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The Opaqueness of Rules†

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

Keywords: opaqueness of rules, rules as reasons, normativity of law.

1. *Introduction*

This article is a treatment of a neglected but important puzzle in the philosophy of law called *the opaqueness of rules*. One instructive articulation of the puzzle occurs in the work of Joseph Raz, for whom its resolution occupies an important place in his influential theory of practical reason.[1] In his theory of positive rules more specifically, Raz argues that though a rule is a reason for action, it is a reason of a peculiar kind because reasons are facts that indicate what is good in the actions for which they are reasons.[2] But a rule does not do this. A rule does not indicate that one should stop at a red light because it would be good to do so. A rule simply says that one must stop. In the

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[1] J Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (OUP 2011) ch 8.

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

language of the literature, a rule is *prescriptive* in that it states what must be done and it is not *evaluative* because it does not indicate what is valuable in the thing being prescribed. Hence the opaqueness of rules. Rules are opaque because they do not reveal what is good, only what must be done. This opacity is claimed by Raz and others to be a puzzle for action. A solution to it is accordingly meant to furnish the grounds for the thesis that though rules are opaque, they are nevertheless themselves reasons for action and not merely statements of what we have reason to do.[3]

Let me call the foregoing thesis the *reflexivity thesis* because it lays its emphasis on the possibility of rules *themselves* being reasons in spite of their opaqueness. I will contrast it to the *paraphrastic thesis*,[4] which refers to the view that reasons are merely paraphrased statements of other reasons. In this article, one of my objectives will be to advance two lines of argument against the reflexivity thesis. The first, which takes up the bulk of section 3, will show that rules are only superficially opaque and that, as a consequence, the puzzle is only superficially a puzzle. The article's second line of argument centres on the principle of presumptive sufficiency, which is another significant but neglected topic of study in practical reason. I offer a new analysis of the principle and argue that either the principle renders rules into mere statements of their justifications or it guarantees that rules themselves cannot be reasons for action in what I will call a *distinctive sense*. Both sides of this disjunction undermine the reflexivity thesis.

The arguments of this article are organised as follows. In section 2, I briefly summarise the conceptual framework needed to make sense of the reflexivity and paraphrastic theses in legal philosophy. I will keep this section short, so some familiarity with the relevant concepts will be assumed. In section 3, I advance the first main line of argument, namely, that it is false that rules reveal nothing of their justifications. This is followed in section 4 with work on the principle of presumptive sufficiency, which I will say makes the reflexivity thesis untenable. Then, in section 5, I address an objection to my analysis of presumptive sufficiency. The objection holds that rules are, in an important sense, constitutive of the actions they prescribe. The *no rule, no action objection*, as it were, implies that presumptive sufficiency is inapplicable whenever rules are constitutive of actions and, as a result, such rules themselves are reasons for action and not merely statements of other reasons. I will reject the objection for two reasons: first, it relies on a conception of action that is irrelevant; and second, it controverts certain truths about the nature of justification in

[3] Some readers will recognise that the topic under discussion—whether rules themselves are reasons for action or can only ever be summaries of other reasons for action which justify them—was the subject of Rawls' 1955 essay 'Two Concepts of Rules' and then again the focus of a long and elaborate exchange between David Lyons and DH Hodgson in the 1960s. See J Rawls, 'Two Concepts of Rules' (1955) 64 The Philosophical Review 3; D Lyons, *Forms and Limits of Utilitarianism* (OUP 1965); DH Hodgson, *Consequences of Utilitarianism* (OUP 1967).

[4] I owe this term to Timothy Endicott.

the law. The take-home message of this article can be summarised by saying that the only sense in which legal rules are possible reasons for action is the one in which they are merely paraphrased statements of non-legal reasons we already have.

2. *Prescriptive Reasons*

Rules are unlike many other reasons because they do not offer any explanation of what is good in the action they prescribe. If rules make no evaluative claims, say nothing about what is good, then how do they figure in practical deliberation as reasons? All normative or deontic statements—that is to say, statements about what we must, should or ought to do—are opaque because they only state what we have to do, and not what value there is in doing as they say. Yet we know that there is nothing puzzling here. The puzzle derives from the view that rules *themselves* are reasons and not, importantly, 'merely statements of what we have reason to do'.[5] One way to terminate the puzzle would be to deny the premise that rules are reasons, but this, at the very least, would be counterintuitive because rules are commonly regarded as such.[6] We often give the fact that there is a rule as a reason for the things that we do, that is to say, we point to rule R as a reason for act ϕ; but the question here is whether an agent X should ϕ because (i) R is a valid rule that acts as an injunction or is it that X should ϕ because (ii) R is a 'good, wise, justified' rule.[7]

What, in other words, makes it possible for a rule to be a reason for action? Is it the more basic and fundamental evaluative considerations that ultimately underpin rules, or is the existence of the rule itself sufficient as a reason for action? Raz and others have sought to advance the latter claim partly through the idea, taken from Hart, of the content-independence of the justification of rules.[8] The idea describes how a justification of an authoritative command, for example, is to be found not in the content of the command, but from the brute fact that it is a command.[9] When the justification of a rule is content-

[5] Raz, Between Authority and Interpretation (n 1) 207.

[6] Not by everyone, of course; see D Enoch, 'Reason-Giving and the Law' in L Green and B Leiter (eds), *Oxford Studies in the Philosophy of Law*, vol 1 (OUP 2011).

[7] Raz, Between Authority and Interpretation (n 1) 208. The question is as old as philosophy itself, with its most notorious relative featuring in *Euthyphro*, where Socrates and his interlocutor were unable to agree whether that which is pious is pious because it is loved by the gods or whether the gods love that which is pious because it is pious. For Raz in particular, the gap between the two horns of this question is worthwhile because it allows him to argue that a rule can be binding, that it can be wrong to violate it, that it can be a valid reason for action, and yet that it can also be a bad rule from an evaluative perspective and which ought never to have been made in the first place. Rules, he says, 'allow for a potential normative gap, a gap between the evaluative and the normative, that is between their value and normative force' (ibid).

[8] The term originates in HLA Hart, 'Legal and Moral Obligation' in AI Melden (ed), *Essays on Moral Philosophy* (University of Washington Press 1958); see also HLA Hart, *Essays on Bentham: Jurisprudence and Political Philosophy* (OUP 1982) 253ff; L Green, *The Authority of the State* (Clarendon Press 1990) 39–42.

