MAKING LAW MATTER:

PROJECTIVISM AND HART'S NORMATIVITY

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ABSTRACT

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This thesis explores a novel approach to understanding H.L.A.Hart's account of the 'normativity of law'. A successful account of the 'normativity of law' is meant to *inter alia* establish how legal requirements come to be morally binding. It will be argued that the internal point of view, key to Hart's account of normativity, can intelligibly constitute the 'source' of moral bindingness *only* if one assumes a *projectivist model* (resting on a non-cognitivist metaethic). The projectivist model understands moral bindingness as the motivational pull exerted by a moral judgment owing to the *attitude* of approval underlying it.

Hart never expressly endorsed projectivism—far from it: he refused to take any firm metaethical stance at all. This thesis argues, however, that there are semantic and metaethical elements in Hart's scheme that naturally lend themselves to a projectivist model. A good portion of this thesis comprises in setting out, aligning—and where appropriate, emending—those elements so as to yield a coherent projectivist model of the 'normativity of law'. While discussing Hart's account of normativity occupies a bulk of this thesis, its overarching *telos* would be to take the first steps towards attempting a new *begrundung* of the projectivist model of 'normativity of law'. It does so by setting out the conceptual underpinnings of the projectivist model and by allaying some of the misgivings surrounding it. The projectivist model used to be prominent in the first half of the 20th century, thanks to the pioneering works of the Scandinavian Legal Realists, but has of late largely fallen into disrepute. Although Hart is widely credited with having taken apart the Scandinavian Legal Realists' project—who themselves saw Hart's project as contiguous with theirs—it will be argued that there is indeed a great deal convergence between the projects of Hart and the Scandinavian Legal Realists.

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I have the dim…outline of this book in my mind…One side saying: you are blind… The other: you are seeing ghosts.

H.L.A. Hart [1]

Are they immutable principles which constitute part of the fabric of the Universe, not made by man, but awaiting discovery by the human intellect? Or are the expressions of changing human attitudes, choices, demands or feelings?...In what follows we shall seek to evade these difficulties.

H.L.A. Hart [2]

[1] Hart's notebook, from which *The Concept of Law* emerged: Nicola Lacey, *A Life of H.L.A. Hart: The Nightmare and the Noble Dream Nightmare* (OUP 2004) 222.

[2] H.L.A. Hart, *The Concept of Law* (2nd ed. OUP 1994) 168.

INTRODUCTION

> The world for them is not a concourse of objects in space; it is a heterogeneous series of independent acts... There are no nouns in Tlön's conjectural *Ursprache*, from which the "present" languages and the dialects are derived: there are impersonal verbs, modified by monosyllabic suffixes (or prefixes) with an adverbial value. For example: there is no word corresponding to the word "moon,", but there is a verb which in English would be "to moon" or "to moonate." "The moon rose above the river" is *hlor u fang axaxaxasmlo*, or literally: "upward behind the onstreaming it mooned."
>
> Jorge Luis Borges [3]

I

Imagine finding yourself in Tlön, the fictional world depicted by Borges. You would find the Tlönians conceptualizing the phenomena around them entirely in terms of verbs rather than nouns; perceptions rather than things; in terms of the 'subjective' rather than the 'objective'. Theirs, you would find, is a world in which Berkley's, rather than Descartes' axiom is common sense. [4] The underlying phenomena which you as an earthling would perceive are just the ones the denizens of Tlön would perceive; only that for the Tlönians there are no things apart from and instantiating such perceptions. No objects that perceptions are *about*. Perception is all there is, *tout court*. Borges meant *Tlön, Uqbar, Orbis Tertius* to be an allegory for the debate between idealists and realists. In a Borgesian twist, we are to learn that

[3] J.L. Borges, 'Tlön, Uqbar, Orbis Tertius' in *Labyrinths: Selected Short Stories and Other Writings* (Penguin 1962) 27.

[4] J.L. Borges, 'Merely a Man of Letters: An Interview' (1977) 1 Philosophy and Literature 337- 341.

Tlön is indeed the very world we presently inhabit; just that no one other than the idealists seems to have noticed.

Tlön, Uqbar, Orbis Tertius could also *mutatis mutandis* serve as an allegory for the metaethical debate in philosophy which resembles the one between idealists and realists in some respects.[5] In issue in the metaethical debate are the nature and foundations of morality. The cognitivist camp, in line with how a typical earthling would view Tlönian phenomena, holds that there are moral facts and properties existing independently of the subject's acts of moral valuation. The non-cognitivist camp, in line with how Tlönians view phenomena in their world, holds that moral valuation is all there is; there are no moral facts and properties existing independently of such valuations. As we shall see a little later, this metaethical debate has had a profound impact on discussions under the rubric of the 'normativity of law'. In fact, it is these very two metaethical camps Hart imagines admonishing him in the first passage of the epigraph. The cognitivist camp is the one Hart imagines calling him 'blind' and the non-cognitivist camp is the one saying he was 'seeing ghosts'. Despite the centrality of this metaethical debate to the project of accounting for the 'normativity of law', Hart refuses to take sides, declaring instead his metaethical non-alignment, which we find in the second passage of the epigraph. As we shall see, this metaethical ambivalence would not only prevent Hart from giving a satisfactory account of the 'normativity of law' but also would engender serious misunderstandings about his views on the topic. This thesis argues that aligning Hart to the non-cognitivist camp alone can render intelligible and bring to fruition his—widely perceived to be abortive—project of accounting for the

[5] Peter Kail, 'Causation, Fictionalism and Non-cognitivism: Berkeley and Hume' (2011) Archives Internationales d'histoire des Idées, 31-40.

'normativity of law'. This will, however, not involve an attempt to artificially force Hart's work into a non-cognitivist mould. As we will see, there are elements in Hart's account which naturally lend themselves to a non-cognitivist model. This thesis sets out, aligns—and where required, emends—elements in Hart's account in a manner that yields a coherent account of 'normativity of law' along non-cognitivist lines.

II

Before we turn to a discussion of the 'normativity of law', or Hart's account thereof, let us begin with an unvarnished characterization of the two camps which have dominated the metaethical landscape since the turn of the twentieth century. The *cognitivist* camp has it that moral judgments have a mind-to-world direction of fit and involve belief in objective moral facts and properties. The semantic model underlying this position is that of moral descriptivism, the thesis that moral statements purport to describe objective moral facts and properties. There is, on this view, something for our moral judgments to be true or false in relation to. Accordingly, there is more to morality than just moral judgments since, in making moral judgments, we are responding to moral facts and properties which are ontologically independent of the moral judgment. The 'bindingness' of morality—or 'normativity' of morality, as the technical label goes—consists in the truth or correctness of moral judgments in relation to the objective moral facts and properties. This idea also lends itself to another mode of elucidation. It could be said that there are 'true' moral requirements which our moral judgments track; and by 'normative', it is meant that these 'requirements' are true or binding. These objective moral requirements are the 'source' of normativity. They *impinge* on the subject and

it is for the subject to be receptive of them. This model of normativity will be referred to as the *impinging model*. The idea of reason-givingness is inextricably intertwined with the impinging model. Talk of objective moral facts and properties is interchangeable with that of objective moral reasons or objective moral requirements.

The *Non-cognitivist* camp urges us to understand morality—much in the same way as Tlönians urge us to understand their world—as being exclusively composed of verbs rather than nouns. Non-cognitivists claim that there is nothing more to morality than acts of valuation, which is to say, the act of making moral judgments. Moral judgments, on this account, have a world-to-mind direction of fit and involve expressions of *attitudes*. Moral beliefs, facts, properties have no place in this account. Non-cognitivists are struck by the fact that there is a non-contingent connection between our moral judgments and motivation. They argue that this connection should be inexplicable if moral judgments involved beliefs, as the cognitivists claim, since beliefs are motivationally inert mental states. This motivational connection could only be rendered explicable, non-cognitivists argue, if moral judgments are understood as expressing motivationally laden *attitudes* which are 'conative' as opposed to 'cognitive' mental states. Accordingly, 'normativity' or 'bindingness' on this model is understood as the motivational pull exerted by moral judgments. Non-cognitivists claim that normativity doesn't impinge on us, but rather we project or spread normativity on to the world by expressions of motivationally laden attitudes. The conception of normativity endorsed by the non-cognitivists is the projectivist model. The 'source' of normativity or bindingness on the projectivist account is the *attitude* of the subject. The projectivist model thus does not countenance the idea of reason-givingness which is the warp and woof of the cognitivist account.

III

The metaethical debate outlined above has had a profound impact on discussions about the so-called 'normativity of law' though the literature doesn't advertise this impact nearly enough. Legal philosophers do not tend to pin metaethical badges to their lapels. This is, of course, not to say that they are metaethically non-aligned. Most of them metaethically align themselves latently, a fact which the tenor of their accounts of the 'normativity of law' bear out amply.

The philosopher's use of the term 'normative' spans two distinct concepts: one semantic and the other metaethical. The term 'normative' is used by philosophers in the metaethical sense to convey the idea that moral requirements are 'authoritative' or 'binding'. Additionally, philosophers also use the term 'normative' to designate as semantically 'normative' any statement purporting to convey what is 'correct' or 'required' in relation to some standard (whether or not moral).

One of the central aims of legal philosophy has been to provide an account of the pre-theoretical intuition that the law is 'normative'. Given the two senses of 'normativity', a complete philosophical account of the 'normativity of law' comprises two distinct but closely related projects: a) Semantic- The theorist's semantic model of legal statements must portray such statements as semantically 'normative'; and b) Metaethical- The theorist must explain how legal requirements that are conveyed by semantically normative legal statements come to be morally binding. As we shall see later in Section VI, the semantic and the metaethical prongs are interconnected. Let

us, for now, train our focus on the metaethical prong. The key question around which the metaethical prong of discussions under the rubric of the 'normativity of law' revolves is this: *how* do legal requirements come to be morally binding? Any attempt at answering this question presupposes taking a stance on the metaethical debate about what the bindingness of morality comprises in. Legal philosophers who discuss the 'normativity of law' have an adherence, often unspoken, to some view about moral bindingness stemming from their latent metaethical commitment. Accounts of the 'normativity of law' are therefore dismissed because they fail to portray the idea of moral bindingness of legal requirements in a manner which accords with the critic's metaethical persuasion.

Nowhere is this more evident than in discussions on Hart's account of 'normativity of law'. The gripe that Hart did not have a successful account of normativity is now almost legion. Instances of such criticisms can be multiplied, but let us, for the moment, consider Stephen Perry's:

> In the end, he [Hart], like Austin, does not take normativity sufficiently seriously. Since the internal point of view is nothing more than an attitude that a standard is [morally] binding, Hart is not offering an account of the 'normativity of law' that looks to its (potential) reason givingness. I argue that Hart's non-cognitivist account of the meaning of legal statements, based as it is on the idea that the proper explanation of the 'normativity of law' looks to the expressed endorsement of a standard of conduct rather than to the law's potential to create reasons for action of a specifically legal kind, prevents him from offering…a proper theoretical account of that aspect of the phenomenon of law which he himself took to be most important.[6]

Perry thinks Hart's model of 'normativity of law' fails because Hart cannot account for the moral bindingness of law in a manner which accords with Perry's

[6] Stephen Perry, 'Hart on Social Rules and the Foundations of Law: Liberating the Internal Point of View' (2006) 75 Fordham LR 1171, 1173 (the first two parentheses are in the passage are added; the third is original).

understanding of moral bindingness. The gravamen of Perry's charge can be stated thus. The internal point of view is a *mere* attitude, to wit, an attitude of approval towards a legal standard; and a *mere* attitude of approval could never, in itself, explain how the standard could be morally binding. These criticisms stem from Perry's unspoken adherence to the impinging model, which has it that for a moral requirement to be binding it must be 'objectively' true. A mere 'subjective' attitude, such as the one Perry finds on Hart's account then, simply cannot do the job of morally binding an agent. The idea of 'reason givingness' Perry emphasizes on presupposes the impinging model of normativity.

IV

It would be no exaggeration to say that the impinging model of 'normativity of law'—such as the one we claim is presupposed by Perry's argument—has now come to assume the status of somewhat of an industry standard.[7] An account of the 'normativity of law', the received view has it, must establish the 'reason givingness of law'. However, it could be argued that this is hardly either an aseptic or helpful way of setting out the problematic of the 'normativity of law' as it already builds the i*mpinging* model into the very idea of a plausible account of the 'normativity of law' and expects any putative account of 'normativity of law' to live up to the impinging model. In doing so, it unwittingly skews the problematic and the whole class of projectivists who understand moral bindingness in a different way is ruled out *in limine*. Quite unsurprisingly then, a great number of legal philosophers with an unspoken adherence to the impinging model find Hart's account to be to be unintelligible. This state of affairs necessitates, as a prerequisite to any fruitful

[7] It will be argued that this is also the view underlying Raz's account of the 'normativity of law'.

discussion, a recalibration of the problematic of the 'normativity of law' to a metaethically aseptic viewpoint.[8] From the aseptic viewpoint, one would have to admit the following: as there are two metaethically respectable ways of understanding 'moral bindingness', there must be two plausible and metaethically respectable ways of understanding 'normativity of law' *qua* bindingness and accounting for it. The impinging model stemming from a cognitivist metaethic, which is now the industry standard, is just one candidate model of 'normativity of law' and rival to the other, the projectivist model of normativity stemming from a non-cognitivist metaethic. The projectivist model, if sound, could render intelligible the idea that a 'subjective' *attitude* could be the source of moral bindingness, without having to invoke the idea of reason-givingness or the idea of objective moral requirements that exist independently of the valuing subject's attitude. The problematic recalibrated to an aseptic viewpoint, this thesis then seeks to provide a novel interpretation of Hart's account of normativity by understanding it along non-cognitivist or projectivist lines.

Before we get there, it may be thought there are hurdles in the way of the very admissibility of the projectivist model. I am acutely aware that the idea of a 'subjective' attitude constituting the 'source' of moral bindingness smells of sulphur to many philosophers: legal philosophers, in particular, since the projectivist alternative has been sparsely articulated in the jurisprudential literature since the 1970's. Some of this disquiet stems from the nature of the projectivist model of moral bindingness in general; others are peculiar to the projectivist model in legal philosophy. The idea of the 'bindingness' of morality is thought to be the pivot which

[8] By 'aseptic', I mean a metaethically neutral viewpoint that does not already presuppose an answer in accordance with one of the two rival metaethical models.

keeps morality in orbit and gives it pride of place in our lives. The fear is that if something like the non-cognitivist model were to be true, it would send morality crashing down. The subjective source of normativity, it is feared, would automatically lead to vulgar subjectivism. Projectivism, the detractor feels, is nothing but an invitation to Ivan Karamazov's nihilistic world where 'anything goes'.

Some of these worries automatically translate into misgivings about the projectivist model of 'normativity of law' as well. Additionally, there are also worries that projectivism in legal philosophy brings in its wake: a) that it cannot account for the 'uniform' bindingness of law, such that if the projectivist model were to be true, the law would be normative only for those who have attitudes of approval towards it; and b) that it collapses into a form of reductionism by reducing 'normativity' to psychological states. I argue that these fears, though understandable, are ultimately misplaced. I argue that the projectivist model is not any worse off than the impinging model; it suffers no obvious disadvantage in comparison to the latter; and it certainly doesn't collapse into relativism, subjectivism, nihilism or reductionism. In doing so, I would not, however, be able to mount a comprehensive defence of non-cognitivism as a metaethical position. Though eminently respectable, non-cognitivism is far from uncontroversial and is challenged on many fronts, semantic, psychological and epistemological; it is also questioned for its motivational model of bindingness. I do *not* seek to establish here that non-cognitivism, as opposed to cognitivism, is *the* correct metaethical view; indeed, nothing in this work turns on my being able to defend such a position. I do *not* seek to establish that accounts of 'normativity of law' stemming from a cognitivist metaethic are wrong or that those stemming from a non-cognitivist metaethic are right. To be sure, the two are incompatible and if one of

them is right, the other has got to be wrong. But this is not an adjudication I will carry out in the present work. In the present work, I will proceed on the assumption that non-cognitivism is a *plausible* metaethical view. The only point on which I do enter the metaethical debate is to defend the projectivist model of bindingness *qua* moral bindingness both in metaethics and as adapted to legal philosophy. I argue that the projectivist model provides a plausible account of the bindingness of morality and moral bindingness of law and is no worse off in comparison to the impinging model *qua* moral bindingness.

Having established that, I seek to give shape to such a model of the moral bindingness of law by setting out, aligning—and where appropriate, emending—elements in Hart's account in a fashion that yields a coherent account of the 'normativity of law' along projectivist/non-cognitivist lines. Though the project of understanding Hart's account of normativity along non-cognitivist lines and the method of doing so will be novel, the idea of a non-cognitivist/ projectivist model of 'normativity of law' itself is of a much older vintage. Scandinavian Legal Realists, such as Axel Hagerstrom, Wilhelm Lundsted, Karl Olivecrona and Alf Ross proposed that the 'normativity of law' was to be understood along non-cognitivist lines. In fact, though he is hardly found credited for it, Axel Hagerstrom was the pioneer of modern non-cognitivism and wrote about it much before A.J. Ayer and Charles Stevenson, who are credited with being the pioneers of non-cognitivism. The Scandinavian Legal Realists argued that the 'normativity of law' was to be explained by the conative attitudes agents take towards the law, which they called 'internalization'. Alf Ross argued that Hart's model of 'normativity of law' was not all that different from his own non-cognitivist model though ostensibly, Hart was very

critical of the Scandinavian Legal Realists' project.[9] Ironically, while Hart is widely credited with having taken apart the Scandinavian Realists' project, they saw Hart's project as contiguous with theirs. I will argue that there is indeed a great convergence between the projects of Hart and the Scandinavian Realists; and Hart's basic scheme in *The Concept of Law* lends itself to be understood along projectivist lines.

V

It will be argued that while Hart did establish that the Scandinavian Realists' sematic model—greatly influenced by the now discarded logical positivism—is flawed, conspicuously absent from his criticisms is any mention of, let alone critical engagement with, either their non-cognitivism or projectivist model of moral bindingness of law. In other words, all of Hart's criticisms are directed against the semantic prong of the Scandinavian Realists' project, not the metaethical prong. There is one element in Hart's account which, at first blush, bears striking resemblance to the Scandinavian Realists' non-cognitivist idea of 'internalization' including its label—namely, the 'internal point of view'. 'Internalization' is the agents' non-cognitive stance of approval of the law. It will be argued that the internal point of view too *lends* itself to be understood as an agent's conative (non-cognitive) attitude of approval of law though as we shall see later, establishing this would need a minor emendation of Hart.

I must hasten to point out that my argument is *not* that Hart endorsed projectivism or non-cognitivism—far from it. He professedly shied away altogether

[9] Alf Ross, 'Review' of *The Concept of Law* (1961-62) 71 Yale Law Journal 1185.

from any metaethical commitment.[10] Hart's official stance was one of metaethical non alignment coupled with a comprehensive normative inertia. He refused to acknowledge that the internal point of view involved a moral stance, let alone a non-cognitivist one. I argue that is only by attributing projectivism to Hart that his idea of the internal point of view could be made to yield an *intelligible* account of 'normativity of law' *qua* moral bindingness. This will, however, not be a contrived or forced metaethical alignment. My work is premised on the conviction that there are elements in Hart's scheme that naturally lend themselves to a projectivist model. These elements include: Hart's view on the *semantics* of legal statements; and the idea(s) of the *internal point of view*. It will be argued that the semantic model that Hart proposes overcomes the flaws of the Scandinavian Realists' semantic model; and when combined with the metaethical prong of the Scandinavian Realists' project, yields a complete account of 'normativity of law' along projectivist lines. The study of semantics of statements of legal obligation and Hart's semantic model will thus play a crucial role in this project. Given his comprehensive normative inertia, however, Hart was altogether ambiguous about the metaethical prong of the project. This lead to problems in his account of 'normativity of law' and also engendered the many misunderstandings about his account.

VI

It was noted earlier that the philosopher's use of the term 'normative' spans two distinct concepts—one semantic and the other metaethical—both of which become relevant in discussions of the 'normativity of law'. In the semantic sense, statements conveying requirements of etiquette, spelling, morality and a host of other standards

[10] Hart (n2) 168.

including shopping lists and cookbooks are all thought to be 'normative' statements. From the welter of statements to which the semantic designation 'normative' applies, we will sieve out two: a) statements conveying moral standards; and b) statements conveying socially practised standards (hereafter norm-relative standards). We pick out these two here because they are relevant in the context of the thesis as a whole and Hart's work in particular. Norm-relative standards such as the requirements of etiquette, grammar, rules of a club etc. owe their existence to social practices. A norm-relative judgment (which issues in a norm-relative statement) need not involve an element of endorsement accompanying the *cognizance* by an agent that something is the socially 'done thing'. A moral judgment, by contrast, *necessarily* entails an element of endorsement. It is because of this element of endorsement that the idea of someone making a moral judgment, 'I ought to donate to Oxfam' and then disavowing it in the same breath, by adding, 'but I don't care', is thought be incongruous. No such incongruity results in disavowing norm-relative judgments because they do not necessarily entail an element of endorsement. Norm-relative statements are also practical and deontic, just as moral statements are; and the two employ similar 'normative' vocabulary comprising expressions such as 'ought', 'must' etc. The distinction between these two kinds of normative statements will assume some significance in the context of this thesis because it will be argued that according to Hart, statements of legal obligation (or internal legal statements as he called them) are norm-relative statements.

The semantic and metaethical prongs have to come together in order to yield a complete account of 'normativity of law'. However, the two cannot just be stacked one on top of the other without regard to their congruity. For a semantic model of

legal statements to figure in a successful account of 'normativity of law', it must be *symmetrical* to the theorist's metaethical model of bindingness of law. The semantic model symmetrical to the *impinging* model is *moral descriptivism*: the thesis that legal statements purport to represent some objective moral requirements or reasons. This mimics the semantic model of moral statements on the cognitivist model. To get off the ground, the projectivist would have to find a semantic model that denies moral descriptivism since it would be asymmetrical with the projectivist account. The projectivist would then have to deny that legal statements purport to represent some objective moral requirements or reasons. It is common these days to hear arguments that Hart's internal legal statements [statements made from the internal point of view] are to be understood as *non-cognitivist* moral statements, expressing the speaker's *attitude* of approval to the law. This understanding is steadily gaining currency as an exegesis of Hart's semantic model because Kevin Toh's recent purported 'expressivist' reconstruction adopts this route.[11] I argue that this route, however, apart from being flawed as an exegesis of Hart's semantic model, is also otherwise unsound and cannot figure in a successful projectivist model of 'normativity of law'. The internal point of view for Hart is a constituent element of the existence conditions of legal systems. Hart maintained that internal legal statements are made by adherents of the internal point of view. Now, if statements made from the internal point of view were to *necessarily* involve moral approval of the law—and non-cognitivist/ expressivist statements do *necessarily* involve an attitude of moral approval—it would render the existence conditions of legal systems fancifully onerous. Treating the internal point of view as comprising an attitude of moral approval would lead us to hold that a legal system does not exist unless it is

[11] Kevin Toh, 'Hart's Expressivism and His Benthamite Project' 11(2005) Legal Theory, 75 (Hereafter: 'Hart's Expressivism'); and 'Raz on Detachment, Acceptance and Describability' 27 (2007) Oxford Journal of Legal Studies, 403; (Hereafter: 'Raz on Detachment').

generally morally approved. This would run counter to everything Hart argued for. Hence, a reconstruction of Hart, like Toh's, which involves arguing that internal legal statements are non-cognitivist/ expressivist moral statements, is a non-starter. Kevin Toh's account, I argue, falters *inter alia* because it falls foul of the above objection. I argue that the semantic model that Hart eventually settled on can be understood as *norm-relativism*: the thesis that legal statements set out what is required by some socially current standard. Being norm-relativistic statements, Hart insisted, internal legal statements (i.e. statements made from the internal point of view) do not entail any moral approval or endorsement of the law. This also explains why Hart maintained that 'normative' terms have different meanings in legal and moral contexts. The norm-relativist semantic model is probably Hart's most important contribution to the debate about 'normativity of law'.

VII

All of this might seem to leave us with a conundrum. On the one hand, I argue that understanding the internal point of view as expressing a non-cognitive attitude of approval of the law is a move necessary to read Hart's account of normativity along projectivist lines. On the other hand—and ostensibly on the pain of contradiction—I argue that internal legal statements (which are made from the internal point of view) do not express any attitude of the approval of the law; and that the internal point of view ought not to be understood as expressing an attitude of approval of law. How then does one bring to fruition the metaethical prong of the project of understanding Hart's account of 'normativity of law' along projectivist

lines if not through the idea the internal point of view? Perplexing as it may initially sound, the answer I propose is—through the idea of the internal point of view which, while involving an *attitude* of moral approval, *neither* makes up a constituent element in existence conditions of a legal system, *nor* provides the perspective from which internal legal statements are made.

I argue, contrary to received wisdom, that in *The Concept of Law*, Hart has *two* versions of the internal point of view. One is the norm-relative internal point of view; and the other, the practical reasoning internal point of view (PR internal point of view). *Any insider* who is *cognizant* of legal rules has the norm-relative internal point of view and can make internal legal statements from this point of view. This fits in perfectly with Hart's semantic position that internal legal statements are norm-relative statements not necessarily involving any moral commitment. The norm-relative internal point of view does not entail any moral commitment on the part of the insider. The *other* version is the PR internal point of view involving a moral stance which only insiders taking an *attitude* of approval towards the law have. It is the latter, I argue, which provides the 'source' of moral bindingness. Sieving out these two versions is central to unlocking Hart's normativity. Dichotomizing of the internal point of view into two, as I have proposed, ensures that one version (the norm- relative internal point of view) services the existence conditions of legal systems; and the other—the PR (moral) internal point of view, comprising as it does, an *attitude* of approval of law—serves to form the 'source' of moral bindingness of law.

Given his metaethical non-alignment and his comprehensive normative inertia, Hart denies that the practical reasoning internal point of view involves a moral

stance at all; let alone admitting that it involves a non-cognitivist moral stance (which is to say, an attitude of approval of the law). This is the point at which I propose a two-fold emendation of Hart. Firstly, I argue that denying the practical reasoning internal point of view to be a moral stance would be tantamount to rendering otiose the entire distinction between the internal and external point of view, which Hart takes to be of great importance in his work. I then argue that the moral stance constituting the practical reasoning internal point of view would have to be read as a non-cognitivist attitude of approval towards the law. It is only by doing so that his idea of the internal point of view can be made to yield an *intelligible* account of 'normativity of law'. The model of moral bindingness of law that our enquiry yields is this. While *any* 'insider'—including even the Holmesian bad man—who is *cognizant* of the law can identify the law and make norm-relative internal legal statements, without the least element of moral endorsement, only those insiders who have the moral internal point of view, by having an *attitude* of approval towards the rule in question, take the law to be morally binding. The internal point of view, if understood as a non-cognitivist attitude of approval of law, can yield a projectivist account of 'normativity of law' without having to understand internal legal statements as non-cognitivist statements expressing the agent's approval of the law. This reading thus brings together the semantic and metaethical elements (appropriately emended) to yield a complete account of 'normativity of law'.

Fortunately, Hart's metaethical ambivalence did not affect the basic projectivist scheme of his account of normativity in *The Concept of Law*. Had this not been the case, the central argument of this thesis, at least in its present form, would have been untenable. In *Essays on Bentham*, however, his metaethical ambivalence drove him

towards a deep metaethical paradox and bedevilled his account of normativity. I seek to examine Hart's self-confessed paradox in *Essays on Bentham* and attribute it to his attempting to eclectically combine elements from the impinging and projectivist models with disregard to the incongruity of elements from the two models.[12]

VIII

I continue to find it somewhat odd that non-cognitivism, which the Scandinavian Realists' pioneered, albeit with significant refinements by subsequent philosophers, should be thought to be a respectable (if contested) metaethical position, but the once dominant projectivist model of 'normativity of law', which their metaethics was designed to serve, should have fallen into disrepute among legal philosophers. While the core of this thesis is about Hart's normativity, its overarching *telos* would be to take the first steps towards attempting a new *begrundung* of the projectivist model of 'normativity of law', and restoring to it a nimbus of respectability. I must stress that this aim is easily overstated and must be hedged in with caveats. Felix Cohen once remarked that in jurisprudence, 'the champion of a new theory is generally expected to prove the virtue of the lady for whom he fights by splitting the skulls of those who champion other ladies.'[13] Though I do argue for the projectivist model of 'normativity of law', no skulls will be split here. I do *not* seek to establish that accounts of 'normativity of law' stemming from a cognitivist metaethic are wrong, nor do I claim to have anticipated and defended the projectivist model from all possible charges

[12] H.L.A. Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Clarendon Press 1982) 267.

[13] Felix Cohen, 'The Problems of a Functional Jurisprudence' (1937-1938) 1 Modern. L. Rev. 5.

that could be raised against it. My aim here will be the modest one of establishing that the projectivist model of 'normativity of law' stemming from a non-cognitivist metaethic provides a *plausible* and intelligible account of 'normativity of law'. In civil procedural jargon, my concern has been that of establishing that the projectivist model of 'normativity of law' has an arguable case and should not be dismissed *in limine*. I have not been able to mount a substantive defence of the projectivist model, nor have I made a counterclaim against the impinging model, let alone substantiate any such counterclaim. In other words, this thesis is an effort at a clearly articulated perspective rather than the final word on the projectivist model of 'normativity of law'.

IX

This thesis consists of seven chapters excluding the introduction and the epilogue. In what follows, I will sketch out the shape the chapters will be taking with the aid of a brief chapter plan.

Chapter I sets out the metaethical divide and the contrasting approaches to cashing out the idea of bindingness or 'normativity' of morality: the *impinging* model (resting on a cognitivist metaethic) and the *projectivist* model (resting on a non-cognitivist metaethic). I set out why the projectivist model relies on a subjective source of bindingness and allay some fundamental concerns surrounding the *plausibility* of such a model. I argue that the projectivist model is not any worse off than the impinging model in securing the bindingness of morality and does not lead to nihilism or relativism, as its detractors fear.

Chapter II argues that the philosophers' use of the label 'normativity' spans two distinct concepts: one semantic and the other metaethical. From the welter of standards to which the semantic designation 'normative' applies, we will focus on two: a) moral standards; b) socially practised standards (norm-relative standards). This chapter will elaborate on the conceptual and phenomenological contrast between moral judgments and norm-relative judgments. This contrast assumes special significance in the context of Hart's work and its import will emerge clearly in Chapters IV and V. A complete account of 'normativity of law', it will be argued, comprises two prongs: semantic and metaethical. Chapter III will concern the metaethical prong and Chapter IV will concern the semantic prong.

In Chapter III, which concerns the metaethical prong, it will be argued that the problematic of the 'normativity of law' is skewed heavily in favour of the impinging model since an overwhelming majority of legal philosophers assume this model. This chapter seeks to recalibrate the problematic of 'normativity of law' to a metaethically aseptic viewpoint and argues that the projectivist model of 'normativity of law' is a plausible rival to the impinging model. Here we will look at the works of the Scandinavian Legal Realists who were the pioneers of the projectivist model of 'normativity of law' and see the contiguity between their project and Hart's: particularly between the Scandinavian Legal Realists' idea of 'internalization' and Hart's idea of the internal point of view. The projectivist model will be defended from some metaethical objections raised against it, namely: a) that it cannot account for the 'uniform' bindingness of law and b) that it collapses into some form of reductionism since it reduces 'normativity' to psychological states.

In Chapter IV, we will focus on the semantic prong of the account of the 'normativity of law'. It will be argued that the semantic model of a theorist ought to be congruous with the metaethical model. Hart, it will be argued, endorsed a norm-relativist model of legal statements: the thesis that statements of legal obligation state what is 'correct' or 'required' in relation to socially practised standards. It will be argued that norm-relativism is congruous with the projectivist model of moral bindingness and when combined with it can yield a complete projectivist account of 'normativity of law'. The norm-relativist model will be defended from some influential objections levelled by Raz to the effect that the model fails to portray legal statements as 'normative' statements.

In Chapter V, we will study the idea of the internal point of view. It will be argued that Hart had two versions of the internal point of view: one, the norm-relativist internal point of view and the other, the practical reasoning internal point of view. It will be argued that one version (the norm-relative internal point of view) services the existence conditions of legal systems; and the other—the PR (moral) internal point of view, comprising as it does, of an *attitude* of approval of law—serves to form the 'source' of moral bindingness of law.

In Chapter VI, I examine Hart's self-confessed paradox in *Essays on Bentham* and attribute it to his attempting to eclectically combine elements from the impinging and projectivist models, with disregard to the incongruity of elements from the two models. I argue that this eclecticism resulted from his metaethical ambivalence. It will be argued that the way to dissolve the 'paradox' is to drop the impinging elements from his account and recalibrate it to a projectivist model of the sort argued for in Chapter V.

Chapter VII examines Kevin Toh's purported reconstruction of Hart's account of normativity along non-cognitivist lines. Toh proposes that Hart's internal legal statements be understood as non-cognitivist moral statements expressing the speaker's attitude of approval towards the law. It will be argued that the reconstruction Toh proposes cannot be squared with Hart's scheme without mutilating the latter's basic structure. It will be argued that Toh's reconstruction collapses into *moral relativism*: a highly discredited and implausible metaethical position.

Chapter I

NORMATIVITY AND MORALITY

> Think of one world into whose fabric values are plainly objectively built; think of another world in which those values have been annihilated. And remember that in both worlds the people in them go on being concerned about the same things- there is no difference in the 'subjective' concern people have for things, only in their 'objective' value. Now I ask what is the difference between the states of affairs in these two worlds? Can any other answer be given except 'None whatever'?
>
> Richard Hare [14]

[14] R.M.Hare, 'Nothing Matters' in *Applications of Moral Philosophy* (London: Macmillan 1972) 32, 42.

I

Introduction

One of the central questions around which discussions under the rubric of the 'normativity of law' revolve is this: *How* do legal requirements come to be morally binding? An examination of how this question has been understood and answered will be undertaken in a subsequent chapter. Here, we will train our focus on something prior; something that underlies the aforesaid question and *any* attempt to answer it: what does the bindingness of morality comprise in? Legal philosophers who discuss the 'normativity of law' have an adherence, often unspoken, to some view about moral bindingness stemming from their latent metaethical commitments. Accounts of 'normativity of law' are often therefore dismissed because they fail to portray the idea of moral bindingness of legal requirements in a manner which accords with the critic's metaethical commitment. A good deal of criticisms of Hart's account of 'normativity of law' stem from the critics' adherence to a metaethical view opposed to non-cognitivism.[15] Examining Hart's account of normativity in the light of their own (contrary) metaethical views, quite unsurprisingly, they find it to be seriously flawed. But once we admit the *plausibility* of non-cognitivism, and assess Hart's account in its light, many of his claims about the 'normativity of law', hitherto thought to be unintelligible, could be rendered intelligible. The non-cognitivist model, if sound, could explain just how a 'subjective' *attitude* could explain moral

[15] Toh, 'Hart's Expressivism' (n 11) 75, 77.

bindingness, without invoking any objective moral requirements, existing independently of the valuing subject's attitude.

It will be the burden of later chapters of this work to argue that Hart's account of normativity is best understood along non-cognitivist lines, though he himself never openly endorsed non-cognitivism, or for that matter, any concrete metaethical stance. Understanding Hart in this fashion will open up before us an account of the 'normativity of law' which presents a *plausible* and *intelligible* alternative to the accounts stemming from a cognitivist metaethic. The latter, it would be no exaggeration to say, has now come to assume the status of somewhat of an industry standard.[16] So complete is the dominance of a cognitivist metaethic among legal philosophers that the problematic of the 'normativity of law' is skewed to *in liminie* rule out an account based on a non-cognitivist metaethic. This necessitates a recalibration of the problematic of the 'normativity of law' to a metaethically aseptic viewpoint—a project which will be undertaken in chapter III of the thesis. The problematic retrieved, Chapters IV & V will then attempt to set out, align- and where appropriate, emend- elements in Hart's account in a fashion that yields a coherent account of 'normativity of law' along non-cognitivist lines.

There is the sense that there may be a major hurdle that needs to be negotiated before one could take up the invitation of understanding Hart's normativity along non-cognitivist lines, the hurdle being: the soundness of the non-cognitivist idea of the bindingness of morality. The idea of bindingness of morality is thought to be the pivot which keeps morality in orbit and gives it the pride of place in our lives. The

[16] I discuss models of the 'normativity of law' stemming from cognitivism and non-cognitivism in Chapter III.

fear is that if something like non-cognitivist model were to be true, it would send morality itself crashing down: if the bindingness of morality were to rest on something as 'subjective' as the non-cognitivist says it does, morality would lose its centrality in our lives. A subjective attitude, it is feared, would be too flimsy to do the job of 'binding' agents morally. If the bindingness of morality rests on an attitude, it is feared, it would be too easy to oil out of moral obligations.[17] From here, nihilism would appear to be but a little step away. It is owing to such considerations that the very thought of a non-cognitivist model of bindingness smells of sulphur to many philosophers. In the present chapter, I seek to establish that such fears, though understandable, are ultimately misplaced. I will argue that the structure and experience of morality will not be any different if the non-cognitivist rather than the cognitivist model of bindingness were true. Even if the source of bindingness is a subjective attitude- as the non-cognitivist model argues- we will not *experience* morality any differently than what we would if the cognitivist model of bindingness were true. It will be my argument that *qua* establishing the bindingness of morality, the non-cognitivist model is not any worse off in comparison to the cognitivist model.[18] That is, I seek to establish, that morality would not be held any less firmly in orbit if the non- cognitivist model were to hold good than if the cognitivist model were to hold good. The non-cognitivist model is not, in any way, worse off than the cognitivist model in accomplishing all the goals that the idea of bindingness of morality is thought to accomplish.

[17] Christine Korsgaard, *Sources of Normativity* (Cambridge University Press 1996) 30.

[18] There are many objections against non-cognitivism—which its critics think are serious—other than those pertaining to its model of bindingness. I will be briefly outlining some of those objections in later sections of the paper. However, I will not defend non-cognitivism against any of those objections.

The purpose of this exercise will *not* be to establish that non-cognitivism, as opposed to cognitivism, is the correct metaethical view; and indeed nothing in this work turns on my being able to defend such a position. I do *not* seek to establish that accounts of 'normativity of law' stemming from a cognitivist metaethic are wrong or that those stemming from a non-cognitivist metaethic are right. To be sure, the two are incompatible and if one of them is right, the other has got to be wrong. But this is not an adjudication I will carry out in the present work. My only aim will be to establish that when it comes to the bindingness of morality, the non-cognitivist model is a plausible account and suffers from no obvious disadvantage in comparison with the cognitivist model. Having established that, in later chapters of the work, I seek to give shape to such a model of moral bindingness of law through Hart's idea of the internal point of view.

Section II of the chapter briefly outlines the diverse ideas of bindingness of morality arising out of different metaethical approaches. In Section III, I set out the metaethical divide that throws up the diverse notions of moral bindingness. In Section IV, I sketch the two rival forces in moral phenomenology that the cognitivists and non- cognitivists latch on to in order to form the basis of their respective accounts of bindingness. Sections V and VI discuss the difference between the models of bindingness stemming from these rival metaethical outlooks. And finally, in Section VII, I seek to establish that the non-cognitivist model of bindingness of morality is not, in any way, worse off than its cognitivist counterpart in accomplishing all the things that the idea of bindingness of morality is supposed to.

II

Moral Bindingness: A Snapshot

We evaluate persons and actions as right or wrong and as good or bad. It is with this aspect of our lives that 'ethics' or 'morality' is concerned. Our choice of action is thought to be 'constrained', 'guided' or 'demanded' by moral 'requirements'—or at the very least, by the ones we are 'aware' of—in a yet unexplored sense of 'requirements', 'awareness' 'demand' 'guidance' or 'constraint'. [19] The thought that moral requirements are a *demand, guide* or a *constraint* on actions is alluded to in the literature with a multitude of kindred—and professedly synonymous—technical expressions; that for example moral requirements are 'normative', 'authoritative', 'binding', 'obligatory', 'action-guiding', 'categorical', 'inescapable' or have 'force'.[20] Philosophers tend to use notions such as 'normativity' 'authority' 'bindingness' and the like, interchangeably. For the sake of economy and convenience, in what follows I intend the pair of terms—'normativity' and 'bindingness' of morality—to cover the abovementioned panoply of kindred ideas. Throughout the rest of this chapter, I will use 'bindingness' and 'normativity' interchangeably. The thought that moral

[19] The prospect of having so many terms nestled in scare quotes does not enamour me. However, I am afraid, this is unavoidable at this juncture, as the precise import and scope of these ideas is the subject of deep metaethical controversy. Cognitivists and non-cognitivists understand each of these ideas differently. For the moment, I mean to use these terms as aseptically as possible from the point of view of metaethics.

[20] Peter Railton argues that these notions are used interchangeably in the literature: P. Railton, 'What the Non-cognitivist Helps us to See the Naturalist Must Help Us to Explain' in, John Haldane and Crispin Wright (eds.) *Reality, Representation and Projection* (OUP 1993) 279. A.W.Moore uses the terms 'normativity' and 'bindingness' interchangeably: A.W.Moore 'Categorical Imperative?' 63 (1953) Ethics, pp. 235,237; and so does Korsgaard: C.Korsgaard, *Sources of Normativity* (n 17) *passim;* John Gardner uses 'normativity' and 'inescapability' interchangeably: 'Nearly Natural Law' (2007) American Journal of Jurisprudence 1.

requirements are 'normative' or 'binding' has now come to assume the status of an axiom amongst professional philosophers. It is thought to be a pivotal feature of moral requirements which must be adequately accounted for by anyone who makes it her business to explain moral phenomena. Theoretical accounts of morality therefore are often dismissed because of their failure to convincingly account for the 'normativity' or 'bindingness' of morality.[21]

But just how is one to understand this idea of 'normativity' of morality?[22] Like elsewhere in philosophy, there is to be found a significant disagreement on how to understand the normativity of morality. It would be tempting to assume that there is *one* particular feature of moral requirements which is understood, by a general consensus, as making up the normativity of morality. Unfortunately, the debate around the normativity of morality does not lend itself to such a neat understanding. Philosophers are deeply divided in their metaethical views about the very nature of morality, and by that token, have very diverse views on the features that moral judgments instantiate. [23] Philosophers of different metaethical stripes pick out entirely different features of moral judgments as making up the normativity of morality, even denying that what the rival stripe has picked out is a feature of moral judgment at all. The metaethical stance that a theorist takes directly influences the

[21] Luke Russell, 'Two Kinds of Normativity: Korsgaard v. Hume' in Charles Pigden (ed.) *Hume on Motivation and Virtue* (Palgrave Macmillan, 2009) 208-9.

[22] This enquiry is different from the sort of enquiry that Korsgaard undertakes because it is prior to such an enquiry. Korsgaard *presupposes* a certain answer to this question.

[23] Metaethical questions are 'second order' questions about the nature of morality. They take the form of—*metaphysical* (are there moral facts or truths?); *epistemological* (if at all there are moral truths how do we access these?); *semantic* (are moral statements propositions or non-propositional?); and *psychological* (does moral judgment involve a cognitive state like belief or a conative one like desire?)—issues about morality and our moral claims; D.Brink, *Moral Realism and the Foundations of Morality* (Cambridge University Press 1989) 1; A. Miller, *An Introduction to Contemporary Metaethics* (Cambridge: Polity 2003) 1. Metaethical questions are separate from first order ethical questions such which are the subject matter of normative ethics.

reading of normativity that she endorses. In the next section, we will briefly outline the most salient metaethical approaches in contemporary moral theory. The deep metaethical divide has thrown up three readings of normativity. Here we present the readings in rudimentary form, to be fleshed out in greater specificity as we go along.

On the *first* reading, normativity is to be understood in *ontological* terms as being a matter of our moral judgments tracking some 'truth', such that a moral judgment is *binding,* if it is in accord with some such truth. For reasons to be elaborated later, this idea lends itself to another mode of elucidation; it could be said that there are 'true' moral requirements that our moral judgments track, and by 'normative' it is meant that these 'requirements' are true i.e. they really exist. This reading of normativity is typically endorsed by cognitivists. On the *second* reading, normativity is to be understood in *psychological* terms such that for a moral judgment to be binding is for it to exert a 'motivational pull' on the agent; normativity or bindingness on this reading is motivational. This reading of normativity is typically endorsed by non- cognitivists. On the *third* reading, normativity is to be understood in terms *combining* the ontological and the psychological, such that for a moral judgment to be binding is for it to be both objectively true and motivating at once. The idea involved here is that there are moral truths, the very perception of which will also exert a motivational pull on the agent.[24] Before returning to these readings of normativity in greater detail, we shall, in the following section, briefly survey the metaethical divide which throws up these varied readings.

[24] This reading of normativity was behind John Mackie's error theory/nihilism: *Infra* (n 32).

III

The Metaethical Divide

I will dichotomize metaethical theories into the cognitivist and non-cognitivist camps.[25] On the subject of labelling, a caveat would be in order. Cognitivism and non-cognitivism are terms of art that have been used somewhat differently by different philosophers. The differentia I will employ to distinguish between cognitivist and non-cognitivist theories is whether they allow for moral judgments to be truth-apt in relation to certain moral facts or moral reality. While this differentia is alone sufficient for the dichotomy, we get *gratis,* as it were, another (secondary) *differentia* tethered to the former. It is only a *cognitive* state of mind, such as belief, that can be truth-apt. A belief aims at some truth and can be true or false, depending on whether the purported truth obtains. Non-cognitive states of mind or what are also known as *conative* states of mind, such as desire, cannot be true or false as they do not aim at truth.

1. Cognitivist Theories

As I shall understand it, a view is *cognitivist* if it allows for moral judgments to count as *beliefs* that are capable of being true or false in virtue of their more or less

[25] I will be excluding from this survey that mythical straw man of moral philosophy: naïve subjectivism—the position which has it that moral judgments are reports of our subjective states of mind. On this view 'X is wrong' is equivalent to 'I think/feel that X is wrong'. No known contemporary philosopher holds this view.

accurate representation of the facts within the domain: moral facts.[26] The central leitmotif of cognitivist theories is the idea that moral judgments are truth-apt; there are moral facts that our moral judgments could be true (or false) in relation to.[27] Cognitivism comprises two theses: *semantic descriptivism*, the idea that moral judgments purport to represent moral facts and properties; and *psychological cognitivism*, the idea that moral judgments involve a cognitive state of mind i.e. belief.

As moral judgments express beliefs, they aim at truth and as such, could fail or succeed in tracking truth. With this comes the idea of *justification*. For a moral judgment to be justified would be for it to be true.[28] When there is a moral disagreement between two parties, the disagreement is one in belief about some moral facts; if one of them is right, the other has to be in error *qua* some moral truth. Cognitivists split into further sub divisions: Moral Realists, Constructivists, Relativists, Voluntarists and Error theorists. While all versions of cognitivism share the above noted semantic and psychological theses, they differ on ontology i.e. on the nature and status of moral facts.

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[26] In this, I broadly follow Russ Shafer-Landau; *Moral Realism: A defence* (Clarendon Press 2003) 17.

[27] Moral judgments are true, if the moral facts they purport to represent, really exist. In the literature, these moral facts are also referred to as 'truth-makers'. See Richard Rorty on the discussion of truth-makers in *Objectivity, Relativism and Truth* (Cambridge University Press, 1991) 4. Also see Trenton Merricks, *Truth and Ontology* (Clarendon Press 2007) 1-14. I will use the terms 'moral fact' and 'moral truth' interchangeably.

[28] Strictly speaking, it is the 'belief' about a moral fact that is or is not justified. But to avoid clutter I will refer to moral judgments, rather than beliefs as things that could be justified. There are two distinct theories of truth that cognitivists could rely on. One is the classic 'correspondence' theory of truth and the other is the 'coherence' theory of truth. This intra-mural distinction will not have any significant bearing on either our taxonomy or on what follows. To keep things simple, I will speak of truth as understood by the correspondence theory. See Richard Kirkham *Theories of Truth: A Critical Introduction* (MIT Press 1992) *passim*.

Moral realism is the paradigm of cognitivist theories. It argues that our moral claims purport to describe the moral properties of people, actions, and institutions: properties that obtain independently of our moral theorizing. It asserts the existence of moral facts and true moral propositions.[29] It holds that there are moral facts whose existence and nature are independent of our beliefs about what is right and wrong.[30] These moral facts are ontologically 'given' rather than being constructed at some place or time by some real, hypothetical or ideal process. *Constructivists* share the realists' semantic and psychological assumptions. They only differ with realists on ontology, in holding that the moral reality is not ontologically *given* but something that is 'constructed'. Russ Shafer Landau, for example, in contrasting the constructivists' idea of moral reality from that of the realists', argues, 'Constructivists [like the realists] endorse the reality of a domain, but explain this by invoking a constructive function out of which the reality is created. This function has moral reality as its output'.[31]

Error theorists accept the semantic and psychological commitments of the cognitivists.[32] They agree that moral statements purport to describe moral reality and our moral concepts are precisely how the cognitivists describe them to be. However, crucially, where they disagree with the cognitivists, is on the ontological thesis; they

[29] Brink (n 23) 14. Moral realism further divides into naturalism and non-naturalism depending on how the theorist portrays moral facts. For naturalists like David Brink, moral facts are naturalistic facts i.e. facts revealed by science; for non- naturalists like G.E. Moore moral facts are non-natural facts and unlike any of the facts revealed by science.

[30] Brink (n 23) 7.

[31] Shafer-Landau (n 26) 14 (parenthesis added).

[32] Though error theory—also referred to often as *nihilism*—has a somewhat long history, with Frederich Nietzsche and Bertrand Russell endorsing some version of it, the most systematic and famous proponent of error theory was John Mackie; *Ethics: Inventing Right and Wrong (*Penguin 1977).

argue that there are no moral facts.[33] *Voluntarism* is a cognitivist position in that it claims that moral judgments purport to represent truth. However, the truth is fixed by the say-so of some entity.[34] Another way of putting this is that on voluntarism the 'truth-maker' is the say-so of some entity. *Moral Relativism* shares the cognitivists' *semantic* and *psychological* commitments and thus could be categorized as a cognitivist theory. However, in contrast to other cognitivists, the relativists hold that moral truths are *relative* to the culture and social practices of a social group.[35] A moral relativist thinks that moral facts are constituted by a social group's moral practices, with the result that what may be morally true of one place and time may not be true of another place and time.[36]. Relativism is, however, severely discredited as a metaethical account. As Chris Gowans points out, 'moral relativism has the unusual distinction—both within philosophy and outside it—of being attributed to others, almost always as a criticism, far more often than it is explicitly professed by anyone'.[37] It entails the problematic view that 'X is right' is equivalent to 'X is the 'done thing' in society'. However, this is easily refuted by our moral experience; we do often morally question the social practices of our own society. Furthermore, relativism does not seem to be able to explain the nature of our moral disagreements either, as according to it all our moral disagreements are reducible to factual disagreements about what the 'done thing' in society is. But as moral experience

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[33] Mackie insists that his error theoretical claims stem from an ontological difference with cognitivists and that he is in agreement with them on the semantic and psychological theses: J.L.Mackie *Ethics* (n 32), 18.

[34] Korsgaard, *Sources of Normativity* (n 17) 21.

[35] C. Gowans "Moral Relativism", *The Stanford Encyclopaedia of Philosophy (Spring 2011 Edition)*, Edward N. Zalta (ed.), URL http://plato.stanford.edu/archives/spr2011/entries/moral-relativism/ (Last retrieved 25/9/2011); Gilbert Harman *The Nature of Morality: An Introduction to Ethics* (OUP 1977) *passim*.

[36] Brink (n 23) 14.

[37] Gowans (n 35).

demonstrates, moral disagreements are known to persist despite agreements on all factual matters.

2. Non-cognitivist theories

The idea of moral judgments being *non-representational* provides the central leitmotif of non-cognitivist theories. Moral judgments, according to non-cognitivists, do not purport to state any moral facts. As they do not purport to state facts, moral judgments do not involve *cognitive* states of mind associated with the discovery of facts i.e. belief. They argue instead that moral judgments involve a *conative* state of mind, whose primary function is non-representational.[38] Such conative states of mind could comprise desire, or desire-like *attitudes*. Non-cognitivist theories literally get their name from the *psychological* thesis that moral judgments are not cognitive (i.e. do not involve belief). Two negative theses make up non-cognitivism: *semantic* (moral) non-descriptivism, the thesis that moral judgments do not purport to describe moral properties and facts; and *psychological* non-cognitivism, the thesis that moral judgments do not involve cognitive states of mind such as belief. Now, as for the ontological or metaphysical commitment of the non-cognitivists: they argue that there are no moral truths, no objective moral facts and properties. In other words, our world does not contain values in the sense in which the cognitivist understands them. When two parties morally disagree, the non-cognitivist would argue, their disagreement is to be understood differently from how one would understand a 'factual' disagreement; their disagreement takes the shape of a conflict between two persons who have different plans about a future course of action and

[38] Simon Blackburn, 'Anti-Realist Expressivism and Quasi Realism' in David Copp (ed.) *Oxford Handbook of Ethical Theory* (OUP 2005) 147.

end up disagreeing about what is to be done.[39] Disagreement in plans is also a disagreement, but it is very different from disagreement about some truth.

There have been many *avatars* of non-cognitivism, beginning with A.J. Ayer's *emotivism* (*Language, Truth and Logic*: 1936), Charles Stevenson's version of emotivism (*Ethics and Language*: 1945), Richard Hare's *prescriptivism* (*Language of Morals*: 1952) down to more sophisticated 'expressivist' accounts of Allan Gibbard, Simon Blackburn, Mark Timmons and Terry Horgan. While there is much that separates these *avatars*, they have retained at their kernel the two negative semantic and psychological theses. In what follows, we will treat non-cognitivism synonymously with expressivism of the sort argued for by Blackburn and Gibbard.

Allan Gibbard's and Simon Blackburn's versions of expressivism, though agreeing with Ayer's core *emotivist* idea that moral judgments are *psychologically* non-cognitive and *semantically* non-fact stating, diverge from it in other crucial respects. Emotivism identifies the conative state with an emotion: for instance, judging that X has done wrong is equated by emotivism with being angry with X.[40] Expressivists, however, have moved beyond this idea. Expressivists argue that moral judgments express conative states of mind (and emotions are also conative) but argue that these conative states of mind should be understood in terms of complex attitudes rather than *mere* emotions. As Blackburn complains, emotivism, gives too much of an impression of moral judgments being like anger, but it need not be that closely aligned to emotions. Gibbard identifies a moral judgment with a complex attitude of

[39] C.L. Stevenson, 'The Emotive Meaning of Ethical Terms' 46 (1937) *Mind* 14,19; Also see A. Gibbard, *Thinking How to Live (* Harvard University Press 2003) *passim*.

[40] Ayer's theory was derisively called the 'boo-hooray' theory or the 'expletive' theory of morality.

norm acceptance; an acceptance of a norm calling for such anger (or for that matter, any other suitable emotion).[41] The posited mental state of norm acceptance is still a kind of attitude: an endorsement of the emotional response as appropriate. But such attitudes can diverge from one's more passion laden sentiments. You can find yourself getting angry at the bearer of bad news, for instance, despite thinking that you shouldn't "blame the messenger."[42]Thus, expressivism has developed the ability to recognize a respect in which particular emotional responses may be defective and others apt, while denying that there are any 'moral facts' against which to measure them. The account thereby acknowledges and explains the critical gap by understanding it as being a gap between a mere sentiment and evaluative judgment — between having some emotional response and endorsing it as appropriate.[43]

IV

An Oscillation Between Parallel Forces

Two aspects of the phenomenology of our moral experience—and the two are also contradictory—are explained by each of these camps better than its rival. The two aspects in question are: *first* the assertoric nature of our moral judgments, *appearing* as they do, at least at the surface level, to make claims about some moral truth; and *second* the motivational pull exerted by our moral judgments; as there

[41] A. Gibbard, *Wise Choices Apt Feelings* (OUP 1990) Chapter 1.

[42] Justin D'Arms and Daniel Jacobson, 'Sensibility Theory and Projectivism' in David Copp (ed.), *Oxford Handbook of Ethical Theory* (OUP 2006) 198.

