can be sufficient grounds for S to accept A as a legitimate authority, but not necessarily to believe that A is a legitimate authority. The distinction between belief and acceptance is captured in the following: “accepting a proposition is conducting oneself in accord with, and because of, the belief that there is sufficient reason to act on the assumption that the proposition is true: acceptance of the proposition that P entails belief, but not belief that P. Rather it entails belief that it is justified to act as if P.” (Raz 2009, p.38). This points to acceptance as combining reasons for action with reasons for belief, but makes clear that the ultimate target of acceptance is action (Ibid).

A significant point of contrast between belief and acceptance is that the latter allows for the possibility of a gap between what is actually the case and what one is willing to go along with as a kind of working assumption or hypothesis<sup>37</sup>. On the other hand, reasons for belief do not allow for such a gap as they are necessarily truth-related (Raz 2009, p.37). Thus, acceptance,

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<sup>36</sup> About the distinction between belief and acceptance much more can be said than I do here. I limit myself to presenting matters in brief, in part, because Raz accepts this basic distinction. Therefore, the basis onto which I build my critique of his conception, it seems to me, is not something which Raz would find problematic. The conclusions I derive are, of course, a different matter.

<sup>37</sup> Audi (2008) refers to acceptance as a kind of working hypothesis and this seem to capture the matter well (p.91).

although a basis for action, is not necessarily an indication of belief. The possibility of having one without the other, that is the possibility of acceptance without belief and belief without acceptance constitutes grounds for distinguishing between the two and also a popular strategy for theorists who advocate for and employ this distinction<sup>38</sup>.

The above belief/acceptance distinction parallels the NJT. The exact formulation of it states that:

The normal way to establish that a person has authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly (Raz 1986, p.53)

This can be captured more succinctly, without altering the meaning of the NJT by the following statement: S (subject) will do better in complying with reasons which apply to him anyway if he treats A's (the authority's) directives as binding. The above illustrates that S will do better in

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<sup>38</sup> Yet another point of contrast between the two is that acceptance involves a voluntariness which is not present for beliefs (Ibid). About this, William P. Alston writes: "...accepting that p is both a complex dispositional state markedly similar to believing that p, but distinguished from it by the fact that this state is voluntarily adopted by a mental act" (2007, p.11). He offers the following example in support of this:

"Consider an army general... facing enemy forces...He needs to proceed on some assumption as to the disposition of those forces. His scouts give some information about this but not nearly enough to make any such assumption obviously true... He *accepts* the hypothesis that seems to him the most likely... He uses this as a basis for disposing his forces in the way that seems most likely to be effective, even though he is far from believing that this is the case (Ibid)."

Audi (2008) supports and employs the distinction above. He argues that acceptance is behavioral in a way in which belief is not. Other positions from the literature are similar. As mentioned, one popular strategy employed by theorists is that of pointing at the possibility of acceptance without belief and belief without acceptance. Van Fraassen (1980) argues that acceptance is a prevalent attitude in science to be distinguished from belief. According to him, scientists, who very often do not think that a particular theory is true, nevertheless accept it as a basis for research. So, although they lacking belief, acceptance allows them to proceed and act accordingly. This is a case of acceptance without belief. The reverse, belief without acceptance is also possible. Bratman (1999) proposes 'the ladder case' for illustration. In his example, an agent may genuinely believe, even before checking, that the ladder is stable. However, given that so much depends on this actually being the case and also because, in general, it makes for good policy, the agent may not accept that the ladder is stable until she has properly checked it. Thus, despite believing the agent performs actions which point to her non-acceptance. For other important discussions of acceptance/belief see: Cohen, J. L. (1989). "Belief and acceptance." *Mind*, 98, 367–389; —(1992). *An essay on belief and acceptance*. Oxford: Oxford; Frankish, K. (2004). *Mind and Supermind*. Cambridge: Cambridge; Harman, G. (1986). *Change in view*. Cambridge: Cambridge; Velleman, D. (2000). *The possibility of practical reason*. Oxford: Clarendon et al.

complying with reasons if he treats A as if it were a legitimate authority. The satisfaction of the NJT entails (for S) the belief that it is justified to act as if (in other words, on the assumption that) A were a legitimate authority. Recall, that this is precisely what the definition of acceptance from above stipulates.

