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Kelsen, Hart, and legal normativity

This article focuses on issues relating to legal normativity, emphasizing the way these matters have been elaborated in the works of Kelsen and Hart and later commentators on their theories. First, in Section 2, the author offers a view regarding the nature of law and legal normativity focusing on Kelsen's work (at least one reasonable reading of it). The argument is that the Basic Norm is presupposed when a citizen *chooses to read the actions of legal officials in a normative way*. In this Kelsenian approach, all normative systems are structurally and logically similar, but each normative system is independent of every other system – thus, law is, in this sense, conceptually separate from morality. Second, in Section 3, the author turns to Hart's theory, analyzing the extent to which his approach views legal normativity as *sui generis*. This approach raises questions regarding what has become a consensus view in contemporary jurisprudence: that law makes moral claims. The author shows how a more deflationary (and less morally-flavored) understanding of the nature of law is tenable, and may, in fact, work better than current conventional (morality-focused) understandings.

Keywords: Kelsen (Hans), Hart (H. L. A.), legal normativity, law and morality, moral obligation to obey the law, Basic Norm

1 INTRODUCTION

Central to the works of Hans Kelsen, H. L. A. Hart, and many other legal theorists of the past century[1] is the idea that law is a normative system, and that any theory about the nature of law must focus on its normativity. There are familiar questions connected with explaining legal normativity: *e.g.*, What is the connection between legal normativity and other normative systems, in particular, morality? And there are methodological questions: when theorists claim that we need to (and that they will) "explain the normativity of law," what is it that is being explained? This article will focus on issues relating to legal normativity, emphasizing the way these matters have been elaborated in the works of Kelsen and Hart and later commentators on their theories.

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1 This is likely too restrictive: one arguably finds focus on the normativity of law in writers of much earlier times, like Aquinas, Hugo Grotius, and many other medieval and classical writers who wrote about the nature of law.

In section 2, I will offer a view regarding the nature of the law and legal normativisty focusing on Kelsen's work (at least one reasonable reading of it[2]). The argument will be that the Basic Norm[3] is presupposed when a citizen *chooses to read the actions of legal officials in a normative way*. In this Kelsenian approach, all normative systems are structurally and logically similar, but each normative system is independent of every other system – thus, law is, in this sense, conceptually separate from morality.

Section 3 will turn to Hart's theory, analyzing the extent to which his approach views legal normativity as *sui generis*. This approach will raise questions regarding what has become a consensus view in contemporary jurisprudence: that law makes moral claims. I will show how a more deflationary (and less morally-flavored) understanding of the nature of law is tenable, and may in fact work better than current conventional (morality-focused) understandings.

2 KELSEN AND NORMATIVITY

2.1 Normativity

Hans Kelsen's jurisprudential work, through most of his long scholarly career,[4] centered on the normative nature of law – that law is essentially made up of norms, and that this requires an approach distinctively different from descriptive, empirical approaches.[5] Kelsen's approach assumes or is grounded on the view (often attributed first to David Hume, though questions remain as the best understanding of Hume's text[6]) that there is a sharp division between "is" statements and "ought" statements, in particular, that no conclusion about what one ought to do can be derived from statements regarding what is the case. Whatever its origins, this view about not deriving "ought" conclusions from "is" statements (sometimes called "the fact-value distinction") is generally accepted in modern philosophy.[7]

The importance of the Humean division between "is" and "ought" is the implication that for every normative conclusion (*e.g.*, about what one ought to do), there must be at least one normative premise (*e.g.*, about what one ought to do or what one ought to value). In the context of a normative system like law (or morality or religion), every statement of what one ought to do (or ought *not* to do) requires justification from a more general or more basic ought statement, leading upward through the normative hierarchy,[8] until one reaches a foundational normative premise. Thus, the rules in a religious system that one ought not pray to idols will be grounded ultimately in the norm, "do whatever the creator God tells you to do"; one's secular ethical rule of thumb not to lie unless there is a very good reason may be grounded ultimately on either the Kantian norm, "so act that the maxim of your will can be a universal law", or the Utilitarian norm, "maximize the greatest good of the greatest number"; and the legal norm not to drive more than 65 miles per hour on a specified highway may be grounded ultimately on the norm, "act according to what has been authorized by the historically first constitution". This foundational norm for legal normative systems Kelsen called "the Basic Norm" ("*Grundnorm*").[9]

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2 I recognize that a more careful analysis of Kelsen's texts – and there are many: as Michael Hartney notes, "in [Robert] Walter's definitive bibliography of Kelsen's works, there are 387 titles, 96 of which are on legal theory", Hartney 1991: x (footnote omitted) – might undermine the proposed reading on exegetical grounds. My discussion of the view will be offered on its merits *as a legal theory*, whatever its merits as an exegesis of Kelsen.