[43] ibid.

seems to be a *non-contingent* connection between making a moral judgment and having one's motivation suitably aligned to it. These two considerations pull in *opposite* directions, akin to a pull exerted by parallel forces, with the consequence that any metaethical theory starts off with an apparently insurmountable hurdle, namely, to accommodate the two opposing considerations. This problem is often thought to be among the knottiest of metaethical issues. Michael Smith, in fact, takes the problem to be serious enough to be labelled *the* moral problem and makes it the centre piece and title of his book.[44] A.W.Moore argues that the idea of a moral judgment being both true and motivating at once is actually a self-contradictory idea.[45] Wittgenstein thought that such an idea was a 'chimera'.[46] Interestingly, this also constitutes the point of departure for J.L. Mackie's famous 'argument from queerness' underlying his error theory. In a nutshell, Mackie argues that the concept of moral value presupposes a moral 'fact', by the mere cognition of which the agent is also motivated to act. He then argues that there is no 'fact' in the universe the cognition of which could, in itself, motivate an agent. Thus he concludes that there are no moral values; and that our moral thought is in deep error.[47]

But why do we have these parallel or contradictory forces in the first place? The answer is to be found in the *standard picture of psychology* which has it that states of mind fall into two categories: cognitive (belief) and conative (desire or desire-like

[44] M. Smith, *Moral Problem* (Oxford Blackwell 1994)*;* Michael Smith 'Realism' in Russ Shafer-Landau ed., *Ethical Theory: An Anthology* (Oxford Blackwell 2007) 74.

[45] A.W.Moore, 'A Categorical Imperative?' 63(4)Ethics,(1953), pp. 235-250.

[46] Ludwig Wittgenstein, 'Lecture on Ethics' 74 (1965) Philosophical Review 3,7.

[47] Mackie (n 32).

attitudes). [48] Beliefs purport to represent the world as it is and are assessable in terms of truth and falsehood. Conative states like desire do not purport do this and so are not assessable in terms of truth or falsehood. The mental state that aims at truth (cognitive) is motivationally inert; and the state of mind that is motivationally laden (conative) does not aim at truth. If I see what I believe to be a viper lying in my path, that 'belief', in itself, will not motivate me to avoid it; it is only some *conative* state, such as fear of the viper, or the like, which will motivate me. The mere cognition of some fact, in itself, could leave a person motivationally 'cold'; the motivation that issues in action must eventually be supplied by some conative state.

As we shall see, cognitivist theories seem better equipped to explain the claims to truth that our moral judgments *appear* to make; and non-cognitivists seem better suited to explain the motivational pull of our moral judgments. Indeed each camp's relative strength constitutes their main line of attack against the rival camp; Cognitivists argue that non-cognitivists cannot accommodate the truth talk with which our moral judgments are shot through; non-cognitivists argue that cognitivists cannot explain the necessary motivational pull of moral judgments. And, as we shall see in the next section, these two contrary considerations also form the lynchpin of each camp's model of moral normativity or bindingness. I will now elaborate on these two considerations.

Truth Talk: At the surface level, our moral talk does appear to be *assertoric* i.e. fact stating. Our moral discourse is shot through with hints and clues that seem to

[48] M. Smith, *Moral Problem* (n 44) 7-9; Michael Smith 'Realism' (n 44) 73, 74. Also see John Bricke, *Mind and Morality: An Examination of Hume's Moral Psychology (*Oxford: Clarendon Press, 1996) Chapters 1 and 2. There are a few philosophers- constituting a small minority- like John McDowell and Mark Platts, who deny the standard picture of psychology. However, in what follows I am going to *assume* – in accordance with the general received view—that the standard picture is the correct representation of human psychology.

suggest that there is something to be right or wrong about in moral judgments. How could such 'truth talk' ever make sense if, in making moral judgments, we were expressing some conative attitude, as the non-cognitivists claim?[49] Non-cognitivists face the burden of being able to explain how their theory can plausibly accommodate such truth talk. This very problem also manifests itself in the form of the Frege-Geach argument, an influential semantic objection to non-cognitivism.[50] Peter Geach pointed out that moral statements such as, 'X is wrong', could appear in *unasserted* or *embedded* contexts, without any change in meaning. For instance, consider the suppositional conditional, 'if lying is wrong then getting your little brother to lie is wrong'. Here, in the above conditional, neither 'lying is wrong' nor 'getting your little brother to lie is wrong, is being used to express an attitude, as they are *embedded* in a conditional. Yet, their meaning must be the same as it is in a straightforward moral judgment, 'Lying is wrong' because the suppositional conditional could combine with an assertion to yield a valid conclusion- by a *modus ponens* inference- 'therefore getting your little brother to lie is wrong'. Geach has used this argument as a *reductio* to show that our moral judgments are indeed *assertoric* and not expressions of attitude in the way that the non- cognitivists claim.

Early non-cognitivists like Ayer made no attempt whatsoever to explain this phenomenon. A lot of the work of modern expressivists, however, has been directed towards trying to accommodate 'truth talk' within a non-cognitivist frame work and to deflect the Frege-Geach problem. The task of 'saving the appearances' of assertoric moral truth talk, as Blackburn puts it, while staying within a non-cognitivist

[49] This factor, of course, accrues equally in favour of all cognitivist theories including the error theory and relativism.

[50] P. Geach, 'Assertion' (1965) 74 *Philosophical Review* 449-465.

framework, has assumed the form of a programme called *quasi realism*.[51] Gibbard and Blackburn have, at various points, offered various accounts of how this project could be accomplished. One of the most interesting manoeuvres that the expressivists have employed to explain the seemingly objective features of moral discourse and its truth talk, is the minimalist or deflationary theory of truth. Blackburn argues that the expressivists, through the project of quasi-realism, can 'earn' the right to speak of truth, though there is no robust truth that our moral judgments purport to represent. Needless to add, cognitivists believe that the minimalist account alone is insufficient to account for the 'truth' talk in morality, which in their view, appears to presuppose a more 'robust' sense of truth.

Practicality Requirement- There is, however, as we noted earlier, another consideration about the phenomenology of moral judgments that pulls in the opposite direction. This consideration is that of motivational force or efficacy of moral judgments or, what is also technically known in the literature as the practicality requirement.[52] Imagine trying to convince your friend that he ought to donate to Oxfam and after a long discussion, you actually manage to convince him; and your friend acknowledges, 'I agree that I have a moral obligation to donate to Oxfam'. Now, if your friend turns around and adds, 'but I am not sure if I should' or 'but I don't care', you would be most perplexed. A disavowal of a moral judgment, in

[51] 'Quasi Realism' is Simon Blackburn's coinage: See S. Blackburn, *Spreading the Word* (OUP 1984) 171.

[52] Michael Smith, *Moral Problem* (n 44) 6; also see S. Finlay 'The Conversational Practicality of Value Judgment' 2004(8) Journal of Ethics 205-223. The practicality requirement also often goes under the label, 'judgment internalism'. Judgment internalism, however, is not to be confused with the idea of internal reasons. The debate about internal v. external reasons concerns the issue of whether we only have reasons which could potentially motivate us (internal reasons) or we could have reasons, which could in practice never motivate us (external reasons). See Bernard Williams, 'Internal and External Reasons' in *Moral Luck* (Cambridge University Press, 1981).

the same breath as making it, does seem incongruous.[53] Peter Railton argues that such disavowal is, in fact, paradoxical.[54] Should someone agree that a certain action would in the present situation be morally required, we would be bemused if he then earnestly enquired what it had to do with him or why he should bother.[55] We would no doubt think that there was something vital missing in a purported moral judgment which was purely intellectual and which, as A.W.Moore notes, left the agents 'motivations, and his conative nature generally, completely uninfluenced'.[56]

Now, an overwhelming majority of philosophers, regardless of whether they are cognitivist or non-cognitivist, accept the *practicality requirement* and take it as a phenomenon that any adequate metaethical theory must accommodate. [57] Expressivists seem to be on firm ground here as their account has a (more or less) fool-proof method of folding motivation into moral judgments.[58] If the making of a moral judgment is the expression of an attitude, then the person making a moral judgment *non-contingently* has his attitude aligned in accordance with the subject matter of his moral judgment. Such a straightforward explanation is not open to the

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[53] G.E. Hughes, 'Moral Condemnation' in I.E. Melden (ed.), *Essays in Moral Philosophy* (Washington University Press 1958) 108,116.

[54] Peter Railton, 'Moral Factualism' in James Drier (ed.), *Contemporary Debates in Moral Theory* (Oxford Blackwell 2006) 201, 211.

[55] Smith, *Moral Problem* (n44) 6.

[56]A.W.Moore, 'Categorical Imperative?' (n 45) 238.

[57] Michael Smith in fact describes the practicality requirement as a 'platitude'. M. Smith, *Moral Problem* (n44) 39; Christine Korsgaard, *Sources of Normativity* (n 17) 12; also see Brink (n14) 49; Daniel Calcut argues that judgment internalism/ practicality requirement can be treated as a given and then used as a datum 'to test the explanatory appeal of rival moral theories.' D. Calcut, 'Mill, Sentimentalism and the Problem of Moral Authority' 21 (2009) *Utilitas* 21, 24. There is a small minority of philosophers like David Milo and David Brink who deny the practicality requirement with the usual repertoire of stock characters like the amoralist and the depressed person.

[58] Mark Schroeder believes that the 'practicality requirement' gives the expressivists the upper hand; and in fact, expressivists like Blackburn claim that it proves the correctness of their account: M. Schroeder, *Non-cognitivism in Ethics* (Routledge 2010) 9.

cognitivists. On the cognitivist picture, moral judgments involve belief in some moral facts. Now, no judgment of fact in itself is sufficient to motivate, in the absence of some conative state of mind such as desire or an attitude. Russ Shafer Landau identifies accounting for this aspect of moral phenomena as the 'perennial' problem facing cognitivists.[59]

V

The Rival Readings of Normativity: Justification *vs* Motivation

The cognitivists and the non-cognitivists latch on to one of the two opposing forces of moral phenomenology that favours them over the rival camp, and make it the foundation of their account of normativity/bindingness. The cognitivists latch on to the idea of truth and justification; and the non-cognitivists latch on to the idea of motivation. Luke Russell argues, 'there are two distinct notions of normativity in play in contemporary disputes… The first notion of normativity is connected to motivation… The second notion of normativity relates to justification and correctness'. [60] He attributes the motivational model to Hume (and the non-cognitivists) and the justificatory model to Korsgaard (it would be *mutatis mutandis* true for any cognitivist). Along similar lines, Jean Hampton points out that idea of

[59] Shafer-Landau *Moral Realism* (n 26) 119; J.C.C. Smart argues that non-cognitivism gains in attractiveness because of this very feature: J.C.C Smart, *Ethics, Persuasion and Truth* (Routledge 1984) 25.

[60] Luke Russell, 'Two Kinds of Normativity: Korsgard v Hume' in Charles Pidgen (ed.), *Hume on Motivation and Virtue* (Palgrave Macmillan, 2009) 208; Also see Valerie Tiberius, 'Humean Heroism: Value Commitments and the Source of Normativity' (2000) 81 Pacific Philosophical Quarterly 426.

normativity, bindingness, authority or inescapabilty of moral judgments can be understood along either the justificatory model of the cognitivists or the motivational model of the non-cognitivists.[61]

The contrast between the justificatory and motivational readings of normativity stemming from the diverse metaethical outlooks is well brought out by H.D. Aiken.[62] Aiken marks out two models of accounting for the 'authority' or 'normative force' of moral judgments. First he refers to the cognitivists' justificatory model.[63] He argues that for the cognitivists the normative status of moral judgments 'is generally treated as a simple function of its claim to truly describe the objective ethical characteristics of actions'. Aiken contrasts this *justificatory* reading with the non-cognitivists' *motivational* reading of normativity according to which, 'by the "normative" status of a judgment is meant…its capacity to determine conduct.' Aiken notes that if one were to accept the non-cognitivists model:

> [T]hen it is clear that the normative status of ethical judgments cannot be adequately understood in terms of a [cognitivist] model whose primary function is informative. For the relevance of any description of fact to the decisions which control our actions is not logical, but motivational; or, put in another way, it is not what a statement descriptively means which establishes its authority as a guide to action, but its power, by whatever means, to influence the will.[64]

[61] See Jean Hampton, *Authority of Reason* (Cambridge University Press, 1996) 84-5, 88.

[62] Henry David Aiken, 'Authority of Moral Judgments' 12 (1952) Philosophy and Phenomenological Research 513-525; and 'Evaluation and Obligation: Two Functions of Judgments in the Language of Conduct' 47 (1950) Journal of Philosophy, 5-22.

[63] He refers to the cognitivists as philosophers who 'have taken the statement of fact as their model in analysing the meaning of ethical judgments'. Though really he seems to target one sub-group of the cognitivists, namely moral realists, what he says would hold true for any cognitivist account.

[64] Aiken, 'Authority of Moral Judgments' (n 62) 513.

For a cognitivist, normativity is to be understood in terms of truth. On the cognitivist picture, moral judgments, being truth-apt, purport to describe moral facts; and when they successfully do so—that is to say, when they are justified—the moral judgment is normative or binding. Ontological success or *justification* is the key to the cognitivist account of normativity. When moral judgments successfully track what is true (this is what I mean by ontological success) they are *justified*. The picture of normativity that the cognitivist account yields is a *justificatory* account of normativity. On this model, one would have to allow for the possibility of a moral judgment being 'binding' even if it does not in the least exert a motivational pull on the agent making the judgment. For the cognitivists, the question of motivation is distinct from that of normativity.[65] Noting the aversion of the cognitivists to the idea that normativity could be understood in motivational terms, Henry Aiken notes, 'when any question is raised concerning the motives governing one's commitment to do what the moral judgment asserts or demands that one ought to do, the [cognitivists] usually brush it aside as a "psychological question."'[66] Derek Parfit brushes the motivational considerations in just such a fashion by arguing that they have nothing whatsoever to do with normativity. While noting that two readings of normativity are to be found in the literature—one based on truth, and the other based on motivation—Parfit argues that normativity is *not* be understood in terms of motivation at all; for Parfit, a cognitivist, normativity is to be understood in terms of 'truth' of the moral requirements. [67] Parfit argues, 'normativity is about truth':

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[65] Derek Parfit, 'Normativity' in Russ Shafer-Landau (ed.), Vol. 1 *Oxford Studies in Metaethics* (OUP 2006) 325; D. Parfit, 'Reasons and Motivation', Proceedings of the Aristotelian Society supp. Vol. 71 (1997) 99–130; Eve Garrard and David McNaughton also make an argument that resembles Parfit's: 'Mapping Moral Motivation' 1 (1998) Ethical Theory and Moral Practice, 45.

[66] Aiken, 'Authority of Moral Judgments' (n 62) 513.

[67] D. Parfit, 'Normativity' (n 65), 332.

> If a question cannot be answered by some truth, this question could not be normative…if there are answers to normative questions, these answers would have to be truths…there are I believe such [normative] truths.[68]

Parfit complains that there are writers for whom 'normativity has got nothing to do with truth'. For such writers, he argues, normativity 'has something to do with motivating force'. But such motivating force, Parfit argues, has nothing whatsoever to do with normativity. [69]

The non-cognitivists, in sharp contrast, understand normativity in exactly the terms that Parfit says it ought not to be understood: that is to say, in terms of motivation. As Blackburn notes, non-cognitivists 'attempt to understand normativity in terms of passion, desire, and attitude.'[70] Charles Stevenson coined a useful phrase: one that aptly captures the emphasis on motivation in the non-cognitivists' understanding of normativity; he called it the 'magnetism' of the good.[71] For a non-cognitivist, the moral judgment's bindingness or normativity is to be understood in terms of the motivational pull or 'magnetism' that it exerts in the reasoning of the agent; the 'inescapability' of morality is a motivational inescapability; the 'authority' of morality is motivational authority. This, according to the non-cognitivist explains why a person who sincerely makes a moral judgment is also thereby motivated to act according to it; and thus any sincere moral judgment is also (motivationally) normative. Stressing on this motivational aspect of moral judgments, Gibbard

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[68] D. Parfit, (Vol 2.) *On What Matters* (OUP 2011) 419.

[69] ibid 421.

[70]Simon Blackburn, 'Normativity a la Mode' 5(2001) Journal of Ethics 139, 145.

[71] Charles Stevenson, The Emotive Meaning of Ethical Terms 46 (1937) *Mind* 14, 16.

understands normativity in terms of an 'element of endorsement' in moral judgments.[72] For Gibbard, this element of endorsement stems from the conative, motivationally laden state involved in making a moral judgment; something that a cognitive state would lack. The non-cognitivist, having endorsed the motivational reading of normativity, will be happy to point out that there is nothing more to normativity talk than this motivational connection between a moral judgment and the agent's actions. He would insist, as Blackburn and Gibbard do, that 'truth' and 'justification' are empty postulates in understanding normativity.

Blackburn argues that normativity depends on our 'conferring it' rather than being something independent to which we are fortunately 'receptive'. [73] The cognitivists find the non-cognitivists' *motivational* reading of normativity inadequate and question-begging as it leaves out the idea of moral 'truth' and 'justification', the lynchpins of the cognitivist reading of normativity. As we have seen, for the cognitivist there is a contrast between motivation and justification and hence normativity is to be understood as a matter of 'truth', distinct from that of motivation. It is almost a common place amongst cognitivists that non-cognitivists cannot explain the normativity of morality, or the normative force of moral reasons. Their complaint is that the non-cognitivist world is one with normativity bleached out of it. Non-cognitivists counter-claim that the cognitivists view the terrain with coloured glasses; and that they don't quite see the subject the same way as do the non

[72] Gibbard, *Wise Choices, Apt Feelings* (n 41) 10. Connie Rosati calls it the "normativity" of the 'good': C. Rosati, 'Naturalism, Normativity, and the Open Question Argument', *Nous*, 29 (1995) 49; Stephen Darwall also discusses this reading of normativity in 'Internalism and Agency', Philosophical Perspectives, 6, *Ethic*s (Blackwell 1992) 155-174.

[73] Simon Blackburn, *Practical Tortoise Raising and Other Philosophical Essays* (OUP 2010) 28.

-cognitivists.[74] Blackburn retorts by saying that it is not normativity that is bleached out the non-cognitivists' world but the philosophers' illusions about normativity.[75] The non-cognitivists argue that as our moral judgments do not track truth, normativity is not to be understood in justificatory terms at all but in motivational terms. Non- cognitivists argue that the world contains a much thinner reality that what the cognitivists allow; but theirs' is not a world without normativity (where normativity is understood in terms of motivation).

The Error theory again: The third reading

It was briefly suggested earlier that the third option—that of treating normativity as a moral judgment capable of being true and motivating at once—though falling broadly within the cognitivist camp, eventually yields error theory or nihilism. Mackie's argument for error theory stemmed precisely from this combination. He argued that moral judgments claimed to be objectively true (justified) and also inherently motivating. From there stemmed his two arguments from *queerness*. He argued *first* that if the moral judgments purported to represent some naturalistic truth (naturalistic fact) they would be *metaphysically queer* because no naturalistic fact could ever in itself motivate. *Second* Mackie argues that once naturalistic facts are ruled out, we would then have to understand moral judgments as representing non-naturalistic facts, but such facts Mackie argued would be *epistemologically queer*. From this, he concluded that there could be no moral truths at all. Interestingly, a little before Mackie's error theoretic arguments, Philippa Foot had also understood

[74] Blackburn refers to this as contrary bias of the realists: Simon Blackburn, 'Morals and Modals', *Essays in Quasi Realism* (OUP 1993) 52, 56.

[75] Simon Blackburn, 'Majesty of Reason' 85 (2010) Philosophy, 5.

normativity with a combination of the justificatory and motivational readings.[76] She argued that a moral judgment was meant to be objectively true and also motivationally binding. Foot, like Mackie after her did, concluded that this was impossible for nothing could be objectively true and motivating, at once. As a result, she understood the normativity of morality as a 'fugitive' thought. Most cognitivists argue that Mackie comes to the error theory because he sets the bar too high by expecting to find some moral truths which are also motivating.[77]As a consequence, most cognitivists deny that there are moral facts that could in themselves motivate; and rather try to explain motivation by a *peripheral* process of accommodation.

VI

The Rival Models of Normativity: Impinging and Projectivist

What we are left with are two non-debunking readings of normativity: the justificatory reading or the cognitivist and the motivational reading of the non-cognitivist.[78] Cognitivism yields an *impinging* model of normativity while non-cognitivism yields a *projecting* model of normativity. In what follows, the contrast between the two models is set out. But before we do that, it will be useful to briefly visit a metaphor, made famous by Hume, that bears on the contrast. Hume spoke of

[76] Philippa Foot, 'Is Morality a System of Hypothetical Imperatives?' (1972) 85 Philosophical Review, 305.

[77] Shafer-Landau (n 26) 120.

[78]As error theory is a debunking account of morality resulting in nihilism, we cannot consider it a plausible account of the normativity of morality.

'two species of philosophy': philosophical *anatomy* and philosophical *painting*. The *anatomist* explains the nature of morality and the *painter* does normative ethics or 'moralizing' (where the term is understood non-pejoratively).[79] To put the contrast in different phraseology, an anatomist explains the *nature* of our *values* and the painter engages in *valuation* (making moral judgments).[80] It will be appreciated that the two readings of normativity are philosophical commitments held by these metaethicists of rival stripes, as *anatomists*.

The cognitivists *as anatomists* understand moral requirements in terms of 'true' normative facts. They allow an objective existence to these facts (values) which people are responsive to in making moral judgments (valuations). There are three implications that follow from this picture: a) even if the agent does believe in the existence of such a moral fact, she may or may not be motivated to act in accordance with her moral belief; the agent's motivation, the cognitivist would argue, is neither here nor there as far as normativity of the moral requirement is concerned;[81] b) going a step further, the cognitivist could also argue there are moral requirements that people may not in a particular case be aware of;[82] and this again, the cognitivist could claim, does not detract from the normativity or truth of the moral requirement; c) for the cognitivist, normativity or bindingness can be understood even without invoking the idea of moral judgment; on the cognitivist account there is more to normativity

[79] See Blackburn, *Ruling Passions* (Oxford: Clarendon Press, 1998) 295.

[80] There are those like Dworkin who doubt whether this distinction is possible at all. Dworkin argues that there is no scope for the job of an anatomist in moral philosophy and all we are all painters. If Dworkin is right, it seems to call in question all of second order moral philosophy, that is to say, all of metaethics. Metaethics however is alive and well and Dworkin's view remains in the minority: Ronald Dworkin, 'Objectivity and Truth: You'd Better Believe It' 25 (1996) Philosophy and Public Affairs, 87. I will proceed on the assumption of the tenability of metaethics.

[81] Parfit, 'Normativity' (n54).

[82] Blackburn, 'Majesty of Reason' (n 75) 5.

than a moral judgment by an agent, for there are moral requirements that exist independently of the moral judgment which moral judgments aim at.

All of this is possible on the cognitivist account because the direction of fit of the moral judgment here is mind-to-world. Moral facts like other facts, as Blackburn's puts it, 'impinge' on the agent and it is up to the agent to be *receptive* of them.[83]Just like sum totality of facts that make up the world impinge on us, so do moral facts. The model of normativity the cognitivist account yields will be called the *impinging* account of normativity. 'Impinging' is the apt term here because normativity *bears upon* the agent regardless of her belief and/ or motivation. Having assumed that moral judgments are truth-apt, the cognitivist anatomist must think that something must make them true or false; the goal then becomes, to borrow Blackburn's phrase, 'elucidating the truth condition and our access to it'.[84] The truth condition she will point out is the 'source' of normativity.[85]

David Hume, the early ancestor of non-cognitivist theories, found that the impinging model did not fit the facts. He observed that moral judgments *cannot* have a mind-to-world direction of fit. He thought that, instead they involve a *world-to-mind* direction of fit. As a result he thought that we *project* or spread out moral properties; they do not impinge on us:

> Take any action allowed to be vicious: Willful murder, for instance. Examine it in all lights, and see if you can find that matter of fact, or real existence, which you call vice. In whichever way you take it, you find only certain passions, motives, volitions and thoughts. There is no other matter of fact in

[83] Blackburn, *Spreading the Word* (n 51) 181.

[84]Blackburn, 'Morals and Modals' (n 74) 52; Here Blackburn is talking about modal necessity; he argues this could very well be translated into the question of moral normativity.

[85] This could be regarded to be gist of Korsgaard's project in *Sources of Normativity*.

> the case. The vice entirely escapes you, as long as you *consider the object*. You never can find it, till you turn your reflection *into your own breast*, and find a sentiment of disapprobation, which arises in you, towards this action. Here is a matter of fact, but it is the object of feeling, not of reason. *It lies in yourself, not in the object*. So that when you pronounce any action or character to be vicious, you mean nothing, but that from the constitution of your nature you have a feeling or sentiment of blame from the contemplation of it.[86]

The crux of what Hume, the *anatomist*, is arguing is that there *are no moral properties* that our moral judgments could instantiate; according to Blackburn, Hume's idea is that in addition to factually judging the states of affairs the world contains, we may react to them. Such a reaction is what is called 'projecting' or 'spreading' on the world, our inner sentiment and attitude. [87] Moral evaluation involves such projecting or spreading out. The move has come to be known as the project of *explanatory projection* which involves *explaining* how the subject takes the world to be, by appeal to some feature of their mind of which that appearance is a projection: in virtue of something 'in here', the world 'out there' appears to be a certain way.[88] Hume argued that we do take actions to be morally right and wrong– but these are to be understood as projections of our sentiment. Because of certain attitudes we happen to possess, we see things as morally right or wrong. This is the gist of the projectivist model of the non-cognitivist. The anatomist who is a non-cognitivist would argue that moral requirements are the *product* of our moral

[86] David Hume, *A Treatise of Human Nature*, P. H. Nidditch (ed.), (OUP 1987), 468-69. Hume also calls this 'gilding or staining all natural objects with the colours borrowed from internal sentiment'.

[87] Simon Blackburn, 'Reply: Rule Following and Moral Realism' in Steve Holtzman et al (eds.) *Wittgenstein: To Follow a Rule* (London: Routledge & Kegan Paul 1981) 163.

[88] P. Kail, *Projection and Realism in Hume's Philosophy* (OUP 2007) 3-4.

judgments and not something that we are receptive to in making moral judgments.[89] Moral requirements are children of our sentiment and not its parents. [90]

The non-cognitivist argues that there are no moral truths or facts and that the world contains no values or moral requirements. For the non-cognitivist as anatomist, the idea of a moral judgment (valuation) is crucial in understanding the very idea of a moral requirement (value) for on their view, all there is to a moral requirement, is a moral judgment made by an agent– which in turn is to be understood in terms of the expression of an attitude. [91] They see the moral requirement (value) as a *product* of a moral judgment (valuation). [92] G.H. Von Wright, a self-professed non-cognitivist, argues that the very term 'value' is misleading as it already smacks of a cognitivist understanding, presupposing as it does some idea of truth or objectivity. He argued that there is nothing more to *values* than *valuation* (the act of making a moral judgment) because what are understood as values are nothing but projections of an attitude and thus, can never be understood in the absence of a valuation by someone. [93] On the cognitivist account, moral requirements are things we respond to, in making judgments; on the non-cognitivist model, moral requirements are the products of our moral judgment. On the projectivist model there is no moral reality we respond to in making moral

[89] Simon Blackburn 'Social and Individual Expression' Unpublished Manuscript. <http://www.phil.cam.ac.uk/~swb24/PAPERS/Expression.pdf>Retrieved on 26 September, 2011.

[90] Blackburn, *Ruling Passions* (n 79)84-90.

[91] Stephen Darwall, 'Human Morality's Authority' (1995) 5 Philosophy and Phenomenological Research 941-948.

[92] Blackburn, 'Social and Individual Expression' (n89).

[93] G.H. Von Wright , 'Valuations- or How to say the Unsayable' in 13(4) 2000 *Ratio Juris* 347; Alf Ross, similarly complains that the term 'morality' smacks of a cognitivist understanding because it hints at a set of moral standards that have existence apart from acts of moral valuation: Ross, *On Law and Justice* (London: Stevens & Sons 1958) 61.

judgments; as a consequence there are no truth conditions to elucidate and no access to them which is to be explained.[94]

> If we think expressivism is false, we might believe in a normative or evaluative 'truth condition', a fact, or ontologically heavy 'truth-maker', an environmentally pressing real law or chunk of glowing normativity which might indeed have its own strange pattern of comings and goings and its own dependencies, or its own magical immunity to contingent fact. But according to expressivism, our activities of evaluation invoke no such mysteries.[95]

The projectivists would insist that 'truth' and 'justification' are empty postulates in understanding normativity. The 'source' of normativity for the projectivist is purely subjective: it lies in the attitudes and sentiments of the moral agent.

VII

Projectivism: Allaying some Concerns

There appears to be a residual unease about the projectivist model among its detractors: if the bindingness and authority of morality were to rest on something as 'subjective' as the projectivists make it out to be, the whole structure of morality would come crashing down. The detractors' unease stems from the conviction that our morality owes its shape to the sort of 'objective' bindingness that the impinging model attributes to morality. The fear then is: how could something as flimsy and fragile as a *conative* attitude ever keep the structure of morality firmly in orbit? Not only does the detractor hold that the projectivist model is flawed as a purported

[94] David McNaughton, *Moral Vision: An Introduction to Ethics* (Oxford: Basil Blackwell 1988) 1.

[95] Blackburn, *Practical Tortoise Raising* (n 73) 32.

depiction of our moral practices but also that it could never be right: if something resembling projectivism were to hold good, we should find ourselves condescend to the morals of a French gangster.[96] Blackburn sums up the unease that many philosophers have with the projectivist model of normativity:

> Even if it provides a satisfactory account of the states of mind, the 'attitudes' associated with normativity, expressivism still faces problems. To many philosophers, it seems to take away too much. It seems to take away any notion of real normative truth. Indeed, that was one of its motivations, since it was difficulty with the nature of normative facts and our access to them that led to the flight from Moore. But then the fear arises that we are left with too little.[97]

The unease isn't always entirely amorphous. It takes the form of some very specific– and potentially damning, I might add–objections which the projectivist had better be able to meet: if all there is to moral bindingness is my attitude, then all I have to do to 'oil out' of a moral requirement is 'alter' my attitude. How then could there ever be a real binding moral obligation? If my moral judgment is just my attitude, how could I ever make a moral demand on someone else: shouldn't that lead to a sort of naive subjectivism? If my moral judgment is an expression of my attitude, how could I authoritatively have any 'lever' on an immoral person who doesn't happen to share my views? When pressed to justify my moral demand, wouldn't I be left with nothing to say, other than 'this is just what I feel'? If morality is what the projectivist says it is, how could we ever have a principled and reasoned moral discourse whereby we provide each other with reasons? To the detractor, an 'objective' morality, such as the one portrayed by the *impinging* model, plugs all these shortcomings in a single swoop. If the impinging model holds good, I should still have a moral obligation

[96] Alasdair McIntyre, '*After Virtue: A Study in Moral Theory'* (London: Duckworth 1981) 22.

[97] Simon Blackburn, 'Anti-Realist Expressivism and Quasi Realism' in David Copp (ed.), *Oxford Handbook of Ethical Theory* (OUP 2005) 153.

regardless of my attitude; I should be able to make moral demands without hesitation; I could objectively justify an action to an immoralist and in the face of his stern resistance point to him that he is mistaken about some moral requirements; and I could give justifications and reasons for my moral demands. In short, to the detractor, the world where the impinging model holds good would be dramatically and significantly different from the world where the projectivist model holds good. Projectivism, the detractor feels, is nothing but an invitation to Ivan Karamazov's nihilistic world where 'all is permitted'. Richard Hare, however, argues that contrary to the detractors' fears, there would, in effect, be no difference between the projectivist and cognitivist worlds: 'Now I ask what is the difference between the states of affairs in these two worlds? Can any other answer be given except "None whatever"?' [98] Here, I seek to flesh out Hare's insight. I argue that there would be no difference whatsoever in the two worlds. In what follows, I will show that the detractors' fears are misplaced. The projectivist model of bindingness is no worse off than the impinging model in doing all the things that the idea of bindingness of morality is supposed to be doing. The projectivist model, I argue, does not lead to the sort of moral paralysis or nihilism as its detractors fear it would.

1. The immorality objection: The immorality objection, as I will call it, presents itself in two versions. On the first version, the disquiet is this: if the projectivist is right, the very idea of moral bindingness or obligation will evaporate into thin air; if having a moral obligation is tantamount to having a certain attitude, the objection goes, all someone has to do, to 'oil out' of the obligation is, stop having the attitude in question.[99] The second version of the disquiet stems from the worry that an agent's

[98] Hare, 'Nothing Matters' (n 14) 32, 42.

[99] Korsgaard, *Sources of Normativity* (n 17) 30.

attitudes could never withstand the revelation that there is no objective moral fact that really makes his moral judgment true. The common thread running through both the above objections is that there is nothing in the projectivist picture to prevent an abrupt disavowal of morality and descent into immorality.

The idea behind the first version of the immorality objection is that if there is nothing 'objective' or 'true' about moral judgments, there wouldn't be anything to prevent the agent from altering them as she pleases. Korsgaard thinks this is a knock-down objection to the projectivist model. And it is of course thought that this problem wouldn't arise on an impinging model. By far, this is the one major reason why projectivism smells of sulphur to so many professional philosophers. But nothing like this need happen at all. The real concern underlying the objection is that a 'mere' attitude is too flimsy and fickle to 'bind' an agent. Blackburn insists, however, that there is nothing 'mere' about an attitude and that an attitude can be a lot more stable and enduring than the detractors are prepared to admit:

> We are not merely blown about by gusts of passion or gusts of attitude. In these areas, just as much as in the area of belief, or even more so, we are self-reflective, self-checking, and, at our best, self-critical, or at least capable of being so, as and when the occasion requires it. I believe that the temptation to see us as passive or 'heteronomous' in the face of our own attitudes arises from an interesting mistake.[100]

Blackburn also points out that there are 'internal speed barriers', as it were, to changes in attitudes; so that a person who has one attitude one day and another one the next day, is not someone with many different, albeit, short-lived values, but

[100] Simon Blackburn 'Normativity A la mode' 7 2001 (5) Journal of Ethics 139, 146; J.S. Mill also makes very similar argument in Chapter 3 of *Utilitarianism*: J.S. Mill, *Utilitarianism* Roger Crisp Ed (Oxford University Press, 1998) 75.

someone with no values at all.[101]And in saying this he also offers the most crucial clarification for projectivism. He points out that we call as moral valuations, only relatively stable dispositions or attitudes. Not just any fickle, fleeting attitude would suffice to ground a moral judgment. There is another related worry flagged by Dworkin.[102] We make moral judgments about our own sentiments, dispositions and attitudes. Dworkin fears this would be inexplicable on the projectivist model. It is not, however, at all obvious why the projectivist model should find this problematic. The projectivist model allows for a degree of *reflexivity*: where our more deeply held attitudes and passions act as checks on our other, not so deeply held ones. In any event it would be chimerical to suppose that we could carry out moral assessments by transcending ourselves from our passions and attitudes all at once. The non-cognitivist views moral assessment like being on Otto Nuerath's boat: where one could stand on one plank while fixing others, though there would be no place to stand outside the boat as a whole. Furthermore, as Blackburn points out, if such *reflexivity* isn't thought to be a problem when it comes to belief, there is no good reason why it should be any different with attitudes:

> Although we can stand apart from any particular desire or disposition, and consider the good of it in the light of other desires and dispositions, taken as a whole there is no process of standing back from all of them at once, any more than there is in the case of belief'. [103]

Now, let us take up the second version of the immorality objection. The objection was that a person's attitudes could never withstand the revelation that there is no objective moral fact that really makes his moral judgment true. The result, it is

[101] Blackburn, *Ruling Passions* (n 79) 67.

[102]Dworkin (n80).

[103] Blackburn, *Practical Tortoise Raising* (n 95) 32-33.

feared, would be instant immorality. But again, nothing of this sort need happen at all. Clearly what the objector is bothered about is the persistence of an agent's moral motivation to hold fast to a moral judgment in the face of the knowledge that there is no moral fact to support the judgment. But remember, the knowledge of any moral fact, in itself, could never motivate. Motivation is clearly independent of the knowledge of any fact- a moral fact even (should we admit the existence of such moral facts). The knowledge that there is no moral fact to support an attitude is neither here nor there when it comes to the question of persistence of moral motivation. Furthermore, we cannot just 'snap' out of our deep rooted attitudes and feelings at will, let alone snapping out of them at the realization that there is no ontological basis for them. As Blackburn pithily observes, a lover does not abruptly stop loving if he is told that his love is metaphysically suspect. [104]

2. The subjectivism objection: Projectivism rings all kinds of alarm bells in many people's minds precisely because they take it to be an invitation to naïve subjectivism, the position we anointed with moniker: the straw man of moral philosophy.[105] The naïve subjectivist position entails that my moral judgments are only mine and do not apply to others. According to this objection, the non-cognitivist view entails that if someone does not share my attitudes, I am constrained to not make a moral demand on him at all. To be sure, the non-cognitivists are not doomed to this eccentric view. According to non-cognitivism, when I judge that something is morally wrong, I judge it as wrong *universally*.[106] Charles Stevenson argued that

[104] Blackburn, 'How to be an Ethical Antirealist' (n 74) 166.

[105] S. Blackburn 'Is Objective Moral Justification possible on a Quasi Realist Foundation?' (1999) 42 Inquiry 213.

[106] Universality is the idea that a moral judgment is meant to be applicable to all people in a situation identical to the one involved in the particular moral judgment in question. Even early non-cognitivists like Richard Hare were very careful to distance their position from naïve subjectivism. Richard Hare

non-cognitivist moral statements have an element of 'do so as well' built into them.[107]In other words, Stevenson points out that in expressing a moral judgment I call upon the addressee to do as my moral judgment conveys. Just because a moral judgment involves conative state rather than a cognitive one does not mean that it cannot be universal and be 'applicable' to others. As Darwall (who is otherwise a critic of non-cognitivism) points out, 'a norm-expressivist, like Gibbard, will have no hesitation in saying that a normative judgment…can be made equally of those who do not accept the norm, as well as, perhaps, of those not capable of doing so'.[108] Blackburn similarly notes that a moral judgment can be made against someone I think is in the wrong and that 'it shouldn't matter if the opinion stands favourably with those who are in the wrong'.[109] Here, the non-cognitivist is not worse off than his cognitivist counterparts. But the objector could still continue to persist. The real problem, it could be argued, is not that I can make a moral demand on someone who doesn't share my views, but rather that I will have no means to persuade such a person to do what I think is morally required.

3. The moral persuasion objection: The objector fears that if morality is not 'objective' but is 'subjective' as the non-cognitivists make it out to be, we will be left with nothing to say to the person who, in our view is doing something morally despicable.[110] The concern is that we cannot have a 'lever' on a 'squeamish Jim' or

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argued that universality was one of the features of non-cognitivist moral judgments: R. Hare *Language of Morals* (OUP 1952) Ch. 11.

[107] Charles Stevenson, 'The Emotive Meaning of Ethical Terms' 46 (1937) *Mind* 14, 16.

[108] Darwall, 'Human Morality's Authority' (n 91) 941, 947.

[109] Blackburn, 'Is Objective Moral Justification possible on a Quasi Realist Foundation?' (n 105) 213, 215.

[110] ibid.

'priggish George', or a 'fanatical Nazi' unless morality is 'objective' in the cognitivist's sense of the term.[111] The unspoken premise of this objection is that somehow this is not a problem for more 'objective' cognitivist accounts of morality which are armed with 'truth' and 'justification'. But that is the premise I would like to bring into question here, on behalf of the projectivist. Even if someone were to be able to 'show' some undeniable moral truths to a morally depraved person, how would that ultimately influence his action? It will be recollected, showing the 'truth' of an argument is of little use in influencing a person's motivation because no fact in itself could motivate. Bernard Williams points out that no truth (justification) could ever suffice to stop in her tracks, a person who is not already in some way moved by a certain moral argument: 'What will the professor's justification do, when they break down the door, smash his spectacles, take him away?'[112] H.L.A. Hart in the last published article in his lifetime made a similar observation, in agreement with Williams:

> There is surely something laughable in the idea that anything we could draw from philosophy could weigh with such characters [immoralists] bent on having their way at others expense. Why should it matter to them that there is a philosopher's proof that, in acting as they do, they are irrational, inconsistent, or flying in the face of some moral truths?[113]

Thus, if getting a 'lever' on a morally depraved person is the concern, the non-cognitivists are not, in any way worse off than the cognitivists. In other words, the impinging model does not have access to a 'lever' which the projectivist doesn't.

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[111] Bernard Williams 'Reply' in J. Altham and R. Harrison (eds.) *World Mind and Ethics* (Cambridge University Press 1995) 191, 216.

[112] Bernard Williams, *Ethics and the Limits of Philosophy* (Routledge 2006) 22-23.

[113] H.L.A. Hart, 'Who can tell right from wrong?' 17th July 1986 New York Review of Books, 49-52

4. No reasons problem: Finally, it is feared that if projectivism is right, all moral reasoning would have to come to end: and that we should be unable to give reasons to each other in support of our moral judgments. A good portion of this chapter has been devoted to arguing that the cognitivists have a *justificatory* concept of normativity whereas non-cognitivists concept of normativity has no place for the idea of 'truth', 'moral facts' or 'justification'. This is likely to give the impression that non-cognitivism entails the view that in making moral judgments we cannot give 'reasons' to one another; and when pressed to do so, would have to rest with saying 'that is just what I feel'. But this impression would be inaccurate. There is nothing whatsoever in a projectivist account that renders unintelligible, a person giving 'reasons' to his interlocutor. Giving each other 'reasons', is the warp and woof of moral discourse and the projectivist picture doesn't deny that in the least bit.

Imagine a projectivist saying: 'It is wrong to hurt animals for fun', and his interlocutor pressing him for a reason: 'what is it that makes it wrong?' Now, it would be wrong to assume that the projectivist at this juncture would have to either keep mum or say something along the lines of, 'that is just what I feel'. A projectivist is open to reply, 'it is wrong…because it causes them suffering'.[114] Note, what the interlocutor is doing in pressing for a reason is, asking the speaker to point out which *feature* of the action counts in favour of doing or avoiding it. And the speaker's reply points out a 'fact': a feature of the action which counts in favour of doing or avoiding it. The *fact* that it causes animals suffering, is a *reason* not to hurt them. Let us call these *feature fact* and *feature reason*. The cognitivist endorses the idea of *feature*

[114] Simon Blackburn points this out on more than one occasion. Note, here the non-cognitivist isn't compelled to say 'because I feel it is wrong' either; the naïve subjectivist perhaps would have to.

facts and *feature reasons*.[115] And the non-cognitivist has no problem in admitting them either. As far as these go, there is then really no difference between the cognitivist and the projectivist account. And it is certainly not such *feature facts* and *feature reasons* that non-cognitivists are suspicious about. What the projectivist denies, and the cognitivist affirms, is the existence of 'moral facts' as distinct from 'feature facts'.

There is a significant difference between *moral facts* and *feature facts*.[116] Moral facts are facts *about* normative significance while feature facts are facts *with* normative significance. Finlay argues that the non-cognitivists have no problem whatsoever with admitting the facts *with* normative significance (feature facts).[117] What they object to, he points out, is the facts *about* normative significance (moral facts). He marks out the difference between along the following lines:

> The fact that Tony's tooth aches—call it 'T'—is [] a fact *with* normative significance…But the fact *about* normative significance would be the fact that 'T' is a reason for Tony to go to the dentist. The normative property here would not be the property of being painful, but rather the property of being a reason for action.

The moral fact is *not* the fact that the tooth aches: the fact that the tooth aches is the feature fact. The moral fact is *the fact that* the feature fact obtains; and it is this moral fact that gives moral reasons for action. As Derek Parfit points out:

> If we ought rationally to act in some way, this fact is *not* a reason for doing so. It is the fact *that* some fact gives us such a reason… In the same way,

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[116] Jonas Oslen argues that the very often philosophers tend to obfuscate the distinction between these two ideas which go under the rubric of 'reasons': 'Reasons and the New Non-Naturalism' in Simon Robertson (ed.), *Spheres of Reason: New Essays in the Philosophy of Normativity* (OUP 2009) Ch.7.

[117] Stephen Finlay, 'Recent Work on Normativity' 70 (2010) *Analysis* 331-346.

> something's being good is not a reason for choosing it; it is the fact *that* this thing has *features* that provide such reasons. [118]

Parfit here points out that it is *not* the feature fact that gives moral reasons for action. It is the moral fact *that* a feature fact obtains that gives moral reasons for action. This moral fact is the all important element in the impinging model of normativity of the cognitivist. The projectivist vehemently denies the existence of any such moral facts.

> According to me, there is only one proper way to take the question "On what does the wrongness of wanton cruelty depend?": as a moral question, with an answer in which no mention of our actual responses properly figures. There *would* be an external reading if realism were true. For in that case there would be a fact, a state of affairs (the wrongness of cruelty) whose rise and fall and dependency on others could be charted. But antirealism (non-cognitivism) acknowledges no such state of affairs, and no such issue of dependency. Its freedom from any such ontological headache is not the least of its pleasures.[119]

Perhaps plugging these into a concrete illustration would give us a clearer sense of the distinction between moral facts and feature facts. Consider yet again, the projectivist saying, 'It is wrong to hurt animals for fun', and on being pressed by his interlocutor for a reason replies with, 'it is wrong…because it causes them suffering'. What the projectivist has just given here is a feature fact. Now imagine the interlocutor pressing the projectivist further: 'Why should the fact that it causes suffering stop me from torturing animals?' This is the point where the projectivist model varies from the impinging model. The projectivist here would have no further *moral* fact to point to. He would have to rest his case with pointing out the feature fact, but can go no further. The cognitivist however doesn't need to stop here. Indeed, the cognitivist will not stop here. The cognitivist could point out to the interlocutor

[118] Parfit, 'Normativity' (n 65) 352.

[119] Blackburn, 'How to be an Ethical Antirealist' in *Essays in Quasi Realism* (n 74) 166, 173.

that there is a *moral* fact that requires the interlocutor to stop torturing animals because it causes them suffering. This can be represented with this schema:

'The moral fact *that* {the feature fact (namely, hurting animals for fun causes them suffering)} is the moral reason why you *ought* not to hurt them'.

On the *impinging* model, it is the moral fact that gives moral reasons. Now the projectivist admits of no such moral fact and accordingly does not admit the existence of such moral reasons. Without this further ontological step, the projectivist cannot point out to the stubborn interlocutor that there is a moral fact, which requires him to stop torturing animals because it causes them suffering. As Blackburn points out, it is such moral facts and moral reasons that projectivists are suspicious of:

> The tenor of his [Parfit's] discussion, as of many others, is that we ourselves are *not just* responding to the presence of the snake [read: feature fact], but to some 'normative feature' of the snake or in other words a further evaluative or deontic fact about the situation of its being in the path, a *nimbus of normativity*[read: moral fact]beatifying the union between the presence of the snake and a subsequent sidestep, a radiance in which Parfit, but not the dog, can bask. Needless to say, this is pure fantasy.[120]

The presence of this moral fact does *seem* to the give the cognitivist the 'last word' in a moral argument. The projectivist, it must be admitted straightaway, cannot claim to have such a last word. Doesn't this ultimately sink the projectivist model? It could be argued that it is this ability to have the last word in a moral argument is what decisively determines why the impinging model has got to be the correct one. However, contrary to initial appearances, the impinging model doesn't secure the possibility of a 'last word' in a moral argument, either. Korsgaard points out that any sort of moral fact is unlikely to give the speaker the last word. The stubborn

[120] Blackburn 'Majesty of Reason' (n 75) 14.

interlocutor could persist with probing the cognitivist: 'why should I act as required by the moral fact'. If the cognitivist presents him with a further, higher order fact, the interlocutor could yet again persist with the stubborn question with such further higher order fact, *ad infinitum*. [121] Parfit, however, strongly rejects the invitation to such infinite regress and points out that the cognitivist can confidently turn his spade over after pointing out the moral fact; that is indeed the last word.[122] Now, where does all this leave the projectivist? Does it make the projectivist worse off? It all depends on what the last word is meant to achieve. If the point of the last word is *not* to influence the immoralist's behaviour but *merely* point out to him what is wrong, the projectivist is no worse off than the cognitivist. The projectivist too can make a moral judgment and let the immoralist know in no unclear terms that what he is doing is wrong.

On the other hand, if having the last word is tantamount to having some sort of 'lever' on the stubborn interlocutor, then it is not going to take the cognitivist too far. As discussed earlier, no moral fact could exert a motivational influence on the stubborn immoralist. Thus, as far influencing conduct goes, the projectivist is no worse off than the cognitivist. In the end, the cognitivist and the projectivist would both have to turn the spade over. The cognitivist surely gets to make one argument more than the projectivist before turning the spade over, but in the end they are on an even keel. Projectivists argue that the moral fact is a spare wheel in moral discourse as it is meant to serve as an algorithm—a spurious one—which could somehow mysteriously bring people (their motivations to be precise) in alignment;

[121] Korsgaard, *Sources of Normativity* (n 17) 33-4.

[122] Parfit, 'Normativity' (n 65) 331.

but no moral fact—such as the one that the cognitivist envisages—is likely to let an agent have the last word.[123]

[123] Blackburn, 'Is Objective moral Justification Possible?' (n 105) 216.

Chapter II

DISAMBIGUATING NORMATIVITY:

NORM-RELATIVITY AND MORAL NORMATIVITY

I

The Nebulousness of 'Normativity'

No sooner one encounters the terms 'normative' and 'normativity', one is constrained, with a degree of trepidation, to utter that ubiquitous philosophical warning: that one is in the presence of a pair of notoriously nebulous expressions. When these notoriously nebulous terms are used as a rubric under which some central issues of legal philosophy are discussed – that of 'normativity of law' – the result, unsurprisingly, is to bury the already nebulous idea under yet another obfuscating layer. Little wonder then that legal philosophers can be heard calling for a moratorium on the use of the phrase 'normativity of law'.[124] We cannot realistically hope to make any progress towards understanding the problematic of the 'normativity of law' until 'normativity' is disambiguated. This is the task we will undertake in the present chapter. In Section II, it will be argued that the philosophers' use of the label 'normative' spans two distinct concepts: one semantic and the other metaethical. It will then be argued that the semantic designation 'normative' applies to a wide range of standards ranging from morality to etiquette to cookery. From the welter of standards to which the semantic designation 'normative' applies, we will focus on two: a) moral standards; and b) socially practised standards (norm-relative standards). The contrast between the two will assume some significance in the context of this thesis and in discussions of Hart's semantic model, in particular.[125] In Section III, it will be argued that normative expressions such as

[124] See Chapter III for a discussion of the legal philosophers' unease about the label 'normativity'.

[125] This connection will become apparent in Chapters IV and V of the thesis.

'ought' ,'right' ,'wrong' ,'must' etc. are used in moral statements as also norm-relative statements. It will be argued, however, that these normative expressions are not used in the same sense in norm-relative and moral contexts. Sections IV and V will set out the phenomenological contrast between moral and norm-relative statements; and explain how they function differently in the practical reasoning of agents. Section VI will briefly set out the relevance of the distinction between norm-relativity and moral normativity in the context of this thesis and Hart's work, in particular.

II

Norm-relativity and Moral Normativity

Normativity's notoriety in the wider philosophical community—not just among legal philosophers—is well earned and to a great extent is attributable to the fact that philosophers' use of the label 'normativity' spans two distinct concepts: one semantic and the other metaethical. I will now consider the two concepts in turn. In Chapter I, we found that the term 'normative' is used by philosophers to convey the idea that moral requirements are 'authoritative', 'binding', 'inescapable', 'have force' and the like. We saw further, that there were two rival conceptions of 'normativity' in the metaethical sense: the justificatory conception of the impinging model and the motivational conception of the projectivist model. That there are these two conceptions of the metaethical sense of normativity is, in itself, enough to obscure discussions under the rubric of the 'normativity of law', as we shall see in the next chapter. But more confusion lurks around the corner as the metaethical concept is

not the only concept 'normative' spans. There is also the 'semantic' concept of normativity, which we will now turn to.

Conversationally, agents make statements conveying what is 'required' in order to conform to a standard: 'you ought to spell 'spell' with two 'L's'; 'you should not cause pain to animals'.[126] Philosophers *meta-conversationally* try to capture what agents are up to when they make such statements.[127] For instance, they *inter alia* figure out what standard the agents are matching the 'required' action to and the like. This meta-conversational exercise that philosophers undertake goes under the technical label 'semantics'. [128] Philosophers designate as semantically 'normative' any statement purporting to convey what is 'correct' or 'required' in relation to some standard. In this sense, statements conveying requirements of etiquette, spelling and morality are all semantically 'normative' statements.[129] The reason why such widely disparate standards have come to be lumped together under the rubric of 'normativity' is not too far to seek. The primary connotation of the term 'normative' is closely tied to its etymological root in the Latin *norma*: a builders' square. A *norma* laid down a 'correct' standard for measurement of squares in comparison to

[126] It goes without saying that conversationally, people may convey all sorts of statements to each other, not *just* statements of what is 'required' from the interlocutor. But our focus here is on 'practical' or 'deontic' statements which convey what is 'required' because it is precisely these statements that are designated as 'normative' by philosophers.

[127] 'Meta-conversation' is meant to connote a higher-order, self-referential consideration of the nature of an activity (here, that of a conversation) rather than actual, first-level participation in the activity.

[128] Broadly, 'semantics' is a second order or meta enquiry on any kind of language. However, here we would be concerned with semantics of 'normative' language alone. Metaethical inquiries also have a semantic component (See discussion in Chapter I). The metaethicists study the semantic component of 'normative' statements which are in the first place assumed by them to be moral statements. The semantic exercise we have been discussing here is logically prior to that carried out by the metaethicists, as it involves the determination whether a given statement is a 'normative' one or not in the first place. So far as this prior exercise goes, philosophers designate as semantically normative any statement conveying what is 'required' in order to conform behaviour to a standard.

[129] C.D. Broad 'Obligations Ultimate and Derived' in *Festskrift Tillagnad Karl Olivecrona* (Noprstedt: Stockholm 1964) 63.

it.[130] In this wide sense of the term, any standard with reference to which any state of affairs could be compared or measured is 'normative'; and any statement which purports to compare or match a state of affairs to a standard is semantically a 'normative' statement. In this wide sense of the term, even recipes in cook books and shopping lists could be thought to be 'normative'.[131] This elasticity of meaning inherent in the label 'normativity' that seems to catch a bewildering range of standards spanning from the moral to culinary recipes has, in part, contributed to its nebulousness.[132]

From the welter of standards to which the semantic designation 'normative' applies we will focus on two: a) moral standards; b) socially practised standards (hereafter norm-relative standards). We pick out these two standards here because the two are relevant in the context of the thesis as a whole and Hart's work, in particular. In fact, as we shall see later in the chapter, several philosophers seek to disambiguate moral standards from norm-relative standards as it is this ambiguity which affects philosophical discussions the most. 'Norm-relativity' is the idea of a state of affairs being 'correct' or 'required' in relation to some socially practised standards: norm-relative standards.[133] Thus standards of etiquette, of honour, of

[130] P. Railton, 'Normative Force and Normative Freedom: Hume and Kant but not Hume V Kant' (1999) 12 Ratio 320.

[131] John Gardner, 'Nearly Natural Law' (2007) 52 American Journal of Jurisprudence 1: Gardner argues that recipes and indeed any standards that can be used as guides to action are 'normative'. Gardner thus holds that even recipes in cook books are 'normative'.

[132] Judith Thomson argues that in the wide sense of the term even shopping lists are 'normative': J. Thomson *Normativity* (Chicago: Open Court 2008) Chapter 1.

[133] I owe the term 'norm-relative' to Anandi Hattiangadi, *Oughts and Thoughts* (OUP 2007) Chapter III. Note, that norm-relative standards are a species of normative standards. Only socially practised standards are norm-relative standards; recipes and shopping lists are not norm-relative standards, though they are undoubtedly 'normative' standards in this wide sense of the term and statements conveying recipes for instance are 'normative' statements. In the present work, however, our focus will

clubs, of games and the like are all norm-relative standards which all go under the semantic label 'normative'. Both—statements conveying norm-relative judgments and those conveying moral judgments—are lumped together under the rubric of the label 'normative' statements.