[9] It is, for instance, a definitional element of a command that obedience to it is rendered not because it indicates other and possibly better reasons to do the thing that the command requires, but to do the thing that the command requires because the command is what it is, namely, a command. Likewise, when X promises to

independent, the principle of the transitivity of implication is often said not to apply. Raz, for instance, argues that the principle breaks down and cannot explain the fact that the 'justification of a rule is not, in and of itself, a justification for performing the action which the rule requires'. At most, the justification of a rule 'justifies giving the makers of the rule the power to make the rule'.[10] Yet Raz contends that this is as far as the justification of rules goes.

No doubt there is an obvious difficulty in the claim that transitivity breaks down in describing the tripartite relation between the justification of a rule, the rule itself and the action that the rule requires. This is the claim that:

> A: The justification of a rule does not, in and of itself, justify the action required by the justified rule.[11]

The 'lack of transitivity in justification', according to Raz, 'seems to be among the most important features of rules'.[12] Nevertheless, the justification of the rule 'indirectly justifies the action which the rule requires, as being an action in accordance with a rule which is thus justified'.[13] In other words:

> B: The justification of a rule indirectly justifies the action that the rule requires.

The very point of transitivity, needless to say, is the indirectness of implication, and so it is not consistent to argue in one's theory of rules for the lack of transitivity in justification but to also accept that the justification of a rule indirectly justifies the action required by the rule in question.[14]

Notwithstanding the foregoing considerations, legal philosophers have sometimes endeavoured to combine A and B under the same theory of rules. These efforts, motivated in part by the aim of distinguishing authoritative reasons from other kinds, have relied on a pair of theses: content independence and the autonomy of rules. Remember that the opaqueness of rules refers to the idea that rules constitute reasons for action even though they do not reveal any evaluative claims about what is good in the action they prescribe. The content-independence thesis adds to this by holding that not even the justification of a rule will tell us anything about the value of the action for which the rule purports to be a reason. From this, we see that opaqueness actually

ϕ, it is one thing for X to ϕ for the reason of the promise *because* that is what it means to promise, and another thing—an entirely different thing—when X ϕs for the reason that they subsequently learned that it would be good to ϕ as a matter of expedience. The point here is about the source of justification, an issue which is at the very heart of understanding what it means to have a reason for action and also at the heart of what it might mean for it to be possible for a rule itself to be a reason for action.

[10] Raz, *Between Authority and Interpretation* (n 1) 210 fn 12.

[11] This claim is at the centre of Raz's argument in the essay 'Reasoning with Rules' (Raz, *Between Authority and Interpretation* (n 1)), where the term the 'opaqueness of rules' makes its first appearance.

[12] ibid 214.

[13] ibid fn 12.

[14] That is to say, one cannot consistently advance A as capturing an essential feature of rules, namely, the lack of transitivity in justification, and also advance B, since it reflects the indirectness of justification, which, as I say, is the very point of transitivity.

derives from the content-independence thesis, and it is this latter idea which encapsulates the so-called normative gap between the evaluative and prescriptive features of rules. It is also content-independence that is said to be responsible for the inadequacy of the principle of transitivity. The issue of content independence, specifically of how the justification of a rule can be content-independent, is also paired with the autonomy thesis, which holds that rules, when valid, constitute reasons that one would otherwise not have were it not for the rule.[15] Explaining how rules can be autonomous has been one way to tackle the puzzle of opaqueness and thus cast rules as reasons for action themselves and not just as paraphrased statements of what we may already have reason to do.

3. *Opaqueness*

The main thrust of the system just described finds its source in the idea that rules reveal nothing of their justifications. This idea should be rejected because it contains a falsehood which might appear trivial but is, in fact, significant.

A. *The 'Trivial' Falsehood*

One might object to the idea that rules reveal nothing of their justification by arguing that the fact that some rules are valid and binding, that is to say, that they were issued in the proper way by the relevant authorities, shows that they are good. This would be an error. The objection would only show that the actions for which they are thought to be reasons are required, but it would not show in what way the actions are good. To say that an action is required by a valid or binding rule would be to describe a normative and not an evaluative property of the action. Insofar as an action is required by a valid rule, one might say that it is *pro tanto* good, which is to say that it is good insofar as it is required by a valid rule. This, however, would have the unacceptable implication that the evaluative follows from the normative rather than the evaluative being the grounds of the normative. That implication will obviously not do, for it would follow that the mere existence of a rule, no matter what it might require of us, makes it valuable.

There is, however, a more promising line of reasoning that begins with the observation that positive rules which are deliberately made and require conformity presuppose a source with standing. This tells us that the rule 'X must ϕ' requires: (i) a superior, 'A', to posit it in some way; (ii) a subject, 'X', to whom it applies; and (iii) a set of actions, of which 'ϕ' is a member, to which it is relevant.[16] In this triadic social relation, what matters is that A posits what it posits rather than what it does not. That A must always select from

[15] Raz, *Between Authority and Interpretation* (n 1) 215.
[16] 'Triadic social relation': Green, *Authority of the State* (n 8) 42.

the range of possibilities available to it, and the fact that A requires X to ϕ rather than $\neg\phi$, in particular, is significant. This is the first and relatively uncontroversial step of the seemingly trivial argument against the claim that 'X must ϕ' tells us nothing evaluative. It does not show that mandatory rules are evaluative. It just shows that they necessarily require selection. But selection, vitally, is necessarily evaluative, and that is the second step in the argument.

This move is unlikely to be controversial if we retain the widely accepted view that reasons are facts that indicate what is good in the thing for which they are reasons.[17] On this view, for me to select P rather than ¬P means that I prefer the former in some way, and I will prefer P to ¬P only if I believe that P is better or more worthwhile than ¬P in at least some way, even if only trivially and even if I am compelled to select it. If selection is grounded in reasons, and if reasons are facts that indicate what is good in the thing for which they are reasons, then selection requires evaluative reasons (though they do not require such knowledge). Evaluative reasons are, in other words, built into the logic of selection.[18] Now, what we have thus far are two claims: that rules necessarily require selection and that selection necessarily requires evaluative reasons. It is small wonder that an act of selection requires reasons, that reasons are fundamentally evaluative and that, in turn, selection is bound to its evaluative grounds. This is just transitivity. What is more, legal philosophers acknowledge that rules are *ultimately* justified on evaluative grounds,[19] but in a way which allows for the normative gap and also enables, or so some have argued, a rule, and not its justification, to operate as a reason for action. But from none of this does it follow that a prescriptive reason, such as a rule, tells us nothing evaluative. At the very least, to know that a rule has been issued is to know that the issuer believed that the rule issued was both good and that it was good for it to be so issued to the persons to whom it was issued.[20] By

