

The Normativity of Law: What is the Problem?

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I. Norms as guides

How do we explain the ‘normativity’ of law—the way law functions, or could function, to guide human conduct? It is not obvious what would count as an answer. Laws, or at any rate many laws, are norms. There are legal norms that require us to take reasonable care to avoid injury to others, norms that permit us to use public footpaths, and norms that enable us to vote in elections. If such laws are norms, then to ask how we might explain their normativity is to ask how to explain the normativity of norms. Is that a sensible question? If someone asked us to explain the triangularity of triangles, it is not clear what we could do except say what a triangle is and what properties it has. Of course, no one ever asks for an explanation of the triangularity of triangles, because by the time they are old enough to frame questions like that they already know what triangles are. On the other hand, legal philosophers do ask how to explain the normativity of law. There are articles, books even, with that very title. The titles give no reliable clue as to what those works are about. As Kevin Toh observes, ‘Somewhat scandalously, despite its frequent mention and discussion, there is no clear conception or articulation of the normativity problem available in the literature.’² Others share that suspicion, and in my own case the suspicion has hardened into a conviction.

Why the confusion? Perhaps the concept of a norm is in some way ambiguous or contested and the writers are talking past each other? I do not think so. I suggest that there is one concept of a norm, but various things that call for explanation about the role of norms in law, and these problems are unhelpfully fused, and sometimes confused, in contemporary jurisprudence. My aim here is not to solve any of them, but to isolate them in the hope that

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² Kevin Toh, ‘Erratum to: Four Neglected Prescriptions of Hartian Legal Philosophy,’ (2014) 33 *Law and Philosophy* 689-72. Similarly, David Enoch: ‘it is entirely unclear what the problem of the normativity of law is supposed to be. Indeed, I suspect that there is no *one* problem here, as different people seem to have in mind different problems when they use this unhelpful phrase.’ David Enoch, ‘Reason-Giving and the Law,’ in Leslie Green and Brian Leiter eds *Oxford Studies in Philosophy of Law* Vol 1 (Oxford University Press, 2011).

doing so may contribute to progress on problems that merit attention and to avoid being snagged on pseudo-problems.³

Though used mainly in technical contexts, the noun 'normativity' is simple enough. It is the quality or property of being normative, and something is normative if it is or serves as some kind of norm.⁴ Or is that open to doubt? Sociologists sometimes jazz up banal remarks about what is expected with the term 'normative', as in 'Heterosexuality is normative.' This is a stylistic error but not a philosophical one. (We might chuckle at 'Heterosexuality isn't normal; it's just common'; we would only grimace at 'Heterosexuality isn't normal, it's just normative.'⁵) Every society has norms about sexual conduct and desire, and these norms are culturally and temporally variable, somewhat vague, and often honoured in the breach. In our societies, many of them are pointless and inimical to human happiness. Does that mean that it is a mistake to think of them as norms? Maybe they are only one kind of norm among others, or degenerate, *soi-disant*, norms and not real norms at all.

Joseph Raz writes,

Two conceptions of normativity of law are current. I will call them justified and social normativity. According to the one view legal standards of behaviour are norms only if and in so far as they are justified. ... On the other view standards of behaviour can be considered as norms regardless of their merit. They are social norms in so far as they are socially upheld as binding standards and in so far as the society involved exerts pressure on people to whom they apply to conform to them.⁶

How should we construe the claim that these mark two views about the conditions under which a legal standard is a norm? Standards are norms, as are rules, principles, orders, directives, and so on. Some standards are socially upheld whether or not they are justifiable, some standards are justifiable even

³ My own views on some of these problems can be found in: Leslie Green, 'Positivism and Conventionalism,' (1999) 12 *Canadian Journal of Law and Jurisprudence* 35-52; Leslie Green, 'Law and Obligations,' in J. Coleman and S. Shapiro, eds. *Oxford Handbook of Jurisprudence and Legal Philosophy* (Oxford University Press, 2002) 514-547; and Leslie Green, 'The Morality in Law,' in L. Duarte d'Almeida and J. Edwards, and A. Dolcetti, eds, *Reading HLA Hart's 'The Concept of Law'* (Oxford: Hart Publishing, 2013), 177-207.

⁴ For 'normative' the OED gives: 'That constitutes or serves as a norm or standard; implying or derived from a norm; prescriptive.' The first context in which OED records 'normative' refers to the binding authority attributed to Holy Scripture and the first occurrence of 'normativity' refers to law.

⁵ I have discovered that some readers under 40 do not get the first joke. It works like this: homosexuality and bisexuality were once thought abnormal, and the senses of 'common' used to include 'cheap' or 'vulgar'.

⁶ Joseph Raz, *Practical Reason and Norms* 2nd ed (Oxford University Press, 1999)

though they are not socially upheld, and some standards are justifiable only if they *are* socially upheld. Nevertheless, that does not add up to two or three conceptions of normativity, or two or three views about the conditions under which a standard can be regarded as a norm, legal or otherwise. Something serves as a norm when someone uses it as a standard to guide someone's conduct, belief, or emotion. It is a guide when the norm-user's representation of that norm explains, by mechanisms of rational causation, his doing what that norm requires, permits or enables.

Some think this is too austere, that it omits the really, truly *normative* aspect of norms, which in law is usually thought to have something to do with morality. J.S. Mill slipped up when he said, in his defence of utilitarianism, that the only proof that something is desirable is that people actually do desire it. Forests have been destroyed by student essays pointing out that 'desirable' does not mean *capable* of being desired, it means *worthy* of being desired. Mill confused fact with value. Some press a similar objection to the claim that something is normative if it *serves as* some kind of norm. Take, for example, the norm 'Love your enemies.' The objection has it that this is normative if and only if *ought* to serve as some kind of norm.

I do not think this view is intelligible. The statement 'X *ought* to serve as a norm' seems normative. It states a norm, in particular, a norm for norms. Here is an example: 'Whatever Jesus ordered *ought* to serve as your norm.' According to the objector's view, however, the Jesus 'norm' is not a real norm unless we *ought* to follow it. The fact that it serves as a guide to norms for (some) Christians does not make it a norm; that is merely a fact about what Christians tend to do. Whether it is a norm depends on whether what Jesus ordered *ought* to serve as their norm-guide. So consider that suggestion: 'X *ought* to serve as a norm' is a norm only if '*It ought to be the case that (X ought to serve as a norm)*'. This statement is but another, even more complex, norm: a norm guiding our choice of norm-guides. On the objection under consideration, this too is a real norm only if *it* *ought* to serve as such, that is, only if '*It ought to be the case that [It ought to be the case that (X ought to serve as a norm)]*'. Clearly, this getting us nowhere fast. I think we should simply hold that 'Love your enemies' is a norm.