But as we have seen earlier, often philosophers also use 'normative' in another sense, to denote the metaethical *status* of a standard.[134] In this sense, philosophers use the label 'normative' to convey the idea that moral standards are 'authoritative', 'binding', 'inescapable', 'have force' and the like. When a philosopher makes such claims, she is doing something completely distinct from *semantically* designating a statement conveying what is correct or required in relation to some standard as a 'normative' statement; she is making claims about the *metaethical* status of the standards that a semantically 'normative' statement conveys.[135]

The use of the same term 'normative' in both the aforesaid senses sometimes leads to an odd result. In the metaethical sense, moral standards are thought to be 'normative' or 'binding' but standards of etiquette are not.[136] Thus, while philosophers do not deny that norm-relative statements conveying norm-relative

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only be on socially practised norm-relative standards and not on standards such as recipes and shopping lists.

[134] To be sure, the idea of normativity as 'bindingness' is to be found across the philosophical spectrum in aesthetics, mathematics, modals and the like. However, as the focus of the present work is on moral bindingness of law the consideration of aesthetic normativity, mathematical normativity and modal normativity would be beyond the purview of this work.

[135] Metaethical inquiries also have a semantic component (See discussion in Chapter I). But the metaethical ethical theorists study the semantic component of 'normative' statements which are in the first place assumed to be moral statements. The semantic exercise we have been discussing here is logically prior to that carried out by the metaethicists.

[136] Gardner argues that while a bewildering range of standards can be normative in the wide sense of the term; they would not be binding in the metaethical sense in which only moral standards are thought to be normative: Gardner 'Nearly Natural Law' (n 131).

standards are 'normative' in the semantic sense, they deny that such norm-relative standards are inherently 'normative' in the metaethical sense.[137] Norm-relative standards are not thought to be metaethically binding or 'normative' in the same way that morality is. Thus, standards which are 'normative' in the semantic sense need not necessarily be 'normative' in the metaethical sense. As Finlay puts it, 'there are standards in use in several areas of thought. Though, in a sense, any area of thought involving standards could be said to be normative (being a matter of standards) the areas of thought are not normative in the same way'.[138]

Parfit highlights the need to differentiate between the notions of norm-relativity and moral normativity which are lumped together under the rubric of 'normativity':

> On the *rule-involving* conception, normativity involves rules, or requirements, which distinguish between what is *allowed* and *disallowed*, or what is *correct* and *incorrect*. Some examples are laws, the requirements of some code of honour, the rules of etiquette, and rules about spelling, grammar, and the meanings of words. Such rules or requirements are often called *norms*, and claims that state or apply such norms we can call *normative* in the *rule-implying* sense. On the *reason-involving* conception, normativity involves reasons or apparent reasons. When I call some claim *normative* in the *reason-implying sense,* I mean that this claim asserts or implies some claim about some reason or apparent reason. This, I shall argue, is the best conception. To illustrate these conceptions, suppose that I say, you shouldn't eat peas with a spoon, and you shouldn't use 'refute' to mean 'deny'. These claims are normative in the rule-implying sense. But I might add that, since these rules are now so often broken, you have no reason not to act in these ways. My claims would not then be normative in the reason-implying sense. [139]

Here, Parfit uses the 'reason-implying sense' of 'normative' as a criterion to test the *metaethical* status of the standards or requirements that a semantically 'normative'

[137] To be sure, no philosopher goes so far as to deny that some norm-relative standards may under appropriate circumstances come to be morally binding. But this moral bindingness is derivative, not inherent.

[138] Finlay, 'Recent Work on Normativity' (n 117) 331.

[139] Parfit, *On What Matters* (n 131) 553.

statement conveys; and finds that norm-relative standards are not inherently 'normative' in the sense of metaethical bindingness.

Though the concern to maintain a clear distinction between the ideas of norm-relativity and moral normativity is shared widely by philosophers, they often continue to use the label 'normative' to refer to both ideas. Consider the following passage from David Copp:

> There are however different types of normativity. Propositions about the proper use of language are normative, for example, but in standard cases they are not normative in the way that moral propositions are normative... In paradigmatic cases type-one normative cases entail non trivially that a relevant standard has an appropriate currency... type two normative propositions are more deeply normative , for paradigmatic propositions of this kind entail that the relevant standard has a standing that is itself normative... that the relevant standard is appropriate justified. [140]

In the above passage, David Copp argues that type-one normative cases entail that that a relevant standard has an appropriate currency. This resembles in all respects the idea of norm-relativity. Indeed from the examples that Copp goes on to give of such type-one normative cases it becomes apparent that Copp means to refer to norm-relative standards. Copp argues that type-two normative standards 'have a standing that is itself normative'. Copp means to argue that type-two normative standards are metaethically binding, while type one standards are not. Similarly John Broome notes that mere talk of normative standards conceals more than it illuminates:

> Grammar requires you not to use a singular form of a verb with a plural pronoun. Morality requires you not to say hurtful things gratuitously... You find yourself subject to many requirements, stemming from various

[140] David Copp *Morality, Normativity and Society* (OUP 1995) 10.

> sources… Are these requirements normative? They are all normative in one sense, simply because they are requirements. Each sets up a standard of correctness of a sort; satisfying the requirement is correct according to the requirement. If you offer your left hand for shaking, you are acting incorrectly according to a requirement of convention. In one sense of "normative," any standard of correctness is normative. But that is not my sense. [141]

Broome, just like Copp and Parfit, points out that while in one sense, socially practised standards, such as that of etiquette are 'normative', they are not 'normative' in the sense of metaethical bindingness. The philosophers' use of the label 'normativity' spans both concepts- namely, norm-relativity and moral normativity- creating confusion in the literature. In the present work, we shall seek to maintain a clear distinction between the three ways in which the term 'normative' is used in the literature by philosophers:

a) In the *semantic* sense to designate a token statement as conveying a *moral* standard;
b) In the *semantic* sense to designate a token statement as conveying *norm-relative* standard;
c) In the metaethical sense to refer to moral *bindingness*.

[141] J. Broome, 'Have we Reason to do as Rationality Requires? A Comment on Raz' (2005) 1 Journal of Ethics and Social Philosophy, 1, 3.

III

‘Normative’ Language: Moral and Norm-relative

So-called ‘normative’ language is fraught with all of the nebulousness associated with the idea of ‘normativity’.[142] ‘Normative’ expressions such as ‘ought’, ‘obligation’, ‘right’, ‘wrong’, ‘duty’ etc., are to be found in statements conveying moral requirements. Identical expressions are also to be found in statements conveying norm-relative requirements. As such, these ‘normative’ expressions are used in different senses in moral and norm-relative contexts. The moral ‘ought’ is to be found in statements conveying moral judgments. The norm-relative ‘ought’ is found in statements conveying norm-relative judgments, where the speaker conveys to another what is correct or required in relation to a socially current standard.[143] Discussing such norm-relative statements, Hare argues a statement ‘you ought to do X’ means ‘X is required in order to conform to the standard which people generally accept (statement of sociological fact)’.[144]

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[142] For convenience we will refer to ‘ought’ as the paradigmatic normative expression. Our discussion of ‘oughts’ would be *mutatis mutandis* applicable to all other normative expressions like ‘right’ ‘wrong’ ‘duty’ etc.

[143] We saw briefly in Chapter I why moral statements can never be understood as conveying socially practised standards. A view which holds so would sooner or later collapse into moral relativism. There is a further discussion of this aspect of moral judgments in Chapter VII.

[144] R.M. Hare, *Language of Morals* (Clarendon Press 1952) 167 (original parenthesis); Hare, however, does not use the expression ‘norm-relative’ to mark out ‘normative’ statements conveying socially practices standards. Hare does not make a difference between norm-relative and moral statements. He seeks to carve out a distinction between evaluative and non-evaluative ‘oughts’. Hare terms the non- evaluative ‘ought as the ‘descriptive’ ought. However it could be argued that is a misleading characterization. Though the above statement is not evaluative (moral) it is not descriptive either. It does not factually state what people generally do. Rather it conveys what ought to be done to comply with what people generally do. Hare here seems to erroneously equate any judgment with a world to mind direction of fit- which is to say any judgment involving cognizance of a socially practices standard- with factual statements.

The above norm-relative statement, Hare says, could also be paraphrased as follows:

> 'There is a principle of conduct which people generally accept which says, 'One ought to do X in circumstances of a certain kind" and I am [or you are] now in circumstances of that kind'.[145]

The norm-relative ought is used in the context of socially practised standards like etiquette, caste rules, rules of a game, code of honour, grammar and the like. The point of such statements is to convey what is required in order to conform to a socially practised standard. Norm-relative statements are also practical and deontic; and so are moral statements.

The aforesaid similarities notwithstanding, moral judgments function differently from norm-relative judgments in the practical reasoning of the agent; and this difference also manifests itself in the phenomenology of moral and norm-relative statements. Let us first consider the phenomenology of these statements before turning to consider why they function differently in the practical reasoning of agents.

When an agent makes a moral judgment, it is thought that her attitude is aligned with the moral judgment; in other words a moral judgment implies attitudinal endorsement on behalf of the speaker.[146] It would be incongruous if an agent makes a moral judgment and then, in the same breath, disavows endorsement of the moral judgment she has just made; it would license her addressee to assume either that the speaker has not made a sincere moral judgment at all, or isn't adequately in the

[145] It will be argued in Chapter IV, that Hart's characterization of statements of legal obligation is strikingly similar to Richard Hare's characterization of norm-relative statements.
[146] Michael Smith Moral Problem (n 44) 6-7.

possession of the concept of making a moral judgment.[147] Should someone agree that a certain action would in the present situation be morally required, we would be bemused if he then earnestly enquired what it had to do with him or why he should bother.[148] Imagine trying to convince your friend that he ought to donate to Oxfam and after a long discussion, you actually manage to convince him; and your friend acknowledges, 'I agree that I have a moral obligation to donate to Oxfam'. Now, if your friend turns around and adds in the same breath, 'but I am not sure if I should' or 'but I don't care', you would be most perplexed.

Peter Railton describes as *Moore paradoxical* any disavowal of a moral judgment, in the same breath as making it. Originally, the idea of Moore paradoxicality captured the incongruity involved in a speaker asserting a fact and denying belief in it in the same breath: 'It is raining, but I don't believe it is'.[149] Railton appropriates the above label and extends the idea to explain the incongruity involved in a speaker

[147] Stephen Finlay, 'The Conversational Practicality of Value Judgment' 2004(8) Journal of Ethics 205-223. Richard Hare also makes an argument to the same effect "I propose to say the test whether someone is using the judgment 'I ought to do X' as a value judgment or not is," Does he or does he not recognize that if her assents to the judgment, he must also assent to the command "Let me do X"? ... to guide choice or actions a moral judgment has to be such that if a person assents to it , he must assent to some imperative sentence derivable from it; in other words if a person does not assent to some such imperative, that is knock-down evidence that he does not assent to the moral judgment in an evaluative sense...to say this is to say that if he professes to assent to the moral judgment but does not assent to the imperative he must have misunderstood the moral judgment..' ' to say that one judgment entails another is to say that you cannot assent to the first and dissent to the other and this cannot is a logical cannot' : Hare, *Language of Morals* (n 144) 168-69; Also See Hare, *Moral Thinking: its Levels, Method and Point* (OUP 1981) 21 .

[148] Michael Smith, *Moral Problem* (n 44) 6.

[149] G.E. Moore, 'A Reply to My Critics' in P. Schilpp (ed.) *The Philosophy of G.E. Moore* (La Salle, Ill.: Open Court 1942) 535, 543; It was Wittgenstein who coined the term 'Moore's Paradox'. Wittgenstein discusses Moore's paradox in Part II X of *Philosophical Investigations* (Blackwell 1958). In his letter to Moore, Wittgenstein wrote that the absurdity is important because it is 'something similar to a contradiction, though it isn't one'. He also thought that the explanation of the absurdity will say something 'about the logic of assertion'; G.H. Von Wright (ed.), *Wittgenstein: Letters to Russell Keynes and Moore* (Oxford Blackwell 1974) 177.

making and then disavowing a moral judgment in the same breath.[150] Whether or not Railton's extension of the idea of Moore paradoxicality to moral disavowals is entirely apposite, it provides us with a useful shorthand for referring to the incongruity involved in disavowing a moral judgment in the same breath as making it and hence we shall refer to it as such.[151]

In sharp contrast to moral judgments, the disavowal of a norm-relative judgment in the same breath as making it, is not thought to lead to Moore paradoxicality. Consider the following statements:

a. One ought not to eat peas with the knife, but I don't care; or

b. One ought to wear whites for cricket, but I don't care.

The above are instances of norm-relative statements which can be combined without any Moore paradoxicality with their disavowals. As David Copp argues, an iconoclast can coherently hold that belching is impolite.[152] We can perfectly understand someone judging that according to the rules of etiquette one is required to do something but doesn't care about it.[153] This comes about because making a norm-relative judgment does not *necessarily* entail the same sort of attitudinal endorsement that a moral judgment necessarily entails. In the next section we will

[150] Peter Railton, 'Moral Factualism' in James Drier (ed.), *Contemporary Debates in Moral Theory* (Oxford Blackwell 2006) 201, 205; Michael Cholbi, 'Moore's Paradox and Moral Motivation' (2009) 12 Ethical Theory and Moral Practice 495-510.

[151] J.C.C Smart writing many years before Railton argues that the disavowal of a moral judgment involves some kind of paradox and he traces the paradox to Moore's naturalistic fallacy rather than the so called Moore's paradox: J.C.C Smart, *Ethics, Persuasion and Truth* (Routledge 1984) 25.

[152] David Copp, *Morality, Normativity and Society* (n 140) 10.

[153] Richard Joyce too notes this feature of norm-relative 'oughts' which he calls 'institutional oughts'. R. Joyce *Myth of Morality* (Cambridge University Press 2001) 34-35.

turn to why moral and norm-relative judgments present such diverse phenomenologies by considering how they figure in the practical reasoning of agents.

IV

Norm-relativity, Morality and Practical Reasoning

It was noted in Chapter I that the practicality requirement is a central feature of moral judgments. The practicality requirement establishes a non-contingent, conceptual link between a moral judgment and the motivation of the agent.[154] When an agent makes a moral judgment, it is non-contingently accompanied by a motivation to act in accordance with such moral judgment.[155] As Michael Smith puts it, the connection between the moral judgment and motivation of the agent is *internal*, or *de re* (non derivative).[156] If the moral judgment-to-motivation fit were not *de re*, we would not find perplexing, the disavowal of the moral judgment in the same breath as making it. If we deny the practicality requirement and hence the *de re* connection between moral judgment and moral motivation, it would be a wholly *contingent* matter that the agent's attitudes and motivation are in accordance with her moral judgment. Such a contingent connection would obviously not suffice as an explanation of the reliable connection of alignment one typically finds between moral

[154] The practicality requirement was discussed in Chapter I. Wittgenstein recognizes this as a necessary feature of moral judgments. See Wittgenstein (n 46). This is something that philosophers across the metaethical divide endorse. Even metaethical nihilists or error theorists such as J.L.Mackie do not deny it.

[155] Philippa Foot, 'Does Moral Subjectivism rest on a mistake?' (1995) 15 OJLS 1, 12.

[156] Smith, *Moral Problem* (n 44) 72-73. John McDowell argues for a similar connection between moral judgments and motivation. See McDowell, 'Are Moral Requirements Hypothetical Imperatives?' (1978) 52 Proceedings of the Aristotelian Society, Supplementary Volumes, 13 -29.

judgments and the agents' motivation and attitudes. If such *de re* connection were not to be found we would not be baffled at someone disavowing a moral judgment in the same breath as making it. That such a disavowal is baffling, argues Smith, is precisely because of the *de re* motivational fit to be found in moral judgments.

> Suppose we debate the pros and cons of giving to famine relief and you convince me that I should. However, when the occasion arises me to hand over my money, I say 'But wait I know I should give to famine relief but you haven't convinced me that I have any reason to do so'... such an outburst would occasion serious puzzlement... Puzzlement would thus naturally arise because having convinced me that I should donate you would rightly expect me to hand over my money. Believing I should, brings with it my being motivated to- at least absent weakness of the will and the like. [157]

In contrast with what we find in cases of moral judgments, when an agent makes a norm-relative judgment, her attitudes and motives need *not necessarily* be aligned with such norm-relative judgment. Her motivation to act in accordance with a token norm-relative judgment *could* be subject to a further, contingent motivational consideration, which may or may not be present in any given case. The connection between norm-relative judgment and motivation could be *external* or contingent. In other words, the motivational fit could be *de dicto* [derivative].[158] The agent is not

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[157] Smith, *Moral Problem* (n 44) 6-7.

[158] Michael Smith 'Moral Problem' (n 44); Note, that the motivational fit between a prudential judgment and the agent's practical reasoning is also to be read as *de dicto*. A prudential judgment identifies efficacious means to bring to fruition the goals or ends of the agent. But whether the agent is motivated to conform to such prudential judgment would be contingent on his desiring the ends, which the prudential judgment is a means to. Consider the following prudential judgment, 'I ought to take the train on Platform 1 to get to Cambridge by noon'. This judgment does not close for the agent the deliberation on whether he should take the train, as it is subject to whether agent desires to get to Cambridge by noon. Whether or not this judgment is accompanied by the motivation to take the train is contingent on whether he wants to get to Cambridge by noon. Thus the agent could coherently disavow a prudential judgment 'I ought to take this train... but I don't want to'. This similarity between norm-relative judgments and judgments of prudential reasons notwithstanding, there is a difference of great significance between the nature of such statements which will be discussed Chapter IV. Prudential judgments are 'hypothetical' in nature, in that, the agent uttering them would have to retract the requirement, once she discovers that it does not fall within the purview of the hearer's goal directed behaviour. Norm-relative judgments, by contrast, are not hypothetical; they are 'categorical' instead.

thought to *necessarily* attitudinally endorse the norm-relative judgment she is making.

It is a live possibility that there could be a *gap* between a person judging what his social practices require and his having an attitude of approval towards it. This could be called the *judgment-attitude gap*. An agent could be *cognizant* of what is the 'done thing' in his society; and yet be motivationally cold in the face of that discovery. There is no necessity that his attitude towards the practice would necessarily be one of endorsement.[159] The possibility of such motivational ambivalence accompanying the cognizance of what is the 'done thing' in society automatically flows from the standard picture of human psychology. The standard picture has it that the belief in or cognizance of a fact cannot in itself, motivate anyone to action, in the absence of a *conative* desire or attitude.[160] And it is this judgment-attitude gap that explains why there need not be anything more motivationally reliable than a *de dicto* connection between a norm-relative judgment—which involves a *cognizance* of what the standards practised in a society require—and the agent's motivation.

A norm-relative judgment involves *cognizance* of what is required to conform to the 'done thing' in society; it need not necessarily be accompanied with an attitude or motivation to act in accordance with such judgment. A token norm-relative statement conveys this norm-relative judgment of what is required to conform to the 'done thing' in society. Even an agent who finds the socially practised standards deeply repulsive, or is deeply disaffected with such standards could be cognizant of

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[159] Richard Brandt, *Facts, Values and Morality* (Cambridge University Press 1996) 62.

[160] Smith, *Moral Problem* (n 44) 7-9; Michael Smith 'Realism' (n 44) 73, 74. Also see John Bricke, *Mind and Morality: An Examination of Hume's Moral Psychology (*Oxford: Clarendon Press, 1996) Chapters 1 and 2.

them; and it follows, can make norm-relative judgments and utter norm-relative statements conveying such standards. It is for this reason that one could, without any sense of puzzlement say, 'one ought not to eat peas with the knife, but I don't care'. It is for this very reason that an iconoclast could coherently hold that 'belching is impolite', which is to say, 'wrong' in relation to standards of etiquette. Such disavowals, as we have seen earlier, are incongruous with making a moral judgment; but the possibility is always a live one in case of norm-relative judgments.[161] In contrast with a moral judgment, an agent who judges what is required by standards of etiquette may quite rightly consider herself free to deliberate whether to act in accordance with such a standard.

This is not, however, to insist that there is *necessarily* a *de dicto* motivational fit in relation to norm-relative judgments in case of *all* agents. In a group with such socially practised standards, it is not too hard to imagine agents, in whose practical reasoning there could be a more reliable connection between a norm-relative judgment and their motivation to act according to it. Let us consider the case of Miss Manners who *endorses* the standards of etiquette in her society so as to be non-contingently motivated to act in accordance with the norm-relative judgments she makes in relation to the extant standards of etiquette in her society.[162] This should prompt us to hold that in the case of Miss Manners, there is a *de re* fit between norm-relative judgments and motivation just *like* the one found in the case of moral judgments and motivation. Indeed, it is not hard to picture norm-relative judgments

[161] Matthew Evans and Nishi Shah make the same argument: 'Suppose for example that one accepts that it is incorrect by the standards of etiquette to slurp one's soup; this certainly does not imply that one is *compelled not* to slurp one's soup. A similar story could be told about the standards of play for chess, or the standards of use for hammers': M. Evans and N. Shah, 'Mental Agency and Metaethics' Russ Shafer-Landau, (ed.), (2012) *7 Oxford Studies in Metaethics* 80, 86.

[162] The character 'Miss Manners' is Michael Smith's invention.

of etiquette function in the practical reasoning of Miss Manners in the same way that her other moral judgments do; and we could indeed, in appropriate cases, describe her commitment to standards of etiquette in her society as moral endorsement.[163] Where Miss Manners morally endorses standards of etiquette in her society she could be found treating them as dispositive of what most of us would regard as moral concerns. Consider for instance that Miss Manners is a caste conscious Brahmin whose motivations are aligned in a *de re* fit with the practised—and regressive, I might add—standards of caste in her society. Imagine, further that Miss Manners refuses to shake hands with a little child of an 'inferior' caste. Now, if her friend, appalled at this behaviour, confronts Miss Manners with the question, 'Don't you think your conduct was morally wrong?' Miss Manners could retort with- 'No it is not, caste rules require that I ought not to touch someone belonging to an inferior caste'. Should the little child accidently touch the caste conscious Miss Manners, she may even feel a sense of outrage. Should her own behaviour fall short of standards of her caste, she could feel guilt and shame. All of this serves to illustrate the fact that in the practical reasoning of Miss Manners, the norm-relative standards of caste of her society could function just as we would expect any moral judgment in her or her egalitarian friend's practical reasoning to. It bears emphasis, however, that such a *de re* fit would be found only in cases where the agent *endorses* the norm-relative standards.

[163] Allan Gibbard argues that it is possible for agents to accept a wide range of norms in their practical reasoning in such a way that they amount to moral endorsements: A. Gibbard *Wise Choices Apt Feelings* (n 41) *passim*. Likewise, Peter Railton argues for the same possibility 'Normative Guidance' Vol.1, Russ Shafer-Landau, (ed.), (2006) *1 Oxford Studies in Metaethics* 1.

V

Moral Endorsement of Norm-relative Standards

Now, is there any way of telling whether endorsement of a norm-relative standard leading to a *de re* fit between norm-relative judgments and motivation in the case of Miss Manners amounts to moral endorsement? To be sure, *per se* equating any and every instance of a *de re* fit between norm-relative judgments with moral endorsement would involve the logical fallacy of arguing that as moral endorsements involve a *de re* fit the *de re* endorsement of any standard is necessarily a moral one. What this determination calls for, is an *individuation* of attitudinal endorsements, so as to isolate instances of 'the' moral endorsement. Metaethicists of different stripes are likely to approach this question differently. The moral ontology of cognitivists allows them to individuate moral standards such that, at least in theory, the cognitivist could draw up a catalogue of moral standards. If the norm-relative standard being endorsed is identical with some such moral standard, the cognitivists would have no hesitation in individuating the endorsement involved as a moral one. The non-cognitivists' ontology doesn't allow for individuation of moral standards and draw up a catalogue in the way that a cognitivist, in theory, could.[164] Non-cognitivists like Gibbard would go about the individuation of endorsements with references to the type of attitudinal dispositions involved in such endorsements. Gibbard argues that a moral endorsement is accompanied with a disposition to feel guilt, shame or

[164] Oddly, though Kevin Toh allegedly professes non-cognitivism, he individuates moral endorsements, just in the way that cognitivists do. In Chapter 7 it will be argued, that Toh's claims notwithstanding, he is not a non-cognitivist; rather he ends up professing the most clearly indefensible form of metaethical theory, namely, moral relativism; see Toh 'Hart's Expressivism' (n 11).

outrage at falling short of the standard endorsed.[165] Simon Blackburn, a fellow non-cognitivist, however disagrees with Gibbard and argues that a disposition to feel guilt, shame or outrage need not necessarily accompany moral endorsement. He suggests that such individuation of *the* specifically moral endorsement is neither necessary nor possible given the polymorphous nature of human psychology. [166] All these differences between the cognitivists and the non-cognitivists notwithstanding, disputes have not been known to break out between the two camps about the classification of a given consideration as a morally significant one.[167]

A resolution of this issue would call not only for a resolution of the debate between cognitivists and non-cognitivists but also the resolution of an intramural debate between non-cognitivists. In the limited space available at hand, it will not be possible to satisfactorily address this issue. At any rate, nothing in the present work turns on our being able to resolve it. In this present work we will take a relaxed, non-dogmatic approach towards the issue so as to side-step the individuation problem altogether. I will treat only those considerations as morally significant which have *not* been ruled out as morally significant concerns in the metaethical literature. This would leave us with a solid core of considerations which no philosopher seriously contends, *are not* moral in nature; and a core of considerations which no philosopher would content *are* moral in nature. For instance, while no philosopher would dispute that certain norm-relative standards of caste or honour affect people in morally

[165] A. Gibbard, *Wise Choices, Apt Feelings* (n 41). Interestingly H.L.A. Hart, though metaethically non-committed also argued- much like Gibbard does- that moral judgments are associated with feelings of guilt or shame; H.L.A.Hart, *The Concept of Law* (n2) 180.

[166] Simon Blackburn *Ruling Passions* (n 79) 14-22.

[167] Hare specifically notes, how despite the much publicized metaethical differences between cognitivists and non-cognitivists, there is surprising agreement between them on first order moral concerns: Hare, 'Nothing Matters?' (n14). Hart argues that regardless of whether one is cognitivist or non-cognitivist, philosophers do not disagree that morality pertains to some of the most important concerns people have; Hart, *The Concept of Law* (n 2) 168.

significant ways; the norm-relative standards of spelling do not. We could then treat as moral, the endorsements of norm-relative standards that affect people in morally significant ways. So we should have no difficulty in holding that as the caste standards in the society of Miss Manners affect people in morally significant ways Miss Manners' *de re* endorsement of such should be treated as moral endorsement. In a similar vein we should hold that the rules of grammar do not affect us in morally significant ways and Miss Manners' endorsement of them—even if it is to the point of feeling guilt and shame at any shortcoming—should not be treated as moral endorsement.

VI

Why the Distinction Matters

In this Chapter, we have attempted to disambiguate 'normativity'. It was argued that the term 'normative' spans two concepts, semantic and metaethical. We have already studied in Chapter I, that there are two readings of normativity in the metaethical sense: the justificatory reading (of the impinging model) and motivational reading (of the projectivist model). Here, in this chapter we saw that there can be at least two readings of normativity in the semantic sense too: moral and norm-relative. From the welter of standards to which the semantic designation 'normative' applies, we focussed on the two which are of relevance to the thesis: norm-relativity and moral normativity. This disambiguation of 'normativity' will be of a great help in appreciating the discussions under the rubric of 'normativity of

law'. In the next Chapter, it will be argued that a complete philosophical account of the 'normativity of law' comprises two distinct but closely related projects: a) Semantic- The theorist's semantic model of legal statements must portray such statements as semantically 'normative'; b) Metaethical- The theorist must explain how legal requirements which are conveyed by semantically normative legal statements come to be morally binding. Furthermore, the distinction we have drawn here between norm-relativity and moral normativity will come to assume great significance while discussing Hart's work. It will be argued in Chapters IV & V, that Hart portrayed statements of legal obligation as 'normative' in the norm-relative sense. We will also see in Chapter IV, how this seems to fit well with the phenomenology of legal statements which does indeed resemble the phenomenology of norm-relative statements. The role of the semantic model in his scheme of accounting for 'normativity of law' will be discussed in Chapter V.

Chapter 3

MODELS OF MORAL BINDINGNESS OF LAW

I

Recognizing a Puzzle

Philosophers go 'norm' in just the same way as cows go 'moo', the grouse goes.[168] To that we could add- 'legal philosophers too'. For better or worse, legal philosophers have settled upon the label 'normativity of law' to discuss some central questions about the nature of law, including the relations between law and morality.[169] Whatever else a philosophical account of law does, it is widely thought, it should account for the 'normativity of law'.[170] Of late, however, the label increasingly is thought to be thoroughly confusing, prompting some legal philosophers to call for a moratorium on its use. To be sure, no legal philosopher denies the importance of discussing the relations between law and morality. It is only the label 'normativity of law' that is felt to be obscure and hence dispensable. Presumably, legal philosophical discussions will not suffer a serious debilitation if the label were to be dispensed with. Indeed, issues now discussed under the label 'normativity of law' were discussed by legal philosophers using other terms and expressions, long before the label gained currency. Just as we found with regard to discussions of 'normativity' in the realm of metaethical literature, in the jurisprudential literature, expressions like

[168] Simon Blackburn echoing Jerry's Fodor's misgivings about the label 'normativity': 'Majesty of Reason' (n 75) 5.

[169] Why set out with such a bleak estimate of the label, 'normativity of law' which is so central to this work? As we shall soon find out, legal philosophers—for good reason, might I add—find the label to be thoroughly obfuscating and unhelpful. Peter Railton notes a similar unease among philosophers even in the case of the label 'normativity' in the wider (non-jurisprudential) philosophical literature: P. Railton, 'Normative Force and Normative Freedom: Hume and Kant but not Hume V Kant' (1999) 12 Ratio 320.

[170] Stefano Bertea and George Pavlakos, 'Introduction' in S. Bertea and G. Pavlakos (eds.), *New Essays on Normativity of Law* (Hart 2011) 1.

'bindingness', 'authority', 'binding force' were used to convey *some*, if not all, of the ideas now conveyed by the expression 'normativity of law'. Few would deny, for instance, that accounting for what is now commonly referred to as the 'normativity of law' was one of Hart's primary theoretical ambitions. Yet, Hart uses the term 'normative' sparingly, hesitantly even, scare-quoting it, displaying the unease of one grudgingly constrained to use the expression only because convention dictated it though he himself didn't find it particularly useful.[171] Though Hart was hesitant to employ the term 'normative', he remained committed to discussing at least some, though not all, relations between law and morality: the subject matter that discussions of 'normativity of law' are thought to be really about. There were, of course, some central questions about the relations between law and morality that Hart would stubbornly refuse to entertain, which we will return to discuss in Chapter V.

But what is it that an account of 'normativity of law' is meant to establish? Or, in other words, how does one set the *problematic* of 'normativity of law'? David Enoch gives us a good idea of the confusion that obscures the issue:

> Unfortunately, though, 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. [172]

[171] The use of the term was not as widespread when Hart wrote *The Concept of Law* (1961). But by the time he returns to the themes in *Essays on Bentham* (1982), the term 'normativity' was thoroughly ensconced in jurisprudential literature.

[172] D. Enoch, 'Reason Giving and the Law' in Leslie Green & Brian Leiter (eds.) *Oxford Studies in Philosophy of Law* (OUP 2011) 1, 2. Sometimes, legal philosophers use the expression 'normativity of law' so vaguely and widely, so as to deprive it of any utility as a label under which to discuss certain philosophical issues about the law. For instance, Roger Shiner manages to accommodate nearly all of modern legal philosophy as a purported account of the 'normativity of law': Roger Shiner 'Normativity of Law' in D. Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory* (Wiley-Blackwell, 2011) 417.

Indeed, different theorists do seem to have different things in mind when they set the problematic of 'normativity of law'.[173] It will be argued that legal philosophers have different *concepts* in mind when they speak of 'normativity of law'. This is one of the factors which hinders us from accurately setting out the problematic of 'normativity of law'. However, the difficulty, it seems, runs even deeper. Not only do theorists have different *concepts* of normativity but there are further competing *conceptions* of each of the different *concepts* of normativity. Typically, when legal philosophers write on the 'normativity of law', they often, albeit unwittingly, presuppose one of the *concepts* of normativity; to complicate the issue further, they also often assume one of the competing *conceptions* of one of those concepts and hold it up as *the* problematic of the 'normativity of law'. As a consequence of this *double* ambiguity, it will be argued, the problematic of 'normativity of law' has become too gilded and obscured. One would be hard pressed to find an entirely neutral and aseptic characterization of the problematic of the 'normativity of law' in contemporary literature. One of the chief goals of this chapter is to sieve out this double ambiguity by unpacking the concepts of 'normativity of law' and the competing conceptions of those concepts, so as to arrive at a neutral and aseptic characterization of the problematic of the 'normativity of law'. In this exercise, we will be guided by our experience from the two previous chapters of untangling the general idea of 'normativity'. We will find that at least some of the ambiguities we encountered in earlier chapters reincarnate themselves to obscure discussions under the label-'normativity of law'. Besides, we will find that discussions of the 'normativity' of law also involve some additional ambiguities peculiar to the field of legal philosophy. Once we have unpacked the notorious label we will come across two distinct, albeit

[173] By the phrase 'setting the problematic of 'normativity of law'' is meant the specification of the goal that an account of the 'normativity of law' is meant to accomplish.

related, *concepts* underlying the label 'normativity of law': one concerning the *semantics* of statements of legal obligation and the other concerning the *metaethical* status or character of moral bindingness of law. Confounding the confusion this bivalence brings in its wake, we will find that there are competing *conceptions* of each of these concepts. That is to say, there are two rival *conceptions* of what it takes for a legal statement to be semantically 'normative', and two competing metaethical conceptions of how law could come to be morally binding.

II

Two Concepts of the 'Normativity of Law'

2.1 The first concept: 'normativity of law' as moral bindingness of law

It's ubiquity in contemporary philosophical literature notwithstanding, the origins of the phrase 'normativity of law' remain something of a mystery. The phrase was probably minted by Kelsen; to be more precise, by the translators who rendered his work into English. There is good reason to think that the term 'normativity' could have been an export from legal philosophy to the wider philosophical community. Stephen Finlay argues that the term 'normativity' only came into vogue in the wider philosophical community in the 1980's[174] which is to say, much after it was used by Kelsen– and after it was thoroughly ensconced in the jurisprudential literature. But

[174] Finlay, 'Recent Work on Normativity' (n 117) 331.

even though Kelsen introduced this term early in the 20th century, the term did not gain currency among legal philosophers until Raz, professedly borrowing it from Kelsen, employed it in the 1970's as a label under which he discussed some (yet to be explained) relations between law and morality. [175]

For Kelsen, to say of a law that it was *valid* was to say that it was *normative*; he equated 'normativity' and 'validity'. In turn, 'normativity' Kelsen used to refer to the 'bindingness' of law–the idea that the law ought to be obeyed.[176] Unlike the gunman's commands, argued Kelsen, the law is 'normative' that is to say, binding, and an individual ought to obey it. In his theory, the *grundnorm* worked as a normative power plant endowing bindingness to all norms of the system. Alf Ross, in one of his relatively little known papers, argued that integral to Kelsen's account was the claim that, 'the [legal] norm expresses a true [moral] obligation: individuals are not only commanded to behave in a certain way but they also… in "truth", "objectively" ought to behave as required by the norm.' [177] As Ross understood it, on Kelsen's model, the moral bindingness of law stemmed from some objective standard that *impinges* on the subject. Kelsen's model of normativity thus presupposed objective values that *impinge* on the subject and give them reasons to obey the law. Ross, in turn, owed

[175] Raz's first extended discussion on the 'normativity of law' was in the paper, 'Kelsen's Theory of the Basic Norm' published in (1974) 19 American Journal of Jurisprudence, thereafter republished as Chapter 7 of *Authority of Law* (OUP 1979). Raz's thoughts on the 'normativity of law' have shaped the understanding of following generations of theorists and as we shall see later in the chapter has, albeit unwittingly, contributed to some of the confusions surrounding the 'normativity of law' that are to be found in contemporary literature on the subject.

[176] On Kelsen's account, it was the *grundnorm* which endowed all other norms in the legal system with normativity, validity and bindingness. Kelsen argued, 'to say that the behaviour of an individual is commanded by an objectively valid norm amounts to the same as saying that the individual is obligated to behave in this way': Hans Kelsen, *General Theory of Law and State* (Russell 1961) 30.

[177] Republished as Alf Ross, 'Validity and the Conflict between Positivism and Natural Law' in S.L. Paulson and B.L. Paulson (eds.), *Normativity and Norms: Critical Perspectives on Kelsenian Themes* (Clarendon Press 1998) 147, 150.

this reading of Kelsen to Karl Olivecrona, who had argued a decade earlier that Kelsen's account treated law's bindingness as stemming from a higher standard; and that this idea necessarily presupposed objective moral values typically associated with classical natural law thought—though Kelsen would have been loath to admit it in so many words.[178] In other words, Olivecrona and Ross can be understood as arguing that Kelsen's notion of normativity or bindingness referred to none other than moral bindingness, and that Kelsen had employed the cognitivists' impinging model of bindingness associated with natural law thought, whereby moral bindingness was to be explained by reference to objective moral standards.[179] Both Olivecrona and Ross were opposed to this impinging model of bindingness. As we shall see in Section V, they, along with other Scandinavian Legal Realists, argued that the moral bindingness of law was to be understood *not* in accordance with an objective moral standard that impinges on the subject (for they thought that there are no such standards) but instead in accordance with the *projectivist* model of bindingness, that is to say, in terms of a non-cognitivist or conative moral stance taken by subjects towards the law. In other words, they subscribed to a different *conception* of moral bindingness than the one that Kelsen professed.

Raz's reading of Kelsen's account bears striking resemblance to Ross's and Olivecrona's though Raz never explicitly acknowledges it.[180] Raz, like Ross and

[178] Karl Olivecrona, 'Realism and Idealism' (1951) 26 NYU LR 125; William Buckland, writing a little before Olivecrona, makes an argument more or less identical to Olivecrona's- he argues that though Kelsen would have been loath to invoking natural law doctrine as underlying the *grundnorm*, Kelsen's self-professed disciple Walter Schiffer openly does so: W.W.Buckland, *Some Reflections on Jurisprudence* (Cambridge University Press 1949) 21.

[179] Nigel Simmonds, argues that this strand of Kelsen's thought can be traced back to Kant, since according to Kant a natural law would necessarily have to precede positive law in order to establish the authority of the lawgiver: N. Simmonds, *Law as a Moral Idea* (OUP 2007) 120.

[180] J.Raz, *Authority of Law* (Oxford, Clarendon 1979) 134; J. Raz 'The Purity of the Pure Theory', S.L. Paulson and B.L. Paulson eds., *Normativity and Norms: Critical Perspectives on Kelsenian Themes*

Olivecrona, reads Kelsen's idea of normativity as moral bindingness, where bindingness is understood along the lines of the *impinging* model. Raz dubs this 'justified normativity'. Raz argues that Kelsen follows the conception of 'justified normativity', traditionally associated with natural lawyers, which has it that a law is binding when it is morally justified 'by objectively existing reasons'.[181] Unlike Ross and Olivecrona though, Raz does not think that this natural-law-inspired impinging model of normativity must be eschewed. On the contrary, he goes on to endorse it and uses it as a template for his own account of the normativity (moral bindingness) of law.

Whether or not Kelsen's idea of the 'normativity of law' ought exegetically to be understood thus is a vexed issue—being a subject of intense debate among Kelsen scholars—and one which need not detain us here. [182] There are those who, like Jim Harris, argue that Kelsen understood 'normativity' in an 'etiolated' or 'pallid' sense, and not in the sense of moral bindingness. Whether or not Kelsen understood normativity as moral bindingness, Raz's reading and further endorsement of normativity as 'justified normativity'—the moral bindingness of law by reference to objective moral values as pictured by the impinging model—has influenced

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(Clarendon Press 1998) 245. Raz, however, goes on to substantiate this claim with a far more elaborate reading of Kelsen than either Buckland, Ross or Olivecrona offer.

[181] Raz defines 'justified normativity' as the thesis which holds that law is justified 'by objectively existing reasons or intuitively perceived as binding or accepted as so by commitment': J.Raz, *Authority of Law* (Oxford, Clarendon 1979) ff.134. However, this definition could be a little misleading if it is not borne in mind that 'intuitively perceived to be binding' and 'accepted as so by commitment' do not add any additional modes of moral bindingness over and above that stemming from the 'objective moral principles'. We will return to discuss this issue in section IV of the present chapter.

[182] J.W. Harris 'Kelsen's Pallid Normativity' (1996) 9 *Ratio Juris* 94; Uta Bindreiter, *Why Grundnorm?: A Treatise on the Implications of Kelsen's Doctrine* (Springer 2002) *passim;* Julie Dickson, 'Interpreting Normativity' in T. Endicott et al (eds.), *Properties of Law: Essays in Honour of Jim Harris* (OUP 2006) 22.

subsequent generations of legal philosophers' understanding of the 'normativity of law'. No contemporary legal theorist setting out to provide an account of the 'normativity of law', for instance, would conceivably take her task as that of providing a Jim Harris style 'etiolated' or 'pallid' account of normativity; such an account of normativity would leave out questions about the moral authority and bindingness of law. And it is precisely these questions that legal philosophers are primarily interested in addressing when they pursue inquiries under the rubric of 'normativity of law'. So profound is the influence of Raz's Kelsenian terminology that legal philosophers take 'normativity of law' not just to mean moral bindingness but the specific *conception* of moral bindingness that Raz endorses, namely 'justified normativity'. As a representative sample of this pervasive influence, consider how a recent work understands the 'normativity of law': 'normativity is the claim about the existence of objective moral reasons for action. It can also be described ontologically as the claim about the existence of objective values.' [183]

The above passage neatly sums up what a great number of legal theorists understand by 'normativity of law'. This reading of normativity, it would be fair to say, has come to enjoy the status of being the 'industry standard'. Most legal philosophers do not, however, use the language of 'justified normativity' or 'objective moral values'. They use another phrase that conveys the very same idea: reason-givingness. The idea of reason givingness, it will be recollected from our discussion in the previous chapter, is integral to the *impinging* model; it is inextricably intertwined with the idea of the objective moral standard which acts as the truth

[183] Wojciech Zaluski, 'Three Senses of Moral and Legal Normativity' in J. Stelmach, B. Brozek (eds), *Studies in the Philosophy of Law: Vol.6 The 'Normativity of Law'* (Krakow: Copernicus Center Press 2011) 51-62.

maker (that which makes the moral judgment true) and the 'source' of reason givingness. It is the objective moral standard that gives people moral reasons. On this terminology, an account of 'normativity of law', as Stephen Perry points out, must account for the law's 'reason givingness'.[184] We could easily summon thoughts from other legal philosophers endorsing this idea:

> The Normativity Thesis: …We understand law only if we understand how it is that laws give members of a community, officials and law-subjects alike, reasons for acting.[185]
>
> There is only one notion of normativity, genuine reasons-giving normativity[186]
>
> T]he question of law's normativity is the question of how law can create reasons for action which we would not have but for the presence of law, or of how and under what conditions law's prescriptions can have the normative force that they purport to have.[187]
>
> [N]ormativity of law; i.e., the idea that legal rules provide reasons for actions and, in some circumstances, both create and impose duties and obligations.[188]
>
> Many nowadays conceive of law's normative force and the notion of legal authority in terms of that [normativity] thesis: to bind authoritatively means, on this understanding, to provide pre-emptive reasons.[189]

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[184] S.Perry, 'Hart on Social Rules and the Foundations of Law: Liberating the Internal Point of View'75 (2006) *Fordham LR* 1171, 1173; also see Perry, 'Hart's Methodological Positivism' (1998) 4 *Legal Theory* 427.

[185] Gerald Postema, 'Coordination and Convention at the foundation of the Law', (1982) 11 Journal of Legal Studies, 165.

[186] Gerald Postema, 'Norms, Reasons and Law' (1998) Current Legal Problems 149; For a similar description of the problematic of the 'normativity of law' also see Veronica Rodrigues Blanco 'From Shared Agency to the 'normativity of law': Shapiro's and Coleman's Defence of Hart's Practice Theory of Rules Reconsidered' Law and Philosophy (2009) 28: 59–100.

[187] Julie Dickson 'Interpreting Normativity' in *Properties of Law: Essays in Honour of Jim Harris* (OUP 2006) 22, 23.

[188] Maria Cristina Redondo 'On Normativity in Legal Contexts' in E. Lagerspetz, H. Ikaheimo, and J. Kotkavirta (eds.), *On the Nature of Social and Institutional Reality* (Finland, SoPhi 2001) 168.

[189] Noam Gur, 'Legal Directives In The Realm Of Practical Reason: A Challenge To The Pre-Emption Thesis' 52 (2007) American Journal of Jurisprudence 159.

This idea of 'reason givingness' that we see repeated in each of the above passages presupposes the impinging model of normativity, or what Raz refers to as the model of 'justified normativity'. As we discussed in the preceding chapter, the projectivist model does not allow for the idea of reason givingness as it is only necessitated by the impinging account which operates with notions such as objective moral standards and moral truth-makers, which projectivists frown upon. Now, legal philosophers tend to write as though this (reason givingness) captures the *only* plausible understanding of 'normativity of law'. This has served to set the problematic of 'normativity of law' in the literature in somewhat misleading terms. An account of 'normativity of law', as the received view has it, must establish the conditions under which the law comes to be reason giving. However, it could be argued that this is hardly either an aseptic or helpful way of setting out the problematic of 'normativity of law' as it already builds the i*mpinging* model into the very idea of a plausible account of 'normativity of law', and expects any putative account of 'normativity of law' to live up to the impinging model. It takes a side, by presupposing a partisan stance on the nature of moral bindingness. In doing so, it unwittingly skews the problematic. As a consequence, discussions of the 'normativity of law' proceed on the assumption that the impinging model *alone* could be a plausible explanation of the moral bindingness of law; the projectivist model could never be equal to the task. If 'normativity of law' is 'defined' as the reason givingness of law, the whole class of projectivists who understand moral bindingness in a different way are ruled out *in liminie*.

However, this 'definition' already involves a *choice* of model of moral bindingness. From an aseptic or neutral viewpoint, this 'definition' of normativity as

'justified normativity' could itself be seen as addressing the logically prior question—'how does the law come to be morally binding?' This calls of a recalibration of the problematic of 'normativity of law' to a metaethically aseptic viewpoint. Only then can the problematic be addressed without presupposing a metaethically partisan standpoint. An account of the 'normativity of law' is meant to establish how the law comes to be morally binding.[190] From the aseptic view point, one would have to admit the following: as there are two plausible ways of understanding 'moral bindingness', there must be two plausible ways of understanding 'normativity of law' and accounting for it. Raz's 'justified normativity' which rests on an impinging model stemming from a cognitivist metaethic is just one and rival to the other—namely, the projectivist model of normativity stemming from a non-cognitivist metaethic.

An overwhelming majority of contemporary legal philosophers have an unspoken adherence to the *impinging* model arising from a cognitivist metaethic. As a consequence, most contemporary discussions of moral bindingness of law proceed on the unarticulated assumption that a putative account of 'normativity of law' must accord with the impinging model. As a result of this, even the plausibility of an alternative to this model does not find serious mention in the literature. Given this propensity of the legal philosophical community to espouse the impinging model of bindingness, it is all too easy to forget that the projectivist model arising from a non-cognitivist metaethic affords a plausible alternative explanation of the moral bindingness of law. In Sections III and IV, we will sketch out the models of the moral bindingness of law that stem from these two models and the commitments (semantic and ontological) that they entail. This exercise will not only elucidate the models of

[190] Nigel Simmonds, *Central Issues in Jurisprudence* (3rd ed. Sweet & Maxwell 2008) 149; M. Karlson 'Roots of Legal Normativity' in *Analisi E Diritto* (Genova 2000) 97.

bindingness, but also later help us understand the account of moral bindingness inherent in Hart's work, which I argue is at odds with the industry standard.

2.2 The Second Concept: 'Normativity of Law' as Semantic Normativity of Legal Statements

Normativity as moral bindingness is not the only concept that the legal philosophers' use of the term 'normativity of law' denotes. We noted earlier that on occasions philosophers use 'normativity' in a *semantic* sense as distinct from the metaethical status sense. It turns out that in some discussions about 'normativity of law', legal philosophers' use of the phrase 'normativity of law' amounts to just this – to designate statements of law as semantically 'normative'. Often, the legal philosophers' use of the term 'normativity of law' *exclusively* denotes this semantic concept, and they use the label 'authority' to denote the metaethical concept of bindingness of law. Here again, Raz has been influential and his definition of the issue has come to assume axiomatic status and is widely regarded as setting the problematic. Raz argues, 'the problem of the normativity of law' is explaining the use of normative language in describing the law or legal situations'.[191] Stripped out of context this could very well sound like a fairly aseptic and neutral characterization of the underlying semantic issue at stake. However, when placed in context, it hardly is neutral for in stating the issue thus, Raz not only assumes a theoretically partisan standpoint about what kinds of statements are 'normative', but expects the account of 'normativity of law' to address an idiosyncratic problem that arises only if one

[191] Joseph Raz *Practical Reason and Norms* (2nd ed. OUP 1990) 170

assumed such a partisan standpoint in the first place. It is telling that Raz portrays explaining the use of normative language in legal statements as a 'problem'. *This* is nothing but very the idiosyncratic problem which we alluded to above. For reasons to be elaborated upon in the next chapter, Raz admits only one kind of 'normative' statement, namely, *moral* statements. Raz does not allow for the possibility of 'norm-relative' statements being semantically 'normative'. Hence, he proceeds on the assumption that legal statements are normative in just the same sense that moral statements are. As we shall see later in the present chapter and in Chapter IV, this semantic assumption is a vital ingredient in Raz's impinging model of normativity. But this semantic assumption leads to a 'problem' which Raz identifies and finds himself pressed to explain. Making a moral statement necessarily implies attitudinal moral commitment on the speaker's behalf; whereas legal statements can be made without any such attitudinal moral commitment. This phenomenological contrast between moral and legal statements renders it *prima facie* unlikely that legal statements could be 'normative' in the same sense that moral statements are. Thus, Raz's 'problem' of explaining the 'normativity of law' is to explain how legal statements, though they are normative in the same way as moral statements are, can be uttered without any of the moral commitment that seems to necessarily accompany moral statements. This phenomenological problem is the one that Raz has in mind when he refers to the 'problem of 'normativity of law''. But this is an idiosyncratic problem that only arises for the theorist who claims that legal statements are semantically normative in the same sense that moral statements are. Raz's solution to the problem involves the idea of *detached* normative statements, sometimes also labelled statements from a *point of view*, which purports to allow

agents to make moral statements without also thereby being committed to the statements they are making.[192]

Yet again, one fears that Raz's handling of the issue hardly provides us with an aseptic route to setting out the problematic. It already builds into the semantic concept of 'normativity', the *moral* conception of the term 'normative', and completely rules out all accounts which treat legal statements as 'norm-relative' statements. At the cost of repetition, it would be well worth reiterating that 'norm-relative' statements are also 'normative'. In this way, Raz's depiction of the issue at hand has unwittingly served to skew the problematic. From an aseptic viewpoint then, the semantic project of accounting for the 'normativity of law' would have to be understood as that of portraying legal statements as setting out 'normative' requirements; and this must be accompanied by the awareness that there are two plausible but rival conceptions of 'normative'. Understood thus, the task of an account of the 'normativity of law' would be to provide an account of how legal statements are semantically 'normative', which is to say 'practical' or 'deontic'. [193] Hart uses the term 'normativity' in the semantic sense in *Essays on Bentham* when he criticizes Bentham's semantics of legal statements for failing to account for the 'normativity' of legal statements. [194] If a putative account of the 'normativity of law' portrays legal statements as factual or predictive statements, like Bentham's account did, it would fail to portray them as 'normative' statements because it would then fail to portray them as 'practical' or 'deontic' statements. As we shall see later in this

[192] For a discussion of Raz's idea of detached legal statements refer to Chapter IV.

[193]Raz uses this terminology in *The Authority of Law* (OUP 1979) 53-55.

[194] H.L.A. Hart *Essays on Bentham* (n 12) 144-147.

chapter and at length in the succeeding one, Hart thought of legal statements as 'normative' in the norm-relative sense as opposed to the moral sense.[195]

Armed with this understanding, we are now better placed to revisit the problematic of the 'normativity of law'. We have now identified two concepts of normativity. A legal philosophical account seeking to fully explain the 'normativity of law' must accomplish two goals: a) It must show that statements of legal obligation are semantically normative; b) it must explain how legal requirements can come to be morally binding.[196]

In the present chapter, we will focus on the second set of questions, namely, the moral bindingness of legal requirements. The former concept of normativity, pertaining to the semantics of legal statements, will be the subject of the following chapter. To be sure, the two are interrelated and the semantic model that a theorist adopts does constrain and shape the sort of metaethical account the theorist can provide to explain the moral bindingness of law. The relationship between the two concepts and their place in a holistic account of the so called 'normativity of law' will be discussed in Chapter IV.

[195] As discussed in Chapter IV, Raz admits of one and only one kind of normative statement, namely the moral one. He does not allow for norm-relative statements being practical or deontic. He fears that they are merely factual or descriptive statements in disguise and hence do not portray the law as comprising of 'practical' or 'deontic' statements.

[196] Redondo (n 188) clearly flags these two issues as comprising the problematic of the 'normativity of law'.

III

Models of Moral Bindingness of Law

Karl Olivecrona argues that one of the central aims of legal philosophy has been to provide a theoretical basis for the pre-theoretical intuition that law has authority or binding force, without which it would be little more than a system of arbitrary organized force.[197] This was also the point of departure for Kelsen's account of the normativity or bindingness of law; it was the normativity or bindingness of law, which for Kelsen, distinguished it from robbers' commands. Roscoe Pound terms this the quest for the 'ultimate basis' of law.[198] An account of 'normativity of law' *qua* bindingness must explain how legal requirements can come to be morally binding. It should seem natural then that any attempt at answering this question would necessarily involve taking a stance on what constitutes 'moral bindingness'; the metaethical commitment that the theorist assumes must have a direct bearing on how she goes about addressing the question of 'normativity of law'.[199] We saw in Chapter II that there are two metaethically distinct ways of explicating the bindingness of morality. In the present discussion, we will find that there are two corresponding models of accounting for the moral bindingness of legal requirements. We will call these the *impinging* model of moral bindingness and the *projectivist* model of moral bindingness. Legal philosophers who discuss the 'normativity of law'

[197] Karl Olivecrona 'Law as Fact' in Paul Sayre (ed.), *Interpretations of Modern Legal Philosophies: Essays in Honour of Roscoe Pound* (OUP 1947) 542.

[198]Roscoe Pound, *An Introduction to the Philosophy of Law* (Yale University Press 1922) p 70.

[199]Sylvie Delacroix emphasizes on the centrality of metaethics to understanding the 'normativity of law' and to legal theory in general: S. Delacroix, *Legal Norms and Normativity: An Essay in Geneology* (Hart 2006) xxiv.

have an adherence, often unspoken, to one of the two models, which stems from their latent metaethical orientation. This dichotomizing of the accounts of the moral bindingness of law into the impinging and projectivist models bears a great deal of resemblance to that suggested by G.H Von Wright. Von Wright calls attention to two ways of accounting for the moral bindingness of law. According to what Von Wright calls the 'cognitivist' position, legal requirements purport to represent 'true' moral requirements and, according to the 'non-cognitivist' position, legal requirements do not purport to represent any objective moral requirements. The moral bindingness of law on the non-cognitivist account, says Von Wright, stems from the non-cognitivist *assent* of the agent subject to a legal requirement. [200] Von Wright's characterization is liable to be somewhat misleading if it is not borne in mind that it combines the semantic and metaethical projects. Furthermore, for reasons we will note later in the chapter, it is not necessary that a complete projectivist account of the 'normativity of law' need adopt a non-cognitivist semantics of statements of legal obligation in order to be able to rely on the non-cognitivist model of moral bindingness. In fact, odd as it may seem, for reasons articulated in Chapter IV, doing so would be detrimental to the projectivist account.

[200] G.H. Von Wright, 'Is and Ought' in S.L. Paulson and B.L. Paulson (eds.), *Normativity and Norms: Critical Perspectives on Kelsenian Themes* (Clarendon Press 1998) 365, 369-70; also see G.H. Von Wright 'Valuations' (n 93) 347-357.