3 In this paper, I will use "Basic Norm" and "*Grundnorm*" interchangeably.

4 Over the course of Kelsen's many decades of writings there were some radical changes of views – particularly if one contrasts his very earliest works and his very last works with most of what came in between. Paulson 1992a, 1998, 1999, 2017. My focus throughout this paper will be in the better known work of Kelsen's middle periods.

5 See, *e.g.*, Kelsen 2013: 217.

6 Hume (1978: Section 3.1.1, at 469-470) wrote: In every system of morality, which I have hitherto met with, I have always remark'd, that the author proceeds for some time in the ordinary way of reasoning, and establishes the being of a God, or makes observations concerning human affairs; when of a sudden I am surpriz'd to find, that instead of the usual copulations of propositions, *is*, and *is not*, I meet with no proposition that is not connected with an *ought*, or an *ought not*. This change is imperceptible; but is, however, of the last consequence. For as this *ought*, or *ought not*, expresses some new relation or affirmation, 'tis necessary that it shou'd be observ'd and explain'd; and at the same time that a reason should be given, for what seems altogether inconceivable, how this new relation can be a deduction from others, which are entirely different from it … [I] am persuaded, that a small attention [to this point] wou'd subvert all the vulgar systems of morality, and let us see, that the distinction of vice and virtue is not founded merely on the relations of objects, nor is perceiv'd by reason.

7 Though there remain prominent dissenters. *E.g.*, MacIntyre 1959, Searle 1964. One might also, in the present context, mention the recurrent questions Lon Fuller raised to any sharp division of "is" and "ought". Winston 1988.

8 This is the *Stufenbaulehre* that Kelsen adopted from Adolf Julius Merkl. See Kelsen 1992: § 28, at 57; Jakab 2007. One can find a similar hierarchy of normative analysis from Hart, with his concept of a "Rule of Recognition" playing a similar role to Kelsen's "Basic Norm". Hart 2012: 107.

9 There is a common confusion in understanding both Kelsen's "Basic Norm" and H. L. A. Hart's analogous concept, the "rule of recognition". Hart 2012: 94-95, 100-110. While there is an understandable temptation to equate these fundamental norms with foundational texts of a legal system (like the United States Constitution), this equation is at best imprecise. First, as Kelsen points out, the current foundational text may have been created under the authority of a prior foundational text of the same legal system, so the Basic Norm should refer to the historically first foundational text. Second, there remain questions of how to interpret the

This view regarding the separation of "is" and "ought" statements, and the hierarchical structure of normative systems, leading to ultimate norms, could lead to somewhat skeptical conclusions regarding morality (and religion and law). The reason is that under this approach every normative system is shown to be necessarily grounded on a foundational norm that is itself subject to no (direct) proof. One simply accepts (or not) the ultimate norm, whether it be "do what the Creator God commands" or "maximize the greatest good of the greatest number" or "act in accordance with the historically first constitution". And the fact that the important normative systems of one's life, like morality, religion, and law, may be grounded on an ultimate norm that cannot be proven, and can be accepted or rejected, seems to invite skeptical or relativistic implications. However, these implications must be left to others to discuss, or for other occasions.[10]

In Kelsen's understanding of "the science" of norms,[11] every "ought" claim – whether legal, moral, religious, or of any other kind – implies the (presupposition of the) foundational norm of that normative system. And the corollary is that every normative system is self-contained and independent of every other normative system. The normative system that is law, with its foundational norm, is necessarily separate from the normative system of a particular religion or a particular moral system. However, it is important to note: this does not exclude lawmakers in fact being influenced by the content of another normative system – *e.g.*, morality or religion. One must distinguish the logical structure of (all) normative systems from the empirical/historical/causal claims regarding why certain lawmakers promulgated the legal norms they did.

provisions of the foundational text, and to determine what priority it has in that legal system in relation to other national and international legal norms. Third, at least with the case of Kelsen's Basic Norm, the norm is an instruction to act in accordance with a particular legal text, a prescription that is in principle separate from the legal text itself.

