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On the nature of legal normativity
Response to commentators

In this response to eight commentaries on my article "Kelsen, Hart, and legal normativity" I clarify some points in my original analysis and agree with some comments regarding work that still needs to be done. In particular, I attempt to distinguish my position from both Berkeleyan idealism and mere subjective perception. I agree with the commentators who urge that more must be done to analyze the nature of normativity in general, and legal normativity in particular.

Keywords: legal normativity, Kelsen (Hans), Hart (HLA), Raz (Joseph), Paulson (Stanley), internalism, externalism, practice theory of norms, foundational norms, idealism

I am greatly honored and deeply humbled by these prominent scholars taking the time to offer deep and detailed critiques of my work. And ultimately, perhaps the feeling should be more humility than honor, given the important concerns raised there about the arguments and conclusions I have offered. Properly bowed, I offer the following brief explanations and responses, along with a vow to do better, going forward, having learned from these critiques.

1 STEFANO BERTEA

While Stefano Bertea (2019: 10–11, 14) agrees with me that we should not assume the legal ought to be moral in nature, he disagrees with my view that legal normativity is *sui generis*, or that it can be treated as comparable to other forms of normativity. He focuses on the differences in the pervasiveness and depth of normative systems (Bertea 2019: 12), differences so great as to be "conceptual" (Bertea 2019: 12). Of course, law is different from fashion and games, though it may be that there are more similarities between law and etiquette than he believes. Traditional books teaching etiquette are hundreds of pages long, because old-fashioned etiquette *did* purport to cover nearly every aspect of life. In any event, as Bertea (2019: 12) rightly notes, the "ubiquity" of law must be an aspect of any effort to understand law, in particular, for our purposes, the way that law "overlap[s] with … practical rationality at large".

Bertea (2019: 13) argues that more confined normative systems, because they are more confined, must be understood in a way separate from legal

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normativity. Legal oughts, reasons, and norms are "deeply connected with our practical existence at large and therefore genuine in kind" (Bertea 2019: 13). However, what here is meant by "genuine"? Bertea (2019: 13–14) states that legal norms "are thus binding in a sense that the ... norms generated by constitutively domain-specific practices ... are not". He then adds that they domain--specific norms "rarely, if ever, clash with the broader and unqualified claims the law and practical rationality make on action" (Bertea 2019: 14).

It is, of course, correct that law, morality, and religion[1] carry both a wider jurisdiction and a greater claim to significance than some other normative practices, like fashion and games. The question is, what follows from that? I think further argument is needed before one can conclude that wider-jurisdiction normative systems *have a different kind of normativity*, and not just a different scope or overall importance.

2 SYLVIE DELACROIX

Sylvie Delacroix brings our attention to many of the problems of focusing on law's normativity: *e.g.*, by normativity do we mean law's ability to guide behavior or its ability to impose obligations (Delacroix 2019: 17–18), and should we focus on what "enables" law's normativity or on its effects on citizens (Delacroix 2019: 18)? One can see the richness and deceptive complexity in the phrasing she gives of possible tasks relating to law's normativity: "explain[ing] how law manifests itself through our linguistic and social practices" and "what makes law's normative status possible" (Delacroix 2019: 25). Here, philosophy has the danger, or the possibility, of verging into sociology or cultural studies.

Delacroix (2019: 18–19, 23–24, 26) points out quotations from Kelsen's work in which he seems to reject any sort of "subjective" approach to normativity, as well the texts that seems to support such a reading,[2] generally noting that Kelsen's views changed significantly over the years. In my piece (Bix 2018: 26, notes 2 and 4, and 29, note 13), I indicated, as Delacroix has, that Kelsen's views changed over his decades of writing, and therefore any characterization of his views is likely to be true of (at most) a portion of his writings; also, I emphasized that my ideas were being put forward primarily on their own merits, regardless of their value as Kelsen exegesis.[3] Delacroix (2019: 25, 27) ultimately comes to the same point: that the discussion should not be focusing on the best reading of Kelsen.

1 And perhaps also etiquette.

2 Spaak (2019: 78–79) also points out places where Kelsen treats the presupposition of the basic norm as optional.

3 And (contra Spaak 2019: 78–79) I certainly never claimed that my interpretation of Kelsen was novel.

Delacroix raises concerns about contemporary discussions of legal normativity. What is the alternative? Delacroix (2019: 25–26) refers to Montaigne's idea of "a law of pure obedience", almost as a reduction ad absurdum of efforts to ground legal normativity. She argues that any approach to explaining normativity (including Kelsen's) that takes the Humean is/ought division seriously, is doomed (Delacroix 2019: 27). Delacroix (2019: 19–20, 27) suggests a different way forward, one that takes seriously a naturalist's approach to morality, that is, one that *does* derive normative conclusions from factual premises. Certainly, there have been important work of late, not least by David Copp (whose work is also mentioned by Connie Rosati (see below)), to ground morality on a naturalist foundation. This is not the best place (and I am not the best person) to analyze the extent to which he has succeeded in that task. If not that path, perhaps we *are* only left with a view Kelsen derides, in a text quoted by Delacroix (2109: 27), that we only "'ought to do [...] what [we want] to do".

