

7. The Normativity of Law

1. INTRODUCTION

Most legal scholars, including philosophers of law, conceive of law as a system of norms that confers rights and imposes duties, and at least some of them believe that law thus conceived necessarily gives rise to normative reasons for action. But are they right? The problem here, which I shall refer to as the problem of the normativity of law, is to explain the precise sense, if any, in which law confers rights and duties, or, as I shall say, provides normative reasons for action. The question thus concerns the normative force that law necessarily has, and it has nothing to do with motivation.

If you hold that law is necessarily moral, as natural law thinkers do, you maintain that the normativity of law depends on the normativity of morality. On this view, law is normative if and to the extent that morality is normative.¹ If you are a legal positivist, however, you hold that law and morality are conceptually distinct, and that therefore the normativity of law cannot depend on the normativity of morality. On what, then, would it depend on a legal positivist analysis?

In this chapter, I discuss the problem of the normativity of law, conceived within the framework of legal positivism. I begin by explaining how I understand the problem of the normativity of law and why I consider it to be a problem worth solving (Section 2). I then suggest that the relevant type of normative reasons for action as external reasons in Bernard Williams's sense (Section 3) and point out that I leave it an open question whether the concept of a reason for action really is more fundamental than the concept of ought (Section 4). I proceed to argue that we should think of the function of the legal 'ought' as that of connecting the consequence with the condition(s) in a legal norm (Section 5), that there is only one sense of normativity, only one sense of 'ought' (Section 6), that this view does not presuppose normative objectivity (Section 7), that we need to distinguish between different grades of normativity, at the very least between social and justified normativity, and that the relevant grade of normativity in this context is justified normativity (Section 8). Next I explain what it is about legal positivism – namely the separation thesis – that makes it so difficult to come up with a satisfactory solution to this problem and briefly consider the relation between the social thesis and the separation thesis (Section 9).

Having come thus far, I introduce the solution to the problem of law's normativity proposed by Hans Kelsen, namely that legal positivists need to presuppose the basic norm, if and insofar as they wish to conceive of the legal materials as a system of valid, that is, binding, norms (Sections 10-11). I explain that on Kelsen's analysis, the presupposition of the basic norm is conditional, and that Kelsen operates with the idea of justified, not social, normativity. I then maintain that a solution to the problem of legal normativity along the lines of Kelsen's analysis is all that legal positivists can hope for, while acknowledging that this solution is widely thought to be no solution at all.

The chapter concludes with a consideration of two recent attempts to account for the normativity of law within the framework of legal positivism made by Scott Shapiro and Andrei Marmor, respectively (Sections 12-13). Whereas Shapiro maintains that law is first and foremost a social planning mechanism, and that a person who has legal authority has moral authority from the legal point of view, Marmor argues that the foundation of law is to be found in conventions of a certain type, namely constitutive conventions. I conclude, however, that neither author has been able to improve substantially on Kelsen's analysis as regards the central question (Section 14). On all three analyses, the upshot is that the normativity of law, conceived within the framework of legal positivism, can only be conditional upon the adoption of a certain point of view. And this, I point out, is precisely what one should expect, given the centrality of the separation thesis in the positivistic framework.

¹ There is, of course, the further problem of accounting for the normativity of morality. On this difficult problem, see Korsgaard (1997).

2. THE PROBLEM OF THE NORMATIVITY OF LAW

To see that the problem of the normativity is indeed a problem, we should note that holding that law is essentially normative and that legal concepts like ‘ought’, ‘duty’ and ‘right’ have normative import is to reject the well-known view, espoused by an earlier generation of legal positivists, such as John Austin, and by some legal realists, such as Oliver Wendell Holmes, discussed briefly in Section 4.2, that having a legal duty means that one is likely to suffer disagreeable consequences if one doesn’t do what one is legally required to do. This type of analysis gives the import of the concept of a legal duty and (in a slightly different version) the concept of a legal right a descriptive import that is easy to understand.²

This type of analysis has been criticized by several leading legal philosophers, however, precisely on the grounds that it does away with the normative import of the concepts in question and that in doing so it misconceives legal thinking. As Karl Olivecrona (1962, 158) puts it, “[i]f I make the assertion that I have a claim for damages against another person, I am not making a prediction as to what will happen if he does not liquidate the claim at once. I mean that I have a claim now, that he ought to comply with it, and that I am entitled to a favourable judgment by the court because I have a right.” The gist of Olivecrona’s critique is thus that the predictive analysis does away with the normative import of the concepts in question, that it cannot account for the circumstance that judges and lawyers treat legal rules and rights and duties as reasons for action.³

Legal positivists Hans Kelsen and H. L. A. Hart have both put forward a similar criticism of the predictive analysis. Thus Kelsen objects to John Austin’s command theory of law that commands are not binding, because they are based solely on the fact that the commander has power over the subject of the command. As he explains,

. . . not every command issued by somebody superior in power is of a binding nature. The command of a bandit to deliver my cash is not binding, even if the bandit actually is able to enforce his will. To repeat: A command is binding, not because the individual commanding has an actual superiority in power, but because he is “authorized” or “empowered” to issue commands of a binding nature. And he is “authorized” or “empowered” only if a normative order, which is presupposed to be binding, confers on him this capacity, the competence to issue binding commands. Then, the expression of his will, directed to the behaviour of another individual, *is* a binding command, even if the individual commanding has in fact no actual power over the individual to whom the command is addressed. The binding force of a command is not “derived” from the command itself but from the conditions under which the command is being issued. Supposing that the rules of law are binding commands, it is clear that binding force resides in those commands because they are issued by competent authorities. (1945, 31-2)

Similarly, H. L. A. Hart’s critique of John Austin’s theory of law illustrates the view that the concepts of legal right and obligation have normative import. Hart (1961, 79-88) rejects Austin’s sanction theory of legal obligation, because he believes it obliterates the important distinction between being *obligated* to do something and being *obliged* to do it. To bring out the inadequacy of Austin’s analysis, he considers a situation in which a person is ordered by a gunman to hand over his money. As Hart sees it, the victim may be obliged – but not obligated – to hand over the money. This distinction is important, Hart says, because “[l]aw surely is not the gunman situation writ large, and legal order is surely not to be thus simply identified with compulsion.” (1958, 603)

² One may, however, wonder how the reference to disagreeable consequences is to be understood. It seems that one has to understand this as a reference to what is commonly perceived to be disagreeable consequences among the people concerned, in order to make sure that one does not incorporate a normative element into the analysis. I would like to thank Lennart Åqvist for drawing my attention to this problem.