This argument might sound like what Hans Kelsen says about chains of legal authority, namely, that the ('real') normativity of the highest legal norm is 'presupposed'. Maybe we can help ourselves to a Kelsenesque move here, too. The appearance of similarity is deceiving. Our endless expansion cannot be stopped where Kelsen stops the chain of legal authority, at something akin to an historical First Constitution. There is no 'first' norm in the expansion above; the simpler norms are not created on the basis of, or under the authority of, more complex norms which at some point run out the way that legal authority

eventually runs out. The expansion is atemporal and infinite. And there is a further problem. Keep expanding the norm until your patience runs out and call your resting place the *ur-Norm*. Can we say that the *ur-Norm's* normativity depends not on the fact that it serves as your *ur-Norm* but on your *presupposition that it is a (real) norm*? Whatever 'presupposition' is supposed to mean, if it explains the normativity of the *ur-Norm* it could also have explained the normativity of 'Love your enemies'. Nothing prevents us simply presupposing that any norm in use as such is indeed a norm. Or are you now tempted to object that whether one presupposes something is yet another matter of fact, a linguistic or psychological fact, and that the *ur-Norm* is made normative only when we *ought* to presuppose it? (*Dal capo al fine.*) On the contrary, the austere first pass was correct all along. Something is normative if it is or serves as a norm, that is, as a guide to conduct, belief, or emotion. Norms are standards; some of them are justified, some of them are not, but they are all norms and norms in the same sense of 'norm'.

We need to look elsewhere for the source of jurisprudential confusion about the normativity of law. My conjecture is that it lies in a failure to notice, and distinguish, certain questions about the role of norms in law. I shall now exhibit four questions of the pertinent sort, comment on their significance, and try to deter certain errors in approaching them.

II. How could law be normative?

The first question is about possibility. How *could* law be normative, in the sense of 'normative' adumbrated in Section I? Unlike some other possibility-questions in legal philosophy, this one is in good order. For law actually *is* normative, at least for some people some of the time. It is offered as a guide and taken as a guide. We need to know how law could be used that way.

This is a place where disambiguation is needed. 'Law' is used to refer to the assemblage of institutions and practices we call a legal system, but also to certain parts of such a system, that is, to individual laws. It was Kelsen who first understood the independent importance of law in the systemic sense. It illuminates many things. Take Kelsen's own idea, later adopted by Ronald Dworkin and others, that law could be normative because it is coercive. On this view, law authorizes (Kelsen) or justifies (Dworkin) the deployment of coercive force against people. Law's threats guide conduct. But not every law coerces or justifies coercion. Here the systematic character of law is important.

Take the twenty-second Amendment to the U.S. Constitution: 'No person shall be elected to the office of the President more than twice....' That is plainly a

norm. It guides potential presidential candidates, and also political parties, the Electoral College, the courts, and many others. Yet it does not coerce anyone or to provide for coercion. If there is a moral justification for the Amendment, it is not a justification for any coercion. Kelsen's answer to this objection—Dworkin never even attempts one—is that the normativity of law is not the normativity of each *individual* law but of the whole *system* of laws. On his view, the twenty-second Amendment might be thought of as a norm that controls the application of other norms that do prescribe coercion. (For instance, the courts must order sanctions against any U.S. official found in breach of certain conflicts of interest—except for the President, which exception protects only a once or twice-elected person, and this we know from the direction given by the twenty-second Amendment.)

It is no surprise that system-level properties may not be present in every, or even any, part of a given system. You have the capacity to reason, but your liver does not; you are alive but no atom in your body is. Of course, no one who thinks the normativity of law has something to do with coercion thinks there could be a legal system with no coercive norms at all; they think that there are always some coercive laws in a legal system, and that these are the key to understanding how laws, including other laws, could serve as norms.

The appeal of coercion-based accounts of law's normativity flows, I think, from the more general appeal of the idea that law's norms are mandatory, that is, obligatory, together with a particular theory of what makes them mandatory. According to that theory, a mandatory norm is one compliance with which is required on pain of sanction. Some such view is endorsed by Aquinas, Hobbes, Bentham, Austin, Holmes, Kelsen and Dworkin. The idea that the normative is the realm of imperious directives also taints other areas of philosophy. Christine Korsgaard suggests not only that morality is commanding, but that most other normative concepts are too: 'Concepts like knowledge, beauty, and meaning, as well as virtue and justice, all have a normative dimension, for they tell us what to think, what to like, what to say, what to do, and what to be.'⁷ The idea that knowledge 'tells us' what to think or, worse, that beauty 'tells us' what to like, strikes me as a very bossy view of norms. I am not even confident that it makes sense to suppose that moral norms always 'tell us' what we must do, if telling is some sort of categorical imperative.⁸

⁷ Christine M. Korsgaard, *The Sources of Normativity* (Cambridge University Press, 1996) 9.

⁸ For doubts, see Philippa Foot, 'Morality as a System of Hypothetical Imperatives,' (1972) 81 *The Philosophical Review* 305. Brian Leiter rejects even such modest Humean normativity of morality, on severely naturalistic grounds: 'Even in the theoretical domain, there is no real normativity, that is, no norms of belief or epistemic value the agent *must* adhere to.... If epistemology proper, the systematic account of what one "ought" to believe, gives the appearance of a more robust

Be that as it may, it is clear that not all legal norms are mandatory. As H.L.A. Hart explained, we cannot without distortion think of the formation rules of contract, or the rules that enable one to make a will, or the rules that confer the power enact legislation, as mandatory norms that obligate people to do anything.⁹ Yet, all of these function as guides; in some sense or other they give someone a reason to act. That idea itself needs clarification.¹⁰ There seems, however, to be a prior obstacle. According to positivist theories of law, in at least some cases it is possible to determine whether a legal norm exists, and what it requires, solely by considerations of social fact, for example, facts about what certain people have said and done and about what customs and practices prevail in their community. But if these norms are purely factual, how can they be normative? David Hume argues that we cannot get normative conclusions from factual premises alone. Lon Fuller considers this an objection to all positivist theories. He asks how there could possibly be ‘an amoral datum called law, which has the peculiar quality of creating a moral duty to obey it’.¹¹ Bracket, for now, the alleged duty of obedience. If Fuller’s complaint were sound, it would hold even if the ‘peculiar quality’ were that law gives a reason of some weaker kind, an ‘ought’ rather than a strict duty.

