

# Normativity (in Kelsen and otherwise)

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## 1. *Hume's law*

An Ought cannot be reduced to an Is, or an Is to an Ought; and so an Is cannot be inferred from an Ought, or an Ought from an Is. (GTN 16.1)<sup>1</sup>

By these words in his last book, and no less consistently in earlier books, Kelsen endorses Hume's Law.<sup>2</sup> In fact he fortifies it: Hume worried only about the inference of an ought from an is; Kelsen worries no less about the inference of an is from an ought. That makes his claim stronger than Hume's. Kelsen's core argument for this claim is summarized by him as follows:

Since something can be without being *decreed to be obligatory* in a norm, and something can be decreed to be obligatory in a norm without *being*

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<sup>1</sup> My Kelsen quotations throughout are from Michael Hartney's translation of Kelsen's *Allgemeine Theorie der Normen* (Vienna 1979), published as Hans Kelsen, *General Theory of Norms* (Oxford 1991). Since most of the chapters and sections in the book are very short, and readers may well be using different editions, I do not give page numbers. Instead I provide locations for the quoted passages parenthetically in the text, in the form GTN XX.XX, where XX in arabic numerals represents the chapter number and xx in roman numerals represents the section number (if applicable).

<sup>2</sup> David Hume, *A Treatise of Human Nature*, (2nd ed, ed L. A. Selby-Bigge and P.H. Nidditch, Oxford 1975), 3.1.1.

in reality, therefore when something *is* it does not follow that something *ought* to be, or when something *ought* to be, that something *is*. The relation between Is and Ought is one of irreducible duality. (GTN 17)

We will come back in a moment to the specialized apparatus of norms (and decrees) that constitute Kelsen's interpretation of the Ought. For now, we should agree that the argument is sound as far as it goes. But how far does it go? Suppose we replace the word 'something' with the letter 'P', and see how it looks now:

Since P can be without being *decreed to be obligatory* in a norm, and P can be decreed to be obligatory in a norm without *being* in reality, therefore when P *is* it does not follow that P *ought* to be, or when P *ought* to be, that P *is*.

Can we really conclude from this that '[t]he relation between Is and Ought is one of irreducible duality'? Surely we can conclude only that the relationship between 'P is' and 'P ought to be' is one of irreducible duality. 'You are buying me lunch' neither entails nor is entailed by 'you ought to be buying me lunch.' True enough. But we do not know whether the same goes for the relationship between 'P is' and 'Q ought to be'.

For example, we do not know whether the same goes for the relationship between 'you *promised* to buy me lunch' and 'you ought to be buying me lunch', to borrow John Searle's famous attempt at a counterexample to Hume's law.<sup>3</sup> We know roughly how Kelsen would reanalyse that claimed counterexample to explain it away. He would say that there is a hidden 'Ought' in the background. He would say that there is a norm in play *sub silencio* according to which you ought to do whatever you promised. You promised to buy me lunch so, according to the *sub silencio* norm, you ought to buy me lunch. That is certainly a

<sup>3</sup> Searle, 'How to Derive "Ought" from "Is"', *Philosophical Review* 73 (1964), 43.

possible reanalysis of Searle's claimed counterexample. It is one of the (Humean) reanalyses that Searle is attempting to resist. But offering the reanalysis is not making an argument for it. If you think that it is the correct reanalysis, that is probably because you already endorse Kelsen's conclusion that '[t]he relation between Is and Ought is one of irreducible duality.' You have done nothing to show that this conclusion is correct.

Personally I share Searle's broadly Aristotelian resistance to Hume's law. I mention that mainly by way of a declaration of interest. In the following remarks I will not make any case against Hume's law. What I aim to do here is merely to draw attention to some ways in which the claim that '[t]he relation between Is and Ought is one of irreducible duality' can easily be made to seem more plausible than it is. What I will suggest is that there are several different distinctions in the neighbourhood, and that the sense of an 'irreducible duality' is mainly owed to their conflation. Since Kelsen is an arch-conflater of these distinctions, and one of the few to conflate them openly, deliberately, and even proudly, he will be figuring prominently in a lot of what follows. Towards the end we will, however, turn away from our engagement with Kelsen towards some preoccupations of contemporary moral and legal philosophers. I will suggest that they are overblown or misdirected preoccupations.