3 TOMASZ GIZBERT-STUDNICKI

Tomasz Gizbert-Studnicki (2019: 29–30) continues the theme of the complexity within the category of explaining legal normativity, noting the difference between a hermeneutical explanation from a deductive one, and commenting that "normativity" itself has its ambiguities. He focuses on the differences among reasons: distinguishing normative versus motivating reasons, and internalist versus externalist understanding of normative reasons (Gizbert-Studnicki 2019: 30–32).

I agree with Gizbert-Studnicki (2019: 32–34) that the way we generally speak of legal and moral reasons is more consistent with an externalist understanding than an internalist (or even counterfactual internalist) understanding.[4] And I am grateful for Gizbert-Studnicki's helpful corrective (Gizbert-Studnicki 2019: 35), that I should have been more consistent, in both phrasing and substance, regarding the fact that legal norms give us *legal reasons*, and that these are new (externalist) reasons, even if they are not necessarily motivating (internalist) reasons.

Gizbert-Studnicki (2019: 35–37) ends his critique with a pointed question: how can an externalist reason analysis, an analysis in terms of reasons understood from within insular normative systems, as Scanlon argues (Gizbert-Studnicki 2019: 34; see Scanlon 2014), work with the Hartian model of law, with its central use of a rule of recognition?

As Gizbert-Studnicki notes, Hart's analysis of the rule of recognition follows generally Hart's practice theory of social rules: that a rule can be said to exist when there is a standard, and within the relevant social group, deviations from the standard are the subject of criticism. Hart's social rule understanding of

4 See generally Paakkunainen 2018.

norms was subject to sharp criticism, not least by Joseph Raz (1990: 49–58) and Ronald Dworkin (1978: 48–58), and in his posthumously published "Postscript" to *The Concept of Law*, Hart (2012: 254–259) conceded that the practice theory was inadequate, at least as regards moral rules. Raz and Dworkin's criticisms echo the present discussion: that Hart's internalist analysis fails to capture the true (externalist) nature of norms. Gizbert-Studnicki (2019: 36) argues that legal positivists must use something like Hart's "internal attitude"/internalist analysis, or else give up their determination that law be understood in terms of social facts alone. At the least (Gizbert-Studnicki 2019: 36–37), the normativity of the rule of recognition could not be justified without an internalist normative structure.

To some extent, the above issue touches on the problem with all foundational norms, not just those of legal systems. What can ground that which is (by definition) foundational? As Gizbert-Studnicki points out, Hart tried to have his foundational norm grounded in social practice. For Kelsen (1992: 55–63), the foundational norm was simply presupposed by those who viewed the law normatively. For John Finnis (2011: 59–75), legal and moral norms come down ultimately to "basic goods," whose status as basic goods is "self-evident". When Gizbert-Studnicki (2019: 37) speculates on whether we should even understand the duty to apply the rule of recognition as a *legal* duty, this is again (at least in part) a problem of any foundational norm, with here there also being a problem of circularity. If the rule of recognition determines what is and is not legal, how can that rule itself be subject to a *legal* duty? Finally, when Gizbert-Studnicki (2019: 37) asks "how to explain the normativity of the rule of recognition", this effectively restates the problem of what can ground a foundational norm. As Jules Coleman (2001: 70) characterizes the problem: "how [can we] explain the *possibility* of legal authority without appealing to legal authority."[5]

As earlier noted, the deep difficulty of the justification of foundational norms is not limited to legal systems. It may be that the questions Gizbert-Studnicki raises ultimately tie together: that those inclined towards an externalist understanding of norms might look to naturalism or some other "external" way of grounding normative systems, while internalists might be more inclined towards norms being grounded in individual assent, commitment, or the like.

4 ANDREW HALPIN

While Andrew Halpin expresses sympathy towards some of the objectives of my article, he also raises some pointed questions. As Halpin (2019: 41) points

5 For Coleman (and, Coleman argues, for Hart and many contemporary legal positivists), the answer is an "interdependent convergence of behavior and attitude" (Coleman 2001: 70).

out, my analysis effectively moves the focus of normative analysis from officials to subjects, and from an objective-style analysis (what must officials do to make law normative to all) to a more subjective-style analysis (the choices of each subject regarding normativity). Halpin (2019: 42) questions the limits of our subjective attitudes on the nature of an entity or activity external to us. Am I claiming that our beliefs or attitudes affect things external to ourselves? Would a tiger have a different nature if I thought differently about it? What about the game of golf?