10 There are, of course, numerous responses in the philosophical and jurisprudential literature to this potential skeptical challenge. Brief but thoughtful responses from a well-known legal theorist can be found in Finnis 2011a: 29-48, 441-442; 2011c: 201-204.

11 Kelsen refers more commonly to "the science of law" (or "legal science") – "*Rechtswissenschaft*". As Paulson notes in the Supplementary Notes to his translation of one of Kelsen's works (Paulson 1992: 127-129), the reference to "science" in Kelsen's work, and in German generally, means objective academic enquiry, without necessarily implying all the extra baggage that the term "science" carries in English (such that one might comfortably refer to literary theory in German as a "science", while it would be an unlikely, and certainly controversial, description in English).

2.2 Presupposing the Basic Norm

In Kelsen's works, one can find language to the effect that the presupposition of the Basic Norm is required to make "possible the interpretation of the subjective sense of [certain material facts] as their objective sense, that is, as objectively valid norms".[12] At the same time, Kelsen makes it clear, in a number of places, that one need not presuppose the Basic Norm.[13] In particular, Kelsen notes that the anarchist need not, and would not, see the actions of legal officials as anything other than "naked power",[14] with the legal system being for them nothing more than the "gunman situation writ large".[15]

Similarly, Kelsen writes: "For the Pure Theory strongly emphasises that the statement that the subjective meaning of the law-creating act is also its objective meaning – the statement, that is, that law has objective validity – is only a possible interpretation of that act, not a necessary one".[16] Kelsen adds: "The Pure Theory aims simply to raise to the level of consciousness what all jurists are doing (for the most part unwittingly) when, in conceptualizing their object of enquiry, they ... understand the positive law as a valid system, that is, as a norm, and not merely as factual contingencies of motivation".[17]

Thus, Kelsen speaks about those who see legal actions as norms, in some places noting, in other places simply implying, that one can also choose[18] *not* to see

12 Kelsen 1960a: §34(d), quoted in translation in Paulson 2013: 50.

13 I recognize that there may be other passages in Kelsen's text that support a different reading. For a good overview of the different tenable readings of Kelsen's writings on the Basic Norm, see Paulson 2012.

14 Kelsen 1992: §16, at 36.

15 This last phrase is, of course, not from Kelsen, but from Hart (1958: 603). However, Kelsen (1965: 1144) writes in similar terms: "The problem that leads to the theory of the basic norm ... is how to distinguish a legal command which is considered to be objectively valid, such as the command of a revenue officer to pay a certain sum of money, from a command which has the same subjective meaning but is not considered to be objectively valid, such as the command of a gangster."

16 Kelsen 2013: 218-219. Later in the same passage, Kelsen adds, helpfully: "The concept of normative validity is, rather, an interpretation; it is an interpretation made possible only by the presupposition of a basic norm", and that such an interpretation is well-grounded "if one presupposes the ... basic norm". Kelsen 2013: 219 (emphasis in original).

17 Kelsen 1992: § 29, at 58. (The omitted text states "[they] reject natural as the basis of validity of positive law..".) And once more: "This presupposition [of the Basic Norm] is possible but not necessary. ... Thus the Pure Theory of Law, by ascertaining the basic norm as the logical condition under which a coercive order may be interpreted as valid positive law, furnishes only a conditional, not a categorical, foundation of the validity of positive law". Kelsen 1960b: 276.

18 When writing that one can "choose" to view the (legal) actions of officials normatively or not, it is important to note that this does not mean that this "choice" is always or necessarily a conscious choice. The reference to "choice" indicates primarily that there is an option; one could do (think) otherwise.

such actions in a normative way. This point can be generalized across normative systems. Some look at events in our (natural, empirical world) and see norms: obligations (reasons) to act according to the requirements of etiquette, the dictates of a religious system, or the norms of a legal system. Other equally competent and intelligent adults can look at the same world and see *nothing* normative: etiquette systems may seem like the trivial rules of a pointless game; religious norms may seem like the superstitions of the ignorant and the self-deluded; and legal rules may seem like just one more way by which the powerful control and oppress the less powerful. And, of course, some people may see in a normative way in some of these areas but not in others.

This reading of Kelsen and normativity is related to Joseph Raz's helpful idea of "detached normative statements". Raz's basic idea is that one can speak of what a normative rule or system requires, without necessarily endorsing or accepting that rule or system.[19] Thus, someone who is not a vegetarian can say to a vegetarian friend, "you should not eat that (because it has meat in its ingredients)", and a non-believer can say to an Orthodox Jewish friend, "you should not accept that speaking engagement (because it would require you to work on your Sabbath)". Analogously, the radical lawyer or anarchist scholar can make claims about what one ought to do if one accepted the legal system (viewed the actions of legal officials in a normative way), even if that lawyer or scholar saw the actions of legal officials only in a non-normative way, as mere acts of power.