## *2. Norms and Oughts*

What does any of this have to do with my title, 'Normativity'? 'Normativity' is an uncountable noun confectioned from the adjective 'normative', while 'normative' is in turn an adjective derived from the countable noun 'norm'. Maybe I am too literal-minded, but it strikes me as natural to suppose that normativity is the property that all and only normative things have, and things are normative if and only if they are norms. This agrees with

Kelsen's usage, although he uses the word 'normativity' very rarely (e.g. *GTN* 45 n114).<sup>4</sup> More interesting and important, for present purposes, is that Kelsen regards the world of norms as co-extensive with the world of Oughts, and normativity, accordingly, as a property of all and only Oughts. I have given this contribution the title 'Normativity' partly because it helps us to focus on this Kelsenian doctrine.

Norms, for Kelsen as for most students of the subject, are of various distinct types. In his terminology, each distinct type has a different 'normative function' (*GTN* 1.v). The main types of norms recognized and discussed by Kelsen (as by Hart, von Wright, Raz, and many other students of the subject<sup>5</sup>) are the obligation-imposing, power-conferring, and permission-granting types.<sup>6</sup> Yet this variety of 'normative functions' lands Kelsen with some unique terminological challenges. If, as Kelsen wants to say, the world of norms and the world of Oughts are co-extensive, then, as he points out, 'the word "ought" is being used in a broader sense than is usual' (*GTN* 25.ii). More specifically:

According to common usage, 'ought' corresponds only to commanding; 'can' corresponds to empowering and 'may' to permitting. We say 'He "ought"' only of the person to whom something is commanded; we say 'He "may"' of the person to whom something is permitted and 'He "can"' of the person empowered to do something. If we say that even an empowering norm decrees an

<sup>4</sup> He is more promiscuous with the word 'normative' which is used in as many as 45 of his 61 chapters.

<sup>5</sup> H.L.A. Hart, *The Concept of Law* (Oxford 1961), 26-32 (on obligations v powers) and 246n (on permissions); G.H. von Wright, *Norm and Action* (London 1963), ch V (on obligations v permissions) and ch X (on powers); Joseph Raz, *Practical Reason and Norms* (London 1975), chs 2 and 3.

<sup>6</sup> Kelsen adds the 'derogating' type, but this seems to reflect a muddle on his part between the typology of norms and the sub-typology of normative powers. Derogating is exercising a power that makes an action permissible (either in the sense of removing an obligation or in the sense of yielding a separate permissive norm). See *GTN* 25.IV for evidence of the muddle.

‘ought’ and that an ‘ought’ obtains even in the case of a permission – since empowering and permitting are essentially related to an Ought – then the word ‘ought’ expresses the three *normative functions* (commanding, empowering, and permitting). (GTN 25.II)

This is not what I find strange. What I find strange is not how broadly Kelsen uses the word ‘ought’, but by contrast how narrowly he uses it. Consider this passage:

The norm which decrees a certain behaviour to be obligatory institutes a *value*. The judgement that some behaviour is ‘valuable’ or ‘has value’ (and in this sense, is ‘good’) means that this behaviour is decreed to be obligatory in a norm, is the content of an Ought. (GTN 16.III)

We will talk more about values below, and particularly about the relationship between obligation–norms and values that is suggested in the first sentence. But for present purposes, let’s think about the second sentence. It identifies the value or goodness of an action with the action’s obligatoriness. Thus there are no valuable or good non-obligatory actions. This seems extremely implausible. To take just one kind of valuable action thereby annihilated, what about supererogatory actions, also known as ‘actions beyond the call of duty’? Possibly Kelsen believes that there are no supererogatory actions. But that hardly seems to warrant his ruling out their existence by definition, such that anyone who thinks that there are supererogatory actions, and that it can be valuable to perform them, must be making a mistake about the very concept of value.

Perhaps denying the intelligibility of belief in supererogation is not Kelsen’s only option. Instead he could conceivably invoke his ‘broader sense of the word “ought”’ and argue that supererogatory actions can be fitted into his normative taxonomy in a different place. They are actions that one is permitted not to perform. Now to fit them into his category of valuable actions he only has to make a minor modification:

The judgement that some behaviour is ‘valuable’ or ‘has value’ (and in this sense, is ‘good’) means that this behaviour is decreed to be obligatory or *permitted to be omitted* in a norm.