IV

The Impinging model

Let us begin by briefly recalling the *impinging* model of the bindingness of morality endorsed by cognitivists. The idea underlying this model is that moral bindingness is to be understood in *justificatory* terms. Moral judgments, being truth-apt, purport to describe objective moral standards; and, when they successfully do so—that is to say, when they are justified—the moral judgment is normative or binding. The idea of reason givingness is inextricably intertwined with the idea of the objective or true moral standard which acts the truth maker (that which makes the moral judgment true) and the 'source' of reason givingness.[201] It is the truth maker that gives people moral reasons. As noted earlier, this idea of reason givingness is conspicuously absent in the projectivist model because when it comes to ontology, the projectivist model eschews the idea of moral truth and truth makers.

The impinging model of moral bindingness of *law* is a mimeograph of the above model. This model has it that the moral bindingness of law is to be understood in *justificatory* terms such that law is binding if it is in accord with some objective moral standard. This is an unvarnished characterization which will be refined as we go along as we study how legal philosophers have structured their accounts of bindingness around this model. Central to the impinging model of bindingness is the idea of moral justification in relation to some objective moral standard. Raz's reading

[201] The nature of the truth-maker was discussed in Chapter 1.

of Kelsen's account of normativity as 'justified normativity' is paradigmatic of the impinging model.

The semantic thesis inherent in the impinging model of moral bindingness of law is that of *moral descriptivism*: the claim that statements of legal obligation purport to denote objective moral facts and properties. This mimics the semantic model of moral statements characteristic of the cognitivist's account. Those committed to the impinging model insist that statements of law are semantically 'normative' in the same sense that moral statements are. Raz endorses just such a semantic thesis when he claims that 'normative' expressions are used in the same sense in legal and moral statements. [202] On the impinging model, there exists a *conceptual connection* between statements of legal obligation and objective moral standards, in that, legal statements 'purport' to denote moral standards, regardless of whether they successfully do so. That is to say, this conceptual connection holds regardless of whether the legal requirements are actually morally 'justified' or not. The nature of this 'conceptual connection' could be clarified with an interesting analogy from the metaethical literature. Cognitivists assert a conceptual connection between moral statements and objective moral standards.[203] Now, J.L.Mackie, an error theorist, joined the cognitivist camp in asserting this conceptual connection by holding that moral statements do indeed purport to refer to objective moral standards. Where he parted ways with the cognitivist was on the ontological question: Mackie asserted that there were in fact no such objective moral standards. His scepticism about objective moral standards, in Mackie's own words, '[was] an ontological thesis, not a

[202] Raz, *Authority of Law* (n 193) 158; Raz, 'The Purity of The Pure Theory' (n 180). Raz's semantic commitments are discussed in greater detailed in Chapter IV.

[203]M. Timmons, *Morality without Foundations* (OUP 1999) 15.

linguistic or conceptual one'.[204] Mackie reiterates, 'moral concepts … are concepts of objective value'.[205] Hare advises us to keep the conceptual and ontological questions about cognitivism separate and distinct.[206] It will be useful to do the same while discussing the moral descriptivism of the impinging model of the 'normativity of law'. On the impinging model one can say that law, unlike a gunman's commands, purports to denote objective moral standards or in other words 'claims' to be justified, and in appropriate circumstances the claim *could* be successful. Most significantly, this conceptual connection holds *regardless* of whether the legal requirements are actually morally 'justified' or not.[207] As we shall see a little later in the present section, there are some variants of the impinging model, which hold that legal requirements are *necessarily* morally justified.

The ontological commitments of the legal philosophers subscribing to the impinging model may vary just as the ontological commitments of cognitivists vary. Here we could expect to find all varieties ranging from realism to constructivism and voluntarism. As a result, the objective moral standard which acts as the truth maker –that which renders moral requirements binding and is the source of reason-givingness—could assume a variety of forms.

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[204]Mackie (n 32) 18.

[205] ibid 35.

[206] R.M. Hare 'Ontology and Ethics' in T. Honderich, (ed.), *Morality and Objectivity*: *Tribute to J. L. Mackie* (London: Routledge 1985) 39.

[207] This conceptual connection, it would seem, is all that is really required to make sense of Raz's idea of law's claims to moral justification. This claim would hold good even if *no* law is morally justified. Dworkin, one fears, tries to set up a false problem for Raz by tying the law's claim to too closely to what the legal official *intends*. His invocation of Holmes, the moral sceptic, is meant to buttress this argument against Raz. However, if law's moral claims are seen as conceptual semantic claims, there would be no grounds to insist, as Dworkin does, that the official must personally *intend* to make these claims on laws behalf. J.L. Mackie for instance, would have no problems in pointing out that a moral sceptic (like Holmes) makes objective moral claims when he says to someone 'X is good' or 'X is right'. See Ronald Dworkin, 'Thirty Years On' 2002 (115) Harvard LR 1655.

On an impinging account, an objective moral standard is the 'source' of moral bindingness; the fount of reason givingness. We had discussed this idea in detail in the previous chapter. We also examined some of the implications that followed from this model. We saw that *qua anatomist*, the cognitivist subscribing to the impinging model holds that: a) even if the agent does believe in the existence of an objective moral standard, she may or may not be motivated to act in accordance with her moral belief; the agent's motivation, the cognitivist would argue, is neither here nor there as far as bindingness of the moral requirement is concerned; b) going a step further, the cognitivist could also argue there are moral requirements that people may not, in a particular case, be aware of; and this again, the cognitivist could claim, does not detract from the normativity or truth of the moral requirement; c) for the cognitivist, normativity or bindingness can be understood even without invoking the idea of a moral judgment; on the cognitivist account in making moral judgments agents are *responding* to binding moral requirements that exist independently of the moral judgment. All of this is possible on the cognitivist account because the direction of fit of the moral judgment is mind-to-world. On this model, moral standards 'impinge' on the agent and it is up to the agent to be *receptive* of them. Each of these features would be true of an impinging account of the bindingness of law as well. The aim of an impinging model of 'normativity of law' would then be to give an account of what could make agents' beliefs true.[208] An impinging account could *never* in principle rest with merely stating that a law is justified because agents *believe* the law to be morally binding. Therefore, Raz's depiction of Kelsen's account of justified normativity as the view that holds that law is morally justified 'by objectively existing reasons or intuitively perceived as binding or accepted as so by commitment' is liable to be misleading if it is not appreciated that an 'intuitive

[208] Olivecrona, 'Law as Fact' (n 197) 547.

perception' or 'acceptance by commitment' could never in themselves endow law with normativity on an impinging model. What endows normativity on an impinging model is the 'objectively existing reasons' – the objective moral standard. This is *the* central point of difference between the impinging model and the projectivist model. The projectivist model explains moral bindingness with reference to the 'making' of the moral judgment by the agent – which they understand as the expression of a conative attitude. On the projectivist account, as the moral judgment does not purport to track any objective moral standard, there is no further question of the projectivist specifying the truth conditions of moral judgments by reference to objective moral standards. Therefore, while the adherent of the impinging model identifies one of the tasks of an account of 'normativity of law' as specifying 'under what conditions law's prescriptions can have normative force'- it would be useful to bear in consideration that such inquiries would never form part of a projectivist account of bindingness of law . It would, I believe, be reasonable to state that the impinging model of moral bindingness of law now enjoys the status of somewhat of an industry standard in legal philosophy. Raz endorses some form of this model as do several legal philosophers on either side of the so-called natural law/ legal positivist divide.

Directly and Indirectly Impinging Accounts

There are two possible versions of the impinging account. One, we will call the *directly* impinging account and the other, the *indirectly* impinging account. In a *directly* impinging account one can find a relation of *content-dependent* justification between the objective moral standard and the legal statement that purports to refer to it; and, it follows, the moral truth aptness of the legal statements is a matter of correspondence to such objective moral standards. In an *indirectly* impinging

account, such content- dependent justification is broken down by 'partitioning' of the normative domain, to borrow Nicos Stavropoulos's phrase[209] leading to a *content-independent* justification. [210] On an *indirectly* impinging account there are *two* levels of justification. On the lower level is the authority's directive. The statement of legal obligation purports to refer to the authority's directive. On the higher level is the objective moral standard that lends moral bindingness to the authority's directive. A legal requirement will be morally binding only if it the authority issuing the directive meets the criteria set out by the objective moral standard.

Raz's service conception of authority works on an indirectly impinging model. Raz invokes a two pronged idea of justification to explain how the authority's directives come to be endowed with moral bindingness. The first prong is the *normal justification thesis*, which Raz describes as a 'moral thesis to establish the legitimacy of the authority'. [211] A person ought to do as the authority directs him to do because 'an alleged subject is likely better to comply with reasons which apply to him if he accepts the directives of the alleged authority as binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly'. [212] The normal justification provides the objective moral standard on his model. The *pre-emption thesis* forms the second prong of the justification in his model. The pre-emption thesis provides, 'the fact that the authority requires performance of an

[209] I owe this idea to N. Stavropoulos' graduate Jurisprudence and Political Theory seminars at Oxford (Hillary Term 2006).

[210] For another famous illustration of partitioning of the normative domain see John Rawls, 'Two Concepts of Rules' (1955) 64 *Philosophical Review* 3.

[211]J.Raz, *Morality of Freedom* (OUP 1986) 53.

[212] Ibid 53.

action is reason for its performance which is not to be added to other reasons when assessing what to do'. However, Raz adds, 'since not every authority is legitimate not every authoritative directive is a reason for action.'[213]The pre-emption thesis holds good only for justified authority.[214] Whether the authority is indeed legitimate and is indeed successful in imposing obligations depends on whether it meets the conditions set by the normal justification thesis, which forms the first prong of his justificatory model. The fact that the 'justified' authority requires a subject to *Ø*, provides the subject with a reason to *Ø*: in fact, it constitutes an 'exclusionary' reason to *Ø* , that is to say, a reason to disregard any reason not to *Ø*, and is not to be added to the other antecedently existing reasons. As long as an authority is justified in accordance with the normal justification thesis, whatever he directs, regardless of the content thereof, within limits, will be morally binding on the subject. Raz maintains a legitimate authority's 'directives are binding even when mistaken'. [215] These exclusionary reasons have a special moral force, owing to the normal justification thesis, which endures even if they run counter to what ought to be done on balance of antecedently existing reasons .[216]

Raz's normal justification thesis assigns a value to taking the legitimate authority's directives as exclusionary reasons for action. The normal justification thesis being a first order moral thesis sets out an objective moral standard that authoritative directives may or may not meet. The authority purports to live up to the qualification set out by the normal justification thesis. While on a directly impinging

[213] ibid 46.

[214] ibid 46.

[215] ibid 47, 48.

[216] ibid 47.

account the moral vector is directly lent by the objective moral standard (which the legal statement purports to denote), on Raz's indirectly impinging account it is the moral status of the authority issuing the directive—that is to say, the authority meeting the standard laid down by objective moral standard set out in the normal justification thesis—that lends the moral vector. Hence on Raz's account, legal statements *indirectly* purport to denote some objective moral property through the medium of the authority purporting to satisfy the condition of legitimate authority laid down by the objective moral standard i.e. the normal justification thesis. As a result, the relation of *content-dependence* between the objective moral proposition and the statement conveying the legal requirement that one finds on a directly descriptivist model is blocked on Raz's model, leading to the idea of *content-independent* reasons for action. The subject ought to Ø in part because the authority said so and in part because the authority is justified by the normal justification thesis. When it comes to the underlying objective reasons the authority is *meant* to balance, the normative domain is completely opaque to those subject to the authority's directives.[217] It is this opacity that allows Raz to argue that as long as the authority meets the standard of the normal justification thesis, its directives are morally binding even if these do not correctly balance the underlying reasons. This opacity is one of the key features of a *content independent* justification. The other feature of such justification is that the same objective moral standard could potentially justify a great number (or, as in Raz's case, all) legal requirements of the legal system.

[217] J.Raz 'Reasoning with Rules' (2001) Current Legal Problems 1, 3; J. Raz 'Incorporation by Law' 11 *Legal Theory* (2005) 1

Seen in this light, Raz's Kelsen *nearly* had an indirectly impinging account with the *grundnorm* standing in as the objective moral standard that justified all subordinate norms in the legal system. We use the word 'nearly' advisedly; Kelsen's account is radically incomplete in so far as the *grundnorm* just 'hangs in the air'- prompting William Buckland to invoke the mythical mage of 'elephants and tortoise which have been supposed to support the earth'. [218] The question 'why obey the grundnorm?' is always a live and open one on Kelsen's account; and one to which he had no ready answer. As such, Kelsen's account suffers from a version of the Euthyphro's problem that voluntarist accounts are typically thought to suffer from.[219] The Euthyphro's dilemma could be stated thus: Voluntarist accounts treat an entity's say-so as 'fixing' the objective moral standard and being the source of moral reason givingness. But the question, 'what justifies obedience to the entities say-so?' is left unaddressed by a voluntarist account.[220] The Scandinavian Legal Realists thought that this was the *deus ex machina* on Kelsen's account. Not addressing this all important question, Olivecrona argued, was 'a declaration of bankruptcy' on Kelsen's part.[221] Kelsen's *grundnorm* took the place that an entity's say-so occupies in a classical voluntarist account – and ends up facing the very same problem that the voluntarist accounts face. The distinctiveness of Raz's account can be found in *supplementing* the voluntarist framework with a higher level justification that seeks to plug Euthyphro's problem. He squarely faces and addresses the issue that voluntarists and Kelsen shied away from. On Raz's account, the question 'what

[218] W.W.Buckland, *Some Reflections on Jurisprudence* (Cambridge University Press 1949) 21.

[219] The Euthyphro dilemma can be found in Plato's dialogue, Euthyphro.

[220] In *The Sources of Normativity* (n17) 28-20 Korsgaard describes what we have outlined here as the problem of infinite regress of justification facing voluntarist accounts. Korsgaard doesn't consider Kelsen's account of 'normativity of law', but her line of criticism against the voluntarists could be easily extended to Kelsen as well.

[221] Olivecrona, 'Realism and Idealism' (n 178) 128.

justifies obedience to the entities say so?' is addressed by the normal justification thesis. A person ought to do as the authority directs him to do because 'an alleged subject is likely better to comply with reasons which apply to him if he accepts the directives of the alleged authority as binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly'.[222]It is this *higher* level justification that completes the indirectly impinging account. [223] There is, however, one major difference between the voluntarists' and Kelsen's accounts on one hand and Raz's on the other. While on the voluntarists' and Kelsen's account, all law is necessarily morally binding, on Raz's account all law claims to be morally binding, but it is wholly compatible with Raz's model that the law could fail to live up to that claim.

V

The Projectivist model

We could begin by reminding ourselves about the projectivist account of moral bindingness before moving on to its counterpart in legal philosophy. For a projectivist, a moral judgment's bindingness or normativity is to be understood in terms of the motivational pull or 'magnetism' that it exerts in the reasoning of the agent. For a projectivist, this element of endorsement stems from the conative, motivationally laden state (which they call an attitude) involved in making a moral judgment- something that a cognitive state (belief) would lack. The projectivist,

[222] ibid

[223]Interestingly, in *Essays on Bentham*, Hart observes that Raz's account of authority resembles the Hobbesian voluntarist account: Hart (n 12) 244.

having endorsed the motivational reading of normativity, would point out that there is nothing more to normativity talk than this motivational connection between the moral judgment and the agent's actions. She would insist, as Blackburn and Gibbard do, that 'truth' and 'justification' are *spare wheels* in understanding normativity and bindingness. The search for truth makers that imbue some action with reason givingness is ruled out on this model.

David Hume is widely thought of as being the early ancestor of non-cognitivism and the projectivist model of moral bindingness. The credit for re-introducing non-cognitivism to the modern philosophical mainstream in the 20th Century, however, must rightly belong to a group of legal philosophers who are now collectively referred to as the Scandinavian Legal Realists: the group Jim Harris referred to as 'the wild prophetic figures riding in from the hills with a message for legal philosophers'. [224] This group comprised of philosophers Axel Hagerstrom, Karl Olivecrona, Vilhelm Lundsted and Alf Ross. Hagerstrom, the leading light of this movement, propounded a strictly empiricist and naturalist philosophy that sought to eliminate what he thought was speculative metaphysics. His chosen motto raised a call to arms against metaphysics, "*Praetere censeo metaphysicum esse delandam*". [225] Integral to Hagerstrom's philosophy (legal and moral) was a non-cognitivist account of moral value, which according to him, consisted in the idea of moral 'internalization' : the agents' subjective conative stance which he, in the vein of early emotivist theories (like A.J. Ayer's and Charles Stevenson's) dubbed as 'emotions' or 'feelings'. He

[224] J.W. Harris 'Olivecrona on Law and Legal Language' *Tidsskrift for Rettsvitenskap* (Saertrykk:1981) 625, 626. They were also (less commonly) collectively referred to as the Uppsala School. Surprisingly, though they are rarely credited with the re-introduction of non-cognitivism in its modern form.

[225] Translated from Latin - 'Metaphysics must be eliminated'.

argued that 'we dress emotions in the form of [moral] judgments'.[226] Richard Hare, in fact, goes to the extent of crediting Hagerstrom with being the pioneer of modern non-cognitivism. [227]The projectivist model of the 'normativity of law', which the Scandinavian Legal Realists put forth, sought to explain the moral bindingness of law in terms of the non cognitive or conative stances of moral approval taken by subjects towards the law. Later, G.H. Von Wright also gave a similar account of bindingness of law. [228]

The impinging model, it will be recollected, treats statements of legal obligation as moral descriptivist statements; terms like 'duty', 'rights' and the like *purport* to denote objective moral standards; the legal requirement is morally binding when it does so successfully. In this fashion, the semantic and metaethical projects of the impinging model line-up neatly to yield a complete account of 'normativity of law'. The projectivist model needs to get off the ground by adopting a semantic route different from the one the impinging model adopts. The projectivist cannot help herself to the impinging theorists' semantic model of legal statements; doing so would be antithetical to and rule out a projectivist model. It may be thought natural that a projectivist could then turn to the non-cognitivist's semantic model which could allow the projectivist to hold that legal statements are 'normative' in a moral sense but are not descriptivist statements, as the cognitivists claim . This would have the projectivist hold a semantic account along the following lines: that statements of

[226] Patricia Mindus *Real Mind: The Life and Work of Axel Hagerstro*m (Springer 2010) 83. However, as Mindus argues, Hagerstrom also at times seems to endorse some sort of error theory. The error theoretical aspects seem to become more pronounced when he discusses legal concepts like 'rights' 'duties' and the like and equates them to superstitions about things magical.

[227] R.M. Hare, *Sorting Out Ethics* (OUP 1997) 96; Mindus notes that Hagerstrom was the successor of Hume and precursor to Ayer, Stevenson and other non-cognitivists: Mindus, (n 226) 79.

[228] Von Wright, 'Is and Ought' (n 200) 365.

legal obligation are non-cognitivist statements that express the speaker's attitude of approval of the law. But for reasons to be elaborated upon in detail in Chapter IV, the non-cognitivist semantic model for legal statements is a non-starter and it is not open for a projectivist about 'normativity of law' to endorse this semantic position. As such, the projectivist would necessarily have to deny that legal statements are normative in the same sense as moral statements are. A complete projectivist account of normativity would thus comprise two distinct but closely related projects:

a. Semantic*:* Establishing how legal statements are 'normative' without being moral statements in either the cognitivist or non-cognitivist sense;
b. Metaethical: Establishing how legal requirements come to be morally binding by pointing to the non cognitive attitude of moral approval taken by agents towards legal requirements.

The *semantic* project has proved to be especially challenging for the projectivists. Early projectivists, such as the Scandinavian Legal Realists abandoned the search for a 'normative' semantic model altogether. Ross proposed *inter alia* a reductive semantic model; and Olivecrona proposed a *performative* semantic model. Both models, as we will see in Chapter IV, were riddled with insuperable problems. It is only in the works of Hart that one finds a systematic and sound semantic model that aligns itself neatly with the semantic goal of projectivism. Hart's semantic model is best described as norm-relativism. It portrays legal statements as norm-relative statements which are 'normative' without being *moral* statements. We will have more to say on the nature of these statements in the next chapter. As we will see in the next section, the Scandinavian Legal Realists had a better grasp of the second, metaethical project though they fared very poorly in relation to the first, semantic, project.

Scandinavian Legal Realism: The quest to smoothen the carpet

Hagerstrom argued that natural law theories assume that law 'binds natural legal subjects on account of some mysterious force such as a cognitively inaccessible super-sensible power'.[229] This picture, in turn, he thought was based on a model of moral value in which values were thought to 'bind on account of [their] inherently rational nature and of which one gains knowledge though reason or faith'.[230] But this impinging model of morality, and the model of bindingness of law following therefrom, Hagerstrom thought, was inherently flawed as it assumed the existence of objective moral values. We will recollect how Von Wright, claiming to extend Wittgenstein's line of thought, argued that the very word 'value' is fraught with confusion because it implies the existence of objective moral standards, and that all we really find are 'valuations': acts of making value judgments.[231] Valuation, Von Wright argued, was to be understood as the expression of a conative attitude. Accordingly, he proposed that the talk of 'values' ought to be eliminated altogether from moral philosophy. Von Wright's call was to put the valuating subject at the heart of ethics rather than the objective moral truths that valuation is (wrongly) thought to track (*pace* the cognitivist account).Similarly, Hagerstrom argued:

> Without *felt* interests it is only possible to establish facts, but impossible to establish values and valuations… because a disinterested subject will neither

[229] Max Lyles, *A Call for Scientific Purity: Axel Hagerstrom's Critique of Legal Science* (Stockholm 2006) 326-7; Karl Olivecrona 'Legal Language and Reality' in Ralph Newman (ed.), *Essays in Jurisprudence in Honour of Roscoe Pound* (Bobs- Merrill 1962) 151, 164.

[230] Lyles (n 229) 327.

[231] Von Wright, 'Valuation' (n 93).

> give voice to any valuations nor formulate, or establish any values concerning any factual circumstances or acts.[232]

Hagerstrom thought that 'values are internal in the sense that they belong to the 'internalized' moral of the evaluating moral subject'.[233] It is therefore proper to say, he argued, that value is determined by subjective factors *internal* to the observer rather than by objective factors intrinsic in the object of a value judgment. As Max Lyles points out, the non-cognitivistic basis of Hagerstrom's value theory had a profound impact on his theory of law.[234] He argued that the very idea of the bindingness of law was intrinsically connected with the 'internalization' of morals.[235] In other words, he thought that what the impinging theorists wrongly assume to be bindingness that arises in relation to some objective moral values is actually motivational bindingness that arises from the expression of the subject's conative attitudes. Following Hagerstrom, Olivecrona argued:

> Rules are patterns of behaviour with which the 'shall' or 'ought' is associated. The reason why a certain person takes such a pattern as model for his actions is no mysterious quality of the pattern itself. It is to be found in this own situation of motivation.[236]

Olivecrona thought that the error of presupposing an impinging model of moral bindingness permeated not just natural law theory but also many forms of legal

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[232] A. Hagerstrom 'On the Truth of Moral Propositions' in H.D. Lewis (ed.), *Philosophy and Religion* (London: George Allen & Unwin 1964) 77, 88.

[233] Lyles (n 229)275.

[234] Lyles (n 229)320.

[235] Lyles (n 229)272.

[236] K. Olivecrona, 'Law as Fact' in P.L. Sayre (ed.), *Interpretations of Modern Legal Philosophies: Essays in Honour of Roscoe Pound* (OUP 1947) 542,547. Olivecrona argued that the natural lawyers and positivists with an affinity for natural law theory sought to set out conditions under which attributions of bindingness to the law could be correct. He thought that legal philosophers should eschew this and offer psychological explanations instead. Harris, 'Olivecrona on law and language' (n 224) 631.

positivism that otherwise professed opposition to natural law theory. He argued that the only difference between natural law and many versions of legal positivism of his day centred on the identity of the supreme objective standard from where law derives it binding power.[237]He thought they were both wrong in insisting on some objective standard that 'endows law with binding power'.[238] Ross and Olivecrona thought that Kelsen made precisely this error in explaining the bindingness of law. Explaining what he found so objectionable in the impinging accounts' search for objective moral standards, Olivecrona explains, 'a foundation independent of men's opinions and feelings is eagerly sought for but unavoidable. The belief in it is on the same level as the old myth of the elephant carrying the world on its shoulders'.

Lundsted argued that legal science 'stands with one leg in the world of realities, and with the other in a world which is held to lie beyond time and space, i.e., in metaphysics'—an anomaly he (rightly or wrongly) puts down to an erroneous belief in objective moral standards.[239] The Scandinavian Legal Realists thought that the accounts of the natural lawyers and positivists with an affinity to the legacy of natural law theory, commit the error that Lundsted identifies; as a consequence, their accounts leaves a bulge in the carpet. The bulge in question is caused by the 'impinging' model, presupposing as it does, some objective standard endowing moral bindingness—where some 'external' standard impinges on the subject and has binding power over her. As long as one remains bewitched by this impinging model,

[237] Lyles (n 229) 312.

[238] Lyles (n 229) 313.

[239] Vilhelm Lunstedt, 'The Responsibility of Legal Science for the Fate of Man and Nations' in 10 (1933) NYULQR 326,328.

they held, there could never be a way to evenly smooth out the carpet.[240] Scandinavian Legal Realists thought that versions of legal positivism, like Kelsen's though not professedly endorsing the natural law position, nevertheless inherit the legacy of natural law thought and continue to remain bewitched by it; Lunstedt charged Kelsen with being a 'metaphysician of the most decided type'.[241] The Scandinavian Realists argued that such the versions of legal positivism with an affinity for natural law thought assume the impinging model of moral bindingness in as much as they seek to explain moral bindingness by reference to an objective moral standard. But this, the Scandinavian Legal Realists thought, was futile, for in doing so, the bulge was always going to end up someplace else. The task of jurisprudence they thought, was to completely smoothen the carpet. Hagerstrom argued that modern jurisprudence 'had a tremendous task ahead of it, namely, to free legal science from its burdensome legacy of natural law'.[242] The only way to ever smoothen the carpet was to naturalize the idea of moral bindingness. The way to go about doing so was to explain moral bindingness without reference to the idea of an objective impinging moral standard, which Hagerstrom took to be the persistent, if burdensome, legacy of natural law thought. The Scandinavian Realists did this by explaining the bindingness of law *without* reference to any objective standard. They explained the moral bindingness and authority of law in terms of the non-cognitivist attitudes of approval taken by subjects towards the law. This stemmed directly from their non-cognitivist account of moral evaluation and their idea of internal motivational authority. As Lyles argues, Hagerstrom's solution for freeing law from

[240] Alf Ross described it as the dualism inherent in legal theory, where law is at once thought of as something that belongs to the natural world and also something supernatural: Alf Ross, *Towards a Realistic Jurisprudence* (Coppenhagen: Einar Munskgaard 1946) *passim*.

[241] Lundsted (n 239) 326,327.

[242] Lyles (n 229) 407.

the burdensome legacy of natural law thought involved 'uncovering surviving elements of legal metaphysics, natural law, especially by pointing to the non-cognitive nature of values'. [243]

VI

Hart, Projectivism and Scandinavian Realism

One could complain, as Hart did, that the Scandinavian Legal Realists went overboard with their empiricism, which blinded them to the phenomenology of law. Hart complained that their readiness to 'smell the rat' of metaphysics in everything including the concepts of 'validity' and 'legal obligation', led to some absurdities in their account. Felix Cohen's phrase 'transcendental nonsense' aptly captures the philosophical outlook that Hagerstrom and Olivecrona bore towards central legal concepts such 'right', 'obligation', 'validity' and the like. Hagerstrom thought that all these ideas belonged to the 'burdensome legacy' of natural law theories that had to be exorcised from jurisprudential thought. Lundstedt argued that 'rights' 'obligations' 'duties' and along with it even ideas of 'wrongfulness', ought to 'go up in smoke'.[244]Olivecrona, following Hagerstrom and Lundstedt, went to the extent of recommending abandoning all talk of legal 'rights' and 'duties' as a vestige of natural

[243] Lyles (n 229) 319.
[244] Wilhelm Lundstedt, 'Law and Justice: A Criticism of the Method of Justice', in Paul Sayre (ed.), *Interpretations of Modern Legal Philosophies: Essays in Honour of Roscoe Pound* (OUP 1947) 450-451.

law theory because he thought it invoked needlessly spurious metaphysics.[245] Legal obligations can be thought to exist, argued Olivecrona, only if, 'they are represented as the commands of a metaphysical being.' The task of jurisprudence, he argued, was 'to analyse the psychological situation and fit it into the context of reality'.[246] Though Ross didn't recommend altogether *abandoning* such talk—he thought it had practical utility—he went out of his way to 'reduce' legal concepts such as rights, obligations and even 'validity' to psychological facts of agents' behaviour and inclinations of behaviour.[247] In the case of Alf Ross, and arguably to a certain extent Hagerstrom, this pronounced anti-metaphysical outlook partly stemmed from an adherence to logical positivism, more particularly the logical positivists' verificationism about meaning, which treated as 'meaningless' and 'nonsense' any descriptive statement which could not be verifiable by empirically recognized facts. This exaggerated empiricist approach of the Scandinavian Legal Realists was criticized by Hart. In this section we will briefly examine what Hart found objectionable in this approach before we come to the one aspect of the Scandinavian Realist account that Hart never expressly criticized- namely, their projectivist account of bindingness.

However, before we proceed to consider Hart's reaction to Scandinavian Legal Realism, we must flag one peculiar problem that the pronounced empiricism of the Scandinavian Realists caused in their works. The full import of the problem will only become apparent in Chapter 5 when we discuss Hart's 'internal point of view' and its relationship with the Scandinavian Realists' idea of 'internalization'. But here we will

[245] Julius Stone argues that the traces of the suggestion to eliminate all talk of rights and obligations can eventually be traced back to Leon Duguit: J. Stone, *The Province and Function of Law* (Maitland 1950) 346.

[246] Olivecrona (n 236) 546.

[247] Alf Ross, 'Tu Tu' (1957) 70 Harvard Law Review, 812; Also see Brian Bix, 'Ross and Olivecrona on Rights' (2009) 34 Australian Journal of Legal Philosophy, 103.

say enough to hint at the nature and significance of the problem. The Scandinavian Realists argued that the moral bindingness of law was to be explained by 'internalization': a non-cognitivist disposition agents take towards the law. However, they also held that this very internalization was a crucial constituent in the existence of law. Consider Ross's view on the *existence* of rules of law:

> The rules of chess have no reality and do not exist apart from the experience of the players, that is, their ideas of certain patterns of behaviour and, associated therewith, the *emotional* experience of the compulsion to obey.[248]

Ross makes it clear that he intends a parallel analysis of legal rules. This creates a tension in Ross's account which any putative projectivist account must find a way of steering clear of. Ross's account has it that for a person to judge what the law requires, involves a conative stance or feeling. This 'feeling' or 'emotion', on Ross's account, one must note, is too closely aligned with—to the point of being indistinguishable from— his idea of 'internalization' which is a non-cognitivist moral disposition.[249] Therefore, all said and done, on Ross's account, for an agent to judge that a law requires some behaviour is tantamount to her making a moral judgment. This was also how Hagerstrom pictured the idea of a legal duty. He thought that a legal 'duty' is nothing more than a psychological conative impulse.[250] He argued that

[248] Alf Ross, *On Law and Justice* (London: Stevens & Sons 1958) 16. Harris rightly identifies that Ross had a different account of how rules function in the psychology of agents and the semantics of legal statements, which according to him becomes relevant when lawyers give information about legal rules; Ross had a reductionist semantic model of statements of legal obligation: Harris 'Olivecrona on Law and Language' (n 224) 633.

[249] On Hagerstrom's account, from which Ross professedly gets this idea, 'internalization' is a conative moral impulse: Hagerstrom, 'On the idea of duty' (n 232) 164-5.

[250]Lester Orfield, 'A Survey of Scandinavian Legal Theory' 1956 Wis L R 585, 601; Hagerstrom argued that it is these conative feelings that played the crucial role of being a constituent in law's existence.

a 'feeling of inner compulsion' towards a certain action is inseparably bound up with the idea of 'duty' or 'obligation'.[251]

It seems then that on Ross's account, it wouldn't be possible for a subject to judge what the law requires without also having a conative feeling of moral obligation to do as the law requires. [252] This problem comes about because Ross makes 'internalization' do double duty in his theory. Internalization bears the burden of explaining the existence of law, and it is also meant to explain the moral bindingness and authority of law. The cumulative result of this twinning is that a law cannot really be judged to exist by an agent unless the agent has a conative moral feeling to do as the law requires. However, the phenomenology of legal statements points us to a contrary conclusion; it is possible to judge that the law requires something without such judgment being necessarily accompanied by a conative moral feeling or impulse to do as the law requires.[253] It is worth mentioning here that this problem returns even if one were to have a non-cognitivist semantic model of legal statements which has it that making a statement of legal obligation involves expression of a non-cognitivist attitude of approval towards the law.[254] The problem that we identify here for Ross hints at a substantial constraint that a projectivist account must fulfil. Though the projectivist model needs a conative moral stance to explain the moral

[251] Hagerstrom, 'On the idea of duty' (n 232) 107.

[252] Ross seems to be dimly aware of this problem and towards the end of *On Law and Justice* he suggests without much argument that 'internalization' is different from a moral judgment. But his reasons for doing so are unsubstantiated and unconvincing and he is unable to differentiate internalization from a conative moral stance. Furthermore putting any real difference between internalization and the conative moral stance would actually militate against the central theme of the rest of his work. Non-cognitivism, which was meant to explain moral bindingness of law, would then become a spare wheel in his account; Ross, (n 248) 52-54, 62-63.

[253] See Chapter IV for a discussion on moral commitment and the phenomenology of legal statements.

[254] The reasons are explained in greater detail in Chapter IV. Further in Chapter VII it will be argued that Kevin Toh's alleged expressivist reconstruction of Hart's account suffers from this problem.

bindingness of law, it must accommodate the fact that conative moral feelings to comply with the law need not necessarily accompany any and every judgment of what the law requires. The conative attitude in other words, cannot be a constitutive of the existence of law; identifying the law must not *necessarily* involve this conative moral attitude. The semantics of legal statements on a putative projectivist account cannot necessarily demand a conative attitude or feeling on the part of the agent identifying something as being required by law. This would rule out a non-cognitivist semantic account of statements of legal obligation.

Hart was quick to spot some of these discrepancies in the Scandinavian Legal Realist account. One of Hart's complaints was that, in their unjustified fear of metaphysics, the Scandinavian Realists strip out the semantically 'normative' dimension of legal statements. His criticism of the semantic models of Bentham and Austin would be *mutatis mutandis* applicable to the Scandinavian Legal Realists as well. Hart's response to the Scandinavian Realists' unusual analyses of 'rights'—motivated by their anxiety to avoid undue metaphysics—was to point out that there are 'non-factual, non-predictive uses of language inseparable from the use of rules.'[255] While we shall elaborate on this point in the next chapter, it suffices to point out here that the 'normative' semantic model that Hart put forth as being an alternative to both reductionism and moral descriptivism was none other than norm-relativism about statements of legal obligation, which Hart stressed invoked no 'obscure metaphysics' and had a '"logic " or "structure" different from 'statements of fact or expressions of feeling.'[256]

[255] H.L.A.Hart, 'Scandinavian Realism' (1959) 17 Cambridge LJ 233,237.

[256] ibid.

Secondly, Hart employed this very norm-relativist account to point out that to have a legal obligation has nothing to do with having any conative feelings, as Ross's account required it.[257]

> Ross is right in thinking that we must distinguish an *internal* as well as an external aspect of the phenomenon presented by the existence of social rules. This is true and very important for the understanding of any kind of rule. But unfortunately he draws the line between these aspects in the wrong places and misrepresents the internal aspect of rules as a matter of "emotion" or "feeling "-as a special psychological " experience."[258]

Hart argued that it could be said of a swindler that he had a legal obligation though he had no feelings of compulsion. Indeed, the swindler could *judge* that he had a legal obligation and have no 'feeling' to act accordingly. In doing so, Hart clearly separated conative 'feelings'—in fact any moral stance whether cognitive or conative –from the agent's judgment of what is required of her by law. In doing so, Hart was able to steer clear of the problem we argued must be avoided by any putative projectivist account – namely, making a conative moral stance or feeling do the duty of supporting the existence of a legal obligation. It also allowed Hart to establish the validity and existence of rules with reference to the ultimate rule of recognition without having to invoke any metaphysics of the kind the Scandinavian Realists were wary of. Hart's criticisms are now widely thought of as having demolished Scandinavian Legal Realism. [259]Add to that the toxic affinity of Scandinavian Legal Realism with logical positivism, which is now a severely discredited position with no

[257] Hart, *The Concept of Law* (n2) 57.

[258] Hart, *Scandinavian Realism* (n 255) 237.

[259] See Brian Lieter, 'Naturalizing Jurisprudence' (OUP 2007) Chapter 1.

sympathisers. The cumulative effect is that Scandinavian Legal Realists are hardly read or discussed in the world of English language philosophy.[260]

However, as Richard Hare identified, there is one element of Scandinavian Legal Realism that has endured – non-cognitivism in ethics.[261] What then about one of the central ideas of their legal philosophy which their invocation of non-cognitivism was meant to serve, namely, the projectivist account of the bindingness of law? It is a little odd that the Scandinavian Realists' non-cognitivism, albeit with significant refinements by subsequent philosophers, is thought to be a serious plausible metaethical account, but that the projectivist model of the bindingness of law should have no takers. For many years, the only philosopher apart from the Scandinavian Legal Realists who endorsed the projectivist model of bindingness of law was G.H. Von Wright.

Conspicuously absent from Hart's criticisms of Scandinavian Legal Realists is any mention of, let alone critical engagement with, either their non-cognitivism or the projectivist model of the moral bindingness of law. It is clear that Hart established the irrelevance of conative feelings to the existence of law and legal obligation. However, despite noting the similarities between Ross's metaethical position and that of Charles Stevenson's *Ethics and Language,* Hart remains silent on the other role that this conative feeling played in the Scandinavian Legal Realists' account: accounting for the moral bindingness of law.[262] All of his influential criticisms of Scandinavian Legal Realism notwithstanding, there does, in fact, seem to be one

[260] Bix, 'Ross and Olivecrona on Legal Rights' (n 247) *passim*.

[261] Hare, *Sorting Out Ethics* (n 227) 96.

[262] Hart, Scandinavian Realism (n 255) 234.

element in Hart's account which, at first blush, bears striking resemblance to the Scandinavian Legal Realists' idea of 'internalization', including its label: the 'internal point of view'. The internal point of view *lends* itself to be understood as an agent's conative attitude of approval of law, whereby the agent takes the laws as a moral reason to act.[263] This reading would have us place Hart in the projectivist camp alongside the Scandinavian Legal Realists. Besides, given the centrality of the internal point of view to Hart's project of normativity, this non-cognitivist reading of the 'internal point of view' would seem especially promising. It will be argued that an *attitude* – which constitutes the internal point of view – could however intelligibly constitute the 'source' of moral bindingness *only* if one assumes a projectivist model. Such exegetical considerations indicate strongly in favour of reading Hart's internal point of view along non-cognitivist lines.

However, it must be stressed that my argument is *not* that Hart meant his internal point of view to be understood along projectivist lines. Hart himself says very little about what this internal point of view really consists of. He denies that it is a moral standpoint, let alone describing it as a non-cognitivist moral stance. In subsequent chapters of this work it will be argued that there are elements in Hart's scheme that naturally lend themselves to a projectivist model. Hart's semantic model of norm-relativism provides the only plausible 'normative' semantic model that could align neatly with a projectivist account of moral bindingness. As such, Hart's semantic model seems tailor-made to address the insuperable semantic problems that the Scandinavian Legal Realists' projectivist account faced. A good portion of my reconstruction would consist in setting out, aligning – and where appropriate, emending – these elements in Hart's account in a fashion that yields a coherent

[263] For a discussion on the internal point of view and what it entails see Chapter V.

projectivist model of moral bindingness of law. These elements include: Hart's view of the *semantics* of legal statements; the idea(s) of the *internal point of view*; and a characterization of the rule of recognition which is *symmetrical* with the projectivist model. Hart's work has the resources yield a complete projectivist account of 'normativity of law' that soundly executes both the semantic and metaethical projects. Had Hart taken the step I propose to take on his behalf in this reconstruction, we would have had the first glimpse of what a complete projectivist account looked like.

In an illuminating book review of *The Concept of Law*, Alf Ross thought that Hart's idea of the internal point of view was a reincarnation of the Scandinavian Realists' idea of 'internalization'—that is to say, a conative moral 'feeling' towards the law. Inherent in Ross's argument was the hint- though Ross does not specifically draw the conclusion in so many words- that Hart too may be putting forth a projectivist account of moral bindingness, much like his own, despite his metaethical silence. After Ross, Olivecrona in the second edition of *Law as Fact* hinted about the similarities between Hart's idea of the internal point of view and Scandinavian Legal Realism.[264] John Finnis argues that Hart's metaethical silence was far from being an impartial one. He argues that Hart harboured a deep latent sympathy for Humean philosophy and a Humean account of morality.[265] In support of his argument, Finnis places great emphasis on Hart's book review of Bernard Williams' *Ethics and the Limits of Philosophy*.[266]

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[264] Karl Olivecrona, Law *as Fact* (2nd ed. London: Stevens & Sons 1971) 165.

[265] John Finnis, 'On Hart's Ways: Law as Reason and Fact' in Matthew Kramer, Claire Grant (eds.), *The Legacy of HLA Hart: Legal, Political and Moral Philosophy* (Oxford University Press 2009)1.

[266] Hart, 'Who can tell right from wrong ?' (n 113)

A modern projectivist account of the 'normativity of law', such as the one that we will reconstruct on Hart's behalf in the next chapter will take on board this central idea of moral bindingness put forth by the Scandinavian Legal Realists. Non-cognitivism has been refined a great deal since the days of the Scandinavian Legal Realists, and a modern projectivist account can help itself to these later sophisticated metaethical accounts. The basic idea of such a refined projectivist account will be that the moral bindingness of law is to be understood in terms of the attitude of approval towards the law taken by the subject. This attitude of approval is an expressivist non cognitive moral stance and explains the moral bindingness of law without having to invoke any objective moral facts and properties. A projectivist account of the moral bindingness of law therefore shall not search for truth makers that endow law with reason givingness.

VII

Acquitting Projectivism from Some Objections

7.1 Cannot explain 'uniform' bindingness of law

The projectivist model of moral bindingness leaves many moral philosophers with a sense of deep disquiet. In Chapter I, we recounted some of the charges that contribute to the hostility towards projectivism and made the case for an honourable acquittal for projectivism from them. One recurrent motif was the concern that morality would cease to be what it is if we were to jettison objective moral values. The projectivist's subjectivity, the concern further went, would deliver us Ivan

Karamazov's dark nihilist world where 'anything goes'. A *more or less analogous* objection about the projectivist account of 'normativity of law' may be thought to be readily available. Given that this motif looms large in metaethical literature—and is usually among the most probable responses of the average legal philosopher when projectivism as theory of 'normativity of law' is broached in conversation—it may be somewhat surprising that it has rarely been articulated in the literature on the subject. Perhaps this is so because very few legal philosophers admit the plausibility, however tenuous, of a projectivist model; fewer still take it sufficiently seriously so as to dignify it with a response by joining issue with it.

Stefano Bertea comes closest to articulating this objection against the projectivist model of bindingness.[267] He raises this objection against Hart's internal point of view. While he stops short of explicitly describing Hart's internal point of view as involving a non-cognitivist view point he makes it clear enough that the target of his criticism is a projectivist model of 'normativity of law'. Bertea recognizes that the internal point of view, consisting of an attitude of approval of the law, is the key to Hart's model of normativity. Bertea recognizes that the explicatory burden for such a model consists in accounting for *how* an attitude could ground bindingness. Such a model must necessarily fail, he argues, for two reasons: (a) it cannot portray the law as 'uniformly normative'; and (b) it makes 'normativity' a 'subjective' matter. Though Bertea characterizes these as two distinct objections, they come together as aspects of one single objection- if the law is morally binding, it must 'uniformly' bind all

[267] Stefano Bertea, ' Legal System's Claim to Normativity and The Concept of Law' in K.E. Himma (ed *Law), Morality, and Legal Positivism: Proceedings of the 21st World Congress of the International Association for Philosophy of Law and Social Philosophy (IVR)* Lund 2003 (Steinaer Verlag 2004) 157.

subjects; and as on the projectivist model, the 'source' of normativity is a 'subjective' attitude of approval, it leads to the result that the law could be binding for some and not for others. This, in Bertea's view, has got to be wrong for how could the law ever be binding for some people and not for others?[268] As it stands, this criticism is somewhat amorphous. Bertea assumes that the lack of uniformity and subjectivity are *self-evident* problems that would obviously trip up a putative model of normativity. However, it is not at all obvious *why* these should be a problem for a putative model of normativity and Bertea offers little by way of elaboration. We must first render Bertea's objection more concrete (and potent) by elaborating on *why* uniformity and lack of subjectivity could be thought to be important for an account of 'normativity of law', before going on to address Bertea's objection as understood in the light of our emendation. Also, we would have to assume that inherent in Bertea's objection must be the hope that an impinging model of 'normativity of law' should fare well on this front.

But before we do any of that, it would be in order to examine how this problem in the realm of legal philosophy is by its very nature different from what I called the 'more or less analogous' objection to projectivism found in the metaethical literature in the moral case.[269] Bertea's worry *cannot* be a straightforward mirroring of that objection: that if 'normativity' of law depends on a subjective commitment people will simply stop following the law and we will descend into anarchy. Law does not typically rely solely on the moral commitment of the subjects for compliance. Unlike what obtains in the moral case, a typical legal system also has a system of sanctions

[268] ibid 159-160. I am grateful to Professor Timothy Endicott and Dr. Nicos Stavropoulos for pressing me to address this issue.

[269] We saw in Chapter II, that the projectivist can easily defend her account from such an objection.

to incentivize compliance (and disincentivize non-compliance) of the law. Therefore, the objection from 'subjectivity' cannot be induced by the fear of the system coming crashing down and delivering us into anarchy: the legal analogue of Karamazov's (morally) nihilistic world.

But Bertea's objection could be *mutatis mutandis* adapted to the legal case. On one interpretation, Bertea could be understood as objecting that the worry is not that a projectivist account will deliver us anarchy stemming from non-compliance, but that it doesn't have the resources to ensure a uniformly 'moral' compliance of law. Taking an 'attitude' of moral approval towards the law is after all *contingent* on the agent's subjective attitudinal set, and no projectivist account could ever be in a position to *ensure* that people have uniform attitudes towards the law. Understood thus, Bertea's objection from 'subjectivity' or lack of 'uniformity' is really directed against the *contingency* of moral commitment towards the law that the projectivist account entails. But Bertea could only ever pose this as a problem for the projectivist account if he rests in the confidence that the objective 'source' of normativity on an impinging account operates as an 'apodictic' device that could *non-contingently* ensure uniformity of moral commitments towards an objectively morally binding law; as an apodictic uniform source of normativity that causes agents to make certain moral judgments though some ineluctable power.[270]

However, if it is an apodictic device that Bertea fears the projectivist account is lacking, it is not at all sanguine to suppose that an impinging account would fare any

[270] Richard Rorty describes this ineluctable grip on agents as the hall mark of accounts of so-called 'apodictic' truths. Rorty, *Philosophy and the Mirror of Nature* (OUP 1979) 156-58. From what Bertea hopes the 'uniform' source of normativity to accomplish, it would seem that he means to use it as some such apodictic device, though he doesn't specifically assign this role to it.

better on this front. For determining whether there is moral compliance with the law, we would have to turn our attention to how legal requirements figure in the practical reasoning of the subject. It is only when the subject 'judges' the law as morally binding that there can be moral compliance with the law. Note, I use the expression 'judges' advisedly so as to be broad enough to accommodate both the cognitivist primitive—belief; and the non-cognitivist primitive—attitude. On no metaethical account—not even on an impinging one—can there be the *assurance* that that one subject to an 'objectively' morally binding law will be non-contingently prompted to herself *judge* it as morally binding. On an impinging account, there is the live possibility of a *gap* between what is objectively morally required and what the subject 'believes' is morally required. Even on an impinging account that requires moral belief on the part of the moral agent, the agent would have to *form* a moral belief. Formation of a moral belief is still a 'subjective' hence, contingent affair though it may aim to track something 'objective'. The formation of belief then is not any less subjective or contingent than the holding of an attitude. No impinging account can *cause* people to *form* 'uniform' moral beliefs towards the law. All of this wouldn't be a problem for an impinging account only if Bertea can point to a plausible impinging account with a fool-proof apodictic device for ensuring that people non-contingently align their moral commitments (here it would have to be moral beliefs) in accordance with objective moral standards that render the law morally binding. But no cognitivist philosopher seriously claims that such apodictic devices are plausible. Indeed, a world where such apodictic devices were available wouldn't have immorality, injustice, violence or indeed most things we find morally despicable – in short, it would be a world very different from the one we happen to find ourselves in as moral agents. The demand for 'uniformity' which sets the bar so high as to require that people will make uniform moral judgments is invariably

bound to end in the disappointing discovery that no earthly metaethical theory ever fulfils it. Any impinging model would have to admit the possibility of different agents forming different moral judgments (i.e. having different moral beliefs). Hence, the lack of 'uniformity' is not a consideration that counts against a projectivist account, for it doesn't count in favour of the impinging account either. Neither stripe of theorist could claim to possess the sort of apodictic device that Bertea's objection seems to require.

There is another way of interpreting Bertea's objection. Perhaps Bertea's objection could be recast by dropping the part having to do with the first person perspective altogether. On this interpretation we could have Bertea argue that the worry from lack of uniformity stems not from the first person perspective where agents are expected to make uniform moral judgments but from the *anatomists'* ontological perspective.[271] The objection would then be that on the projectivist account there are no objective moral standards that uniformly give people moral reasons notwithstanding whether people 'respond' to those uniformly by forming uniform moral judgments. Note, on this interpretation we would have Bertea drop the troublesome idea of the apodictic device altogether. However, if Bertea's objection is read in this fashion it would do nothing more than state an anodyne point—that the projectivist model does not allow for objective moral values. However, if this is indeed Bertea's objection, the projectivist will not seek to counter it at all. But more importantly, the projectivist would rightly wonder how this could be a sound objection to her model for it does nothing more than state the case for the impinging model. This does not in any way clinch the argument in favour of the

[271] The distinction between the perspectives of the anatomist and the painter was discussed in Chapter I.

impinging model. Far from it, it merely points to the case that the cognitivist would have to establish against projectivism. It would then squarely fall upon the cognitivist to establish how the phenomenology of morality and our moral experience would be entirely different in a world where the projectivist rather than the impinging model is true.[272] It is the projectivist's case that objective moral facts and properties are a spare wheel, or a spurious algorithm [273] when it comes to establishing the bindingness of morality and that the projectivist model is not any worse off because it doesn't take recourse to them. If anything, the projectivist would commend herself as it confers an explanatory advantage to the projectivist for not being profligate in ontic commitments.

7.2 Rescuing Projectivism from the charge of Reductionism

Several areas of philosophical investigation bear witness to longstanding debates about the soundness of reduction, and the overwhelming consensus treats reductionist accounts of a 'normative' discourse as spurious and unsound. [274] Ever since G.E. Moore articulated the charge against reductionist metaethical accounts under labels minted by him—the 'naturalistic fallacy' and the 'open question argument'—steering clear of reductionism is thought of as a crucial theoretical constraint for any putative metaethical account.[275] Here, it will be argued that a

[272] See Hare (n 14).

[273] Blackburn (n 105) 213-15.

[274] Mark Schroder, 'Realism and Reduction' (2005) 5 Philosopher's Imprint 1.

[275] G.E. Moore, *Principia Ethica* (Cambridge University Press 1903); As Alexander Miller points out the naturalistic fallacy's weapon is the open question argument: Miller, (n14)12-14.

projectivist account of moral bindingness of law cannot be charged with being reductionist.

But before we can turn to what is so objectionable about reductionism and why is it thought to be fatal to a metaethical account, we would need to sketch out the motivation behind reductionist analyses in a given area of philosophical discourse. Explaining the motivation behind reductionism Simon Blackburn notes:

> The motivation for reductive analysis is based on a *contrast*. The commitments expressed in some original vocabulary (the A-vocabulary or A-commitments) must be felt to introduce some apparent puzzle either of meaning or epistemology or of metaphysics not introduced by statements of B vocabulary. [276]

Reduction involves the idea that the content of the *discourse* A can be expressed in other ways using a different kind of vocabulary: B vocabulary. Reduction is informed by hostility towards profligacy in ontic commitments in a *discourse*. Some concepts in a discourse appear to involve commitments to properties or entities that appear mysterious. The reductionist, motivated by an empiricist and naturalist outlook, wants to *demystify* these properties/entities or *restructure* ontic commitment by *re-describing* the offending domain without using any of the commitments or concepts thought to be problematic. [277]

There can, however, be considerable tension between disappearance of the problem, which motivates the reduction, and *equation of meaning* between the A

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[276] Blackburn, *Spreading the Word* (n 51) 153.

[277]Nicos Stavropoulos, *Objectivity in law* (Clarendon Press 1996) 70.

discourse and B discourse into which the former is reduced.[278] G.E. Moore famously argued that reduction of ethical and evaluative concepts led to this form of asymmetry of meaning.[279] The crux of his argument was 'good' cannot be defined in terms of some naturalist *defeniendum*; because there can never be a complete equation of meaning between *good* and the proposed *definiendum*. Moore also devised a famous philosophical tool – known as the 'open question argument'– to bring home this point. Take the utilitarian formula that 'good' means productive of greatest happiness of the greatest number. Moore argued that one could say 'X produces greatest happiness for the greatest number', but without contradiction combine it with the statement 'but X is not good'. This happens because Moore thought the fact that X produces maximum happiness does not *close* the question of whether X is good; 'X is good' is *not* equivalent in meaning to 'X produces greatest happiness'. The open question argument can be turned against every other naturalistic reduction of 'good'- hence it was also called the 'naturalistic fallacy'. For instance, take moral relativism. For a moral relativist 'X is good' is equivalent to 'X is the generally practised thing'. But it is not incoherent to raise the question 'X is generally approved of, but is it good?' Before Moore, Henry Sidgwick had employed a similar manoeuvre against utilitarianism.[280] However, it is Moore with whom this argument against reductionism is associated. As 'good' could not be defined in naturalistic terms, Moore concluded with the idea that the 'good' denoted a non-natural property, extra sensory in nature, which could be accessed only by the faculty of intuition.

[278]Blackburn, *Spreading the Word* (n 51) 154-55.

[279]Moore, *Principia Ethica* (n 275)

[280] Henry Sidgwick, *Methods of Ethics Book I Chapter III* (Macmillan 1963) *passim*. Hacker notes this similarity between Sidgwick and Moore; P.M.S. Hacker 'Sanction Theories of Duty' in A.W.B. Simpson (ed), *Oxford Essays in Jurisprudence* (OUP 1973) 131.

It would be worth reiterating what would have been apparent from the aforesaid arguments. Moore's anti reductionist objections are *semantic* in nature; they are not directed against ontological substitution per se but against semantic substitution.[281] As Richard Rorty explains the gist of reductionism:

> Reduction is a relation between linguistic items, *not* among ontological categories. To reduce the language of X's to the language of Y's, one must show either (a) that if you can talk about Y's you need not talk about X's, or (b) that any given description in terms of X's applies to all and only the things to which a given description in terms of Y's applies.[282]

A reduction is thought to fail if neither (a), nor (b) can be demonstrated successfully. And the demonstration would necessarily involve a semantic or linguistic comparison between the purported reduction and ordinary usage of the terms under reduction. In contemporary philosophical jargon, the term reductionism is employed for *unsuccessful* reductions which fail in both (a) and (b) above. Moore endeavours to show with his 'open question argument', the failure of naturalistic definitions of 'good' on both those counts. It could never have sufficed for Moore to have merely pointed out that any account with a naturalist ontology (as opposed to his non naturalist ontology) is reductionist and hence flawed, for ontological commitments, in themselves, can never be the target of an anti-reductionist argument. For his anti-reductionist charge to have stuck, Moore would have had to – as he did- demonstrate

[281] Brian Bix points out that in jurisprudential literature, 'two ideas that go under the label 'reductionism': one is the statement of normative phenomenon in empirical (non normative terms); and the other is the explanation of all normative phenomena in terms of just one kind (for eg, duty). Bix, 'Reductionism and Explanation in Legal Theory in *Properties of Law: Essays in Honour of Jim Harris* (OUP 2006) 22.

