**Chapter 5**

**Three Conceptual Problems of Legal Normativity: The Logical Space of Reasons**

One of the conceptual features of law requiring philosophical explication is its normativity: the practices constituting something as a system of law are normative in the sense that they give rise to something capable of persuading subjects to change their minds about doing something prohibited by mandatory legal norms governing non-official behavior. Anything properly characterized as a system of *law* regulates behavior, as a conceptual matter, through the governance of valid legal norms capable of persuading – or rationally inducing – subjects to conform to mandatory legal norms governing non-official behavior when they are antecedently disposed to do otherwise. A legal system is the kind of thing that can do this only if its constitutive practices create reasons capable of rationally inducing compliance among subjects tempted not to comply.[[1]](#footnote-1)

It is quite difficult to make sense of why every existing society of any complexity has adopted the practices constitutive of a legal system to regulate behavior – regardless of whether the ultimate end of doing so, as I have argued, is to keep the peace – unless law is presumed conceptually normative. To begin, it makes sense to adopt an artifactual system to *regulate* behavior only if rationally competent subjects are characteristically likely, as a descriptive matter of contingent fact, to view the system as giving rise to something that can rationally induce them to comply with its norms. If law is not conceptually normative in this minimal respect, then the practices constituting something as a system of law are not reasonably contrived to regulate behavior; behavior can be efficaciously regulated by a system of norms only insofar as the system is capable of rationally inducing subjects to comply.

Further, it would be presumptively problematic, from the standpoint of both our moral and our collective prudential interests, to adopt an institutional normative system that purports to regulate behavior but lacks the requisite conceptual capacity to rationally induce subjects to comply when antecedently tempted to do otherwise. Adopting a legal system would be prudentially unjustified, if law is not conceptually normative, because it is not in anyone’s self-interest to have her freedom restricted, coercively or otherwise, by a system of norms that are not reasonably contrived to make a difference with respect to how other people behave towards her. Adopting a legal system would likewise be morally unjustified, if law is not conceptually normative, because it would be morally problematic to impose a system on subjects that restricts their freedom, coercively or otherwise, if the system is not reasonably contrived to do something of moral or prudential value; and a system that purports to regulate behavior but lacks the resources change the way subjects behave towards other subjects is not reasonably contrived to do anything of moral or prudential value.

It would therefore be *unjustified*, as far as our moral and collective prudential interests are concerned, to adopt a legal system to regulate behavior, which every existing reasonably large and complex society has done, if the mandatory norms of the system prohibiting undesirable behaviors are not reasonably contrived to rationally induce people to do what the norms require. If we all know, as is plausible to hypothesize, that the point of adopting the practices constitutive of a legal system has something to do with regulating behavior regardless of the ultimate end of doing so, then those practices, by themselves, are not reasonably contrived to do *anything* of moral or prudential value unless they are practically equipped to give rise to something beings like us in worlds like ours characteristically regard, as a descriptive matter of fact, as normatively relevant in deciding what to do because beings like us in worlds like ours should, as an objective matter of normative practical rationality, regard it as normatively relevant in deciding what to do.

But the practical and theoretical implications of denying law’s conceptual normativity are worse than this. If law’s conceptual normativity is denied, then there is nothing about the practices constituting something as a system of law that would enable them to be used to regulate behavior. The problem, then, is that it makes no sense to adopt the practices constitutive of law to regulate behavior when we know they are not equipped to give rise to something that can rationally induce subjects to change their behavior – which is *exactly* what everything properly characterized as an *artifactual normative system* of any kind is supposed to do, as a functionally normative matter. If we deny that law is conceptually normative, then it is *irrational –* and not just *unjustified* – to adopt these constitutive practices to regulate behavior because we believe they are not conceptually equipped to perform that task: it would make more sense to shoot oneself in the head to end the pain of a headache than to adopt a legal system to regulate behavior under those circumstances; at least we know that shooting oneself in the head will end a headache.

Law’s presumed conceptual normativity, then, poses a hard adequacy constraint on metaphysical theories of the nature of law. No such theory can succeed unless it explains how the practices constitutive of law are reasonably contrived to give rise to something subjects characteristically regard as the right kind of reasons to comply, as a purely descriptive matter of contingent fact, because they should regard them as such reasons, as an objective matter of normative practical rationality.[[2]](#footnote-2) Any theory lacking the resources to vindicate law’s presumed conceptual normativity fails, for precisely that reason, as a metaphysical theory of the nature of law – either because it is incomplete and needs supplementation or because it is false.

This part of the essay argues that law’s conceptual normativity cannot be vindicated without the help of the Coercion Thesis. In the first two sections of this chapter, I explicate the concept of normativity and distinguish several classes of reasons that might be thought to figure into the problems associated with explicating law’s conceptual normativity. In the third section, I identify the class of reasons that the practices constitutive of law must be reasonably contrived to provide given law’s conceptual normativity. In the final section of this chapter, I distinguish three conceptual problems of legal normativity that define the topics of the next three chapters of the essay.

1. **The Concept of Normativity**

The concept of normativity, as our practices define the corresponding concept-term, has to do with the capacity of something to give rise to reasons.[[3]](#footnote-3) There are two basic types of normativity: an institution or authority is *epistemically* normative insofar as it gives rise to considerations rationally competent subjects characteristically regard, as a descriptive matter of contingent fact, as reasons to *believe* things because rationally competent subjects should, as an objective matter of normative epistemic rationality, regard them as reasons to *believe* things; an institution or authority is *practically* normative insofar as it gives rise to considerations rationally competent subjects characteristically regard, as a descriptive matter of contingent fact, as reasons to *do* things because rationally competent subjects should, as an objective matter of normative practical rationality, regard them as reasons to *do* things.[[4]](#footnote-4)

What exactly must be done theoretically to explicate law’s conceptual normativity depends on the character of the reasons to which the practices constitutive of law are thought reasonably contrived to give rise. The next two sections are concerned with explicating the differences among various classes of reasons and identifying the relevant class of reasons.

2. **The Logical Space of Reasons**

The problems associated with law’s normativity cannot be adequately addressed without understanding various distinctions defining different classes of reasons. There are four distinctions needing clarification: (1) the distinction between reasons to believe (epistemic reasons) and reasons for action (practical reasons); (2) the distinction between reasons that support something but are defeated by other reasons (defeasible reasons) and reasons that support something but are not or cannot be defeated by other reasons (conclusive reasons); (3) the distinction between considerations that provide an incentive for performing an act (motivating reasons) and considerations that justify performing an act (justifying reasons); and (4) the distinction between considerations that ought, as an objective matter of normative epistemic or practical rationality, to be regarded by competent subjects as reasons (objective reasons) and considerations that subjects regard, as a descriptive matter of contingent fact, as reasons (subjective reasons). Addressing the various problems of legal normativity requires identifying the character of the reasons that law as such is equipped to provide as it relates to each of these distinctions.

*2.1 Epistemic and Practical Reasons*

Reasons are considerations that favor or oppose something. At the most general level, there are two species of reason having to do with the kind of thing they favor or oppose: reasons for belief and reasons for action. An epistemic reason is a consideration that favors *believing* some proposition *p*: something is an epistemic reason to believe *p* if and only if it provides some evidence that *p* is true; that is, *r* counts as an epistemic reason to believe *p* if and only if someone who believes *p* is more likely to be correct in her belief that *p* if, other things being equal, she believes *r* than if she does not believe *r*.[[5]](#footnote-5) A proposition expressing the fossil record is an epistemic reason favoring belief that the theory of evolution is true. In contrast, a practical reason is a consideration that favors performing some act *a*; *r* counts as a practical reason to perform an act *a* if and only if *r* favors doing *a*.[[6]](#footnote-6) A proposition expressing that I will likely be punished with incarceration if I rob a bank because doing so is illegal expresses a practical reason for me not to rob a bank.

It is important to note that the claim that some piece of propositional content *r* is a reason for *P* to do or believe something does not imply that the explanation for why *P* does or believes that something, as a descriptive matter of contingent fact, is that *r* has persuaded *P* to do or believe that something. I believe that the illegality of robbing a bank is a practical reason not to rob a bank yet that belief has nothing to do with why I have never robbed a bank; I believe that the absence of a plausible account of how John Connally was struck by the “magic” bullet that also struck John F. Kennedy is a reason to think Lee Harvey Oswald was not the lone shooter but nonetheless believe that the available evidence best supports the theory that he was the lone shooter.