We may agree with the proposal that supererogatory actions are actions that one is permitted not to perform. They are regulated, in that negative way, by a permissive norm.<sup>7</sup> The difficulty is, however, that this is clearly not the feature of supererogatory actions that entails their value. Many actions are permitted to be omitted without being supererogatory and without any implications as to the value of performing them. Under the conditions of my train fare, I am permitted to break my journey overnight or not to do so, at my discretion. Nothing is implied about the value of doing either. True, breaking my journey overnight becomes supererogatory if, for example, I do it at the cost of some personal inconvenience to assist a stranger who is taken ill on the train. The value of the action lies in the assistance I thereby provide. Relative to that value, however, the permission not to perform the action is a surprise and a puzzle. It is even known among philosophers as ‘the problem of supererogation’.<sup>8</sup> Given their value, why are supererogatory actions not obligatory? Why, in spite of that value, are they permitted to be omitted? The suggested modification to Kelsen’s claim about value turns this question upside down. It makes it the case that actions that one is permitted to omit are *eo ipso* valuable to perform. That is a crazy position to take.

Of course Kelsen might challenge my example: he might say that my assisting the stranger on the train is an obligation, perhaps a moral obligation of which my legal permission to break my journey overnight happily facilitates the fulfilment. Then he

<sup>7</sup> For an influential analysis in these terms, see Joseph Raz, ‘Permissions and Supererogation’, *American Philosophical Quarterly* 12 (1975), 161.

<sup>8</sup> Roderick Chisholm and Ernest Sosa, ‘Intrinsic Preferability and the Problem of Supererogation’, *Synthese* 16 (1966), 321.

is able to accommodate the case in his original formulation. But he has to be able to give this answer not only for this case but for all alleged cases of supererogation. And if he does, that brings him back to his original difficulty. He is not only denying that there are cases of supererogation. He is denying the intelligibility of the category. He is not solving the problem of supererogation but denying that there could possibly be any such problem.

### *3. Reasons beyond norms*

The problem of supererogation can be restated as a problem, not about values, but about reasons. Supererogatory actions are those that one has powerful (possibly decisive) reasons to perform, but that one is permitted not to perform because of the burden of performing them. There can also be actions that one has powerful (possibly decisive) reasons to perform but that one has no obligation to perform, never mind any permission not to perform them.<sup>9</sup> Your severe symptoms give you decisive reasons to see your doctor, but you have no obligation to see her. Your love of Hitchcock gives you decisive reasons to see the new print of *Vertigo*, but you have no obligation to see it. Of these actions one might say: they are actions that one ought to perform even though it is not the case that one ought to perform them. Putting it that way invites the charge of contradiction. But there is no contradiction. It is just that there is more than one sense in which we say of an action that it ought to be performed. Sometimes we mean that the action is obligatory; on other occasions we mean

<sup>9</sup> It follows that not every action that one has no duty to perform is 'beyond the call of duty' in the sense that can (in suitable cases) make its performance supererogatory. Only actions that one has no duty to perform *and* that one is permitted not to perform can be supererogatorily performed. Thus the kind of permission involved in supererogation is not just absence of duty, which Kelsen calls 'negative permission' (GTN 31). It is the kind of permission that exists under a distinct permissive norm.

only that there are powerful, perhaps decisive, reasons to perform it. Kelsen does not discuss the latter case any more than he discusses the case of supererogation. That is because these are cases, if I may put it this way, of an 'ought' without any norm that corresponds to it. The action ought to be performed, and it is a valuable action to perform, but those facts hold irrespective of any 'commanding, empowering, or permitting' norm.

Just as some deny that there can be supererogation, so some deny that there can be an action that one has decisive reason to perform but that one has no obligation to perform. Some utilitarians, for example, would subscribe to the view that I have an obligation to perform whichever action I have decisive reason to perform.<sup>10</sup> But that is a substantive principle. It admits the conceptual distinction between having an obligation and having a decisive reason. Does Kelsen also admit it? To put it another way, does he admit the existence of actions that one ought to perform but not by virtue of any norm under which one ought to perform them? Perhaps he would say that, in the examples of the severe symptoms and of the new Hitchcock print, the way to go is to differentiate different normative points of view. One lacks both a moral obligation and a legal obligation, perhaps, but couldn't it be that one falls under an analogously commanding norm from the point of view of prudence or from the point of view of aesthetic appreciation? Perhaps he would say that.<sup>11</sup> But the answer does not solve his problem.

