

# Kelsen and Hart on the Normativity of Law

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## 1 Introduction

The problem about the normativity of law – that is, the problem of accounting for the nature of the legal ought, the law’s normative force, or, if you will, the nature of legal reasons for action – is in my view the most serious if not the only serious question facing legal positivists. The problem, I have argued elsewhere, is that although legal positivists can account for law’s normativity in (what I shall call) the strictly legal sense, but not in (what I shall call) the moral sense, such an account is difficult to combine with the thesis that law necessarily claims to trump moral and other reasons for action.<sup>1</sup> But, one may wonder, if normativity in the strictly legal sense is so problematic, why have first-rate legal thinkers like Hans Kelsen and Herbert Hart expended so much energy in trying to account for the normativity of law in this sense? Were they perhaps really concerned with normativity in the moral sense? I don’t think so. I think they were concerned with normativity in the strictly legal sense. And in this article I am going to consider Kelsen’s and Hart’s analyses of the normativity problem in order to show that both Kelsen and Hart were indeed concerned with normativity in the strictly legal sense. I am also going to argue that their accounts can be combined with a qualified version of the thesis that the law necessarily claims to trump moral and other reasons for action, while suggesting that the normativity of law in the strictly legal sense is not so important a characteristic of law as Kelsen and Hart seem to have thought.

I begin by presenting the problem about the normativity of law (Section 2). I then proceed to consider Kelsen’s and Hart’s analyses of this problem (Sections 3-4). Having done that, I consider the possibility of combining the strictly legal conception of law’s normativity with a qualified version of the trump thesis, and add a few words about the significance of strictly legal normativity (Section 5).

## 2 The Problem About the Normativity of Law<sup>2</sup>

As is well known, natural lawyers and legal positivists hold opposing views about the *nature of law*. While they tend to agree that law is a system of norms, they disagree about the relation between law thus conceived and morality. The debate, as I see it, concerns *concept formation* at the most fundamental level in the study of law: How should we understand and shape the concept of law? And what role, if any, should moral considerations play in such concept formation?

*Natural law theory* understood as a theory of law takes positive law, that is, law laid down by humans for humans, to be inherently and genuinely normative, necessarily conferring genuine rights and imposing genuine obligations. And it accounts for this binding force by asserting that positive law is conceptually connected with moral values like justice and the common good. Generally speaking, the idea is that there is a *higher law*, which we can discover by using

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<sup>1</sup> See Spaak, Torben, *Legal Positivism, Law’s Normativity, and the Normative Force of Legal Justification*, in *Ratio Juris* Vol. 16:4 2003, p. 469-85.

<sup>2</sup> The text in this section can be found, more or less verbatim, in Spaak, *Legal Positivism*, *supra* note 1, p. 471-2, 478-81.

our reason and which confers binding force on positive law, if and insofar as the latter is in keeping with the former. More specifically, natural law theory asserts (i) that there is a conceptual connection between law and morality, and (ii) that moral values and standards exist independently of people's beliefs and attitudes.<sup>3</sup> On this analysis, the moral authority of law is part of the concept of law, and the thesis that an unjust law cannot be legally valid, i.e., cannot be a law at all (*lex injusta non est lex*), turns out to be a *corollary* to (i).

*Legal positivism* is a *general* and *descriptive* theory of law of the type advanced by scholars like John Austin,<sup>4</sup> Hans Kelsen,<sup>5</sup> Alf Ross,<sup>6</sup> H. L. A. Hart,<sup>7</sup> Joseph Raz,<sup>8</sup> and Neil MacCormick & Ota Weinberger,<sup>9</sup> not a theory telling the judge how he should decide hard cases or when civil disobedience is justified.<sup>10</sup> Underlying, though neither entailing nor entailed by, legal positivism is meta-ethical *noncognitivism*, according to which moral claims have no cognitive meaning.<sup>11</sup> Legal positivism thus conceived could perhaps be described as a *meta-theory*, a theory *about* theories of law, because it aims to lay down requirements that any adequate theory of law must meet.<sup>12</sup> Since legal positivists usually exclude from the study of law questions concerning the moral value of law, they tend to describe law in terms of formal features, saying for example that it is a "specific social technique of a coercive order."<sup>13</sup>

Now the problem about the normativity of law, as I have said, concerns the nature of the *legal ought* or law's *normative force*, or, if you will, the nature of *legal reasons for action*. Philosophers tend to conceive of normativity in general as that which is common to the normative (right, wrong, duty) and the evaluative (good, bad) in regard to theoretical as well as practical questions.<sup>14</sup> We are not concerned with normativity in general, however, but with *legal* normativity; and I take legal normativity to be stronger than other types of normativity – ex-

<sup>3</sup> See, e.g., Aquinas, Thomas, *Summa Theologiae* (R. J. Henle ed.) 1993, Q 90, Art. 2, C. & Art. 4, C.; A. P. d'Entrèves, *Natural Law*, London 1951, p. 85; Moore, Michael S., *Law as a Functional Kind*, in *Natural Law Theory* (Robert P. George ed.) Oxford 1992, p. 189-92; Radbruch, Gustav, *Rechtsphilosophie*, 7<sup>th</sup> ed., Stuttgart 1950, p. 353.

<sup>4</sup> Austin, John, *The Province of Jurisprudence Determined*, Indianapolis/Cambridge 1954.

<sup>5</sup> Kelsen, Hans, *General Theory of Law and State*, Cambridge, Massachusetts 1945; Kelsen, Hans, *Reine Rechtslehre*, 2d. ed., Wien 1992 [1960].

<sup>6</sup> Ross, Alf, *On Law and Justice*, Berkeley & Los Angeles 1959.

<sup>7</sup> Hart, H. L. A., *The Concept of Law*, Oxford 1961; Hart, H. L. A., *Essays on Bentham*, Oxford 1982.

<sup>8</sup> Raz, Joseph, *The Authority of Law*, Oxford 1979, Ch. 3; Raz, Joseph, *Authority, Law and Morality*, *The Monist* Vol. 68 1985, p. 295-324.

<sup>9</sup> MacCormick, Neil & Weinberger, Ota, *An Institutional Theory of Law*, Dordrecht 1986.

<sup>10</sup> See also Gardner, John, *Legal Positivism: 5 1/2 Myths*, in *American Journal of Jurisprudence* Vol. 46 2001, p. 199 and Hartney, Michael, *Dyzenhaus on Positivism and Judicial Obligation*, in *Ratio Juris* Vol. 7 1994, p. 48-51.