The class of epistemic reasons and the class of practical reasons are mutually exclusive. Practical reasons to do something might be grounded in, or otherwise appeal to, epistemic reasons to believe something; one cannot have a reason to do something unless one has a reason to believe that it should be done. But epistemic reasons are not practical reasons; an epistemic reason concerning a desire I have to eat a sandwich might give me a reason to believe that I want to eat a sandwich, but it is the desire to eat the sandwich, and not the belief that I have that desire, that constitutes the reason to *eat* the sandwich. Believing something is a purely doxastic state that does not usually require moving the body around, while doing something usually involves moving the body around.

The class of epistemic reasons and the class of practical reasons are also jointly exhaustive of the class of things counting as reasons in the relevant sense. While we sometimes use the term *reason* to refer to causal explanations for events, as when we ask for the “reason”the automobile does not start, this usage is not relevant for my purposes. This usage of *reason* is just shorthand for *causal explanation* and has nothing to do with normativity of any kind. Since there are thus only two classes of reasons and they are mutually exclusive and jointly exhaustive, the class of epistemic reasons and the class of practical reasons partition the logical space of reasons.

*2.2 Defeasible and Conclusive Reasons*

A second distinction is between defeasible and conclusive reasons. A consideration that favors something is a defeasible reason for that something if and only if it can be defeated by reasons that oppose that something. An epistemic reason *r* to believe *p* is defeasible if and only if an agent’sbelief that *r* is true makes it more likely, other things being equal, that she is correct in believing *p* than she would be without the belief that *r* is truebut does not warrant belief because it can be defeated by other epistemic reasons. The proposition that *P*’s fingerprints were on the gun that killed *Q* is a defeasible epistemic reason to believe that *P* killed *Q* insofar as it can be defeated by evidence that *P* was framed by someone else who shot *Q* with *P*’s gun.

A practical reason for performing an act *a* is defeasible if and only if it expresses a consideration that favors doing *a* but one that can be defeated by practical reasons opposing doing *a*. The proposition that I would make Maria happy if I were to pick her up from work is a defeasible practical reason for picking her up from work insofar as it could be defeated by a stronger reason not to pick her up from work – such as would be the case if a friend has a medical emergency and needs me to drive her to the hospital.

Both kinds of defeasible reason can be defeated by a countervailing reason that is commensurable in the sense that it can be weighed against the other. A defeasible epistemic reason for believing that *P* shot *Q* to death in the form of veridicalevidence showing that *P*’s fingerprints were on the gun that killed *Q* can be outweighed by veridical evidence showing that *R* was the shooter but used *P*’s gun while wearing gloves.[[7]](#footnote-7) Likewise, a defeasible practical reason *p* to do somethingbecause it produces a benefit can be outweighed by a defeasible reason to abstain because it will produce detriment that outweighs the relevant benefit. The proposition that doing heroin will make a person feel euphorically good is a defeasible practical reason for doing heroin that is outweighed by countervailing practical reasons having to do with all the dangers associated with overdose and addiction; if experiencing pleasure is all one cares about, one is likely to experience more pleasure over the long term by not getting oneself addicted to heroin.

 One can have a defeasible practical reason favoring something that, by itself, is outweighed by another practical reason but that nonetheless contributes to a case that, all things considered, warrants that something. Where two countervailing defeasible practical reasons, *p* and *q*, express commensurable values, *p* can be conclusively defeated by *q* in a situation where they are the only two applicable practical reasons and the weight of *q* is greater than the weight of *p*. But where there are more than two commensurable practical reasons, two practical reasons that are each singly defeated by another practical reason might combine to defeat that latter reason; if, for example, there is one practical reason to abstain from doing *a* that has a weight of 5 and two commensurable practical reasons to do *a* that each have a weight of 3, then the balance of reasons favors doing *a* despite the fact that neither of the reasons for doing *a*, by itself,outweighs the reason for abstaining from doing *a*.

The same is true of defeasible epistemic reasons. Where two countervailing defeasible epistemic reasons, *p* and *q*, express considerations that can be weighed against each other, *p* can be conclusively defeated by *q* in a situation where they are the only applicable epistemic reasons and the weight of *q* is greater than the weight of *p*. Suppose there are two witnesses testifying with respect to whether *P* shot *Q* and one testifies that she has known *P* all her life and knows that *P* would never shoota person while another testifies that she saw *P* shoot *Q*. One will have to decide, first, how much weight to give the testimony of each witness by assessing, among other things, issues having to do with the witnesses’ credibility and, then, assess the comparative weight of the relevant epistemic reasons after they have been adjusted to reflect the credibility of each witness’s testimony.

There *can* be practical reasons, as far as our shared judgments are concerned, that trump other conflicting reasons by expressing a winning value in virtue of being *qualitatively* more important than the others rather than in virtue of being *quantitatively* heavier. Mill’s hedonistic utilitarian moral theory differs from Bentham’s in the following way: whereas Bentham holds that all pleasures are of the same kind and can always be weighed against one another in assessing which action would produce the most pleasure, Mill holds that the intellectual pleasures are qualitativelyhigher pleasures than non-intellectual pleasures and cannot be weighed against those non-intellectual pleasures because they are of a non-commensurable *kind*. On Mill’s idiosyncratic utilitarian calculus, a higher pleasure necessarily *trumps* the lower pleasures because of its qualitatively superior character. While Mill’s view might not seem facially plausible, it is because it does not conform to our evaluative practices with respect to assessing practical reasons – and not because it is conceptually or metaphysically incoherent.

There are more plausible ways in which one reason can be thought to trump another in virtue of expressing a qualitatively more important value. One might think, for example, that there are second-order exclusionary reasons for action that trump other specified reasons in the sense that they preclude acting on those latter reasons; on this view, the moral reasons expressed by a moral obligation to do *a* include a first-order moral reason to do *a* and a second-order exclusionary reason not to act on any first-order prudential reasons to abstain from doing *a*; I have a moral exclusionary reason, on this view, not to kill an innocent person on the strength of any prudential reasons I might have to do so. The first-order prudential reasons to abstain from *a* can be thought of as trumped by the exclusionary moral reason that precludes acting on those reasons.

Conclusive reasons are reasons that are not, or cannot, be defeated by other reasons. A reason *p* might be *contingently* conclusive in the sense that there are other considerations that could outweigh *p* but do not obtain, as a descriptive matter of contingent fact, in our world. Alternatively, *p* might be *necessarily* conclusive in the sense that there could be no considerations that outweigh *p*. In the case where *p* is contingently conclusive, there are other possible worlds in which there obtain considerations not obtaining in our world that define reasons that defeat *p*; in the case where *p* is necessarily conclusive, there are no possible worlds in which considerations obtain that define reasons that defeat *p*.[[8]](#footnote-8)

Epistemic reasons can be either contingently or necessarily conclusive. A reason that supports believing *P* killed *Q* might be contingently conclusive in the sense that it justifies belief that *P* killed *Q*, all things considered,because there are no facts in this world giving rise to considerations that defeat that reason, although there might be facts obtaining in other possible worlds that do so. In contrast, my belief that there is an something to which I refer to as “I,” whatever its nature turns out to be, is arguably necessarily conclusive: if “I believe that *p*” is true when entertained or uttered by me, then there could not be any evidence to the contrary that would defeat the claim expressed by “I am something that has beliefs” when entertained or uttered by me.

The norms of morality are commonly taken to define conclusive practical reasons but the sense in which they are conclusive arguably depends on whether we believe those norms are objective in character. If, on the one hand, we believe that morality is objective, then it is not preposterous to think that, as far as our evaluative practices are concerned, moral obligations define practical reasons that are necessarily conclusive; since what determines the truth-value of a moral statement does not depend on contingent considerations having to do with the beliefs and preferences of subjects, it is reasonable to think that its truth-value is determined by features instantiated by every possible world – including worlds in which moral norms lack application either because there are no moral agents or because there are no moral patients.[[9]](#footnote-9) If, on the other hand, we believe that morality is conventional or intersubjective, then it is not preposterous to think there could be moral obligations defining practical reasons that, as far as our evaluative practices are concerned, are contingently conclusive insofar as they are outweighed or trumped in other possible worlds in which the relevant community converges on adopting different standards of morality; the idea that insulting *P* will hurt *P*’s feelings would thus be a practical moral reason not to insult *P* only in worlds in which subjects converge on adopting a conventional moral norm that prohibits acts likely to hurt a person’s feelings.