That is because, in order to solve his problem, it is not enough for him to assimilate only *decisive* reasons to the world of norms. We need to know how to think about reasons more generally, whether decisive or not. Do they or do they not belong to the domain of Ought? So now we see the strange

<sup>10</sup> e.g. Peter Singer, 'Famine, Affluence, and Morality', *Philosophy and Public Affairs* 1 (1972), 229; Shelly Kagan, *The Limits of Morality* (Oxford 1991).

<sup>11</sup> He turns to the metaphysics of 'points of view' for some similar purposes, e.g. in *GTN* 58 note 163.



narrowness of Kelsen's use of the word 'ought'. If no norm, he says, then no ought. But what if, in spite of there being no norm, there are reasons? If I assert that you have a reason, probably not a decisive one, to eat a hot lunch on a winter's day, where does my assertion stand in Kelsen's 'irreducible duality of Ought and Is'? Does it stand on the 'Ought' side or the 'Is' side?

#### 4. Reasons with and without values

Ontologically, reasons are facts, and that may dispose one to place reasons on the 'Is' side. What reason do you have to eat a hot lunch on a winter's day? The fact that a hot lunch will stop you shivering is one reason; the fact that a hot lunch will help keep winter flu at bay is another. But one may think that the ontological classification is a red herring. As Kelsen says:

By the very nature of things, even a statement about a norm is an *is*-statement, a statement about the *specific* existence (an Is) of a norm (an Ought). But the 'Is' of an 'Ought', the existence of a norm, is something different from the existence of a fact; it is an *ideel* and not a 'real' Is or existence. (GTN 41)

So there is the fact that a norm exists (e.g. the fact of my obligation). That is different, thinks Kelsen from the fact of a 'real' fact's existence. We may worry a little about the scare-quote-marks around 'real'. But we may yet be tempted by the thought that the "Is" of an "Ought" is something special, and we may think that in this respect the fact of the norm is no different from the fact that constitutes the reason. Both are facts only, so to speak, within the normative domain.

They are something special, then, but what makes them special? It is tempting to return here to the relation with values. If I have a reason to  $\phi$ , and a fortiori if my  $\phi$ ing is obligatory, doesn't that entail that there is some value in my  $\phi$ ing? In Kelsen's version:

When a norm decrees behaviour to be obligatory, the actual behaviour which agrees with the norm can be judged (i.e. evaluated) as valuable or good, and the behaviour which does not agree with the norm as ‘disvaluable’ or bad. As was indicated previously, this norm institutes a *value*, if we mean by ‘value’ agreement with a norm and by ‘disvalue’ failure to agree with a norm. When a certain behaviour is objectively— i.e. purely cognitively—asserted to agree or not with a norm presupposed to be valid (and in this sense is evaluated), the norm serves as a *standard of value*. (GTN 30)

Notice that Kelsen is a deontologist, i.e. one who believes that the norm institutes the value, rather than the value instituting the norm. Be that as it may, we may think that what makes the “‘Is’ of the ‘Ought’” into something special is the place of value in it. Where there are reasons and norms there are values, and that is what takes reasons and norms out of ‘ordinary’ facticity. Thus:

The duality of Is and Ought coincides with that of *reality* and *value*. ... In the case of an objective value-judgment, the value cannot ... be understood as a property of reality, as a colour is a real property of a real object. That something real is objectively ‘valuable’ means that an Is agrees with an Ought. (GTN 16.III)

Again, we may worry about the possibly tendentious use of the world ‘real’ here. But making a value-realist attack on Kelsen is not our immediate priority. Instead, our question is whether the domain of Ought is coextensive with the domain of value, once we are thinking of both norms and reasons as belonging to the domain of Ought. The answer is that it is not.

Consider epistemic reasons, reasons to believe. That I have reasons to believe P, even decisive reasons to believe P, does not entail or even suggest that there is any value in my believing P. My belief that it is a warm day outside may be supported by evidence (people are walking by without coats), by testimony (I was told by my friend who visited earlier), and by perception (I can feel the warm air through the window). I have decisive reasons to believe that the day is warm. But what is the value of

my believing this, while I lie incapacitated in my hospital bed? Perhaps the belief only adds to the curse of my incapacitation. Likewise, while I am bed-ridden, what is the value of my believing that the bus to town will be leaving in seven minutes, or that today there is a strike on the railways? There is no value in my believing either of these things since I am not going anywhere and I don't have anyone else who is going anywhere to whom I could impart the information. And yet I have decisive reasons to believe both of these things: for both the bus timetable and the local newspaper are right here on my bedside table. Epistemic reasons, to put it crudely, are reasons that do not correspond to any value in the thing that they are reasons for.