³ Note that Olivecrona does not believe that law necessarily gives rise to normative reasons for action (on this, see 1939, chap. 2). What he means is that the predictive analysis cannot account for the import of the concepts of right and duty as those concepts are traditionally been understood, even though he does not himself accept the traditional view.

We might say, then, that in emphasizing the necessary normativity of law legal positivists like Kelsen and Hart aim to steer a middle way between natural law theory, which sees legal normativity as moral normativity, and classical legal positivism à la Jeremy Bentham and John Austin, which does not see law as normative at all.⁴ The question is whether such a middle way, which emphasizes that law is necessarily normative but not necessarily moral, is really intelligible, and the answer to this question depends in turn on the answer legal positivists give to the problem of the normativity of law.

3. EXTERNAL REASONS FOR ACTION

When I say that the problem of the normativity of law is the problem of accounting for the sense, if any, in which law necessarily gives rise to normative reasons for action, I have in mind external reasons for action in Bernard Williams's sense (1981), that is, reasons for action that do not depend on the agent's "subjective motivational set." The reason is that it would not make much sense to ask whether law necessarily gives rise to normative reasons for action, if one had in mind reasons for action that depended on the agent's "subjective motivational set" – if they depended on the agent's subjective motivational set, they could hardly be necessary.

Williams offers the following characterization of the difference between internal and external reasons for action:

Sentences of the forms 'A has a reason to ϕ ' or 'There is a reason for A to ϕ ' (where ϕ stands in for some verb of action) seem on the face of it to have two different sorts of interpretation. On the first, the truth of the sentence implies, very roughly, that A has some motive that will be served or furthered by his ϕ :ing, and if this turns out not to be so the sentence is false: there is a condition relating to the agent's aims, and if this is not satisfied it is not true to say, on this interpretation, that he has a reason to ϕ . On the second interpretation, there is no such condition, and the reason sentence will not be falsified by the absence of an appropriate motive. I shall call the first the 'internal', the second the 'external', interpretation. (Ibid., 101)

As is well known, Williams doubts the existence of external reasons for action and even question the coherence of claims about the existence of external reasons for action (ibid., 110-1). He points out that a person, *A*, who maintains that another person, *B*, has an external reason, or reasons, to do *X* seems interested in charging *A* with irrationality, if *A* does not do *X*. He objects, however, that such a claim is difficult to make sense of. For, he says, it clearly cannot mean that *B* would be properly motivated to do *X* if only he reasoned rationally on the basis of his subjective motivational set. What, then, Williams asks, could it mean? This, he concludes, is very unclear.

I shall, for the purposes of the discussion in this chapter, assume that Williams is wrong and that there are such things as external reasons for action. As we have seen, if there are no external reasons for action, then the very problem of the normativity of law seems to vanish.

4. 'OUGHT' AND REASONS FOR ACTION

I have assumed that we may analyze the concept of normativity in terms of normative reasons for action, because I find this analysis rather attractive. Indeed, many contemporary philosophers prefer to analyze normativity in terms of normative reasons for action. Joseph Raz (1990), for example, maintains that a person, *p*, has a duty to perform an action, *a*, if and only if *p* has a reason to perform *a* and a reason not to act on some (or all) reasons there might be for *p* to not perform *a*. And Thomas Scanlon (1998, chap. 1) starts out from the concept of a reason for action in his

⁴ To be sure, one might argue that somebody who conceives of law as the commands of the sovereign necessarily sees law as normative in a broader (and weaker) sense of the term 'normative,' on the grounds that commands are normative in this broader sense of the term. But Hart's distinction between being obligated and being obliged makes it clear that he is not concerned with normativity in this broader sense. Kelsen (1960, 8; 1999, 30-2) takes the same view.

attempt to account for value and normativity. But other philosophers, such as John Broome (forthcoming) prefer instead to take the concept of ought as primitive; and some writers, such as Torbjörn Tännsjö (2010), argue that we ought to scrap all talk of reasons for action and take the concept of ought or the concept of obligation to be the fundamental normative concept.

I do not, however, wish to argue that the concept of a reason for action is more fundamental than the concept of ought, but prefer to leave this an open question in the context of this investigation.

5. THE FUNCTION OF THE LEGAL 'OUGHT'

Following Kelsen, I conceive of the function of 'ought' in the context of law as that of connecting the legal consequence with the condition(s) in a legal norm. Having objected to the view of (what he refers to as) traditional legal scholars, namely that law comprises an ethical minimum, and that this means that the legal 'ought' becomes a moral 'ought' (1992 [1934], 22-3), Kelsen proceeds to offer a reconstruction of the concept of a legal norm, in which this concept is completely severed from its source, the concept of a moral norm. He does this by conceiving of the legal norm not as an imperative, but as a *hypothetical judgment* that connects legal conditions (or legal grounds) and legal consequences by means of the concept of ought: If A, then B ought to be (ibid., 23). He explains that, on this analysis, the legal 'ought' is a relative *a priori* category with the help of which we comprehend the legal data precisely by connecting legal consequences with legal conditions. Here is Kelsen:

The legal norm becomes the reconstructed legal norm, which exhibits the basic form of positive laws. Just as laws of nature link a certain material fact as cause with another as effect, so positive laws [in their basic form] link legal condition with legal consequence (the consequence of a so-called unlawful act). If the mode of linking material facts is causality in the one case, it is *imputation* in the other, and imputation is recognized in the Pure Theory of Law as the particular lawfulness, the autonomy, of the law. Just as an effect is traced back to its cause, so a legal consequence is traced back to its legal condition. The legal consequence, however, cannot be regarded as having been caused by the legal condition. Rather, the legal consequence (the consequence of an unlawful act) is linked by imputation to the legal condition. This is what it means to say that someone is punished 'because' of a delict, that a lien against someone's property is executed 'because' of an unpaid debt. The connection of the punishment to the delict, of the execution of the lien to the material fact of an unlawful civil act, has *normative* import, not causal import. Expressing this connection, termed 'imputation', and thereby expressing the specific existence, the validity, of the law—and nothing else—is the 'ought' in which the Pure Theory of Law represents the positive law. That is, 'ought' expresses the unique sense in which the material facts belonging to the system of the law are posited in their reciprocal relation. In the same way, 'must' expresses the law of causality. (Ibid., 23-4. Footnotes omitted, emphasis added.)