The logical relationship between conclusive and defeasible practical reasons can be expressed as follows. If *r* is a reason that is not necessarily conclusive, then *r* is a *defeasible* practical reason to do *a* in the sense that *r* can be defeated by other countervailing practical reasons. If *r* is contingently conclusive in this world, then *r* is also defeasible, as I define the term here, insofar as there are other possible worlds in which considerations obtain that define practical reasons that would have defeated *r* in this worldhad they obtained in this world. The class of necessarily conclusive practical reasons and the class of defeasible practical reasons are thus both mutually exclusive and jointly exhaustive, while the class of contingently conclusive practical reasons and the class of defeasible practical reasons are jointly exhaustive but not mutually exclusive – since there can be a defeasible practical reason that is defeated in other possible worlds by other practical reasons but is not defeated by other practical reasons in the actual world.

*2.3 Subjective and Objective Reasons*

A third distinction is between subjective and objective reasons.[[10]](#footnote-10) The notion of a subjective reason favoring *p* is concerned with what some particular agent regards, as a descriptive matter of contingent fact, in her thinking as a consideration favoring *p*. The proposition that *P*’s fingerprints are on the gun that killed *Q* is a subjective epistemic reason for *R* to believe that *P* killed *Q* if and only if *R* both believes thatproposition and regards it as evidence for the proposition that *P* killed *Q*. *R*’s experiencing uncomfortable pangs of hunger defines a subjective practical reason for *R* to get something to eat if and only if *R* treats the proposition expressing that fact in her deliberations as a consideration that favors eating something. Such reasons are felt or internal reasons that arise from the subject’s experienced mental states and are, for that reason, properly characterized as *subjective*.

Subjective reasons might be good reasons from the standpoint of our shared evaluative practices, or they might be bad reasons. *P*’s fingerprints being on the gun that killed *Q* defines a good defeasible epistemic reason, if true, to believe that *P* killed *Q*; *P*’s having written a sympathetic book about a serial killer, if true, is not a good reason to believe that *P* killed *Q*. *R*’s experiencing hunger pangs, other things being equal, defines a good practical reason for *R* to eat a modest nourishing meal; *R*’s experiencing a desire to feel the exhilaration that frequently attends committing a crime defines a bad practical reason to rob a bank.

The notion of an objective reason arises out of the idea that there can be good and bad reasons for doing or believing things. Our shared conceptual and evaluative practices presuppose that there are objective standards of normative epistemic and practical rationality that determine whether or not a reason is a good one. On this view, there can be subjective reasons for believing or doing something that are bad in the sense that they do not satisfy the relevant objective standards and hence do not favor doing or believing that something regardless of what anyone thinks. It is the hallmark of objectivity with respect to reasons, as we conceive the notion, that any or all of us could be mistaken with respect to whether something counts as a good reason for doing or believing something.[[11]](#footnote-11)

The distinction between objective and subjective reasons amounts to this. The claim that some proposition *r* is a subjective reason for *Q* to do/believe something is an empirically descriptive claim about *Q*’s mental states with respect to *r*; insofar as *Q* regards *r* as a reason to do/believe something, *r* is a subjective reason for *Q* to do/believe that something. The claim that *r* is an objective reason for *Q* to do/believe something expresses a claim about what we take to be mind-independent standards of normative rationality; in particular, it asserts that *Q* should, as an objective matter of normative rationality, regard *r* as a reason to do/believe that something. In the case of epistemic reasons, the relevant determinants of correctness are objective norms of epistemic rationality while in the case of practical reasons, the relevant determinants are objective norms of practical rationality – or, rather, what we converge on believing these norms require.

The claim that an institution is normative in the relevant sense does not entail anything about the strength of the reasons its operation provides, as an objective matter of normative practical or epistemic rationality, or the strength of the reasons that subjects are likely to be regard it as providing, as a descriptive matter of contingent fact. The strength of the relevant reasons might or might not rise to the level of being conclusive depending on the relevant circumstances. If I know that someone is infallible with respect to what I should do and always tells the truth about what I should do, then the fact that she tells me that I should do *a* gives rise to a conclusive epistemic reason to believe that I should do *a* and might also, depending on what justifies someone in asserting practical authority over me, give rise to a conclusive practical reason for me to do *a*.If I know that someone is more reliable than I am in determining what I should do but is not infallible with respect to what I should do and always tells the truth, then the fact that she tells me that I should do *a* provides an epistemic reason to believe that I should do *a* that is weighty but might fall short of being conclusive; it might also, depending on what justifies someone in asserting practical authority over me, provide a practical reason for me to do *a* that is also weighty but falls short of being conclusive.

*2.4 Motivating and Justifying Reasons for Action*

A final distinction is relevant only with respect to practical reasons. A *motivating reason* *m* to do *a* is a *practical* reason expressing a consideration that the agent either views, as a descriptive matter of contingent fact, or should view, as an objective matter of normative practical rationality, as desirable and that hence inclines, or should incline, her to do *a*; in the former case *m* is a *subjective* motivating reason to do *a* while in the latter case *m* is an *objective* motivating reason to do *a*.

In both cases, a motivating reason *m* to do *a* is a practical reason for doing *a* that might, or might not, be defeated by other reasons. In the case of subjective reasons, the agent might, or might not, view *m* as outweighed or trumped by other considerations she regards as countervailing motivating reasons to abstain from doing *a*; in the case of objective reasons, the motivating reason to do *a* might, or might not, be outweighed or trumped by other reasons, as an objective matter of normative practical rationality, to abstain from doing *a*.

A motivating reason *m* is subjectively conclusive for an agent if she believes that *m* is not, or could not be, defeated by other practical reasons. Insofar as an agent believes that *m* is not but could be defeated by other reasons, *m* is contingently conclusive for her; insofar as she believes that *m* could not be defeated by other practical reasons, *m* is necessarily conclusive for her. Insofar as she regards *m* as a conclusive reason to do *a*, she treats *m* as sufficient, by itself, in her deliberations to warrant doing *a*.

A motivating reason *m* to do *a* is objectively conclusive for an agent if, as an objective matter of normative practical rationality, *m* is sufficient, by itself, to motivate her to do *a*; that is, *m* is objectively conclusive for an agent if she should, according to objective standards of normative practical rationality, view it as sufficient to motivate – i.e. rationally induce – her to do *a*.[[12]](#footnote-12) A motivating reason *m* is contingently conclusive if, according to objective standards of normative practical rationality, *m* is not but could be defeated by other reasons; *m* is necessarily conclusive if it cannot, as an objective matter, be defeated by other reasons.

A motivating reason *m* need not be a conclusive motivating reason to do *a* to contribute to motivationally warranting the performance of *a*. It might be that *m* falls short of being conclusive but contributes enough weight that the agent either regards *m*, as a descriptive matter of contingent fact, or should regard *m*, as an objective matter of normative practical rationality, as combining with the weight of other motivating reasons in favor of doing *a* to tip the balance of the applicable motivating reasons in favor of doing *a*.

A *justifying* reason *j* to do *a* is a practical reason that justifies the performance of *a* in the sense that *j* expresses a value that the agent either views, as a descriptive matter of contingent fact, or should view, as an objective matter of normative practical rationality, as justifying the doing of *a* under some set of standards governing her behavior; in the former case *j* is subjective justifying reason to do *a* while in the latter case *j* is an objective justifying reason to do *a*.

A justifying reason *j* to do *a*, as was true of motivating reasons, might be objectively or subjectively conclusive with respect to justifying the act, or it might not be. If *j* is not necessarily conclusive (as an objective/subjective matter), then *j* is a defeasible (objective/subjective)justifying reason to do *a*. But, as was true of motivating reasons, if *j* is contingently but not necessarily conclusive, then *j* is a defeasible reason to do *a* that is undefeated in the actual world but is defeated in other possible worlds.

The logical relationship between motivating and justifying reasons is not clear. One might think that the conceptual distinction between the two amounts to little in practice because motivating reasons also purport to justify an act, but there is no obvious reason to rule out the possibility that someone might be motivated to act on some consideration that she knows would not justify the act. Someone could have, for whatever reason, such a strong desire to do somethingthat she is motivated to act on that desire regardless of whether she believes she is justified in doing so under any set of applicable norms; “I don’t give a fuck” is sometimes used with obvious exasperation on the part of the speaker to express exactly that unfortunate configuration of preferences. While acting on the basis of such preferences might not be rational in the weak sense that it is not justified on the strength of the relevant norms, it is not obviously irrational; the boundaries of the distinction between what is irrational and what is merely not rationally justified are not altogether transparent.