<sup>11</sup> See MacCormick, Neil, *Legal Reasoning and Legal Theory*, 2d. ed., Oxford 1994, p. 5; Kelsen *GTLS*, *supra* note 5, p. 13-14.

<sup>12</sup> See Raz, *AL*, *supra* note 8, p. 39.

<sup>13</sup> Kelsen *GTLS*, *supra* note 5, p. 19.

<sup>14</sup> See Dancy, Jonathan, *Editor's Introduction*, *Normativity* (Jonathan Dancy ed.) Oxford 2001, p. 1.

cepting moral normativity of course. The reason is that law necessarily claims to *trump* moral and other reasons for action.<sup>15</sup> That is to say, law does not, except in extreme cases, recognize as legally relevant conflicts between legal and moral reasons for action. From the viewpoint of the courts, acts of civil disobedience and conscientious objection cannot be accepted, unless there is a legal norm authorizing the judge to take certain moral arguments into account.<sup>16</sup>

Now, as many writers have noted, the obvious way to account for the normativity of law is to argue that having a legal right or obligation is having a special kind of *moral* right or obligation. Ronald Dworkin,<sup>17</sup> Lon Fuller,<sup>18</sup> and Aleksander Peczenik,<sup>19</sup> among others, have analyzed the normativity of law along these lines. This conception, which I shall refer to as the *moral conception of law's normativity*, is attractive, because it makes it clear why we should care about our legal rights and obligations and why we should obey the law. For on this analysis, a person who is *legally* obligated to do *X* is necessarily *morally* obligated to do *X*; and that explains why we should be interested in our legal rights and obligations, and it also explains (roughly) what it *means* to have an obligation to obey the law.

But not everyone believes that having a legal right or obligation is having a special kind of moral right or obligation. Some maintain instead that having a legal right or obligation is having a sort of strictly legal right or obligation, that is, a legal right or obligation *sui generis*.<sup>20</sup> H. L. A. Hart's critique of John Austin's theory of law illustrates (what I shall refer to as) the *strictly legal conception of law's normativity*. Hart 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* (or forced) to do it.<sup>21</sup> 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 to Hart because, he says, “[I]aw surely is not the gunman situation writ large, and legal order is surely not to be thus simply identified with compulsion.”<sup>22</sup>

<sup>15</sup> When I say that the *law* makes a claim, I mean that *judges* – the law's spokesmen – make that claim when they act on behalf of the law. See Alexy, Robert, *Law and Correctness, Legal Theory at the End of the Millennium* (M. D. A. Freeman ed.) 1998, p. 205; Soper, Philip, *The Ethics of Deference*, Cambridge 2002, p. 7.

<sup>16</sup> This is nicely illustrated by the Supreme Court's reasoning in the Swedish case NJA 1982 s 621.

<sup>17</sup> Dworkin, Ronald, *Taking Rights Seriously*, 2d. ed. London 1978, Ch. 4.

<sup>18</sup> Fuller, Lon L., *Positivism and the Fidelity to Law: A Reply to Professor Hart*, Harvard Law Review Vol. 71 1958, p. 644-57.

<sup>19</sup> Peczenik, Aleksander, *Vad är rätt?*, Stockholm 1995, p. 527-8.

<sup>20</sup> The term 'strictly legal' is my own invention. See Spaak, Torben, (Review of) *Rex Martin, A System of Rights* Theoria, Vol. 61 1995, p. 80. It has not been used by Kelsen, Hart or other leading legal positivists.

<sup>21</sup> Hart, *CL*, *supra* note 7, p. 79-88.

<sup>22</sup> Hart, H. L. A., *Positivism and the Separation of Law and Morals*, Harvard Law Review Vol. 71 1958, p. 603.

Hart maintains that what is missing in Austin's theory is the idea of a *rule*.<sup>23</sup> According to Hart, we need the idea of a rule in our analysis of the concept of a *legal obligation*. For to say that someone has an obligation (legal or moral) to perform an action is to assume a *back-ground of rules* that makes certain behavior standard, and to *apply a rule* to that person and his behavior.<sup>24</sup> Such duty-imposing rules, Hart tells us, are "conceived as binding independently of the consent of the individual bound."<sup>25</sup>

Now according to Hart, a statement that a person has a legal obligation refers to an action that is "due from or owed by" the person having the obligation, in the sense that it "may be properly demanded or extracted from him according to legal rules or principles regulating such demands for action."<sup>26</sup> On this analysis, when a judge states that someone has a legal obligation to pay his taxes, say, he may mean to "speak in a technically confined way," that is, he may mean to speak *from within* a legal institution that he is committed as a judge to maintain; and in so doing he draws attention to what may be *legally* demanded of the person having the obligation.<sup>27</sup> Although the judge may morally approve of this obligation, his moral approval is *not* part of the *meaning* of his legal statement.<sup>28</sup>

The strictly legal conception of law's normativity is problematic, however. The main problem is that it seems to be impossible to combine it with the thesis that law necessarily claims to trump moral and other reasons for action.<sup>29</sup> For how can a judge, who conceives of legal reasons for action as something that necessarily trumps moral and other reasons for action, also think of himself as speaking from within an institution in the sense indicated by Hart? Hart himself notes that "to many it will seem paradoxical, or even a sign of confusion, that . . . I should argue that judicial statements of the subject's legal duties need have nothing directly to do with the subject's reasons for action."<sup>30</sup> I fear that I am one of the many.<sup>31</sup>

Let us now turn to consider Kelsen's and Hart's analyses of law's normativity in order to see how they understood the problems involved and how they proposed to solve them. Let us begin with Kelsen's analysis.

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<sup>23</sup> Hart, *CL*, *supra* note 7, p. 78.

<sup>24</sup> *Id.* p. 83.

<sup>25</sup> *Id.* p. 168.

<sup>26</sup> Hart, *EB*, *supra* note 7, p. 159-60.

<sup>27</sup> *Id.* p. 266.

<sup>28</sup> *Id.* p. 266.

<sup>29</sup> For a version of this thesis, See Joseph Raz, *Practical Reason and Norms*, 2d. ed., Princeton 1990, p.151-2

<sup>30</sup> Hart, *EB*, *supra* note 7, p. 267.

<sup>31</sup> See also Raz, Joseph, *Hart on Moral Rights and Legal Duties*, in *Oxford Journal of Legal Studies* Vol. 4 1983, p. 129-31.