But Fuller’s complaint is not sound. Suppose you are wondering how to find the nearest subway stop, and you ask someone for directions. She says, ‘Turn left at the next corner.’ Is there any doubt that her directive could serve as a guide? It seems possible to understand and to follow her direction without adding some premise of the form ‘I ought to do what she tells me.’ Perhaps this is because of the communicative character of this directive; there is both an intention to direct, and uptake of the relevant intention. Even in a single-person case, however, a matter of fact can serve as a norm. Suppose I am wondering whether this screw is long enough to attach that board. I take as my guide this ruler, the existence of which and the markings on which are ‘amoral data’, yet data by which I can guide my choice of screws, and thereby pick the right one and avoid the wrong one. (The English ‘norm’ derives from the Latin *norma*, a

discipline it is only because its primary data points—namely, the claims of the successful empirical sciences—are clearer and more widely accepted, precisely because of their resonance with our practical interests.’ Leiter, ‘Normativity for Naturalists’ (2016) 25 *Philosophical Issues* 64, 75.

⁹ H.L.A. Hart, *The Concept of Law*, 3rd Edition, eds. P. Bulloch and J. Raz, intro L. Green (Oxford University Press, 2012), chap III.

¹⁰ H.L.A. Hart, *The Concept of Law*; David Enoch, ‘Reason-Giving and the Law.’

¹¹ Lon L. Fuller, ‘Positivism and Fidelity to Law—A Reply to Professor Hart’ (1957) 71 *Harvard Law Review* 630, 656. Fuller never doubted that there is in fact a moral duty to obey the law. I return to this below

carpenter's square.) If you object that neither the passerby's directive nor the ruler's scale can function as *real* norms unless I *ought* to consult them you will fall back down the rabbit hole out of which we clambered in Section I.

The peculiar conviction that facts cannot be norms has also been advanced on other grounds. According to Hart, the ultimate constituents of every legal system are a kind of social rule, established by what he calls a 'practice' among at least the officials of that system. A practice is composed of convergent behaviour together with a shared attitude Hart calls 'acceptance' of the regularity that the practice helps constitute. Scott Shapiro thinks this is metaphysically impossible. He writes,

Social rules cannot be reduced to social practices because rules and practices belong to different metaphysical categories. Rules are *abstract objects*. (...) Practices, on the other hand, are *concrete events*. They take place in the natural world and causally interact with other physical events.¹²

Assume for the moment that some sort of reduction is needed to support Hart's view. Contrary to Shapiro's suggestion, a practice is not an event, concrete or otherwise. A practice, as Hart defines it, is a series or sequence of events, and series and sequences are abstract objects just as much as rules are. Indeed, that is one of the reasons practices seem like possible candidates for the constituents of social rules in the first place.

Kevin Toh puts a third objection.¹³ He says the relationship between fact and norm is not constituent but concomitant: if we attend to what Hart calls 'internal statements'—statements that do not merely comment on the existence of a law but actually state that very law—we will see that they typically presuppose, but do not assert, the existence of the facts that make up practices. Toh thinks that to treat practices as constitutive of rules is to misinterpret Hart's position and that it gives an implausible account of the language in which legal norms are stated. Toh favours 'expressivism', according to which the normative force of sincere, internal statements of legal norms (e.g. 'You should take reasonable care!') is captured by the special attitudes they express, and not by anything they assert or typically presuppose.

Toh's objection is more far-reaching than Shapiro's is, for it would apply to any constitutive relationship between practices and norms, and not only to reductive ones. Toh is not worried about the metaphysics of norms but about the interpretation of normative statements. I find Hart's position on the relation between practices and norms somewhat unclear. But in his formative work on

¹² Scott Shapiro, *Legality* (Harvard University Press, 2011), 102.

¹³ Kevin Toh, 'Four Neglected Prescriptions of Hartian Legal Philosophy' (2014) 33 *Law and Philosophy* 689.

obligations, he writes ‘The area of morality I am attempting to delineate [viz. the realm of obligation] is that of principles which would lose their moral force unless they were widely accepted in a particular social group.’¹⁴ Within that area, he pins down legal obligations in this way:

[I]n any social group where obligations are created by legislation, and the expressions “I have a legal obligation to do this” and “He has a legal obligation to do that” have their present force, there must be a social practice at least as complex as I have described....¹⁵

I think that Hart means it when he says he is exploring the sort of norms that would *lose their moral force* unless widely accepted, and that for legal obligations to have normative force *there must be* a social practice. Other passages are ambiguous, but even in his last work Hart never suggests that Ronald Dworkin and Joseph Raz misinterpret him when they object that there are binding obligations not supported by any practice, or that while a practice may be a sign that there is some sort of guide to action in the background, the practice does not itself serve as such a guide.

In any case, Toh’s objection is compatible (as he intends it to be) with the idea that matters of fact can themselves serve as guides to action, that is, as norms. The qualification *themselves* is important. No one says that law always and only works normatively, by functioning as a guide in itself. Law can sometimes signal that there is some other guide to action. Perhaps the fact that the legislature enacted a prohibition on assault is simply reliable evidence that there is a law-independent reason to refrain from assault. In addition, law can and does influence action in other ways too. For instance, law can *goad* people into action, by changing their preferences or altering the outcome set over which they must choose.¹⁶ When law works that way, its subjects need not even be aware of it, let alone be guided by it. (Sometimes that is a good way for law to work—by stealth.)

The idea that law could guide action only if we could somehow ‘reconcile’ fact and norm is a myth, and the increasingly baroque reconciliation attempts in jurisprudence are misguided. People or things need to be reconciled only if there is some kind of tension between them. There is no tension here. Aside from the mistakes explained above, a contrary appearance may arise from the fact that something that originally works non-normatively can come to guide action normatively without there being any moment or event that effects that transition.