Motivating and justifying reasons can come apart in other ways. First, an agent can act on a subjective motivating reason that does not objectively justify the act; in this case, the agent’s internal motivations do not line up with what objectively justifies the act. Second, an agent can act on a subjective motivating reason that she falsely believes does not objectively justify the act; in this case, the agent’s subjective motivating reason is an objectively justifying reason but not a subjective justifying reason. Third, an agent can act on a subjective motivating reason without having any beliefs about whether the act is justified. One might plausibly think that there are some acts that one can permissibly perform that need not, as an objective matter of normative practical rationality, be justified under some set of standards that govern the agent; for my part, I do a lot of things without regard for whether they are justified because those acts, being morally permissible, do not trigger a need for prudential, moral, or other kind of justification. As a conceptual matter, the permissibility of an act under some set of standards seems to logically preclude the need to justify it under that same set of standards.

Motivating and justifying reasons can also come apart with respect to the mechanisms by which an institutional normative system provides each type of reason. If it makes sense to think that we have a legally justifying reason not to commit murder, it is the valid legal norm prohibiting murder that is the source of that reason – and not the coercive sanction that some recognition norm authorizes a court to impose for non-compliance. But if it makes sense to think that what provides the relevant motivating reason to comply with a law prohibiting murder is the fact that the courts are authorized to impose a sanction for non-compliance, then the mechanism by which law creates justifying reasons is distinct from the mechanism by which it creates motivating reasons; the threat of a coercive sanction for doing *a* does not, and cannot, give rise to a legally justifying reason not to do *a*. If this is correct, then one can have motivating reasons that are not justifying reasons and conversely.

There are as many types of justifying reason as there are types of normative standards. Insofar as a justifying reason to do *a* makes reference to moral standards and is thereby concerned with what is morally justified, it is a moral justifying reason to do *a*. Insofar as it makes reference to prudential standards and is thereby concerned with what is justified in virtue of optimally conducing to the agent’s interests, it is a prudential justifying reason to do *a*. Insofar as a justifying reason to do *a* makes reference to legal standards and is thereby concerned with what is justified under the law, it is a legal justifying reason. And so on.

This feature of justifying reasons also distinguishes them from motivating reasons. It is somewhat counterintuitive, though not obviously incoherent as a conceptual matter, to think of motivating reasons as being relative to particular classes of *standards*. It is clear that some motivating reasons make reference to considerations that are prudential in character because they have to do with what might or might not conduce to self-interest and thus count as prudential motivating reasons, but the qualifier functions differently from the way it functions with respect to justifying standards. There is nothing in the notion of a prudential motivating reason that seems clearly to require any reference to some set of behavioral standards of prudential justification; the motivating reason is prudential in the sense that it is concerned with self-interest but not in the sense that it makes any obvious reference to standards explicitly concerned with prudential justification.

The claim that *P* has a justifying reason to do *a*, then,neither implies the claim that *P* has a motivating reason to do *a* nor is implied by it. The claim that *r* is an objective/subjective *justifying* reason to do *a* does not, without more, imply anything with respect to whether *r* is an objective/subjective *motivating* reason of any kind to do *a*; one can have an objective legal justifying reason to do something that one has no objective or subjective motivating reason to do. Conversely, the claim that *r* is an objective/subjective motivating reason to do *a*, by itself, asserts and entails nothing about whether it is an objective/subjective justifying reason to do *a*; one can have an objective motivating reason to do something that is not subject to the standards of rational *justification* and hence does not imply the existence of a justifying reason of any kind.

Even so, the claim that the relevant considerations are motivating reasons does not preclude that they might also be, or correspond to, justifying reasons. A concern to do the morally right thing can serve both as a motivation for an agent’s act and as part of a justification under the standards of morality. Indeed, it might be the case that the two types of reason always coincide with respect to moral motivations and moral standards, but this is consistent with the two kinds of reason being conceptually and ontologically distinct. The claim that these two kinds of reason are conceptually distinct does not imply the claim that the considerations that give rise to one type of reason cannot also give rise to the other type; it implies only that something is not a justifying reason wholly in virtue of being a motivational reason, and conversely.

3. **The Character of the Reasons to Which the Practices Constitutive of Law are Reasonably Contrived to Give Rise**

To fully address the problem of legal normativity, one must identify the character of the relevant reasons to which the practices constitutive of a legal system are, as a conceptual matter, reasonably contrived to give rise; there is no way to understand law’s conceptual normativity without knowing what kinds of reasons are relevant. This requires determining the character of the applicable reasons with respect to each of the four distinctions discussed above. This section attempts to identify the character of the reasons to which the practices constitutive of law are, as a conceptual matter, reasonably contrived to give rise as a prelude to offering an explication of law’s conceptual normativity that is grounded in the Coercion Thesis.

*3.1 The Relevant Reasons are Practical Reasons and Not Epistemic Reasons*

There are, as will be discussed in Section 4 below, a number of conceptual problems of legal normativity but the most important problem is concerned with *how* the practices constitutive of a system of law can give rise to practical reasons. Insofar as it is a conceptual truth that law as such is reasonably contrived to regulate behavior through the governance of norms metaphysically capable of guiding behavior, it is also a conceptual truth that the practices constituting something as a legal system must be capable, in some sense, of giving rise to reasons to comply with mandatory norms prohibiting acts that might otherwise tempt subjects.[[13]](#footnote-13) A system of law can *regulate* behavior only insofar as it is practically normative in the sense that it does something capable of rationally inducing subjects to refrain, when otherwise tempted, from prohibited acts.

A system of law can be practically normative in the required sense only insofar as it has resources capable of changing the behavior of subjects by providing them with practical reasons to comply with at least some of its requirements. When a person does something differently because of the law, her behavior has been changed by it; for a legal system to be capable of changing the behavior of subjects, it must be capable of providing reasons for doing something they might not otherwise be inclined to do. At the most basic level, then, the most important conceptual problem of legal normativity is to explain how the practices constituting something as a system of law are capable of changing the behavior of subjects inclined to do things prohibited by law by providing what they characteristically regard, as a descriptive matter of contingent fact, as a practical reason not to do those things because they should, as an objective matter of normative practical rationality, regard it as a practical reason not to do those things.

It is true that the practices constitutive of a legal system must be capable of providing epistemic reasons with respect to what behaviors are prohibited or otherwise regulated. Law could not make a practical difference with respect to how people behave unless the practices constituting something as a system of law make it possible for subjects to have some reliable way to learn what law requires and hence to be epistemically justified with respect to their beliefs about what it requires.[[14]](#footnote-14) One cannot knowingly conform one’s behavior to laws prohibiting copyright infringement unless one knows what acts are treated under those laws as constituting copyright infringement.

But there is nothing mysterious about *how* the practices constitutive of a legal system make it *possible* for subjects to learn what mandatory legal norms require of them. Law is, by nature, a public institution in the sense that the norms treated as valid laws are publicly promulgated, recognized, and applied in something that counts as a common language. If the issue is to explain how law as such is capable of providing reasons to believe, the fact that laws are publicly promulgated, recognized, and applied in a common language is enough to solve that problem; if there is anything left to explain, that is a task for normative and descriptive epistemologists to perform – and not one for conceptual jurisprudents.

A legal system might not always be successful in informing subjects of exactly what the norms require in every case by providing reasons for belief, but the practices constitutive of a legal system are clearly equipped to provide epistemic reasons with respect to what behaviors are legally prohibited or otherwise regulated in the vast majority of cases. It might not always be obvious who counts as innocent for purposes of applying a valid legal norm prohibiting the killing of *innocent* people, but it should be clear to any rationally competent subject that it prohibits bashing, beating, bludgeoning, burning, choking, crushing, poisoning, shooting, smashing, stabbing, starving, suffocating, and torturing infants to death; insofar as that is not clear to some person who competently speaks the language, that is a reason to think that she is not rational and hence ought not, as a moral matter, be held accountable under the law.