[17] Some might object that this widely accepted view commits us to the anti-Humean position in debates about the theory of action, namely, that what we desire, we desire for reasons related to what we think is good. The commitment I am describing assumes a certain revealed preference theory of choice, which in the main holds that preferences reflect choice behaviour or choice dispositions. This view of preferences, of course, has its detractors. For a discussion, see Amartya Sen, 'Behaviour and the Concept of Preference' (1973) 40 Economica 241; Amartya Sen, 'Rational Fools: A Critique of the Behavioral Foundations of Economic Theory' (1977) 6 Philosophy and Public Affairs 317. Most philosophers today hold that preferences are kinds of judgments that explain dispositions and behaviour; see F Dietrich and C List, 'A Reason-Based Theory of Rational Choice' (2013) 47 Noûs 104. For Dietrich and List, preferences are contingent on motivating reasons, and motivating reasons in turn are a motivationally relevant proposition. For a critique, see DM Hausman, 'Revealed Preference, Belief, and Game Theory' (2000) 16 Economics and Philosophy 99, who argues that the notion of 'revealed preference' is unclear and ought to be abandoned, at least in the context in which it is deployed most (economics).

[18] These are old insights, for they figure centrally even in *Protagoras* (358c–d), which dealt in part with the goodness of intentional action. 'No one,' Socrates argued, 'goes willingly toward the bad or what he believes to be bad; neither is it in human nature, so it seems, to want to go toward what one believes to be bad instead of to the good. And when he is forced to choose between one of two bad things, no one will choose the greater if he is able to choose the lesser.'

[19] eg Raz, *Between Authority and Interpretation* (n 1) 209.

[20] It bears emphasis that these considerations apply to the subject of this article, ie posited mandatory legal rules, and *not* customary legal rules.

these lights, one knows something evaluative about the rule. QED the 'trivial' falsehood.[21]

Suppose, however, that a sceptic of my argument were to say that the trivial falsehood I have described did not give us an evaluative account of the relation between an agent and an action that is required by an authority's rule. The sceptic may grant that an authority, in issuing a rule, is required to choose amongst the various options available to it and further grant that the authority chooses on the basis of the evaluative grounds before it, and even that the agent to whom the rule applies happens to be aware of these evaluative grounds. And yet, the sceptic might say, it is not clear that the agent to whom the rule is issued has been given an evaluative reason to do as the rule requires. The agent has been given the rule itself as a reason for action. All we get from the story about the properties of selection is that there are evaluative grounds for the authority to issue the rule, but that does not give us an evaluative account of the relation between the agent and the act that the rule requires. The reply to this line of thought is as follows. First, the puzzle of the opaqueness of rules stems from the view that rules tell us nothing evaluative about the acts that they require. The story about the properties of selection entails the observation that there is at least one thing that the existence of a rule tells us that is evaluative and that is that the authority that issued it believed that it was valuable to do so. Part of these evaluative beliefs are then packaged into the rule and the action that it requires, for one is able to *know* that performing the action that the rule requires promotes the evaluative *beliefs* that were used to advance the rule in the first place. Put differently, in acting as the rule requires, I promote the evaluative considerations that constitute the rule's genealogy.

Now what if the sceptic were to say that the rule that I must pay taxes, for example, grants only the presupposition that the authority who made that rule had to make certain evaluative judgments in doing so? And yet, according to the sceptic, the fact that the authority had to do so does not reveal an

[21] It is possible to press the trivial case a little further by noting that some evaluative judgments are actionable, which is to say that something such as 'ϕ is good' can sometimes entail that one ought to ϕ. I will treat the possibility of actionable evaluative judgments as an assumption, albeit one that can be drawn from Raz himself: 'I am among those who believe that possession of a value property (that is, the property corresponding to a value, in the way that being beautiful corresponds to the value of beauty) constitutes a presumptively sufficient reason for an action.' If we accept the assumption, one implication is that insofar as prescriptive reasons such as 'X must ϕ' imply something evaluative, they are at risk of just being statements of what one may have reason to do on the evaluative grounds so implied. This is a kind of normative collapse rather than a normative gap. In such cases, one not only knows something evaluative about the rule, but one may even have good evaluative grounds to heed the rule's prescriptions. See J Raz, *The Practice of Value* (OUP 2003) 144. Also: 'by the nature of value and of reason, the value of what we care about is presumptively sufficient reason to engage in it' (ibid 145). Value, as I argue elsewhere, is not sufficient for the possibility of a reason for action, though it is necessary for it. It is important to guard against the error that evaluative grounds (or values) always imply reasons for action. If I have an evaluative reason to ϕ that stems from the value that ϕing is good, I may not have a conclusive reason to ϕ if, for instance, I could not succeed in ϕing or that attempting to ϕ would result in circumstances in which I make things worse for myself or others. For an extended discussion, see B Williams, 'Replies' in JEJ Altham and R Harrison (eds), *World, Mind and Ethics: Essays on the Ethical Philosophy of Bernard Williams* (CUP 1995) 189ff, especially in respect of Williams' discussion of the Aristotelian conception of *phronimos*.

evaluative *fact*. That fact tells us nothing evaluative about me paying taxes. It merely tells us that the authority, in its judgment of the considerations before it, believed that it would be valuable to issue a rule indicating that taxes must be paid. No doubt the authority could believe anything it wishes about the value of the rules it issues, but that would not be enough to establish that there is value in any of it. 'The existence of law is one thing', as Austin put it, 'its merit or demerit is another', and so, too, with the lawmaker's belief, the sceptic might add, for that belief is one thing, its evaluative merits another.[22] On this account, rules that flow from mere belief retain a certain evaluative opaqueness because they bear no relation to evaluative facts. At the limit, they might reveal something about the authority's beliefs.

The sceptic's objection seems to ensure the evaluative opaqueness of rules by restricting the background work of rule-making to the realm of belief. The boundary between belief and knowledge, however, marks the end of the objection. If we grant that at least some of the rules of law are issued with knowledge of the relevant evaluative facts, then the account of selection properties I have set out will be true in at least those cases, for knowledge pertains to facts. A further point to bear in mind is that belief comes in degrees and, without complicating matters too much, it suffices to observe that if A issues a rule R that requires X to ϕ on the basis of, say, a true credence value of 0.9 in the proposition that R requiring X to ϕ is valuable, then, other things being equal, the fact of X ϕing, *ceteris paribus*, inherits the same probability that it is valuable, that is to say, that X ϕing promotes an evaluative fact. In the case of the rule that requires X to pay taxes, the evaluative fact that is promoted would be, *ceteris paribus*, the value that inheres in a certain degree of wealth redistribution that is logged by the taxation of X's income. Now, on the view that accepts credence as a relevant feature of law-making, the opaqueness that legal philosophers regard as a puzzle for action is one of degrees. But it is still a form of opaqueness that allows for the puzzle to be relevant to the question of how it is that a rule itself can or cannot be a reason for action.[23] Granting, then, that there is a sufficient degree of opaqueness, let me now turn to that question, namely, the question, again, of what it is for a rule *itself* to be a reason for action.