Another way to get at the general point is John Gardner's observation that law is voluntary in a way that morality is not. Gardner argues that morality's claim upon all of us, as human beings, is "inescapable".[20] According to Gardner, one cannot reasonably ask whether one should follow the dictates of morality.[21] But one can reasonably ask that question of law.[22]

However, it may be that the reference to "inescapability" is too vague to be useful here. One might argue that the sanctions pervasively and importantly present in all (or almost all) legal systems (past and present)[23] make law, in a sense, "inescapable".[24]

19 Raz 1990: 170-177.

20 Gardner 2012: 150. *Cf.* Raz 1999 (94-105), on whether reasons are optional.

21 To be clear: this is Gardner's view, and Gardner here reflects the conventional position, though, of course, radical thinkers like Friedrich Nietzsche appear to raise exactly the question Gardner's quotation implies cannot or should not be raised, whether one should follow the dictates of morality (though one can also read Nietzsche less radically, as simply arguing for a rejection of conventional morality in favor of the moral system he espouses).

22 Gardner 2012: 160-176. Robert Alexy points out similarly that "[o]ne can of course refuse ... to participate in the (utterly real) game of law". Alexy 2002: 109.

23 *Cf.* Schauer 2010.

24 I am indebted to Frederick Schauer for this suggestion.

One might choose not to see the actions of legal officials as creating valid norms, but law (at least in systems that are efficacious) is not something that a practically reasonable person could ignore, the way that she could ignore (say) fashion, etiquette, or chess. Still, while one may be unable to "escape" or ignore the coercive power of the State, one can choose not to think of the State's actions in a normative way.

I am not sure that the Kelsenian approach (as I am interpreting it) would go even as far as declaring morality (unlike law) to be "inescapable", for morality (or one's moral system) would be, under this analysis, just one more normative system that one could choose or not choose, assert or not assert. Certainly, we see around us a wide variety of (secular and religion-based) moral systems being advocated or assumed – with a broad range of variations on consequentialism, deontological ethics, and virtue ethics (and mix-and-match combinations of the three), just among the secular approaches to morality.

The general view of normativity underlying the present analysis is often explained in analogy to games. For example, one might say to people playing chess that they ought not (*e.g.*) to move the bishop a certain way. However, those same people could decide never to play chess, in which case these sort of prescriptions about how one ought to move the bishop would have no application.[25] (Of course, one might make an all-things-considered judgment as to whether it is right to play chess on a particular occasion, or whether it is wise to devote significant time to chess as a hobby, but these are very different inquiries, and, in any event, few would argue that everyone has an unconditional (moral?) obligation either to play chess or to avoid playing chess.)

The voluntariness of affiliation with religions is somewhat more complicated. On one hand, in many societies today the normative rules of a particular religion are not thought to be binding on those who are not members of that religious group. Of course, the way we think about religion today is far different from the way people thought about it in the past. As Jacques Barzun points out, "in earlier times people rarely thought of themselves as 'having' or belonging to' a religion. ... Everybody 'had' a soul, but did not 'have a God', for God and all that pertained to Him was simply *what is*, just as today nobody has 'a physics'; there is only one and it is automatically taken to be the transcript of reality".[26] And similarly, true believers even today (especially in countries in which fundamentalist views have greater social and political influence) see the dictates of their religion as simply the Truth, binding on all.

25 For one good analysis on the similarities and differences between the normative system of law and the normative game of chess, see Marmor (2007: 153-181).

26 Barzun 2000: 24.

Back to law: if one views legal rules and official actions as things that people may or may not view in a normative way, this understandably affects how one views Kelsen's Basic Norm – the role it plays and how it is justified. As Paulson has pointed out,[27] it is common now to view Kelsen's argument for the Basic Norm as a neo-Kantian version of the Kantian transcendental deduction. A transcendental argument (to simplify) goes from a conclusion of what must be true, lest the ultimate conclusion be false, or, at any rate, unsupported. Kant's transcendental deduction (again, to simplify) went from the unity of our experience to the requirement of categories of thought (e.g., time, space, substance, and causation) projected onto sense data.[28] For Kelsen, the relevant transcendental deduction is something along the following lines: since law is (experienced as) normative, the Basic Norm must be presupposed. The difficulty, as Paulson has pointed out,[29] is that Transcendental Arguments depend on there being *only one* available explanation for the matter being examined (in Kant's case, the unity of experience; in Kelsen's case, the normativity of law), and that Kelsen did not come close to proving that his approach was the only available explanation.[30]