But, either way, there is no non-trivial *conceptual* problem of any kind that concerns how law as such can provide epistemic reasons with respect to beliefs about what behaviors are regulated by law. The practices constitutive of a legal system manufacture, apply, and enforce legal norms in a manner that is sufficiently public in character that subjects can come to know much, if not everything, about what law requires.[[15]](#footnote-15) These practices include publicly recognizing, applying, and enforcing norms that are expressed in language clear enough to communicate to reasonably competent subjects the core of what is prohibited. Since it is clear that the practices constitutive of law are sufficiently public to enable rationally competent subjects to determine, at least, the core content of those general norms that will be applied and enforced against them, whether by reading the relevant laws or asking an attorney, there is no mystery as to how those practices can provide epistemic reasons; law is arguably better suited, in virtue of these conceptual publicity requirements, than any other set or system of artifactual or non-artifactual norms to provide epistemic reasons.

This should not be construed to deny that there are interesting problems having to do with legal epistemology or normativity; it is merely to assert that there is no serious conceptual problem concerning how the practices constitutive of law can give rise to epistemic reasons with respect to legal requirements. Because there is no decision procedure by which any competent subject can determine in any case what law requires of her, there will always be issues with respect to how judges should decide and apply the law in hard cases.

But none of these issues is conceptual. The most important conceptual problem of legal normativity is to explain how law as such is equipped to provide practical reasons because it is not immediately clear *how* the practices and norms constituting something as a system of law can generate reasons to comply with legal requirements. If, as one might plausibly think, it is conceptually *sufficient* for the existence of a legal system (1) that the persons serving as its officials practice a social rule of recognition governing the recognition and application of valid norms of the system and (2) that the behavior of subjects generally conforms to the norms valid under the social rule of recognition, it is difficult to see how law as such is equipped to provide practical reasons to comply. There is no obvious reason to think that rationally competent subjects should, or are likely to, treat content with the status of law as practical reasons to comply with that content solely in virtue of being recognized and applied as such by officials in a manner that conforms to (1) and (2).

*3.2 The Relevant Practical Reasons are Defeasible Reasons and Not Conclusive Reasons*

The practices constituting something as a system of law, by themselves, do not necessarily result in something that subjects characteristically regard, or should regard, as conclusive reasons to comply. It might be true that there are conceptually possible legal systems that provide reasons that subjects characteristically regard, or should regard, as conclusive. A legal system *L* that is always *morally* justified in enforcing its valid norms with a coercive sanction might give rise to something subjects should, and characteristically do, regard as conclusive practical reasons; it is hard to see how *L* could always be morally justified in imposing non-trivial detriment for violations if it did not provide objectively conclusive practical reasons that are characteristically accepted by subjects as such. But if *L* provides conclusive practical reasons, it is not the general practices constituting something as a legal system, which are shared by every conceptually possible legal system, that explains how it provides such reasons; it is rather those distinctive practicesconstituting *L* as always morally justified in enforcing its norms, which are not shared by every conceptually possible legal system, that explains how *L* provides those conclusive practical reasons.

 The most that can be presumed of the capacity of law *as such* to generate practical reasons is that the practices constituting something as a system of law are equipped to provide considerations likely to be regarded by subjects, because they should be so regarded, as practical reasons to comply that can be defeated by practical reasons not to comply. The officials of a morally illegitimate legal system might recognize as law norms governing non-official behavior that require acts that are obviously prohibited by objective norms of political morality, as is true of laws requiring discriminatory treatment of persons on the basis of race; in such a case, the practical reason to comply defined by the practices constituting the system as one of law can and should be regarded as defeated by those entailed by moral norms prohibiting discriminatory behaviors.

But the practices constitutive of law can give rise, at most, to defeasible practical reasons to comply even with respect to mandatory legal norms prohibiting morally wrongful assaults against persons or nations. Insofar as one has a conclusive practical reason to refrain from the socially disruptive acts prohibited by that legal content, it is the moral quality of that content that provides such reasons and not the fact that there is a valid mandatory legal norm reproducing it. While it might be true that a morally legitimate legal system provides novel content-independent conclusive practical reasons to comply with those norms, this would be so in virtue of the moral properties of the system that give rise to moral reasons to comply. The practices constituting something as a system of law, by themselves, are not equipped to provide any kind of conclusive practical reason to comply. No purely artifactual institutional normative system in our world is built that way because beings like us are capable of recognizing, applying, and, more worrisomely, enforcing morally wicked content that gives rise to, at best, practical reasons that should be regarded by subjects as conclusively defeated by moral reasons.

*3.3 The Relevant Reasons are Motivating Reasons and Not Justifying Reasons*

Insofar as it is a conceptual truth that a legal system is equipped to provide practical reasons capable of inducing compliance with norms in persons antecedently disposed to act otherwise, the relevant reasons for action are motivating reasons, and not justifying reasons. To induce someone to refrain from doing something she is antecedently disposed to do that violates a mandatory legal norm, the practices constituting something as a system of law must be equipped to persuasively motivate her to do otherwise. We do what we are most motivated to do.

There are a variety of considerations that can motivate us, including a desire to be justified in our behavior, but it makes little sense to think that law is equipped to provide reasons that *justify*, from the standpoint of one’s legal obligations, refraining from mandatory legal norms governing non-official behavior, such as assaults on persons and properties. While it is always possible to fetishize the law or some group of officials claiming authority, someone motivated to refrain from killing someone simply to ensure that her behavior is *legally justified* is confused and possibly in need of serious medical intervention; the idea that valid legal norms prohibiting murder are concerned to legally justify not killing persons who should not be killed is silly enough to be medically worrisome.

It is, of course, possible, in any relevant sense of the term, for someone to be motivated by such considerations, but it is hard to see what would warrant thinking that the practices constituting something as a system of law are primarily concerned to appeal to such foolishly fetishistic and idiosyncratic preferences. Given the content of *our* conceptual practices, which reflect what *we* commonly believe about the propensities of beings like *us* in worlds like ours to behave in socially undesirable ways, it makes far more sense to think that these practices are best understood as providing some sort of motivating reason than it does to think that they should be understood as providing something that justifies compliance under any set of standards – including standards of moral and prudential justification.

This is not to suggest that the concept of a justifying reason is irrelevant with respect to understanding law as such; it is clear that the concept has necessary application with respect to official acts that can be challenged by those putatively bound by the normative output of those acts. The rule of recognition as it applies to adjudication typically requires not only that judges behave in a manner that can be justified by reference to the relevant mandatory legal norms governing judicial behavior but also that judges articulate the reasons that would show their decisions properly apply the relevant mandatory legal norms governing non-official behavior; those decisions can hence be challenged on the ground that they are not *legally* justified because inconsistent with the balance of applicable *legal* justifying reasons – which are determined by the relevant legal norms governing judicial behavior together with the relevant legal norms governing non-official behavior that give rise to the dispute requiring judicial adjudication. Similarly, the rule of recognition as it applies to enforcement defines standards that legally justify the imposition of coercive sanctions on those who violate valid legal norms; those enforcement decisions can typically be challenged on the ground that they are not legally justified given the balance of applicable legal justifying reasons. Finally, legislative acts can also be challenged on the ground that they do not conform to the procedural or substantive requirements of the rule of recognition and are hence not legally justified by the balance of applicable legal justifying reasons.

The practices constituting something as a system of law are contrived, for these reasons, to utilize different normative mechanisms for regulating official and non-official behavior. These practices seem primarily contrived to regulate official behavior through norms that entail justifying reasons that legally *justify* the acts of legislative, adjudicative, and enforcement agencies; insofar as any official act can be challenged under the relevant legal standards, its rectitude can be established only by showing that the act is legally justified. Even a rule of recognition endowing a sovereign with authority to enact legal norms without restriction defines justifying reasons: something that is treated as law by officials can be challenged on the ground that it does not have a source in an appropriately configured sovereign act. In contrast, the practices constituting something as a system of law are primarily contrived to regulate non-official behavior through norms that provide reasons sufficient to *motivate* subjects to comply with certain valid legal norms in circumstances where they are not antecedently motivated to do so. Persons who do what the law requires because it is required by the law regard the balance of motivating reasons as favoring compliance, as do people who do what the law requires because the requirement is backed by a coercive sanction.

It is nonetheless clear that law as such can provide both *motivating* reasons for *official* acts and *justifying* reasons for *non-official* acts. To begin, a rule of recognition can include norms providing for impeachment or removal of officials for acts that violate either mandatory legal norms governing either non-official or mandatory legal norms governing official behavior. The U.S. Constitution does both with respect to presidents: Article II, Section 4 authorizes the impeachment and removal of presidents for “High Crimes and Misdemeanors”; Section 4 of the 25th Amendment authorizes removal of presidents upon an appropriate showing that “the President is unable to discharge the powers and duties of his office.” Insofar as the required inability to discharge the relevant powers and duties includes a willful refusal to comply with the relevant recognition norms, both constitutional provisions would be the source of motivating reasons to do what is required so as not to be removed from office. Such provisions are not conceptually necessary pieces of a legal system, but they are possible in every sense that matters.