[282] Richard Rorty, 'Non Reductive Physicalism' in Objectivity, *Relativism and Truth (*Cambridge University Press 1991) 115.

that the purported reduction was semantically flawed; and the demonstration of that necessarily required matching up the semantics of the purported reduction with the ordinary linguistic usage where the term under reduction was to be found. Moore's open question argument does just that. Thus, reductionism cannot be employed against a blanket charge against any naturalist metaethical account. Now, if a charge of reductionism is to be successfully brought against projectivism, it needs to be established that projectivism relies on a reductive semantic program; that projectivism gives naturalistic definitions to ethical terms in a way that falls foul of the open question argument. A projectivist could never be termed as a reductionist merely because she doesn't share the cognitivists' ontology. It is precisely here that the projectivists are thought to be on *terra firma*.

Odd as it may seem at first blush, the projects of G.E. Moore, a non-naturalist cognitivist, and the projectivists, committed to the exact opposite (non-cognitivism and naturalism) actually converged at a crucial point – and that convergence was to do with Moore's anti- reductionism. Stephen Darwall argues, rehearsing an argument made by Charles Stevenson, that the seeds of non-cognitivism could be seen as being already implicit in Moore's 'open question argument'.[283] Projectivists endorsed G.E. Moore's anti reductionist arguments and employed them to show that ethical terms like 'good' can never be given naturalistic definitions. But from there they didn't follow Moore into embracing non-naturalism either. They argued that ethical terms cannot be defined precisely because they do not denote any properties whether natural or non-natural; rather they have an entirely different direction of fit and are used to express emotions (or attitudes as latter day expressivists would have

[283]Darwall, 'Internalism and Agency' (n 72) 160, 161.

it). Having a non-descriptivist semantics of moral statements, the non-cognitivists could never in principle fall afoul of the 'open question argument'. [284] On Stevenson's diagnosis, Moore's jump from anti- reductionism (which non-cognitivists approved) to non-naturalism (which non-cognitivists opposed) was caused by 'an invisible shadow cast by confusion and emotive meaning'. [285]As Gibbard, Darwall and Railton point out Moore's open question argument sent opponents 'kicking and screaming' towards non-cognitivism precisely because it did not fall afoul of the 'open question argument' or commit the so called 'naturalistic fallacy'- and was held out by the non-cognitivists as the only plausible alternative to Moore's non naturalism and intuitionism.[286] Non-cognitivism, thus could be regarded as the greatest beneficiary of the legacy of Moore's anti-reductionist arguments. For these reasons, no philosopher has seriously accused projectivism of reductionism or of having committed the naturalistic fallacy. [287]

[284] This also enables non-cognitivists to handle ethical disagreements without committing any of the errors that Moore attributed to ethical naturalists. See Chapter VII for a discussion of this aspect of non-cognitivism.

[285] Charles Stevenson, *Ethics and Language* (Yale University Press 1945) 109.

[286] Stephen Darwall, Allan Gibbard and Peter Railton, 'Toward Fin de Siecle Ethics: Some Trends' (1992) 101 *Philosophical Review* 115, 144.

[287] Blackburn, *Spreading the Word* (n 51) Chapter 5.

VIII

Hart's Semantics and Projectivism

While rescuing projectivism from the charge of reductionism, however, there is one problem relating to reductionism that could potentially return to haunt the projectivist account of 'normativity of law'. While their model of the moral bindingness of law can rest securely on the edifice of the decidedly non-reductionist projectivist model of moral bindingness, projectivists about the 'normativity of law' *cannot* rely on the non-cognitivist semantic model of the projectivists and present it as the semantic model of legal statements. A non-cognitivist semantic model of legal statements is notoriously renowned to be a non-starter. Any non- descriptivist model of statements of legal obligation in fact, including performativism, seems ridden with difficulties. We hinted at this problem in Section V above and will return to it in greater detail in Chapter IV. The great challenge for a projectivist account of normativity, as we noted earlier, comes on the semantic front. A projectivist account of the 'normativity of law' would have to show the law as semantically 'normative' and would have to present a semantic model of legal statements that, while steering clear of moral descriptivism one the one hand also avoids any form of reductionism on the other.

This is where Hart's contribution assumes vital significance. Hart devised a semantic model which steered clear of reductionism on the one hand, and moral descriptivism on the other. And this he did by paying acute attention to the

phenomenology of legal statements. In the next chapter, we will study why Hart's semantic model of norm-relativism provides a plausible 'normative' semantic model that could align with the projectivist's metaethical model of moral bindingness to yield a complete account of the 'normativity of law'.

Chapter IV

STATEMENTS OF LEGAL OBLIGATION

AND HART'S SEMANTICS

I

Introduction

Sometimes legal philosophers, perhaps unwittingly, tend to write as though satisfactorily explaining the use of normative language is the be all and end all of an account of the 'normativity of law'.[288] This, however, cannot be right. A complete philosophical account of the 'normativity of law' must comprise two distinct but closely related projects: a) Semantic- The theorist's semantic model of legal statements must portray such statements as semantically normative; b) Metaethical- The theorist must explain how legal requirements which are conveyed by legal statements come to be morally binding.

This chapter will primarily be concerned with discussing some issues surrounding the first of the above projects-namely, the semantic one. The aim of this chapter will be two-fold:

a. To determine the semantic model of legal statements that Hart settled on and why he did so. It will be argued that Hart endorses the semantic model of norm-relativism according to which legal statements convey what is required to conform to a socially practised standard.

b. To establish that Hart's semantic model (norm-relativism) provides a plausible 'normative' semantic model that could align with the projectivist's metaethical model

[288] Though Raz clearly treats the issue of 'normativity of law' as being wider than a merely semantic one, at places he writes as though explaining normative language were the be all and end all of an account of 'normativity of law': 'The problem of the 'normativity of law' is the problem of explaining the use of normative language in describing the law or legal situations.' J.Raz, *Practical Reason and Norms* (OUP 1990) 170.

of moral bindingness (the second of the two abovementioned projects) to yield a complete account of the 'normativity of law'. It may be thought that the most obvious way for the projectivist to execute the semantic project would be to argue that legal statements are non-cognitivist statements expressing the agent's approval of the law, in line with their semantic model for moral statements. However, it will be argued that this route is bedevilled with problems and a projectivist cannot rely on this model of legal statements.

Before setting out the outline of the present chapter, it would be useful to briefly touch upon some *desiderata* that a candidate semantic model of legal statements must meet. In the literature, candidate semantic models are criticized for their failure to meet these desiderata. Firstly, it must satisfactorily account for the use of 'normative' language in legal statements. A plausible semantic model must portray legal statements as 'practical' or 'deontic' statements that *require* something from the addressees.[289] Secondly, it must conserve the phenomenology of legal statements. That is to say, it must fit the facts of how legal statements are employed in practice and the commitments that are thought to accompany them. An account that puts a strain on many basic pre-theoretical intuitions about legal practice or shows us to be in some deep error with regard to them is to that extent, to be treated with scepticism.[290]

[289] Raz, *Authority of Law* (n 193) 52, 53. For instance, a 'reductionist' semantic account is now widely *in limine* ruled out because it is thought—for good reason, it will be argued in section V—to be unsuccessful in adequately explaining the 'normative' language found in legal statements.

[290] It will not be possible to enumerate here the great number of forms that an objection of this sort could assume; we shall be encountering some of them in the course of this chapter. One often finds this class of objections pressed into service in the realm of semantics in metaethics. The influential Frege-Geach objection against non-descriptivist semantics is a good example of such an objection in action.

We will begin by setting out in Section II, the semantic models of legal statements that Hart engaged with, namely, the *equivalence theory*, *reductionism*, *performativism* and *norm-relativism*. In Sections III to V, we will discuss the problems associated with the equivalence theory, reductionism and performativism; and consider why Hart rejected them as semantic models. In Section VI, we will set out, norm-relativism, the semantic model that Hart eventually settled on. Section VII will defend Hart's norm-relativism from criticisms levelled against it by Raz, to the effect that the model is not 'normative' enough. In Section VIII, it will be argued that for a semantic model of legal statements to figure in a successful account of 'normativity of law', it must be *symmetrical* to the theorist's metaethical model of bindingness of law. Here, I will seek to establish that the equivalence theory is asymmetrical with the projectivist's model of moral bindingness; and symmetrical with the impinging model instead. A projectivist account of 'normativity of law', it will be claimed, could only ever set off the ground by denying the equivalence theory. It will be argued that performativism and reductionism—which early projectivists like Karl Olivecrona and Alf Ross respectively, endorsed—are riddled with insuperable problems. In the present chapter I endeavour to establish that Hart's semantic model of norm-relativism overcomes the problems that early projectivists faced and presents a plausible semantic model that could combine with the projectivist's metaethical model to yield a complete account of 'normativity of law'.

II

The Candidate Semantic Models: A Primer

'Normative' expressions such as 'ought', 'obligation', 'right', 'duty' etc., are to be found in statements conveying moral requirements. Identical expressions are also to be found in statements conveying legal requirements (hereafter, statements of legal obligation). What do we make of the occurrence of these expressions in legal and moral language? Is there an *equivalence* of meaning between them in legal and moral language? Or are these expressions used to convey what is required to conform to norm-relative standards like those to be found in statements conveying requirements of etiquette and other socially practised standards? Or, is it that the ostensibly 'normative' language notwithstanding, these expressions are used in an altogether different sense, not setting out 'requirements' whether norm-relative or moral, but rather predict that sanctions are likely to follow non-compliance? In the literature, one comes across supporters and detractors of each of these semantic positions. What follows is a brief survey of the positions that Hart engaged with.

1. Equivalence: On this view, there is an *equivalence* of meaning between 'normative' expressions in statements conveying legal and moral requirements. In other words, legal statements—just like moral statements—convey moral requirements. There are two ways of cashing out this equivalence depending on the theorist's (metaethical) understanding of the nature of a moral requirement. The cognitivist version of the *equivalence* theory would be committed to *moral descriptivism*—the thesis that legal statements purport to denote objective moral facts and properties; which is to say, legal statements purport to state objective moral

reasons for action. This mirrors the cognitivist's semantic model of moral statements. It will be argued that Raz endorses moral descriptivism.

The non-cognitivist version of the equivalence theory would—if it were ever to be systematically articulated—be committed to the thesis that statements conveying legal requirements express moral (conative) attitudes. We will return to the cognitivist version later in Section IV. Here, we will dwell further on the non-cognitivist version of the equivalence theory. Thanks to Kevin Toh's purported 'expressivist' reconstruction of Hart, the non-cognitivist version of the equivalence theory is currently in vogue.[291] But it will be argued that the non-cognitivist semantic model of legal statements is a non-starter. One could press into service a litany of phenomenological objections against it. A legal statement, whatever else it does, must 'identify' the law. For this, the direction of fit of a legal statement *would have to be* world-to-mind. A moral statement, as the non-cognitivist understands it, has the reverse direction of fit (mind-to-world).[292] Moreover, a semantic model must conserve the possibility of a legal statement being right or wrong depending on what the law really is. It is an undisputed feature of legal statements that they are truth-apt in relation to law in force. A non-cognitivist statement, by definition, is not truth-apt. This non-cognitivist semantic model of legal statements leads to the counter-intuitive result that when someone makes a legal statement, it is no more than an attitude she expresses and there is no way of saying whether it is right or wrong as a depiction of the law because a non-cognitivist statement, thanks to its reverse direction of fit, is not meant to be truth-apt. For these reasons, the non-cognitivist

[291] See Chapter VII for a discussion of Kevin Toh's account.

[292] For a discussion of 'directions of fit' of moral statements see Chapter I.

version of the equivalence theory is ill-equipped to serve as a candidate semantic model of legal statements. Little wonder then that no one has seriously held it up as a semantic model of legal statements. Even Kevin Toh, who ostensibly holds himself out as a torchbearer of this non-cognitivist/ expressivist model, only manages to put forth a *hybrid* semantic model with a combination of cognitivist and non-cognitivist elements. Having ruled out the non-cognitivist version of the equivalence theory, we shall take *moral descriptivism* to be the only plausible version of the *equivalence* theory and hence treat the equivalence theory as synonymous with moral descriptivism. We will have more to say about moral descriptivism in Section IV.

2. <u>Reductionism</u>: Reductionism claims that statements of legal obligation are predictions of sanctions that are likely to be brought to bear against an agent for non-compliance with the law. In theory, a great many reductions are possible, but the most popular version of reductionism portrays legal statements as predictive or probabilistic statements which convey the sanctions likely to follow non-compliance. So much so that reductionism is treated in the literature as synonymous with the predictive model. Reductionism is now severally discredited and among its blemishes is the charge that it doesn't portray legal statements as conveying 'requirements' at all; which is to say, it ignores the 'normative' dimension of legal statements. We will consider reductionism and Hart's objections to it in Section V.

3. <u>Performativism</u>: Performativism is the thesis that legal statements do not state anything; rather they are meant to perform certain speech acts which create a state of affairs. Performativism is a cognate of the non-cognitivist model. Like the non-cognitivist's semantic thesis, performativism argues that statements of law have a

mind-to-world direction of fit. Unlike the non-cognitivists' semantic model though, performativism has had a longer run in legal philosophy even counting in its heyday some influential legal philosophers like Glanville Williams[293], Olivecrona[294] and Hart among its adherents. After having briefly endorsed performativism early on in his career, Hart abandoned it eventually. We shall consider performativism in Section V.

4. <u>Norm-relativism</u>: Norm-relativism is the youngest of the semantic models. Whilst denying the equivalence theory, reductionism and performativism, it purports to portray legal statements as 'normative'. According to norm-relativism, legal requirements convey what is 'required' to comply with socially practised standards. It will be argued that the semantic model to be found in *The Concept of Law* can be rightly classified as norm-relativist, though Hart himself did not label it as such. We will consider why this was the semantic model Hart settled on and what motivated him to do so.

III

<u>Moral Descriptivism</u>

There is a feature of moral statements, which may seem to make moral descriptivism, at first blush, *implausible* as a candidate semantic model of legal

[293] Glanville Williams, 'Language and the Law' (1945–1946) 61 Law Quarterly Review, 71.

[294] Olivecrona, 'Legal Language and Reality' (n 229) 151.

statements. The feature in question was discussed in Chapters I & II, as forming the *practicality requirement* of moral judgments. When an agent makes a moral judgment, it is assumed that her attitude is aligned with the moral judgment; which is to say, a moral judgment implies motivational moral endorsement or commitment on behalf of the speaker.[295] It would be incongruous if a speaker makes a moral judgment and then in the same breath disavows endorsement of the moral judgment she has just made.[296] Peter Railton describes as *Moore paradoxical* any disavowal of a moral judgment in the same breath as making it.[297] There is something else that immediately follows from this. If a 'normative' statement can be combined without paradoxicality with a statement conveying its disavowal, there is good reason to believe that the 'normative' statement in question is not a moral one at all.

Now, legal statements can be combined with their disavowals without the result being paradoxical. Consider the following statements:

a. Legally you ought to X, but I really don't care.

b. It is obligatory to not park on yellow lines, but I don't care.

c. Legally, you ought to X, but morally you ought not to do it.

No Moore paradoxicality occurs in any of the above cases because is a feature of the phenomenology of legal statements that they can be uttered without any moral endorsement on the speaker's part.[298] Even an anarchist could coherently make

[295] Smith, *Moral Problem* (n 44) 6.

[296] Stephen Finlay, 'The Conversational Practicality of Value Judgment' 2004(8) Journal of Ethics 205-223.

[297] Peter Railton, 'Moral Factualism' in James Drier (ed.), *Contemporary Debates in Moral Theory* (Oxford: Blackwell 2006) 201, 205.

[298] Bix (n 247) 103.

statements of legal obligation conveying what is required by the law though an anarchist, by definition, doesn't endorse the law.[299] This feature of legal statements seems to set them apart from moral statements, which necessarily entail attitudinal endorsement/commitment on the part of the agent uttering them. This feature of legal statements renders it improbable that normative expressions like 'ought', 'duty' etc., are used in the same semantic sense in legal and moral statements. The equivalence theory or moral descriptivism then, at least at first blush, seems to be inaccurate as a semantic model of legal statements.

Raz is acutely aware of these phenomenological problems facing moral descriptivism. Yet, he goes on to support it. He expounds a sophisticated version of moral descriptivism precisely to deal with such problems. Raz is committed to the central insight of the equivalence theory that normative expressions like 'ought' in legal statements purport to convey what morally ought to be done.

> Legal statements are normative statements in the same sense and in the same way that moral statements are normative. [300]
>
> Normative terms like 'a right', 'a duty', 'ought' etc., are used in the same sense in legal, moral and other normative statements.[301]

Raz clearly anticipates the Moore paradoxicality objection emerging from the phenomenology of legal statements:

> Since one may know what the law is without knowing if it is justified there must be the possibility of making legal statements not involving commitment to its justification. [302]

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[299] Copp (n 140) 10.

[300] Raz, 'Purity of the Pure Theory' (n 180) 245.

[301] Raz, *Authority of Law* (n 193)158.

Raz is aware that any plausible theory about legal statements must explain how it is possible to make legal statements (which according to him are equivalent to moral statements) without moral commitment to its justification, on behalf of the speaker. The moral descriptivist's dilemma is to explain how legal statements despite being equivalent to moral statements need not necessarily entail moral endorsement and commitment of the sort that moral statements necessarily do. Raz himself identifies the dilemma:

> If normative terms are used in their ordinary (moral) sense in legal statements are not the statements made by their use always committed statements?
>
> If legal statements are as normative as ordinary moral ones, if they are moral statements, then the law and its existence and content, which is what legal statements state seem to be essentially moral facts. But the study of moral facts and their identification cannot be free of moral considerations and arguments.[303]

The dilemma can be restated thus: How can someone utter moral statements without being morally committed to or attitudinally endorsing the moral judgment one is making? The way out of the dilemma, says Raz, is to be found in the idea of detached normative statements:

> [The] doctrine of detached statements … provides the framework for a solution to the dilemma by explaining a class of statements which are normally made by the use normative language, which are not about behaviour or beliefs but about rights and duties and which are none the less not committed and not internal statements.[304]

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[302] ibid.

[303] Raz, 'Purity of the Pure Theory' (n 180) 245.

[304] ibid 249.

> Such statements state what one has reason to do from the legal point of view, namely, what one ought to do if legal norms are valid[morally justified] norms. [305]

What Raz hopes to give us in the form of a detached normative statement is a linguistic device whereby the speaker can tell the hearer what moral reasons he has for action, while herself still being uncommitted to the moral judgment. Raz's idea of detached statements is meant to enable the speaker make moral judgments without any of the moral commitment or endorsement associated with moral judgments.

Though they are made with the use of 'ordinary normative terms' they 'do not carry the same normative force' as a committed legal statement. Raz adds that they are a common feature of our normative practice—not only law—and are to be found 'wherever a person advises or informs another on his normative situation in contexts which make it clear that the advice or information is given from a point of view or on the basis of certain assumptions which are *not necessarily shared* by the speaker'. [306]

Hart was firmly opposed to moral descriptivism. He consistently held that statements of legal obligation do not purport to describe objective moral facts and properties. In *Essays on Bentham,* Hart maintains that statements of legal obligation 'do not refer to actions which they (subjects) have a categorical reason to do'.[307] Also,

[305] Raz, *Practical Reason and Norms* (n 288) 175; (parenthesis added).

[306] Whether or not the device of detached legal statements solves the phenomenological problems facing moral descriptivism need not detain us here. Nothing in this work hinges on our being able to assess Raz.

[307] Hart (n 12) 19, 147, 159-160.

Hart defended unto the very end, against Raz, that statements of legal obligation do not have the same meaning in legal and moral contexts.[308]

> Of course if Raz's ...cognitive analysis of the notion of duty were correct so that ' X has a duty to act in a certain way' means that there is an objective reason for X to act in that way, this would amount to a moral judgment...but I find little reason to accept such a cognitive interpretation of legal duty in terms of objective reasons or the identity of meaning of 'obligation' in legal and moral contexts which this would secure. [309]

In an interview with the Spanish journal *Doxa,* near the end of his career, in 1988, he maintained 'that legal and moral obligation are conceptually different' in the sense that a statement of obligation has a different meaning in law and in morality.[310] Among the reasons Hart spells out for rejecting moral descriptivism is the phenomenological objection we noted above.

[308] H.L.A. Hart *Essays on Bentham* (n 12) 145-161; T. Endicott 'Law and Language'*(Fall 2010 Edition)*, Edward N. Zalta (ed.) <http://plato.stanford.edu/archives/fall2010/entries/law-language/>. Retrieved on 5/10/2011; Hart *Concept of Law* (n 2) 202, 239-40.

[309] Hart (n12) 160. In talking about the 'cognitive' account of duty, Hart is referring to the *descriptivist* conception of legal statements on which legal statements are descriptions of moral reasons for action. Hart endorsed a non-descriptivist conception of statements of legal obligation. Raz too characterizes Hart's non-descriptivist position as 'non-cognitivism' about legal statements; I fear the term non-cognitivism is an unhappy and a potentially misleading one for characterizing Hart's semantic position, which in reality, is non-descriptivism about legal statements. Non-cognitivism is a position in metaethics about the character of reasons. Non-descriptivism is a semantic thesis about legal statements.

[310] De Paramo, 1988, 'Entrevista a HLA Hart', Doxa 5: 340; Endicott, 'Law and Language' (n308).

IV

Reduction

4.1 Bentham's reduction of ethical terms and Moore's objection:

In Chapter III, we discussed reductionism in ethics and the objections against it. Bentham pioneered a reductionist analysis in ethics with his doctrine of utilitarianism. The idea behind this form of reduction is that ethical terms like 'good' are rendered mysterious if they require commitment to ontologically obscure moral facts and properties. The problem is avoided if terms like *good* are reduced into *naturalist* (empirical) terms, which do not require such problematic ontological commitments. Moore's famous 'open question' argument was *inter alia* directed against such utilitarian reductionism. As we shall soon see, Bentham also had a reductionist account of statements of legal obligation and Hart opposed Bentham's reduction *inter alia* with an argument very similar to Moore's *open question argument*.

4.2 Bentham's reduction of legal statements:

Bentham's overall naturalist and empiricist orientation which informed his reductionism in ethics also led him to embark on a reductionist project in legal theory. The subject of this reduction was the notion of statements of obligation.

Bentham held that 'law shews itself in a mask' and one of his primary goals, as Hart argued, was the 'demystification' of law.[311] Bentham thought there was something metaphysically suspect about the notion of obligation as understood by the natural lawyers of his day, particularly, Blackstone. Hacker argues that Bentham found that the notions of duty and obligation are prone to make us postulate the existence of some metaphysically obscure entities to which these terms refer.[312] Given this outlook, Bentham was opposed to moral descriptivism about statements of legal obligation. This is not, of course, to suggest that moral descriptivism necessarily involves something metaphysically obscure; only that it was found to be so in Bentham's philosophical outlook. Bentham was hostile to the idea that legal duty and obligation could ever refer to any moral facts or properties. His aim was to bring down the notion of obligation to the plane of plain *hard* natural facts; the antidote which Bentham suggested for such 'obscure metaphysics' – as Hart would call it— was reduction.[313]

He carried out his reduction by a novel theory of definition, which he called *paraphrasis*. A sentence containing the word to be defined is substituted with one in which the word to be defined doesn't appear at all. Accordingly, he substituted sentences with words such as duty obligation and like with sentences without them. Therefore a statement that 'A has an obligation to X' was be *reduced* by Bentham to a statement about natural facts which he found metaphysically austere such as 'A will be visited with a sanction in the event he does not do X'. Bentham reduced the notion

[311] H.L.A.Hart, 'Bentham and the demystification of law' 1973 (36) Modern Law Review 2, 4.

[312] Hacker (n 280) 138.

[313] Hart (n2) 84.

of obligation to *likelihood* of sanction. Furthermore, Bentham noticed that the generic concept of obligation is embedded within an illuminating archetype which further establishes the connection between obligation and motivational necessitation implied by a sanction. We refer to the binding force of obligations. The archetype here is of a cord or rope tying us to a person or binding us to a course of action. Bentham interpreted this as indicating the motivational necessitation of the probable sanction, which renders the action obligatory. Thus for Bentham a statement of legal obligation was a predictive statement, specifying the likelihood of sanctions against the offender. As Bentham himself put it:

> An obligation is incumbent upon a man in so far as in the event of his failing to conduct himself in that manner pain or loss of pleasure is considered as about to be experienced by him. [314]

The analysis here is predictive or probabilistic. One of the fall outs of Bentham's account was that it *demystified* the notion of duty and stood in firm opposition to any theory of duty which equated statements of legal obligation with statements of moral obligation. As Hacker puts it, 'the existence of duties serves no mysterious transcendent realities'.[315] Stressing the naturalist and empirical ambitions underlying Bentham's reduction, Hart argues:

> To many later day theorists this [predictive theory of statements of legal obligations] has appeared as a revelation, bringing down to earth an elusive notion and restating it in the same hard empirical terms as are used in science. It has indeed, been accepted sometimes as the only alternative to metaphysical conceptions of obligation or duty as invisible objects mysteriously existing 'above' or 'behind' the world of ordinary, observable facts.[316]

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[314] Jeremy Bentham, 'Logic'; quotation reproduced in Hacker (n 280) 136.

[315] ibid 140.

[316] Hart (n2) 80.

Bentham's reductionist theory of obligation was strongly advocated by Austin and later by the American Legal Realists, Holmes in particular. The predictive theory of obligation held sway for long until Hart discredited it in *The Concept of Law*.

4.3 Hart's objections to reductionism:

While Hart was sympathetic to Bentham's *empiricism* and, in principle, approved of it—in fact, as we shall see later, Hart's own analysis of statements of legal obligation seeks preserves to the extent possible the gist of Bentham's empiricist ambitions—Hart found the reductionist account of legal statements to be problematic and unsatisfactory. He took serious objection to this account treating 'statements of obligation as predictions or assessments of chances of incurring punishment or evil.'[317] Hart had two significant criticisms of Bentham's semantics of legal statements namely:

a. The objection from the 'Open question' argument;
b. The objection of overlooking what is 'primary' in legal obligation.

a. Hart's version of the 'open question' argument:

[317] Hart (n2) 83.

Hart employed a technique strikingly reminiscent of G.E. Moore's 'open question' argument, to contradict the semantic claims of reductionism. [318]Just as Moore's open question argument relies on the asymmetry of meaning in a reduction, so does Hart's objection. Hart noticed that the *meaning* of 'you have an obligation to φ' could never be the same as 'you are likely to be punished if you don't φ'. Hart points out that it is possible to conjoin a statement of the likelihood of sanctions for non-performance with the statement that the act is obligatory, without any sense of redundancy or tautology. [319] To demonstrate this, he argued that the statement 'you have an obligation to X' can be coupled *without contradiction* with the statement that 'you will never be punished for not doing X'.[320] He reiterates this argument in *Essays on Bentham*.

> The statement that a person has a legal obligation to do a thing can be combined without contradiction or absurdity with the statement that it is not likely that in case of disobedience he will suffer by incurring some sanction.[321]

b. <u>Overlooking What is 'Primary' in Legal Obligation</u>:

Hart feared that reductionism *strips* away the 'normative' element in statements of legal obligation. Reductionism entails the view that statements of legal obligation are factual (predictive) statements. Legal statements Hart—and later Raz—insisted, are deontic or practical statements. The problem with the reductionist model is that it simply fails to capture the idea a legal statement 'requiring' something; it blandly

[318] Sidgwick (n 280) Book I Chapter III.

[319] Hacker notes this move is reminiscent of Moore's 'open question' argument' (n 280) 142.

[320] Hart (n2) 84.

[321] Hacker (n 280) 135.

portrays legal statements as predictions of something likely to follow non-conformity. The predictive Bentham-Austin model, loomed large over generations of legal theorists and also formed the core of the American Legal Realists' semantic model of statements of legal obligation.

Before we can turn to Hart's precise criticism of the reductionist account *qua* normativity, it will be useful to consider an illustration which clarifies how these predictive theories work in practice and what Hart found so objectionable in them. Assume A has booked a ticket on V airlines to fly from London to Bombay. Now, what in this scenario is the legal obligation of V airlines? The reductionists would say that the legal obligation of V is to pay damages, which a court will hold V to, in the event he does not fly A to Bombay. The above characterization of statements of legal obligation could well have come straight out of O.W. Holmes's *The Common Law*. Indeed, this was Holmes's idea of a contractual obligation; the obligation to pay damages in the event of breach.

> The only universal consequence of a legally binding promise is that the law makes the promisor pay damages if the promised event does not come to pass. In every case it leaves him free from interference until the time for fulfilment has gone by, and therefore free to break his contract if he chooses.[322]

A litany of objections are readily available against this characterization. Isn't the legal obligation really the one to *perform* what the promisor has undertaken, namely, to fly his passenger to Bombay? After all, hasn't A bought the ticket *to fly* to Bombay, rather than to get paid damages in the event of *not being flown* to Bombay? Isn't the

[322] O.W. Holmes Jr., *The Common Law* (Boston: Little Brown 1881) 236.

matter of damages something that may arise *because* V has failed to perform what it has promised, namely to fly A to Bombay? Hart highlighted just some of these as his main concerns about the reductionist account. He observed that these reductionist accounts err in failing to stress on what is 'required' by the law: ' a legally obligatory act is one that is *required* by law and not merely one for failure to do which the law provides unpleasant consequences.'[323]

In their fascination with sanctions—something, which Hart argues come into play only if a person fails to comply with the law—reductionists overlook what is 'required' by law in the first place.

> where rules exist deviations from them are not merely grounds for prediction that hostile reactions will follow...but are also reason or justification for such reaction and for applying the sanction.[324]

Hart noticed that the reductionist accounts place the cart before the horse in as much as they define the very existence of a legal obligation in terms of likelihood of sanctions. What Hart does in the above passage is to restore the horse to its rightful place- before the cart. A sanction is something that only comes into the picture because the rule has been deviated from in the first place. But there is a great temptation to read the words *reason* and *justification* in the above passage as signalling *moral* reason and *moral* justification; like Kevin Toh does. In the above passage Toh reads Hart as arguing that judges take the rules as a moral reason / justification for applying the sanction.[325] He then uses this as support for the central

[323] Hart, *Essays on Bentham* (n 12) 133-34.

[324] Hart, *Concept of Law* (n2) 84.
[325] Toh 'Hart's Expressivism' (n11) 82.

argument of his thesis- that Hart's internal legal statements are non-cognitivist/expressivist moral statements, expressing the speaker's moral approval of the law. Nothing could be further from Hart's design. Sanctions, Hart thought, were 'secondary'; something which followed the breach of the primary obligation. This relationship between the primary and the secondary obligation is what Hart was stressing upon while using the words 'reason' and 'justification'.

> These secondary reasons[sanctions] are in a sense *pis aller*: they are secondary provisions for a breakdown in case the primary intended peremptory reasons[the primary legal obligation] are not accepted as such.[326]

V

Performativism and Hart

There was a movement in the 1930's and 40's centred in Oxford which challenged the then prevailing orthodoxy that the purpose of all language was to describe. At the 'centre of this centre', was J.L. Austin, who was also one of Hart's most influential collaborators.[327] Austin dubbed the orthodoxy as the 'descriptive fallacy': the fallacious tendency to assume that all language was meant to be a true (or false) description of reality. A performative utterance *does* something other than describe:

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[326] Hart, *Essays on Bentham* (n12) 254.

[327] Francois Recanti, *Meaning and Force: The Pragmatics of Performative Utterances* (Cambridge University Press 1987) 67.

its function is to constitute or *create* a state of affairs.[328] Typical examples would include the following:

a. I baptize;
b. I promise;
c. I do (take this woman to be my lawfully wedded wife);
d. I name this ship the 'Queen Elizabeth'.

One of the first topics in jurisprudence to which Hart turned his attention was that of the semantics of statements of legal obligation. In his earliest published work he argued that statements of legal obligation are performatives, whose primary function was to *create* a state of affairs; typically to ascribe responsibility and rights.[329] This mirrored Austin's view; that performatives are naturally at home in the legal world. On Hart's performativist model, legal statements were *not* truth-apt (whether in relation to moral or social facts). If I may be permitted to venture a conjecture—whether or not biographically accurate—Hart was keen on devising a semantic model for legal statements which avoided moral descriptivism; for the denial of moral descriptivism is a constant theme in Hart's work right up until his interview to the Spanish journal *Doxa* in 1988. In fact, he seems to have been concerned about avoiding any semantic model (whether cognitivist or non-cognitivist) that equated legal statements with moral ones. Performativism must have then seemed to Hart the ideal candidate to fulfil these goals. On the performativist model, a legal statement could be portrayed as not purporting to describe any reality (moral or social) *tout court*. However, by the time Hart wrote

[328] J.L. Austin, *How to do Things with Words* (Harvard University Press 1962) 4-7.

[329] H.L.A. Hart, 'Ascription of Responsibility and Rights' (1948-49) 17 Proceedings of the Aristotelian Society 171-94.

'Legal and Moral Obligation' (1958) and *The Concept of Law* (1961) he seems to have completely abandoned performativism, as many commentators including Raz suggest.[330]It is not immediately apparent why Hart gave up performativism, for Hart does not make his reasons explicit in either of the abovementioned works. It may be thought that Peter Geach's (1960) influential criticisms against performativism may have motivated Hart to do. But this does not seem possible because Hart appears to have given up performativism by the time of 'Legal and Moral Obligation' (1958) long before he was likely to have been aware of Geach's criticisms.

Performativism is now thought to be notoriously problematic. Legal statements as performatives are meant to create a state of affairs. But, as Stavropoulos argues, it is only on a judge's lips, rather than a layman's or even lawyers' that a statement like 'X has a right to compensation' brings about a change in a state of affairs.[331]This leads to the problematic idea that the content of the legal statement is different depending on who is uttering it. Raz flags a related worry; he argues that it would be impossible for a person to adduce the statement of a rule as something she is complying with if the statement is to be understood as a performative.[332] Further, in 1960, Peter Geach argued that these so-called performatives can figure in *embedded* contexts such as questions, conditionals etc., in ways that only truth-conditional statements can do, creating the strong presumption that these so-called performatives must have a truth value; therefore, it is unlikely that these can be non

[330] Raz, *Practical Reason and Norms* (n 305) 57; Stavropoulos, 'Objectivity in Law' (n 277) 53. In 'Legal and Moral Obligation' (1958) Hart had a semantic account which was in many respects similar to the one he puts forth in *The Concept of Law*; the latter is discussed in detail in section VII and later in chapter 6.

[331] Stavropoulos, *Objectivity in Law* (n 277) 55.

[332] Raz, *Practical Reason and Norms* (n 288) 57.

truth-apt performatives in the first place.[333] Finally, performativism is prone to the same error that we found with the non-cognitivist model of legal statements. A legal statement must be able to identify the law. Therefore, it must be truth-conditional and must have a world-to-mind direction of fit. But a performative statement has the reverse direction of fit. Therefore, it cannot plausibly form the basis for a semantic model of statements of legal obligations.[334] As such, a projectivist model of normativity cannot help itself either to a performative or non-cognitivist semantic model of statements of legal obligation. It would need a model which, whilst portraying legal requirements as 'normative', must also deny moral descriptivism. It will be argued that Hart was successful in pioneering such a model in *The Concept of Law*. That is the model which we will call norm-relativism.

VI

Hart's Way Out : Norm-relativism

In *The Concept of Law*, Hart sought to provide a semantic model which steered clear of performativism, reductionism and moral descriptivism. Though Hart opposed reductionism, he was *in principle* sympathetic to Bentham's empiricist project and—as his criticism of Raz in *Essays on Bentham* reveal—was suspicious (whether rightly or wrongly) of the 'obscure metaphysics' that the moral descriptivist

[333] Peter Geach, 'Ascription' (1960) 69 Philosophical Review 221-225.

[334] Searle has argued that a performative is really a disguised declaration and thus disguises a janus-faced two directions of fit. However, neither Hart nor Austin thought this to be the case.

model would have entailed.[335] Even though he criticizes Bentham's reductionism, Hart makes his sympathies clear for Bentham's empiricism and his quest for a semantic model which provided an alternative to moral descriptivism. Hart argues that 'there are many reasons for rejecting [the] interpretation of statements of obligation as predictions, and it is not in fact the only alternative to obscure metaphysics.'[336]

Hart promises to present a semantic account of statements of legal obligation that, while eschewing obscure metaphysics, also avoids reductionism; and portrays the law as comprising of 'normative' requirements.[337] It will be argued that the semantic model Hart eventually settled on in *The Concept of Law* can be classified as norm-relativist, though he never used the label. Norm-relativism is the idea of something being required by some socially practised standards. Hart's proposed norm-relative solution, in a synoptic form, was the following. Statements of legal obligation are 'normative' in that they convey what is 'required' by socially practised norm-relative standards, which for Hart, was a *rule*.

The idea of norm-relativism was not entirely novel when Hart wrote *The Concept of Law*. As discussed in Chapter II, in the *Language of Morals* (1952), Richard Hare pointed out that not all uses of 'normative' expressions like 'ought' are moral. He argued out that 'oughts' can also be used in an entirely non moral, norm-relative

[335] Hart (n2) 84; Perry (n6), in fact, fears that Hart's affinity with empiricism thwarted his attempt to account for the normativity (moral bindingness) of law.

[336] Hart (n2) 84.

[337] Hart's opposition to moral descriptivism meant that Hart would have had to present a model which, while portraying legal statements as 'normative' did not treat them as equivalent to moral statements.

sense to convey what is required to conform to a socially practised standard. Norm-relative statements are 'normative' statements which convey what is required in order to conform to a socially practised standard; but are distinct from moral statements. In Chapter II, it was argued that norm-relative statements, unlike moral statements, could be combined with their disavowals without any sense of Moore paradoxicality. It was argued that this comes about because norm-relative judgments do not necessarily entail motivational endorsement in the way that moral judgments do.

Hart, it *appears,* was influenced by Hare's norm-relativism. As we shall see, Hart has a strikingly similar, norm-relativistic analysis of statements of legal obligation. Whether Hare's analysis had any role in steering Hart away from performativism, towards norm-relativism, cannot be answered without speculation. However, we can be confident that Hart most certainly employed something closely resembling Hare's norm-relativism in his semantic model of statements of legal obligation. Hart argues that to understand the idea of statements of legal obligation we must turn to a situation that includes the existence of social rules for 'this situation contributes to the meaning of the statement that a person has an obligation in two ways.'[338]

a. the existence of rules making certain types of behaviour standard are the normal though unstated background for making statements of obligation.

[338] Hart (n2) 85.

b. the distinctive function of such a statement of obligation is to apply such a general rule to a particular person by calling attention to the fact that his case falls under it.[339]

Here, a lot hinges on what Hart means by 'existence of rules making the behaviour a standard'. The rule that makes the behaviour a standard is the ultimate rule of recognition, as it is only rules identified in accordance with the rule of recognition that qualify as primary rules. Hence, statements of legal obligation are statements pointing out that what is required of a person falls under a rule, 'identified' by the rule of recognition.

> The use of the unstated rule of recognition, by courts and others, in identifying particular rules of the system, is characteristic of the internal point of view. Those who use them in this way manifest their own acceptance of them as guiding rules and with this attitude goes a vocabulary different form the natural expressions of the external point of view. Perhaps the simplest of these is the expression, "It is the law that…" [340]
>
> Statements of legal validity made about particular rules in the day to day life of a legal system made whether by judges , lawyers or ordinary citizens…are internal statements of law expressing the point of view of those who accept the rule of recognition.[341]

The rule of recognition is constituted by the practice of officials.[342] Statements of legal obligation convey what is required by (primary) rules deriving their validity from the rule of recognition.[343] According to Hart, one could say that a legal

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[339] ibid; Even the phraseology Hart uses here, resembles that of Hare.

[340] ibid 102.

[341] ibid 108; For a further discussion of the relationship between legal statements and the internal point of view see Chapter V.

[342] ibid 114.

[343] Legal statements are thus truth-apt. They can be true or false depending on whether rule they purport to convey is valid according rule of recognition. The have a world-to-mind direction of fit. Performativism, it will be recollected, struggled to account for this feature of legal statements.

obligation exists when there is a rule, identifiable by the rule of recognition, which is grounded in shared official practices, *requiring* a certain action from the subject, and that the subject's case falls within such a rule. It is the law that P has a legal obligation to Ø IFF:[344]

a. P is a subject of the legal system G;
b. There is a rule (R) in G that specifies in effect that if anyone is in circumstance C; they must either Ø or not Ø as the case may be;
c. R is valid according to the rule of recognition of the system G;
d. P is in circumstance C.

We could now turn to consider how Hart's norm-relativistic analysis of legal statements succeeds in proposing an alternative to moral descriptivism that does not collapse into reductionism. Hart's account is grounded on an 'empiricist' social base—that of the rule of recognition which is practised by legal officials. For Hart, the socially practised rule of recognition played the crucial role of detaching the legal obligation from any objective moral reason. A statement of legal obligation conveys what is required by a rule deriving its validity from the officially practised rule of recognition. From the statement 'It is the law that X has an obligation to Ø' it does not follow that 'X has a moral obligation to Ø'. A statement of legal obligation, according to Hart, does not purport to state any objective moral reasons for action. Therefore, statements of obligation, according to Hart, did not have the same meaning in legal and moral contexts.[345] Hart argued that Raz's moral descriptivism entailed the view that making a statement of legal obligation was tantamount to

[344] For a similar reading of Hart' analysis of statements of legal obligation, see Michael Martin, *Hart's Concept of a Legal System* (Philadephia1987) 38, 39.
[345] Hart, Essays on Bentham (n 12) 133-34.

making a moral judgment.[346] Hart firmly resisted this view. As statements of legal obligation, according to Hart, are norm-relative statements, they do not necessarily entail moral motivational endorsement on the part of the agent uttering them, in the way that moral statements do.[347] Hart's norm-relativist account helps conserve a significant element in the phenomenology of legal statements. It was argued in Section III, that legal statements can be combined, without any paradox, with their disavowals. Hart's norm-relativist account of legal statements explains this feature. From the discussion in Chapter II, it will be recollected that norm-relative statements do not necessarily entail moral motivational endorsement on the part of the agent uttering them, in the way that moral statements do and hence can be combined without any paradox with their disavowals. A norm-relativist about legal statements could agree with the reductionist that a legal statement is not a statement about (objective) moral reasons; and yet object to the reductionists' stripping away of 'normativity' in their account of legal statements. Rather than propose a reduction of 'normative' terms like 'obligation',' right', 'duty' etc., the legal norm-relativist argues that these terms are used in a non-moral yet 'normative' sense in legal statements.

Timothy Endicott fears that Hart's semantic model is inadequate because it leaves unexplained the nature of the difference between legal and moral obligation *qua* 'normative' requirement. He complains that, consequently, Hart has nothing whatsoever to say about the meaning of normative expressions in legal statements.[348]

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[346] ibid 159-60.

[347] As a result the norm-relativist model of legal statements does not need the idea of detached normative judgments which is so crucial to the success of Raz's semantic model.

[348] Note, Raz raises a more fundamental objection revolving around the same basic theme which we will encounter in Section VIII.

> According to Hart, the meaning of normative language differs in morality and in law, but he never explained the difference. In fact, Hart had nothing to say about the *meaning* of normative expressions such as 'ought' and 'must' or 'obligation' or 'right' (except that their meaning differs in law and in morality).[349]

Endicott then suggests, 'How much simpler it would be to say that normative language means the same in its moral uses and in its legal uses'. In other words, Endicott invites Hart to embrace moral descriptivism of the Razian variety. Endicott's objection, it is feared, overlooks the fact that there is *not* just one kind of 'normative' statement; and contrary to his argument, Hart did have something important to say about the meaning of these 'normative' expressions. Endicott's objection seems to be premised on the assumption—which he shares with Raz—that the only kind of 'normative' statement is a moral statement. In Chapter II, it was argued that it is not just moral statements which are 'normative' but so are norm-relative statements.[350] It was also argued that given the elasticity inherent in the idea of 'normative', there is a bewildering variety of 'normative' statements which are neither norm-relative nor moral statements—for instance statements conveying recipes in cookbooks are also treated as 'normative' in the wide sense of the term. The characteristic use of norm-relative statements is to convey what is required by a socially practised rule.

On Hart's semantic model, statements of legal obligation being norm-relative statements are deontic or practical as they convey 'requirements'; they *do* pick out some action which is 'required' of the hearer to comply with some socially current

[349] T. Endicott 'Law and Language' (n 308).

[350] See discussion in Chapter II.

standard. Thus, contrary to Endicott's arguments, there is a clear sense in which a statement can be normative and not moral; and that is the norm-relative sense. In the wider philosophical community, few see anything problematic in norm-relative statements being 'normative'. In fact some go even further and regard it as almost a trite truism that statements of legal obligation are norm-relative statements.[351] For Endicott's objection to have purchase against Hart's thesis, he would have to establish *why* 'normative' expressions appearing in ordinary norm-relative judgments like statements conveying standards of etiquette or statements conveying standards of grammar are to be understood in the moral sense. Or, at the very least establish why legal statements by their very nature have to be understood as conveying moral judgments. Endicott, I am afraid does neither. In the next Section, we will see that Raz raises a more fundamental objection against Hart's semantic model revolving around the same basic themes that Endicott touches upon.

VII

Raz *Vs.* Hart on the Nature of 'Normative' Statements

Raz has remained unconvinced of Hart's semantic model and the latter's insistence that normative expressions are used in a different sense in legal and moral contexts. Raz fears that Hart's internal legal statements, unless they are understood as making moral claims (read: moral descriptivism), would lack a 'normative' character. He argues that to understand legal statements as 'normative' we must

[351] Copp (n 140) 10.

necessarily understand them as moral statements. We will now defend Hart's norm-relativist model of legal statements from Raz's objections.

In *Authority of Law*, Raz fears that Hart's analysis of statements of legal obligations, as it stands, doesn't move much beyond Bentham's reduction.

> The Benthamite answer was to deny that they[legal statements] are normative utterances 'X has a duty to θ' means that X is liable to sanction if he does not θ' … later positivists admitted that 'law' 'duty' 'right' etc have their normative uses but assumed that they carry a purely factual sense when qualified by the adjective 'legal'… But this is essentially nothing more than a more sophisticated version of Bentham's view. [352]

Raz argues that reductionism is doomed to failure because fails to capture one crucial feature of legal statements, namely, legal statements are 'deontic or practical' in that, they, 'are used to demand and justify action and thus function in discourse and argument in ways in which no theoretical statements could'.[353] The 'later positivists' who Raz alludes to in the above passage, also includes Hart. Raz fears that Hart's model of statements of legal obligations, notwithstanding Hart's claim to have provided a 'normative' account, doesn't move beyond reductionism. He argues for this conclusion in the following manner. He begins with Hart's bipartite division of legal statements, namely internal and external;

a. Internal statements: Raz points out that Hart's internal statements are those applying the law using it as a standard of by which to evaluate criticize or guide behaviour. Making internal statements signals endorsement of the rule by the

[352] Raz, *The Authority of Law* (n 193) 154.

[353] ibid 53.

speaker. He acknowledges that for Hart however this endorsement need not be moral; the speaker can accept it for any reason 'or no reason at all'. In other words Hart's internal statements do not convey any moral claims made by the speaker.[354]

b. External Statements: Raz then points out that Hart's external statements about the law are statements of people's practices and actions. They are theoretical statements of fact, and echoing Hart, Raz argues that they are irrelevant to the explanation of normativity or use of normative language in the law. [355]

Raz then goes on to argue that the Hart's idea of internal statements is flawed in so far as he insists that they do not involve any moral claims by the speaker. He argues that internal legal statements cannot *but* involve moral claims made by the speaker. Raz argues normative expressions 'are used in the same sense in legal and moral contexts'.[356] But why does Raz think that legal statements necessarily involve moral claims? Raz has the following explanation stressing on the fact that 'much legal discourse concerns the rights and duties of others':

> While one can accept the law as a guide for one's own behaviour for reasons of one's own self-preferences or self-interest one cannot adduce one's preferences or one's self-interest by themselves as a justification for holding that other people must, or have a duty to, act in a certain way. To claim that another has to act in my interest is normally to make a moral claim about his moral obligations.[357]

[354] ibid 154.

[355] ibid.

[356] ibid 153-155.

[357] Raz, 'Purity of the Pure Theory' (n280) 249 (emphasis added).

> None of them nor any combination of them is likely to explain the widespread use of normative language in legal discourse… it [is] impossible to resist the conclusion that most internal…legal statements, at any rate those about the rights and duties *of others*, are moral claims'.[358]

For the reasons he sets out in the above passages, Raz argues that Hartian internal statements (statements of legal obligation) *must* involve moral claims by the speaker. A closer examination of the above quoted passages, particularly the first one, reveals that Raz denies Hart's internal legal statements the status of 'normative' statements because internal legal statements are meant to require others to do things 'categorically', that is to say, regardless of whether the required action falls within the purview of the addressee's interests and goal directed behaviour; and presumably according to Raz, the only statements that can require others to do things 'categorically' are moral statements. Raz never spells out explicitly why he believes that moral prescriptions alone can 'categorically' require the addressee to do something. We will here attempt to lay bare the assumptions underlying Raz's position. Prescriptions that *apply* to the addressee irrespective of whether the required action falls within the addressee's goal directed behaviour are termed as 'categorical'. Categorical prescriptions are thought to require others to do something, regardless of the addressee's desires and preferences. Moral requirements are thought to be the paradigm of categorical prescriptions. These categorical requirements are contrasted with hypothetical requirements, which do not *apply* to the addressee unless the prescription comes within the latter's goal directed behaviour. Raz's argument seems to be predicated on the assumption that the only kind of statement that *applies* to the addressee categorically—not just the speaker alone—are moral statements. The only categorical statements that Raz admits of, are

[358] ibid.

moral ones. This would neatly explain his objection that internal legal statements would have to be understood as moral statements, if they are to be applicable to others at all. This objection that Raz raises is nothing but an appeal to moral descriptivism. In Raz's cognitivist metaethic, making a moral claim is nothing but purporting to describe some objective moral facts and properties. Hence Raz says, in effect, that Hart's theory is flawed in denying moral descriptivism. Without moral descriptivism, Hart's account will be nothing but reductionism in disguise. Raz's argument here is that the only possible 'deontic', 'normative' statement is the moral one. This is not an entirely novel diagnosis of Raz's assumption. Kevin Toh has argued to the same effect. According to Toh, Raz assumes that 'only those statements that are used to attribute some normative facts can purport to give objective or categorical reasons'. [359] Raz's assumption is that only moral statements (as understood by a cognitivist/ moral descriptivist) could ever be categorical and normative.[360]

Raz denies that norm-relative statements are normative because he thinks that only moral statements can be 'normative', being categorical statements that *apply* to others regardless of whether the required action falls within the purview of the addressee's interest or goal directed behaviour. Raz must then assume—though he never explicitly articulates such an assumption—that norm-relative statements are not 'normative' because they do not apply to others regardless of whether the required action falls within the purview of their goal directed behaviour.

[359] Toh, 'Raz on Detachment' (n 11).

[360] Toh then goes on to argue that non-cognitivist moral statements can also be categorical. Toh's idea that internal legal statements are non-cognitivist moral statements will be dealt with in Chapter VII.

I think that little fault can be found with Raz's assumption in so far as he holds that internal legal statements are 'categorical' and any plausible semantic model must conserve that idea. But the other limb of Raz's assumption, namely, that moral statements *alone* are categorical, is questionable. It will be argued here that norm-relative statements are also 'categorical' and hence Raz's opposition to them is not well founded. Now, is there any test for determining whether a given statement conveying a requirement is categorical as opposed to merely hypothetical? There is, I submit, one such test—one suggested by Philippa Foot echoing Wittgenstein—it will be called the 'retractability' test.[361] We shall turn to the retractability test in a moment. But before that, let us briefly examine a contemporary philosopher, Anandi Hattiangadi, who holds that norm-relative statements are not categorical; but are hypothetical instead.[362] She fleshes out the categoricalness of moral judgments by agreeing with J.L.Mackie, that moral judgments are supposed to *apply* to an addressee regardless of his desires and goals.[363] She argues that this feature is lacking in judgments of norm-relativity as there they do not apply to addressees regardless of their actions desires and goals. At one place she argues 'to say that moral principles are categorically prescriptive is to say that they… give us sufficient reason to act, independently of our desires. In contrast, just about any fact can give me a non categorical reason to act, given the right desires.' Norm-relative requirements, of which rules of grammar and etiquette are paradigm instances, are thought by Hattiangadi to be applicable only if they are ancillary to a person's ends and goals. Foot has interesting—and in my opinion, decisive—objections against such a view. To appreciate Foot's objection we must now turn to the retractability test.

[361] Foot (n76); Wittgenstein (n 46).

[362] Hattiangadi (n 133).

[363] Mackie (n 32).

On the retractability test, those requirements which the speaker would have to 'retract' or 'withdraw' on knowing that they simply do not come within the goal directed behaviour of the addressee are classified as hypothetical; and those the addressor of can press on without retraction, even on learning that the prescription does not come within the goal directed behaviour of the addressee, are 'categorical' prescriptions. Let us quickly examine how the test works in practice.

Imagine A and B waiting at the Oxford train station. A assumes that B wants to go to London. So when the train to London arrives, A tells B, 'you ought to take that train'. Now if B replies to A, 'I don't want to take that train because I do not want to go to London', A would have to retract his prescription by saying something like 'it is alright then', or 'sorry, I didn't realize you didn't want to go to London'. A's prescription here was meant to apply to B on the assumption that she wanted to go to London. The fact that the prescription falls beyond the scope of the B's goal directed behaviour is enough for the prescription to not apply, and a good ground for A to retract the prescription by uttering something along the lines of 'it is alright then'. It would be most odd if A insisted that B take the train to London regardless of her preference in the matter. Here, we find a statement conveying a hypothetical requirement, which the speaker must retract, if the required act falls beyond the scope of the addressee's goal directed behaviour.

In the case of statements conveying moral requirements—which are indisputably categorical—this picture dramatically changes. That a moral prescription doesn't fall within the addressee's goal directed behaviour is never considered ground enough for the prescription not to apply to the addressee. Now, if A tells B that torturing

kittens is wrong, and if B replies, 'but I like torturing kittens and I want to', A would be entitled to stand his ground and it would be most odd if A said 'it is alright then', or 'sorry I didn't realize you relish torturing kittens'.[364] This is the case with moral requirements because they are categorical; they apply to the addressee, regardless of the addressee's goal directed behaviour, likes and dislikes; the same cannot be said of hypothetical requirements.

No one really doubts that moral requirements are categorical i.e. applicable to others regardless of the addressee's goal directed behaviour and likes and dislikes. But what about norm-relative requirements like those of etiquette or even the rules of a club? Are these categorical or hypothetical? Raz's view entails that these cannot be categorical because they do not *apply* to a person other than the addressor, moral ones alone do. But Foot has a convincing argument against such a treatment of norm-relative requirements and that involves use of the retractability test.

> Here is a non-hypothetical use of "should" in contexts where something like a club rule is in question. The club secretary who has told a member that he should not bring ladies into the smoking room does not say, "Sorry, I was mistaken" when informed that this member is resigning tomorrow and cares nothing about his reputation in the club. Lacking a connection with the agent's desires or interests, this "should" does not stand "unsupported and in need of support"; it requires only the backing of the rule. The use of "should" is therefore "non-hypothetical" in the sense defined...It follows that if a hypothetical use of "should" gives a hypothetical imperative, and a non-hypothetical use of "should" a categorical imperative, then "should" statements based on rules of etiquette, or rules of a club, are categorical imperatives.[365]

Foot argues that even statements conveying what is required by a club rule are not retractable. They apply regardless of whether a person wants them to or not. In that sense, they are just as 'categorical' as statements conveying moral requirements are

[364] See Wittgenstein (n 46) 5.
[365] Foot (n 76) 308.

supposed to be. From this, Foot concludes that requirements of grammar or etiquette are just as 'categorical' as that of morality. Foot's argument could be extended to all statements conveying norm-relative requirements. This tells directly against Hattiangadi's argument—and *mutatis mutandis* against Raz's assumption as well—that moral statements are categorically prescriptive whereas norm-relative statements are only hypothetically prescriptive. Foot concludes by pointing out that both norm-relative and moral statements are 'normative' and categorical: 'Moral judgments are normative, but so are judgments of manners, statements of club rules, and many others…The behaviour [in both cases] is required, not simply recommended…'.[366]

Norm-relative prescriptions—and Hart's internal legal statements are norm-relative statements—apply to others 'categorically'. Norm-relative statements are categorical practical and deontic. It is not just moral statements which have such categorical application. Raz overlooked the categorical nature of norm-relative statements altogether and this was what prompted him to argue that internal legal statements must involve moral claims and hence be morally descriptivist statements that purport to describe objective moral facts and properties.[367]

[366] ibid 310.