Could we not say that the truth of one's beliefs is a value in its own right, and that this is the value served by epistemic reasons? Kelsen rightly rejects this option:

'Good' is a value, a moral or legal value, according to whether it is a moral or a legal norm which institutes this value. If we also conceive of truth as a 'value', as a logical or *theoretical* value (as opposed to a moral or legal value which is a *practical* value), we might believe that the desired parallel or analogy between a statement and a norm can be justified by the claim that both are related in some way to *values*.

But this is not possible: there is no parallel or analogy between the being-true of a statement and the being-good of behaviour, between the judgment that a statement is true and the judgment that behaviour is morally or legally good. The latter is a genuine value-judgment, but not the former. (GTN 45.1)

But this leaves Kelsen with a difficulty. What are we to say about epistemic reasons, reasons to believe? Being reasons that do not correspond to value in what they are reasons for, do they belong to the domain of Ought or the domain of Is?

Kelsen offers no answer. He says nothing about epistemic reasons or epistemic norms. In developing his view that truth is not a value, he thinks only of logic, not epistemology. He concludes that the so-called norms of logic are not truly norms:

There do not exist any norms of logic prescribing that statements are to be true, and thus instituting truth as a logical value. Logic is not a 'normative' science. ... Acts of thought as such are not subject to any norms at all (GTN 45.III)

We may regard the claim that the norms of logic are not truly norms as a *reductio*.<sup>12</sup> It shows only that Kelsen's *General Theory of Norms* is not an explanation of norms in general, but only of a certain specialised type of norms. Be that as it may, the omission of attention to epistemic norms raises independent doubts about Kelsen's bold conclusion. Cannot a belief be unjustified? Cannot a believer be biased, gullible, superstitious, prejudiced in her reasoning towards her beliefs? Are these not faults relative to her cognition of truth? And if they are faults, should Kelsen not also say that they constitute or entail epistemic norm-violations, notwithstanding that truth is not a value?

### 5. Normativity deinflated

Allow me to recap. The distinction between the world of norms and what lies outside it does not correspond to the distinction between the world of reasons and what lies outside it, for there are reasons beyond norms, for example those that tell in favour of supererogatory action. The distinction between the world of reasons and what lies outside it does not correspond to the distinction between the world of value and what lies outside it, for there are epistemic reasons as well as practical ones. Finally, for completeness, the distinction between the world of norms and what lies outside it does not correspond to the distinction between the world of values and what lies outside it, for there are epistemic norms as well as epistemic reasons, and neither corresponds to any kind of epistemic value. There are three quite

<sup>12</sup> But cf Gilbert Harman, 'Logic and Reasoning', *Synthese* 60 (1984), 107.

different distinctions here. Kelsen conflates them. But now we know they are different: Which, we may wonder, constitutes the ‘irreducible duality’ of Ought and Is? Now that we know that there are three different distinctions in the neighbourhood, should we still agree with Kelsen’s claim that

The difference between Is and Ought cannot be explained any further: We are immediately aware of the difference (GTN 17)

### 6. *The special problem of legal normativity*

Many contemporary philosophers fret about normativity, and in particular about how normativity is possible.<sup>13</sup> But often they are not fretting about normativity in my literal-minded sense, i.e. about the property or properties in virtue of which a norm is a norm. Often their concerns extend beyond norms to reasons that are not norms. In framing a question about reasons, irrespective of whether they are norms, one might expect them to have used the word ‘rationality’ instead of the word ‘normativity’. They might have asked: How is rationality possible? But that would be a rather misleading way to express their question. For the word ‘rationality’ is widely used to designate the capacity or propensity to respond to reasons, to follow reasons, or to use reasons in one’s reasoning. In this sense it is a property, not of the reason, but of the reason-user. By contrast, the word ‘normativity’ is not in everyday use so it can be given a technical meaning for philosophical purposes. And perhaps the technical meaning is something like this. Normativity designates the property or properties in virtue of which a reason is a reason. Or, to put it

<sup>13</sup> For some recent high-quality fretting, see David Plunkett, Scott Shapiro, and Kevin Toh, *Dimensions of Normativity: New Essays on Metaethics and Jurisprudence* (Oxford 2019).

differently, normativity is what differentiates a fact that is a reason from a fact that is not a reason.