It is likewise clear that law can provide justifying reasons for non-official acts. Valid legal norms empowering persons to alter their legal relations with other people are also contrived to provide justifying reasons.[[16]](#footnote-16) A defendant in a lawsuit alleging breach of contract will typically claim that her actions are legally *justified* either because they satisfied her contractual obligations or because the agreement does not satisfy the formal requirements of contract law and hence does not legally bind her. The legal norms of contract law, like the recognition norms governing official behavior, are reasonably contrived, as a conceptual matter, to provide justifying reasons.[[17]](#footnote-17)

The norms of contract law thus resemble the recognition norms that prescribe how valid legal norms can be recognized, applied, and enforced by officials. Both types of norms are best conceived as primarily concerned to provide subjects with justifying reasons. Insofar as they provide prudential motivating reasons, those reasons depend on the subjects instantiating a constellation of internal motivations that cannot be plausibly attributed to all rationally competent subjects; while all rationally competent subjects can be presumed, other things being equal, to want not to be incarcerated, they cannot be presumed to want to engage in the activities of officials or to formalize their agreements by memorializing them in enforceable instruments.

But there is no philosophical mystery with respect to how the relevant legal norms are equipped to provide justifying reasons. It is a conceptual truism that any norm that defines a standard to which some agent must conform can provide a justification *relative* to that norm for conforming behavior where a justification is needed. This is just how norms work: moral standards are the source of considerations that morally justify conforming behavior; social standards of etiquette are the source of considerations that socially justify conforming behavior from the standpoint of those standards; and legal standards are the source of considerations that legally justify conforming behavior. While it is therefore trivially true that one is legally justified in not committing murder by the mandatory legal norms prohibiting murder, the point of laws prohibiting murder is to provide a decisive motivating reason, where one is needed, for someone to refrain from murder. But since officials do not challenge the legal propriety of acts that do not putatively violate the law, the legally justifying reasons that any legal norm necessarily provides do not play a central role in how law regulates non-official behavior. There is simply no interesting problem of how the practices constitutive of a system of law can give rise to justifying reasons.

*3.4 The Relevant Reasons are Objective and Not Subjective Reasons*

It is a conceptual truth that law is an institutional artifact characteristically used to regulate the behavior of rationally competent subjects sometimes disposed to do things thought to be undesirable. An institutional normative system that does not contribute marginally to preventing these undesirable acts where putative subjects nonetheless abstain from them because they are not antecedently disposed to commit such acts has nothing to do with why they abstain from them and is not properly characterized as a legal system; there can be no *efficacious* legal regulation of the behavior of *real angels* when it comes to undesirable acts – because real angels, as opposed to the beings comprising the society of angels discussed below in Chapter 10, are morally infallible, morally impeccable, and hence never disposed to commit such undesirable acts. That is what makes them angels.

The point here is not just that real angels hence have no *need* for a legal system; it is also that they *cannot use* a legal system to prevent undesirable acts because the practices constituting an institutional normative system as one of law cannot make any difference with respect to whether they commit such acts. One can use an object for a purpose only insofar as that object is needed for that purpose; if subjects are already behaving perfectly well without law, law cannot be used by those subjects to prevent undesirable acts any more than a medication can be used to cure an illness that someone does not have.

 Law is an institutional artifact conceptually equipped to make a difference with respect to what subjects do enough of the time to enable them to live together in a stable community. Where there is a system of law, it is because the practices constituting something as a system of law change the behavior of subjects frequently enough to ensure that they can get along well enough to live peacefully together in a stable community; a group of people can get along well enough to live together only insofar as they are refraining from acts that prohibited because commonly regarded as undesirable.[[18]](#footnote-18) The practices constituting something as a system of law are thus reasonably contrived to make it more likely that beings like us can get along together in worlds like ours than it would otherwise be – which presupposes that the psychology of subjects is such that they can be, and sometimes are, antecedently disposed to commit acts that are prohibited by law.

The practices constituting something as a system of law are equipped to perform law’s conceptual function of regulating behavior by providing something that *subjects are likely to treat as additional motivating reasons* that persuade them when they need to be persuaded, as is sometimes the case, to refrain from acts that are prohibited by law because they are deemed undesirable. That is, these constitutive practices are equipped to perform its conceptual function of regulating behavior, regardless of the ultimate end these practices seek to achieve, only insofar as they are likely to give rise to novel content-independent *subjective* motivating reasons that persuade subjects to refrain from prohibited acts, when antecedently disposed to do otherwise, often enough to permit them to live together in a state of comparative peace. Law is contrived to make a practical difference in the behavior of subjects whose motivations sometimes dispose them to behave badly by giving them something they are likely to regard as a persuasive countervailing motivating reason to comply when otherwise antecedently disposed.

But this can be done only insofar as the practices constitutive of law are also conceptually equipped to provide new *objective* motivating reasons to conform to some mandatory legal norms governing non-official behavior. The practices constituting something as a legal system would not be equipped to provide something subjects are characteristically likely, as a descriptive matter of contingent fact, to treat as subjective motivating reasons to refrain from prohibited acts if those practices did not provide something that, as an objective matter of normative practical rationality, subjects *should* treat as motivating reasons to refrain from such acts. We are plausibly characterized as *rationally competent* precisely because we are reason-responsive in a way that *largely* conforms to objective norms of practical rationality.

The need for law arises among beings like us precisely because we are not *always* predisposed to behave in a manner that conforms to objective norms of practical rationality – either because we do not always know what these norms require, all things considered, or because we are motivated by considerations of self-interest to act in ways that we know violate moral norms we should not violate. The claim that we are rationally competent does not entail the claim that we always satisfy the objective norms of practical rationality dictating how we should assess the applicable reasons; those norms incorporate moral and prudential considerations in a manner that determines what, as an objective matter, we have most reason to do all things considered. The claim that we are rationally competent entails only the claim that we characteristically act for what we take to be reasons and that we are characteristically responsive to what we collectively regard as the requirements of objective norms of practical rationality. What we need law to do is to provide something that rationally competent beings are likely to treat as persuasive motivating reasons to refrain from certain acts when antecedently disposed to do otherwise.

The practices constituting something as a legal system are not plausibly thought to be concerned primarily with providing subjective motivating reasons to comply because these practices are concerned to regulate the behavior of subjects who are presumed rationally competent in virtue of being largely reason-responsive; it would be prohibitively expensive for a system of law to accommodate every subject’s idiosyncratic preferences. The best that a legal system can do, insofar as it is reasonably contrived to prevent acts deemed undesirable through the governance of norms metaphysically capable of guiding it, is to provide something beings like us are likely to regard as an additional motivating reason to comply that can tip the balance in favor of complying with mandatory legal norms prohibiting undesirable acts, when we are not sufficiently motivated to comply by considerations that *should* motivate beings like us, often enough that we can live together. It is thus a conceptually necessary condition for something to count as system of law that it is equipped to provide objective motivating reasons to comply with at least some mandatory legal norms governing non-official behavior.

*3.5 The Relevant Motivating Reasons Must be Both Novel and Content-Independent*

Insofar as a legal system provides objective motivating reasons to comply, those reasons are both novel and content-independent. They are novel in the sense that subjects have *those* reasons only in virtue of being entailed by the practices constituting a norm as a binding law of the system; while subjects might have other motivating reasons for doing what law requires in any given instance, the practices giving rise to a system of law are contrived to give rise to new motivating reasons to comply with norms that subjects did not have prior being treated by the officials as law. They are content-independent in the sense that the relevant motivating reasons arise from the fact that they are treated by the officials as law and not from the content of the relevant norms.

 The novelty of these motivating reasons is derived from their content-independence. Insofar as it is the empirically observable fact that some norm is recognized, applied, or enforced by officials as law that gives rise to the new motivating reason, the new motivating reason depends on its being treated as *law* and not on its content. If it is the case, given any act *a* required by law, that subjects would have had a new motivating reason not to do *a* had the relevant officials treated a norm prohibiting *a* as law, then the legal norms and practices regulating the performance of *a* provide content-independent and hence new motivating reasons with respect to doing or not doing *a*.