[367] Raz, however, doesn't rest here. After having argued that internal legal statements are moral statements in 'Purity of the Pure Theory' he goes on to argue that this causes a problem for Hart's legal positivism unless Hart admits detached internal statements of the sort that Raz had argued for. Without it, Hart would have to concede, says Raz, that all internal statements express the speaker's endorsement of law: n (280). Detached statements are meant to rescue Hart from that predicament. Endicott, agreeing with Raz, says that detached internal statements crucially fill a 'gap' in Hart's account. But this is a problem for Hart only if his internal legal statements must necessarily be understood as moral statements. A norm-relativistic model portrays legal statements as normative without being moral. They can be uttered by speakers without any moral endorsement of the rule- just like any other norm-relative statement. Hence, Hart does not need any idea of detached normative statements—a moral descriptivist alone needs them. As such, there is no 'gap' in Hart's account that needs to be filled by the idea of detached statements as Endicott claims.

Before moving on, we must consider another interpretation that could be given to Raz's objection that statements of legal obligation are necessarily morally descriptivist statements. This interpretation would have Raz arguing along the following lines. As legal requirements affect people in morally significant ways, statements conveying legal requirements are to be understood as morally descriptivist statements. Marmor advances just such an argument. [368] Marmor, unlike Raz though, has no difficulty in admitting that moral statements are not the only kind of 'normative' statement. He readily agrees that statements conveying rules of etiquette and the rules of a game are also 'normative'. However he argues, that statements conveying legal requirements cannot be understood in the same sense that we understand statements conveying rules of etiquette and the rules of a game because legal requirements unlike the requirements of a game and etiquette affect people in morally significant ways. Marmor then argues that since legal requirements affect people in morally significant ways, we must understand them as making moral claims. Thus, in effect, Marmor argues for moral descriptivism; as legal requirements make moral claims, statements conveying legal requirements are to be understood as moral statements. In Marmor's cognitivist world view—on which he agrees with Raz—this translates to the claim that legal statements are morally descriptivist statements. [369] While little fault could be found with Marmor's argument that the law affects us in morally significant ways, it does not follow that any requirement that affect us in morally significant ways are necessarily moral requirements; and statements conveying them moral requirements. Of all possible norm-relative requirements, Marmor restricts himself to just two: statements conveying

[368] Andrei Marmor, *Positive Law and Objective Values* (OUP 2001) 25-27.

[369] John Gardner makes a similar claim about legal requirements. 'How the Law Claims, What the Law Claims' Oxford Legal Research Paper Series 44/2008. <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1299017> (retrieved on 1 October 2012).

requirements of etiquette and rules of a game. There is little doubt that these requirements do not affect us in morally significant ways. However, as discussed in Chapter II, there could be norm-relative requirements like codes of honour, caste rules and the like that *do* affect us in morally significant ways. And yet, statements conveying requirements of the rules of caste or codes of honour are not morally descriptivist statements (even if one were to assume a cognitivist standpoint).[370] They would still remain norm-relative statements conveying what is required to conform to socially practised standards. There is no contradiction whatsoever in arguing that legal requirements are socially practised standards and that they affect us in morally significant ways. There is also then no contradiction in claiming that legal requirements affect us in morally significant ways and that statements conveying them are not moral statements.

VIII

Semantics, Metaethics and Symmetry

It is of some significance to consider why the semantic model of legal statements adopted by the theorist restricts her choice of model of moral bindingness. The semantic model of legal statements is an essential ingredient in an account of 'normativity of law'. Any metaethical position—and any account of moral bindingness of law does entail taking a metaethical position—is a combination of *semantic*, *ontological*, *epistemological* and *psychological* theses. The semantic thesis

[370] Statements conveying such requirements would manifest the phenomenology of norm-relative statements; they would not manifest the phenomenology of moral statements.

assumes a pivotal role in defining the possible shape a theory of bindingness could assume. For instance, consider cognitivism. The semantic thesis which the cognitivist camp upholds is *moral descriptivism*: the thesis that moral statements purport to denote objective moral facts and properties. This initial semantic assumption sets the shape for the other commitments. For, if a moral statement is descriptivist then it is truth apt; the state of mind that accompanies a truth apt judgment is belief (the psychological thesis of cognitivism) and these give rise to the ontological question of what could make these judgments true—involving a thesis on the nature and existence of these moral facts and properties. Given this centrality of semantics to metaethics (and accounts of bindingness of morality), it is only natural that semantics should also play a central role in explanations of moral bindingness of law.[371] Some semantic accounts of statements of legal obligation are symmetrical with one of the two models of bindingness (namely, the impinging and projectivist accounts).

The semantic model of moral descriptivism (which is the *legal* counterpart of moral descriptivism in ethics) aligns itself symmetrically with the impinging model of bindingness of law. Moral descriptivism is premised on the assumption that the only plausible way to go about explaining the presence of ethical terms in legal statements(statements of legal obligation) is to *accept* their equivalence *qua* meaning; that expressions like 'obligations', 'right', 'duty', etc., in legal statements are used in the same sense in which they are used in moral statements. This would

[371]This is not to suggest that the semantic is more basic than other commitments, such as the ontological one. Arguably, no ordering amongst them in terms of priority is possible. In fact, at times there is no way of carving up these questions in such neat pigeon holes at all. However, typically modern metaethicists begin with a discussion of semantics and in a paradigmatic metaethical account all other commitments else *seems* to follow from this initial assumption. As Simon Blackburn argues, these commitments form a triangle and which of the elements of the triangle are emphasized is largely dictated by the dominant philosophical outlook of the day: Blackburn, *Spreading the Word* (n 51) 3-4.

amount to claiming that when a speaker says 'legally you ought to X' she thereby means to say that 'morally you ought to X'. As this is so, the semantic structure of legal statements must be identical to moral statements. This leads to the idea—which mimics the semantic account one finds in all cognitivist accounts—that legal statements purport to denote objective moral facts and properties. Moral descriptivism, by virtue of its close affinity with cognitivism, aligns itself exclusively with the impinging model of normativity. The impinging model has it that legal statements conveying legal requirements purport to describe objective moral properties and legal requirements are binding when they successfully do so. The nature of the truth maker—which makes these requirements truly binding—need not concern us here. The truth maker could assume a variety of forms, depending on the ontological commitment of the theorist.

The projectivist model, in sharp contrast to the impinging model, claims that the moral bindingness of law comprises in subjects taking an *attitude* of approval to it. This necessarily puts the projectivist model in opposition to the idea that legal statements purport to represent some objective moral truth. The projectivist would have to find a way of denying the moral descriptivism of the impinging account in order to set a projectivist account off the ground. If the projectivist concedes this initial semantic argument to the impinging theorist, the prospects of a plausible projectivist theory are obliterated. For instance, if the aspiring projectivist, accepting moral descriptivism, agrees that legal statements purport to denote objective moral properties, then it would amount to conceding that a legal requirement would be morally binding *only* if the objective moral facts and properties that the legal statement purports to represent indeed exist; bindingness must then necessarily

mean the justification of the legal requirement in question, in relation to moral truths, as the cognitivist understands them. Should ontology permit such entities as moral facts and properties to exist, it would yield a successful impinging account of bindingness. Should ontology not permit moral facts and properties, it would result in an error theory. Now, projectivists uniformly deny the existence of moral facts and properties, hence the only real theoretical option open to them would be error theory of bindingness of law; an error theory of bindingness of law would be one which states that legal statements purport to represent objective moral facts and properties but denies that legal requirements could *ever* be morally binding because it does not admit the existence of such moral facts and properties.[372] *Qua* moral bindingness, it should then be irrelevant whether or not the subject takes an attitude of approval to the legal requirement, because what makes it binding would be what justifies it—the subject's attitude of approval would then have to be treated as *not* constituting the moral bindingness of law. In other words, the path which begins with the acceptance of moral descriptivism necessarily ends with a denial of projectivism. For a projectivist to accept moral descriptivism of legal statements would be no less incongruous than for a non-cognitivist to accept moral descriptivism of moral statements. Just as a non-cognitivist has to deny that moral statements are morally descriptivist, a projectivist must deny that legal statements are morally descriptivist. Hart argued that it would be odd for someone who claimed that moral statements were not morally descriptivist, to claim that legal statements were morally descriptivist. [373] Now, as projectivists being non-cognitivists deny that moral

[372] There is some evidence to suggest that Axel Hagerstrom, at least at some places, endorsed an error theory about statements of legal obligation. Accordingly, he thought that legal concepts involved belief in superstition and magic: Mindus (n 226) 81-85.

[373] Hart, *Essays on Bentham* (n 12) Chapter X; Von Wright also claims that non-cognitivists deny moral descriptivism about legal statements: Von Wright, 'Is and Ought' (n 200).

statements are descriptivist, they would necessarily have had to deny that legal statements were morally descriptivist. Indeed, historically, projectivists have set out their accounts of 'normativity of law' by denying moral descriptivism. Alf Ross and Olivecrona have professed semantic models that deny moral descriptivism. Alf Ross combined his projectivist model with a reductionist semantic model. [374] Olivecrona combined his projectivism with performativism.[375]

It is worth stressing that denying moral descriptivism gets the projectivist only so far as clearing one hurdle. It gives the theorist a semantic model that will not directly undermine her projectivist model of normativity *qua* moral bindingness. But the semantic model must also fulfil the other *desiderata*: the account must explain the use of 'normative' language in legal statements and it must conserve and make sense of the phenomenology of legal statements. This is where the alternatives to moral descriptivism professed by the Scandinavian Legal Realists faltered. Ross's reductionism suffered the fate that other reductionist accounts did; it failed to portray legal statements as 'normative'; and Olivecrona's performativism failed to conserve the phenomenology of the practical use of legal statements, as discussed in Section V.

[374] Alf Ross, *Tu Tu* (1957) 70 Harvard LR 812.

[375] Olivecrona, 'Legal Language and Reality' (n 229)151, 164.

IX

Projectivism and the Semantic Project

For reasons considered in the preceding section, the projectivist would necessarily have to deny that legal statements are normative in the same sense as moral statements are. A complete projectivist account of normativity would thus have to comprise two projects:

a. Semantic*:* Establishing how legal statements are 'normative' without being moral statements in either the cognitivist or non-cognitivist sense;

b. Metaethical*:* Establishing how legal requirements come to be morally binding by pointing to the non cognitive attitude of moral approval taken by agents towards legal requirements.

The *semantic* project has proved to be especially challenging for the projectivists. The work of the Scandinavian Realists, who were the pioneers of the projectivist model of 'normativity of law', offers a promising account of how the second of the above projects—namely, the metaethical—could be brought to fruition, though it fares poorly in relation to the semantic project. It is only in the work of Hart that one finds a systematic and sound semantic model that symmetrically aligns itself neatly with the projectivist's metaethical model of bindingness of law. Hart's semantic model of norm-relativism portrays legal statements as norm-relative statements which are 'normative' without being *moral* statements.

Our discussion in this chapter has another payoff. It serves to dispel some common misconceptions about Hart's semantic model, which are currently in vogue thanks to Kevin Toh's purported 'expressivist' reconstruction. It may be thought, along the lines Toh has argued, that the most obvious way to read Hart, so as to yield an account of 'normativity of law' along projectivist lines, would involve arguing that Hart's internal legal statements were non-cognitivist or *expressivist* moral statements, expressing the speaker's *attitude* of approval of the law. However, as we have considered that this route is far from being either obvious or sound. Indeed, as an exegesis of Hart, it is clearly flawed.

Chapter V

HART'S NORMATIVITY AND THE INTERNAL POINT(S) OF VIEW

I

Introduction

In earlier chapters, it was argued that a holistic projectivist account of the 'normativity of law' comprises of two distinct but closely related projects: one semantic and the other, metaethical. In the present chapter, it will be argued that there are elements in Hart's scheme which naturally lend themselves to the second of the above projects—namely, establishing how legal requirements come to be morally binding or normative or authoritative, by pointing to the non-cognitive attitude of moral approval taken by agents towards legal requirements. The present chapter sets out, aligns—and where appropriate, emends—these elements in Hart's account in a fashion that yields a coherent *projectivist* model of moral bindingness of law.[376] Conspicuously absent from Hart's criticisms of Scandinavian Legal Realists is any mention of, let alone critical engagement with, their projectivist model of the 'normativity of law'. All of his influential criticisms of Scandinavian Legal Realism notwithstanding, there can be found a striking resemblance between the account of the 'normativity of law' that Hart was arguing for and the projectivist model the Scandinavian Legal Realists had pioneered. It will be argued that many of Hart's thoughts on the 'normativity of law' can only be squared with a projectivist model of normativity. The reading of Hart proposed here would have us place him in the projectivist camp alongside the Scandinavian Legal Realists.

[376] In this chapter 'normativity', 'normative' and 'authority' will be used in the 'metaethical' sense of moral bindingness. On the occasions when the semantic concept of 'normativity' is being invoked, I will specifically mark it out as such.

II

Apollo or Dionysus : Hart's Metaethical Ambivalence

> "I have the dim… outline of this book in my mind…One side saying: you are blind. The other: you are seeing ghosts."[377]

The above quotation comes from Hart's notebook, from which *The Concept of Law* emerged. Which are the two sides that Hart imagined admonishing him? We are to learn from Hart that the two were the opposed metaethical camps seeking to explain the nature of morality. 'One side' stood for the cognitivists who Hart says, assert the existence of 'immutable principles constituting part of the fabric of the universe, not made by man, but awaiting discovery by the human intellect'. 'The other' side was the non-cognitivists who deny the existence of such moral truths by asserting that moral judgments are 'expressions of changing attitudes, choices, demands and *feelings*'. [378] As Simon Blackburn metaphorically puts it, the one side asserts that our moral judgments are the children of Apollo, the god of reason; and the other asserts that our moral judgments are the children of Dionysus, the god of passion, involving as they do, passion, sentiment or 'feelings', as Hart himself put it.[379] The cognitivist Apollonian camp has an *impinging* picture of morality whereby moral truths *impinge* on us. The non-cognitivist Dionysian camp argues that we *project* our

[377] Lacey (n1) 222.

[378] Hart, *The Concept of Law* (n2) 168.

[379] Blackburn, *Ruling Passions* (n 79) 84-91.

sentiment passion onto the world as moral judgments.[380] The Apollonian camp accuses the Dionysian camp of blindness to moral truths with the latter retorting that the former has been seeing ghosts all along.

Which of the two sides did Hart eventually throw his lot with? Crucial as the question is, it does not admit of a straightforward answer. If Hart is to be taken at his word, we would have to say that he remained non-committed on the issue. Just after setting out the two positions, he declares his metaethical non-alignment: 'in what follows we shall seek to evade these philosophical difficulties'.[381] Even as late as 1982, in *Essays on Bentham,* he declares that he remains non-committed on the metaethical front.[382] At places, Hart seems to abandon his metaethical non-alignment and take a direct stand on the issue. In *The Concept of Law*, Hart suggests that the Apollonian picture is deeply flawed; he argues, 'the claim that there are true principles of right conduct, rationally discoverable…is in many ways antithetic to the general conception of nature which constitutes the framework of modern secular thought'.[383] Does this mean that he would have favoured the Dionysian picture of morality? It is hard to tell, for though he says nothing against the non-cognitivist view in *The Concept of Law*, in *Legal and Moral Obligation* (1958) Hart notes that Richard Hare's variant of the Dionysian picture is too 'protestant' a position.[384] In fact, this metaethical theme plays out right through Hart's works over the following

[380] Blackburn, *Spreading the Word* (n 51) 181- 182.

[381] Hart (n2) 168.

[382] Hart (n12) 159- 160.

[383] Hart (n2) 186.

[384] H.L.A. Hart, 'Legal and Moral Obligation' in I.E. Melden (ed.), *Essays in Moral Philosophy* (University of Washington Press 1958) 82, 100.

quarter of a century, the very last publication in his lifetime. [385] All said and done, we would have to conclude that Hart never took a firm stance on this issue.

Nevertheless, it will be argued in the present chapter that with the idea of the *internal point of view*, Hart was trying to develop a model of authority or normativity that can only be understood along projectivist lines. Hart held that the authority or 'normativity of law' was to be explained by the stance taken by an agent towards the law, which he referred to as the 'internal point of view'. In other words, Hart thought that this subjective stance towards the law was the source of authority. It will be argued that such a position would be incongruous with the impinging model of 'normativity of law'. The only metaethical model on which a stance towards the law would be a source of authority or normativity is the projectivist model. The 'internal point of view'—which Hart, at places, describes as taking the law as *reason* for action—I argue, would have to be understood as a non-cognitive attitude of approval of the law; indeed, it lends itself to be understood as such.

My argument is *not* that Hart endorsed projectivism. To be sure, he professedly shied away altogether from any metaethical commitment. In fact, Hart never admitted that the stance involved in the internal point of view was a moral one, let alone a non-cognitivist one. Rather, I argue that it is only by attributing projectivism to Hart, that his idea of the internal point of view can be made to yield an *intelligible* account of normativity or authority or moral bindingness of law. As such, it will be argued that we would have to *attribute* non-cognitivism/expressivism to Hart in

[385] Hart, 'Who can tell right from Wrong?' (n 113) 49-52.

order to bring to fruition his model of authority, though he himself never took a firm metaethical stance.

There is, however, a significant hurdle in the way of understanding the internal point of view as expressing an attitude of approval of the law. The internal point of view for Hart is a constituent element in the existence conditions of a legal system.[386] If the internal point of view were to *necessarily* involve moral approval of the law—and a non-cognitivist attitude does *necessarily* involve an attitude of moral approval—it would jeopardize the existence conditions of legal systems. Thus, it could quite understandably be feared that a non-cognitivist/expressivist reconstruction of Hart which involves arguing that the internal point of view is a non-cognitivist attitude of approval of the law is a non-starter.

How then does one account for the normativity (moral bindingness) of law in Hart's works along projectivist lines, if not through the idea of the internal point of view? I argue this would only be possible if we are able to locate in Hart's work another version of the idea of the internal point of view which, while involving an *attitude* of moral approval, does not make up a constituent element in the existence conditions of a legal system. It may seem that we would have to fabricate a custom-made version of the internal point of view in order to fit the above requirements. However, I argue that no such fabrication is needed because *two* rather different versions of the internal point of view, performing different theoretical roles, can be found in *The Concept of Law*.

[386] As we will see in Sections 4.2 & 4.3, more precisely, the internal point of view is the constituent of the existence conditions of the rule of recognition. Nothing of significance turns on whether we treat it as the constituent of the existence conditions of legal systems or of the rule of recognition.

III

Two Versions of the Internal Point of View

I argue, contrary to the received wisdom, that Hart has *two* versions of the internal point of view. One is the norm-relative internal point of view; and the other, the moral or practical reasoning internal point of view. Any insider who is *cognizant* of legal rules has the norm-relative internal point of view and can make internal legal statements, his moral stance and attitudes towards the law, notwithstanding. This norm-relative version of the internal point of view is the constituent of the existence conditions of a legal system. This fits in perfectly with Hart's semantic position that internal legal statements [statements made from the internal point of view] are norm-relative statements not necessarily involving any moral commitment.[387] The norm-relative internal point of view does not entail any moral commitment on the part of the insider. The *other* version is the moral or practical reasoning internal point of view (hereafter, PR internal point of view) which only insiders taking an *attitude* of approval towards the law have. It is the latter, I argue, which involves is a non-cognitivist moral stance constituting the source of normativity or authority.

Sieving out these two versions of the internal point of view is central to unlocking Hart's account of the 'normativity of law'. Accomplishing this would necessitate a close reading of Hart's text. For all its liberal use by Hart and

[387] See discussion in Chapter IV.

unhesitant references to it by Hart's commentators, the exact connotation of the phrase 'internal point of view' is fiendishly difficult to pin down. We are not helped much by Hart who uses the phrase in different senses on different occasions, without doing much in the way of alerting the reader to the variations in meaning.[388]

In Sections 4.1 to 4.5, the two versions of the internal point of view will be sieved out and their respective roles in Hart's scheme set out. The norm-relative internal point of view, it will be argued, is the constituent of the existence conditions of the rule of recognition and the moral or the PR internal point of view is the source of authority. Hart, however, appears to deny that the PR internal point of view is a moral stance at all. It will be argued that denying the practical reasoning internal point of view to be a moral stance would be tantamount to rendering otiose the entire distinction between the internal and external points of view, which Hart takes to be of great importance; and eventually scuttle any hopes of the internal point of view yielding an account of authority or 'normativity of law'. Then in section VIII, it will be argued that the moral stance constituting the practical reasoning internal point of view would have to be read as a non-cognitivist attitude of approval towards the law. It is only by doing so that his idea of the internal point of view can be made to yield an *intelligible* account of 'normativity of law'.

[388] To add another wrinkle to the problem, Hart also uses phrases, that we could, for the want of a better expression, term *allotropes* of 'internal point of view'. These *allotropes* include phrases like 'acceptance of rules', 'internal aspect of rules', 'internal statement', 'voluntary acceptance' which are used mostly in tandem with 'internal point of view' and on some occasions even interchangeably.

IV

Unpacking the Internal Point of View

4.1. Internal Aspect of Rules:

Hart first introduces the *internal aspect of rules* to distinguish rule governed behaviour from habitual behaviour. Hart enquires:

> [W]hat is the acceptance of a rule…how does a habit differ from a rule? What is the difference between saying *of a group* that they have the habit e.g. of going to the cinema on Saturday nights, and saying that it is a rule with them that the male head is to be barred on entering a church? [389]

In contrasting rule governed social behaviour from habitual social behaviour, Hart notes the following *differentia*:

a. Internal Aspect: Hart says that while in case of both a rule and a social habit there is an ostensible convergence in behaviour, which he terms the 'external' aspect, the difference between the two is to be found in the *internal* aspect:[390]
   (i) In case of a rule, some must *look upon* the pattern of behaviour in question as a general standard to be followed by the group as a whole.
   (ii) In case of a social habit no member need look upon the pattern of behaviour as a standard or still less strive to maintain such behaviour.[391] Member of a group can *for his part*, behave in the way that others in fact do.

[389] Hart (n2) 55.

[390] ibid 56.

[391] 'In order that there should be such a habit no members of the group need in any way think of the general behaviour or even know that the behaviour in question is general.' Hart (n2) 56.

b. Critical reflective attitude: In following rules, members of a group regard a certain pattern of behaviour as a standard for the whole group.[392] Reflective critical attitude manifests as demands and pressure for conformity; criticisms of deviations; and acknowledgement that criticisms are legitimate.

c. Normative language: Members of the group use the normative language of 'ought', 'must' ,'should', 'right', 'wrong' etc., to convey demands and criticisms of deviations from the general standard of behaviour.

Now, how does Hart picture the 'internal aspect' manifesting in the practical reasoning of the individual agent? Hart categorically stresses that having the internal aspect does not require a *feeling of being bound* to follow the rule.[393] He says that such feelings are 'neither necessary nor sufficient' for the existence of social rules. [394] Hart also adds that 'there is no contradiction in saying that people *accept* certain rules but experience no such feelings'. [395] All that the internal aspect requires, maintains Hart, is the existence of 'a critical reflective *attitude* to certain patterns of behaviour as a common standard'.[396]

[392] ibid 57.

[393] ibid.

[394] ibid.

[395] ibid.

[396] ibid.

Hart's use of the phrase 'critical reflective attitude', in describing what is distinctive about rules, and as what differentiates having the 'internal aspect' from having 'feelings' towards a pattern of behaviour, strikes me as somewhat odd, misleading even. In the metaethical literature, an 'attitude' is treated as a conative or non-cognitive stance; and so are 'feelings' and 'emotions'. The non-cognitivists treat moral judgments as expressions of such conative 'feelings', 'attitudes' and 'emotions'. Hart specifically points out that the internal aspect does not necessarily involve any specific non-cognitive stance (i.e. feelings) towards the rule in question. In his book review of Alf Ross's *On Law and Justice*, Hart had complained that Ross, who was a non-cognitivist, errs in equating the internal aspect of rules with a non-cognitive stance of approval (feelings of being bound by the rule).[397] On Ross's account, making a judgment of what was required by a rule was tantamount to moral endorsement.[398] Hart's reiteration in *The Concept of Law* that the internal aspect of rules does not comprise in a feeling of being bound by the rule, was meant to counter Alf Ross' argument. In his explanation of the internal aspect then, the term 'critical reflective attitude' cannot be read to mean—having a non-cognitive stance of approval or endorsement towards some rule. Treating the internal aspect as a non-cognitive stance (i.e. feeling or attitude) would render his earlier criticisms of Ross and his reiteration of the same in *The Concept of Law,* incomprehensible. [399]

[397] See Chapter III for discussion of Ross's semantics and Hart's criticisms.

[398] Ross, in other words, argued that there was a *de re* fit between knowing what the law is and the agent's motivation. See Chapter II for a discussion of *de re* and *de dicto* fit.

[399] Indeed, Ross wonders in his book review of *The Concept of Law* that if the internal aspect of rules involves a critical reflective attitude, there would be nothing to distinguish Hart's position from his own; the thrust of Ross' criticism presumably being that he two—attitude and feeling—are, after all, 'conative' states: Ross 'Review' (n 9).

How then does one understand the internal aspect if not as a critical reflective *attitude*? Hart defines having a critical reflective attitude towards a rule as 'regard[ing] it as a standard for all'.[400] However, as we have just seen, 'regarding the rule as standard for all', which is meant to be distinctive about the internal aspect, cannot comprise in having a conative stance of approval towards the rule. It will be argued that what is distinctive about the 'internal aspect' of rules then, is not a 'critical reflective *attitude*', but a 'critical reflective *cognizance*'—where the agent is *cognizant* of a pattern of behaviour, as a general standard of behaviour for all, regardless of the attitudes he may happen to have towards such standards.[401] Indeed, treating the internal aspect as comprising of a *cognitive* stance rather than an attitudinal or conative one would be perfectly consistent with what Hart hopes to establish with the idea of the internal aspect. In marking out habits from rules by pointing to the 'internal aspect' as a crucial distinguishing factor, Hart argues:

> In order that there should be such a habit, no members of the group need in any way think of the general behaviour or even know that such behaviour is general... by contrast if a social rule is to exist some at least must look upon the behaviour in question as a general standard to be followed by the group as a whole. [402]

In the above passage, what does the job of marking out a habit from a rule seems to be the 'cognizance' of members that a pattern of a behaviour is a general standard for the group- which Hart describes in terms of 'knowing' and 'looking upon' a behaviour as a general standard. In case of a social habit where there is a convergent pattern of behaviour—like in the case of the convergent practice of visiting the cinema on Saturdays—agents are not cognizant that this pattern of behaviour in question is a

[400] Hart (n2) 57.

[401] Treating the internal aspect as an attitude is at the very root of the so called non-cognitivist or expressivist interpretations of Hart's semantic model. See discussion on Kevin Toh in Chapter VII.

[402] Hart (n 2) 57.

general *standard* for the society. Hart conveys this idea by telling us that in case of habitual behaviour 'each person *for his part* behaves in the way that others also in fact do.' Critical reflective *cognizance* is then both necessary and sufficient to mark out a rule from a social habit; and it is consistent with *any* set of attitudes that an agent may have towards the rule.

Treating the internal aspect as comprising of an 'attitude' rather than 'cognizance' would not only render his repeated criticisms of Ross incomprehensible but also disable it from performing the crucial role, Hart envisaged for it. For Hart, the internal aspect is the constituent of rules; it is the internal aspect that turns a pattern of behaviour into a rule. Treating the internal aspect as an attitude towards a pattern, rather than the cognizance of a pattern would jeopardize this crucial role the internal aspect plays.[403] As Stavropoulos points out, if the internal aspect is read as an attitude, it becomes superfluous, as it would 'range over' rules rather than constitute them.[404] He argues, 'if one really has the pattern in sight i.e. if one can correctly apply the rule' then no attitude is in fact necessary to constitute the rule. In other words, Stavropoulos' criticism is that an attitude can only be thought to be directed at a pattern which is already in some sense taken to be a rule, independently of the attitude; as far as turning a pattern into a rule goes, Stavropoulos argues that an attitude comes 'analytically too late to make a difference'.[405] The idea of the

[403] Some critics read Hart as having committed this error. Michael Payne, for instance, reads the internal aspect as comprising of an attitudinal endorsement; he argues that this jeopardizes the existence conditions as according to him, Hart is committed to the view that unless a majority of agents morally endorse a rule, no rule exists according to the practice theory: Michael Payne, 'Hart's Concept of a Legal System', (1976) 18 Wm. & Mary L. Rev. 287. It will be argued here that Hart is not committed to such a position.

[404] Stavropoulos (n 277) 58-61.

[405] ibid 58-59.

internal aspect can be saved from these criticisms if it is read as the cognizance of a pattern as a standard, regardless of the attitudes one takes towards the standard.

Hart's 'internal aspect of rules' is premised on the idea of *norm-relativity*; and his portrayal of 'normative' language as a manifestation the internal aspect of rules—which he later also employs in his analysis of statements of legal obligation—uses the idea of *norm-relative* statements.[406] Any member of the group can *identify* and be *cognizant* of what is required by a social rule practised in her group, regardless of the attitudes she may have towards the rule. The behaviour of an individual member of the group would remain consonant with the 'internal aspect' when she is *cognizant* of what is required by the rule, regardless of the attitudes she may have towards the rule. It will be recollected from our earlier discussion (in Chapters II & IV) that being *cognizant* of a practised social rule, without thereby necessarily attitudinally avowing it, is one of the hall marks of a norm-relative judgment. It may seem a little odd that Hart uses the term 'acceptance'—which carries with it a sense of attitudinal avowal or endorsement—to describe the stance of agents which need not comprise of anything more than *cognizance* of the rule, their attitudes towards the rules, notwithstanding.[407] The oddity is considerably attenuated, if not entirely dissipated, when Hart is understood as having used the term 'acceptance' in the norm-relative sense.[408] 'Acceptance' by a member, of a rule, here denotes a member belonging to a

[406] For a discussion on the nature of norm-relative judgments see Chapters II and IV.

[407] Interestingly, Richard Hare too uses the term 'acceptance' in the context of norm-relative 'ought' statements. Hare, however, makes it tolerably clear that 'acceptance' doesn't amount to any endorsement: Hare, *Language of Morals* (n 144) 168-169. It was argued in Chapter IV that Hart's account of statements of legal obligations bears great resemblance to Hare's. It is likely that the term 'acceptance' is yet another instance of this resemblance.

[408] All the same, I maintain that the term 'acceptance' is inappropriate as a description of what is characteristic of the internal aspect. Terms such as 'cognizance' or 'recognition' capture the mental stance involved in the internal aspect much better.

group which practices a rule and herself being *cognizant* of the rule regardless of the attitudes she has towards the rule.[409]

It would be open to the member of a group in which a rule is practised to convey what is required by the rule with the aid of norm-relative statements, employing the language of 'ought', 'must', 'duty' etc. [410] The member could, in the same breath, combine norm-relative statements with their disavowals, without any sense of contradiction. Thus, an agent could say of a rule of etiquette, 'I *ought* to wear black tie for formal college events but I couldn't care less'. [411] As we noted in earlier chapters, such a disavowal would be incongruous if the 'normative' statements in question were semantically moral statements conveying moral 'oughts' because in the case of moral judgments there is a *de re* fit between the 'normative' judgment and the agent's motivation—such that an agent who utters the moral judgment is thought to have her attitude *internally, non-contingently* aligned to such judgment. No such incongruity occurs in the case of norm-relative statements as there need not be anything more motivationally reliable than a *de dicto* fit between the 'normative' judgment and the agents' motivation, in that, the agent who makes a norm-relative judgment could have her attitude *externally* aligned to such judgment. Any set of attitudes on the agents part are consistent with her having made a norm-relative judgment. The agent is not thought to necessarily attitudinally endorse the norm-relative judgment she is making. In case of a *token* norm-relative judgment, the

[409] Roger Shiner, *Norm and Nature* (Clarendon Press 1992) 160.

[410] As we noted in earlier chapters, 'normative' terms such as 'ought' 'duty' etc., have their moral and norm-relative uses.

[411] The 'ought' here is a norm-relative ought.

motivation to act in accordance with the 'normative' judgment is thought to be supplied by an external *contingent* motivational factor.

In the light of the above feature of norm-relative judgments—namely their external, contingent connection with an agents' attitudes and motivations—Hart's depiction of 'normative' statements manifesting the internal aspect as conveying 'criticisms' appears to be inapt. Discussing Hart's claim on this point, Alf Ross notes that a person could only be thought to 'criticize' another for a deviation from a rule, if she has a non cognitive stance of approval or endorsement towards the rule.[412] Indeed, if nothing more is said, the term 'criticize' does carry the connotation that Ross alludes to. In Chapter II, we came across the character, Miss Manners, in whose practical reasoning, the rules of etiquette figure just in the way moral judgments would; which is to say in her case a *de re* fit obtains between the judgment that a rule of etiquette and her motivation to act on it. There would be no difficulty in supposing that Miss Manners 'criticizes' when she conveys requirements of etiquette. However, one doesn't necessarily have to be Miss Manners in order to make the sort of norm-relative judgments and statements that Hart thinks are characteristic of and manifest the internal aspect. Accordingly, an agent need not necessarily be understood as 'criticising' when she utters norm-relative statements of, say, etiquette. Whether a norm-relative statement in a given case is also a 'criticism' is contingent on the attitudes of the agent uttering it. However, the attitudes of the agent uttering it do *not* change the *meaning* of the norm-relative statement, the purpose of which is to convey what is required by a socially practised rule; and as such, can be coherently

[412] Ross, 'Review' (9) 1185; Note, for Ross, this conative or non-cognitive stance would have to be a moral one.

uttered by one who does not, in the least, approve of the rule she is invoking; and thus, is in no way 'criticising' her interlocutor. Even on the lips of Miss Manners, statements of etiquette remain norm-relative statements, not moral statements. If we understand 'criticism' not in the *de re* sense of endorsement that Ross does, but merely as one agent conveying to another, what is 'required' by a social rule, the need to emend Hart's idea of normative statements manifesting 'criticisms' would be obviated. The very same set of concerns highlighted here in relation to Hart's idea of normative statements as manifestation of 'criticisms' would also apply to a *cognate* idea. Hart argues that another manifestation of the internal aspect is the 'acknowledgement' by the *hearer* that criticisms the 'normative' language convey are 'legitimate' and 'justified'.[413] If nothing more is said, these expressions seem to tilt in the direction of attitudinal endorsement on the part of the hearer. And here again, we cannot understand acknowledgements of 'legitimacy' and 'justification' of rules in the sense of endorsement. If the internal aspect is to be treated as a norm-relativist stance, as we have argued it should, we would have to read 'acknowledgments' of 'legitimacy' and 'justification' congruously, in the norm-relative sense. Just as the speaker need not be Miss Manners in order to utter norm-relative statements of etiquette, the hearer need not be Miss Manners to acknowledge that the criticisms are made in relation to a generally practised set of standards. In this sense a person who acknowledges the 'legitimacy' and 'justification' of a criticism, is cognizant that 'criticisms' are not arbitrary but made for non-conformity with a socially practised standard. Such person need not however, necessarily endorse such standards or such 'criticism'.

[413] Hart (n2) 57.

As long as the agent is cognizant of a pattern of behaviour, any attitude on her part (whether *de dicto* or *de re*) would be consonant with the internal aspect of rules. This would remain the case even if the agent in question disapproves of a social rule and 'breaks' it. This was amply borne out by our illustrations portraying statements of etiquette accompanied by their disavowals. There is a qualitative difference of great significance between those who 'break' the rule and those who are not even cognizant of it as a pattern, which Hart seems to hint at only vaguely. It would be possible for those who are cognizant of a pattern as a rule to even break the rule. There is no reason for denying these people the internal aspect as they are indeed cognizant of the rules; after all, their *cognitive* stance towards the rule is not akin to a stance towards a social habit. Insisting that the internal aspect requires that agents attitudinally endorse the rule in some manner as Miss Manners does or necessarily follow it (for whatever motivating reasons), would militate against Hart's understanding of the internal aspect of rules.

We will see in Section 4.2 that Hart argues that such norm-relative critical reflective cognizance is the constituent of the rule of recognition, which he later goes on to term as the internal point of view. This, it will be argued, gives us the first version of the internal point of view which is the constituent of the rule of recognition: namely, the norm-relative internal point of view.

4.2. Acceptance of the rule of recognition and the internal aspect:

In the previous section, it was observed that Hart had a norm-relativist understanding of practices that constitute social rules. In the present section, it will

be argued that Hart uses the very same idea to account for practices that constitute the rule of recognition. Hart tells us that a practised social rule lies at the very roots of a legal system: 'we may suppose that our social group *has* not only rules…which make a specific kind of behaviour a standard, but a rule that provides for the identification of behaviour in a less direct fashion…'.[414] This is the first glimpse Hart gives us of the rule of recognition. Hart argues that in the simple legal system comprising of Rex and his subjects, 'where such a rule is *accepted* Rex will not only in fact specify what is to be done but will have the right to do this…'[415] Hart treats the *existence* of such a rule of recognition as synonymous with the social group *accepting* the rule of recognition. The rule of recognition in the simple legal system of Rex is constituted by the practice of citizens and the acceptance of this rule of recognition is *qualitatively* no different from the acceptance of any other practised social rule. In other words, the sort of acceptance that constitutes the rule of recognition is none other than the norm-relative acceptance of the sort which constitutes any practised social rule. Such norm-relative acceptance is consistent with a great variety of attitudes on the part of the agents involved and does not necessarily involve any *de re* attitudinal endorsement of the rule of recognition.

Hart tells us that while in a simple legal system, it is the practice of citizens that constitutes the rule of recognition, in a *complex* legal system the rule of recognition is constituted by the practice of officials, not citizens.[416] We are told that the officials 'accept' the rule of recognition by *identifying* and *applying* law according to it;

[414] Hart (n 2) 57.

[415] ibid.

[416] Ibid 114.

citizens 'accept' by *acquiescence* in official operations and 'may know nothing more about the laws than that they are laws'.[417] Hart adds that where the officials and the citizens 'accept' the rule of recognition in the aforesaid sense, conditions necessary and sufficient for the existence of a legal system would be satisfied.[418] It bears emphasis that the practice which constitutes the rule of recognition remains norm-relative in nature, regardless of whether the practice in question is that of the citizens (as is the case in a simple legal system) or that of the officials (as is the case in a complex legal system). Thus, the attitudes of the participants in the practice (officials or citizens, as the case may be) need not be in anything more reliable than a *de dicto* alignment with the rule of recognition. They need not necessarily *de re* endorse the rule of recognition. Thus, all that is needed to satisfy the existence conditions of a legal system *qua* officials is that they *identify* and *apply* the law in accordance with the rule of recognition, their attitudes or motivating reasons for doing so, notwithstanding. This reading of the norm-relative practice of officials constituting the rule of recognition is borne out by what Hart says in *Essays on Bentham*:

> I agree that it would be extraordinary if judges could give no answer to the question why in their operation as judges they are disposed to accept enactments by the legislature as determining the standards of correct judicial behaviour and so as constituting reasons for applying and enforcing particular enactments. But if all that is required is that judges should have some comprehensible motives for behaving as they do in this respect, this can be easily satisfied by motives which have nothing to do with the belief in the moral legitimacy of the authority whose enactments they identify and apply as law. [419]

[417] Hart (n 2) 61,114.

[418] Hart (n 2) 114.

[419] Hart, *Essays on Bentham* (n 12) 265.

4.3. Internal point of view (insider's perspective) and external point of view (observer's perspective):

Hart first introduces the phrase 'internal point of view' on page 89 of *Concept of Law* by contrasting it with the observer's perspective, which he terms the 'external point of view':

> It is possible to be concerned with the rules either merely as an *observer* who does not himself accept them or as a *member of the group* which accepts them and uses them as guides to conduct. We may call these respectively the 'external' and the 'internal points of view'.[420]

Hart tells us that the external point of view is the *observer's* perspective; the perspective of someone who is not a member of a group which accepts rules.[421] Any member of the *group which accepts rules* has the internal point of view. In other words, every legal 'insider' that is to say, officials and citizens, have the internal point of view.[422]

Notably, here Hart says that *any* member of the group—or in other words, *any* insider—has the internal point of view. In a group in which a rule is practised, all

[420] Hart (n2) 88.

[421] In Section 4.2, we learnt that a group practicing a rule is the same as a group accepting a rule. Here, Hart says that any member of a group which accepts/practices the rule has the internal point of view.

[422] Hart further divides the observer's external point of view into a moderate variant and extreme variant where the observer does not even view the behaviour of insiders in terms of rule governed behaviour but rather in terms of regularities of conduct and likelihood of reproofs in the event of certain patterns of behaviour. This further dichotomy between the variants of the external point of view will be of no concern to us: Hart (n2) 89.

members are thought of as having the internal point of view.[423] This would also include someone who is terrorized by the rules and complies only out of fear of consequences following non-compliance. In an extant legal system then, every member—be it an official or a citizen—has the internal point of view. An insider, by definition, *necessarily* has the internal point of view and is thought by Hart to *accept* the law. This is in harmony with the norm-relative definitions of internal point of view and acceptance of rules that we have seen earlier in sections 4.1 and 4.2. We will further study the norm-relative nature of the internal point of view and acceptance of rules in the next section. Here, in setting apart the insiders' internal point of view from the observers' external point of view, Hart does not make the distinctions that he later goes on to make between the ways in which rules function in the practical reasoning of the insiders. We will turn to this distinction in section 4.5.

4.4. Norm-relative Internal Point of view and Internal Legal Statements:

We saw in the previous section that the internal point of view is the member's point of view, or the insider's point of view. When Hart introduces the idea of internal statements he relies on this very notion of the internal point of view. He defines internal statements as statements made by those who have the internal point of view; which is to say, statements made by a member or an insider. Hart contrasts

[423] This reading of the distinction between the internal and external points of view partly tallies with that offered by Perry. Perry too endorses the view that all insiders including the Holmesian bad man have the internal point of view. Perry points out that the external observer's point of view is a *theoretical* one and the insider's point of view is a *practical* one. Perry, however, does not note the difference (discussed in section 4.5) that Hart draws between two entirely different sets of attitudes insiders could have towards the law: Stephen Perry 'Holmes v Hart' in Steven Burton (*ed.*) *The Path of Law and its Influence* (Cambridge University Press 2000) 158.

an internal legal statement made by an insider with an external legal statement made by an observer.

> The use of unstated rules of recognition, by courts and others in *identifying* particular rules of the system is characteristic of the internal point of view. Those who use them in this way manifest their own *acceptance* of them as guiding rules and with this attitude goes a characteristic vocabulary different from the natural expressions of the external point of view. Perhaps the simplest of these is the expression, 'It is the law that ..' which we may find on the lips not only of judges, but of ordinary men living under a legal system…This attitude of shared acceptance of rules is to be contrasted with that of an *observer* who records *ab extra* the fact that a social group accepts rules but does not himself accept them.[424]

Hart argues that i*dentifying* law with the use of the rule of recognition 'is characteristic of the internal point of view' and manifests acceptance of the rule of recognition. Any legal insider—whether it be an official or citizen—who is cognizant of and hence in a position to be able to identify the rules of the legal system could, on the above account, be said to have the internal point of view. A citizen regardless of the attitudes he has towards the law including the Holmesian bad man, or a swindler, or someone terrorized by the law can *identify* the law. The ability to do so, Hart terms as the acceptance of the rule of recognition *qua* citizen. In the above passage again, the term 'acceptance' is odd as a depiction of the stance that agents need to have in order to be able to identify the law (regardless of their attitudes), just as the term was found to be odd in the discussion pertaining to the internal aspect of rules. Here again, 'acceptance' of the rule of recognition is to be understood as norm-relativist acceptance which is compatible with a host of *de dicto* attitudes on the part of the agent. Like the internal aspect of rules, the internal point of view is compatible with a host of attitudes on the part of the insider (be it official or citizen).

[424] Hart (n2) 102.

The 'acceptance' of officials and citizens is *qualitatively* no different; it is norm-relative acceptance in either case. However, the acts in which such 'acceptance' manifests are different because of the different roles the officials and the citizens play in the makeup of a legal system. Hart makes it clear that the officials manifest their acceptance of the rule of recognition by *identifying* and *applying* the law. The actions of an official who identifies and applies the law, regardless of whether his motivations are *de dicto* or *de re* are consonant with the internal point of view.[425] Thus, a citizen who can identify the law and the official who identifies and applies the law can be said to have the internal point of view regardless of the attitudes they have towards the law. We will name this version of the internal point of view the norm-relative internal point of view. Doing so would help us mark out this version of the internal point of view from another version of the internal point of view which we will encounter in section 4.5.

Internal legal statements made from the internal point of view could be understood as norm-relative statements. Indeed, internal legal statements exhibit all features of norm-relative statements. Such norm-relative internal statements convey what the law 'requires'. Hart gives the example of statements like 'it is the law that…' as illustrations of internal legal statements. It was noted that any insider can identify the law and hence can make internal statements. An internal legal statement can be combined without any contradiction with its disavowal. Hence the Holemsian bad man could say 'it is the law that I ought to φ' and combine it without any contradiction with the disavowal, 'but I don't care'. Hart's internal legal statements

[425] Hart, *Essays on Bentham* (n 12) 265;

are no different from what he terms statements of legal obligation.[426] They perform the same function and are identical in all respects. The purpose of statements of obligation, Hart points out, is to show that a certain behaviour 'falls under a certain rule'.[427] Hence, the internal legal statements can take two forms: 'it is the law that' as also the form, 'X has a legal obligation to φ'. It was argued in Chapter IV, that the characteristic use of a statement of legal obligation is to point out that exists a rule, identifiable by the rule of recognition, requiring a certain action from the subject, and that the subject's case falls within such a rule.[428] Just as any insider can identify what the law requires, he could also make internal legal statements/ statement of obligations of the law so identified: 'it is a legal obligation that …' or 'it is the law that…'. These statements are 'normative' in the norm-relative sense.

4.5. Internal point of an insider *v* external point of view of an insider: A new version of the internal point of view:

Hart introduces [on page 90 of *The Concept of Law*] another version of the internal point of view that is *qualitatively* different from the norm-relative version of the internal point of view which we understood earlier as the insider's point of view. Hart's aim in introducing this new version of the internal point of view is to distinguish between two perspectives that *insiders* may have towards rules of a legal system. Using how the rules function in their practical reasoning as the *differentia*,

[426] See discussion in Chapter IV for Hart's model of statements of legal obligation.

[427] Hart (n2) 88.

[428] Martin (n 344) 38-39.

Hart points out that some *insiders* take the internal point of view while some take the external point of view.

While on the earlier version of the norm-relative internal point of view, we were told that the insiders' point of view is the internal point of view, here Hart tells us that only some insiders take the internal point of view and some take the external point of view, depending on how a legal rule functions in their practical reasoning.[429] To mark out a distinction between the two versions of the internal point of view let us name the *new* version of the internal point of view the 'practical reason internal point of view' or the 'PR Internal point of view', for short.

While all insiders have the norm-relative internal point of view, Hart tells us that only those insiders who treat a rule as *reason* for action are said to take the PR internal point of view. Those who obey the rule merely out of fear of consequences are said to 'reject' the rule and take the PR external point of view towards it. Those insiders taking the PR internal point of view, 'look upon it [the red light] as a *signal for* them to stop, and so a *reason* for stopping, in conformity to rules which make stopping when the light is red, a standard of behaviour and an obligation.'[430] This, Hart says, explains 'the internal aspect of rules seen from the internal point of view'.

[429] Perry thinks that in making the distinction currently under discussion, Hart is still trying to distinguish the insiders' practical view point from the observers' theoretical viewpoint. Accordingly, Perry complains that Hart is wrong to think that the Holmesian bad man has the observer's theoretical perspective. Perry's complains that the insider's view point is a practical view point and hence the Holmesian bad man being an insider has the internal point of view; and not the external point of view. Perry's criticism altogether misses the distinction Hart was carving out between two sets of attitudes that could be taken by insiders: Perry, 'Holmes v Hart' (n 423) 164-166.

[430] Hart (n2) 90.

He contrasts this attitude with the attitudes of those insiders who have the PR external point of view. He says that those taking the PR external point of view 'are only concerned with them [rules] when and because they judge that unpleasant consequences are likely to follow violation'.[431] Hart says that such persons taking the external point of view 'reject the rules'. Thus, Hart's internal point of view is distinct from the norm-relative internal point of view and attitudinally requires much more than just critical reflective cognizance.

Later, Hart goes on to say that those who take the PR internal point of view *accept* rules *voluntarily*. Soon after introducing the PR internal and external points of view, Hart says that there is likely to be a tension between 'those who, on the one hand, accept and voluntarily cooperate in maintaining the rules…and those who, on the other hand, reject rules and attend to them only from the external point of view as a sign of possible punishment.'[432] Here, Hart contrasts the PR external point of view from the stance of voluntarily accepting rules, thus licensing us to infer that he means to use the phrase 'voluntary acceptance' in the same sense as PR internal point of view. Hence, PR internal point of view is the same as 'accepting law voluntarily' and taking the external point of view is the same as 'rejecting' the law. Hart clearly means the PR internal point of view to be different from the norm-relative internal point of view. Therefore, acceptance in relation to the PR internal point of view must mean something different from norm-relativist acceptance which any insider has. But what is the difference between them? It is this question we will turn to in Section V.

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[431] ibid.

[432] ibid.

V

The PR Internal Point of View: A Moral Stance

Though the distinction between the PR internal and external points of view is crucial, Hart never spells out explicitly what exactly marks the distinction between the two. All we are told is that the person taking the PR internal point of view treats a rule as *reason* for action, whereas the one taking the PR external point of view complies out of the fear of consequences that will attend non-compliance. In the circumstances, it falls upon us to determine the qualitative difference between how rules function in the practical reasoning of those subscribing to the two respective points of view. In particular, we would want to determine what 'taking the rule as reason for action' connotes.

There seems to be a distinct lack of polarity between Hart's depiction of the PR internal point of view and the PR external point of view. Hart tells us that the one taking the PR internal point of view takes the rule as *reason* for action. This should licence us to infer that the one who does *not* take the rule as *reason* for action, takes the PR external point of view. However, out of all possible instances of not taking the rule as *reason* for action, Hart seems to privilege just one—namely acting out of the fear of consequences—as constituting the PR external point of view. The lack of polarity means that the PR internal point of view and PR external point of view, as Hart depicts them, do not exhaust the stances and attitudes one may have towards law. This has led to a problem in understanding the nature of the PR internal point of

view. Legal philosophers often seek to decipher what Hart could possibly have meant by 'taking a rule as *reason* for action' by treating it as an instance of *not* taking, what Hart cites as the illustration of the PR external point of view—namely, complying with rules out of the fear of consequences following non-compliance. This has led them to assume that taking the rule as reason for action means just—*not* complying out the fear of consequences. Having made this assumption, they are naturally led to the conclusion that Hart has no clear sense of what 'taking the rule as reason for action' is, for a great number of stances towards the rule are consistent with *not* complying out the fear of consequences.[433]

However, we shouldn't be so quick to dismiss Hart's dichotomy. We could interpret Hart charitably so as to lend polarity to his distinction between taking the rule as reason for action on the one hand and taking the PR external point of view on the other. The minor step required for such a charitable interpretation would have us understand 'complying out of the fear of consequences' as not *the* only instance of the PR external point of view but as the paradigmatic instance of the PR external point of view. We could then say that an insider who does not take the rule as reason for action takes the PR external point of view, of which the paradigmatic instance is complying out of the fear of consequences. This helps us bring to the dichotomy between the PR internal and external points of view, the polarity which Hart's unvarnished depiction lacks; and this polarity is absolutely crucial to carve out an intelligible distinction between 'taking the rule as reason for action' on the one hand and taking the PR external point of view on the other. With the polarity in place, let us now turn to determine the qualitative distinction between taking the PR internal

[433] G. Postema, 'Norms, Reasons, and Law' (1998) Current Legal Problems 155.

point of view and PR external point of view by focussing on how the rules function in the practical reasoning of the adherents of these respective points of view.

Let us begin by considering the case of Mary who complies with an income tax rule requiring her to file tax returns by a certain date only because she thinks that non-compliance with it will be disapproved by her ailing father; let us further assume that she is not motivated to comply with the rule because of fear of the fine attached to the rule which in her view is too miniscule. Here is an instance of an agent *not* taking the rule as reason for action.[434] All the same, she is not being coerced into compliance by the legal sanctions attached to the rule, either. Now, we could tweak Mary's case to one where she complies with the aforesaid tax rule to please her ailing father, rather than for avoiding his displeasure. Even here, we would find that Mary does not take the rule as reason for action; and note, she is not coerced either. In Mary's practical reasoning the rule figures in a calculus where there is a contingent, external connection between her judgment that the income tax rule requires something and her motivation to comply with it. We could multiply illustrations of instances where a rule figures in such a calculus in the practical reasoning of an agent. The common factor we would find uniting all these cases is the following: the connection between the judgment that the rule requires something and the motivation to do as required by the rule is *de dicto*; the judgment by such agent that a rule requires some behaviour is *externally* connected with her motivation to behave as required by the rule. The motivational push is provided by a *contingent* consideration which may or may not accompany her judgment that the rule requires

[434] Mary does not take the rule as reason for action because despite knowing what the rule requires, she still considers herself free to deliberate on whether she should conform to it. The judgment of what the rule requires, does not close for Mary, deliberation on whether she ought to conform.

some behaviour. This is just how we could expect rules to figure in the practical reasoning of the Holmesian bad man. This, to my mind, is the best explanation of the PR external point of view—where the agent does not take the rule in itself as reason for action. Having lent polarity to Hart's distinction between the PR internal and external points of view, we could then understand the PR internal point of view as one where the connection between the rule and motivation of the agent is not *de dicto* but *de re*.

For someone who takes the internal point of view by treating the rule as reason for action, there would be a *de re* fit between the judgment that a particular rule requires some behaviour and motivation to act. There is an *internal* or *non-contingent* connection between his judgment that the rule requires something and his motivation to act on it. The motivation to be guided by the normative judgment non-contingently accompanies the normative judgment. Where such a *de re* fit obtains between the agent's judgment that a rule requires something and taking it as reason for action, the agent could be thought of as taking the rule as *reason* for action. Thus, taking the internal point of view amounts to adopting a mental stance that brings about a *de re* fit between judging that the 'accepted' rule requires something and being motivated to act according to it.

How does one understand this mental stance towards legal rules involved in the PR internal point of view which brings about a *de re* connection between judging that something is required by a rule and being *internally* motivated to act in accordance to it? It was argued in Chapter II that such a *de re* connection requires attitudinal

endorsement on the part of the agent. It will be recollected, an agent who judges that something is morally required is also *de re* motivated to act according to his judgment. Could the *de re* endorsement of law from the PR internal point of view be then read as moral endorsement?

It was argued in Chapter II, that if the standard being endorsed affects people in morally significant ways, the *de re* endorsement would have to be understood as moral endorsement. Accordingly, we had argued that while *de re* endorsement of standards of grammar could hardly be understood as moral because they don't affect people in morally significant ways, *de re* endorsement of norm-relative standards which do affect people in morally significant ways, like the standards of caste would amount to moral endorsement. Few would deny that the law affects people in morally significant ways.[435] It is because law affects us in morally significant ways that the search for an explanation of its authority is found by legal philosophers to be a pressing one. In so far as law affects people in morally significant ways, the *de re* endorsement by agents of legal standards would have to be understood as moral endorsement. Taking the PR internal point of view is then the same as having a moral stance towards the rule or morally endorsing the rule. In the practical reasoning of the agent who takes the internal point of view, the law would function just in the way that any other moral judgment does. It bears emphasis that we could expect such *de re* fit to obtain only in case of rules that the citizen endorses or accepts from the PR internal point of view.[436] The stance towards the rule—which Hart refers to as 'acceptance' of the rule—which is a prerequisite for such a *de re* fit to obtain

[435] John Gardner 'How the Law Claims, What the Law Claims' (n 369).