¹⁴ Ibid 100.

¹⁵ H.L.A. Hart ‘Legal and Moral Obligation,’ in A. I. Melden, ed, *Essays in Moral Philosophy* (University of Washington Press, 1958), 90.

¹⁶ W.D. Falk, ‘Goading and Guiding,’ (1953) 62 *Mind* 145.

That can seem like magic. John Searle offers a nice example.¹⁷ Neighbours concerned to keep off their respective plots build an insurmountable wall to separate them. At first the wall keeps people out because it physically separates them, and it does so without engaging any of their rational faculties. Crossing is just impossible. Over the centuries however, the wall erodes so that it becomes difficult though not impossible to cross. Since crossing is costly, the wall is still a pretty effective boundary, but now it engages their rational faculties as a kind of silent disincentivizer. Respect for property is now rationally produced, via the calculation of costs and benefits. Later still, the wall collapses entirely, leaving only a line on the ground. Partly because of its history, it now comes to be used as a guide, at first tentatively and later with greater conviction, as to who should work which plot. The boundary wall went from being a mere fact to functioning as a norm: seamlessly, silently, and perhaps even without general awareness of what was happening. Something along such lines, I believe, explains the emergence of customary legal norms and, because the existence of all other law ultimate rests on customary norms, the existence and possibility of law itself.

III. Which laws are norms?

In Section II I averred that some laws are norms. Before exploring the problem of which those are, we might glance at a doctrine according to which this is based on a false assumption.

Oliver Wendell Holmes says that all laws are mere ‘prophecies of what the courts will do in fact.’¹⁸ People’s contrary actions can refute prophecies, but they cannot breach them. If all laws are prophecies then the answer to the question ‘Which laws are norms?’ is: none.

If Holmes’s much quoted slogan were a serious analysis it would be vulnerable to well-known, and well-worn, objections: (a) Predictive statements about what courts will do cannot represent normative statements made in the mouths of those very courts. A judge mentions breach of duty as a *justification* for his order to compensate; in this context ‘duty’ cannot be a *prediction* that he will so order. (b) The fact that certain courts are predictably racist does not show that the law of their jurisdiction requires bias against black defendants. Those courts may be breaking the law. It is of great interest to lawyers and clients to be able to predict judicial decisions, and especially to be able to predict the decision of a

¹⁷ John Searle, *The Construction of Social Reality*.

¹⁸ O.W. Holmes, Jr., ‘The Path of the Law’, in his *Collected Legal Papers* (New York: Harcourt, Brace & Howe, 1920) 173.

particular judge, however lawless. That only shows that sometimes it is more profitable to be able to know what a court will do than it is to know what that court is legally bound to do. (3) Lawyers often predict what courts will do based on their supposition that the courts guide their own behavior by conforming to laws that they use as norms. At least in the trial courts and in routine cases this supposition is well founded. The non-normative picture puts the cart before the horse.

These objections are all so obvious that you might wonder whether anyone really offered the predictive view as a serious alternative to the normative view. Hart wonders that, and so does Brian Leiter. Leiter suggests that the American legal 'realists' were not offering an analysis of anything.¹⁹ So why were they so insistent on their 'denial of the ought'?²⁰ Leiter thinks they were proto-naturalists, social scientists of the law, and that the closest a naturalist can come to the normative is the nomological. I think their view was as much ideology as philosophy: the realists regarded much discussion of American law, particularly judges' and lawyers' discussions of the work of appeals courts, as moralistic claptrap serving mainly to conceal the true grounds of their decisions. Legal terms such as 'right,' 'liberty,' and 'obligation' are moral sounding; we may not be able to keep them out of the law, but at least we should eliminate them from study of the law.

As a matter of jurisprudence, however, it would be an error to regard all legal statements as theoretical predictions rather than practical norms. But which ones *are* the norms? This is another distinct problem about the normativity of law, and it is a thorny one, as Bentham and Kelsen discovered. The sources of difficulty are two-fold. First, legal norms need not, and often do not, bear normativity on their face. Overtly mandatory directives ('No right turn on red') are not very common in the law. The law takes it for granted that competent lawyers will understand that when a statute says 'It is an offence to...' this means that people are to abstain from the activity in question.

Second, because law is systematic in character, to identify norms we will often have to understand how various parts of that system operate together. Consider an example. The UK Criminal Justice and Immigration Act 2008 regulates, inter alia, youth offenders, and directs what should happen if they do not comply with rehabilitative orders. Section 94 of that Act regulates warrants

¹⁹ On the realists, see Brian Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (Oxford: Oxford University Press, 2007). For discussion of Leiter's reading of them see Leslie Green, 'Law and the Causes of Judicial Decisions' *Oxford Legal Studies Research Paper* 14/2009 <http://dx.doi.org/10.2139/ssrn.1374608>

²⁰ Kelsen, *Pure Theory of Law* 101-107.

that transfer responsibility for the detention or release of offenders to or from some Minister. Some transfers are conditional on the transferee's consent. Once given,

a purported withdrawal of that consent after that time shall not affect the validity of the warrant...

Here, 'shall not affect' neither predicts the future nor imposes a duty. By making consent irrevocable, it limits a power, that is, it creates a disability. Knowing that depends on understanding how the term 'validity' works in contexts like this.

Even more complex is s 99, dealing with violent offenders, some of whom qualify for special kinds of treatment:

In this Part "qualifying offender" means a person aged 18 or over who is within subsection (2) or (4).

This is neither a duty-imposing norm nor a power-affecting norm. It is simply a definition: 'X means Y'. But it is a stipulative definition, and stipulating is an illocutionary act prescribing a special use for statutory words. Perhaps we could think of it as norm to shut down other possible definitions of offenders who might be 'eligible.' However, this feels strained, and most lawyers would probably not interpret the section that way. Maybe it is not a norm at all, for it has no guiding function apart from filling in norms that impose duties on, or regulate powers in respect of, violent offenders. All the same, it is a lot *more* norm-like than the following passage, also from the same Act:

'Part 2 Sentencing'

This is definitely not a norm, and it does not affect the validity or content of anything that is a norm. It is simply a heading, which, like a section or page number, allows lawyers to find their way around a statute. Some explanatory material and preambles are similar, and so too (at least in theory) is everything in a judicial decision that is not necessary to arrive at the ruling; it is superfluous *obiter dicta*. Kelsen called all this 'legally irrelevant material'.