Note that Kelsen appears to have been concerned in the first edition of the *Pure Theory of Law* with the 'legal ought' not as it occurs in legal norms, but as it occurs in legal statements produced by legal scholars, that is, in statements *about* legal norms. For it is clear that he speaks (in the above quotation) of the 'ought' in which the Pure Theory *represents* positive law. But surely the 'ought' that is of primary interest to jurists is the 'ought' that occurs in the legal norms themselves, not the 'ought' that occurs in statements about legal norms.⁵ I shall, however, assume that what Kelsen says about the function of the legal 'ought' in external legal statements holds for the function of the legal 'ought' in internal legal statements, including legal norms, as well.

⁵ This confusion suggests that Kelsen may not have been fully clear about the distinction between internal and external legal statements in the first edition of the *Pure Theory of Law*. He did, however, insist on the distinction in later writings (see, e.g., 1999, 163).

6. THE MEANING OF 'OUGHT'

The discussion in Section 2 above raises the question about the meaning of the term 'ought' and related normative terms, such as 'right' and 'duty.' And as we have seen in Section 4.2, some legal philosophers, typically legal positivists, maintain that central normative terms such as 'right,' 'duty,' and 'ought' have a special legal meaning, which differs from the meaning they have in a moral context. Thus whereas the moral meaning of the term 'ought' is usually taken to be normative, the specifically legal meaning of 'ought' is sometimes taken to be descriptive in one way or the other and sometimes taken to be normative, albeit in a way that differs somewhat from the meaning it is thought to have in a moral context.

Kelsen (1945, 60), for example, maintains that whereas the concept of a moral duty coincides with the concept of a moral 'ought,' the concept of a legal duty does not coincide with the concept of a legal 'ought'. He reasons that a person, *p*, has a legal duty to perform an action, *A*, if (and only if) there is an organ, *O*, that ought to apply a sanction to *p* in case *p* omits to perform *A*, and that this means that *A* is *not* necessarily an action that *p* ought to perform. But this analysis is not satisfactory. One simply cannot leave it an open question whether the concept of a legal duty has normative import or not.

Neil MacCormick, on the other hand, is explicit that central normative terms have the *same* meaning in legal and moral contexts. Having argued that legal and moral rights and obligations are conceptually distinct, he goes on to point out that it does not follow from this that these terms have different meanings when qualified as 'legal' and 'moral,' respectively:

Legal obligations are not moral obligations, but this does not make them 'obligations' in different senses of the term 'obligation.' (Contrast the two sense of 'interest' which occur in 'mortgage interest' and 'life interest'.) / . . . / Whatever differentiates legal obligations from moral obligations, it is not . . . some kind of pun on the term 'obligation'. But in my suggestion . . . the differentiation arises from justifying grounds of ascription of legal and of moral right and duty, the former being jurisdictionally relative while the latter are not. (1987, 108)

I agree with MacCormick that it is preferable to distinguish between legal and moral rights and obligations not on the basis of the *meaning* of these terms, but on the basis of the reasons *why* a certain right or obligations is a legal, or a moral, right or obligation (ibid., 108). I thus maintain with MacCormick that there is only one sense of normativity, only one sense of 'ought', so that although we may with good sense speak of the normativity of law or the normativity of morality, etc., there is no specifically moral or legal or prudential *type* of normativity, but only normativity plain and simple. And this means that the various 'oughts' – the moral 'ought', the legal 'ought', the 'ought' of etiquette, etc. – can logically conflict with one another.

The view that there is only one sense of normativity, only one sense of 'ought', is shared by a number of contemporary moral philosophers. Judith Jarvis Thomson (2007, 242), for example, maintains that 'ought' means the same in different contexts, though she points out that only the moral 'ought' is *categorical*. To clarify her view, she introduces an example in which Alfred has noticed that Smith will lose a chess game that he is playing unless he moves the rook and has concluded that Smith *ought* to move the rook, and in which Bert has noticed that Smith will cause the deaths of hundreds of people unless he refrains from moving the rook and has concluded that Smith *ought* to refrain from moving the rook. The correct way to conceive of the situation, she explains, is to say that 'ought' *means* the same thing in both cases, even though the moral 'ought' is categorical and the chess 'ought' is conditional upon a will to win the game. I take it that what she means is simply that the moral 'ought', but not the chess 'ought', provides the agent with normative (moral) reasons for action that are external in Williams's sense.

7. 'OUGHT' AND NORMATIVE OBJECTIVITY

Torbjörn Tännsjö (2010, 84-5) appears to share Jarvis Thomson's view about the meaning of 'ought', and he also appears to believe that this view presupposes the truth of moral realism, or at least the truth of some version of moral objectivism. For he notes that there could be different 'oughts' with (slightly) different meanings, if some sort of meta-ethical relativism were true. Thus he considers a version of meta-ethical relativism proposed by Gilbert Harman (1996) and by David Wong (2006, chaps. 1-3), which has it that moral judgments can be true or false only in relation to a given moral framework, and that there is no moral framework that is objectively privileged as the one true moral framework. If such a type of relativism were true, Tännsjö reasons, there would be different 'oughts' (relating to different moral frameworks) with slightly different meanings.

To illustrate this idea, he considers a hypothetical example in which an American girl from a small town in the Midwest moves to Chicago and takes up the study of public choice theory, which takes the pursuit of self-interest for granted (2010, 87-8). She gets pregnant and arrives at the conclusion that she ought to have an abortion, since having a child at this moment would be an obstacle to her career. Her parents object, however, that human life is sacred and that she ought not to have abortion.