### 3 Kelsen's Account of the Normativity of Law

#### 3.1 Kelsen's Theory of Law

The Pure Theory of Law is a general theory of law that conforms to the requirements of *legal positivism*.<sup>32</sup> As such, it aims to understand the law as it is, not as it ought to be, and its method is structural analysis.<sup>33</sup> More specifically, it provides us with a set of fundamental legal concepts – such as ‘legal system,’ ‘norm,’ ‘right,’ ‘duty,’ ‘sanction,’ and ‘imputation’ – that we can make use of when trying to understand and describe the law in a scientific manner.<sup>34</sup> We might say that the Pure Theory aims to lay down the theoretical basis for other legal disciplines, such as contract law, constitutional law, legal history, comparative law, etc.<sup>35</sup>

The Pure Theory conceives of law as a *system of norms*,<sup>36</sup> which norms function as schemes of interpretation in light of which we can view human behavior and other natural events.<sup>37</sup> The *structure* of such a system is described by Kelsen as a *Stufenbau*, that is, a structure of norms on different levels where norms on a higher level authorize the creation of norms on a lower level.<sup>38</sup> On Kelsen's analysis, a *norm* is the meaning of an act of will directed at the behavior of another. As such it expresses – just like the orders issued by a Mafia boss – a *subjective* ought. Legal norms differ, however, from the orders issued by the Mafia boss in that they also express an *objective* ought: that the act in question ought to be performed not only from the viewpoint of the person positing the norm, but also from the viewpoint of the person whose behavior the norm regulates, and from the viewpoint of a neutral third party.<sup>39</sup>

To say that a legal norm is *valid*, Kelsen explains, is to say that it *exists*, and to say that it exists is to say that it *ought* to be obeyed or applied, that it has *binding force*.<sup>40</sup> To say that a valid legal norm expresses an *objective ought* is just another way of expressing the same idea. Kelsen maintains, in keeping with the separation thesis, that legal validity is conceptually independent of morality: “[t]here is no kind of human behavior that, because of its nature, could not be

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<sup>32</sup> Kelsen, *GTLS*, *supra* note 5, p. xiii; Kelsen, Hans, *On the Pure Theory of Law*, Israel Law Review Vol. 1 1966, p. 5.

<sup>33</sup> Kelsen, *RR II*, *supra* note 5, p. 112.

<sup>34</sup> Kelsen, Hans, *The Function of the Pure Theory of Law*, Law: A Century of Progress 1835 to 1935. Vol. 2 1937, p. 231; Kelsen, *GTLS*, *supra* note 5, p. xiii-xiv.

<sup>35</sup> Kelsen, *Function*, *supra* note 34, p. 232.

<sup>36</sup> Kelsen *RR II*, *supra* note 5, p. 215-21. See also Kelsen, *GTLS*, *supra* note 5, p. 3.

<sup>37</sup> Kelsen *RR II*, *supra* note 5, p 3-4. See also Kelsen, *GTLS*, *supra* note 5, p. 41.

<sup>38</sup> Kelsen *RR II*, *supra* note 5, p. 228.

<sup>39</sup> *Id.* p. 4-5, 7-8, 45-6; Kelsen, Hans, *What is the Pure Theory of Law?*, 34 Tulane Law Review Vol. 34 1959/60, p. 270.

<sup>40</sup> Kelsen *RR II*, *supra* note 5, p. 9-10. See also Kelsen, *GTLS*, *supra* note 5, p. 30, 39. Kelsen thus treats ‘norm’ and ‘valid norm’ as synonyms, which means that a non-valid norm is not a norm at all. For the sake of simplicity, I will sometimes allow myself to depart from Kelsen's usage and speak of non-valid norms.

made into a legal duty corresponding to a legal right.”<sup>41</sup> He also maintains, in keeping with the is/ought distinction, that the validity of a given legal norm can only be explained by reference to the validity of another and higher legal norm. Thus a norm,  $n_1$ , is legally valid if, and only if, it was created in accordance with another and higher legally valid norm,  $n_2$ , which in turn is legally valid if, and only if, it was created in accordance with another and higher legally valid norm,  $n_3$ , etc.<sup>42</sup>

We should note here that Kelsen accepts as fundamental and self-evidently correct the distinction between what *is* and what *ought to be*,<sup>43</sup> between the world of is and the world of ought, as he used to say in his earlier writings.<sup>44</sup> He conceives of ‘is’ (*Sein*) and ‘ought’ (*Sollen*) as two fundamental and distinct categories or modes of thought,<sup>45</sup> and he takes the meaning of ‘ought’ to be intuitively clear, expressing “the specific sense in which human behaviour is determined by a norm.”<sup>46</sup> ‘Ought,’ he says, is a simple notion, and it can therefore not be defined:<sup>47</sup> “ebensowenig, wie man beschreiben kann, was das Sein oder das Denken ist, ebensowenig gibt es eine Definition des Sollens.”<sup>48</sup>

Law, then, is a *normative* phenomenon, and as such it must be carefully distinguished from factual phenomena,<sup>49</sup> but also from other normative phenomena.<sup>50</sup> Since this is so, legal scholars can invoke neither (i) empirical considerations from psychology, sociology, economics, political science, etc., nor (ii) normative considerations from ethics, theology, etc. in their analyses of the law.<sup>51</sup> As Kelsen says, the basic methodological aim of the Pure Theory is to free the study of law from all foreign elements, to avoid methodological syncretism.<sup>52</sup> This is what the purity of the Pure Theory amounts to.

As one might expect, Kelsen rejects John Austin’s command theory of law.<sup>53</sup> He maintains instead that a command can be binding only if the commander has the legal power to issue that command, and that the commander’s legal power depends on the existence of a legal system that confers on him the requisite legal power. Hence a gangster’s command that you hand over your money to him cannot be binding, as there is no valid legal norm conferring legal power on the gangster to issue such commands. Kelsen concludes that Austin wrongly thought

<sup>41</sup> Kelsen, *GTLS*, *supra* note 5, p. 113. See also Kelsen, *RR II*, *supra* note 5, p. 200-1.

<sup>42</sup> Kelsen, *RR II*, *supra* note 5, p. 196-7. See also Kelsen, *GTLS*, *supra* note 5, p. 110-1.

<sup>43</sup> Kelsen *RR II*, *supra* note 5, p. 5-6. See also Kelsen, *GTLS*, *supra* note 5, p. 36-7, 110-1.

<sup>44</sup> Kelsen, Hans, *Hauptprobleme der Staatsrechtslehre*, 1911, p. 7-10.

<sup>45</sup> *Id.* p. 7-8.

<sup>46</sup> Kelsen, *GTLS*, *supra* note 5, p. 37. Negatively, Kelsen says that “p ought to do A” means neither that the speaker or someone else wants p to do A, nor that p will in fact do A. *Id.* p. 37.