I said that many philosophers writing about normativity fret about how normativity is possible. They are attempting, we may now think, to address deep doubts about the very possibility of reasons. The doubts, however, come from two contrasting directions, reflected in two contrasting literatures. Among philosophers of law, the doubts are mainly about how so-called 'legal reasons' can possibly qualify as reasons. After all, as Kelsen and others taught us, law is a human creation. It is found in or supervenes upon legislative acts, judicial decisions, and customary practices. It is therefore morally fallible. At least sometimes it purports to give us reasons to act which are morally invalid and which, apart from fidelity to the law, there is no reason to treat as reasons. In that case fidelity to the law is surely irrational. So why do we classify legal reasons as reasons? Why not go straight to the moral reasons, relative to which these so-called legal reasons turn out to be nothing but extremely unreliable intermediaries? Call this the 'special problem of legal normativity'.

You will see right away that the special problem of legal normativity is not one that could be encountered by Kelsen. That is because Kelsen regards morality as just another normative order operating with a given social space:

Morality is just as much a social order as law, and an individual is just as subject to the morality which is valid in the social group to which he belongs as he is subject to the law which is valid in the social group to which he belongs. (*GTN* 1 note 4)

Like law, morality is a human creation. Law does not answer to morality any more than morality answers to law. Nor is there any third thing to which both law and morality answer:

The Natural Law ... is [supposed to be] ... a system of norms which is immanent in nature and which is posited by the will of nature. There is, and there can be, no such law. The name 'Natural Law' is given to

whatever appears just to a given Natural Law teacher, which he then projects onto 'nature' in order to give it the necessary authority. (GTN 35 note 90)

Those who worry about the special problem of legal normativity think, on the contrary, that there is something, a set of reasons beyond the law, to which the law must answer. Morality is the name generally given to this set of reasons.

One might say that, for Kelsen, both law and morality are relative, whereas for those who worry about the special problem of legal normativity, law is relative whereas morality is real. Those who worry about the special problem of legal normativity worry about how relative reasons are possible, given the existence of real reasons. What space could there be in rational thought for reasons that lack the status of *real* reasons? There is no such problem for Kelsen, since the relative is, so to speak, as real as anything in the domain of Ought ever gets. Everything there is valid only relative to some system of norms. There is no normative reality beyond that. Remember Kelsen's rebuke:

[T]he 'Is' of an 'Ought', the existence of a norm, is something different from the existence of a fact; it is an *ideel* and not a 'real' Is or existence. (GTN 41)

These words, however, tend to suggest a problem with talk of the 'real' and the 'relative'. It is not totally clear what is meant by either term. Even Kelsen must resort to scare-quotes around the word 'real' to convey that fact. Elsewhere, responding to that terminological problem, I have suggested a different way of formulating the special problem of legal normativity. I have suggested that we think of legal reasons as *escapable* and moral reasons as *inescapable*.<sup>14</sup> The idea is that there is an intelligible

<sup>14</sup> Gardner, 'Nearly Natural Law', *American Journal of Jurisprudence* 52 (2007), 1, reprinted with minor corrections in my book *Law as a Leap of Faith*

question of why I should follow, or even pay attention to, legal reasons. Further reasons, not local to the law, are needed for caring about what the law says. That is the sense in which legal reasons are escapable. But there is no intelligible question of why I should follow, and more generally pay attention to, moral reasons. No further reason is called for. They are among the reasons that are mine to follow, and more generally to attend to, just in virtue of my being a rational agent, i.e. an agent with the capacity to follow and attend to reasons.