Commenting on this example, Tännsjö maintains that the pregnant woman and her parents are arguing at cross-purposes, because they are using 'ought' in slightly different ways (*ibid.*, 87-8). He does not, however, explain *why* he believes that the different 'oughts' differ in meaning. But my guess is that he takes these "socially constructed" 'oughts' (as he refers to them) to be *conditional*: "To act in accordance with your self-interest, you ought to have an abortion" and "To act in accordance with Midwestern morality, you ought not to have an abortion" (*ibid.*, 105-27). The idea, as I understand it, is that the difference in meaning would be a result of the fact that the *ends* are different in the two cases and that the meaning of 'ought' depends in each case on the relevant end.

I am not, however, convinced by this line of reasoning. While I agree with Tännsjö that, strictly speaking, the parties are arguing at cross-purposes in the abortion example, I doubt whether this is because 'ought' *means* different things to the girl and her parents. As I see it, we may accept Gilbert Harman's quasi-absolutist analysis and think of the young woman and her parents as projecting their respective "socially constructed" moral frameworks onto the world and speaking and acting accordingly. That is to say, we may think of the parties as speaking and acting from a point of view in Joseph Raz's sense (1990, 170-7), though in this case the points of view are ones to which the parties are committed. On this analysis, the moral judgments will turn out to be *internal*, that is, normative, and committed, which means that they will not be conditional in the sense contemplated by Tännsjö. And if we accept the view that underlies the quasi-absolutist approach (Harman 1996, 34-5) – that a word can be given a meaning by being given a use – we can say that the meaning of 'ought' depends in both cases on the way the agents use it, and since we can assume that they use it in the same way, that is, in a moral way, we may conclude that it means the same in both cases.

I conclude that the truth of meta-ethical relativism is not a sufficient condition for the occurrence of 'oughts' with different meanings, and that therefore the view that there is only one sense of 'ought' does not, as Tännsjö appears to believe, presuppose the truth of some version of moral objectivism.

8. JUSTIFIED AND SOCIAL NORMATIVITY

I have argued (in Section 3) that the relevant reasons for actions are external in Williams's sense and (in Sections 6 and 7) that there is only one sense of normativity, only one sense of 'ought', and that this view does not presuppose normative objectivism. There is, however, also the question of the *strength* of the relevant 'ought' or reasons for action.

Raz (1979) makes a distinction between justified normativity and social normativity and argues that whereas Hart works with a conception of social normativity, Kelsen operates with a conception of justified normativity. As Raz explains, justified normativity is normativity that is justified, whereas social normativity is normativity that is accepted and insisted on by the people concerned:

Two conceptions of the normativity of law are current. I will call them justified and social normativity. According to the one view legal standards of behaviour are norms only if and in so far as they are justified. They may be justified by some objective and universally valid reasons. They may be intuitively perceived as binding or they may be accepted as justified by personal commitment. On the other view standards of behaviour can be considered as norms regardless of their merits. They are social norms in so far as they are socially upheld as binding standards and in so far as the society involved exerts pressure on people to whom the standards apply to conform to them. Natural law theorists characteristically endorse the first view, positivists usually maintain the second view. (1979, 134)

I believe that the conception of normativity that Raz calls justified normativity is the relevant conception of normativity in the context of a discussion of the normativity of law. That law is normative in the sense of social normativity is quite clear, but not very interesting. The question whether law is normative in the sense of justified normativity, on the other hand, is quite interesting, and it is this conception of legal normativity that I shall focus on here. There is, however, also a question about the precise strength or normative force of justified normativity. I shall not, however, go further into this problem in this chapter.

Let us not turn to a very brief consideration of the logical relation between the social thesis and the separation thesis.

9. THE SOCIAL THESIS AND THE SEPARATION THESIS

As we have seen, the social thesis has it that one can determine what the law is, using factual criteria of legality (or validity), the separation thesis has it that there is no conceptual connection between law and morality, and the thesis of social efficacy that a legal system can be said to exist only if it is efficacious.

The reason why it is so difficult for legal philosophers to account for the normativity of law, that is, to account for the fact, if it is a fact, that law necessarily gives rise to normative reasons for action is to be found in the separation thesis. If, as the separation thesis claims, there is no conceptual connection between law and morality, so that law can be grossly immoral, then it seems that law simply cannot give rise to normative reasons for action – if law can be grossly immoral, then it can hardly be the case that it necessarily gives rise to normative reasons for action.

Legal philosophers who aim to account for the normativity of law do not, however, usually focus on the separation thesis, but on the social thesis. For example, in his well-known article “Coordination and Convention at the Foundations of Law,” Gerald Postema (1982, 165) explains that there are two fundamental theses that dominate philosophical reflection about the nature of law (and adjudication), namely (what he refers to as) the normativity thesis and the social thesis, and that the difficulty is to interpret the normativity thesis and the social thesis in such a way that they are compatible. He describes the theses as follows:

“The Normativity Thesis: Law is a form of practical reasoning; like morality and prudence, it defines a general framework for practical reasoning. We understand law only if we understand how it is that laws give members of a community, officials and law-subjects alike, reasons for acting. Thus any adequate general theory of law must give a satisfactory account of the normative (reason-giving) character of law and must relate the framework of practical reasoning defined by law to the framework of morality and prudence.

The Social Thesis: Law is a social fact; what is and what is not to count as law is a matter of fact about human social behavior and institutions which can be described in terms which do not entail any evaluation of the behavior of institutions. We understand law only if we understand it as a kind of social institution which can be said to exist only if it is actually in force and directs human behavior in the community. Any adequate general theory of law must give a satisfactory account of law as a social phenomenon.” (Ibid., 165)

We might say that, on Postema analysis, these two theses set the framework within which much contemporary legal philosophy operates (ibid., 165-6). But, one wonders, does the separability thesis add anything of interest to the social thesis? The answer to this question depends on how we understand the separability thesis (on this, see Spaak, 2003, 473-4). Let us make a distinction between the strong and the weak separation thesis and say that whereas the former stipulates that there is no conceptual connection between morality and law *simpliciter*, the latter stipulates that there is no conceptual connection between morality and the content of law. If we do, we see that both the strong and the weak social thesis entail the *weak* separability thesis. For if we determine the law using (exclusively or essentially) factual criteria, there can be no conceptual connection between morality and the content of law, which is precisely what the weak separability thesis asserts. And this seems also to be the view that Postema holds, since he says that the description of the relevant social institutions do not entail any evaluation. However, neither the strong nor the weak social thesis entails the *strong* separability thesis. For the truth of the latter thesis turns on whether an effective legal system necessarily has moral value, and this has little to do with the social thesis.