Notice that it does not follow from satisfying the NJT that S has reason to believe that A is a legitimate authority, or that S should believe that A is a legitimate authority, or that A is in fact a legitimate authority. Because A satisfies the NJT, S has reason to act as if A were legitimate, meaning S has reason to obey A. However, this does not mean that S (necessarily) has reason to believe that A is legitimate. Because the NJT is not a truth-related consideration it cannot count as support for belief in the legitimacy of an authority. As above, the NJT entails S's belief that if he were to follow A's directives he would be likely to achieve better conformity with reason. NJT entails the belief that it is justified to act *as if* (i.e., on the assumption that A is in fact a legitimate authority) A were a legitimate authority, but NJT does not support the belief that A is in fact a legitimate authority.

On the basis of the above, it seems that the truth regarding A's legitimacy is not the concern of the NJT. Rather, the NJT is about providing subjects with reasons for acting, and not necessarily with reasons for believing. This is not a statement which constitutes a departure from what Raz himself would say about the condition. Raz's concern is with providing justification for following the directives of authority or with what is referred by him (and by many others) as surrender of judgment. While he is successful in providing such justification for action, the problem is that the aims of the NJT are not consistent with the demands from the knowability condition. From this follows that the NJT, as a condition that helps to establish who or what is, in fact, a legitimate authority, may not be apt to do so. The most that it can do, is establish who or

what alleged authority should be treated as if it were legitimate ( i.e., accepted *as* not believed *that*).

It may not be clear at this point how the issues above affect the knowability condition. Recall that the knowability condition stipulates that it must be knowable to subjects that an authority is legitimate (i.e., that it meets the two conditions for legitimacy): “one can reliably conform (to authority) only if one has reliable beliefs regarding that has legitimate authority.” Raz would claim that S cannot have reason to believe that A is a legitimate authority unless A meets the conditions for legitimacy. It follows that for Raz, if S believes that A meets the conditions for legitimacy, then S has reliable reason to believe that A is a legitimate authority. But as above, meeting the two conditions does not establish that an authority is, in fact, legitimate. It does not necessarily follow that if S believes that the two conditions are met S also has sufficient, reliable reason to believe that A is a legitimate authority, but only that S has reason—non-truth related reason—to accept A as legitimate and follow its directives. The fact that the Normal justification thesis is not truth-related shows that it is not a reason for belief, but rather a practical reason. As such, it may justify action but not belief.

The analysis has not yet tackled the issue of true and false beliefs. I start from the assumption that it is not irrational for an individual to act out of false beliefs when that individual does not have sufficient reason to suspect that she has a false belief. However, this does not show the individual to have a reason to act on those false beliefs. Suppose S has a false belief of the sort:

S believes wrongly that A will bring better conformity with reason.

It follows that:

S believes wrongly that she has a reason to follow A.

The two assertions cannot, in general, make the case that S (in fact) has reasons for acting of the sort:

S has a reason to follow A, because A will (in fact) bring better conformity with reason.

Ulrike Heuer (2004) addresses the issue of true and false beliefs when distinguishing between justificatory and explanatory reasons. According to Heuer the latter may rest on mistakes without any loss to their explanatory force (p.44). So, if S believes that she has reasons to follow A because of improvement to (right) reason, and it turns out later that she was wrong; her belief can still explain why she performed the action. However, it can justify the performance of the action only if she was right (Ibid, p.44-5). The idea is that false beliefs, in general, do not justify (Ibid). Heuer makes this point by looking at the structure of some excuses:

If a false belief could justify, there would be no need for an excuse in such cases. But in fact, we do excuse ourselves by claiming that the situation - say, our specific epistemic situation - was such that it wasn't possible for us to get it right. Only, because this is so - because it was impossible or extraordinarily difficult for us to form the right belief - are we excused (if we are) (Heuer 2004, p.45).

The analysis reveals that false beliefs do not justify action, but can explain it. If one accepts this, and I think there are some compelling reasons to do so, then the consequence for the example from before is that false beliefs with regards to the legitimacy of A, based on false (and sometimes even true<sup>39</sup>) beliefs about A satisfying the two conditions for legitimacy, may not justify S's actions even if they could help explain them. So, if A is not, in truth, a legitimate authority, as the NJT permits given that its entailment of acceptance of the legitimacy of A allows for a gap between the truth about A and what subjects are willing to go along with, then

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<sup>39</sup> The preceding discussion about belief and acceptance aimed to expose such a case. Even when S had a true belief that A met the conditions for legitimacy this was insufficient to establish whether or not A was, in fact, legitimate.

S's obedience might not be justified. It follows that in order for S's actions to be justified A must be, in fact, a legitimate authority. Justification can only come from true beliefs.