[436] See Section VI below for a further discussion of this aspect.

would have to be *moral* in nature. The 'acceptance' that underlies the PR internal point of view must then be understood as *moral* acceptance. And taking the rule as *reason* for action must then be understood as following from moral acceptance of the rule; or in other words, following from taking a moral stance towards the rule in question.[437]

With this distinction between the PR internal point of view and PR external point of view in place, we are in a position to better appreciate what distinguishes the PR internal point of view from the norm-relative internal point of view. While any insider who is cognizant of the law, regardless of his attitudes towards it, has the norm-relative internal point of view, it only the insider who *de re* attitudinally endorses the law and takes it as reason for action, who has the PR internal point of view. The norm-relative internal point of view is the constituent of the rule of recognition and existence conditions of legal systems; not the PR internal point of view. The PR internal point of view, as we shall see in Section VIII, forms the source of authority or 'normativity of law'. It could be argued that Hart does little in the way of alerting the reader to the two different versions of the internal point of view and the distinct roles they perform in his work.[438] This has fuelled a great misunderstanding of Hart's idea of the internal point of view and ultimately, of his

[437] For the purposes of the distinction between the PR internal and external points of view, it is of no consequence whether we read the moral stance as cognitivist or non-cognitivist. The *de re* connection would continue to remain on either reading.

[438] At places, Hart himself seems to conflate the two. For instance, in the famous oft-quoted passage on (n2) p.117, Hart says that in the extreme case the internal point of view would be restricted to the official world; and citizens would have no internal point of view. From what Hart says in the lead up to this passage, it emerges that he conflates the two versions of the internal point of view. When speaking of officials having the internal point of view, Hart refers to the norm-relative internal point of view of officials; but when Hart speaks of citizens not having the internal point of view, he speaks about the PR internal point of view. For a further illustration of Hart's having mixed up the two versions of the internal point of view, see Section IX.

account of 'normativity of law'. An overwhelming majority of Hart's commentators have failed to notice the qualitative difference between the two versions of the internal point of view and do not distinguish between the two. In what follows, we will strive to maintain a clear distinction between the norm-relative internal point of view, which is any insider's perspective and the PR internal point of view, which is the perspective of those amongst the insiders who take the law as reason for action.[439]

I am acutely aware that the above reconstruction of the PR internal point of view is likely to come across as exegetically implausible. It would certainly seem to run counter to Hart's insistence that the internal point of view does not necessarily entail moral endorsement. In Section IX, I will consider these objections and seek to defend my reconstruction of Hart. It will be argued that not treating the PR internal point of view as a moral stance would be to render otiose the entire distinction between the

[439] On McCormick's reading of Hart, statements *of* law are made from the internal point of view, while statements *about* law are made from the external point of view. McCormick argues that Hart's distinction between the internal and external point of view misses the 'hermeneutic' point of view, from which one can make statements *of* law—which is distinct from the internal point of view. The difference between the internal and the hermeneutic point of view, argues McCormick, is *volition*. While the internal point of view involves volitional endorsement, the hermeneutic point of view does not; Neil McCormick, *H.L.A. Hart* (Stanford University Press 1981) 34-40. McCormick's analysis proceeds on a monolithic idea of the internal point of view; and McCormick maintains that internal legal statements [statements made from the internal point of view] involve endorsements. In contrast to McCormick's view, it has been argued here that there are two versions of the internal point of view, not one: the norm-relative internal point of view, which does not need necessarily entail any endorsement of the law; and the PR internal point of view which does entail endorsement of the law. H.L.A Hart's scheme does not need the hermeneutic point of view, offered by McCormick because on Hart's view, internal legal statements could be made even by those who do not endorse the law. Internal legal statements are made from the norm-relative internal point of view and as such could be made even by those who do not endorse the law. McCormick only needs the hermeneutic point of view because he holds that internal point of view necessarily entails endorsement of the law. Though McCormick does not specifically invoke Raz here, his argument closely resembles the one made by Raz first in *Practical Reason and Norms* and then repeated in his Memorial Lecture for Hart in 1993 (discussed in chapter VII). There, Raz claims that Hart's statements of legal obligation express the speaker's endorsement of law. This has provided the basis for the later day non-cognitivist readings of Hart's semantic model. McCormick's reading of Hart, however, flies in the face of Hart's consistent and repeated objections to Alf Ross. Furthermore, the objections raised against the idea of the internal aspect by Stavropoulos (see section 4.1) are premised on McCormick's arguments.

PR internal and external points of view; and moreover, it would also render redundant Hart's exercise of introducing a new version of the internal point of view distinct and apart from the norm-relative internal point of view.

VI

Scattered Moral Acceptance v Aggregated Moral Acceptance: Emending Hart

How does one understand the moral (PR) internal point of view? Is it to be understood as an agent's moral stance of approval towards the entire legal system? Or is it best understood as an agent's stance towards a particular rule? Hart does not speak in one voice in this matter. At places, he does speak of the internal point of view as the acceptance of a particular rule. In fact, the traffic signal example that Hart gives, is of the PR internal point of view towards a specific rule. Yet, at places he refers to it as the acceptance of the system.[440] Let us call these the 'scattered' and 'aggregated' models of acceptance respectively. In consonance with which of the two models do we understand the PR internal point of view?

It is not immediately clear what taking the internal point of view towards the entire legal system is because it is unclear what morally accepting the entire legal system would amount to. We face a similar problem when we talk of persons obeying

[440] Hart (n2)116; Hart also notes 'Those who accept the *authority of a legal system* look upon it from the internal point of view…': Hart (n2) 203.

a legal system. Unpacking the latter could give us a clue to understanding the former. How could a person ever obey the legal system? As a matter of fact, a person cannot obey the amorphous entity called- the legal system; he can only obey the individual rules comprising the legal system. It could be said that someone who obeys all individual rules obeys the entire legal system.[441] We need to similarly unpack the idea of PR internal point of view towards the legal system. Arguably then, a person who takes the PR internal point of view to all rules of a legal system could be said to take the PR internal point of view towards the legal system. Our two exegetical choices can then be restated thus. Should we take the PR internal point of view as obtaining only when an agent takes the PR internal point of view towards each and every rule of the legal system (aggregated acceptance)? Or should we treat the PR internal point of view as a rule-specific stance whereby a person could have the PR internal point of view towards some rules and but not others (scattered acceptance)?

The aggregated idea of the PR internal point of view though a conceptual possibility would be practically very hard to find in an agent. What we are more likely to find is the scattered kind of acceptance towards individual rules. We could easily imagine an agent taking some rules as reason for action while merely complying with others out of fear of consequences or other *de dicto* considerations. Hart himself hints at the internal point of view being a scattered rather than an aggregated stance.

> a society with law contains those who look upon its rules from the internal point of view as accepted standards of behaviour and not merely as reliable predictions of what will befall them, at hands of officials, if they disobey. But it also comprises those … concerned with the rules merely as a source of

[441] Ross, 'Validity and the Conflict Between Positivism and Natural Law' (n 177) 147.

> possible punishment…. *Between these two extremes various combinations of these attitudes are to be found, often in the same individual.*[442]

In the above passage, Hart seems to favour the idea of scattered acceptance. The 'two attitudes' that Hart refers to here are the PR internal point of view and the PR external point of view.[443] The idea of the internal point of view is rule specific. Hart acknowledges that often the two attitudes may be found in the same individual. If Hart was a little more careful here he would have said that the same individual may have different attitudes to different rules. In other words, the same person may have the PR internal point of view towards some rules and the PR external point of view towards some others. However, at places, Hart seems to endorse the aggregated acceptance by referring to the PR internal point of view as consisting of acceptance of the entire legal system.

It seems most plausible—and imminently realistic—that some persons may accept some rules and reject some others. Even those who take the internal point of view towards the entire legal system can only do by taking the internal point of view towards specific rules. And just because a person does not have that stance in respect of some rules should not lead us to deny that he may have the PR internal point of view towards other rules which he does in fact morally accept. For this reason, it is also misleading to take about the Holmesian bad man *qua* individual. It is not too difficult to imagine some taking a Holmesian bad man like stance towards some rules and not towards others. Consider the case of a revolutionary who is on his way the

[442] Hart (n2) 202 (emphasis added).

[443] Internal point of view cannot mean norm-relative internal point of view which any insider has because Hart seeks to distinguish between the ways in which rules function in the practical reasoning of insiders.

Presidential palace to execute a coup and stops his armoured jeep on a busy traffic crossing thus taking the PR internal point of view towards the traffic rules.[444] A revolutionary can hardly be thought of as taking the PR internal point of view to the legal system as a whole and yet here he does take the PR internal point of view towards some specific rules. Such nuanced views get obscured if we talk of the internal point of view as an aggregated all-or-nothing stance towards the legal system as a whole. We must then understand the PR internal point of view as incorporating the idea of scattered acceptance—where an individual takes the internal point of view towards specific individual rules of the legal system. In an ideal case, he may even take the internal point of view towards all rules. However, just because he doesn't do that doesn't mean that he has not taken the internal point of view towards those rules that he does take as reason for action, as the case of the traffic signal conscious revolutionary demonstrates. This reading would be consistent with Hart's concern of depicting as realistically as possible, the way in which rules functioned in the practical reasoning of individual agents.

VII

Judges, Internal Point(s) of View and Legal Statements

The only example of the PR internal point of view that Hart gives in all of the *Concept of Law* has to do with how a rule features in the practical reasoning of the citizen. He has very little to say about the PR internal point of view of the officials.

[444] The example is taken from T. Endicott, 'Subsidiarity of the Law and the Obligation to Obey' (2005) 50 American Journal of Jurisprudence, 233.

Whenever Hart discusses officials and the internal point of view, his emphasis invariably appears to be on the norm-relative internal point of view. Hart points out that the rule of recognition is constituted by the norm-relative practice of officials—where they identify and apply rules in accordance with the rule of recognition.[445] Hart makes it abundantly clear that this norm-relative internal point of view is consistent with a great number of attitudes or stances that the officials may have towards the law. In other words, Hart could be seen arguing that officials need not take the PR internal point of view in so far as their role in contributing to the existence of legal systems goes.

But what Hart doesn't emphasize adequately is that just as some citizens could take the PR internal point of view and others, the PR external point of view, so could officials.[446] There could be officials who could come to adopt a moral stance towards rules and takes them as *reason* for applying the law. In case of officials who take a rule as reason for applying it, we could expect to find a *de re* fit between their judgment that the rule requires something and their motivation to *apply* it. In the case of officials who not take the PR internal point of view there is a *de dicto* fit between their judgment that the rule requires something and their motivation to *apply* it. Hart enumerates a few such *de dicto* considerations in *Concept of Law* and returns to the theme in *Essays on Bentham*. Hart points out in *Essays on Bentham* that many factors—most significant of them being a settled institutional practice that judges find themselves in when they assume their office as judges—may supply

[445] Hart (n2) 101.

[446] To be sure, Hart never denies this possibility; it is just that he doesn't emphasize it in *The Concept of Law*. He specifically alludes to it in *Essays on Bentham* (n 12) 267-8.

judges with the external *de dicto* motivations to apply the law, even if they themselves do not have moral stance towards the rules that they apply.[447] We could understand these officials as having taken the PR external point of view.

As we noted in section 4.3, internal legal statements or statements of legal obligation are norm-relative statements uttered by officials and citizens having the norm-relative internal point of view.[448] It bears reiteration that this norm-relative internal point of view does not entail any moral stance on part of the agent concerned; and statements of legal obligation could well be uttered by a judge or citizen who does not have the PR internal point of view. Now, what is the nature of internal legal statements on the lips of those who *do* have the moral PR internal point of view? Do we understand legal statements as moral statements on the lips of those with the PR internal point of view and norm-relative statements on the lips of those with the PR external point of view? Such a stand would be a curious one. Statements which are otherwise norm-relative do not become moral statements depending on the subjective attitudes of the speaker. Internal legal statements/ statements of legal obligation remain norm-relativist statements regardless of whether the agent uttering them morally endorses them or not. This is also borne out by our discussion of statements of etiquette on the lips of Miss Manners.

[447] Hart, *Essays on Bentham* (n 12) 264.

[448] In Chapter IV, we discussed that Hart's statements of legal obligation are norm-relativist statements which are morally non descriptivist in nature. In other words, they do not purport to state any objective moral reasons for action.

The attitude of the individual agent uttering a statement may have a bearing on the illocutionary force of the legal statement, but it has no bearing on its meaning or content. The meaning or content of the legal statement remains constant regardless of the attitudinal stance of the agent uttering it, namely, conveying what is required by a rule identified in accordance with the rule of recognition. The illocutionary force leaves untouched the meaning or content of legal statements, which remain norm-relative in nature. Consequently, internal legal statements can be coherently uttered by a judge or citizen who does not in the least morally approve of or endorse the rule she is invoking. Hart maintained that legal statements are morally non descriptivist-which is to say they do not state any objective moral reasons for action.[449]

For Hart, statements of legal obligation on the lips of judges and citizens remain morally non descriptivist, norm-relative statements. The characteristic use of such statements, as we have seen in section IV, is to point out that certain behaviour is required by application of a rule to a given situation. As Hart reiterates in *Essays on Bentham*, statements of legal obligation do not state any objective (justificatory) reasons for action, regardless of whether the person uttering them endorses it.

[449] Hart, *Essays on Bentham* (n12) 159-160.

VIII

Internal Point of View : Projecting Authority

In this Section, it will be argued that Hart envisaged the PR internal point of view to be the source of normativity or authority on his account.[450] Towards the end of Chapter V of *The Concept of Law*, where he introduces the idea of the PR internal point of view, Hart argues that the concept of authority involves reference to the PR internal point of view.

> The concepts which bestride both law and political theory of the state of authority and of an official require a similar analysis if the obscurity which still lingers about them is to be dissipated…most of the obscurities and distortions surrounding legal and political concepts arise from the fact that these essentially involve reference to what we call the internal point of view: the view of those who do not merely record and predict behaviour conforming to rules, but *use* the rules as standards of appraisal for their own and others behaviour.[451]

Later, in the Chapter IX entitled 'Laws and Morals', while returning to the same theme, Hart discusses the difference between power and authority where yet again, the idea of the PR internal point of view is seen by him as crucial to explaining authority.

> It is often said that a legal system must rest on a sense of moral obligation or on the conviction of the moral value of the system, since it does not and cannot rest on power of man over man. We have ourselves stressed in the earlier chapters of this book the inadequacy of orders backed by threats and habits of obedience for understanding the foundations of a legal system and the idea of legal validity… as we have seen in this chapter a necessary condition of the existence of coercive power is that some at least must

[450] Here, I mean to use the term 'normativity' to denote metaethical bindingness. See Chapter 3 for discussion on the two concepts of normativity in vogue in legal philosophy.

[451] Hart (n2) 98.

> voluntarily cooperate in the system and accept its rules. In this sense it is true that the coercive power of law presupposes its *accepted authority*.

And just a little earlier in the chapter Hart argues:

> It is true, as we have already emphasized in discussing the need for and the possibility of sanctions that if a system of rules is to be imposed by force on any, there must be a sufficient number who accept it voluntarily. Without their *voluntary cooperation thus creating authority*, the coercive power of law and government cannot be established. [452]

As we have already seen in Section 4.5, Hart uses the term 'voluntary acceptance' synonymously with an agent's taking the PR internal point of view. Significantly, Hart argues here that it is voluntary acceptance—or in other words, acceptance from the PR internal point of view—that creates 'authority'. A little later, yet again, Hart reiterates 'those who accept the authority of a legal system look upon it from the internal point of view…'[453]

In the above passages, Hart is arguing that it is the internal point of view that 'creates' authority and that for the law to have authority is for agents to accept it from the internal point of view. For the internal point of view to be the *source* of normativity or authority, it would have to be a moral stance. It was argued earlier that the PR internal point of view involves a moral stance. But this, in itself, does not licence us to understand it in either cognitivist (impinging) or non-cognitivist (projectivist) terms. In other words, we cannot determine—going by Hart's writings alone—whether to treat the moral stance involved in the PR internal point of view as

[452] Hart (n2) 201 (emphasis added).

[453] Hart (n2) 203.

comprising in an agent *believing* the law to be morally justified, or as comprising in a certain *conative* or non cognitive attitude towards the law. The *de re* connection between the judgment that law requires something and the agent's motivation, which is characteristic of the PR internal point of view could equally obtain on either metaethical account.[454] Recently, Perry has tried to give the PR internal point of view a cognitivist reading by treating it as a moral belief.[455] But here, it will be argued that only an expressivist or non-cognitivist reading of the moral stance involved in the PR internal point of view would bring to fruition Hart's project of accounting for the 'normativity of law'. Doing so would require us to understand the moral stance constitutive of the PR internal point of view as a non-cognitivist or conative attitude. I do not argue that Hart endorsed non-cognitivism/ projectivism. Rather, I argue that it is only by attributing non-cognitivism/ projectivism to Hart that his account of 'normativity of law' can be brought to fruition.

The idea of the internal point of view 'creating' authority or being the 'source' of authority would be totally out of place if we understand Hart as proposing an *impinging* account of authority. The *impinging* model understands authority in terms of objective moral standards that give reasons for action. On the impinging model, it is the objective moral standard that is the 'source' of moral bindingness or normativity and gives reasons for action, regardless of the moral acceptance or moral

[454] Kevin Toh wrongly thinks that the *de re* connection could only obtain on a non-cognitivist account but this view is mistaken. The *de re* motivational fit between moral judgments and motivation is a result of the practicality requirement which is shared across the metaethical divide.

[455] Perry, 'Hart on Social Rules' (n6); To be sure, Perry does not distinguish between the norm-relative internal point of view and the PR internal point of view in the way that we have done here. He reads just one version of the internal point of view which is both the constituent of legal systems and the source of normativity or authority. Noting that the internal point of view cannot be made to do both tasks, he proposes to relieve the internal point of view of its duty as a constituent of the rule of recognition.

belief of the subject. We have considered in chapters I and III, why it would be incongruous for a purported impinging model to rest the source of normativity on the moral acceptance or moral belief of the subject. The moral belief aims to track objective moral standards and it is this objective moral standard, not the belief, which would be the source of normativity. A moral belief could never be the source of normativity on the impinging model. As such, something akin to the PR internal point of view which is a moral stance could never be the source of normativity if we understand normativity along the lines of the impinging model. The idea of a subject's acceptance from the PR internal point of view 'creating' authority is altogether incongruous with the *impinging* picture of authority.

However, the idea of a subject's acceptance from the PR internal point of view 'creating' or being the 'source' of authority is wholly at home in a *projectivist* model of authority of law of the sort that the Scandinavian legal realists had advanced before Hart. The Scandinavian legal realists had argued, it will be recollected, that the bindingness, authority or 'normativity of law' could be explained entirely in terms of conative stances that people take towards the law, without having to invoke any objective moral standards or truthmakers.[456] Indeed, their non-cognitivist outlook was opposed to the very idea of there being such objective moral truthmakers as sources of normativity. The idea involved in this explanation of 'normativity of law' is very similar in nature to Hume's idea of explanatory projection. Explanatory projection is a matter of explaining how the subject takes the world to be, by appeal to some feature of their mind of which that appearance is a projection: in virtue of

[456] Though Hart did not endorse any metaethical view, as discussed in Section II, he made it abundantly clear in *Concept of Law* and in *Essays on Bentham* that he was opposed to the idea of objective truthmakers.

something ‘in here’, the world ‘out there’ is taken to be a certain way. The idea of the Scandinavian Legal Realists was that the authority of law was a *projection* of the attitudes of people subject to it. The projectivist picture holds that for the law to have authority is not for it to meet some objective moral conditions, but rather for those subject to take it as reason for action by assuming a conative or non-cognitivist stance towards it. The idea is that it is the attitude of internal point of view that explains authority.

Thus, Hart’s picture of authority needs that we understand the internal point of view in projectivist terms as the expression of an *attitude* or some such conative stance towards the law. This reading alone could bring to fruition Hart’s project of accounting for the ‘normativity of law’ with the aid of stances that people take towards it. Hart never specifically uses the term ‘attitude’ in relation to the PR internal point of view. He uses ‘attitude’ only in the discussion of the internal aspect of rules. For reasons discussed earlier in section IV, the ‘internal aspect’ is not best understood as an attitude. It is the PR internal point of view which needs to be understood in terms of attitude, though Hart himself never makes the move specifically.

IX

Meeting Hart's Objections: Internal Point of View *Not* a Moral Stance?

In Section V, it was argued that the PR internal point of view is best understood as a moral stance (a non-cognitive attitude to be more precise) whereby the agent who takes the PR internal point of view towards a rule, treats it as a moral requirement in his practical reasoning. But this reading of Hart, it could be thought, faces a hurdle put up by Hart himself. To be sure, Hart does appear to place such a hurdle at more than one place in the *Concept of Law*:

> Those who accept the authority of a legal system look upon it from the internal point of view and express their sense of its requirements in internal statements couched in the normative language which is common to both law and morals. "I (you)ought", "I (he) must", I(they) have an obligation"...Yet they are not thereby committed to a moral judgment that it is morally right to do what the law requires. ... This however does not show that nothing can be acknowledged as legally obligatory unless it is accepted as morally obligatory.[457]

The opening line of the above passage bears out that Hart is referring to the PR internal point of view; not the norm-relative internal point of view. Hart could then be understood as arguing that an agent taking the PR internal point of view need not be morally committed to the law in respect of which he takes the PR internal point of view. The reason he cites in support of the argument is to be found towards the end of the passage. His reasoning proceeds along the following lines:

[457] Hart (n2) 203.

(1) For identifying law one need not be morally committed to the law one is identifying.[458]

(2) Therefore to acknowledge that a legal obligation exists one need not be morally committed.

(3) Therefore a person who takes the PR internal point of view need not be morally committed.

It could be argued that even if (1) and (2) are thought to be unobjectionable, (3) is a *non sequitur* as it does not logically follow from the preceding premises. The *non sequitur* is brought about by an equivocation between the norm-relative internal point of view and the PR internal point of view. Premises (1) and (2) establish why the norm-relative internal point of view does not necessarily entail a moral commitment. Identifying that a law exists and acknowledging the existence of legal obligations is a hall mark of the norm-relative internal point of view; any insider who is cognizant of rules has this norm-relative internal point of view and could identify a legal obligation without moral commitment. However, from the above premises Hart fallaciously concludes (3) that the PR internal point of view does not entail moral commitment. Thus, properly understood, the above is hardly an objection to the view that the PR internal point of view is a moral stance.

However, elsewhere, Hart does unequivocally argue that the PR internal point of view is not a moral stance:

> it is not true that those who accept the system voluntarily must conceive of themselves as morally bound to do so... in fact their allegiance to the system may be based on many different considerations: calculations of long term

[458] (1) is an inarticulate premise in the above passage by Hart. My explanation could have been complete even without including it. However, (1) has been included only to elucidate premise (2).

> interest; disinterested interest in others; an unreflecting inherited or traditional attitude; or the mere wish to do as others do. There is indeed no reason why those who accept the authority of the system should not examine their conscience and decide that morally they ought not to accept it, yet for a variety of reasons continue to do so.[459]

Here again, the opening line of the passage bears out that Hart is discussing the PR internal point of view.[460] Hart could be understood as arguing that the motivations of those who accept the law from the PR internal point of view could be *de dicto* aligned with their judgment that the accepted rules require certain behaviour. Hart sets out some such *de dicto* considerations: self-interest, inherited attitude, disinterested interest in others and the like. Hart tells us that the motivations of those who accept the law from the PR internal point of view need not be *de re* aligned with their judgment that the accepted rules require certain behaviour; which amounts to saying that acceptance from the PR internal point of view need not be moral acceptance.

Conspicuously absent from the Hart's catalogue of *de dicto* considerations compatible with the PR internal point of view is compliance with the rule out of fear of consequences. Why does Hart leave such considerations out from the list? Hart presumably left them out because had he included them he would have obscured and rendered otiose the very distinction he drew between the PR internal point of view and the PR external point of view. It will be recollected, out of all possible *de dicto* considerations, Hart seems to privilege just one—namely, acting out of the fear of consequences—as constituting the PR external point of view. It was argued that this causes a lack of polarity between the PR internal point of view and external point of

[459] Hart (n2) 203.

[460] It will be recollected from our discussion in Section 4.5, Hart uses the ideas of 'voluntary acceptance' and (PR) 'internal point of view' interchangeably.

view. To restore polarity to Hart's dichotomy we had emended Hart to read all *de dicto* considerations as instances of the PR external point of view, the paradigm of which was compliance out of fear of consequences. The ambiguity caused by the lack of polarity between the PR internal and external points of view returns in the passage under consideration. Hart seeks to carve out a distinction between complying out of the fear of consequences and *de dicto* considerations of other sorts that he lists in the passage. Now, there is no principled way of carving out a qualitative distinction between these two alleged classes of *de dicto* considerations.[461] What ties together all *de dicto* cases is how the rule figures in the practical reasoning of agents: in none of them does the agent take the rule as *reason* for action. As the whole point of Hart's dichotomy between the PR internal and external points of view was to distinguish between those who take the rule as reason and those who don't, we would have to treat all *de dicto* cases as instances of the PR external point of view, the paradigmatic instance of which is complying out of the fear of consequences. Not doing so would be tantamount to rendering the entire distinction between the PR internal and external points of view otiose. Just a few passages before the one under consideration, Hart makes it abundantly clear that he doesn't want to render the distinction between the PR internal and external points of view otiose.

> In earlier chapters of this book we stressed the fact that the existence of a legal system is a social phenomenon which always presents two aspects, to both of which we must attend to if our view is to be realistic. It involves attitudes and behaviour involved in the voluntary acceptance of rules and also the simpler attitudes and behaviour involved in mere obedience or acquiescence'. [462]

[461] We could easily imagine the threat of consequences overlap with items on the catalogue of other *de dicto* considerations that Hart enumerates. Take self-interest for example. Does the thought of avoiding a jail term not count as a consideration of self-interest? Almost any fear of sanctions could arguably count as a consideration of long term self-interest. Further, recollect the example of Mary we saw in Section 4. Wouldn't Mary's *de dicto* motivating reasons, based on her father estimation of her behaviour, not count as disinterested interest in others?

[462] Hart (n2) 201.

Here, Hart stresses that voluntary acceptance (acceptance from the PR internal point of view) is distinct from the 'simpler' attitudes involved in mere obedience or acquiescence. In other words, Hart stresses that there is a significant qualitative difference between those who take the rule as reason for action and those who don't. If this distinction is not to be rendered otiose there must be a distinct polarity between those who take the rule as reason for action (internal point of view) and those who don't (external point of view). That would require us to treat all *de dicto* cases including those of self-interest, disinterested interest in others etc., as instances of the PR external point of view. We would have to then maintain that the PR internal point of view is a moral stance. Furthermore, if the PR internal point of view is compatible with all *de dicto* considerations, it would be no different from the norm-relative internal point of view and could never be the source of authority or normativity as Hart sought to make it. Obeying the law for any reason could hardly be thought of as explaining the authority of law.

X

Misunderstanding the modus operandi of the Projectivist model

The projectivist model of normativity has hardly any takers among contemporary legal philosophers. As a consequence, legal theorists in general seem

to pay scant attention to the distinct method of operation or *modus operandi* of the projectivist model.

The *modus operandi* of the impinging model is 'justificatory'; which is to say, on the impinging model, for the law to be binding is for it to be 'justified' by objective moral facts and properties. It is the objective moral facts and properties which constitute the 'source' of normativity on this model. On the projectivist model, by contrast, the 'source' of normativity is a conative attitude. Being non-cognitivists, the projectivists would have none of the reason-givingness, truth makers and 'justification' that are characteristic of the impinging model. The *modus operandi* of the projectivist model is *not* 'justificatory' but 'motivational' instead; for the law to be binding for an agent is for her to have a conative, motivationally effective, moral attitude towards the law. The varying *modus operandi* on the two models can be attributed to the varying readings of moral bindingness endorsed by the adherents of the respective models.

Often, legal philosophers expect the projectivist model to operate in the same way as the *impinging* model does, and seeing that it does not do so, they are quick to declare its failure. In other words, they expect a putative model of 'normativity of law' to generate reason givingness like the impinging model does and as the projectivist model is simply not geared to do so, it is written off as a plausible account of the 'normativity of law'. This problem is particularly noticeable among theorists who are willing to read Hart along non-cognitivist lines, only to go on to dismiss the resulting account of normativity for failure to generate reason givingness.

Recently, the thought that non-cognitivism must have a central role to play in Hart's work, has been steadily gaining ground. Developing some pointers in this direction given by Raz in 'Purity of the Pure Theory' and further expanded upon by him in his memorial lecture for Hart in 1993, legal philosophers such as Stephen Perry, Gerald Postema and Kevin Toh have advanced arguments reading Hart along non-cognitivist lines. Of the above philosophers, Kevin Toh alone purports to provide a non-debunking reading of Hart's normativity by trying to fit it along non-cognitivist lines. Perry attributes non-cognitivism to Hart only to point out how the resulting account of normativity is deeply flawed.[463] In the present section, we will be concerned with criticisms against a projectivist account of the sort advanced by Perry. In Chapter VII, it will be argued that Kevin Toh's reconstruction of Hart's account of normativity, though alleging to be non-cognitivist in nature, fails to be so and eventually fails in outlining a metaethically plausible model of normativity at all. All the same, each of these attempts to read Hart along non-cognitivist lines adopt a route quite unlike the one adopted in the present work; they seek to introduce non-cognitivism by reading Hart's internal legal statements/ statements of legal obligation as non-cognitivist statements expressing the speaker's attitude of approval towards the law. We have expressly ruled out such a reading of Hart's semantic model in Chapter IV and will return to the theme while discussing Kevin Toh purported reconstruction in Chapter VII. As such, in discussing Perry's criticisms of Hart's account of normativity, we will not be so much concerned with contesting what he takes to be the semantic model of Hart as his assumptions about why a putative non-cognitivist/ expressivist account of 'normativity of law' fails.

[463] Perry'Hart on Social Rules' (n6).

Hart, according to Perry, held the view that an agent making an internal legal statement expresses his attitude of approval towards the law; and thus sought to explain the 'normativity of law' with the aid of this non-cognitivist attitude.[464] Perry understands this non-cognitivist attitude as constituting the internal point of view. Perry argues that this account of 'normativity of law', however, must fail as the model cannot account for the potential reason- givingness of law. An attitude, Perry argues, is simply not geared to do the job. A plausible account of 'normativity of law' according to Perry must explain how the officials could ever have the power to change the normative situation of others by giving them reasons for action in a way that the Razian account does.[465] As an 'attitude' is just not equal to the task, Perry dismisses Hart's account of 'normativity of law'. The crux of Perry's criticism can be stated thus: an account of 'normativity of law' must explain the law's reason givingness; reason givingness requires objective moral standards as the source of normativity; and a non-cognitivist account which seeks to rest the source of normativity in an attitude can never explain reason givingness. [466]

It will be argued that Perry's criticism of the non-cognitivist account is misplaced, because he presupposes the *modus operandi* of the impinging model and expects the projectivist model to follow that *modus operandi*. The mistake Perry makes is of

[464] Perry does not distinguish between the two versions of the internal points of view that we have discussed in this chapter. He recognizes only one version of the internal point of view which according to him is both at the root of any social rule including the rule or recognition and one which is the source of normativity; and this he takes to involve non-cognitivist moral endorsement. We have seen why this reading of Hart would be exegetically flawed; Hart outlined two distinct versions of the internal point of view.

[465] Perry openly endorses the central tenets of Raz's account of 'normativity of law' as well.

[466] Perry (n6) 1173.

assuming that any plausible model of normativity would necessarily have to follow the *modus operandi* of reason givingness to be found on the impinging model. But that error could only arise from an insufficient appreciation of the *modus operandi* of the projectivist model.

On the impinging model, the 'source' of normativity or bindingness is a truth maker that acts as the fount of reason-givingness. The *modus operandi* of the impinging model is 'justificatory'; which is to say, on the impinging model, for the law to be binding is for it to be 'justified' by the truth-maker. On the projectivist model, by contrast, the 'source' of normativity is a conative attitude. The *modus operandi* of the projectivist model is *not* 'justificatory' but 'motivational' instead; for the law to be binding for an agent is for her to have a conative, motivationally effective, moral attitude towards the law.

The projectivist model does not understand moral bindingness in 'justificatory' terms as the impinging model does. Rather, it understands moral bindingness in motivational attitudinal terms. Consequently, the projectivist model explains moral bindingness without invoking the idea of reason givingness or the moral *right* to issue directives in a lawgiver: ideas that make sense only on a justificatory understanding of normativity and necessarily presuppose a truth maker. The projectivist model explains 'normativity of law' entirely in terms of moral attitudes taken by subjects towards the law. Once the distinctive modus operandi of the projectivist model is brought into the picture, the basis of Perry's criticisms erodes.

XI

Hart's Projectivist Account of 'Normativity of Law' Revisited

The *holistic* projectivist account of 'normativity of law' which we have reconstructed by arranging, re-aligning and at places, emending elements from Hart's works comprises two elements:

a. Semantic: legal statements on this account are norm-relativist statements which are semantically 'normative' without being moral statements in either the cognitivist or non-cognitivist sense. We saw in Chapter IV, how Hart's work readily yields a norm-relativistic account of legal statements, without us having to reconstruct or emend his work.
b. Metaethical: legal requirements come to be morally binding, or normative, or authoritative by reference to the non cognitive attitude of moral approval (the PR internal point of view on our emendation) taken by agents towards legal requirements. The PR internal point of view *lends* itself to be understood as an agent's conative attitude of approval of law—whereby the agent takes the laws as a moral reason to act.

To be sure, Hart never specifically endorsed the projectivist model of 'normativity of law'. It was argued, however, that many of Hart's thoughts on the 'normativity of law' can only be squared with a projectivist model of normativity. An *attitude*—which on our reading, constitutes the internal point of view—could intelligibly constitute the 'source' of moral bindingness *only* if one assumes a projectivist model. It is only by attributing projectivism to Hart, that his idea of the internal point of view can be

made to yield an intelligible account of normativity or authority or moral bindingness of law. The reading of Hart proposed here would have us place him in the projectivist camp alongside the Scandinavian Realists; and indeed there is a striking resemblance between the account of 'normativity of law' that Hart was arguing for and the projectivist model, the Scandinavian Legal Realists had pioneered.

However, it must be stressed, my argument is *not* that Hart meant his internal point of view to be understood along projectivist lines. Hart himself says very little about what this internal point of view really consists of; he denies that it is a moral standpoint, let alone describing it as a non-cognitivist moral stance. In fact, Hart's metaethical ambivalence precludes him from saying anything about the metaethical status of the internal point of view. This metaethical ambivalence precluded Hart from being able to give an account of the 'normativity of law': something that necessarily involves assuming a metaethical stance.

Though his metaethical ambivalence kept him from advancing a holistic account of the 'normativity of law', *The Concept of Law* had all the elements which could be put together to yield a projectivist account of 'normativity of law'. In *Essays on Bentham*, however, Hart's metaethical ambivalence caused him to eclectically combine incompatible elements from the impinging and projectivist models leading to an antinomy in his account of 'normativity of law'. In Chapter VI, we will study what the antinomy comprised in and how the resolution of the antinomy calls us to address Hart's metaethical ambivalence.

Chapter VI

HART'S METAETHICAL PARADOX:

A TALE OF TWO HARTS

I

Metaethical Eclecticism and Hart: Introduction

In previous chapters, we had the occasion to discuss the contrast between the *modus operandi* of the projectivist and the impinging models of 'normativity of law'. The only semantic model of legal statements congruous with the impinging model of 'normativity of law' is *moral descriptivism*; and the only semantic model of legal statements congruous with the projectivist model of 'normativity of law' is moral non-descriptivism about legal statements. Given that the two models of the 'normativity of law' are diametrically opposed, a putative model which hopes to eclectically combine incompatible elements from the two is bound to run into antinomy. While it would not be practicable to set out here, the many shapes an antinomy of this kind could assume, suffice it to say that broadly, an antinomy could result from the following varieties of eclecticism: a) combining a semantic account exclusive to one of the two models with the model of moral bindingness exclusive to the opposed account; or b) combining the 'source' of normativity of one of the models with the *modus operandi* of the other.

The first of the aforesaid eclecticisms will be found, for instance, when a putative model of 'normativity of law' combines moral descriptivism (which is exclusively congruous with the impinging model) with the projectivist model of moral bindingness. The semantic model of such a putative eclectic account would hold that statements of legal obligation purport to state objective moral reasons for action,

while the metaethical commitment entailed on such an account would deny the existence of such objective moral reasons. The antinomy resulting from this eclectic combination would manifest in the form of an error theory of the 'normativity of law' analogous to Mackie's. Eclecticism in the opposite direction would also lead to antinomy: where a putative model of the 'normativity of law' rests on the combination of the impinging model of bindingness and a non-descriptivist semantic model of any hue. On such an eclectic semantic account, statements of legal obligation would *not* state any objective moral reasons for action, while the metaethical commitment presupposed by such an account would have it, that legal requirements purport to give objective moral reasons for action.

Eclecticism could also result from combining the 'source' of normativity exclusive to one of the models with the *modus operandi* of the other. This comes about when, for instance, a putative model claims that the source of normativity is a conative attitude, but envisages that the 'source' of normativity operate as the fount of reason-givingness, as it does on the impinging model. In Chapter V, we had argued that Perry commits this kind of antinomy when he expects the projectivist model of 'normativity of law' to follow the *modus operand*i of the impinging model.

It will be argued in that thanks to his metaethical ambivalence, in the account of 'normativity of law' advanced in *Essays on Bentham,* Hart seems to be committed to a variant of both kinds of eclecticism discussed above, namely: a) combining a semantic account exclusive to one of the two models with the model of moral bindingness exclusive to the opposed account and b) combining the 'source' of

normativity of one of the models with the *modus operandi* of the other. It will be argued that the 'paradox' that Hart confesses to in the concluding parts of *Essays on Bentham* is a manifestation of such eclecticism.[467]

Hart's paradox will be discussed in Sections II & IV. In Section V, it will be argued that Hart's paradox was brought about because Hart's model of the 'normativity of law' eclectically combined the 'source' of bindingness typical to the projectivist account with the *modus operandi* of the impinging model. In order to understand how all of this came about in Hart's works, it is absolutely essential that we rewind to a quarter of a century before *Essays on Bentham*, to *Legal and Moral Obligation* (1958)[468] where Hart first addressed the question of the 'normativity of law' and, from that point on, trace out the development of this idea in his works. We will undertake this exercise in Section III. It is hoped that this brief intellectual biography will reveal how the problems which came to a head in *Essays on Bentham* were more or less inherent right from the outset in his method of conceptualizing the model of the 'normativity of law'; and how he fortuitously managed to avoid all those problems in *The Concept of Law*. Shortly after confessing to a paradox in his work, Hart attempts a diagnosis of its possible cause. It will be argued in Sections VI and VII that Hart misdiagnoses the real cause of the paradox.

[467] Hart, *Essays on Bentham* (n 12) 267; Hart's self-confessed paradox will be set out in Sections II & IV.

[468] Hart, 'Legal and Moral Obligation' (n 384) 82-107.

II

Hart's Paradox: A First Look

In Chapter X of *Essays on Bentham* entitled 'Commands and Authoritative Legal Reasons', Hart argues that legal directives are 'content independent' and 'peremptory' reasons for action. However, he combines this with a semantic proposition ostensibly incongruous with it—that statements of 'legal duties have nothing directly to do with the subject's reasons for action.'[469] Hart realizes that the latter proposition sits oddly in a chapter named 'Commands and Authoritative Legal Reasons' and more worryingly, directly contradicts the chapter's central idea of legal directives being 'content independent peremptory' reasons. Yet, the semantic proposition does nothing more than reiterate Hart's long held commitment to moral non-descriptivism about statements of legal obligation. It simply confirms what Hart maintained all throughout his career—that statements of legal obligation do not purport to state any moral reasons for action.[470]

Hart admits that this position he finds himself in, may seem to be 'paradoxical or even a sign of confusion'.[471] In a brutally honest confession, towards the end of

[469] Hart, *Essays on Bentham* (n 12) 267.

[470] See Chapter IV for a discussion of Hart's commitment to non descriptivism.

[471] Hart, *Essays on Bentham* (n 12) 267.

Essays on Bentham, Hart admits that the paradox may have been caused because of his insufficient 'grasp of many complexities surrounding the matter'.[472] Thereafter, he attempts a diagnosis of the problem, which we will discuss later in the present chapter. It will be argued that Hart's 'paradox' stems from deeper underlying metaethical problems that he never fully appreciated and which his diagnosis altogether misses.

As a result of his metaethical ambivalence, Hart at different times, seems committed to two different models of the rule of recognition: one symmetrical with the impinging model, and the other non-symmetrical with the impinging model. The impinging version of the rule of recognition purports to act just as the Kelsenian *grundnorm* does, which is to say, it purports to function as a normative power plant endowing laws deriving its validity from it, with bindingness; and gives reasons for people to obey such laws. The impinging version of the rule of recognition is to be found in *Legal and Moral Obligation* (1958) and *Essays on Bentham* (1982). His portrayal of legal directives as 'peremptory' 'content independent' reasons for action in *Essays on Bentham* belonged to one such 'impinging' phase. From the discussion in Chapter III, it will be recollected that the idea of a lawgiver's directives giving reasons for action could only ever make sense on an impinging model of 'normativity of law'.[473] Between *Legal and Moral Obligation* (1958) and *Essays on Bentham* (1982) Hart wrote *The Concept of Law* (1961), where the rule of recognition doesn't

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[472] ibid.

[473] In Chapter III we had argued that more particularly this idea is associated with indirectly impinging accounts such as Raz's.

operate as the impinging Kelsenian grundnorm does; and is thus non-impinging in nature.[474]

On the impinging model found in *Legal and Moral Obligation* (1958) and *Essays on Bentham* (1982), legal directives are content independent and peremptory reasons.[475] They give legal subjects peremptory reasons to obey the commander's directives. Now, the only semantic model that is symmetrical with this impinging model was *moral descriptivism*: the thesis that statements of legal obligation purport to state moral reasons for action. However, oddly, even in such 'impinging' phases, Hart continued to endorse non-descriptivism about legal statements whereby statements of legal duties do not state subject's reasons for action.[476] This non-descriptivist model is incongruous with an impinging model and is congruous with the projectivist model alone.[477] The coincidence of these incongruous ideas—namely, impinging model with moral non descriptivism—is the immediate cause of the 'paradox' that Hart identifies in *Essays on Bentham*.[478] His semantic non-descriptivism when twinned with a non impinging rule of recognition—like he did in the *Concept of Law*—did not cause Hart any problems. But when twinned with the impinging rule of recognition—as he did in *Essays on Bentham*—it did cause

[474] Since the rule of recognition found in *The Concept of Law* is non-symmetrical with the impinging model it lends itself to be compatible with a projectivist model of 'normativity of law'.

[475] The terminology of 'content independent' and 'peremptory' reasons is conspicuously absent in *The Concept of Law*.

[476] Hart, *Essays on Bentham* (n 12) 159-160.

[477] The reason for incongruity of non-descriptivism with the impinging model was discussed in Chapter IV.

[478] While this problem prominently comes to a head in *Essays on Bentham*, the roots of the problem were inherent in his account in 'Legal and Moral Obligation': the first occasion on which Hart sketched out his account of the rule of recognition and the 'normativity of law'. The phrase 'content independent reason' is also to be found in 'Legal and Moral Obligation'.

problems. Lurking beneath the surface of this eclecticism- and the real cause of Hart's paradox- is another, namely, the combination of the source of normativity exclusive to the projectivist model with the *modus operandi* of the projectivist model.

III

Two *Versions* of the Rule of Recognition

Hart's thoughts on the nature of the rule of recognition and the 'normativity of law' can be seen as having proceeded in *three* distinct phases; the first phase being *Legal and Moral Obligation* (1958); the second: *The Concept of Law (1961)*; and the third : *Essays on Bentham (1982).* In the first and third phases Hart advances an impinging version of the rule of recognition. The rule of recognition that Hart advances in *The Concept of Law* (his second phase) has no kinship with the Kelsenian *grundnorm* and is non-impinging in nature. However, even in the *Concept of Law,* Hart very nearly had an impinging rule of recognition like he did in the first and third phases. I use the word 'nearly' here, advisedly; though Hart looks set in the *Concept of Law* to make his rule of recognition act as an impinging device, like the Kelsenian grundnorm, he eventually desists from doing so.

a. The Rex Model in *The Concept of Law:*

Hart introduces the rule of recognition in *The Concept of Law* with a discussion about the *simple* legal system with Rex at its helm.[479] Hart tells us that in a *simple* legal system comprised of Rex and his subjects, the citizens 'accept' the rule of recognition-'what Rex says is to be done'.[480] Hart adds that such acceptance of the rule of recognition is 'normative'. On the Rex model—where the rule of recognition is 'accepted' by the citizens—what Rex says, Hart argues, will not only be valid but also generate 'obligations' of obedience.[481] Rex will not only specify what is to be done but will have the *right* to do so.[482] The 'acceptance' of such a rule of recognition, says Hart, will invest Rex with *authority*.[483]

The same set of comments that Ross and Olivecrona made about Kelsen's *grundnorm*, seem to be *mutatis mutandis* applicable to rule of recognition in Hart's Rex model as well.[484] It could be argued that not only does the rule of recognition in the Rex model set out the criteria for valid law but like the Kelsenian *grundnorm*, it has an additional justificatory task—it also purports to generate a *moral* obligation to obey Rex's directives. To be sure, Hart never claims in so many words that the obligation to obey generated by such a rule of recognition is a *moral* obligation. But as Olivecrona and Ross remind us, it makes little sense to understand such an obligation as anything other than a moral obligation. It would be redundant to

[479] Hart, *The Concept of Law* (n2) 59-60.

[480] ibid 58.

[481] ibid 60.

[482] ibid 58.

[483] ibid.

[484] See Chapter III for discussion on Ross's and Olivecrona's comments on Kelsen's *grundnorm*.

understand the obligation to obey purported to be imposed by the *grundnorm* (the same holds true for the rule of recognition as well) as a legal obligation.[485]

Such a 'rule of recognition' having a 'justificatory' role, which generates a moral obligation of obedience, would be congruous with an impinging model of moral bindingness *alone*. However, Hart does *not* eventually employ this impinging model of the rule of recognition in *The Concept of Law*. The new model of the rule of recognition is of the form 'whatever Rex enacts is law'.[486] It no longer reads-'what Rex says is to be done'. This new rule of recognition that holds the field in the remainder of *The Concept of Law* only sets out the criteria for 'identifying' valid law: it does not perform the 'justificatory' task that the rule of recognition on the Rex model had assumed. Had Hart persisted with this impinging model of the rule of recognition in the remainder of *Concept of Law*, it would have been the case that legal rules deriving their validity from the rule of recognition provide authoritative *moral* reasons for action;[487] and this would have flown in the face of his non-descriptivism about legal statements.[488] Hart would then have had to face the paradox he did in *Essays on Bentham*, twenty years earlier, in the *Concept of Law* itself. Yet, none of that happened because Hart abandons this impinging model of rule of recognition; and the rule of recognition which holds the field in the remainder

[485] This argument is discussed at greater length in section 3 (d) of the present Chapter.

[486] Hart (n2) 96.

[487] To be sure, Hart never uses phrase 'moral authority' or 'moral obligation'—and neither does Kelsen for that matter. But as we saw in Chapter III, in Raz's, Olivecrona's and Ross's discussions of Kelsen's account of normativity: whether or not the idea of moral authority and moral bindingness is used, any impinging account which seeks to impose an obligation of obedience on the subjects presupposes moral authority and moral obligation of obedience.

[488] Hart's norm-relativist semantic model in *The Concept of Law* was non-descriptivist in that it is opposed to moral descriptivism and denies that statements of legal obligation purport to describe moral reasons for action.

of *The Concept of Law* is decidedly non-impinging in nature. But the interesting question is: why does Hart abandon the impinging model of the rule of recognition in the remainder of the *Concept of Law*? Briefly tracing the intellectual history of the rule of recognition will be indispensable in order to understand Hart's move.

b. The Impinging Rex Model in '*Legal and Moral Obligation*':

Hart first introduced the idea of the rule of recognition in *Legal and Moral Obligation* (1958).[489] The rule of recognition we find here is no different in nature from the one on the Rex model in the *Concept of Law* its content being— what the legislator says 'is to be obeyed'. Like on the Rex model, the rule of recognition here imposes an obligation on the subjects to obey the law giver; and is reminiscent of Kelsen's impinging *grundnorm*. For reasons discussed in Section 3 (d), this obligation imposed by the rule of recognition would have to be understood as a moral obligation. In *Legal and Moral Obligation*, Hart makes explicit the affinity of his rule of recognition with Kelsen's grundnorm. He prefaces his account of the rule of recognition with a discussion of Kelsen's grundnorm. He agrees with Kelsen's criticism of the Bentham-Austin model; and also says nothing to dispute the role that the basic norm plays in the legal system. The only point on which he differs from Kelsen is latter's insistence that the *basic norm* is a 'hypothesis' or is 'postulated'. Hart thought such vocabulary to be confusing as it needlessly brought in 'a set of quasi mathematical expressions'. [490] While appearing to favour retaining the

[489] Hart, 'Legal and Moral Obligation' (n 384) 91-93.

[490] ibid 91.

structure and function of the basic norm, Hart proposes that the basic norm needs to be *grounded* in the fact that it is 'accepted' in a practice of the citizens:

> If a group of persons behaves in the way we have distinguished as accepting what a legislator says as constituting a standard of behaviour, then they accept the rule that he is to be obeyed and then the rule that his word is law exists.[491]

In the above passage, Hart sets out *two* different roles for the basic norm or what he calls the 'rule of recognition'. The first prong of the rule of recognition as formulated by Hart has it that the 'legislator is to be obeyed' and the second prong has it that the 'legislator's word is law'. This dual pronged rule of recognition—which *also* requires obedience to the legislator—bears close resemblance to the Kelsenian basic norm which stipulated that 'any law deriving its validity from the rule of recognition ought to be obeyed'. The Kelsenian grundnorm, it will be recollected, was the fount not only of validity but also of normativity (bindingness); and as such performed both the roles set out by Hart for the rule of recognition. It must be noted that there is a great *qualitative* difference between a basic norm which sets out 'what the law is' and one which not only sets out what the law is but also specifies that the 'law ought to be obeyed'. It will be argued in section 3(d) that the latter form of basic norm specifying that 'the law ought to be obeyed' purports to impose a moral obligation of obedience on the citizen and is congruous with an impinging model alone.

Twenty five years later, Hart goes on to use the very same model of the rule of recognition in *Essays on Bentham*. It is just this model that Hart sets out to advance in *The Concept of Law*. Hart would most certainly have employed it, had it not been

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[491] ibid.

for a fortuitous intervention by Graham Hughes in 1960. We will now briefly study Hughes fortuitous objection and Hart's response to it. We term Hughes' intervention as fortuitous because though it had nothing to do with the impinging nature of the rule of recognition, in response to Hughes criticism, Hart unwittingly ended up significantly altering the nature of the rule of recognition by dropping its impinging elements.

c. Hughes' intervention and Hart's rejection of the Rex model:

In 1960, Graham Hughes criticized the Rex model of the rule of recognition to be found in *Legal and Moral Obligation* for reasons that had nothing to do with either the rule of recognition's impinging nature or its affinity to the Kelsenian grundnorm. Hughes' criticism was that Hart's model of the 'acceptance' of the rule of recognition was practically implausible in complex modern legal systems as it demanded of the citizens, knowledge of constitutional law to an extent well beyond their grasp.[492] Hart appears to have taken this criticism to heart. Hart admitted that while the citizens in the simple system such as Rex's may be cognizant of the rule of recognition, citizens in complex legal systems are ordinarily in no position to be cognizant of it. Thus, while the citizens in the simple system such as Rex's may 'accept' the rule of recognition, citizens in complex legal systems were in no position to 'accept' it. Hart

[492] G. Hughes, 'The Existence of a Legal System' (1960) 35 NYULR 1011.

agrees that his model of acceptance would 'involve putting into the heads of ordinary citizens an understanding of constitutional matters which they might not have.'[493]

Consequently, Hart breaks up the 'acceptance' requirement between the citizen and the legal officials. The officials manifest their 'acceptance' by identifying and applying rules in accordance with the rule of recognition; and citizens manifest their *acceptance* largely by 'acquiescence' in the results of these official operations.[494] When citizens and officials 'accept' in the aforesaid fashion, we have the conditions necessary and sufficient for the existence of a legal system. Note, that here Hart does not expect the officials to morally endorse the rule of recognition. His emphasis is on the fact that it is only officials who can be cognizant of the rule of recognition and as long as they identify and enforce laws in accordance with it, the rule of recognition is sustained. In Chapter V, we had described this as the norm-relative internal point of view of officials. We had also noted that the Hart's description of the existence conditions of the legal system in terms of varying kinds of 'acceptance' by citizens and officials is not entirely apt. The real import of Hart's move was the following. In a simple legal system, the rule of recognition is constituted by the norm-relative practice of citizens. In a complex legal system, it is the norm-relative practice of officials that constitutes the rule of recognition and the citizens need do nothing

[493] Hart, *The Concept of Law* (n2) 60 Roger Shiner argues that Hart accepts Hughes criticism as sound (albeit without expressly naming him) and his move of breaking the acceptance requirement between citizens and officials was in response to the objection by Graham Hughes: Roger Shiner, *Norm and Nature* (Clarendon Press 1992) 162.

[494] Hart (n 2) 60.

more than merely 'acquiesce' in the official operations for there to be legal system in place. [495]

But the one upshot of the Hughes objection was something that neither Hughes spoke of, nor Hart seriously emphasized. When Hart tweaks the existence conditions of the rule of recognition, in response to Hughes' objection, he introduces an altogether different model of the rule of recognition. The new model of the rule of recognition is of the form 'Whatever Rex enacts is Law'.[496] It no longer reads—'what Rex says is to be done'. This new rule of recognition that holds the field in the remainder of *The Concept of Law* only sets out the criteria for 'identifying' valid law: it does not perform the justificatory task that the rule of recognition on the Rex model did. The Kelsen- inspired normativity that Hart had built into the rule of recognition on the previous Rex model is dropped. In other words this rule of recognition stops being an impinging one altogether. The rule of recognition that Hart had envisioned on the Rex model would have made the rule of recognition do the exact normative load bearing that the Kelsenian *grundnorm* did. Hart would probably have continued walking on that road had it not been for the fortuitous intervention by Hughes. As a result, *The Concept of Law* is free from this Rex model.

[495] Hart perhaps placed too much emphasis on 'knowledge' or cognizance of the rule of recognition being the crucial factor that set simple legal systems apart from complex ones. While it is true that it is easier for a citizen in a simple legal system of Rex to *know* the rule of recognition, than in a complex legal system, most citizens in a complex legal system, do nevertheless know what the law is; and by implication would have at least a working knowledge of the rule of recognition, though not know of its specifics. Knowledge of something is not a binary idea that admits of only two extremes. There is a sliding scale between knowledge and ignorance that Hart doesn't appear to be sensitive to. Later on in the *Concept of Law* Hart does admit that citizens in even in a complex legal system do know what the law is and utter internal legal statements -which would be impossible without having a working knowledge of the rule of recognition; Hart, *The Concept of Law* (n 2) 114.

[496] Hart (n 2) 96.

However, as we shall see in the next section, in *Essays on Bentham*, Hart returns to this impinging Kelsenian model of the rule of recognition.

But the crucial question that can be raised here is—why does Hart drop the impinging model of the rule of recognition while tweaking the existence conditions of the rule of recognition? Why should the fact that it is the norm-relative practice of officials rather than of citizens which constitutes the rule of recognition in a complex legal system, lead Hart to drop the impinging nature of the rule of recognition? Hart never goes into reasons for doing so anywhere in the *Concept of Law*. However, he does return to the theme in the last few pages of *Essays on Bentham* when he tries to diagnose the self-confessed 'paradox'. We will return to discussing the significance of this move in section VII.

d. Return to the Rex model in *Essays on Bentham:*

In *Essays on Bentham*, Hart returns to the impinging Rex model of the rule of recognition, which he had endorsed in *Legal and Moral Obligation*; and had floated in *The Concept of Law*, before going on to reject it. In *Essays on Bentham*, explaining his motivations for re-introducing the Rex model, Hart tells us that he seeks to employ the Hobbesian voluntarist model in explaining the 'normativity of law'. Along with it, he also introduces the idea of legal directives being 'content independent', 'peremptory' reasons for action which was absent from his

philosophical repertoire in *The Concept of Law*.[497] Furthermore, he also clarifies that his idea of 'peremptory' reasons is identical to Raz's idea of 'exclusionary reasons'.