<sup>47</sup> Kelsen, *RR II*, *supra* note 5, p. 5, note \*. He holds that G. E. Moore’s characterization of ‘good’ – that it is a simple notion like ‘yellow’ – applies to ‘ought,’ too. *Id.* p. 5, note \*.

<sup>48</sup> Kelsen, *Hauptprobleme*, *supra* note 44, p. 7.

<sup>49</sup> *Id.* p. 1-2.

<sup>50</sup> Kelsen *RR II*, *supra* note 5, p. 61.

<sup>51</sup> *Id.* at 1. See also Kelsen, *On the Pure Theory*, *supra* note 32, p. 2-3.

<sup>52</sup> Kelsen *RR II*, *supra* note 5, p. 1.

<sup>53</sup> Kelsen, *GTLS*, *supra* note 5, p. 30-2. See also Kelsen, *RR II*, *supra* note 5, p. 45-6.

he could derive the binding force of a command from the command itself, when instead he should have focused on the conditions under which the command is issued.

### 3.2 *The Basic Norm as Hypothesis*

When tracing the validity of a given legal norm through the chain of validity, one finally arrives at the historically first constitution. Since that constitution cannot have been created in accordance with another and higher valid norm, Kelsen terminates the chain of validity by simply *presupposing* that we ought to behave in accordance with the historically first constitution.<sup>54</sup> He calls this presupposition the *basic norm (die Grundnorm)*, and explains that it is "the final postulate, upon which the validity of all the norms of our legal system depends."<sup>55</sup> So the basic norm is the tool we use to distinguish between law and coercion, between being obligated and being obliged,<sup>56</sup> which means that it grounds the normativity of law.

Kelsen emphasizes that although the basic norm refers directly to a specific constitution in an efficacious legal system,<sup>57</sup> the moral value of the legal system does not enter into consideration when one presupposes the basic norm. On the contrary, "[i]n der Voraussetzung der Grundnorm wird kein dem positiven Recht transzendenter Wert bejaht."<sup>58</sup> Accordingly, he maintains that one may well presuppose the basic norm in a situation where the Mafia has effective control over a certain geographical area, thus excluding competing coercive orders, and so consider their coercive order a legal system.<sup>59</sup> He admits, to be sure, that we may ask *why* we ought to obey the historically first constitution, but points out that it is characteristic of legal positivism to *dispense* with religious and moral justifications of law.<sup>60</sup>

Although Kelsen seems to take the ontological basis of norms to be the norm-giver's *will*, he characterizes the basic norm as an *epistemological* device for conceiving of the legal materials as valid legal norms:

So wie Kant fragt: wie ist eine von aller Metaphysik freie Deutung der unseren Sinnen gegebenen Tatsachen in den von der Naturwissenschaft formulierten Naturgesetzen möglich, so fragt die Reine Rechtslehre: wie ist eine nicht auf meta-rechtliche Autoritäten wie Gott oder Natur zurückgreifende Deutung des subjektiven Sinns gewisser Tatbestände als ein System in Rechtssätzen beschreibbarer objektiv gültiger Rechtsnormen möglich? Die

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<sup>54</sup> Kelsen *RR II*, *supra* note 5, p. 197, 203. See also Kelsen, *GTLS*, *supra* note 5, p. 115.

<sup>55</sup> Kelsen, *GTLS*, *supra* note 5, p. 115.

<sup>56</sup> Kelsen *RR II*, *supra* note 5, p. 204-9. See also Kelsen, *GTLS*, *supra* note 5, p. 115-7.

<sup>57</sup> Kelsen *RR II*, *supra* note 5, p. 204.

<sup>58</sup> *Id.* p. 204. See also *id.* p. 223-4.

<sup>59</sup> Kelsen, *GTLS*, *supra* note 5, p. 45-9. See also Kelsen *RR II*, *supra* note 5, p. 223-4.

<sup>60</sup> Kelsen, *GTLS*, *supra* note 5, p. 116.

erkenntnistheoretische Antwort der Reinen Rechtslehre lautet: unter der Bedingung, daß man die Grundnorm voraussetzt.<sup>61</sup>

This characterization makes it clear that the act of presupposing the basic norm is really an *act of cognition*, not an act of volition, and that therefore the basic norm is the meaning of an act of *thinking*, not the meaning of an act of will.<sup>62</sup> It is also in keeping with Kelsen's view that anyone interested in conceiving of the law as a system of valid norms – judges, lawyers, legal scholars, ordinary citizens – *may but does not have to* presuppose the basic norm:

Die Grundnorm kann, muß aber nicht vorausgesetzt werden. Was die Ethik und Rechtswissenschaft von ihr aussagt ist: Nur *wenn* sie vorausgesetzt wird, kann der subjektive Sinn der auf das Verhalten anderer gerichteten Willensakte auch als ihr objektiver Sinn, können diese Sinngehalte als verbindliche Moral- oder Rechtsnormen gedeutet werden. Da diese Deutung durch die Voraussetzung der Grundnorm bedingt ist, muß zugegeben werden, daß Soll-Sätze nur in diesem *bedingten* Sinne als objektiv gültige Moral- oder Rechtsnormen gedeutet werden können.<sup>63</sup>

### 3.3 The Basic Norm as Fiction

After years of referring to the basic norm as a *hypothesis*,<sup>64</sup> Kelsen changed his mind in the beginning of the 1960's, suggesting instead that we think of it as a *fiction* as that concept is understood in Hans Vaihinger's Philosophy of As-If.<sup>65</sup> Having maintained for a long time that the basic norm is really the meaning of an act of thinking, Kelsen now emphasizes that there is an important correlation between will (*Wollen*) and ought (*Sollen*), so that there can be no norm without a corresponding act of will.<sup>66</sup> Accordingly, he explains that presupposing the basic norm involves presupposing an imaginary authority, over and above the "fathers" of the historically first constitution, whose act of will has the basic norm as its meaning.<sup>67</sup> But, he points out, this means that the notion of the basic norm *contains a contradiction within itself*, as it involves presupposing the existence of an authority that *could not possibly exist*.<sup>68</sup>

Kelsen concludes that the basic norm is best described as a genuine fiction in the Vaihingerian sense. Following Vaihinger, he conceives of a fiction as an *aid to thought* (*ein Denkbehelf*) to be used when one cannot reach one's aim of

<sup>61</sup> Kelsen *RR II*, *supra* note 5, p. 205.

<sup>62</sup> *Id.* p. 205-6.

<sup>63</sup> Kelsen, Hans, *Allgemeine Theorie der Normen* (Kurt Ringhofer & Robert Walter, eds.) Wien 1979, p. 206. *See also* Kelsen *RR II*, *supra* note 5, p. 223-4.