Knowing what is legally relevant and what is not requires being able to identify the content of a statute (or decision) and to understand its working parts and how they fit together. This applies to *all* the law's parts: to constitutional provisions, treaties, statutes, interpretive practices, judicial rulings, legally relevant conventions, and so on. What the law requires of anyone, on any

matter, is the net effect of *all* of this. It may then seem a short step to see any society with a legal system as subject to just One Big Norm: *Act lawfully!* Kelsen is effectively driven to that conclusion, and that is a *reductio ad absurdum* of his approach. It cannot capture how law's subjects or officials use or reason with norms, and that is the gold-standard test for correctness in legal theory.²¹ If a provision looks like it imposes a legal duty, and we all act and judge as if it does, then that is what it does, unless special considerations suggest otherwise.

In most legal systems, the distinction between legal norms and non-normative material will not be clear, no more clear than the distinction between a fine and a tax on conduct, or the distinction between binding authority and a powerfully persuasive consideration. That is because there are no clear distinctions here, only clear cases, marked by the fact that some material is obviously picked out for use in guiding someone's conduct. The evidence for that may be linguistic, or may lie in the way it figures in the practical inferences that courts and others draw.

Not everyone agrees. Liam Murphy doubts there are any issues worth discussing about how to identify mandatory norms in law. (Though he does not say so, I assume he takes the same view about permissive and power-conferring norms.) There are good, purely legal, questions about what law is in force, and there are good, purely moral, questions about what we ought to do in light of that—and there is nothing else:

Suppose someone says that they have a legal obligation to turn in their dissident neighbors to the secret police. A variety of responses seems acceptable, so far as the nature or concept of legal obligation is concerned. [1] No, you have no obligation to do that, in fact it would be immoral. [2] Yes, you have a legal obligation to do that since the law is valid, but you have no moral reason to do it. [3] No, you have no legal obligation because no one but the authorities would expect you to follow that legal rule. These are just different plausible ways of understanding what a legal obligation is, and I don't see any scope for so much as an argument that one of them is best.²²

²¹ Hart, *The Concept of Law*, 41.

²² Liam Murphy, *What Makes Law?* 114-115 Murphy excludes the possibility of appealing to things like the concept of law or to what the courts think is obligatory, on the ground that these are philosophically indecisive. Many legal philosophers seem to conclude from the fact that there is a *philosophical* controversy about some point, that the conceptual point must be indeterminate. For doubts about that self-important hypothesis see, Leslie Green, 'Law and the Role of a Judge,' in K.K. Ferzan and S.J. Moore, eds, *Legal, Moral, and Metaphysical Truths* (Oxford: Oxford University Press, 2016), 322-341

The sting is in the last sentence. There are competing ways to pick out obligations within the law and it should come as no surprise that philosophers have offered ‘a variety of responses’ to the question of which is most convincing. Murphy does not merely think the matter is controversial, however; he thinks this is a verbal dispute, a pseudo-problem. The only arguments worth having are legal or moral. (Like many skeptics, Murphy dispenses his skepticism in carefully rationed doses.) The three responses he enumerates, however, hardly warrant that conclusion. [1] says nothing about legal obligations, so is not relevant. [2] presumes that we can, somehow, pick out legal obligations; but the fact that the law in question is valid does not show that the norm-act is obligatory, only that it has in law whatever force it purports to have. [3] is a more interesting claim, though Murphy does not tell us why what the authorities think about legal matters has no bearing on the existence of legal obligations. This is not credible. Does a penalty of 25 years for the offence of homicide mean that there is a legal obligation not to kill, breach of which may on conviction lead to that punishment, or does it mean that killing is in law licensed upon an *ex post facto* payment of a 25 year charge? Since legal officials and institutions have views on this matter, and *much* prefer people refraining from homicide to committing homicide then going to jail, one might suppose this is some argument for the conclusion that this is indeed a legal obligation and not a tax on conduct. There is no real doubt about what sort of guidance the Criminal Code has in mind here.

Note that I have here freely referred to what the authorities want, and to what our institutions have in mind. Some philosophers have doubts about such notions and some, like Kelsen, impose on jurisprudence a self-denying ordinance requiring that it never invoke them in establishing what norms are in the law. Here, I can add no more than this: the failure of Kelsen’s own theory shows where such a formalistic view is bound to lead. Structural, syntactic, considerations alone will never tell us what guidance law gives.

IV: What are the relations between legal norms and other norms?

A third problem in jurisprudence is what to make of the relationships between legal norms and moral norms—the problem of the connection between law and morality. I think this problem has, for reasons I will explain in the next section, become too familiar. Of equal importance are the relationships between legal norms and other positive norms, including the norms of religions, private associations, and customary social norms. But here I shall focus, as many do, on the relations between law and morality.

The problem begins by trying to identify what makes legal norms different from moral norms. Again, it was Kelsen who first saw the most important part of the answer: not much. There is no feature of a legal norm taken by itself that marks it is distinctive: not its content, not its range of application, not its function, not its justifiability, and not anything else. A norm is a legal norm if it is part of some legal system. (He also added, less persuasively, that it must be a system that guides by threat of coercive force.) Where systematicity is weak, as it still is in parts of international law, we have doubts about whether a given norm is law, or a moral norm, or some kind of political convention. I conjecture, but cannot prove, that the denial of the explanatory primacy of legal systems ultimately leads to the view there is no significant difference between legal norms and any other norms, and thus no specifically legal norms, strictly speaking.²³ But if we hold on to the idea that every law is a part of some legal system—English law, or Roman law, or canon law, or Sharia—we still need some account of the differences, if any, between norms of such systems and moral norms.