The reason why I emphasize that the social thesis implies the separation thesis is that any account of the normativity of law – whether it is focused on the social thesis or immediately on the separation thesis – must take the separation thesis into account. And since the separation thesis appears to be a formidable obstacle to any account of the normativity of law, this is an important conclusion.

10. KELSEN ON THE NORMATIVITY OF LAW

As is well known, Kelsen conceives of law as a system of norms, arguing that a legal norm, N_1 is valid (which means that it ought to be followed) if (and only if) it can be traced back to another and higher legal norm, N_2 , that N_2 in turn is valid if (and only if) it can be traced back to yet another and higher legal norm, N_3 , and that if one keeps tracing the validity of legal norms through the system in this way, one will finally arrive at the historically first constitution (1992, 55-7, 63-5). He maintains, in keeping with this, that the normativity of law depends ultimately on the presupposition of the *basic norm (Grundnorm)*, which can be formulated schematically as follows: “Coercion is to be applied under certain conditions and in a certain way, namely, as determined by the framers of the first constitution or by the authorities to whom they have delegated appropriate powers.” (Ibid., 57)

The presupposition of the basic norm, Kelsen explains, is necessary for anyone who wants to conceive of law as a valid system of norms, while remaining within the framework of legal positivism. The reason is that the separation thesis bars the legal positivist from grounding the normativity of law in morality, say, by a reference to democracy or human rights, or, for that matter, by reference to the will of God. In the words of Kelsen,

[t]hat a norm of the kind just mentioned is the basic norm of the national legal order does not imply that it is impossible to go beyond that norm. Certainly one may ask why one has to respect the first constitution as a binding norm. The answer might be that the fathers of the first constitution were empowered by God. The characteristic of so-called legal positivism is, however, that it dispenses with any such religious justification of the legal order. The ultimate hypothesis of positivism is the norm authorizing the

historically first legislator. The whole function of this basic norm is to confer law-creating power on the act of the first legislator and on all the other acts based on the first act. To interpret these acts of human beings as legal acts and their products as binding norms, and that means to interpret the empirical material which presents itself as law as such, is possible only on the condition that the basic norm is presupposed as a valid norm. The basic norm is only the necessary presupposition of any positivistic interpretation of the legal material. (1999 [1945], 116)

Kelsen emphasizes, in keeping with this, that although one *may*, one does not have to, presuppose the basic norm, which is to say that although one *may*, one does not have to, conceive of law as a system of valid norms (1992, 34, 58). The idea, then, is that the basic norm plays only an *epistemological* – not a justificatory – role in Kelsen’s analysis. As Kelsen puts it in the second edition of the *Reine Rechtslehre*,

Sie [the Pure Theory] beschreibt das positive Recht, das heißt jede im großen und ganzen wirksame Zwangsordnung, als eine objektiv gültige normative Ordnung und stellt fest, daß diese Deutung nur unter der Bedingung möglich ist, daß eine Grundnorm vorausgesetzt wird, derzufolge der subjektive Sinn der rechtsetzenden Akte auch ihr objektiver Sinn ist. Sie kennzeichnet damit diese Deutung als eine mögliche, nicht als eine notwendige, und stellt die objektive Geltung des positiven Rechts nur als bedingt: durch die Voraussetzung der Grundnorm, bedingt, dar. Daß man die Grundnorm einer positiven Rechtsordnung nur voraussetzen kann, nicht voraussetzen muß, besagt, daß man die in Betracht kommenden zwischenmenschlichen Beziehungen normativ, das heißt als durch objektiv gültige Rechtsnormen konstituierte Pflichten, Ermächtigungen, Rechte, Kompetenzen usw. deuten kann, aber nicht so deuten muß; daß man sie voraussetzungslos, das heißt: ohne die Grundnorm voraussetzen, als Machtbeziehungen, als Beziehungen zwischen befehlenden und gehorchenden oder nicht gehorchenden Menschen, das heißt soziologisch, nicht juristisch deuten kann. Da – wie gesagt – die Grundnorm als eine in der Begründung der Geltung des positiven Rechts gedachte Norm nur die tranzendental-logische Bedingung dieser normativen Deutung ist, leistet sie keine etisch-politische, sondern eine erkenntnistheoretische Funktion. (1960, 224-5. See also 1979, 206.)

He also points out that by introducing the concept of the basic norm, he is not introducing a new method into jurisprudence, but is simply making explicit what is implicit in everyday legal thinking. As he explains, “[w]ith the doctrine of the basic norm, the Pure Theory analyses the actual process of the long-standing method of cognizing positive law, in an attempt simply to reveal the transcendental logical conditions of that method.” (1992, 58. See also 1945, 116-7.) What he means is that since, as David Hume has taught us, one cannot derive an ‘Ought’ from an ‘Is,’ a person who wants to arrive at a normative (or evaluative) conclusion, such as that law consists of valid norms, has to introduce a normative (or evaluative) premise, and this premise is nothing other than the basic norm. And since one must assume that lawyers and judges respect Hume’s law, one must attribute to them the presupposition of the basic norm – logically if not psychologically.

Let me remind the reader in concluding this section that Raz has argued that Kelsen operates with the conception of justified, not social, normativity (on this, see Section 8). Raz points out that Kelsen’s insistence on the distinctions between a subjective and an objective ‘ought’ and between subjective and objective value judgments speaks in favor of this interpretation of Kelsen (Raz 1979, 135). And I agree. I would, however, add that only a person who operated with the conception of justified normativity would have reason to presuppose the basic norm in the first place – if he did not operate with the conception of justified normativity, why would he need to presuppose the basic norm? Surely one does not have to presuppose a basic norm of grammar rules or rules of etiquette. But perhaps this amounts to no more than what Raz has already said.