Mine is not an argument about George Berkeley-style idealism; I am not asserting that we create our own worlds. The question is rather about the origins of our obligations and our reasons for actions generally. Morality imposes obligations on us regardless of our choices and regardless of our assent. Other obligations and reasons for action are contingent; they depend on our choices or consent.

Halpin (2019: 44) analyzes the question down to whether individuals' attitudes can affect "the normative quality" of the law. And he wonders about the "strange consequences of the nullification of a complete legal quality of normativity by the choice of the legal subject" (Halpin 2019: 44).

He views my position as defective in viewing individual attribution or acceptance of normativity "as fully representative of the quality of legal normativity," when in fact this is only "one of the different ways in which a quality of legal normativity might be found" (Halpin 2019: 45). (His other ways include existence of a norm within a system of norms and enforcement by a system official (Halpin 2019: 43).)

Two points: first, I do not doubt that there are various ways systems or individual rules could be (said to be) normative: *e.g.*, reflecting validity under a particular system's internal rules, reflecting actual practices of coercive enforcement, etc. Second, we can – and sometimes *do* – use normative language even when speaking of normative systems that have no efficacy, no substantial impact on our practices. There are law school courses on Roman Law (referring to the rules of ancient Rome) and scholars debate the proper application of norms relating to sales contracts under Roman law, even though those rules are not efficacious anywhere today. Of course, those rules were efficacious once, but one can just as well choose other examples, *e.g.*, model legal codes that have never been adopted. One can use, following ideas of both Kelsen and Raz, the point of the view of that legal-normative system: what are the rights and obligations under that system? Our individual attitudes and individual acts of will – either favorable or unfavorable, committed or uncommitted – will not make norm systems efficacious in the world if they were not so already (nor remove efficacy from systems that have it). However, whether our commitments affect our obligations is, at least in principle, a different question, and that was (and is) the focus of my analysis. As Hart wrote (*e.g.* 2012: 85–88), there is a difference

between being obliged and having an obligation. The former goes to efficacious pressures, the latter to duties. My suggestion is that it is something in us, of from us, rather than something in the system, that should be our focus in trying to understand duties and comparable normative concepts.

5 GEORGE PAVLAKOS

George Pavlakos (2019: 47–48) offers a provocative reading of a Kelsenian approach to law, leading to the conclusion that "legal phenomena are objective because the possibility of legal knowledge is objective". This is the product of an intricate analysis of the way "imputation" works as a bridge between facts and norms in Kelsen. Pavlakos (2019: 50–51) explains this view by an analogy to Saul Krikpe's well-known skeptical reading of Ludwig Wittgenstein's rule-following considerations. Ultimately, Pavlakos (2019: 55) argues, the normative realm of law is not dependent on any individual's choice or commitment, and we can no more choose not to view law in a normative way that one could choose to ignore water.

Pavlakos argues that Kelsen's notion of "imputation," properly (and charitably) understood, has the purpose and effect of overcoming skeptical epistemological challenges. I have my doubts. To begin with, Kelsen's use of "imputation" changed significantly over the course of his writings, and the doctrine had its complications and weaknesses at every stage, as those who have studied this notion testify.[6] I would need to hear more on the topic – certainly more could be offered in the brief space Pavlakos had to make out his claim, though it is certainly an intriguing idea.

6 MARÍA CRISTINA REDONDO

María Cristina Redondo (2019: 58–59) states that my discussions of legal normativity were, in important respects, inconsistent and confused. However, I think we agree more than she thinks we do. There is one small point on which we may disagree. I do not accept Redondo's view (Redondo 2019: 62) that discussing Kelsen's ideas with the help of Raz's notion of detached statements implies or entails that legal normativity is the same as moral normativity. A detached statement, like "If one accepts the law (this legal system) one ought not park here or drive over 60 mph," is not – or, at least, not necessarily – a moral claim.

Redondo (2019: 63–64) thinks that I inconsistently both accept and reject a moralist conception of normativity. This conclusion, I think, is based on a misunderstanding of what I was trying to say – and this is likely the fault of my poor phrasing. In fact, I assert just what Redondo (2019: 63) states that I reject, that "along with moral reasons, there can be legal, political, religious, etiquette, or fashion reasons". Redondo (2019: 63) goes on to quote a passage where I state that to some readers there might seem "something a little strange about this line of analysis", but the fact is, that *this is* the line I ultimately supported.

6 *See, e.g.*, Langford & Bryan 2013, Paulson 2001.

7 CONNIE S. ROSATI

Connie S. Rosati argues that Kelsen and Hart (at least as I have understood and presented them (Rosati 2019: 70, note 1)) do not tell us much about "what it is for law to be normative" (Rosati 2019: 71). Additionally, Rosati (2019: 71–72) urges our attention to four distinct questions (and criticizes me for not keeping them sufficiently distinct): "(1) do officials and some citizens) see or view the law as giving them reasons?; (2) what sorts of reasons do they view the law as giving them?; (3) does the law actually given them reasons?; and (4) what sorts of reasons does it actually give them?".