(1) Legal norms are *sui generis*

Lon Fuller remarks that, even in uncertain cases at law, there may nonetheless be something that a judge *ought*, all things considered, to decide. Like Ronald Dworkin after him, Fuller concludes on that basis that there is some kind of union between law and morality. Hart replied

The word "ought" merely reflects the presence of some standard of criticism; one of these standards is a moral standard but not all standards are moral. We say to our neighbour, "You ought not to lie," and that may certainly be a moral judgment, but we should remember that the baffled poisoner may say, "I ought to have given her a second dose."²⁴

Hart's reply is effectively that not all 'oughts' are moral 'oughts'. That is correct, but it is no answer to Fuller (or Dworkin), because it is obvious that the norms to which judges give effect where law runs out *are* typically moral norms, especially norms about what would be fair, just, or humane on the facts of the case. It also

²³ It seems to me that this is why Ronald Dworkin's long exploration of the nature of law ends up where it does: 'We have now scrapped the old picture that counts law and morality as two separate systems and then seeks or denies, fruitlessly, interconnections between them. We have this with a one-system picture: we now treat law as part of political morality.' Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press, 2011) 405.

²⁴ H.L.A. Hart, 'Positivism and the Separation of Law and Morals,' (1958) 71 *Harvard Law Review* 4, 613.

leaves unanswered the question of what the relationship is between legal oughts and moral oughts. It seems odd to assume that they are merely homonyms.

Hart's idea that 'duty' or 'ought' differ in legal and non-legal contexts suggests that we could disambiguate by indexing: there is what we ought-L to do, and what we ought-M to do. But there is no reason to stop there. There are different legal systems. What guarantees that the 'ought' of English law and the 'ought' of Roman law are the same sort of ought? Do we then need ought-LE and ought-LR? Perhaps not. Maybe what we have is just so many different specimens of ought-L, differing not in their meaning or force, but only in the criteria that determine, for a given system, whether or not it is true that ought-L. If so, then presumably we could, on this view, go back one step and say that ought-L and ought-M also differ in that way only. If so, it seems that any differences between legal norms and moral norms must lie elsewhere.

Andrei Marmor seems tempted by a similar line. He thinks it is no harder to explain the normativity of law than it is to explain the normativity of cricket. They are separate, yet in some way equal.²⁵ We need only distinguish external norms from internal norms: reasons to 'play the game' from reasons within the game. '[T]he rules simply *determine* what their obligations in the game are; they constitute what the game is.'²⁶ If, but only if, there is a moral reason to participate, do the constitutive rules of a game also create moral obligations, and those are different things. (Back to Hart.) So, we have internal obligations constituted by the rules, and we can have external obligations constituted by...well, by what? Not by moral rules about when we must play games. There are no such rules. By any reasons for playing games? If I join a game just to annoy the other players, am I morally bound to play by the rules? Marmor does not explain.

(2) Legal norms are norms in the law that are morally justified.

Proposal (2) is by far the simplest, and but for three facts would garner support: (a) many laws that impose obligations or grant powers (etc.) are seriously morally wrong; (b) the basic law-making procedures of many societies are seriously morally wrong; (c) our knowledge of what the law is does not move in tandem with our knowledge of the wrongness of a society's laws or law-making procedures. I can know whether an increase in the value of one's home

²⁵ I find law a lot easier to understand than cricket; but I was born in the West of Scotland and grew up in Canada.

²⁶ Andrei Marmor, *Positive Law and Objective Values* (Princeton University Press, 2011) 82. Emphasis added.

is subject to capital gains tax without knowing whether it would be unfair to exempt it, coming to believe that such an exemption is wrong gives me no reason to doubt what is in the tax code.

Only Ronald Dworkin made a comprehensive attempt to deal the difficulties thrown up by (2), and even he has little to say about the patent lack of epistemic correlation between legal and moral knowledge. His theory resists compact explanation, and has developed over time from the early thought that fact-based views of legal obligation leave something out (i.e. ‘moral principles’), to his claim that fact and value in law cannot be clearly distinguished (because every eligible interpretation of law must show it in its ‘best light’), to his final dramatic conclusion, embraced by Mark Greenberg and others, that there is no difference between law and morality.²⁷ Law is the department of morality that entitles people to a coercively enforceable decision from the courts, forthwith, and independent of any other consideration. ‘[T]he obligation to obey whatever laws lawmaking institutions adopt—is a legal obligation because it can be enforced on official demand in and through such institutions’ [viz the courts].²⁸

I have expressed doubts about Dworkin’s general theory of law on other occasions. His last claim—that law is conceptually tied to what may be demanded from the courts—gives a nod to the institutional and systemic character of law. Presumably, the obligations of American law are those whose enforcement can properly be demanded of American courts. Yet such a court may have a good ground to deny someone the enforcement he demands, even though he has in the law, properly interpreted, a right to it. There may be no legal doctrine of ‘abuse of right’ in U.S. law, but U.S. courts are not immune to a sound charge of a moral abuse of right. There are sometimes sound moral reasons for courts to refuse to grant coercive remedies or even any remedies at all. A court may properly frown on people using a clear legal right in an abusive or oppressive way, or it may properly hold that though a claimant is entitled to a remedy, reasons of political legitimacy require that it be granted only by Parliament. Maybe these reasons are typically defeated by the preemptory demands of the rule of law. It nonetheless follows that there may be legal obligations that require support of further, moral, reasons before any court should enforce them, and Dworkin has no account of these.

(4) Legal norms state what the law holds to be moral norms.

This Baedeker ends with a proposal developed by Joseph Raz and in some

²⁷ Mark Greenberg, ‘The Moral Impact Theory of Law’ (2014) 123 *Yale Law Journal* 1288.

²⁸ Ronald Dworkin, *Justice for Hedgehogs*, 406.

version favoured by John Gardner, me, and others. In addition to the sort of committed, internal statements that express some kind of attitude or other, there are normative, but *non*-committed, statements that Raz calls 'detached'.²⁹ These are characteristic of circumstances where someone advises another on what to do in light of norms that he, the advisor, does not accept but which are pertinent to the advice. The carnivore says to her vegan friend, 'You ought not to eat that, it contains animal fat.' This is not an 'external statement' that describes a norm in force—that norm may not be in force in their society--nor is it a norm-endorsing or approval-expressing statement. Still, it does state and make use of a norm, here to advise someone what to do.