11. THE LEGAL MAN

Raz (*ibid.*, 140-3) has made an attempt to clarify the role the idea of the basic norm plays in Kelsen’s theory of law. He introduces the concept of the legal man – the legal man accepts the law

of the land as his personal morality – and explains that, on Kelsen’s analysis, legal scholars adopt the point of view of the legal man in a *detached*, not a committed, way. The reason is that legal scholars want to be able to conceive of the law of the land as a system of valid norms for the purely intellectual purpose of analyzing and discussing its correct interpretation. As Raz (ibid., 142-3) puts it, “[l]egal science is not committed to regarding the law as just. It adopts this point of view in a special sense of ‘adopt’. It is professional and uncommitted adoption. Legal science presupposes the basic norm not as individuals do—i.e. by accepting it as just—but in this special professional and uncommitted sense.”

We see that a detached legal statement is really an *internal*, that is, a first-order, normative, not an external, that is, a second-order, descriptive legal statement. As Raz takes pains to explain elsewhere (1990, 170-7), to make a detached legal statement is *not* to make a conditional legal statement, such as “If you want to achieve *Y*, you ought to do *X*.” To make a detached legal statement is to state that you ought to do *X*, on the *assumption* that you want to achieve *Y*, without being committed to the truth of the assumption. The difference between a conditional legal statement and a detached legal statement, then, is that in the former case the assumption that you want to achieve *Y* is part of the statement, whereas in the latter case it functions as a tacit presupposition. As I understand it, this means that whereas a conditional legal statement is *descriptive*, a detached legal statement is *normative*. In other words, whereas the former is a moderate external, the latter is an internal legal statement. We see that the emphasis on detached legal statements is in keeping with Kelsen’s claim that the basic norm plays an epistemological role in the Pure Theory of Law.

It is worth noting that Raz’s idea of speaking from a point of view is very much in keeping with Gilbert Harman’s theory of *quasi-absolutism* (1996, 32-44).⁶ The idea behind the theory of quasi-absolutism, Harman explains, is that each person projects his own (relatively true) moral framework onto the world and proceeds to think and speak as if this framework were the one true moral framework. That is to say, such a person is speaking from a point of view in Raz’s sense. On Harman’s analysis, a person who projects his moral framework onto the world in this way typically makes committed moral statements, though there is no reason why he could not equally well project a moral framework onto the world provisionally and proceed to make detached moral statements. In either case the moral statements he makes would be normative, not descriptive legal statements. As Harman (ibid., 34) explains, “[t]he supposed advantage of this quasi-absolutist usage is that it allows people with different moral frameworks to disagree with each other.” Indeed, he introduces the theory of quasi-realism precisely to solve the problem that on his relativist analysis of moral judgments, people could not disagree morally since they would simply be *reporting* the moral views of their respective moral communities in the following way: In my (*A*’s) moral community, meat-eating is considered to be wrong; in my (*B*’s) moral community, meat-eating is not considered to be wrong. And this would not qualify as moral disagreement.

What this means is that, as Raz sees it, Kelsen does not conceive of the normativity of law as being conditional upon the presupposition of the basic norm, but as being unconditional when seen from a point of view. The difference between these two ways of conceiving of legal normativity, as I understand it, is the difference between a conditionally normative, that is, descriptive, and a normative, though uncommitted, interpretation of the theory of the basic norm. One may, however, wonder whether it is really possible to maintain a clear distinction between the two interpretations.

12. THE PLANNING THEORY OF LAW

Scott Shapiro (2010) defends a theory that he calls the planning theory of law. According to this theory, law is first and foremost a social planning mechanism. Shapiro (ibid., 59-60) maintains, more specifically, that a legal system is an institution for social planning, and that its function is to

⁶ On quasi-absolutism (or quasi-realism) as a general approach to philosophical problems, see Blackburn (1993).

compensate for the deficiencies of alternative forms of planning. On this analysis, the function of law is not to solve any particular moral quandary, but to solve a higher-order problem, namely the problem of how to solve moral quandaries in general. What this means, Shapiro explains, is that “[a] community needs law whenever its moral problems (whatever they happen to be) are so numerous, and their solutions so complex, contentious or arbitrary, that non-legal planning is an inferior way of guiding, coordinating and monitoring conduct.” (Ibid., 62)

Shapiro maintains that plans are, and must be, a matter of *social fact* – if they were not, they could not fulfill their function to guide human behavior:

As we have seen, shared plans are supposed to guide and coordinate behaviour by resolving doubts and disagreements about proper action in complex, contentious and arbitrary environments. If a plan with a particular content exists only when certain moral facts obtain, then it could not resolve doubts and disagreements about the right way of proceeding. For in order to apply it, the participants would have to engage in deliberation and bargaining that would recreate the problem that the plan aimed to solve. The logic of planning requires that plans be ascertainable by a method that does not resurrect the very questions that plans are designed to settle. Only social facts – not moral ones – can serve this function. (Ibid., 65)⁷

Having introduced his theory, Shapiro turns to consider (what he calls) the possibility puzzle, that is, the difficulty of accounting for legal authority in light of the fact that although legal authority is conferred by legal norms, these legal norms must in turn be created by someone who has legal authority (ibid., 66). He claims, however, that the planning theory can solve this problem. Under his theory, a person, or an institution, *X*, has legal authority if, and only if, (i) *X* has been given authority by the fundamental master plan of the system, and (ii) the subjects of law obey the law on the whole. As he puts it, “[I]legal systems are possible . . . because certain states of affairs are possible, namely, those that underwrite the existence of a legal system’s master plan and those that account for the disposition of the community to comply with the plans created under normal conditions.” (Ibid., 69)

As Shapiro notes, one might object that having legal authority in this watered-down sense does not mean that one can create normative reasons for action. Considering this objection, Shapiro makes a distinction between two different interpretations of the concept of legal authority, namely (what he calls) the adjectival interpretation and the qualifying interpretation (ibid., 70). On the former interpretation, he explains, the word ‘authority’ means the same as it does in moral contexts, namely, the power to impose moral obligations, and the word ‘legal’ functions as an adjective, identifying this kind of moral power.” (Ibid., 70) On the latter interpretation, on the other hand, we are not necessarily imputing any kind of moral power to a person when we ascribe legal authority him: “To the contrary, we are qualifying our ascription of moral legitimacy. We are saying that, *from the legal point of view*, the person in question has morally legitimate power.” (Ibid., 70)