The whole of the above serves to qualify a previous statement. It was stated that the fact that the Normal justification thesis did not entail in its formulation any truth-related considerations about the bearers of legitimacy pointed towards it being not a reason for belief, but rather a practical reason. As a consequence it could justify action but not belief. In fact, being that the NJT is not truth-related illustrates that it may not even justify action. What it can do, is explain it.

So far the primary focus has been on the Normal justification thesis. By analyzing it in the above, some potential weaknesses in Raz's conception became clearer. To summarize, the NJT does not necessarily provide sufficient, reliable reasons for belief in the legitimacy of an authority, but rather acceptance of an assumed legitimacy. In light of this, the feasibility of satisfying the knowability condition can be doubted. That is, so long as knowability demands that one have a reliable belief about who has authority, then that the NJT might not establish this proves problematic.

## **2.2. Knowability and the Independence Condition**

Having concentrated heavily on the NJT does not leave us without things to say about the Independence condition. The two are related, and what was said of the NJT affects what can be said about the IC. After all, they have to be satisfied in conjunction with each other in order for legitimacy to be established. The preceding points, then, retain their strength. To make a brief note of them: if S believes that the Independence condition is met, then that may only give S reason to accept authority as legitimate (i.e., reason to act on assumption), but not necessarily provide strong, reliable reasons to support the belief that the authority is, in truth, legitimate.

Nonetheless, the following assesses what it means for the Independence condition to be satisfied. In so doing, it also takes account of two more aspects of weakness related to the knowability condition.

In order that the Independence condition is met, it must be the case that for the matters that the NJT obtains it is better to improve conformity to right reason than for a subject to decide for herself, without the aid of the authority (Raz 2006, p.1014). There are at least two problems associated with the preceding and these will be addressed below. The first pertains to the difficulty of comparing between independent values (i.e., arriving at 'right reason' and deciding for oneself). The second pertains to the issue of right reason itself and the vagueness and difficulties which surround it.

To the first problem, Raz acknowledges that one possible objection to his account is that a subject may not be able to make a comparison between the importance of deciding for herself and the importance of conforming to right reason<sup>40</sup> (Raz 2006, p.1015). However, he attempts to dismiss this objection from incommensurability by saying that it is premised on a false assumption; namely, that concerns which underlie reasons to act independently and reasons to conform to 'right reason' have nothing to do with one another (Raz 2006, p.1015). He may be right about this. Still, even if concerns that undergird both reasons may be in some way connected, that hardly resolves the problem of incomparable values.

Put briefly, the incomparable value problem arises when attempting to compare the value of achieving better conformity with 'right reason' with the value of deciding for oneself unaided

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<sup>40</sup> At various points in his body of work, Raz refers not only to the NJT's requirement of improved conformity with right reason, but also reason, background reasons and reasons. The ideas behind his assertions were explained before. Recall, the NJT is a condition for the improvement of conformity with right reason. This means conformity with background reasons, i.e. the justifying reasons which underpin the rule and were considered by the authority. These reasons instead must be those which independently apply to subjects, meaning that they are reasons that subjects already have as per the stipulations of the Dependence thesis. It is somewhat difficult to keep track of, but I think this captures the basic ideas to a certain extent. Raz comes close to offering more of an explanation of what he calls 'right reason' when he equates it with what is best (see page 114 in "On the Nature of Law" in *Between Authority and Interpretation* (2009)).

by authorities (Raz 2006, p.1015).<sup>41</sup> Even though Raz attempts to mount a defense from objections like this one, ultimately he concedes that “often the two concerns, one satisfied by conformity with reasons, the other by acting on one’s own judgment, may be radically different, and the cases for conformity or independence may be incommensurate, with the (uncomfortable) result that whether one is then subject to authority is undetermined” (Raz 2006, p.1016). Notice, then, that in finding weakness in the service conception on the basis of incommensurability, one need look no further than Raz himself. How this point affects the knowability condition specifically is explained below.

Unresolved by Raz, the incommensurable value problem is pertinent to the broader consideration of the service conception, but the main purpose of mentioning it here is that it affects the possibility of meeting the knowability condition. The most basic source for doubting that the condition's satisfaction is feasible comes from Raz’s own admission that the case of incommensurable values may leave one in a situation of indeterminacy with respect to her obligation to follow authority.

Although there is a vast literature on the topic of incommensurable values, we can put aside debates surrounding finer theoretical points about it, and assert with Raz that, at least on some occasions, subjects may find themselves in a deadlock with respect to how they should act.<sup>42</sup> Deciding whether to follow one's own reasons or improve right reason instead may not be

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<sup>41</sup> The terms incomparable and incommensurable are used synonymously. For discussions of this, and incommensurability generally, see: *Incommensurability, Incomparability, and Practical Reason*, Ruth Chang (ed.) (Cambridge: Harvard UP, 1997).