*3.6 Law Must be Reasonably Contrived to Provide the Relevant Reasons and Not Merely Capable of Doing So*

The claim that law is equipped to provide defeasible novel content-independent objective motivating reasons to comply with legal norms prohibiting socially disruptive acts should be construed to assert something stronger than the claim that these practices are *capable* of doing so. It might be possible for something to provide reasons to refrain from undesirable acts without its being even minimally likely that it succeeds in doing so among beings like us in worlds like ours.

It is *possible* in every relevant sense for us to regard those practices as providing content-independent motivating reasons to do what the law requires. Since there is nothing in the causal laws obtaining in our universe that precludes us from treating certain institutional practices as providing content-independent motivating reasons to refrain from prohibited acts, it is nomologically possible – and hencelogically and conceptually possible – for law to provide such reasons. If the concern is with how the practices constituting something as a system of law are nomologically *capable* of generating something that beings like us can regard as new content-independent motivating reasons to comply with such norms, there is nothing to explain.

But the claim that it is possible in any of these senses for the practices constitutive of law to provide such reasons does not imply the claim that it is minimally likely to do so. It might be nomologically possible for something do so without its being even minimally likely to succeed in doing so because the relevant practices implicate a consideration that, while normatively relevant, has insufficiently normative force to do the job; an institutional normative system deployed that rewards desired behavior with candy but does not punish undesired behavior is not minimally likely to succeed in preventing undesired behavior – though there is nothing in either our nature or that of the material nature of our universe that precludes it from doing so. What is nomologically possible and what is empirically probable are two different matters.

The conceptual claim that law is equipped to provide such reasons is properly interpreted as expressing the stronger idea that law is *reasonably contrived* to do so in the sense that the practices constituting something as a system of law produce something that subjects are characteristically likely to regard – because they *should* do so – as defeasible novel content-independent motivating reasons to refrain from prohibited acts. It would make no sense for us to use law as a means of regulating behavior, regardless of the ultimate end of doing so, unless the practices constituting something as a legal system were reasonably contrived in the sense that they are sufficiently likely, as a practical matter, to provide such reasons.

 This should not be thought surprising. As discussed in Chapter 4, it is a conceptual truth that only things reasonably contrived to do what some artifact *A* is needed, characteristically used, and supposed to do, as a functionally normative matter, are properly characterized as “*A.*”If (1) it is a conceptually necessary condition for something to count as an artifact-type *A* that it is reasonably contrived to do what *A*sare needed, characteristically used, and supposed to do, as a functionally normative matter; (2) it is conceptually true that legal systems are artifactual in character; and (3) something could not be reasonably contrived to do what legal systems are needed, characteristically used, and supposed to do, as a functionally normative matter, without being reasonably contrived to provide new defeasible content-independent objective motivating reasons to refrain from prohibited acts, then it is a conceptually necessary condition for something to count as a legal system that it is reasonably contrived to provide novel defeasible content-independent objective motivating reasons to refrain from prohibited acts.

**4**. **Three Problems of Legal Normativity**

The conceptual normativity of law poses three problems of theoretical import for a metaphysical theory of its nature.[[19]](#footnote-19) The first, and most important, of these problems is to explain *how* the practices constituting something as a system of law are reasonably contrived to create novel defeasible content-independent objective motivating reasons reasons to conform to some mandatory legal norms governing non-official behavior (the How Problem). The second is to identify the order of the objective motivating reasons created by those practices; some theorists believe that those practices are reasonably contrived to create only first-order reasons to comply while others believe that they are also reasonably contrived to create second-order exclusionary reasons not to act on some class of first-order reasons (the Order Problem). The third is to expose the content of the relevant objective practical reason to comply that is supposed to motivate compliance among subjects antecedently disposed to behave otherwise (the Content Problem); insofar as the practices constituting something as a system of law are reasonably contrived to make a difference in the way subjects behave, it is in virtue of being reasonably contrived to create content that can motivate compliance among rationally competent subjects antecedently disposed to behave otherwise.

This part of the essay addresses these problems. Chapter 6 addresses the How Problem, arguing that the most plausible account of how law as such creates objective motivating reasons to comply is by backing certain legal directives with sanctions for non-compliance; the relevant practices give rise to something that rational competent subjects are likely to regard, because they should regard them as such, as defeasible prudential reasons to conform to those norms. Chapter 7 addresses the Order Problem, arguing that it is not a conceptual truth that law provides subjects of mandatory legal norms governing non-official acts with second-order exclusionary reasons; the only reasons that the practices constituting something as a system of law are conceptually equipped to provide with respect to non-official acts are prudential first-order motivating reasons that implicate a subject’s desire to avoid being subject to sanctions. Chapter 8 addresses the Content Problem, rejecting the idea that the content of the objective motivating reason provided by the practices constituting something as law is to conform to certain norms because those norms have the status of law; the content of the objective motivating reason that law as such is equipped to provide, if the Coercion Thesis is true, is to conform to those norms to avoid coercive sanctions.[[20]](#footnote-20)

 But the arguments of these chapters go further; they comprise a critically important piece of the case for the Coercion Thesis insofar as they also show that the only plausible solution to the conceptual problems of legal normativity presupposes the Coercion Thesis. This part of the essay argues not only that the Coercion Thesis can figure into a plausible explanation of law’s conceptual normativity; it argues, further, that any conceptual theory of law that does not include the Coercion Thesis cannot explain how the practices constitutive of a system of law are reasonably contrived to make a practical difference in the deliberations of subjects by regulating their behavior through the governance of norms metaphysically capable of guiding it.

1. It is important to note that the problem of explaining law’s presumed conceptual normativity arises only in connection with mandatory legal norms governing non-official behavior – and not in connection with the rule of recognition that defines the recipes for making, changing, and adjudicating law. Taking the internal point of view towards a norm, as Hart defines it, entails regarding it as normatively relevant with respect to deciding whether or not to do what it requires; there is thus no mystery how the rule of recognition, which is law partly in virtue of its being practiced by officials who take the internal point of view towards it, can make the right kind of difference with respect to what officials do. Given that it is clearly possible for someone to be justified, as an objective matter of normative practical rationality, in taking the internal point of view towards a rule of recognition, there is no mystery as to how officials could be warranted by objective norms of practical rationality in regarding the rule of recognition as normatively relevant. The problems of legal normativity are concerned with vindicating the normativity of law as it governs non-official behavior. See Chapter 6, Section 3.2, for more discussion of this issue. [↑](#footnote-ref-1)
2. Some caution is needed here. It is worth remembering here that the modest approach to conceptual analysis adopted in this essay does not purport to tell us anything about the metaphysical nature of something as it is independent of our conceptual practices; it purports to explain the metaphysical nature of a thing only as it is determined by our shared conceptual practices. Given that, as I have argued, we have no epistemically reliable way of determining what the world is like independent of the conceptual framework we impose on it, I cannot assume that our shared beliefs about what mind-independent standards of epistemic or practical rationality, which presumably exist, conform to the objective truth about them. For this reason, the concern here is to explicate the relevant notions in terms of *our shared views about* what objective norms of practical rationality require. To simplify the exposition, I will not repeat the qualification when I discuss the relevant norms, but it should be remembered throughout the discussion in this part of the monograph. [↑](#footnote-ref-2)
3. The notion of normativity is in need of some conceptual clarification; dictionary reports of the meaning of *normative* are circular and largely uninformative for this reason. Oxford Online Dictionary defines the term *normative* as “[e]stablishing, relating to, or deriving from a standard or norm, especially of behaviour.” <https://www.lexico.com/en/definition/normative>. Insofar as norms purport to guide behavior by providing reasons of some kind, the idea that something is normative entails that it is equipped to provide the relevant kind of reasons. [↑](#footnote-ref-3)
4. For purposes of this essay, the claim that an subject is rationally competent should be understood as implying that she is properly responsive both to norms of epistemic rationality and to norms of practical rationality. See Section 2 for discussion of the distinction. [↑](#footnote-ref-4)
5. The reason *r* does not make it more likely that *p* is true; *p* is either true or it is not. The truth-conducive effect of the *r* with respect to *p* is as follows: someone who believes that *r* and *p* are true is more likely to be correct with respect to her belief that *p* is true in virtue of believing that *r* is true than she would be, other things being equal, if she did not believe that *r* is true. The relevant relationship here has to do with how well supported the belief is by other propositions that are regarded as evidence for the truth of the belief at issue and is hence probabilistic in character. [↑](#footnote-ref-5)
6. The lower-case variable for actsis underlined while the lower-case variable for propositions is not because reasons of any kind are plausibly thought to express propositions; the variable for reasons and the variable for propositions pick out the same kind of thing while the variable for reasons and the variable for acts do not. Only something that expresses a proposition can function as a reason in the conscious deliberations of beings like us who can reason only with things that express propositions. [↑](#footnote-ref-6)
7. The idea that evidence can be comprehensively assessed by *weighing* one piece against another is not quite as natural as the idea that values can weighed against each other; the idea in the former context should be understood to involve assessing certain probabilities. I use the term *weight* to simplify the discussion; nothing of substance turns on this. [↑](#footnote-ref-7)
8. There are four interpretations of this claim that correspond to four interpretation of the claim that something is *possible*. First, a reason *p* might be contingently conclusive in the sense that there are other considerations that obtain in *logically* possible worlds that could outweigh *p* but do not obtain, as a descriptive matter of contingent fact, in the logically possible world that is ours. Second, a reason *p* might be contingently conclusive in the sense that there are other considerations that obtain in *conceptually* (or metaphysically) possible worlds that could outweigh *p* but do not obtain, as a descriptive matter of contingent fact, in our world. Third, a reason *p* might be contingently conclusive in the sense that there are other considerations that obtain in other *nomologically* possible worlds (i.e. worlds in which the same propositions describing regular causal relations obtain) that could outweigh *p* but do not obtain, as a descriptive matter of contingent fact, in our world. Finally, a reason *p* might be contingently conclusive in the sense that there are other considerations that obtain in *practically* possible worlds (i.e. nomologically possible worlds that resemble ours in more ways that are relevant with respect to our practical deliberations than other nomologically possible worlds that resemble us only with respect to the material character of our world) but do not obtain, as a descriptive matter of contingent fact, in our world.