Shapiro thus aims to deflect the objection by distinguishing two different ways of understanding the concept of legal authority and arguing that we are by no means forced to adopt the adjectival interpretation, which would make the objection valid. Instead, we may adopt the qualifying interpretation. As Shapiro explains, to adopt the qualifying interpretation is to distance oneself from morally endorsing the law by adopting the legal point of view. But what, exactly, does this mean? The legal point of view, Shapiro explains, is the perspective of a certain normative theory:

⁷ Shapiro’s argument seems to be modeled after Raz’s argument in support of exclusive legal positivism (Raz 1979; 1985). Raz’s starting point is that as a matter of conceptual necessity, the function of law is to *claim* legitimate authority, and to settle disputes in an authoritative manner, and he argues that therefore it must be capable of *having* legitimate authority, even if in fact it does not have it. He then argues that law could not fulfill its function, if it were not possible for the parties to identify the directive (or decision) “without relying on reasons or considerations on which the directive [or decision] purports to adjudicate.” (1985, 303) For, he reasons, if they had to reconsider the reasons or considerations that the directive was meant to replace, in order to identify the directive in the first place, the directive would be of no use to them; and if it would not be of any use to them, law could not fulfill its function.

According to that theory, those who are authorized by the norms of legal institutions have moral legitimacy and, when they act in accordance with those norms, they generate a moral obligation to obey. The legal point of view of a certain system, in other words, is a theory that holds that the norms of that system are morally legitimate and obligating. (Ibid., 71)

But, as Shapiro points out (ibid., 71), the legal point of view may of course be false from the (correct) moral point of view, if there is such a point of view.

Shapiro concludes that since (Premise 1) *X* has legal authority over *Y* in system *S*, if, and only if, *X* has moral authority over *Y* from the point of view of *S*, and since (Premise 2) *X* has moral authority over *Y* from the point of view of *S*, if, and only if, the master plan of *S* authorizes *X* to plan for *Y*, then (Conclusion) *X* has legal authority over *Y* in system *X* if, and only if, the master plan of *S* authorizes *X* to plan for *Y*.

But it is clear that to have legal authority in this sense is not necessarily to have the authority to create normative reasons for action. Instead, Shapiro's analysis renders the normativity of law *conditional* in the same sense that Kelsen's analysis does, whether this is to be understood as conditional and descriptive in the sense explained above or as non-conditional and normative but detached in Raz's sense. For on Shapiro's analysis, we can view the law as necessarily giving rise to normative reasons for action, *if* we adopt the legal point of view. And on Kelsen's analysis, we can view the law as a system of valid (binding) norms, *if* we adopt the basic norm. I conclude that Shapiro has not been able to account for the normativity of law.

13. MARMOR'S LEGAL CONVENTIONALISM

Andrei Marmor's (2010) account of the normativity of law centers on the idea of a convention and a couple of distinctions between different types of convention. Marmor, who speaks about the rules of recognition in the plural, maintains that these rules are best understood as conventional rules of a certain type, namely constitutive – as distinguished from coordinative – conventions. And he also maintains that once we see that the rules of recognition are constitutive conventions, we will also see that the normativity of law can only be conditional. For while constitutive conventions can constitute an activity or a game or – in our case – the law, they cannot obligate anyone to engage in the activity or to play the game. Finally, he maintains that the rules of recognition are surface conventions, as distinguished from deep conventions, that deep conventions occupy a place between surface conventions and the reasons for having law, and that deep conventions manifest themselves in that the people concerned follow the surface conventions. What this means is that, on Marmor's analysis, our concept of law depends on both deep conventions and surface conventions, and that in this sense the foundation of law is conventional.

Having considered and rejected Ronald Dworkin's objection that there is no such thing as a rule of recognition at all, on the grounds that there simply is no disagreement among legal officials about the criteria of legality in central (or pivotal) cases (ibid., 148), Marmor turns to consider the conditions that he claims have to be satisfied for the rules of recognition to be conventional rules (ibid., 149). He lays down the following three conditions:

- (i) There is a group of people, *P*, whose members normally follow the rules of recognition, *RR*, in circumstances, *C*.
- (ii) There is a set of reasons, *A*, for the members of *P* to follow *RR*.
- (iii) There is at least one other potential set of rules, *SR*, such that if the members of *P* had actually followed *SR* instead of *RR* in *C*, then *A* would have been sufficient for the members of *P* to do so.

We see that, on Marmor's analysis, a rule (such as the rule of recognition) is a conventional rule if, and only if, (i) a group of people follow a certain rule, (ii) they have reasons to do that, and (iii) these reasons would also have been sufficient to follow another, similar rule. Condition (iii) thus makes it clear that a convention has to be arbitrary, in the sense that a different convention might have filled the function equally well. For example, we drive on the right-hand side of the road in Sweden, though we might equally well have driven on the left-hand side; in fact, we did so until 1 September 1967. What is important is thus that there is a rule, or a convention, not its precise content.

If we consider the rule of recognition in light of these three conditions, we see that it qualifies as a conventional rule. For if Hart is right, there is a rule that the legal officials follow, they have reasons to follow this rule, and these reasons would also have been reasons to follow a somewhat different rule.

Marmor (*ibid.*, 150) notes here that Leslie Green, among others, have objected to the view that the rules of recognition are conventional that it is difficult to see how a mere convention can give rise to an obligation. As Marmor puts it (*ibid.*, 151), "if the rules of recognition are *arbitrary* in the requisite sense, how can we explain the fact that they are supposed to obligate judges and other legal officials to follow them?" His answer is that we have to insist on a distinction between the legal obligation to follow the rules of recognition and the moral obligation, if there is one, to follow these rules (*ibid.*, 152) He develops this view as follows:

The rules of recognition, like the rules of chess, determine what the practice is. They constitute the rules of the game, so to speak. Like other constitutive rules, they have a dual function: they both determine what constitutes the practice, and prescribe modes of conduct within it. The *legal* obligation to follow the rules of recognition is just like the chess players' obligation, say, to move the bishop diagonally. Both are prescribed by the rules of the game. What such rules cannot prescribe, however, is an 'ought' about playing the game to begin with. As I noted elsewhere, the normativity of constitutive conventions is always conditional. Conventional practices create reasons for action only if the relevant agent has a reason to participate in the practice to begin with. And that is true of the law as well. If there is an 'ought to play the game', so to speak, then this ought cannot be expected to come from the rules of recognition. The obligation to play by the rules, that is, to follow the law, if there is one, must come from moral and political considerations. The reasons to obey the law cannot be derived from the norms that determine what the law is. (*Ibid.*, 152. Footnote omitted.)