<sup>64</sup> *See, e.g.*, Kelsen, *GTLS*, *supra* note 5, p. 116.

<sup>65</sup> Kelsen, Hans, *Die Funktion der Verfassung*, (Neues) Forum Vol. 132 1964, p. 585; Kelsen, *On the Pure Theory*, *supra* note 32, p. 6-7; Kelsen, *ATN*, *supra* note 63, p. 206-7. *See also* Vaihinger, Hans, *Die Philosophie des Als Ob* (4th. ed.) 1920.

<sup>66</sup> Kelsen, *Verfassung*, *supra* note 65, p. 585.

<sup>67</sup> *Id.* p. 585.

<sup>68</sup> *Id.* p. 585.

thought (*Denkzweck*) with the materials available.<sup>69</sup> Kelsen's aim of thought, as we have seen, is to ground the normativity of the legal system, and he admits that he can achieve this goal only by introducing a fiction, viz. the basic norm.

Kelsen scholars have been debating whether the change of status of the notion of the basic norm is an important event in the development of Kelsen's theory of the basic norm and, therefore, of the Pure Theory. Iain Stewart, for example, contends that this change signifies the Pure Theory's, indeed legal positivism's, swan song,<sup>70</sup> whereas Richard Tur and Robert Walter are of the opinion that the change is of little consequence.<sup>71</sup> Stewart maintains, more specifically, that if the concept of a basic norm is a fiction, then everything that follows from it, such as the concept of a legal system, must be fictional too.<sup>72</sup> I agree with Stewart that if the concept of a basic norm, properly understood, is self-contradictory, then it has to go. I am not, however, convinced that there is such a close connection between will (*Wollen*) and ought (*Sollen*) as Kelsen assumes. In fact, I am not even convinced that we need to conceive of the basic norm as a *norm*. We might simply think of it as a *presupposition* that the historically first constitution is legally valid – and as such it is not contradictory.

### 3.4 The Basic Norm and the Normativity of Law

We see, then, that Kelsen's proposed solution to the problem about the normativity of law, considered within the framework of legal positivism, is to presuppose the basic norm conceived of either as an hypothesis or as a fiction. But is this really a solution to our problem? As we shall see, the answer to this question depends on which conception of legal normativity we have in mind.

Joseph Raz has made an attempt to reconstruct the theory of the basic norm in its role as an explanation of the normativity of law.<sup>73</sup> Raz introduces the notion of a *legal man* – a man who accepts all and only the laws of his country as morally valid, as his personal morality, as it were, because he morally endorses the basic norm –<sup>74</sup> and suggests that legal scholars should adopt this point of view in “a special professional and uncommitted sense” of ‘adopt.’<sup>75</sup> Specifically, he suggests legal scholars should view the law from the legal man's

<sup>69</sup> *Id.* p. 585.

<sup>70</sup> Stewart, Iain, *The Basic Norm as Fiction*, Juridical Review 1980, p. 207-8. See also Paulson, Stanley L., *Kelsen's Legal Theory: The Final Round*, Oxford Journal of Legal Studies Vol. 12, p. 268-70; Alf Ross, *Directives and Norms*, 1968, p. 29-33, 156-8; Stewart, Iain, *Kelsen and the Exegetical Tradition*, in *Essays on Kelsen* (Richard Tur & William Twining, eds.) 1986, p. 131-5.

<sup>71</sup> Tur, Richard, *The Kelsenian Enterprise*, in *Essays on Kelsen*, *supra* note 70, p. 167-75; Walter, Robert, *Zum Versuch einer Kritik der Reinen Rechtslehre*, *Rechtstheorie* Vol. 21 1990, p. 148-9.

<sup>72</sup> Stewart, *The Basic Norm as Fiction*, *supra* note 70, p. 208.

<sup>73</sup> Raz, AL, *supra* note 8, p. 122-45; Raz, Joseph, *The Purity of the Pure Theory*, *Revue Internationale de Philosophie* Vol. 138 1981, p. 441.

<sup>74</sup> Raz, AL, *supra* note 8, p. 140. See also Raz, *Purity*, *supra* note 73 p. 451-2.

<sup>75</sup> Raz, AL, *supra* note 8, p. 142-3. Note that Raz uses the verb ‘adopt’ rather than ‘presuppose.’

point of view “as if it is valid or on the hypothesis that it is . . . but without actually endorsing it.”<sup>76</sup> On this analysis, there is no specifically legal normativity, but only a “specifically legal way in which normativity can be considered”,<sup>77</sup> in that the validity of the constitution is simply (non-committally) assumed.<sup>78</sup>

I find Raz’s analysis illuminating.<sup>79</sup> For one thing, it is in keeping with the notions that legal validity is conditional upon presupposing the basic norm and that one may, but does not have to, presuppose the basic norm. Moreover, it is in keeping with the notion that one may presuppose the basic norm even in a situation of Mafia-rule. But, as should be clear, the theory of the basic norm thus conceived can only account for the normativity of law in the *strictly legal* sense.<sup>80</sup> On this reading, Kelsen appears as a positivistic hard-liner much like John Austin, and we may therefore conclude that Kelsen was indeed concerned to account for the normativity of law in the strictly legal sense.

## 4 Hart’s Account of Law’s Normativity

Like Kelsen, Hart conceives of law as a system of norms, the foundation of which is a single, fundamental norm. And just as Kelsen’s account of law’s normativity rests ultimately on a fundamental, presupposed norm (the basic norm), Hart’s account of law’s normativity rests ultimately on a fundamental, accepted norm, which he calls the rule of recognition. The problem Hart faces is therefore the same problem as Kelsen faced, viz. to explain how this fundamental norm can ground the normativity of law.

### 4.1 Hart’s Theory of Law

Like Kelsen, Hart offers a general theory of law that conforms to the requirements of *legal positivism*. Like Kelsen, Hart conceives of law as a *system of norms*, or as he says, rules. More specifically, he conceives of law as a system of primary duty-imposing rules and secondary rules of change, adjudication and recognition.<sup>81</sup> Duty-imposing rules are of course the paradigm of rules, as they

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<sup>76</sup> *Id.* p. 157.

<sup>77</sup> *Id.* p. 145.

<sup>78</sup> Raz, *Purity*, *supra* note 73, p. 459.