On this view, law is a kind of positive morality, institutionalized and made systematic. What we ought to do in law is what, in the law's view, we ought morally to do. Again, this requires us to make sense of the idea that law can intelligibly hold or claim things. Legal positivism holds no patent on that idea. Robert Alexy makes it central to his competing 'natural law' account of the relation between law and morality.³⁰ Alexy says that the law necessarily claims for itself moral correctness. His point is about the pragmatics of legal language. It is no accident that we do not have a Department of Injustice or a Charter of Wrongs and Oppressions. Law holds itself out in a favourable light. Alexy thinks that if an institution is bound, of its nature, to make a certain pitch, then we are to take its pitch not just seriously, but as correct. Now, I assume that the Pope is bound, in the nature of the papacy, to claim infallibility in certain domains and to claim to be apostolic successor to St Peter. That is (part of) what it is to be a Pope. But that gives no reason to give any credence to his claims. They may be sincere, essential to the office, and yet false. Moreover, is it not clear that law's claims actually are claims to moral correctness. Judges are often as dubious as anyone about the moral standing of the norms they interpret and enforce. Where they seem confident, at least in their public role, is in claiming the authority to rule on these things—'rightly or wrongly' as English judges often say.

More modest versions of the perspectival approach are more appealing. It may be that sincere, normative legal statements are made from the point of view of law's claim to authority, without presupposing the law is morally sound. The idea is close to what Mark Sainsbury has in mind when he writes about correctness and truth in certain contexts:

²⁹ Joseph Raz, 'The Purity of the Pure Theory,' in his *The Authority of Law* 2nd ed (Oxford University Press, 2009).

³⁰ Robert Alexy, *The Argument from Injustice: A Reply to Legal Positivism* (Oxford University Press, 2010).

We readily enter into a game, an opponent's position, or a world view, and are then equipped to make sincere assertions which we don't take to be true absolutely. When we do this, it's not right to say that we must suspend or bracket our own position, or that, in one sense of this slippery notion, we need to presuppose the correctness of the perspective we adopt.'³¹

On a view like this, sincere assertions of norms within the legal 'world view' take for granted parts of that view, including some of its moral claims, but without necessarily adopting them, or even expressing approval of their adoption as norms.

V. What could ground a moral obligation to obey legal norms?

We arrive, finally, where many legal and political philosophers want to begin. They treat the primary problem of normativity as the question of how to explain the moral obligation to obey the law, without pausing to ask how a law could be a norm, whether laws are the sorts of norms that claim obedience, or how we might identify them in the law. Worse, they assume all other philosophers are as impatient as they are, so they read Kelsen's claim that effectiveness of law is a condition of its bindingness as the thesis that might makes right, and Hart's claim that all obligations are practice-constituted as the thesis that we are to obey whatever customary practices claim our allegiance. Never mind that Kelsen and Hart expressly disown these propositions.

I think we should exclude, on grounds of charity, the possibility of willful misreadings. My sense is that many simply do not see that, in these arguments, Kelsen and Hart are tackling one of the *other* problems about normativity mentioned above. Kelsen has no theory at all of the moral obligation to obey the law, because he is a moral subjectivist and (somewhat inconsistently) a relativist who also thinks all moral argument is ideological. Kelsen would allow the possibility of explaining people's *belief* in a moral obligation to obey, but he would also say that psychological inquiry is no part of jurisprudence. It is a different subject, from which jurisprudence has no lessons to learn. Hart, on the other hand, does have a rough-and-ready account of the obligation to obey. He says it is can be required by the principle of fair play—but Hart's main concern is to argue how heavily qualified this obligation is, and how little relevant is the validity of a legal norm to the question of whether there is a good moral case for obeying.

³¹ Mark Sainsbury, *Paradoxes* (Cambridge University Press, 1995)

Every beginning student can rehearse the main candidates that supposedly ground an obligation of obedience: necessity, fairness, consent, community, and so on, most of which were already known to Plato. And just as quickly she can recite decisive objections to each.³² In essence, the difficulty is that an obligation of obedience requires that we conform our conduct to legal norms *because* the authorities require that, and without regard—or at least without decisive regard—to the content of the obligations they prescribe. Moreover, the obligation is normally taken to extend only to the law of a state of which one is a citizen or resident, unless one somehow puts oneself under its authority, for instance by going as a tourist or doing business there. So the laws of Bhutan are, morally speaking, nothing to me. Thus the standard view.

No argument to that conclusion withstands scrutiny. The conclusion is too bold. It contemplates a very demanding policy, according to which everyone under the jurisdiction of a legal system is morally bound, at least *pro tanto*, to follow the guidance of every one of the system's norms, without regard to its content. I will not retrace all the difficulties in making a case for a policy like that, but I do want to examine why jurisprudence so often takes it as the main problem, or the hard problem, about legal normativity. There is one good reason, and two bad ones.

The good reason is that law of its nature claims wide authority to affect obligations, including the authority to create, modify, or extinguish them, and, as Locke says, to impose on its subjects any penalty for breach of their legal obligations, up to and including death. That is an awesome, and fearsome, claim. It is of great interest whether it is sound. It may be doubted whether testing for the presence of an obligation to obey is the right way to go about it. Maybe law claims only something weaker, for instance, not a right to obedience but a liberty-right to rule.³³ (There can certainly be justified authority without an obligation to obey it; but is this true of legal authority?) And Stephen Perry correctly stresses that practical authority is a kind of normative power, and the Hohfeldian correlate of a power is not a duty, but a liability.³⁴ So why focus on the obligation to obey rather than directly on justifications for the power to create and modify obligations? The answer is that, whatever else legal authorities do, they necessarily use their normative powers to create obligations. They may also create rights, privileges, powers and immunities, but they are two families of

³² I assess some leading accounts in Leslie Green, 'Law and Obligations'.

³³ See William A. Edmundson, *Three Anarchical Fallacies: An Essay on Political Authority* (Cambridge University Press, 1998), 7-70.

³⁴ Stephen Perry, 'Political Authority and Political Obligation,' in Leslie Green and Brian Leiter, eds, *Oxford Studies in Philosophy of Law* vol 2 (Oxford University Press, 2013).

obligations no legal system can fail to create. First, obligations on the part of the courts to settle disputes by applying law. Where officials remain free to decide every case on its merits, applying only the ‘raw’ norms of morality, there are dispute-settlement mechanisms, but there is no law. Second, legal systems must create obligations in criminal and civil law that regulate what Hart called the ‘minimum content’ of every humanly possible legal system. So one fair test of whether law has the authority it claims is whether, whenever it does create such obligations, all subjects are morally bound to obey those directives. If they are not then law does not have the authority it claims for itself. (It may be entitled to some weaker or narrower authority.)