[22] J Austin, *The Province of Jurisprudence Determined* (CUP 1995) 157.

[23] A further objection to my account of the evaluative properties of selection might take issue on the grounds that it is not necessarily true that if we know that R is a positive rule, that is to say, that it was deliberately made, then we also know something about what the authority knew or believed to be valuable about the rule that X must ϕ. For, the objector might say, it could be the case that the authority who issued the rule did so arbitrarily, or the authority enacted R without knowing anything about, or even caring about, R's requirement that X must ϕ. The reply to this variant of the sceptic is twofold. First, the rules that the sceptic has in mind are not the kind of rules with which I am concerned, as they are extraordinary and do not characterise the rules that are typically issued by authorities in healthy legal regimes. Second, that a rule was formulated on the basis of arbitrariness still indicates, necessarily, that the issuer of such a rule thought that it would be good to do so, that is to say, good on evaluative grounds to issue rules on the basis of arbitrariness.

B. *Reflexivity*

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

One interpretation would be that the rule and not its justification is sufficient as a reason for action. Perhaps that is all 'a rule itself' means. But every reason is presumptively sufficient for action in the absence of either defeating reasons or cancelling facts.[24] If this is true, and unless the justificatory reasons qualify as defeating reasons or cancelling facts, which of course they do not, then the justificatory reasons of a rule are themselves also presumptively sufficient to do the thing that the rule requires. This, once more, just describes presumptive sufficiency and transitivity. Yet the interpretation of 'the rule itself' we are considering—that the rule itself and not its justification is sufficient as a reason for action—entails the denial of both presumptive sufficiency and transitivity. This prompts an important query. What might motivate this counterintuitive structuring of reasons in the law?

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

(A) If J justifies R, and R justifies ϕ, then J justifies ϕ.

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

(B) J and R both justify ϕ.

(C) J and $\neg$R justify ϕ.

[24] See Raz, *Between Authority and Interpretation* (n 1) 27ff for defeating reasons and 187ff for cancelling facts. For reasons as presumptively sufficient, see Raz, *The Practice of Value* (n 21) 144–5. I turn to presumptive sufficiency in section 4.

(D) ¬J and R justify ϕ.

(E) ¬J and ¬R justify ϕ, so that neither J nor R justify ϕ.

For 'the rule itself' to be meaningful, all four descriptions must be (i) necessary and (ii) distinct. (i) They are necessary because for one to understand what it means for a rule itself to be a reason for action, one needs to know what it means for a rule itself not to be a reason for action. The sets in which this condition is true, that is to say, wherein the rule itself is not a reason for action, are described under (B), (C) and (E). (ii) The descriptions, moreover, are distinct because they cannot be combined non-trivially, that is to say, without just inserting conjunctions between them.[25]

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

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

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

The doxastic and competitive conditions constitute what I call the reflexive properties of rules as reasons for action, that is to say, the properties of a rule

[25] This is especially clear if we use set-theoretic descriptions—take, for example, the quantified expressions of the first and second descriptions:

A′: $\exists x$: $\{x \in J, x \in R, x \in \phi\}$

B′: $\exists x$: $\{x \in J, x \in R^C, x \in \phi\}$

where we let R^C indicate the complement of R (all members which are not members of set R). A non-trivially combined rule for both descriptions would imply that there exists an x which belongs neither to R (since, given the second description, it belongs to R^C) nor R^C (since, given the first description, it belongs to R). So, a generalised description of the model in which the 'rule itself' is meaningful is not possible.

when it is *itself* a reason for action and not merely a statement of reasons we already have. Notice that the conditions essentially reflect circumstances in which, for instance, one is subject to a prescriptive reason, such as a legal rule, but does not—or, at least, does not want to—do as the reason requires. However, there is also a central jurisprudential question about cases in which one has reasons to do the actions the law requires but not for the reasons provided by the law. The question arises in cases of obligations to obey the law and accounts of the nature of obedience. It will be helpful in the next section to explain briefly how the rule itself is relevant to these cases as well.

C. *Obedience*

According to Green,

> political authority, of which legal authority is one species, is normally seen as a right to rule, with a correlative duty to obey ... and to obey is not merely to comply with the law; it is to be *guided by* it (original emphasis).

Wolff puts it more directly: 'Obedience is not a matter of doing what someone tells you to do. It is a matter of doing what he tells you to do *because he tells you to do it*.'[27] As far as my treatment of the reflexive property of rules as reasons for action is concerned, it is not necessary to engage the thorny question of whether the law entails a general obligation to obey its directives. It will be enough to point out that the notion of the 'rule itself' is necessary for an account of the possibility of obedience. For that is what it would mean to obey the law if it is to be possible to do as a legal rule itself requires rather than for some other reason. Of course, the relation need not be one of exclusion. If reasons P and R both require ϕ, P and R can jointly figure as the reasons for action, with neither P nor R being a statement or summary of the other. Part of the standard picture of legal obligation is that if R is the legal reason for X to ϕ, and P is the non-legal reason for X to ϕ, then R itself can function as the reason for X to ϕ notwithstanding whatever considerations may centre on P. In this notwithstanding sense, R is said to itself be a reason for action and, we might add, not a summary of reasons we may or may not have by way of P or, indeed, any other reason for X to ϕ. Call this the *obedience condition*:

> OC: Where R requires obedience, it must be possible for me to do as R requires because R requires it.[28]

[26] L Green, 'Legal Obligation and Authority' in EN Zalta (ed), *The Stanford Encyclopedia of Philosophy* (winter 2012 edn). Green's terms (1) 'comply' and (2) 'guided by' are the terms Raz uses for (1') 'conform' and (2') 'comply', respectively.

[27] RP Wolff, *In Defense of Anarchism* (University of California Press 1998) 9, cited in Green, 'Legal Obligation and Authority' (n 26).

[28] One could call this an internalist conception of obedience. According to the standard reading of Bernard Williams's essay 'Internal and External Reasons', R is a possible normative reason for X to ϕ only if it is possible for X to ϕ for R, which is an 'explanatory dimension' of R. B Williams, *Moral Luck* (CUP 1981) ch 8.