<sup>79</sup> But note that Raz’s analysis has been criticized by a number of legal scholars. *See, e.g.*, Bindreiter, Uta U., *Why Grundnorm?*, Dordrecht 2002, p. 94-5; Paulson, Stanley L., *Kelsen Without Kant*, in *Öffentliche oder private Moral? Festschrift für Ernesto Garzón Valdès* (Werner Krawietz & Georg Henrik von Wright, eds.) Berlin 1992, p.160-2; Vernengo, Roberto J., *Kelsen’s Rechtsätze as Detached Statements*, *Essays on Kelsen*, *supra* note 70, p. 99; Wilson, Alida, *Joseph Raz on Kelsen’s Basic Norm*, *American Journal of Comparative Law* Vol. 27 1982, p. 46.

<sup>80</sup> James Harris Seems to share this view, though he does not accept Raz’s analysis and does not speak of ‘strictly legal normativity.’ *See* Harris, James W., *Kelsen’s Pallid Normativity*, *Ratio Juris* Vol. 9:1 1996, p. 94.

<sup>81</sup> Hart, *CL*, *supra* note 7, at 91.

directly guide human behavior by giving reasons for action: no normative system can do without them. The secondary rules, on the other hand, are about the primary rules in the sense that they are used to identify, and to create, change, and extinguish primary rules, and to set up legal institutions that apply the primary rules. Specifically, *rules of change* confer legal power on persons, thus enabling them to change legal positions;<sup>82</sup> *rules of adjudication* constitute courts and other law-applying organs and regulate their activities;<sup>83</sup> and the *rule of recognition* lays down criteria for the identification of the rules of the system.<sup>84</sup> According to Hart, the introduction of these three types of secondary rules into a set of primary rules may be considered “the step from the pre-legal to a legal world.”<sup>85</sup>

#### 4.2 *The Rule of Recognition*

The rule of recognition fulfills two important functions. First, it *identifies and ranks* the sources of law: legislation, precedent, custom, etc.<sup>86</sup> Second, it constitutes the ultimate source of law’s normativity by imposing a legal duty on the officials to apply all and only norms that meet the criteria of validity laid down in it.<sup>87</sup> The second function clearly presupposes that normativity can somehow be transmitted from the highest level of the *Stufenbau* down to the lower levels.

To be sure, Hart does not explicitly state that the rule of recognition constitutes the ultimate source of law’s normativity, that the normative force of a given legal rule depends on the normative force of the rule of recognition. But he clearly thinks it does.<sup>88</sup> Why else would he insist—as laid down by his theory of social rules—that the rule of recognition is a *rule*, as distinguished from a mere habit, and that a legal rule is valid if, and only if, it has been created in accordance with another and higher legal rule, and ultimately in accordance with the rule of recognition?<sup>89</sup>

The rule of recognition is a *customary* or, as Hart says, a *social* rule. In other words, it is a rule by virtue of being *accepted* by a certain group of people, viz. the legal officials. So whereas other legal rules exist in the sense that they meet

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<sup>82</sup> *Id.* p. 93-4.

<sup>83</sup> *Id.* p. 94-5.

<sup>84</sup> *Id.* p. 92-3.

<sup>85</sup> *Id.* p. 91.

<sup>86</sup> *Id.* p. 97-107.

<sup>87</sup> On this issue, See Dworkin, *TRS*, *supra* note 17, p. 48-51; MacCormick, Neil, *H. L. A. Hart*, Stanford 1981, p. 110; Raz, Joseph, *The Concept of a Legal System*, 2. ed., Oxford 1980, p. 199.

<sup>88</sup> See Dworkin, *TRS*, *supra* note 17, p. 21; Postema, Gerald J., *Coordination and Convention at the Foundations of Law*, *Journal of Legal Studies* Vol. 11 1982, p. 170.

<sup>89</sup> Hart has criticized Kelsen for speaking of the *validity* of the basic norm, asserting that the rule of recognition “can neither be valid nor invalid but is simply accepted as appropriate for use . . . .” Hart, CL, *supra* note 7, p. 105-6. But since Hart takes ‘valid’ to mean ‘satisfies all the criteria provided by the rule of recognition,’ *Id.* p. 100, his criticism does not show that he is indifferent to the normativity of the rule of recognition.

the criteria of validity laid down in the rule of recognition, the rule of recognition itself “exists only as a complex, but normally concordant, practice of the courts, officials, and private persons in identifying the law by reference to certain criteria.”<sup>90</sup> This means that “[f]or the most part the rule of recognition is not stated, but its existence is *shown* in the way in which particular rules are identified, either by courts or other officials . . . .”<sup>91</sup>

Social rules, Hart explains, have an *internal* aspect, in addition to the *external* aspect that they share with habits, and which consists in a certain regularity of behavior.<sup>92</sup> Accordingly, his account of the normativity of social rules centers on this internal aspect, or more specifically, on the characteristic pro-attitude toward the rules among those concerned that he refers to as the *internal point of view*. He describes the internal point of view as “a critical reflective attitude to certain patterns of behaviour as a common standard,”<sup>93</sup> which displays itself in criticism of deviant behavior and in recognition that such criticism is justified, etc.<sup>94</sup>

So, on Hart’s theory, there is a Danish (say) rule of recognition if Danish legal officials (i) display a regular pattern of behavior with regard to the identification and ranking of the sources of law (the external aspect), and (ii) have a steady commitment in favor of acting in accordance with this pattern of behavior (the internal aspect).<sup>95</sup> And this rule of recognition constitutes the ultimate source of normativity of Danish law in that it imposes on the legal officials a legal duty to apply all and only those rules identified in accordance with it.

Note that on Hart’s theory, part of the reason for each official to comply with the rule of recognition is that other officials comply with it.<sup>96</sup> As Hart has made clear, legal officials must view the rule of recognition as a “common standard of correct judicial decision, and not as something which each judge obeys merely for his part only.”<sup>97</sup> The rule of recognition can therefore be described as a *conventional* rule.<sup>98</sup>

Hart’s rule of recognition differs from Kelsen’s basic norm in several respects.<sup>99</sup> The most important one is that whereas the rule of recognition is a social rule, the basic norm is merely a presupposition, an idea in the minds of legal scholars and others. Whereas Hart makes it clear that he grounds law’s

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<sup>90</sup> Hart, *CL*, *supra* note 7, p. 107. Strictly speaking, the rule of recognition is addressed only to the legal officials. See Raz, *CLS*, *supra* note 87, p. 198.

<sup>91</sup> Hart, *CL*, *supra* note 7, p. 98.

<sup>92</sup> *Id.* p. 54-6.

<sup>93</sup> *Id.* p. 56.

<sup>94</sup> *Id.* p. 56.

<sup>95</sup> For an analysis of the place of the rule of recognition in American law, See Greenawalt, Kent, *The Rule of Recognition and the Constitution*, Michigan Law Review Vol. 85 1987, p. 621.