Marmor concludes his discussion of the nature of the rules of recognition by pointing out that there are three difficulties with the competing view that the rules of recognition are coordinative – not constitutive – conventions (*ibid.*, 153-4). First, this view overlooks the fact that the rules of recognition constitute what law is. Secondly, this view is difficult to reconcile with the moral and political importance that is commonly ascribed to the rules of recognition. Thirdly, this view also blurs the distinction between what law is and what *the* law is, that is, its relation to the concept of law is unclear.

Having discussed the question whether the rules of recognition are constitutive or coordinative conventions, Marmor turns to argue that they are surface conventions, not deep conventions, that deep conventions occupy a place between surface conventions and the reasons for having law, and that deep conventions manifest themselves in that the people concerned follow the surface conventions (*ibid.*, 154).

To explain what a deep convention is, Marmor offers the example of two families of law, namely civil law and the common law, arguing that these two families of legal systems instantiate two different sets of deep conventions (*ibid.*, 155-6). While the reasons for having law in the first place will be very similar all over the world, these reasons will give rise to different sets of deep conventions, such as civil law and the common law.

But, one wonders, how do we know that the differences between, say, continental law and the common law are differences in deep conventions? Marmor's answer is that they could not really be anything else:

The fact, well known and undeniable, that these two legal traditions have evolved as a result of various political events, and to a large extent still reflect different political conceptions of law, does not necessarily undermine their conventionality. As we noted earlier, the conventionality of the rules of recognition is easily reconcilable with their moral-political importance. Conventional practices of various kinds often evolve in response to historical contingencies, and their constitutive norms tend to reflect the normative convictions that were involved in the historical events that have brought about their existence. Conventions, as we have seen all along, are always supported by reasons. What makes norms conventional consists in the fact that those reasons underdetermine the content of the norms. But the reasons are still there, and there is nothing in the nature of those reasons that precludes the possibility that they reflect moral-political considerations. (Ibid., 156-7. Footnote omitted.)

Marmor ends his essay by pointing out that our concept of law depends on both deep conventions and surface conventions, and that in this sense the foundation of law is conventional:

Let me sum up: the conventional foundation of law consists in two layers. There are deep conventions that determine ways of organizing a legal order, its main building blocks, as it were, and those deep conventions are instantiated by the surface conventions of recognition that are specific to particular legal systems. The concept of law is constituted by both layers of conventions. Our concept of law partly depends on the deep conventions that determine the basic organisation of a legal order, and partly on the specific institutions we have in our community – those that are determined by the rules of recognition. Both are conventional – and in this general insight, I think that Hart was quite right. (Ibid., 157)

I find Marmor's analysis persuasive, on the whole, though I have some objections. First, although Marmor reaches the same conclusion as Kelsen, namely that the normativity of law can be conditional only, he is nevertheless critical of Kelsen's analysis (ibid., 146). First, he points out that not much is explained by the presupposition of the basic norm: "Instead of telling us something about the foundations of the basic norm, Kelsen simply invites us to stop asking." Secondly, he objects that Kelsen's idea of the basic norm fails on its own terms, since even though the basic norm was meant to avoid the reduction of legal normativity to facts, its content actually depends on facts. For, Marmor points out, the content of the basic norm of different legal systems differ according to the criteria of validity of the respective legal systems.

Marmor's objections are not very good, however. The first objection assumes that the basic norm needs a foundation, but that is not so. The upshot of Kelsen's analysis is that the normativity of law, conceived within the framework of legal positivism, is conditional upon the presupposition of the basic norm. The reason, of course, is that the separation thesis is a formidable obstacle to any attempt to find a non-conditional foundation of law's normativity. Kelsen is simply making this clear when he says that the presupposition of the basic norm is the ultimate hypothesis of legal positivism.

The second objection is no more successful. It is, of course, true that as a legal positivist, Kelsen believes that one should only presuppose the basic norm when one is faced with an efficacious legal system. But why, exactly, is this a problem? For one thing, it is not a problem because the content of the basic norm varies with each different legal system. For, as Kelsen points out, the content of the basic norm does not vary at all, but is always the same:

What is to be valid as norm is whatever the framers of the first constitution is whatever the framers of the first constitution have expressed as their will—this is the basic presupposition of all cognition of the legal system resting on this constitution. Coercion is to be applied under certain conditions and in a certain way, namely, as determined by the framers of the first constitution or by the authorities to whom they have delegated appropriate powers—this is the schematic formulation of the basic norm of a legal system

(a single-state system, which is our sole concern here). (1992, 57)

14. LEGAL POSITIVISM AND THE NORMATIVITY OF LAW

I have argued that the problem of the normativity of law is the problem of accounting for the sense, if any, in which law necessarily gives rise to normative reasons for action, that the relevant reasons for action are external in Williams's sense, and that the relevant conception of legal normativity is justified normativity in Raz's sense. I have also argued that the social thesis implies the separation thesis, and that the separation thesis stipulates that there is no conceptual connection between law and morality. Finally, I have argued that given these assumptions, the normativity of law can only be conditional in the sense Kelsen had in mind when he said that we need to presuppose the basic norm, in order to conceive of law as a system of valid, that is, binding, norms. My discussion of Shapiro's planning theory of law and Marmor's legal conventionalism makes it clear that neither theory improves on Kelsen's analysis as regards the central question, that is, the question of accounting for the normativity of law. This does not, of course, mean that their respective analysis is not an important contribution to the debate about the normativity of law. It only means that, like Kelsen, they have to be satisfied with the conclusion that law can only be conditionally normative. This is worth noting since Kelsen's idea of presupposing the basic norm is widely considered to be anything but a solution to the problem of the normativity of law, conceived within the framework of legal positivism.