However, the approach discussed in this article does not require the full machinery of a Kantian Transcendental Deduction; it requires only belief in the basic and generally accepted Humean division of "is" and "ought," combined with a comparably conventional idea that law is a normative *system*. Where one asserts the validity of any lower-level norm in a legal system,[31] one implicitly asserts or presupposes the validity of the foundational norm of the system.

27 *E.g.*, Paulson 1992b, 2000, 2012, 2013.

28 This particular way of phrasing the matter (e.g., the reference to "sense data") is likely not a way most Kantians would choose, but it should suffice for the rough summary needed here.

29 *E.g.*, Paulson 2012, 2013.

30 Paulson argued, correctly in my opinion, that Kelsen's analysis was far too quick to dismiss natural law approaches and was not convincing in its effort to show that there was no possible explanations beyond the limited number of alternatives he considered.

31 A comparable point could be made, as earlier mentioned, for a moral or theological normative system, or any other kind of normative system.

2.3 Concerns

In an earlier work,[32] Paulson expressed concerns about the sort of reading of Kelsen's work I am offering here.[33] His primary worry was that this reading leaves the Basic Norm in particular, and Kelsen's Pure Theory of Law in general, doing little work, and not the important task that Kelsen seemed to set for himself. Kelsen's Pure Theory offers the Basic Norm (and its presupposition) as the key to explaining the objective meaning of norms generally, not just for those who happen to choose to interpret official actions in a normative way.

I disagree that the proffered reading of Kelsen leaves Kelsen's theory unimportant, and the reading has the distinct benefit of being more defensible than more ambitious readings of Kelsen's aims.[34] Kelsen's Pure Theory, as I read it, offers important insights about the logic of norms, about what follows from the fact that someone reads the actions of officials normatively, and it offers related insights regarding the connections (or lack thereof) between law and morality, and regarding whether (or not) one has an obligation to accept or presuppose the Basic Norm of one's legal system.

3 H. L. A. HART AND THE RELATIONSHIP OF LAW AND MORALITY

3.1 Hart and the internal point of view

H. L. A. Hart, like Kelsen, emphasized the normativity of law in his criticism of earlier legal theorists (particularly that of John Austin), and in the development of his own, more hermeneutic theory of law. Hart argued that Austin's command theory did not sufficiently distinguish a community acting out of fear, the "gunman situation writ large".[35] From a community where the officials and at least some portion of the citizens treated the law as giving them reasons for action – what Hart called "the internal point of view".

32 Paulson 2012.

33 In private e-mail communication, Paulson reasserted his objection to this reading of Kelsen – while he noted that the reading was supported by some of Kelsen's texts, he characterized the reading as "trivial" and question-begging. For the "question-begging" criticism, Paulson refers to Robert Alexy's analysis, where Alexy makes that charge against Kelsen. Paulson 2012: 68-70. However, Alexy's accusation is based on a "justified normativity" reading of Kelsen's Basic Norm, a reading I do not share. I believe that the problem of begging the question disappears when one reads Kelsen's theory in a less ambitious way.

34 As Paulson shows, indirectly, by his critique of other readings. Paulson 2012.

35 Hart 1958: 603.

As part of the legal positivist separation of law and morality that he advocated, (a) Hart is careful not to claim that citizens *must* accept the law as giving them reasons for action (he does not even discuss the circumstances under which citizens *should* do so); and (b) he offers a broad and open-ended set of reasons for why citizens might accept the law as giving them reasons for action. Hart writes that a citizen "may obey it [the law] for a variety of different reasons and among them may often, though not always, be the knowledge that it will be best for him to do so".[36] And later: "[A]dherence to law may not be motived by it [moral obligation], but by calculations of long-term interest, or by the wish to continue a tradition or by disinterested concern for others".[37]

3.2 Hart's legal normativity

The question still remains for Hart: what is the nature of this normativity of, or in, law? The law prescribes behavior – to act in certain ways, and to avoid acting in other ways – and also empowers citizens to use legal institutions and processes for their own purposes (through wills, contracts, and the like). If under a Hartian analysis someone accepts the legal system as giving reasons for action, what kind of reasons are those? Is there any alternative to understanding these reasons as *moral* reasons?