The two poor arguments for treating an obligation to obey as the primary problem of normativity rest on views about the methodology of jurisprudence. According to one, jurisprudence must take at face value every widely held view about law, and the view that we each have an obligation of obedience is such a view. According to the other account, jurisprudence need only attend to the central, best-case, instances of law, and law is at its best when it is such that everyone has a moral obligation to obey.

The first method we associate with Hume, who poured scorn on the Whig contractarians’ idea that we owe law a duty of obedience only if we have consented to obey it. Hume saw that they would either have to take an implausible view of what counts as an agreement to obey or else confess that law was a lot less binding than everyone thought. He could not swallow the second alternative. Hume wrote, ‘nothing is a clearer proof, that a theory of this kind is erroneous, than to find, that it leads to paradoxes repugnant to the common sentiments of mankind’.³⁵ Notice that Hume assumed that ‘the common sentiments of mankind’ *did* acknowledge the authority claimed by eighteenth-century English law—something a bit shocking when you consider, for example, the minute compass of the franchise, the extensive corruption of Walpole’s government, and the fifty-odd capital offences created by the Black Act. The same holds true today. The most benign liberal states are miles from any plausible threshold at which their procedural and substantive laws would be sufficiently fair, just, and humane to trigger a general moral obligation to do as they ask.³⁶ There is no good reason to think that most subjects believe otherwise.³⁷ (And if disobedience sometimes breaches no serious moral

³⁵ David Hume, ‘Of the Original Contract, in his *Essays, Moral Political, and Literary* ed. E.F. Miller (Indianapolis: Liberty Classics, 1985), 486.

³⁶ David Lyons, ‘Moral Judgment, Historical Reality, and Civil Disobedience,’ (1998) 27 *Philosophy and Public Affairs* 31-49

³⁷ Leslie Green, ‘Who Believes in Political Obligation?’ in W. Edmundson, ed., *The Duty to Obey the Law* (Rowman and Littlefield, 1999) 301-17.

obligation to the law, we might wonder about the justifiability of our punitive practices.³⁸) That so many philosophers write as if our states are ‘close enough’ to being reasonably just to make it worth worrying the duty to obey does not reflect well on contemporary jurisprudence. We should be thinking as much or more about our obligations to *disobey*. Hume had it open to him, consistently with his method, to explore more carefully than he did precisely what sort of pro-attitudes people had to their law, how far those attitudes reached, and even to criticize them as ideological or superstitious. That is how he treated beliefs about religious obligations, some of which (contrary to Hume’s view) were probably socially useful in their day.

The second method is derived from one interpretation of Aristotle. If you want to explain monarchy, the proposal goes, you should take its best, central case—i.e. kingship, and not its degenerate form, which is tyranny. To understand what a university is, you should think about Princeton or Oxford (say), and not Bob Jones University or Phoenix University. It is important to see that, on this view, the central case is not the statistically standard or even paradigmatic one, it is the best case in view of the functions the institution in question ought of its nature to serve. In medicine, we sometimes proceed that way. People are getting a lot fatter, so to study normal human anatomy we should take people of normal ‘healthy’ weight as our standard, not normal *average* weight, which has been going up and up.

The error in this approach to law the opposite to Hume’s. Hume gave credence to too much of the phenomena; this gives it to too little. There is no reason whatever to assume that law is at its best, at its healthiest, when it is such that each of its mandatory norms comes with an obligation of obedience. Remember that normative guidance is only one way that law contributes to society, and it is not always its best way. Consider sexual assault. Does law’s contribution to sexual morality go best when it prescribes sound norms about consent, and everyone *takes those norms* as their reason for responding properly to their partner’s interests? (‘I must not get her too drunk to consent to sex—that would violate the law!’) As Bernard Williams used to say, that is ‘one thought too many’. Better that law should indirectly, and sometimes non-normatively, affect the ordinary social norms that guide sexual interaction. Likewise, we want people to avoid assault, to refrain from discrimination, and to deal fairly, not because of a lively awareness of the normative force of law, but because it would hardly occur to them to do otherwise. Law has a role to play in securing that

³⁸ Cf Jeffrie G. Murphy, ‘Marxism and Retribution’ (1973) 2 *Philosophy & Public Affairs*, 217-243.

smooth-running state of affairs, but not only, and not often, by securing the duty of obedience.³⁹

Finally, consider the cognitive pre-requisites for obeying the law. No one can obey a norm of which he is unaware. He may inadvertently conform to what that law requires, or he may comply with moral reasons that independently require what law requires, but he cannot obey a law that he does not know. Is the best, central case of law one in which people know all the laws that apply to them? That is impossible; no one can know all the legal obligations they have. People have other things to attend to. But it is also grotesque as a social ideal. Only a lawyer, and a very legalistic lawyer at that, would think that law should be such that all its obligations are *known* to all of its subjects. Perhaps law is at its best when all its obligations are *knowable*, but that is a very different matter. It is one aspect of the familiar ideal of the rule of law. The law ought to be such that it is possible for law to guide conduct—when that sort of guide is what we need. Sometimes it is, but sometimes it is not.

The problem of the moral obligation to obey the law is real; but it is only one of the problems about the normativity of law, and there is no good reason for thinking it is the main or primary problem. Indeed, it is ill formed until we have in hand plausible answers to the other three problems I explored above.

VI. Conclusion

I have, as they say, raised more questions than I have given answers. At least there was no false advertising. That was my aim: to show there is no single ‘problem of the normativity of law’ but at least four different problems, each requiring solution, and the solutions to some depend on solutions to the others. The questions are these:

Q1 How could law be normative?

Q2 Which laws are norms?

Q3 What are the relations between legal norms and other norms?

Q4 What could ground a moral obligation to obey legal norms?

On the other hand, some much-discussed questions prove to be pseudo-problems. There are no competing conceptions of norms. There is no problem of explaining how a matter of fact could be a norm. In addition, while we should inquire into what might ground an obligation to obey, we should not take the

³⁹ Leslie Green, ‘Should Law Improve Morality?’ 7 *Criminal Law and Philosophy* (2013) 473-494.

existence of such an obligation as any sort of fixed point that legal philosophy must explain. Above all, we need to be clear which of these questions about the normativity of law we hope to address. And perhaps we should agree to a moratorium on the title 'The Normativity of Law.'