<sup>96</sup> Hart, H. L. A., *The Concept of Law*, 2d. ed. (With a postscript edited by Penelope A. Bulloch & Joseph Raz) Oxford 1994, p. 255.

<sup>97</sup> Hart, *CL*, *supra* note 7, p. 112.

<sup>98</sup> Hart, *CL II*, *supra* note 96, p. 255.

<sup>99</sup> Hart himself has commented on these differences. Hart, *CL*, *supra* note 7, p. 245-6.

normativity in social facts, Kelsen avoids this strategy, as he believes it violates the is/ought distinction. Kelsen could thus accept the rule of recognition as a criterion of validity, but not as the source of law's *normativity*.

### 4.3 *The Rule of Recognition and the Normativity of Law*

We see, then, that Hart's proposed solution to the problem about the normativity of law, considered within the framework of legal positivism, is to point to the rule of recognition. But is this an adequate solution to our problem? As we shall see, the answer to this question – like the answer to the corresponding question about the basic norm – depends on which conception of law's normativity we have in mind.

Let us begin by asking whether the rule of recognition is best understood as a moral or as a non-moral rule. Lon Fuller maintains that the rule of recognition must be a *moral* rule, because it will have to derive its efficacy “from a general acceptance, which in turn rests ultimately on a perception that [it is] right and necessary.”<sup>100</sup> The idea, then, is that unless the officials morally approve of the rule of recognition, they will not look upon it as a standard to be complied with, or criticize those who do not comply, etc. On this analysis, the internal point of view is a moral point of view and the rule of recognition is therefore a moral rule.

To be sure, when accepting the rule of recognition, the legal officials are, strictly speaking, accepting a customary rule laying down essentially *factual* criteria of validity. One might, therefore, be tempted to argue that the rule of recognition has nothing to do with morality. I doubt, however, whether the officials can really disregard the actual content and function of the legal system in question when contemplating whether to accept the rule of recognition. If, for example, the legal system were grossly immoral, wouldn't this influence the legal officials' acceptance? I think it would. If I am right, accepting the rule of recognition involves accepting the legal system, and acceptance of the legal system would seem to be a paradigm case of moral acceptance.

Nevertheless, Hart denies that the legal officials who accept the rule of recognition need consider themselves morally bound to do so:

Not only may vast numbers be coerced by laws which they do not regard as morally binding, but it is not even true that those who do accept the system voluntarily, must conceive of themselves as morally bound to do so, though the system will be most stable when they do so. In fact, their allegiance to the system may be based on many different considerations: calculations of long-term interest; disinterested interest in others; an unreflecting inherited or traditional attitude; or the mere wish to do as others do. There is indeed no reason why those who accept the authority of the system should not examine their conscience and decide that, morally, they ought not to accept it, yet for a variety of reasons continue to do so.<sup>101</sup>

<sup>100</sup> Fuller, *Positivism*, *supra* note 18, p. 639. See also Goldsworthy, Jeffrey D., *The Self-Destruction of Legal Positivism*, *Oxford Journal of Legal Studies* Vol. 10 1990, p. 460.

<sup>101</sup> Hart, *CL*, *supra* note 7, at 198-9. See also Hart, *EB*, *supra* note 7, p. 265; Hart, *CL II*, *supra*

Of course, one *can* accept a rule for non-moral reasons. One can, for example, accept a rule that one should spend time outdoors on sunny days for non-moral reasons, since this is simply not a matter of morality. But can a judge really accept the *rule of recognition*, the foundation of the legal system, for non-moral reasons? I don't think so. As I see it, a judge who thinks of himself as *obligating* – as distinguished from simply coercing – a person to pay back a loan, or to spend time in jail, etc., will have to accept the rule of recognition for moral reasons, or, at the very least, pretend that he does.<sup>102</sup> For as Joseph Raz has convincingly argued, one can accept a *personal* rule for reasons of self-interest, but one cannot coherently accept a rule that imposes *obligations* on *others*, such as the rule of recognition, for other than moral reasons.<sup>103</sup> One might, for example, hold that sticking to the rule even when it yields bad results will yield better consequences on the whole than a strategy of picking and choosing would. This argument becomes even more persuasive when considering that on Hart's theory, duty-imposing rules differ from other rules, *inter alia*, by being more important.<sup>104</sup>

Hart maintains, however, that inclusion of a moral component in the judges' acceptance of the rule of recognition conveys an unrealistic picture of the way judges conceive of their task of identifying and applying the law.<sup>105</sup> According to Hart, when a judge takes up his office he finds a "firmly settled practice of adjudication," which requires him to apply the legal norms identified by certain criteria, a practice that determines the central duties of his office.<sup>106</sup> In this situation judges "are committed in advance in the sense that they have a settled disposition to do this [that is, apply the rule of recognition] without considering the merits of so doing in each case and indeed would regard it not open to them to act on their view of the merits."<sup>107</sup>

But Hart's analysis does not show that the judge's "settled disposition" is not a moral disposition.<sup>108</sup> My own view is that most judges have this disposition because they consider the legal system on the whole to be worthy of moral approval – if things would change for the worse they would gradually give up that disposition.

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note 96, p. 257.

102 R.A. Duff clearly believes that acceptance of the rule of recognition is a matter of moral acceptance, since he maintains that to accept a rule for reasons of self-interest or habit is to not accept it at all. For, he explains, "such a relationship to the rules is defective by the standards of the practice itself." Duff, R. A., *Legal Obligation and the Moral Nature of Law*, Juridical Review Vol. 25 1980, p. 72. The reason, he explains, is that the acceptance of a rule involves accepting the moral values internal to the rule. *Id.* p. 70.

103 Raz, Joseph, *Hart on Moral Rights and Legal Duties*, Oxford Journal of Legal Studies Vol. 4:1 1983, p. 130-1; Raz, *Purity*, *supra* note 73, p. 454-5.

104 Hart, *CL*, *supra* note 7, p. 84-5. For an analysis of this issue, See Hill, Roscoe E., *Legal Validity and Legal Obligation*, Yale Law Journal Vol. 80 1970, p. 61-7.

105 Hart, *EB*, *supra* note 7, p. 158.

106 *Id.* p. 158.

107 *Id.* p. 158-9.

108 See Postema, Gerald J., *The Normativity of Law*, in *Issues in Contemporary Jurisprudence: The Influence of H. L. A. Hart* (Ruth Gavison, ed.) 1987, p. 94-5.