One alternative that comes immediately to mind is that people often obey the law for purely prudential reasons: to avoid the financial penalties, potential loss of liberty, or public humiliation that can come from being adjudicated a law-breaker. However, Hart builds his theory of law from a critique of Austin's command theory of law, and a key part of Hart's critique is that for many people law is more than (that phrase again) the "gunman situation writ large" – that a perception of (legal) obligation can frequently be something different from merely feeling obliged (coerced).[38] Hart clearly intends an understanding of legal normativity where legal reasons are something distinct from (mere) prudential reasons.

Hart could be read as treating law as a *sui generis* form of normativity, and there is support for this position in a number of his writings.[39] As mentioned, Hart, as legal positivist, does not explore whether there are good *moral* reasons for accepting a particular legal system (or *all* legal systems) as giving reasons for action. Analogously, Hart does not explore in any length *what kind of reasons* people might think that the law gives them. It is sufficient for Hart that some people treat the law as

36 Hart 2012: 114.
37 Hart 2012: 232.
38 Hart 2012: 82-91.
39 See, *e.g.*, Hart 1982: 262-268; cf. Finnis 2011b: 248-256.

giving reasons for action; this is a fact for which the descriptive or conceptual theorist should attempt to account. As Hart sees it, it is not for the theorist of law to be too concerned about what sort of reasons these might be, and whether they are well grounded. Elsewhere (as part of his debate with Lon Fuller), Hart emphasizes that one should not confuse "ought" with morality – that there were many forms of "ought," many sorts of reasons for action.[40]

Along the same lines, one could read Hart as saying that for the person who accepts the law, the sort of reason the law gives is (simply) a *legal* reason, just as in other contexts people might consider themselves as subject to chess reasons (while playing that game – *e.g.*, reasons within the game for moving the bishop diagonally rather than otherwise, and to this square rather than another one), *etiquette* reasons, or *fashion* reasons. There is, to be sure, something a little strange about this line of analysis – one can understand the force of the objection that "*legal* reasons" should reduce either to prudential reasons, on one hand, or moral reasons, on the other. However, it is not clear that Hart, or a modern follower of his approach, needs to concede this point. Why should one assume that one has a moral obligation to do as the law says, simply because the law says so? While it may once have been the accepted view that generally just legal systems create such general moral obligations to obey their enactments, many theorists today have offered strong arguments against such a general obligation.[41] The alternative view is that law *sometimes* creates moral obligations, and that this is a case-by-case analysis, relative to the individual citizen, the particular legal rule, and the coordination problems or expertise claims that may be involved.[42] There are good reasons to avoid constructing one's theory of the nature of law around the view that law generally does create, should create, or claims to create moral obligations.[43]

Again, under this approach, legal normativity in general, and legal propositions in particular, do not, by their nature, reduce to or equate to propositions of another type, nor do legal propositions, by their nature, *purport to be* propositions of another type. Sometimes Hart makes this point indirectly, when he ascribes to "expressions like legal right and legal duty meanings which are not laden with any ... connection" to morality.[44] At other places, Hart explains his view as simply the assertion that something can be "an authoritative legal reason" without assuming anything about the moral content of the norm in question, or the institution that promulgated it.[45]

40 Hart 1958: 612-614.
41 *E.g.*, Smith 1973; Raz 1994: 325-338; Edmundson 2004; Higgins 2004.
42 Raz 1994: 325-338; Enoch 2011.
43 Schauer 1998.
44 Hart 1982: 263.
45 Hart 1982: 264-265.

John Finnis concurs, while making a somewhat different point. He argues that while law may claim to be reasonable (in the precise sense of "being controlled by reasons", responsive to "such criteria as coherence and validity"), it does not, and should not, claim to be morally obligatory, because it creates prescriptions over a wide range of conduct, and even a morally praiseworthy legal system will create prescriptions which the practically reasonable person would need to violate on occasions where there are stronger competing moral obligations.[46] Finnis rejects the idea that law makes moral claims, and accepts the view that law creates only indefeasible *legal* obligations,[47] which are then slotted into:

> a flow of general practical reasoning – by good citizens in terms of the common good ... by careerists in the law in terms of what must be done or omitted to promote their own advancement towards wealth or office, and by disaffected or criminally opportunistic citizens in terms of what they themselves need in order to get by without undesired consequences (punishment and the like).[48]

Similarly, for those who accept the law as giving them reasons for action, why should we assume that these reasons are *moral* reasons? For example, with etiquette or chess, we understand how a practice can give reasons that are not moral reasons. Perhaps law similarly gives reasons that are not moral reasons.