Formulated in these terms, the special problem of legal normativity becomes: Why attend to these so-called escapable reasons, given that not doing so is *ex hypothesi* not irrational? Why not just follow the inescapable reasons, such as the moral ones, directly? I already hinted at the answer. For escapable reasons, the question arises of why I should follow them or more generally pay attention to them. The answer to that ‘why’ question needs to be given, ultimately, in terms of inescapable reasons. But it does not follow that one could leap straight to the inescapable reasons and ignore the escapable ones. Suppose I am advised to follow the law, or I promise to conform to the law, or I debate whether I have an obligation to obey the law, or I warrant that I am acting within the law, or I take on a role that requires me to support the rule of law. Naturally there arise questions about the soundness of the advice, the bindingness of the promise, the basis of the obligation, the truth of my warranty and the legitimacy of the role. These questions arise at the level of inescapable reasons. But if there are such reasons they refer to the law, which *ex hypothesi* a system of escapable reasons. The

(Oxford 2012). In his ‘Escapable Law: John Gardner on Law and Morality’, *Jerusalem Review of Legal Studies* (forthcoming) Leslie Green makes some telling criticisms of the escapable/inescapable distinction as I originally presented it. I have presented it here in a way that is supposed to steer clear of most of his criticisms. However a couple of criticisms in section 3 of his paper do strike me as rather relativistic and I make no attempt to steer clear of these!



relevant question is whether I have any inescapable reasons to resort to certain escapable reasons. The escapable reasons do not become redundant just because there is a question of whether I have inescapable reasons to resort to them. On the contrary: it is only if they are not redundant – i.e. if resorting to them would make some difference – that I could possibly have inescapable reasons to resort to them. There can be no reason to resort to anything if resorting to it makes no rational difference.

Some people seem to be squeamish about calling escapable reasons, such as legal reasons, ‘reasons’. Much ink was spilt among philosophers of law over the ages in trying to establish that either legal reasons are inescapable or they are not reasons at all. But why so? Presumably those who are squeamish about calling escapable reasons ‘reasons’ would also be squeamish about calling escapable norms ‘norms’. Here they could learn from Kelsen. Since Kelsen thought all norms escapable, his work provides a test case for the cogency of the view that escapable norms are norms. One may think, as I think, that he got a lot of things about norms wrong, including quite a few things about legal norms. But one thing that he clearly did not get wrong is that legal norms are norms in spite of being escapable (or ‘relative’) norms. Why be more squeamish about calling escapable reasons ‘reasons’ than one would be about calling escapable norms ‘norms’? Is it a norm of Monopoly that one must pay rent if one lands on another player’s property. So there is a reason, so far as playing Monopoly goes, to pay such rent. Naturally that does not allow one to avoid the further question of whether one has any reason to play Monopoly. It is just that such a reason, which ultimately needs to be inescapable, makes essential reference to the escapable reasons given by Monopoly itself. For it is *ex hypothesi* a reason to play Monopoly, with all its crazy norms and bizarre reasons (all fortunately escapable).

7. *The special problem of moral normativity*

If all this is right, then the special problem of legal normativity is not so much of a problem. It is a storm in a teacup. So we turn our attention now to doubts that come from precisely the opposite direction. They are doubts about what I call inescapable reasons. How can there be such things? How can any reason, or for that matter any norm, have such a hold over us? This might be called the ‘special problem of moral normativity’ for it is most often raised in connection with moral reasons and moral norms. But that already shows where one error is creeping in. For the same question arises with various other kinds of reasons and norms. It arises with respect to prudential reasons and norms, for example. How can my own future have such a hold over me that I ought to keep an eye on my own health and my own pension? An interesting feature of some writing that treats moral normativity as a special problem is that it treats prudential normativity as *fait accompli*, and attempts (often in a contractarian spirit) to build moral normativity out of it.<sup>15</sup> But such a line of argument is hard to maintain for long. What problem does morality throw up on this front that prudence does not? Both moral and prudential reasons and norms have an inescapable hold over rational beings, and inescapability is supposed to be the puzzling feature of reasons that is being explored under the heading of ‘normativity’.

More importantly, perhaps, the same question arises with respect to epistemic reasons and epistemic norms. For they too are inescapable.<sup>16</sup> There is no intelligible question of why I

<sup>15</sup> A no-nonsense example is David Gauthier’s *Morals by Agreement* (Oxford 1987): ‘Morality, we shall argue, can be generated as a rational constraint from the non- moral [=prudential] premisses of rational choice’ (4).