We can append OC to DC and CC as constituting the reflexive properties of rules. OC corresponds to a further feature of practical reason, namely, the distinction between compliance and conformity.[29] The former obtains when the reason why X intends to ϕ is the very fact that it is required by R, and X knows that it is so required. Compliance reflects congruence between the motivation of the agent and the rule.[30] It obtains when X intends to ϕ because the rule says that X should do so and not because it would be prudent or beneficial on some other grounds to do so. Conformity is different. It requires no motivational congruence between the agent's reasons and the rule. X could ϕ for reasons entirely unrelated to R's requirement that X should ϕ. This might be the case if X stopped at a red light because, for instance, their passenger made such a request rather than because the law required it. Here there is conformity to, but no compliance with, the law's requirement to stop at red lights; instead, there is compliance with the passenger's request and conformity to the law's requirement.

Raz thinks reasons for action *in general require only conformity*: 'reasons for action are, *barring special circumstances*, merely reasons to conform' and 'what matters is conformity with reason'.[31] But rules *are that special case* in which it must be *possible* to comply, for otherwise it would be impossible, as a conceptual matter, to obey the law—that is to say, to do as the legal rule itself requires for the reason that it requires it.[32] A surprising implication of this account of obligation is that it means that the justificatory basis of a legal rule is not to figure as the reason for the action that is required by the rule, for otherwise there would be no obedience to the rule. Hence the denial of both the principles of transitivity and presumptive sufficiency, for either would foreclose the possibility of obedience wherever: (i) an agent reasons transitively from the justification of the rule to the action it requires; or (ii) the justification of the rule is a presumptively sufficient reason for the action that the rule requires. That, in any case, is the prevailing story in the philosophy of law today.

4. *Presumptive Sufficiency*

Yet how could it be that an account of practical reason could jettison *both* the principle of transitivity from classical logic *and* the principle of presumptive sufficiency from practical reason itself? How could a theory of reasoning be so demanding that it requires us to discard foundational standards of what it is

[29] For a methodological critique of the distinction between conformity and compliance, and about the conceptual possibility of obedience, see B Hass, 'The Methods of Normativity' (2017) 30 CJLJ 159.

[30] What Hegel called the 'moral element' of the deed. GWF Hegel, *Elements of the Philosophy of Right* (AW Wood and HB Nisbet tr, CUP 2002) § 121.

[31] ibid 180ff and 190 (emphasis added). For a discussion, see B Celano, 'Are Reasons for Action Beliefs?' in LH Meyer, SL Paulson and TW Pogge (eds), *Rights, Culture, and the Law: Themes from the Legal and Political Philosophy of Joseph Raz* (OUP 2003) 40.

[32] For a discussion, see MS Moore, 'Authority, Law, and Razian Reasons' (1989) 62 S Cal L Rev 827, 875ff.

to reason correctly in most other domains of reasoning? In this section, I will argue that whatever we might think of discarding transitivity for some areas of practical reason, it is not possible to likewise discard presumptive sufficiency without creating further conceptual problems for which there are no clear payoffs.

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

> PS: P is a presumptively sufficient reason for X to ϕ under two conditions: (i) if there does not exist another reason to ϕ or $\neg\phi$, then it is justified for X to ϕ for P; and (ii) if X believes that P and only P applies, then for X to $\neg\phi$ for P is a case of akrasia.[33]

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

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

For example, if I promised to meet you at the train station at 10 pm, the promise, as my reason for action, would be cancelled if you released me from it. It does not follow that I have no reason to meet you at the train station at that hour, just that, other things being equal, that particular promise is no longer an eligible reason for that action. An important feature of cancelling facts is that they do not rely on the strength of reasons in the way of defeating reasons. That a fact cancels a reason does not imply that the cancelling fact is the stronger reason. It indicates nothing about the strength of reasons, just that a reason that is cancelled is no longer a reason for the action for which it was once a reason.

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

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

[33] J Raz, *From Normativity to Responsibility* (OUP 2011) 46ff. The second feature is disputed by some, but I am in agreement with Raz that the objections are unsustainable. See M Stocker, 'Raz on the Intelligibility of Bad Acts' in R. Jay Wallace and others (eds), *Reason and Value: Themes from the Moral Philosophy of Joseph Raz* (OUP 2004); J Dancy, 'Enticing Reasons' in Jay Wallace and others (ibid). One point to bear in mind independently of these disputes is the distinction between presumptive sufficiency and pre-emption. A cause x is pre-empted in relation to an effect z when (i) another cause y is closer to the effect z and (ii) y causes z such that x can no longer cause z. I merely note the distinction between presumptive sufficiency, which I take to bear on justifications, and pre-emption, which is principally about causation, and leave the discussion of their priority to another day. On pre-emption, see J Stapleton, 'Unpacking "Causation"' in P Cane and J Gardner (eds), *Relating Responsibility—Essays for Tony Honoré on His Eightieth Birthday* (Hart Publishing 2001) 177–78.

In contrast to cancelling facts, a reason that is defeated by a defeating reason does not cease to exist. It is merely outweighed by the defeating reason for the act in question.[34] My promise to meet you at the train station at 10 pm, for instance, could be defeated but not cancelled by a weightier reason to put out a fire in my kitchen. The promise to meet you in this example has not been cancelled out of existence. It is still a reason to meet you at the appointed time, yet it is outweighed by a more pressing reason to save my house from burning down.

Now, my view is that the justification of a prescriptive reason, such as a legal rule, falls neither under the rubric of CF nor DR, which means that it qualifies as a presumptively sufficient reason for the act that is required by the rule itself. If I am right, then two implications follow: (i) the rule itself is in fact merely a paraphrased statement of its justification; and (ii) it is conceptually impossible to obey such a rule. Let me then turn to defending this view.