While many other theorists see little alternative to equating legal claims with either moral claims or predictions of official actions, I think the better view is that either equation is both unnecessary and unjustified. Like many academic theories, views equating legal propositions with, or reducing them to, either morality or descriptions or official action, discount the obvious in the search for the subtle and the sophisticated. Ultimately, the question is whether it is productive – or, on the contrary, absurd – to think that reasoning is often confined within a particular domain: that one can have "legal reasons" that can differ from not only "moral reasons" and "prudential reasons", but also "etiquette reasons", "fashion reasons", or "chess reasons". Tim Scanlon recently defended at length just such a view of reasons and reasons for action in his 2009 John Locke Lectures, later published as *Being Realistic About Reasons*.[49] As he argued, reasons tend to have force within particular normative domains, and we should not too quickly assume that reasons in one domain are reducible to, or subject to challenge by, reasons in a separate normative domain.

46 Finns 2013: 554-556.

47 Finnis 2013: 553-556.

48 Finnis 2013: 555.

49 Scanlon 2014.

3.3 Law and morality

The advantage of the approach discussed in this article – that the normativity of law is a matter that individuals assume (presuppose) or not, but it carries no direct connection with moral normativity – is that it accounts for the normative nature of law, at least in a thin way, without the requirement of substantial metaphysical assumptions or controversial moral claims. This approach agrees with the new view that denies that the law always creates moral obligations – or even that is *almost always* does so, or does so presumptively, or does so as long as the legal system is otherwise "generally just".

This approach also (thus) goes against the increasingly common view in legal theory that it is an essential aspect of law that it claims to be authoritative, morally right, or at least "correct" in some general sense.[50] Why should one assume that law makes moral claims (let alone that law by its nature always makes such claims)? As with all claims regarding the relationship of law and morality, the difficulty is that both terms in the equation – "law" and "morality" – are hard to define, and all likely definitions will be controversial.

As part of Leslie Green's argument that "[n]ecessarily, law makes moral claims on its subjects" (part of his list of ways in which there are necessary connections between law and morality, contrary to some understandings of legal positivism's "separability thesis"[51]), Green explains that law "make[s] categorical demands" upon citizens, and that these demands require citizens "to act without regard to our individual self-interest but in the interests of other individuals", and that these criteria together constitute "moral demands".[52] I do not find this definition of morality (or this characterization of law's demands) persuasive. Even putting aside, for the moment, Hart's essential point that law does not merely command, it also empowers,[53] legal rules do not make the same sort of (implied or express) claims as do moral rules: that they reflect universal and unchanging moral truths, and that they are integral aspects of the Good.[54]

50 Raz 1994: 325-338; Green 2003: 14-17; Alexy 2002. (For a critique of Alexy's theory of correctness, see Bix 2013: 38-39.) There are, to be sure, notable dissenters, at least from the view that such claims are essential to law. *E.g.*, Dworkin 1996: 198-211; Kramer 1999: 100-101; Himma 2002: 155-157.

51 Green 2003: 14-17.

52 Green 2003: 16. His precise language: "But to make categorical demands that people should act in the interests of others is to make moral demands upon them."

53 Hart 2012: 27-33; Hart 1958: 604-606.

54 According to some, there is a connection between morality and divine command (*e.g.*, Quinn 1990), while law (at least outside Sharia systems) does not claim any direct connection with divine command.

Joseph Raz offers a somewhat different explanation of why he believes that law's claim to authority is a moral claim: "it is a claim which includes the assertion of a right to grant rights and impose duties in matters affecting basic aspects of people's life and their interactions with one another".[55] I am not sure that this will go much further to persuading those not already persuaded that law's claims are moral claims. Many normative systems, including those of etiquette and even fashion, seem to involve claims of "rights to grant rights and impose duties". And while it is true that law, like morality, covers "basic aspects of people's life and their interactions with one another", this does not seem sufficient to turn claims on behalf of law into moral claims.