<sup>42</sup> One aspect of incommensurability debated in the literature is the relationship between incommensurability and vagueness. In this debate Raz differentiates between incomparability and what he calls “indeterminacy” of value. Raz defines two bearers of value as incomparable if and only if it is not true that “either one is better than the other or they are of equal value” (Raz 1986, p.342). The indeterminacy of value is a case of vagueness: it is neither true nor false of two items that “either one is better than the other or they are of equal value.” Raz regards the indeterminacy of value to result from the “general indeterminacy of language” (Raz 1986, p.324). On the other hand, other philosophers argue for the interpretation of incomparability as vagueness or, better put, they understand incomparability as entailing vagueness (Griffin 1986, p.96; Broome 1997, 2000). This is a departure from Raz as his account claims only that vagueness and incommensurability are compatible. This is simply a sketch of one of the debates in the literature on incommensurable values. Cf. Adler, M. (1998). “Law and Incommensurability:

such an easy task. The consequence is that subjects may not know whether or not the IC is met. Recall, that meeting the IC involves subjects knowing that it is better to follow the directives of an authority, so as to improve conformity with right reason, than it is to decide for them (Raz 2006, p.1014). This is precisely what the incommensurability problem questions. In turn, this means that the satisfaction of the IC may, at least in some cases, be unknowable which means that the knowability condition (i.e. that subject must know that the authority meets both the NJT and IC) is less feasibly attainable.

The second problem identified above concentrates on right reason. As will be seen, some of the difficulties that arise because of right reason center on Raz's limited explanation of both what it is and how it can be known by subjects. This affects the possibility of comparing between the value of arriving at right reason and that of deciding autonomously. Furthermore, it ultimately affects the possibility of forming reliable beliefs concerning who has authority (i.e., knowability condition).

The service conception holds that the legitimacy of authority turns primarily on its value in achieving something beyond itself—conformity to 'right reason' (Raz 2006, p.1026). The main advantage brought by recognizing authority as legitimate in Raz's conception is that following authority is "a more reliable and successful guide to right reason" (Raz 1985, p.25). One implication of this is that it must be possible for a subject to know (i.e., form reliable beliefs) that the authority is more likely than not to achieve 'right reason'. Further, Raz claims that through reasonable inquiry one should be able to discover that an authority is an authority and as such should be obeyed (Raz 2006, p.1025). The reasonableness of the inquiry turns on the

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Introduction." *University of Pennsylvania Law Review* 146, 1169-1184; Broome, J. (1997). "Is Incommensurability Vagueness?", in Chang, R, (ed.) *Incommensurability, Incomparability, and Practical Reason*. Cambridge: Harvard UP; Crisp, R. & Hooker, B. (2000). *Well-Being and Morality: Essays in Honour of James Griffin*. Oxford: Clarendon Press; Richardson, H. (1994). *Practical Reasoning about Final Ends*. Cambridge: Cambridge UP; Sinnott-Armstrong, W. (1985). "Moral Dilemmas and Incomparability." *American Philosophical Quarterly* 22, 321-329.

degree of improvement of conformity with 'right reason', where the more important the improvement the more extensive the inquiry (Raz 2006, p.1025).

This does not mean that subjects necessarily have to know what 'right reason' is. Any trepidation detected in the preceding sentence comes from Raz's lack of explication of 'right reason' and associated epistemic conditions. At a minimum, in order for conditions of legitimacy to be satisfied, subjects must believe that by following authority they will be able to arrive at 'right reason'. This may not necessarily mean that a legitimate authority knows what 'right reason' is either, at least not prior to deliberation. In a nutshell, subjects must believe that given the good judgment and coordinative abilities of an authority, it is more likely that by following the authority they will arrive at that which best instantiates 'right reason'.

Remember that the legitimate authority considers only reasons that apply independently to subjects (i.e., Dependence Thesis). Under-explained in this is how the authority comes to know the reasons that apply independently to subjects. Yet another feature that is given limited treatment is how one selects and weighs these reasons. How many (independent) reasons are preempted by the authority's ruling is also a bit of the unknown<sup>43</sup>. Now, it is possible that Raz can answer these concerns and provide a more robust depiction, but exactly how he would do this is not entirely clarified in his conception.