A. *Cancelling Facts*

First we can test whether a justification of a rule can be subject to a cancelling fact, which would be a condition of a rule itself being a reason and not merely a statement of its justification. Cancelling facts are typically occasioned by decisions, such as the decision to release someone from a promise, or material changes in the circumstances that pertain to the initial reason, such as a clock that is discovered to have displayed the time incorrectly and which made some reason to arrive at an appointed time no longer relevant. In every case, as I say, the defining effect is that cancelling facts render erstwhile reasons into non-reasons for the act for which they were once reasons, rather than merely reasons that are outweighed by other reasons. Could it ever come to be that the justification of a legal rule is cancelled in this way? It does not seem that it could come by way of a decision, as in the example of being released from a promise. This is because it would not do for political authority to assert that its directives are themselves to be followed without recourse to their justifications because that is what it would mean for one to obey. It would be artificial to assert a conception of obedience and then require that it not merely *override* but, indeed, *cancel* other reasons for action, even when they are as intuitive as the justificatory bases of the directives themselves. If the nature of obedience is such that it requires—as a conceptual matter—that justifications are cancelled as reasons for action, then the argument must centre on necessity. Yet such an argument seems implausible as a general matter and, more specifically, most legal philosophers today deny that the law entails a general obligation to obey its directives.[35] The notion, therefore, that justifications can be

[34] As Broome observes, the mechanical language of 'outweighing' is metaphorical. Broome, 'Reasons' in Jay Wallace and others (n 33) 36ff.

[35] The standard view is that the law merely claims that it entails such an obligation. See eg J Raz, *The Authority of Law* (OUP 1979) 233ff, who argues that 'there is no obligation to obey the law ... not even a prima

cancelled as reasons for action *because* they are the justifications of legal rules is to be rejected.

On the other hand, one might suggest that material changes in the circumstances that pertain to the relevance of a justification may constitute cancelling facts if we insist upon the opaqueness of rules. Yet this route is unlikely to be satisfying. The argument for it might rehearse the claims about rules not indicating their evaluative grounds—that the rule to stop at red lights, for instance, reveals nothing about it being a good idea to coordinate traffic, and the like. Suppose, further, that it really were the case that as I approached the red light I did not have the slightest clue about the evaluative bases of the bylaw that directed me to stop. Does my condition constitute the kind of cancelling fact that would terminate the justification as the reason for action and thus leave just the rule itself as the reason for my stopping at the light? It is important to see that it would not, for it is not the case that my ignorance of the justifications cancels them as reasons for action. They retain their status as normative reasons for the act in question even if they are outside of my perspectival ken.[36] Indeed, it is difficult to conceive of possibilities in which such normative reasons would relinquish their status as reasons on grounds of ignorance or changes in other material conditions. And if ignorance is not the relevant marker, it would seem that any other fact which might cancel the justification of a rule would likewise cancel the rule itself as the reason for the act it prescribes. For it seems implausible, even contradictory as a logical matter, to conceive of circumstances in which the justification of a rule that prescribes an act would be cancelled as the reason for that rule *and* that act (by transitivity), and, *furthermore*, for it to nonetheless stand that the rule remains a reason for that act. It is doubtless possible, even likely, that one can have many reasons to do some act, and that some of those reasons can be cancelled as a result of shifting circumstances but that other such reasons can remain material for the same act. However, it is not possible for that condition to arise within the same transitive line of reasoning. For example, I may have two independent reasons to step outside and get some sun at lunchtime: one, I have a vitamin D deficiency and have been directed to do so by my doctor; and two, I know that winter is coming, so it is now or seemingly never that I will be able to get some sun. It may turn out that I do not have the vitamin deficiency in question, hence cancelling that reason, but that winter is still coming. I therefore still have at least one reason to get some sun at lunchtime. Notice, however, that the same result is not possible within the same line of reasoning. It cannot be the case that it turns out that I do not have the

facie obligation to obey it'. See also MBE Smith, 'Is There a Prima Facie Obligation to Obey the Law?' (1973) 82 Yale LJ 950.

[36] Perspectivalists would disagree. See G Björnsson and S Finlay, 'Metaethical Contextualism Defended' (2010) 121 Ethics 7. For a defence of objectivism, see PA Graham, 'In Defense of Objectivism about Moral Obligation' (2010) 121 Ethics 88.

vitamin deficiency but that I still have a reason to step outside to get some sun because I have a vitamin deficiency. That would be a contradiction unless we commence at the start by denying transitivity, yet that would constitute question begging, for one of the features of this account is that it aspires to set transitivity aside as a result of its understanding of legal reasons.

B. *Defeating Reasons*

The second challenge to the claim that the justification of a rule retains its status as a presumptively sufficient reason for the same action that the rule prescribes is that the justification might be defeated by another set of reasons. That is to say, if the justificatory bases of a mandatory rule are defeated, could that rule itself be left as a reason for the action it was meant to prescribe? Suppose that a new government passes a law that requires foreign-born citizens to register at local police stations. The law's justification has two components: (i) a factual claim about reducing crime rates by requiring foreign-born citizens to so register; and (ii) an evaluative claim about it being good to have such a policy because it would reduce certain crime rates *and* that it would be well to reduce those crime rates. The factual and evaluative claims are advanced throughout the recent election campaign across the country as well as the subsequent debates in the legislature. Suppose that these claims are challenged by (i) conclusive evidence that refutes the factual component of the law's justification, as well as (ii) arguments that make a conclusive evaluative case against requiring foreign-born citizens to register with the police because it would reduce certain crime rates. The challenges are, we suppose, conclusive and together entail that both components of that particular law's justification are, in fact, false. The question now is not: does that law exist? The existence of a law, as we say, depends not on its merits, but on its sources. The real question, then, is: does that law itself constitute a reason for action? Namely, is the law that requires that I register at the local police station a reason for action, that is to say, a reason for me to so register, absent its twin justificatory bases?

I suggest that the answer to this question is No. It does not follow from the fact that a law exists that it is even *a* reason for the action that it prescribes. Existence is not a sufficient condition for something being a reason for action. Though all reasons are facts, not all facts are reasons.[37] This idea is sometimes borne out in the law, as in the form of jury equity (or nullification), which has a long and fascinating history in the common law. Take the case of the English Leveller, John Lilburne. In 1649, Parliament charged Lilburne under the Treason Acts for high treason. The indictment was challenged on the facts—that though Lilburne's conduct satisfied the definition of treason in

[37] I defend this line of argument at length in B Hass, 'Force and Possibility: A Study in the Theory of Reasons' (DPhil thesis, University of Oxford 2018).

the Acts, he had not acted treasonously—as well as its evaluative merits, that is to say, its inequity. The jury returned its verdict after a two-day trial, declaring Lilburne not guilty of all charges. The Treason Act remained unaffected, yet its mandatory rules did not become reasons for action on that day, for its justificatory bases, comprising factual and evaluative aspects, were inadequate on that occasion despite the legal facts before the court. We need not stretch so far back in time to see the principle at work either. In *R v Krieger*, a 2006 case before the Canadian Supreme Court, we read that it has been well-established that 'juries are not entitled as a matter of right to refuse to apply the law—but they do have the power to do so when their consciences permit of no other course'.[38] Here the emphasis centres on just the evaluative aspect of a law, revealing that a mandatory rule can fail to be a reason for action even if the factual, that is to say, non-evaluative aspects of its justificatory bases are cogent. These ideas operate in other areas of the law as well, for example, with judicial opinions. One striking example is to be found in *Woodson v North Carolina*,[39] where the US Supreme Court held that a mandatory legal rule—in this case, a death sentence—was invalid precisely because it was mandatory.[40] The phenomenon of a law failing to be a reason for action on account of having its justification(s) defeated by other reasons is not restricted to the courts,[41] though we need not review these other instances except to recognise, by way of summary, that sometimes when the justification of a law is defeated, the law itself—the rule itself—then fails to be a reason for action.