These practically possible worlds instantiate characteristics reasonably likely to obtain in our world. It might be nomologically possible for a human being to run one hundred meters in under seven seconds, but it does not follow that it is practically possible in our world; if our doing so requires the aid of technologies that we are not likely to develop before some foreseeable extinction event occurs, then it is not practically possible in our world because it is not reasonably likely to happen in worlds that resemble ours in every respect that is salient. The relevant modality, as has been the case throughout this essay, is practical. [↑](#footnote-ref-8)
9. It is not preposterous to think that moral norms, if objectively true, are necessarily true and hence true even in worlds in which these norms lack application because neither moral agents nor moral patients exist; if it is objectively wrong for human beings to torture non-human sentient animals, then it is wrong in worlds in which only humans exist, worlds only non-human sentient animals exist, and worlds in which neither exist. On this conception, the principle expresses an objective value protecting beings that have certain properties that is true in every possible world but has practical application *only* in possible worlds in which both humans and non-human sentient animals exist. [↑](#footnote-ref-9)
10. I have, of course, presupposed this distinction throughout the essay by my use of the locutions “as a descriptive matter of contingent fact” and “as an objective matter of normative practical rationality” to distinguish what agents believe from what agents should believe; since this distinction is obviously presupposed in our shared conceptual and evaluative practices, its use begs no questions. [↑](#footnote-ref-10)
11. This should not be taken to imply that we have epistemic access to any objective norms governing reasons; the point here is merely that our shared evaluative practices presuppose that there are such standards. The best we can do, as far as the modest approach to conceptual analysis I have adopted is concerned, in evaluating the objective rationality of some belief or behavior is to assess it against our shared conception of what these objective norms require. I speak as though we do have such access only because our conceptual and evaluative practices presuppose that we do; a modest analysis of the concept of a legal system must presuppose the shared views that motivate the associated practices, which I have assumed without endorsing them or presupposing that they are objectively correct. See Chapter 1, Section 7, above. [↑](#footnote-ref-11)
12. These two notions, as I use them, amount to the same thing: to conclusively motivate someone to do *a* by doing something giving rise to practical reasons to do *a* is to rationally induce her to do it; conclusive objective motivating reasons should rationally induce her to do *a* while conclusive subjective motivating reasons succeed in rationally inducing her to do *a*. Motivation is partly determined by desires and partly determined by beliefs; to be motivated to do *a* is to have a configuration of desires and beliefs with respect to doing *a*. I am motivated to eat a snack insofar as I have a desire to do something satisfy my hunger and a belief that eating a snack is likely to satisfy that desire. [↑](#footnote-ref-12)
13. The argument in this chapter is agnostic, despite the argument of the last chapter, with respect to the content of the ultimate end for which legal regulation is the means and with respect to the conceptual function of law. While the last chapter argued the ultimate end and conceptual function of a legal system is to keep the peace, I wish to avoid begging any questions and so will not assume anything more about law’s conceptual function – or basic task (if one prefers) – than that it involves regulating behavior. [↑](#footnote-ref-13)
14. This seems to be a general truth about norm-governance. It is implausible to think that a class of beings could be *governed* by normative content they are causally unable to identify and understand; it is a conceptually necessary condition for norms to *govern* the behavior of a class of beings that class-members can determine what those norms require, at least, in enough cases for the system to be capable of succeeding in performing its conceptual function, if it has one. This is no truer of law than it is of morality or of any other set of norms governing our behavior; these are simply conceptual truths about norm-governance. See Kenneth Einar Himma, Morality and the Nature of Law (Oxford: Oxford University Press, 2019), Chapter 7. [↑](#footnote-ref-14)
15. Law differs from morality in this respect. Assuming that there are right answers to questions about what is required by morality that do not depend on what subjects believe about the answers to these questions, it is not obvious how we can reliably learn what mind-independent standards of morality require from us. Unlike the concept of law, there is nothing in the *concept* of morality that would explain how subjects can come to have epistemically justified beliefs with respect to what norms of morality require of them. [↑](#footnote-ref-15)
16. Other civil laws are, in contrast, contrived to provide motivating reasons but these function differently from the civil norms of contract law. Insofar as negligence law authorizes courts to coercively order a defendant to compensate a plaintiff for reasonably foreseeable injuries proximately resulting from negligent acts, negligence law functions as though it prohibits the relevant acts; the prospect of having to pay damages is characteristically likely to be regarded – and should be regarded – by subjects as providing motivating reasons to avoid the kind of negligence that triggers such liability. [↑](#footnote-ref-16)
17. There are also legal norms having to do with contract law that are equipped to provide motivating reasons to comply with certain directives. Norms authorizing courts to coercively enforce properly formed contracts are equipped, given the practices that constitute them as norms of law, to provide subjects who wish to have an agreement enforced by the court with a motivating reason. But such a motivating reason has force only insofar as subjects are antecedently motivated to ensure that their agreements are enforced by the court; it is that pre-existing desire that leads subjects to regard the norms of contract law as motivational reasons to do what is necessary to ensure that their agreements are enforced. [↑](#footnote-ref-17)
18. This claim does not depend on the view that the conceptual function or ultimate end of law is to keep the peace; it depends only on the conceptual truism that mandatory legal norms prohibit acts deemed to be undesirable. See Note 10, above. But if one is unhappy with even that much, the argument can be reconfigured to accommodate that view; however, it would be much more challenging to do so because the view expresses an end that is far more general and abstract than the one discussed above. I have no inclination to attempt this here because I find a denial of the idea that mandatory legal norms prohibit acts deemed undesirable so implausible that it does not warrant a serious response. [↑](#footnote-ref-18)
19. Another problem related to legal normativity is concerned with explicating how the practices constitutive of a legal system create something properly characterized as a legal obligation, which is the characteristic mechanism through which law purports to provide practical reasons to comply. This problem will be comprehensively addressed in the final three chapters of the next volume of the series, which is tentatively entitled Authority and the Nature of Law. [↑](#footnote-ref-19)
20. It should be clear that these problems are related and hence that the solution to each of these problems must cohere with the solutions to the others. The solution to the How Problem must cohere with the solution to the Order Problem since a complete explication of law’s conceptual normativity requires identifying the order of every reason to which the practices constitutive of law are reasonably contrived to give rise and explaining how these practices are contrived to do so. Similarly, the solution to both of those problems must cohere with the solution to the Content Problem since a complete explication of law’s conceptual normativity requires identifying the content of every first- and higher-order reason to which the practices constitutive of law are reasonably contrived to give rise and explaining how the relevant normative mechanisms are contrived to produce a reason with that content. [↑](#footnote-ref-20)