Belief in the legitimacy of an authority is conditional on the authority being more likely than not to help subjects conform to 'right reason'. The length that one should go in order to inquire into the legitimacy of a particular authority depends on this. But in spite of many references to 'right reason', Raz provides no full explanation of it (Lukes 1990, p.214). This is a problem that works in at least two ways. One is simply that Raz's account lacks clarity on key points. The other appears when we try to see how Raz's account would function. On this point,

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<sup>43</sup> For a criticism of Raz incorporating these and related problems see: Gur, N. (2007). "Legal Directives in the Realm of Practical Reason: A Challenge to the Pre-emption Thesis." *52 Am. J. Juris.*, 159-228.

we can wonder what subjects would do if they were trying to determine ‘right reason’ for themselves, perhaps in order to test whether the authority in fact meets the legitimacy conditions. There might be a multiplicity of conceptions of what it is (assuming one believes that it can be obtained, which is disputable). These conceptions would be grounded on a variety of beliefs, values, traditions, and so on. With these differences come a pronounced possibility of disagreement and conflict. Of course, there are many cases when we can say with a level of confidence that such conflicts will not arise. In absence of clarification by Raz of both the meaning and the procedure for arriving at ‘right reason’, the simple lack of clarity looks to be more threatening to the service conception. Notice that inquiring into whether an authority is legitimate (i.e., Raz’s reasonable inquiry) is dependent on being able to know what ‘right reason’ is. This in turn affects the knowability condition as a subject must be able to know that an authority is legitimate.

Exclusionary reasons, part and parcel of how authoritative directives operate, are also not without problems. Given the opaqueness of rules a subject may not know which reasons have been excluded by the authority and which ones remain. Furthermore, the weight of background dependent reasons as taken into account by the authority considering them may not be known. Finally, the weight assigned to reasons may be different on the subject-perspective than on the authority’s perspective and it may also change overtime<sup>44</sup>. These issues may prove problematic when attempting to determine improvements in conformity with right reason. Ultimately, because a subject is barred from acting on background reasons and possibly from even consulting them she may not know whether or not an action prescribed by a rule is the correct one. Because of this she may not know whether on the whole the rules point to right reasons and thus help improve conformity with them.

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<sup>44</sup> See supra note 43.

One might quickly reply to the above criticism that the service conception is not about knowing what the ‘right reason’ is. An ideal legitimate authority helps conformity with ‘right reason’ because it is best placed to do so, given its expertise and coordinative abilities. So, the argument goes, it does not matter that Raz does not explain what ‘right reason’ is. Even taking these points into account, the legitimacy of authority seems intimately linked with *being able to know* what ‘right reason’ is. This is because an alleged subject should be able to determine whether or not an authority has done what it claimed it could do. An alleged subject should be able to criticize authority on the grounds that it has failed to provide what it set out to provide. Finally, an alleged subject should be able to have in place a test for the success of authorities. After all, this is what Raz set out to achieve and what the knowability condition requires.

To conclude, the above points indicated potential weaknesses in Raz’s service conception of authority. They all pertained most directly to the condition of knowability as set out in his account. The problems noted were the distinction between belief and acceptance of authority; incommensurability of values; and most recently, right reason. About the first, I pointed out that it is acceptance of legitimacy that is supported by the two conditions (NJT and IC), and not necessarily belief in the legitimacy of an authority. The consequence was that the satisfaction of the two conditions could (at most) provide subjects with reasons for action and not with reasons for belief required for the satisfaction of knowability. As to the second, I illustrated that due to incommensurable values (conforming to ‘right reason’ and self-reliance) subjects might find it impossible to determine if the conditions for legitimacy are met. As such, I pointed out that subjects might not be able to form a reliable belief with regards to their obligations. Finally, I highlighted how Raz’s limited explication of ‘right reason’ posed difficulties for both scholars and (ideal) subjects. The latter impacted the possibility for forming a reliable belief concerning who has authority (i.e., the knowability condition).

## **Conclusion**

The preceding chapter has focused not only on some of the core elements of Joseph Raz's account, but also on certain points of weakness associated with the condition of knowability treated within it. The identification of these points indicates areas within the theory that can be refined or clarified to a greater degree. As analysis shows, however, none of these can be conceived of as more than potential grounds for adjustments. None of these points can yet fatally undermine Raz's account, or by extension my analysis of legitimacy and prescriptive rules in relation to it. The elements in support of my claim against the puzzle of rule-guidance are unperturbed by analysis of knowability and the other points treated above; however, by identifying them I have indicated where and for what reasons my conception might depart from Raz's. This proves an important contribution not only to the way in which Raz's service conception of authority is considered, but also to possible developments to my account in the future.

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