This returns us to the principle of presumptive sufficiency. The question that directed the discussion of the preceding pages was the following: is the law that requires that I register at the local police station a reason for action, namely, a reason for me to so register, absent its two justificatory bases, namely, the factual component and the evaluative component? I have shown that the law contains the conceptual resources that would allow me to make a reasonable argument to the contrary, that is to say, that the law that requires me to register is no such reason if I could show that its justificatory bases are inadequate.[42] If I am able to demonstrate as much, it is still clear that it would

[38] *R v Krieger* 2006 SCC 47.

[39] *Woodson v North Carolina* 428 US 153 (1976).

[40] ibid 303. The key demerit of a mandatory death sentence, the Court opined, 'is its failure to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death … It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.'

[41] Indeed, it is observed to be more widespread with enforcement agencies, especially in cases where policing a law would prove too onerous or otherwise absurd, hence rendering the legal rule inert as a reason for the action it prescribes without affecting its existence.

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

not follow that the law is not a reason simpliciter, or even that it would not be a reason for some action, or that it would not even be a reason for the action that it prescribes—yet it *does* follow that it would not be a conclusive reason for the action it prescribes. This may seem like an underwhelming conclusion, but it is not. Its significance is made clearer once we observe that:

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

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

Some may wonder what the disagreement might be in all this, for if the argument grants, in light of (i) and (ii), that the rule can still be *a* reason for the action it prescribes, though not a conclusive reason for that act, then it appears that matters are left as they stood. This, however, would be an error. It will be helpful to recall that a massive amount of legal philosophical labour has been directed by Raz and others towards establishing the thesis that a rule itself can be a reason for action and not merely a statement of other reasons, including a statement of its justification. Part of the motivation for these efforts has been to show the distinctness of the law's reasons in a vast sea of other reasons, for all reasons are facts and some facts are possible reasons. Hence, the efforts so directed would not achieve their purported ends if they merely established what we already know, namely, that a legal rule is a fact—that it exists—and is therefore a possible reason for action. That was always obvious, and is surely not to be taken as the objective of Raz's—or anyone else's—research programme. What was distinctive about Raz's efforts in particular was the attempt to establish that a rule itself can be reason for action and not merely a statement of other reasons (such as its justificatory reasons) *and* that even if the rule's justificatory bases are defeated by other reasons, the rule itself can retain its status as a reason for action in spite of what would otherwise hold under transitivity. Yet we have seen that, in the event that the justification of a rule is not defeated by stronger reasons, then the justification is a presumptively sufficient reason for the action that the rule prescribes, thus rendering the rule into a mere paraphrased statement of its justification. The

(not *as a law*) in the absence of its justificatory grounds in certain contexts (such as when one is being chased by assassins).

rule would not be a reason for action in what we can call a *distinctive sense*. This was a conclusion that Raz and others have worked hard to avoid, for it is a thesis that underpins much else in one of the most influential theory of rules. On the other hand, if the justification *is* defeated, then the rule, at least in some important cases, is no longer a conclusive reason for action—it is merely one datum amongst a virtually infinite number of others, which would not be a thesis worth defending, for it has no explanatory utility.

5. *No Rule, No Action*

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

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

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

the literal sense in which the sceptic's objection seems cogent. But that is as far as the cogency goes.

The deeper question, however, and this is my second reply, will centre on the way in which we conceptualise action. For what is the *action* that the motorist performs when they stop at red lights? The answer we give will depend, in part, on what draws our interest. To stop at the light, the motorist will perhaps look behind them to check that it is safe to brake, tilt their heads upwards to check the light, gently press the brakes with their right foot and a long line of other actions that together constitute the mechanical aspects of the literal act of stopping at the red light. We may, however, be interested in a different reply to the question of what constitutes the action in the scenario I am describing. It will help to briefly revert to the usual formal representation—namely, that J justifies the rule R that X must ϕ—so that we can put the question abstractly. The question, that is, of 'What is ϕing?' In my view, to point to the mechanical operations involved in ϕing is only part of the answer and, some might say, the relatively uninteresting part of the answer from a philosophical point of view. I will suggest that the literal sense in which the sceptic's objection is true is restricted to *that* part of the answer to the question 'What is ϕing?' As I say, it is small wonder that motorists would not stop at red lights absent the rule to stop at them, so to say that the justification of the rule is not presumptively sufficient to stop at red lights in the absence of the rule does not seem to tell us very much that could be of philosophical interest.

A thicker view of this question would reveal something about what is going on when X ϕs. Doubtless, the phrase 'what is going on' is metaphorical, and perhaps a more precise way to put the point would be to speak of the metaphysics of ϕing, but I worry that this would entail biting off more than we need in order to grasp that X's ϕing is constituted of more than just mechanical and sensory operations. And, of course, the sceptic would admit as much. For X to ϕ for R is for X to comply with the law, and 'comply with the law' is not principally a sensory or mechanical event. It is, in an important sense, abstract because it refers to a kind of relation between an action and an idea, namely, the idea of X doing as the law requires. Seeing this, we edge closer to the understanding that, contrary to the objection of the sceptic, it is possible for it to be the case that one can do as a rule requires in the absence of the rule. But we are not yet there. All that is established so far is that actions can stand in relation to ideas, and thus far we have just the idea of complying with the law. Absent the rule to ϕ, it is not possible for X to comply with the rule to ϕ. Yet what is it that the law *really* requires? What are the law's *deep requirements*?