If, then, we assume that the rule of recognition is best understood as a moral rule, what follows in regard to the normativity of law? My view is that the normative force of the rule of recognition cannot be transmitted down to the lower levels of the *Stufenbau*. For it does not follow from the fact, if it is a fact, that the *legal officials* have a moral duty to apply all and only the rules identified by the rule of recognition, that those rules impose (moral or non-moral) obligations on the *citizens*. Although the *legal officials* must reasonably consider the citizens to be obligated by a court-decision, say, it does not follow that the *citizens* must view things this way, still less that the citizens *are* thus obligated. This should be clear from a brief look at the existence conditions for a legal system. On Hart's theory, a legal system exists if, and only if, (i) the legal officials adopt the internal point of view in regard to the rule of recognition, and (ii) the citizens conform to the law.<sup>109</sup> According to Hart, the voluntary acceptance by the officials is necessary to create *authority*, without which the law could not establish its coercive power.<sup>110</sup> The citizens need not adopt the internal point of view, however, and may have any of a number of reasons to conform, including fear of punishment.<sup>111</sup> Hence the law need not extend its protections and benefits to all groups in a society.<sup>112</sup> As Hart notes, we have to pay a price for having a developed legal system, viz. that "the centrally organized power may . . . be used for the oppression of numbers with whose support it can dispense."<sup>113</sup> But what kind of authority could the law have over the people it oppresses?

I conclude that whatever normative force the rules of the legal system may have, it is not derived from the rule of recognition, and that therefore the very idea of accounting for law's normativity by means of an ultimate norm or rule is misconceived. Any realistic account of the normativity of law has to be based on the properties of the whole legal system.

## 5 The Trump Thesis and the Significance of Strictly Legal Normativity

I have argued that both Kelsen and Hart attempted to account for the normativity of law in the strictly legal sense, and that they succeeded in doing so. But I have also argued that normativity in the strictly legal sense is problematic because it seems to be impossible to combine it with the thesis that the law necessarily claims to trump moral and other reasons for action. If this is so, we must make a choice: (i) we might adopt the moral conception of law's normativity instead, (ii) we might reject the thesis that the law is intrinsically normative, or (iii) we might reject or qualify the thesis that the law necessarily claims to trump moral and other reasons for action? James Harris – who has analyzed Kelsen's conception

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<sup>109</sup> Hart, *CL*, *supra* note 7, p. 59-60, 109-14.

<sup>110</sup> *Id.* p. 196.

<sup>111</sup> *Id.* p. 197.

<sup>112</sup> *Id.* p. 196.

<sup>113</sup> *Id.* p. 198.

of normativity and who complains that it is pallid – recommends that we reject the assumption that law is intrinsically normative:

Kelsen's pallid normativity is contrived and artificial. His legacy is a challenge to account for the normativity of the law in some other way.... The solution suggested here is that we give up the search for any intrinsic connection between legality and "ought," whilst recognizing, as Hart and others have shown, that normativity, in many important ways, hovers over the law. Propositions of law assert the existence (or absence) of duties prescribed by the law presently in force in some jurisdiction. They do not, in and of themselves, assert that anything, from any point of view, ought to be done.<sup>114</sup>

I cannot accept Harris' analysis, however. Harris rejects (what he refers to as) the *standard negative argument for the normativity of law*, namely that "statements to the effect that behaviour is legally obligatory cannot, without change of meaning, be translated into statements about past, present or future events."<sup>115</sup> But his argumentation is not convincing. He simply maintains that propositions of law "do not, in and of themselves, assert that anything, from any point of view, ought to be done."<sup>116</sup> As I see it, propositions of law – as distinguished from propositions about law – do not assert anything, but simply express norms.<sup>117</sup> That is to say, they provide (but do not *assert*) that certain things ought to be done. Harris' characterization of propositions of law seems rather to be true of propositions about law, but such propositions are irrelevant to the problem about the normativity of law.

I recommend instead that we qualify the thesis that the law necessarily claims to trump moral and other reasons for action in the following way. Instead of saying that the law necessarily claims to trump moral and other reasons for action in the sense that it claims a right to coerce that entails a duty to obey, we might say that the law necessarily claims to trump moral and other reasons for action in the sense that it claims a right to coerce *simpliciter*.<sup>118</sup> On this understanding of the trump thesis, we can easily combine it with the strictly legal conception of law's normativity.

There remains one question to be considered. Even if we agree that the strictly legal conception of law's normativity can be combined with a qualified version of the trump thesis, we may wonder whether the normativity of law thus conceived is an important characteristic of the law. Hart, as we have seen, rejected Austin's theory of law, *inter alia*, on the ground that it could not account for the distinction between being *obligated* and being *obliged*. But why was Hart so concerned with this distinction? If he wasn't trying to elucidate the difference between authority and power, what was he trying to do? Stanley Paulson suggests that on this issue, Hart's quarrel with Austin concerned the

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<sup>114</sup> Harris, *Normativity*, *supra* note 80, p. 115.

<sup>115</sup> *See id.* p. 110.

<sup>116</sup> *See* the quotation above.

<sup>117</sup> I have in mind here Hart's distinction between statements of the law and statements about the law, and I assume that Harris has the same distinction in mind. *See* Hart, *EB*, *supra* note 7, p. 144-5.

<sup>118</sup> For more on this topic, *See* Soper, *Deference*, *supra* note 15, Ch. 3.

*nature of facts*: whereas Austin spoke of habitual obedience, Hart spoke of social rules. Says Paulson:

...Hart's quarrel with the empirico-reductive tradition is over the *nature of facts*. Austin's facts – for example, that of habitual obedience – lend themselves to explication apart from a rule-governed scheme, whereas Hart's facts – the social fact, for example, that certain ultimate criteria of legal validity are accepted in this or that legal system – do not.<sup>119</sup>

If Paulson is right, Hart has offered a new and perhaps more sophisticated analysis of the type of social situation in which we find obligations. But we may still ask *why* it was so important to Hart to distinguish between these two types of social situation. I have not been able to find a satisfactory answer to this question, and I doubt that there is one to be found. I therefore conclude that the strictly legal conception of law's normativity is not so important a characteristic of law as Kelsen and Hart seem to have thought.

If one accepts this conclusion, one is likely to start thinking about the relation between Kelsen's and Hart's theories, on the one hand, and Austin's and Bentham's theories, on the other. Did Kelsen and Hart advance our understanding of law as much as is commonly thought? I am not convinced that this is the case – at least in regard to the question of law's normativity. But a fuller investigation of this difficult issue will have to await another occasion.

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<sup>119</sup> Paulson, Stanley L., *Continental Normativism and Its British Counterpart: How Different Are They?*, *Ratio Juris* Vol. 6:3 1993, p. 240-1.