It is, of course, important to distinguish what reasons law gives from what reasons we *perceive* it as giving, and Rosati (2019: 72) is, obviously, correct that the inquiry about perceptions is more appropriate to psychology (or sociology) than to philosophy. However, I was not focusing on "perception" (though, once again, I can see how my less than optimal phrasing could encourage that reading). Hartian acceptance of a legal system and the positing or presupposing of a Basic Norm presupposition in Kelsen is more of a commitment or an act of assent – a matter of normative significance *towards* the legal system – not just "a belief about" or "perception of" the legal system.

Rosati's point that I – and other legal theorists as well – need to do more to explore the nature of normativity (Rosati 2019: 73–74) involved in legal normativity is well taken. As she argues, many of us assume the reason-based approach that has been advocated by Raz, Finnis, and others, without questioning it sufficiently, or exploring Copp's point (cited at Rosati 2019: 73) "that claims about what we have reason to do are themselves normative, so such an approach [to understanding normativity] does not go very deep" (Copp 2007: 256). Rosati (2019: 73) challenges us to discover an understanding of legal standards as "appropriately justified," noting pointedly under this understanding legal standards need not be reducible to moral or prudential standards.[7]

7 Rosati refers here to Copp's idea of different "types" or "grades" of normativity. Copp 2007: 255–264.

8 TORBEN SPAAK

Torben Spaak (2019: 76–77) agrees with Joseph Raz that Kelsen's version of normativity is what Raz calls "justified normativity".[8] Stanley Paulson (2012) has argued at great length that Kelsen should *not* be understood as referring to justified normativity. As discussed, my work is not primarily meant as Kelsen exegesis, and I defer to Paulson and to many of my present commentators on the question of the best understanding of Kelsen (or, perhaps one should say, the best understanding of the *different* Kelsens one finds over the course of his decades of writing).

At one point, Spaak (2019: 78) observes that "even if law is independent of any other normative system, law may nevertheless be necessarily moral by some of its necessary properties". This is just a comment in passing, so one should not put too much weight upon it. However, I think it may be important here to recall the distinction Scott Shapiro (2011: 8–10 and 404–405, note 8) drew between identity questions and implication questions. If morality/moral evaluation plays no role in what makes something "law" or "legally valid," the fact that law (and its necessary features) may have moral *implications* is not contrary to a legal positivist approach.

Spaak (2019: 80–81) notes (following my discussion of Hart) that if legal normativity is in fact *sui generis*, it raises problems regarding the relationship of legal reasons and other, better understood sorts of reasons, like moral and prudential reasons. I accept that this is a complication, but a complication most of us experience on a daily basis: how to integrate the various sorts of reasons we accept (moral, religious, conventional social norms, professional, etc.), without assuming that they are all reduce to any single metric. Here is Finnis's comment on the matter:

> [L]aw['s] ... schema of practical reasoning ... can be explicated – reintegrated into a flow of general practical reasoning – by good citizens in terms of the sustaining of the regime, 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) (Finnis 2013: 555).

8 As Spaak (2019: 76–77 and note 1) implicitly acknowledges, there is some tension between characterizing Raz's "justified normativity" as being an objective moral standard independent of our "desires, wishes and goals" (Spaak 2019: 77) and the language in Raz's quotation that normativity might be "justified" just by "being perceived as binding" or by being "accepted ... by personal commitment" (Spaak 2019: 76, quoting Raz 2009: 134). Spaak's response (Spaak 2019: 77, note 1) appears to be that once one has made a commitment, no mere "desire [], wish [], or goal []" (Spaak 2019: 77) could justify deviation from a standard from the system to which one had committed. However, it is not clear how this then differs from a Hartian "acceptance" of a legal system (which Raz meant to distinguish in his idea of a merely "social" normativity) or a neo-Kelsenian (express or implicit) choice to presuppose the Basic Norm.

Finally, Spaak (2019: 81) remarks that "there appears to be general agreement among legal philosophers that something like justified normativity is, and should be, at the center of the debate about the normativity of law". I am grateful for the subtle reminder that my view may be going "against the flow" (and perhaps also a reminder that those who go against accepted opinion risk looking foolish). The warning is duly noted. If I am still willing to advocate, at least for now, this unconventional view, it is largely for two reasons: (1) as discussed in my original article, it is a position that has support from two prominent legal theorists, Hart and Finnis, so may not be entirely foolish; and (2) as also discussed in my article, though many theorists espouse a justified normativity position, it is rare to find extensive arguments supporting that conclusion, and many of the arguments that are presented are not especially persuasive.

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