The next step is to recall the significance of transitivity. If X ϕs for R, it follows that X has also ϕed for J if J is the justificatory basis of R. If one resists this point by arguing that it ought to be possible to ϕ for R and not J by, for

example, having R as one's motivating reason, my reply is that that is fine only insofar as it explains the possibility of what X is doing from a first-person perspective. But the first-person perspective is not the beginning and the end of the story and, what is more, one can explain anything one wants from a first-person perspective, yet that does not always change the facts. Further, if the justification of the rule that I must not, say, park my car in a way that obstructs an accessibility ramp is that doing so would unjustly impede wheelchair users from accessing the sidewalk, then nothing stands in the way of that justification being presumptively sufficient as a reason for action for not parking my car in such a location. So, it is indeed possible for J to be presumptively sufficient for X to ϕ when J is the basis for R requiring that X ought to ϕ. In this example, ϕing is not merely not parking my car in front of this or that accessibility ramp. It is, instead, not unjustly impeding wheelchair and other accessibility ramp users from safely accessing sidewalks. To go back to the example about red lights, what would it mean for the justification of the rule about stopping at red lights to be presumptively sufficient? If the justification is that avoiding collisions is valuable, then it appears that the actions that flow from that justification are all possible with or without the rule *unless* the rule generates conditions—that is, produces a reality such as putting up lights at intersections—that would not exist without it *and* on which ϕing would depend. Yet not all rules are like that. Not all rules create their own realities. Some merely attempt to regulate existing reality and, at least in those cases, the arguments about presumptive sufficiency that I have advanced are cogent. With the red light, I do not doubt that I cannot stop at it in the absence of the rule that requires me to do so, and the reason for this is that we would have no red lights absent the body of rules that stand behind putting them up at intersections. But, on my view, it does not follow from that observation that I cannot have a presumptively sufficient reason to do as that law requires of me. In that case, *that* law is merely a statement of the presumptively sufficient reason that I already have.

What about the claim that *all* rules create their own realities that are distinctly legal? If this were true, would it not also be true that, in the absence of rules, there could be no actions for which their justifications in turn could be presumptively sufficient? Would it not be, then, that one could not do as a rule required in its absence? For that, one might say, is the essence of following rules—to have them guide our actions. The first point to note here, as elsewhere, is that no legal philosopher, to the best of my knowledge, holds that legal rules require compliance in this way.[43] Now, if the sceptic's

[43] That is, no one is of the view that I must do as a legal rule requires me to do because the rule requires me to do it. At the limit, some philosophers have argued that compliance must be a conceptual possibility of legal rules, for without it, it would be impossible to obey the law (according to the orthodox understanding of obedience; see Green, 'Legal Obligation and Authority' (n 26)), while others have argued that compliance also underpins the theory of justification in the normative domain (this, for example, is Gardner's view; see John Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (OUP 2007) 91ff).

objection against my arguments about presumptive sufficiency is that, in the absence of rules, I am not able to use them as my motivating reasons in doing as I do, then, of course, the objection is granted. I cannot follow something that does not exist. But surely that is not the thrust of the objection. If the no rule, no action objection has bite, its challenge is about the status of ϕing. It holds that the justification of the rule that requires that I ϕ is not presumptively sufficient to ϕ, and its premise for this claim is that the metaphysical status, if one could call it that, of ϕing is that it is constituted by the rule. The rule, in other words, determines what counts as ϕing.[44]

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

Before I conclude, let me summarise the no rule, no action objection and restate its significance. Throughout this article, I have argued that the reflexivity thesis is false and the paraphrastic thesis is true. That is to say, it is not possible for a rule to itself be a reason for action in a distinctive sense and not merely a paraphrased statement of reasons that we already have. The no rule, no action objection sought to show that some rules define what counts as the actions they require and that, if this is true, then the justifications of these rules would not be presumptively sufficient for the actions they require in at least some cases because, in the absence of these rules, the actions they require would not be conceptually possible. The example of this was the rule to

[44] As noted earlier, a variant of this question was the focus of a long and elaborate debate between Rawls and Hodgson. See, in particular, Rawls (n 3) 25ff and esp 32; Hodgson (n 3) 26ff and esp 33.

stop at red lights. In the rule's absence, it would be unlikely that there would be any lights at all for me to stop at. My reply to the objection was twofold, both of which focused the argument on the question 'What is ϕing?' First, the no rule, no action objection cannot intend to mean that the required actions are mechanical, that is to say, that ϕing is merely a set of mechanical movements directed at red lights at intersections, for that would be trivial; and second, if the objection does not mean to emphasise the mechanics of conformity, then more abstract considerations about what it is to ϕ obtain, chief amongst them being conformity with the justificatory grounds of rules—the so-called deep requirements of the law. The challenge of the no rule, no action objection was important to meet because it presented a route to what looks like the hard-line view that rules are constitutive of the actions they require. Blocking that route, in turn, gives us a broader, truer view of rules, one in which the presumptive sufficiency of their justificatory bases entails the conclusion that rules are merely paraphrased statements of reasons that we already have. That is the only sense in which legal rules are possible reasons for action.

6. *Conclusion*

Let me conclude by briefly restating the argument of this article and then describing some of its implications for the possibility of reasons more generally. In the main, my concern has centred on the form in which legal rules can constitute possible reasons. To get a grip on the matter, I focused on the puzzle of the opaqueness of rules, which reflects two opposing views of rules as a reason for action, that is, the reflexivity and paraphrastic theses. I advanced two main lines of argument against the reflexivity thesis.

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

The second line of argument centred on the principle of presumptive sufficiency. I argued that the principle of presumptive sufficiency is fatal for the reflexivity thesis. The reflexivity thesis is important for Raz's work in particular, especially in his attempt to solve the puzzle of the opaqueness of rules. Much like transitivity, presumptive sufficiency is not a principle that philosophers are at liberty to discard in the theory of practical reason, for it does important work on many fronts. Yet it appears that it, too, like transitivity, causes problems for the Razian theory of rules in particular, for it entails the view that either: (i) the justification of a rule is presumptively sufficient for the act that

the rule prescribes—in which case the rule is a paraphrased statement of its justification; or (ii) the justification is defeated by other reasons and it is not presumptively sufficient for the act that the rule prescribes, yet in that case, necessarily, the rule itself is no longer a reason that would be of interest any more than any other fact. In light of the difficulties prompted by the implications of presumptive sufficiency, I suggest that the way forward is not to add it to the list of rules of classical logic that we cannot accommodate in the theory of practical reason but, instead, to reconsider any theory of practical reason that requires us to discard so much of classical logic.

To summarise this all, according to one influential account of rules, it is possible for rules themselves to be reasons for action and not merely statements of reasons that we already have, such as the reasons that constitute a rule's justificatory grounds. I have argued against that possibility. If rules are to qualify as possible reasons for action, then their qualifications stand in relation to the reasons they paraphrase. *No reason, no rule*, we might say of rules that paraphrase no reasons.