<sup>16</sup> Brian Leiter writes: ‘Even in the theoretical domain, there is no real normativity, no norms of belief ... the agent *must* adhere to.’ Leiter, ‘Normativity for Naturalists’, *Philosophical Issues* 25 (2016), 64 at 75. This is

should follow them. No further reason is called for. They are among the reasons that are mine to follow, and more generally to attend to, just in virtue of my being a rational agent, i.e. an agent with the capacity to follow and to attend to reasons. Why is the intense worry about the normativity of moral reasons not paralleled, then, by a no less intense worry about the normativity of epistemic reasons? This is a particularly important challenge if we think that what we are looking for is some mysterious ingredient X that differentiates a fact that is a reason from a fact that is not a reason. For surely all facts are epistemic reasons. Any fact that we become aware of supports the inference to some further belief beyond belief in that very fact. Everything is evidence of something else. If that is true, and if we accept that normativity in the relevant sense is a property of facts that are inescapable reasons, then there is no ingredient X that must be added to a fact to turn it into a reason. Rather, the question turns into this one: why is this particular fact a reason for this particular response? And that is not a problem unique to inescapable reasons. Even of legal reasons and Monopoly reasons we have the problem of why *this* legal or ludic fact is a reason for *that* response by a competent reason-user. This is surely not a problem of normativity but of relevance. It is not about how reasons can have their inescapable hold over us. It is about what is to be done with them *once* (inescapably or otherwise) they have their hold over us. It is about what rationalises what.

Thinking about epistemic reasons alongside moral reasons has another advantage in defusing worries about moral normativity.

perhaps an attempt to deny the inescapability of epistemic reasons and norms. If so it is misleadingly put. That epistemic reasons and norms are inescapable does not mean that any particular epistemic reason or norm is inescapable. Probably there is room for diversity in approach or technique in arriving at defensible beliefs. Defensibly, some rely more heavily on testimony, some on perception, etc. That is compatible with the inescapability (or what Leiter calls 'real normativity') of epistemic reasons and norms taken as a set.

It is part of the nature of a belief, as opposed to delusions, flights of fancy, etc. that it responds to reasons for believing. If one is not believing for reasons then one is not exactly believing. Of course sometimes one may get the reasons wrong. But even then there is the question of whether one gets the reasons wrong for reasons. Did one miss the evidence, or misperceive what was going on, for a reason? Responsiveness to the world – to the facts – is part of what it takes to be a believer. Belief, in that sense, entails rationality. Is this not equally true with action? How can one act without intending? And how can one intend if not by acting for what one takes to be reasons? And if one mistakes what are not reasons for reasons, again there is the question of whether one did so for reasons. As lawyers put it, if not justified was one at least excused? Again these are questions that presuppose that we are dealing with rational beings, beings with the capacity and the propensity for paying attention to and making use of reasons. And there we have the answer to the supposed problem of the normativity of moral reasons. As rational beings we cannot but engage with reasons, at any rate the inescapable ones. And among inescapable reasons, moral reasons are nothing special in respect of their inescapability. Their hold over us as rational beings is no different from the hold of prudential reasons, epistemic reasons, and various other inescapable reasons.

I say that moral reasons and epistemic reasons are alike in respect of their hold over us. But we already know that they are unlike in another way. Where there are reasons for action there is value in our doing as they would have us do. Where there are reasons for belief, there need be no value in our believing as they would have us believe. If there is something to discuss in ethics that does not equally arise in epistemology, it is that. Could it be that those who believe in the existence of a special problem of moral normativity are really just worried about the place of value in the world? If so, their problem does not extend to epistemology, but it does still extend to prudence, and one wonders why they regard it as a *special* problem for morality. But

one may also ask whether the problem is as intimately connected with *our* place in the world as the talk of ‘normativity’ leads one to expect. For there is value in the world whether or not there are extant valuers to experience it. The question is not how value comes to be relevant to us or how we come to be locked into engaging with it. We are rational beings, to whom (hence) reasons apply, including practical reasons, which by their nature bring us into constant encounters with the value all around us. The problem, rather, is in the nature of the world. I am not sure that we are well-served by thinking of this as a problem of norms and normativity, or even of reasons and rationality. It is a mistake to think that value is there for the sake of valuers. Valuers, on the contrary, are there for the sake of value.<sup>17</sup> If the special problem of moral normativity is really the quite different problem of the existence of value, then I think we should be told.

<sup>17</sup> Tim Macklem and I explore this theme further (and with more subtlety) in ‘Value, Interest and Well-Being’, *Utilitas* 18 (2006), 362.