I do not mean this to be a dispute about the proper way to define morality; in any event, such disputes are unlikely to get far beyond one person's "that seems right to me" evoking "but it does not seem right to me" by another. I think it is sufficient to the perspective I am trying to elaborate that few of us confuse morality and law. We may be inclined to overestimate the moral merits of the law, but we still do not confuse the two. Who, besides a strong believer in a Sharia legal system, thinks that law is essentially an instantiation of morality, grounded in divine command or otherwise? It is true that the early Common Law judges in England (and commentators on the Common Law from that period) cited "Reason" with a capital "R" as the justification for why the Common Law rules were the way they were (the judges characterizing their actions as declaring the existing law, while modern observers would describe their decisions as making new law or modifying existing law), but even legal figures from that period did not conflate or confuse law with morality. In English (and later American) Common Law, there was no legal obligation to rescue another, however easy and low-risk the rescue might be,[56] and there was no legal obligation to keep one's promises (only those promises that were supported by "consideration" – that is, that were part of a bargain).[57] In these, and many other cases, the Common Law judges distinguished what individuals had a moral obligation to do and what the legal obligation was.

(Actually, though, one *can* find versions of such a view among some recent works in jurisprudence. Greenberg, in his "Moral Impact Theory of Law", offers the radical view that "the law is the moral impact of the relevant actions of legal institutions".[58] Law, under this analysis, is thus a quite specific subset of morality: the impact on our moral rights, duties, and authorizations by the actions of legal officials. In a recent work, Greenberg restated his view in the following terms: "that legal obligations are those genuine obligations that obtain in virtue of the actions of legal institutions".[59] Under this approach, one might think of law as being defined on either end of a process: "law" as being a certain set of officials authorized to take actions in the name of the state over certain sorts of disputes; and "law" as the moral rights and duties that result from those actions. Heidi Hurd, in an earlier article, offered a comparable view: that law should be seen as a theoretical authority regarding our moral obligations.[60] However, such equations of law and morality seem sufficiently distant from how most people perceive law to be non-starters as theories about the nature of law.)

An approach put forward by David Enoch explains a way of understanding the connection between law and morality that does not require us to think of the law as making a moral claim or as being some sort of subset of morality. Enoch's argument is that legal enactments and other actions by legal officials can act as "triggering reasons", giving us reasons to act under the moral reasons for action that we already had.[61] This parallels a more common observation that law may make more articulate or determinate our general obligations: where our obligation to drive safely now means driving on one particular side of the road and below a specified speed, and supporting the basic needs of society and helping the poor now means paying a certain percentage of one's income to a government fund as taxes.

What may be mysterious is why many legal positivist have taken a more ambitious starting point. For example, Jules Coleman & Brian Leiter, in their otherwise excellent overview of legal positivism, asserted that it was part of the task of a legal theorist to explain the "normativity" or "authority" of law, by which they meant "our sense that 'legal' norms provide agents with special reasons for acting, reasons they would not have if the norm were not a 'legal' one".[62] One might reasonably question whether we (whoever "we" might be in this case) do in fact believe that legal norms "provide [us] with special reasons for acting", separate from the prudential reasons associated with legal sanctions, or the general moral reasons that *some* legal norms might *sometimes* trigger. Additionally, even if a significant number of people believe that law *qua* law gives them reasons for action, this may be a matter calling more for a psychological or sociological explanation,[63] rather than a philosophical one.

55 Raz 2009: 315-316.
56 *E.g.*, Weinrib 1980: 247.
57 *E.g.*, *Mills v. Wyman*, 20 Mass. (3 Pick.) 207 (1825).
58 Greenberg 2014: 1290 (citation omitted).

59 Greenberg 2017: 275.
60 Hurd 1991.
61 Enoch 2011.
62 Coleman & Leiter 2010: 228-229; see generally Bix 1996, 2006.
63 See, *e.g.*, Tyler 1990.

4 CONCLUSION

Stanley Paulson wrote: "Exactly what 'normative' comes to in Kelsen's Pure Theory of Law has never been clear".64 One might make a similar claim about many contemporary legal theorists: they purport to "explain legal normativity", but often fail to articulate what it means to say that law is normative or in what way that property requires explanation. In the case of Hans Kelsen, this article has offered a reading of his approach as a limited claim about the logic of normative claims: that when one reads the actions of legal officials normatively, this assumes or presupposes the validity of the foundational norm of that legal system, a Kelsenian "Basic Norm".

Through a focus on the work of H. L. A. Hart, this article has advocated a simple and unambitious view of legal normativity: law as a *sui generis* form of normativity. Legal norms frequently prescribe what one ought to do or ought not to do. However, the rush of legal theorists to describe law as thus making *moral* claims, or predictions about official actions, seems ungrounded and unnecessary.

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64 Paulson 2012: 64.

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