> [T]his modern analysis of meaning was first suggested to me by Hobbes who said some simple but illuminating things about commands and the similarity and differences between commands and covenants as sources of obligation or as obligation creating acts. But I do not think I should have seen the full importance of Hobbes' remarks on these topics had I not had the benefit of the work of Joseph Raz on what he terms 'exclusionary reasons' which *resembles in many respects the notion which I have taken from Hobbes* [note: i.e. peremptory reasons]'[498]

In the model that follows, Hart argues that legal directives are content independent and peremptory reasons for action. A legal directive is a content independent reason for action, in that, the commander's directives are meant 'to function as a reason' for the subject 'independently of the nature or character of the actions to be done'.[499] And the legal directive is a peremptory reason in that 'the commander's expression of will is… not intended to function in the hearer's deliberation as a reason for doing the act, not even as the strongest or dominant reason…the commander intends to cut off or exclude it [deliberation about reasons].'[500] Here we find that Hart seems to substantially endorse the central tenets of Raz's impinging model of 'normativity of law' which we had the occasion to consider in Chapter III—namely, the idea of content independent reasons and exclusionary reasons. Hart then goes on to advance

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[497] Hart thought that the notion of content independent peremptory reasons was central to his account of 'normativity of law': 'I certainly think…that the notion of a content independent peremptory reason for action is needed…to explain the 'normativity of law': Hart, *Essays on Bentham* (n 12) 262.

[498] ibid 244 (parenthesis and emphasis added).

[499] ibid 254; Hart also reminds us here that he had first introduced the idea of 'content independent' reasons in *Legal and Moral Obligation*.

[500] ibid 253.

a model of the rule of recognition, which like the Rex model and the Kelsenian *grundnorm* would render it an impinging device:

> The general recognition in a society of the commander's words as reasons for action is equivalent to a social rule…this rule might be formulated as the rule that the commander is *to be obeyed* and so would appear as the rule *imposing obligations* on the subjects. Regarded in another way as conferring authority on the commander…[501]

Note the phraseology of the rule of recognition here—'the commander is to be obeyed'. This resembles the phraseology of the rule of recognition in the Rex model in *Legal and Moral Obligation* and in the abandoned Rex model in *Concept of Law*; and indeed that of Kelsen's *grundnorm*.[502] Hart makes it plain that this rule of recognition imposes an *obligation of obedience* on the subjects. He also stresses on the correlative authority it confers on the lawgiver. The laws made by the commander are not only *valid* but also, authoritative, *normative* and give rise to obligation of obedience for the subjects. Such 'obligations of obedience' would have to be understood as *moral* obligations, though Hart never specifically refers to them as such; it would make little sense to understand them as legal obligations. In this context, the comments of Alf Ross on the 'obligation of obedience' imposed by Kelsen's *grundnorm* are pertinent for they are *mutatis mutandis* applicable to the 'obligation of obedience' imposed by Hart's rule of recognition in *Essays on Bentham*.

> Binding force it is said, means you are duty-bound to obey the law. What kind of duty is meant here? It seems obvious that the duty to obey the law cannot mean here a legal duty or obligation… A [legal] duty is always duty to behave in a certain way. In this case the required behaviour is "to obey the

[501] ibid 258 (emphasis added)

[502] Here, in this new version, the 'recognition of the commander's words as constituting content independent reasons', does the very job as 'acceptance of the rule of recognition' by the citizen does on the Rex model. Indeed, Hart uses the words 'recognition', 'acceptance' and 'normative attitude' interchangeably.

> law"... if the duty to obey the prescriptions of the legal system is to mean something different from the obligation prescribed directly by this system, then the difference cannot consist in the *required behaviour - what* we are bound to do- but must consist exclusively in how we are bound.[503]

According to Ross, the 'obligation to obey the law' must therefore necessarily mean moral obligation to obey the law. Ross says, 'it is a moral duty toward the system, not a legal duty conforming to the system.'[504] The 'obligation of obedience' which the rule of recognition in *Essays on Bentham* purports to impose must then be understood as a moral obligation, though Hart nowhere describes it as such. In fact, given his metaethical ambivalence, Hart would have been loath to expressly refer to such obligations of obedience as moral obligations.

However, Hart's invocation of Hobbes as an early harbinger of his account in *Essays on Bentham* is very instructive; and it shows us that Hart must have been vividly aware that the obligation of obedience his model in *Essays on Bentham* purported to set out was (at least ostensibly) a moral obligation. Hobbes was a voluntarist.[505] In chapter III, we had the occasion to consider how a voluntarist account presupposes an impinging model of moral bindingness. Hart seems to recognize that the ideas he borrows from Hobbes presuppose a moral obligation to obey the law giver; something that Bentham was fervently opposed to:

> Hobbes, like Bentham thought that all laws were commands of a Sovereign but, unlike Bentham thought the commands were laws only if given to those who were under a *prior obligation* to obey, and his account of this prior obligation was that it arose from the subjects covenant or contract to obey

[503] Ross (n 177) 147, 153-154.

[504] ibid 154.

[505] Leslie Green, 'Legal Obligation and Authority', (2010) The Stanford Encyclopedia of Philosophy, <http://plato.stanford.edu/archives/spr2010/entries/legal-obligation/> accessed 20th October 2012.

> the commander… Bentham however would have none of this prior obligation to obey nor of the social contract alleged to generate it nor of the idea that in making laws the Sovereign was exercising the right or normative power…[506]

The rule of recognition in *Essays on Bentham* which purported to impose a moral obligation of obedience on the subjects and conferred authority or the right to issue directives on the lawgiver could *only* be congruous with an impinging model of 'normativity of law' such as Kelsen's or Raz's or Hobbes's; it would be incongruous with a projectivist model of normativity such as the one we reconstructed for Hart in the previous chapters. And it clearly is at odds with the version of the rule of recognition in the *Concept of Law* which only provides the criteria for validity of law but does *not* also render them metaethically normative or morally binding. It would not be out of place to interpose here an observation Olivecrona makes about Kelsen's and the Voluntarists' accounts of 'normativity of law'.

> A command cannot be conceived as being obligatory unless issued by an authority possessing the *right* to command. This authority cannot, however, create such a right through its own commands. The right can only be based on a higher principle whose validity is independent of the authority in question. This leads us straight into the sphere of natural law. The right of the state to command must be derived from principles of natural law, whether this name is used or not.[507]

The crux of Olivecrona's observation is the following. Any account which presupposes a *right* in the lawgiver to issue commands or a *power* in him to morally bind subjects; and a corresponding moral *duty* of obedience in the subject, would necessarily have to rely on an impinging model of moral bindingness typically associated with natural law theory. The accounts of voluntarists like Hobbes follow

[506] Hart, *Essays on Bentham* (n 12) 253.

[507] Olivecrona (n 178) 125.

this model; and so do the models of many self-professed positivists' like Kelsen and Raz. The rule of recognition advanced by Hart in *Essays on Bentham* is impinging in nature. It not only sets out the criteria for valid law but also purports to justify them and endows them with bindingness. The rule of recognition in *Essays on Bentham* being impinging in nature, purports to endow the lawgiver with the normative power, or right to issue directives and purports to create a corresponding moral duty of obedience in the subjects. As we shall see in Section V, Hart seems to have been aware that his model *ostensibly* requires an objective moral principle as truth maker constituting the 'source' of normativity.

IV

Hart's Paradox

On Hart's model in *Essays on Bentham*, the law giver has the normative power to morally bind subjects; and his directives constitute *moral* reasons for the subject's action. From this it *should* naturally follow that statements of legal obligation purport to state 'content independent' 'peremptory' reasons that subjects have for action. In other words this model of the rule of recognition could only be congruous with a descriptivist semantic model. [508]

[508] Raz, it will be recollected from our discussion in Chapter III has a descriptivist semantic model of statements of legal obligation and an impinging model of normativity, admittedly inspired by Kelsen's justified normativity. Hence Hart's Razian sounding vocabulary of 'peremptory' 'content independent reasons' should hardly come as a surprise given his shift to an impinging model.

Now, despite his shift to an impinging model and in the teeth of his claim that legal directives give peremptory content independent reasons for action, Hart remained fervently committed to the semantic non-descriptivism he espoused in *The Concept of Law*. In Chapter VI *of Essays on Bentham*, Hart reaffirms his commitment to non-descriptivism arguing that statements of legal obligations: 'do not refer to actions which they have a categorical reason to do, but… refer to actions which are due from or are owed by the subjects having the duty, in the sense that they may be properly demanded from them.'[509] Reiterating his non-descriptivism in Chapter X of *Essays on Bentham* Hart argues:

> Of course, if Raz's …cognitive analysis of the notion of duty were correct so that ' X has a duty to act in a certain way' means that there is an objective reason for X to act in that way, this would amount to a moral judgment…but I find little reason to accept such a cognitive interpretation of legal duty…far better adapted to the legal case is a different non-cognitive account…[510]

Accordingly, Hart proclaims that 'legal duties have nothing directly to do with the subject's reasons for action.'[511] But in saying that, Hart directly contradicts his argument that laws are 'content independent peremptory' reasons for action.[512] What we find here is a paradox. Hart endorsed a model of the rule of recognition that operated along the lines of the impinging model but at the same time denied all the

[509] Hart, *Essays on Bentham* (n 12) 160.

[510] ibid 159. In talking about the 'cognitive' account of duty, Hart is referring to the *descriptivist* conception of legal statements on which legal statements are descriptions of moral reasons for action. Hart endorsed a non-descriptivist conception of statements of legal obligation. Raz too characterizes Hart's non-descriptivist position as 'non-cognitivism' about legal sentences; I fear the term non-cognitivism is an unhappy and a potentially misleading one for characterizing Hart's position, which in reality, is non-descriptivism about legal norms. The label 'Non-cognitivism' if nothing more is said, stands for a position in metaethics about the character of reasons.

[511] Hart, *Essays on Bentham* (n 12) 267.

[512] In line with his commitment to non descriptivism, Hart argues that statements of legal obligation are *not* statements of moral obligation. Hart, *Essays on Bentham* (n 12) 144-145.

consequences that necessarily followed form it. Hart admits that these contradictory moves may seem to be 'paradoxical or even a sign of confusion'.

Hart's rule of recognition and the idea of laws being content independent peremptory reasons for action were incompatible with the model of the rule of recognition and semantic model of statements of legal obligation that Hart had supported in T*he Concept of Law*. Hart's rule of recognition in the *Concept of Law* did not act as an impinging device like Kelsen's *grundnorm*. Hart's non-descriptivist conception of legal statements meant that legal statements did not purport to state content independent peremptory reasons for action—making it incongruous with the impinging model of the rule of recognition. Hart probably realized that he just couldn't square his new theory with the central tenets that he had laid down in *The Concept of Law* which he was still committed to. In a brutally honest confession, towards the end of *Essays on Bentham*, Hart admits that he may not have 'sufficient grasp of many complexities surrounding the matter'.[513] He then goes on to attempt a diagnosis of his paradox. In the next section we will consider the reasons for the paradox.

V

Hart's Metaethical Eclecticism

It will be argued that Hart's paradox arose from eclectically trying to fit a projectivist model of normativity into an impinging mould. Let us begin with the

[513] Hart, *Essays on Bentham* (n 12) 267.

crucial metaethical question Hart puts to himself but never goes on to engage thoroughly, namely: how could the directives of a lawgiver ever give rise to reasons for action without the grounding of an 'ulterior' moral standard? Hart is dimly aware that his model *ostensibly* requires an objective moral principle as truth maker constituting the 'source' of normativity. Echoing Olivecrona, Hart puts to himself the all-important metaethical question:

> How can an artifact of the human will such as a command or compliance with a legislative procedure either in itself be or be believed to be a reason for action? Surely, the critic may urge, such products of the human will could only be such a reason if there were some artificial ulterior reason for taking the former as guides to action…[514]

Hart was acutely aware that his impinging model of normativity *ostensibly* requires an 'ulterior' objective moral standard to act as truth maker and be the 'source' of normativity—without which there could be nothing to generate the reason-givingness his model presupposes. In Chapter III, we saw that Kelsen's impinging model simply hung in the air without any 'source' of normativity for want of such an ulterior objective moral standard. However, while Hart's model of normativity openly invokes the Razian idea of reason-givingness, he seems to be fundamentally opposed to the idea of some objective moral standard as the 'source' of normativity.[515] What then on Hart's account is the 'source' of normativity if not an ulterior objective moral standard? Though Hart doesn't specifically provide us with an answer, we are in a position to decipher it from Hart's description of the rule of recognition he gives

[514] ibid 265.

[515] We saw in Chapter III, that the normal justification thesis acts as the ulterior moral standard in Raz's model of normativity.

earlier in the chapter. The 'source' of normativity, for Hart, it turns out, is not some objective truth maker but 'acceptance' by citizens.

> Such a standing recognition (which may be motivated by any of a variety of ultimate reasons) of a commander's words as generally constituting a content independent peremptory reason for acting is a distinctive normative attitude … and in my view this is the nucleus of a whole group of related normative phenomena, including… the general notion of authority… [516]

In the above passage, Hart makes it clear that the 'source' of authority on his model is the 'recognition' of the commander's words as constituting content independent reasons. He also makes it abundantly clear that this 'recognition' is an 'attitude': a *normative* attitude. Here, in *Essays on Bentham* Hart, uses the terms 'acceptance' 'recognition' and 'normative attitude' interchangeably. [517] He points out, in no uncertain terms, that this 'attitude' or 'acceptance' is the 'source' of normativity and authority. The above passage is in some respects reminiscent of Hart's argument in the *Concept of Law* that the 'internal point of view' is the nucleus of the concept of authority.[518]

Hart seems to have held the view that his model doesn't need an ulterior moral standard as the source of normativity *because* the attitude towards /acceptance of the rule of recognition by citizens serves to constitute the 'source' of normativity. Hart gives the impression of having wanted to use the idea of reason givingness of the impinging model, while at the same time denying the idea of an objective moral

[516] Hart, *Essays on Bentham* (n 12) 256; Note, here Hart is talking about the case of the simple legal system.

[517] At one place, Hart says '… to have such authority is to have ones expressions of intentions as to the actions of others *accepted* as peremptory content independent reasons for action.': Hart, *Essays on Bentham* (n 12) 256.

[518] See discussion in Chapter V.

standard as the 'source' of normativity. However, as we discussed at length in Chapters I & III, the idea of reason givingness is inextricably intertwined with the idea of objective moral standards that act as truthmakers. Having reasons to do something, on the impinging model, is tantamount to there being an objective moral standard that requires action. It *is* the objective moral standard which gives reasons. If the idea of an objective moral standard as the source of normativity is dropped, along with it, the idea of reason givingness would also have to be dropped.[519] Having rejected the idea of an objective moral standard as the source of normativity, Hart couldn't have couldn't have consistently advanced a model of normativity which employed the idea of reason givingness. [520]

Hart's move of seeking to explain authority in terms of a normative attitude taken by the citizen is consistent with a projectivist model alone. The projectivist model understands authority in terms of the motivational attitudinal states involved in making a moral judgment. On the projectivist model, for the law to have authority for an agent, is for her to take a non-cognitivist moral attitude of approval/ acceptance towards it. It is only on a projectivist account that an attitude could be thought to constitute the source of 'normativity' or 'authority'. However, there is considerable

[519] See Chapter II where this point is discussed at some length.

[520] Furthermore, even the idea of 'acceptance' by citizens being the ground or source of normativity is at odds with an impinging model. The impinging model understands authority in terms of objective moral standards that give reasons for action. It is the objective moral standard that is the source of moral bindingness gives reasons for action, regardless of the moral acceptance of the subject. It would be incongruous for a purported impinging model to rest the source of normativity on the moral 'acceptance' of the subject (where moral acceptance is understood in terms of cognitive belief). The moral belief aims to track true moral standards and it is this true moral standard, not the belief, which is the source of normativity. Thus a moral belief could never be the source of normativity on the impinging model. In any event, Hart rules out a cognitive understanding of moral acceptance as he categorically refers to the moral acceptance on his model as an 'attitude'. An attitude is not even truth apt and does not purport to track any moral standards.

difficulty in straightforwardly fitting Hart's model of normativity in *Essays on Bentham* into a projectivist mould. The idea of reason-givingness, which Hart's stresses on repeatedly in his account in *Essays on Bentham*, is alien to the projectivist model; it is congruous with the impinging model alone. Despite advancing a source of normativity that is consistent with the projectivist model, Hart seems to have wanted his model of normativity operate as the impinging model did. In other words, Hart seems to have wanted a projectivist model with the projectivist source of normativity but which in every other respect *operated* like the impinging model and gave reasons for action. This would explain why he insisted that the source of normativity was an attitude and oddly also insisted on accommodating the idea that laws are reason-giving. But this attempt to fit a square projectivist peg into a round impinging hole was fraught with serious problems that he didn't seem to entirely appreciate. It is this metaethical eclecticism that was the real cause of the paradox in his account. In my estimate, this eclecticism was caused by Hart's having misunderstood the *modus operandi* of the projectivist account.

Hart, however, would not be alone in labouring under such misunderstandings about the projectivist model of normativity. In Chapter V, we discussed the criticisms that Stephen Perry advances against the projectivist model of bindingness of law. How could an attitude, he questioned, ever explain reason givingness? For the law to give reasons, the law maker would need to have the moral *right* to issue directives. And only an objective moral principle, his argument went, could ever provide the basis for such a *right*.[521] We had argued that this criticism was misplaced, because

[521] It will be recollected, Olivecrona argues that this move of trying to locate a moral right in the law giver is the inarticulate premise in Kelsen's account of normativity. He points out that this move necessarily presupposes an objective moral standard as the truth maker. He goes on to dismiss the

Perry had presupposed the *modus operandi* of the impinging model and expected the projectivist model to follow that *modus operandi*. The mistake Perry made was of assuming that any plausible model of normativity would necessarily have to follow the *modus operandi* of reason givingness to be found on the impinging model. But that error could only arise from an insufficient appreciation of the *modus operandi* of the projectivist model. The projectivist model does not understand moral bindingness in 'justificatory' terms as the impinging model does. Rather, it understands moral bindingness in motivational attitudinal terms. Consequently, the projectivist model explains moral bindingness without invoking the idea of reason givingness or the moral *right* to issue directives in a lawgiver: ideas that make sense only on a justificatory understanding of normativity and necessarily presuppose a truth maker. The projectivist model explains 'normativity of law' entirely in terms of moral attitudes taken by subjects towards the law. Despite having wanted to advance a model of normativity which had a projectivist source of normativity, Hart doesn't seem to have been aware of the distinctive *modus operandi* of the projectivist model. From Hart's discussion, it would appear that he wanted to advance a model of normativity with a projectivist 'source' but wanted it to generate reason givingness just like Perry had mistakenly expected it to. Consequently, Hart wanted the lawgiver on his model to have the moral *right* to command. However, none of that is possible on an account with a projectivist source of normativity. What Hart, *inter alia*, needs to dissolve the paradox in his account is to do away with its impinging elements. This could be achieved by dropping the requirement that the rule of recognition give the commander the *right* to issue directives and also dropping the corresponding *obligation* for obedience the rule of recognition purports to generate in subjects. This

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move as a vestige of natural law thought. The projectivist model of the Scandinavian Realists explains normativity without presupposing a moral right in the lawgiver.

would entail dropping the idea of legal directives as content independent peremptory reasons for action. With those elements eschewed would be left with a projectivist model of 'normativity of law' which does not purport to give reasons for people to obey the law, similar to what we saw in *The Concept of Law*.

VI

Hart's Wrong Diagnosis

Shortly after confessing that he did not have a 'sufficient grasp of many complexities' surrounding the problem, Hart seeks to diagnose why he ended up with the paradox. Hart thinks the paradox came about entirely because of his having argued on the one hand that judges need not 'accept' legal directives as content independent and peremptory reasons for action while having argued on the other hand that the citizens accept the lawgivers directives as reasons for action. In other words, the paradox, Hart thinks, arose because of his having 'whittled down' the *nature* of the acceptance; in simple legal systems there is acceptance by subjects of the commanders directives as content independent peremptory reasons whereas there is no such acceptance (by judges) in a complex legal system.

Hart thinks that the 'whittling down' may have come about as a result of the transition from the simple legal system of Rex to a complex legal system. He says the whittling down is something ' for which I had made express provision on p. 257... that the introduction into the simple society of specialized law-applying and law-

enforcing agencies would mean the institutionalization of the recognition of the commander's authority… and this would transform the situation depicted in the model'.[522] But why should the complexity of the system affect the model?

> Where courts with these functions exist the normative attitude consisting in the recognition of the commands as content independent peremptory reasons for action and as standards for the assessment of conduct as right or wrong is itself institutionalized as defining public standards of correct adjudication and a duty to conform to these standards is attached to the office of the judge and assumed by individual judges when they take up that office.[523]

Hart's explanation of what happens in the transition from the simple to the complex legal system is the following. In the simple legal system of Rex, citizens 'accept' or 'recognize' the words of the commander as constituting content independent peremptory reasons for action. The situation, however, is transformed in a complex legal system. A complex legal system has courts; and where the courts identify and enforce the law, in accordance with the rule of recognition, the legal system is in place. But judges may enforce the law for any reason whatsoever, indeed oftentimes their position as judges—and the settled institutional practice they come into when they assume office—precludes them from deciding on the moral soundness of the law they are enforcing. In other words, the judges who enforce the law *need not* accept the laws as content independent peremptory reasons. This is why, Hart thinks, the 'whittling down' in the nature of the acceptance takes place. [524] And this, according to Hart, explains the paradox he finds himself faced with.

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[522] ibid 267.

[523] ibid 257, 258.

[524] What we find here is in many respects similar to the situation Hart had found himself in *The Concept of Law* in the transition from the simple to the complex system. In response to Hughes' objection, Hart conceded that while the citizens in the simple legal system of Rex may 'accept' that what 'Rex says ought to be done' and thus accept the authority of the lawgiver; in a complex legal

We are now in a better position to appreciate why Hart thought the transition from the simple to the complex legal system led to a 'whittling down' of the nature of acceptance; thereby, in his view, causing the paradox. Hart's explanation for the 'whittling down' of the acceptance is based on one significant assumption that he never explicitly articulates: that citizens in a simple legal system (unlike the judges in a complex system) morally 'accept' the rule of recognition. But as we shall now see, even in a simple legal system the citizens are in no position to morally accept the rule of recognition; and hence there is no 'whittling down' in the nature of acceptance in the transition from the simple to the complex system.

The rule of recognition—whether or not it is charged with the additional justificatory function—constitutes one of the most crucial existence conditions of a legal system. Now, the sort of 'acceptance' that constitutes the rule of recognition (regardless of whether its nature be made impinging or non-impinging) in the *simple* legal system of Rex *cannot* be moral acceptance. Insisting on the 'acceptance' constituting a rule of recognition necessarily being moral acceptance would have the effect of rendering the existence conditions for the legal system too onerous. Hart would then have had to insist that a simple legal system with Rex as the king exists *only* if citizens (or a sizeable number of them) morally accept Rex as the law giver. It is quite obvious that Hart never wanted to do this. In *Legal and Moral Obligation*,

system, they are in no position to do so. Consequently, he also ended up significantly altering the rule of recognition in the remainder of *The Concept of Law* from an impinging one to a non- impinging one. As a consequence, when a judge made a statement of legal obligation, he did not thereby state any peremptory reasons that a citizen has for action. Here, in *Essays on Bentham*, a problem similar to the one that Hart faced in *The Concept of Law* in the transition from the simple to the complex system seems to recur. However, in *Essays on Bentham*, in response, Hart does not deprive the rule of recognition of its impinging nature (as he had done in *Concept of Law*).

Hart had specifically ruled out that the 'acceptance' constituting the rule of recognition in the simple Rex model was moral acceptance.[525] Again, in *Essays on Bentham*, Hart reiterates the same point when he argues that the acceptance of the citizens in a simple legal system may be motivated by 'any reason whatsoever'. Then, the nature of 'acceptance' we find constituting the rule of recognition in the simple legal system of Rex is none other than the norm-relativist acceptance of the sort that constitutes any token social rule. Which is to say, the 'acceptance' in question does not require anything more from the citizens than that they be *cognizant* of the existence of the social rule; it does not require any moral attitudinal endorsement of such rule. Given this nature of 'acceptance' constituting the rule of recognition it would have been possible for a citizen in a simple legal system to identify and state to others what a directive of Rex requires, without morally accepting it just as Hart thought it possible for a judge in a complex legal system to identify what is legally required and apply the law without any moral endorsement. Hart was mistaken in thinking that this was a phenomenon exclusive to judges in a complex legal system alone brought about by the 'institutionalization' of the 'acceptance'. Thus, it is not true even for a simple legal system that citizens necessarily morally 'accept' the rule of recognition. We would then have to acknowledge that there is, in reality, no 'whittling down' of the nature of acceptance of the rule of recognition in the move from the simple legal system of Rex to the complex one, as Hart supposed there was. Hart erroneously assumed that the ingredient of simple legal systems which was missing in the complex system was moral acceptance.

[525] Hart, 'Legal and Moral Obligation' (n 384) 92.

VII

‘Acceptance’ and Conflating the Internal Point(s) of view

As was noted in Chapter V, there are two distinct versions of the internal point of view in the *Concept of Law*: norm-relative and moral. The acceptance found in the norm-relative internal point of view—comprising of *cognizance* of a social pattern as a rule—is the constituent of the rule of recognition.[526] Statements of legal obligation (or internal legal statements as Hart also sometimes called them) are norm-relative statements uttered by participants having the norm-relative internal point of view. A participant without the least attitude of moral approval towards the law could have the norm-relative internal point of view and utter statements of legal obligation. In contrast, the acceptance found in the moral internal point of view is the *attitude* taken by subjects towards rules identified in accordance with the rule of recognition. It was argued that in the *Concept of Law*, Hart had sought to explain the authority or ‘normativity of law’ with the aid of the moral internal point of view. We understood the moral internal point of view as a non-cognitivist attitude; and sought to explain normativity with the aid of this attitude. We also argued why this moral attitude would have to be directed at rules identified in accordance with the rule of recognition, rather than the rule of recognition itself. As such, in the *Concept of Law* Hart did not seek to explain *both* the existence conditions of the rule of recognition *and* the authority of law with the aid of one single idea of the internal point of view.

[526] The relevant norm-relative internal point of view in a simple legal system with Rex and his subjects is that of subjects. The norm-relative internal point of view of officials becomes relevant only in a complex legal system.

Conspicuously absent from Hart's account in *Essays on Bentham* are the *two* distinct versions of the internal point of view we found in the *Concept of Law*. Here, in *Essays on Bentham* Hart seems to conflate the two versions of the internal point of view. Hart has just one version of the internal point of view, which he *expects* to be both: the constituent of the rule of recognition, and also be the projectivist source of authority. But we have seen why that expectation is bound to be frustrated given the fact that the internal point of view is just not geared to do double duty. Thus, even in the simple legal system of Rex, contrary to Hart's expectations, there is no moral acceptance of the rule of recognition by the subjects. The conflation of the two versions of the internal points of view left Hart with a rather odd combination of semantic commitments. While he clearly maintained that judges do not express any moral commitment when they make legal statements, his position committed him to the view that citizens in a simple legal system do approve of the directives of Rex in making legal statements, though he never makes this claim.[527] This would have meant that internal legal statements uttered by citizens in the simple legal system of Rex not only state what is required by law but also *necessarily* morally approve the law.[528] This was inevitable given the conflation of the two versions of the internal point of view.

The clearest evidence of Hart having conflated the two versions of the internal point of view, and the semantic confusion resulting there from, is to be found in *Legal and Moral Obligation*. There again, Hart only holds one version of the internal

[527] This would further explain why he thought that the whittling down of acceptance occurs only in the transition from the simple to the complex system.

[528] Kevin Toh seeks to reconstruct Hart's model in *The* Concept of Law by attributing to him some such commitment. We will see in Chapter VII why such a project is flawed.

point of view which comprises of the citizens *accepting* the rule of recognition—which invests the lawmaker with authority and imposes an obligation of obedience on the citizens. Hart argues that subjects in the simple legal system with Rex at its helm, having the internal point of view towards the rule of recognition will treat the directives of Rex as 'authoritative' and utter statements of legal obligation such as 'I (you) have an obligation to'. Those who do not have the internal point of view and do not treat the directives of Rex as authoritative will not utter statements of legal obligation; instead they will utter statements like 'I am (you are) obliged to', 'under this system I you will suffer if I (you) do not'.[529] Hart makes an identical point in *Essays on Bentham* while holding that citizens who accept the rule of recognition accept the commander's directives as authoritative reasons. He could very well have used the above examples in his account of legal statements in *Essays on Bentham* as well.

Internal legal statements are uttered by those who *accept* the rule of recognition. On Hart's accounts in *Legal and Moral Obligation* and *Essays on Bentham,* making an internal legal statement seems to necessarily require the moral internal point of view whereby the agent treats the law as authoritative. This would require that any one who can identify the law and make internal legal statements also morally approves of the rule of recognition. However, Hart also thought that no rule of recognition would exist unless and until subjects *generally* 'accept' the rule of recognition. As we have just considered in the previous section, insisting that such moral acceptance is necessary to constitute the rule of recognition is fraught with problems even in the simple legal system of Rex. Furthermore, Hart himself stresses

[529] Hart, 'Legal and Moral Obligation' (n 384) 90, 91.

that the acceptance of the rule of recognition need not be moral acceptance. Then, we would have to conclude that acceptance that constitutes the rule of recognition is the norm-relative internal point of view and statements of legal obligation like 'I (you) have an obligation' are norm-relative statements that can be uttered even by those who do not accept the directives of Rex as morally authoritative. This problem was a consequence of Hart's having conflated the two versions of the internal point of view in *Legal and Moral Obligation* and *Essays on Bentham*.

Interestingly, while Hart was writing *The Concept of Law*, he seems to have been aware of the need to keep the two versions of the internal point of view separate, presumably, in order to avoid some of the problems identified here. The following is an excerpt from the notebook which he maintained contemporaneously with his writing of *The Concept of Law*:

> There is something odd, possibly something mistaken in position which I have taken v.2 that the essence/structure of a legal system rests on acceptance of central/certain authority as binding…Perhaps all I need to convey is that the obligation is strictly obligation i.e.: narrower than belief in moral goodness. But? There is a muddle (in me) I suspect here. [530]

The only place in *The Concept of Law* where Hart does take the position he writes of as 'mistaken' and 'odd' is the case of the simple model of Rex where he pictures citizens accepting the 'impinging' rule of recognition that the directives of Rex are authoritative and binding. This Rex model was in many respects identical to the Rex model in *Legal and Moral Obligation*. The impinging rule of recognition on this picture would have created moral obligations of obedience in citizens. Having a legal obligation would have necessarily been equivalent with having a moral obligation.

[530] Lacey (n1) 228.

Could the above entry in his notebook have something to do with his having dropped the impinging rule of recognition in the transition from the simple to the complex legal system in the *Concept of Law*? There is no way of telling with any certainty. However, Hart does go on in *The Concept of Law* to avert the problem by advancing two distinct versions of the internal point of view: the norm-relative internal point of view which constitutes the rule of recognition; and the moral internal point of view which constitutes the source of authority of law. Statements of legal obligation which are uttered from the norm-relative internal point of view do not state any moral obligations and the norm-relative internal point of view does not involve any moral endorsement of the rule of recognition. Consequently, Hart settled on a purely norm-relativistic analysis of statements of legal obligation. This move did sort out Hart's muddle to a great extent. But it returns in *Essays on Bentham* where Hart goes on to endorse the position he found mistaken and odd.

Chapter VII

TOH'S ALLEGED EXPRESSIVISM AND HIS HARTIAN RECONSTRUCTION

I

Introduction

In recent papers, Kevin Toh has proposed a reconstruction of Hart's account of normativity along non-cognitivist/ expressivist lines.[531] At first blush, this may appear to approximate my own project. It must be emphasized, however, that there are significant differences between the two, the full extent of which will emerge only after a detailed discussion of Toh's work. It suffices to prefatorily note that the difference between my project and Toh's is both: of approach and of outcome. Toh purports to introduce non-cognitivism through Hart's idea of internal legal statements. He treats them as moral statements expressing the speaker's attitude of approval towards the law. Toh is led to this characterization of internal legal statements because he treats the internal point of view as any *insiders'* point of view; and he takes this *insiders'* point of view to involve an *attitude* of moral approval/acceptance towards the law. I have argued at length in chapters IV and V of the thesis—the gist of which I also reiterate in synoptic form in the present chapter –why this reading would be incongruous with Hart's scheme. I argue that Hart's internal legal statements cannot be treated as moral statements, let alone 'expressivist' or 'non-cognitivist' moral statements. This difference in approach has far reaching implications for Toh's reconstruction. The reconstruction Toh proposes cannot be squared with Hart's scheme, without mutilating the latter's basic structure. Toh struggles to reconcile his idea that internal legal statements express moral approval, with Hart's persistent insistence that the internal point of view need

[531] Toh, 'Hart's Expressivism' and 'Raz on Detachment' (n11).

involve no moral approval/endorsement. One of the other fall outs of Toh's tying the internal point of view to an attitude of moral approval is to render Hart's existence conditions for a legal system fancifully onerous. The internal point of view for Hart is a constituent of the existence conditions of legal systems. If the internal point of view were to *necessarily* involve an attitude of moral approval—as Toh's reconstruction would have it—the existence conditions of legal systems would be seriously jeopardized.

Toh's reconstruction of Hart, it will be argued, does not do any of the things it claims on the tin. Despite the ostensible and much publicized invocations of *expressivism*, Toh's reconstruction relies on a 'hybrid' view, combining cognitivist and expressivist elements. In arriving at this view, Toh is greatly inspired by a hybrid metaethical model attributed by Raz to Hart in his memorial lecture. I do not, however, criticise Toh simply because he presents us with a *hybrid* rather than purely expressivist model. It will be argued that the hybrid model—both, in its original Razian manifestation, and its reincarnated version due to Toh—far from being expressivist, collapse into *moral relativism*, a highly discredited and implausible metaethical position. I argue that this comes about because both versions of the hybrid model (Raz's and Toh's) are built on an unstable and psychologically implausible combination of cognitivist and non-cognitivist elements. Interestingly, some of the problems Toh identifies with the un-emended Hart, clearly seem to be due to the fact that Hart's critics read him as being committed to moral relativism. Yet, oddly, the solution that Toh offers by way of an emendation to Hart is a decidedly relativistic one. Toh's reconstruction faces all the tell-tale deficiencies found on a relativistic metaethical account: it runs counter to our most basic

intuitions about the nature of moral judgments; and it struggles to account for moral disagreements which persist despite agreement on all 'factual' matters. To be sure, Toh does not set out aiming to offer a moral relativistic theory but unwittingly ends up embracing it.

II

The Roots of Toh's Moral Relativism

Toh credits Raz with being the first to realize that Hart's internal legal statements must be understood along *non-cognitivist* lines.[532] Toh arrives at his 'expressivist' reconstruction of Hart's internal legal statements by carrying out modifications to Raz's 'non-cognitivist' reading of Hart, while retaining its basic structure.[533] As such, a critical appraisal, albeit brief, of Raz's reading of Hart's metaethical position would be indispensable in evaluating Toh's expressivist reconstruction. It turns out, Toh's reconstruction, being inspired by Raz's reading of Hart, also inherits some its shortcomings.

Raz's 'Hybrid' Model

In his 1993 memorial lecture Raz attributed a novel, *hybrid* metaethical model to Hart:

> If Hart must be classified as one or the other, then it is better to classify him with the non-cognitivists. But he charted his own way between the two, and

[532] Toh, 'Hart's Expressivism' (n 531) 85.

[533] I will be using the terms 'expressivism' and 'non-cognitivism' interchangeably, for the purposes of this chapter; and so does Kevin Toh. Strictly speaking, though, expressivism is a member of the family of non-cognitivist theories.

> developed a distinctive view which combines cognitivist and non-cognitivist elements. Statements of rules, duties, and rights are true or false, but the conditions which render them true or false do not exhaust their meaning and do not account for their normative character. The truth-conditions of such statements are the existence of certain social practices. . . . A simple moral statement such as 'parents have a duty to look after their children' is true if there is (in the community to which the speaker belongs) a practice that parents have such a duty, that is, roughly speaking, if most parents do so and are consciously disposed to do so. But the statement means more than that. It also expresses its speaker's endorsement of this rule, his willingness to be guided, and to require others to be guided, by it. This second non-cognitivist component expresses the normative element in the statement.[534]

Raz argues that Hart evolved a unique and novel metaethical position that incorporated cognitivist and non-cognitivist elements. He argues that for Hart, a simple moral statement such as, 'parents have a duty to look after their children', is true or false, according to whether there is a practice to that effect in society: where parents looking after their children is the generally 'done thing'. In uttering the moral statement however, the speaker also expresses his endorsement of the act in question. The latter is the non-cognitivist component according to Raz. Let us call this view attributed to Hart by Raz, the *hybrid* view.

Now, what according to the hybrid theory is the state of mind involved in *making* a moral judgment? A palpably clear answer emerges from Raz's depiction: the agent looks to what most people in her society *generally* do. This factual examination determines what is morally 'right' for the agent. Being right or wrong is equivalent to whether it is the generally 'done thing' according to extant social practices. Thus when someone has to decide whether it is the duty of parents to look after their children, she looks to see what the practice in her society is. This determination is

[534] J. Raz, 'H.L.A.Hart (1907-1992)' 5 (1993) Utilitas 148 (Hereafter: Memorial Lecture).

cognitivist i.e. a judgment involving a factual belief about what the society's practices are: about what the 'done thing' in society is. Raz describes this as the *cognitivist prong* involved in making moral judgments on the hybrid view.

We will now turn to examine how the *hybrid* theory incorporates the non-cognitivist prong. If the *making* of a moral judgment involves a cognitive state of mind—judging what is the 'done thing' in society—it is hard to see how the non-cognitivist prong could be plugged into the *making* of the moral judgment. To be sure, the hybrid theory does not commit that error. It is *not* Raz's claim that the non-cognitivist prong is to be found in the *making* of the moral judgment; on the contrary, that, on the hybrid view, involves a straightforward factual belief. Raz points out that the non-cognitivist prong is to be found in the person's 'endorsing' the moral statement, in *conveying* it, after having factually identified the moral requirement. Raz says, 'the conditions which render them [moral statements] true or false, do not exhaust their meaning and do not account for their normative character'.[535] A speaker who utters a moral statement *expresses* his own acceptance or endorsement of it; and this is what is supposed to account for the 'normative' character of these statements.

Moral Relativism in Disguise

The Hybrid theory's similitude to *moral relativism* is striking. Moral relativism holds that moral truths are *relative* to the culture and social practices; and that moral facts are constituted by a social group's practices.[536] The relativists are thus committed to

[535] ibid.

[536] Gowans, 'Moral Relativism' (n 35); Harman, *The Nature of Morality* (n 35).

the view that what may be morally true of one place and time, may not be true of another place and time.[537] They hold that 'moral statements are true or false only relative to some standard or other'.[538] According to relativism, 'x is good' means, 'x is generally approved of'. [539] The determination of what is morally right is equivalent to a factual determination of the 'done thing' in society. Moral relativism is severely discredited as a metaethical account; philosophers across the metaethical spectrum—even those who are otherwise diametrically opposed in their philosophical outlooks—unite in opposition to it. Relativism is thought to run counter to our most basic intuitions about the nature of moral judgments; and it struggles to account for moral disagreements which persist despite agreement on all 'factual' matters.

It should be readily apparent that the hybrid theory comes perilously close to explicitly professing moral relativism. If one drops the non-cognitivist prong, the *hybrid* theory will be indistinguishable from relativism. As far as the *making* of the moral judgment itself goes (the cognitivist prong), the hybrid theory is no different from relativism. It is only by incorporating the non- cognitivist prong that the hybrid theory hopes to put a distance between itself and relativism. The lone device that serves to arrest the *hybrid* theory's slide into relativism is the argument that the *conveying* of the moral judgment, as opposed to *making* it, *necessarily* involves a non-cognitivist attitude. But the non-cognitivist prong, which is supposed to distance it from relativism, appears to be 'artificially' plugged into the thesis, contrived even.

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[537] David Brink (n 23) 14.

[538] James Drier, 'Moral Relativism and Moral Nihilism' in David Copp (ed.), *Oxford Handbook of Ethical Theory* (OUP 2005) 241.

[539] Michael Smith, 'Should we Believe in Emotivism?' in Graham Macdonald and Crispin Wright ed., *Fact, Science and Morality: Essays on A.J. Ayer's Language, Truth and Logic* (Oxford: Blackwell, 1986), 289.

For the non-cognitivist prong to be *necessarily* present in the case of any token moral judgment, there would need to be a *non-contingent connection* between a person judging that something is required by the practice of his society, and having an attitude of approval/endorsement towards it. It is the attitude of approval which is supposed to supply the non-cognitivist prong. In its absence, there would be no way of ensuring that the non-cognitivist prong would *necessarily* be found in all moral judgments. Should the aforesaid non-contingent connection not *necessarily* obtain for *all* token moral judgments, the *hybrid* theory would collapse into relativism. And this is precisely the point where, it will be argued, the *hybrid* theory falters. The *hybrid* theory does not have the internal resources to ensure that when the person, who having made a moral judgment, conveys it, would *necessarily* have his attitude accordingly aligned. The failure to ensure that the non-cognitivist prong *necessarily* accompanies every moral judgment, collapses the hybrid theory into moral relativism. Furthermore, the hybrid theory also exhibits some other tell-tale shortcomings that are typical of relativistic theories: it fails to adequately capture the nature of moral judgments; and struggles to account for moral disagreements which persist despite agreement on all 'factual' matters. In what follows, we shall set out these shortcomings.

a. Judgment- Attitude Gap: The *hybrid* theory does not have the resources to explain how a *non-contingent connection* could ever obtain between a person judging that something is required by the practices of his society, and having an attitude of approval towards it. It is a live possibility that there could be a *gap* between a person judging what his social practices require and having an attitude of approval towards it. Let us call this the *judgment-attitude gap*. An agent could

identify, as a matter of fact, what is practised by the society; and that, on the hybrid theory, determines what is morally right. No element of attitude or motivation goes into the making of that moral judgment. An agent could judge that X is the 'done thing' in his society; and yet be motivationally cold in the face of that discovery. There is no way to ensure that his attitude would *necessarily* be one of approval towards the act in question. As Michael Smith points out, the judgment-attitude gap is a typical feature of relativistic theories:

> 'Consider…the view that X is good means 'X is generally approved of'. Does this view explain why necessarily, if A judges that X is good then A has a motivating reason to promote X? It does not. For A may judge that x is generally approved of without himself being the one who approves of X, and hence without himself having any motivating reason to promote X'[540]

Whether the agent possesses an attitude of approval to something that is identified as the socially 'done thing', would have to be a purely *contingent* matter. Raz does not offer any explanation of how this gap could possibly be plugged, neither does Toh. This is not, of course, to suggest that Raz owes us an explanation of this problematic aspect of the *hybrid* theory. He was merely setting out what he took to be Hart's theory; and the problems of the *hybrid* theory are not to be attributed to him.

The judgment-attitude gap is, in fact, an impossible one to plug. The possibility of such motivational ambivalence accompanying the cognizance of what is the 'done thing' in society automatically flows from the standard picture of human psychology. The standard picture has it that the knowledge of a fact cannot, in itself, motivate anyone to action, in the absence of a *conative* desire or attitude. Presupposing a *non-*

[540] ibid.

contingent connection between judging what is required by a social practice and the person's own attitude of endorsement and approval towards the act in question seems to be the central error of the hybrid theory. Remember, this non-contingent connection between the moral judgment and attitude of approval was the lone device that could have served to arrest the *hybrid* theory's slide into relativism. As the device fails, the hybrid theory irretrievably collapses into moral relativism.

b. The 'open question' argument- The hybrid theory doesn't do a very good job of capturing the nature of our moral judgments; and it fails for precisely the same reason that relativism does. According to the *hybrid* theory—or any typical relativistic theory for that matter—judging that 'X is right', is equivalent to judging whether 'X is the "done thing" in society'. However, our moral experience indicates that this just *cannot* be correct. It is thought to be possible for us to judge, as a matter of fact, what is the 'done thing' in society and yet be undecided on whether the socially 'done thing' is morally right. Our moral experience tells us that knowing what is the 'done thing' does not *close* the question of whether it is morally right. Judging whether something is morally right or wrong seems to involve a judgment that is *independent* of knowing what the 'done thing' in society is. If that were not so, we would find ourselves unable to morally call into question the practices of our society. All of this indicates that even after knowing that X is the 'done thing' in society, it could still be an *open question* for us whether or not X is morally right. This, of course, is nothing but an adaptation of G.E. Moore's famous *open question argument* which he employed against all naturalistic definitions of evaluative and moral terms.

c. Failing to account for moral disagreement- The other objection to the hybrid view is that it struggles to make sense of our moral disagreements. The hybrid theory asks us to take our moral judgments to be factual judgments about the 'done thing' in society. Therefore, if two people disagree morally, the hybrid theory would have to insist that one of the parties in the disagreement must have got his *facts* about the social practices wrong; if both parties get the facts about their practices right, they cannot really have a moral disagreement. Yet, we can easily imagine cases where there could be moral disagreements that persist even when both parties have got all the facts about their social practices right and are in agreement on all factual matters. Imagine a society where all are meat eaters with the exception of A: the lone vegetarian. Now, imagine A saying to B, 'eating meat is wrong' and B denying it. On the hybrid theory, when pressed to explain what he meant by saying that eating meat is *not* wrong, B will say 'meat eating is the 'done thing' socially, so eating meat eating cannot be wrong'. In response to this, A could turn around and say to B, 'I know meat eating is the 'done thing' socially, but why is it not wrong?' Now, we understand A's question in light of the open question argument and we recognize it as intelligible; but not on the hybrid theory. The hybrid theory renders unintelligible the moral stance of the lone vegetarian in a meat eating society because according to it, A would be guilty of misusing moral concepts and misunderstanding morality. It would be readily apparent that this lone vegetarian's illustration is precisely the one that Dworkin invokes against Hart in *Taking Rights Seriously*.[541] Perhaps, Dworkin also took Hart to be endorsing either a *hybrid* theory or a straightforwardly relativistic theory; the objection would be just as valid against either. The gist of Dworkin's argument is that a lone vegetarian in a meat eating society could still coherently

[541] Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth 1978) 53.

maintain that meat eating is wrong. Such a possibility is ruled out on Raz's hybrid theory as also on any other relativistic theory.

All said and done, the hybrid theory irretrievably collapses into moral relativism. Although the hybrid theory holds itself out to be, at least partly, a *non-cognitivist* theory, in reality it is a relativistic theory because though there are elements present in there which are meant to put distance between itself and moral relativism, in practice, none of those elements do the required job. It will be argued that something similar also happens to Kevin Toh's alleged 'expressivist' reconstruction. It also collapses into relativism and does so for reasons not too unlike the ones we have encountered here.

III

Toh's Reconstruction

a. A snapshot of Toh's Reconstruction:

Toh's 'expressivist' reconstruction of Hart's idea of internal statements is admittedly inspired by the *hybrid* model that Raz attributes to Hart.[542] Toh's reconstruction, like Raz's, is not entirely expressivist. Toh's reconstruction too is a 'hybrid' that incorporates cognitivist and non-cognitivist elements.[543] Further, Toh also retains *the non-contingent* connection which was presupposed on the Razian

[542] Kevin Toh, 'Hart's Expressivism' (n 11) 88.

[543] ibid 112-113; Toh admits this expressly.

hybrid, between judging that a practice requires something and having an attitude of approval towards it. Toh not only attributes such a metaethical position to Hart but also ties it to the idea of internal legal statements. It is thus Toh's argument that the hybrid theory is not only an account of Hart's moral statements, but also legal statements- because according to Toh, Hart's internal legal statements are moral statements. Toh argues that:

i) In uttering internal legal statements (legal statements uttered from the internal point of view) the speaker *expresses* his approval of the fundamental rule of recognition (R) of the legal system.
ii) The speaker presupposes that (R) is generally accepted and complied with by the members of his community
iii) There is a non-contingent connection between judging that law exists and having an attitude of approval to it.

'Acceptance from the internal point of view' according to Toh is *expressivist* approval of the sort found in any moral judgment. The crux of Toh's expressivist reconstruction of Hart is the following. Just as on the expressivist picture, in making a moral judgment a person expresses his attitude of approval for the act in question, in the making of an internal legal statement, the person expresses his attitude of approval towards the rule of recognition of the legal system. Thus, judging that law exists is as much a normative judgment as any moral judgment and an internal legal statement is as much a normative statement as any moral statement, which expresses the speaker's approval. Toh insists that the acceptance from the internal

point of view is not any 'weaker or paler' than acceptance involved in expressivist moral utterances.[544]

> [T]he difference between moral and legal statements has to do *not* with the difference in the acceptances involved but instead with the difference in the norms accepted.[545]

Toh points out that his reconstruction is not entirely expressivist, but 'hybrid' (like Raz's) incorporating both, a cognitivist prong and a non-cognitivist prong.[546] Toh argues that while on the Razian hybrid, in making an internal legal statement, the speaker 'states' the general acceptance of the norm he endorses, on his reconstruction, the speaker 'presupposes' that the rule of recognition is generally approved of and complied by members of the society. Toh says this *presupposition* supplies the *cognitivist* prong in his reconstruction.[547] The non-cognitivist prong on Toh's reconstruction is also similar to the one in Raz's hybrid with the only difference that on Toh's account, the speaker expresses his approval of the rule of recognition of the legal system, as opposed to an individual social norm.

Toh also explicitly adopts, with one modification, the central *presupposition* of Raz's *hybrid* model: the *non-contingent* connection between an agent judging

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[544] ibid 89

[545] Ibid

[546] ibid 112-13.

[547] Toh's appears to have misunderstood this aspect of the Razian hybrid. On the Razian hybrid, the person uttering the moral statement does not 'state' that the norm he is approving is generally approved of: that would amount to negating the 'non-cognitivist' prong in his theory, altogether; and make it a straightforwardly relativistic account. Even on the Razian hybrid, when a person utters a moral statement, he *expresses* his non-cognitivist approval. The 'presupposition', in fact, doesn't supply the *cognitivist* prong on either Toh's account or Raz's hybrid. When it comes to making a moral judgment, Toh's account is no different from the Razian hybrid in that on both accounts the person makes a factual determination. The only difference is that on Raz's account the judgment is about 'done thing' in society and on Toh's account the determination is about what is required by a rule deriving its validity from the rule of recognition.

something to be the 'done thing' in his society, and himself being in an attitude of approval towards it. But Toh ties this *presupposition* to a judgment that the law exists. That is to say, Toh argues that there is a non-contingent connection between the agent judging that a law exists and being in an attitude of approval towards the law by taking it as reason for action. Toh assumes this stance because for him, the hybrid model is not only an account of Hart's view on moral statements but an account of Hart's view on legal statements as well. Toh treats internal legal statements as expressivist moral statements. The Razian hybrid model on the other hand was meant to be a model of Hart's moral statements alone, not legal statements.

> Hart is appealing to nothing other than the *non-contingent connection* between a normative assessment, on the one hand, and the assessing person's possession of reason or motive, on the other, to reject the prediction theory…he is saying that *there is such a connection* between a judge's judgment that a law exists, on the one hand, and his *taking* or *considering* the law as providing him with a reason or justification for punishing the offender, on the other…where a person makes a judgment that a law exists, he considers some action non-optional or obligatory.[548]

To buttress this non-contingent connection, Toh argues that Hart was motivated by a consideration that typically motivates expressivists.[549] That consideration, Toh points out, was forging a non-contingent link between normative (moral) judgment and motivation.[550] Toh argues that judging that law exists is tantamount to making an expressivist moral judgment. Just as there is a *non-contingent* connection between moral judgment and motivation, there is a *non-contingent* connection between judging that law exists and having an attitude of approval to it. This non-

[548] Kevin Toh 'Hart's Expressivism' (n11) 82.

[549] ibid 83-84.

[550] ibid 79.

contingent connection, Toh argues, is the hall mark of acceptance from the internal point of view and internal legal statements made from the internal point of view.

b. Overarching Attitude and the Judgment-Attitude Gap:

Toh argues that in uttering an internal legal statement, a person is expressing his approval/acceptance of the *rule of recognition* of the legal system.[551] As it stands, this position is problematic as it leaves open the possibility of an agent *not* approving the *individual* rule with respect to which he utters the internal legal statement whilst approving of the rule of recognition. To be sure, Toh would want to avoid this at all costs as it would threaten the *non-contingent* connection he seeks to forge between judging the existence of a rule (identified in accordance with the rule of recognition) and having an expressivist attitude of approval towards it. To keep that non-contingent connection intact, Toh has to find a way of saying that the speaker *necessarily* approves of the individual rule he identifies, while he is approving the rule of recognition. For that to come about, we will have to understand Toh as arguing that the speaker's approval of the individual rule necessarily *flows* from his having accepted the rule of recognition. In other words, to ensure the aforesaid *non-contingent* connection, Toh needs the idea of *overarching attitude* towards the rule of recognition which ensures that the attitude of approval inures to each individual rule identified in accordance with the rule of recognition. Though Toh himself never articulates the idea explicitly, the idea is *latent* in his model and indeed his model seeks to employ it.

[551] ibid 88.

The *overarching attitude* towards the rule of recognition ensures that whenever a person judges that something is required by an individual rule deriving from the rule of recognition, he would necessarily be in approval of that rule; and such approval would stem from an *overarching attitude* to do whatever is required by *any* rule deriving its validity from the rule of recognition R. This idea of an *overarching attitude* seems to be Toh's improvisation on the Razian hybrid and it *seems*, at first blush, to be useful in avoiding the problematic judgment- attitude gap to be found on the Razian hybrid. It will be recollected that the judgment-attitude gap was found on the Razian hybrid because there was no mechanism to ensure that a person's attitude would necessarily always be in sync with what was judged to be the 'done thing' in his society; a judgment-attitude synchronization on the hybrid model would beat all times a purely *contingent* matter. The idea of an *overarching attitude* seeks to plug the judgment attitude gap and make the judgment-attitude synchronization a *non-contingent* matter. And in this respect Toh's reconstruction is a leap over the Razian hybrid. But as we noted earlier, the judgment-attitude gap arises because of the way human psychology operates; no judgment of a social fact could ever in itself motivationally excite anyone. And despite Toh's improvisation one fears ultimately Toh cannot quite overcome the *judgment-attitude* gap because of that psychological constraint.

There are two ways of understanding the idea of *overarching attitude* latent in Toh's expressivist reconstruction. Toh himself does not specify which of the two readings he prefers. In the circumstances we would have to evaluate both readings and chose the one that best fits Toh's model. *One* of the readings successfully manages to plug the *judgment-attitude gap*; while the *other* does not. One must

surely wonder at this juncture: if Toh can be read in a way that closes the *judgment-attitude gap* must we not prefer that reading? Unfortunately for Toh, the reading that bridges the judgment-attitude gap is metaethically implausible. If one eschews that and steers Toh towards the second reading-which certainly more metaethically respectable- the *judgment-attitude* gap would continue to persist.

On the *first* reading it could be argued that people are biologically *wired* to have an overarching attitude of approval of the rule of recognition. The claim would then be that people automatically feel motivated to follow the laws laid down in accordance with the rule of recognition. This interpretation would plug the *judgment-attitude* gap totally.[552]However, this would amount to saddling Toh with an over-ambitious, and suspect, claim about human psychology: the claim being that people are naturally 'hard wired' with the disposition to approve of the rule of recognition- and all laws deriving their validity from it- of the legal systems that they belong to. The claim only needs to be stated to realize its inherent implausibility. The world where such a claim holds good would be dramatically different from ours: in such a world there would be no need for any law enforcement agencies or sanctions or the like. But the problem for Toh is that our world isn't one where everyone is biologically wired to follow the laws deriving their validity from the rule of recognition of their respective legal system.

On the *second* reading, it could be argued that a person voluntarily 'comes' to adopt this overarching attitude towards the rule of recognition, as opposed to being

[552] Gilbert Harman thinks that such a biological wiring in reading could 'in theory' be reconciled with expressivism/ non-cognitivism; Harman, *Nature of Morality* (n 35) 29. It must be emphasized, however, that no expressivist/ non-cognitivist has ever held such a position.

biologically *wired* with it. The second option is definitely more plausible (psychologically) than the 'wiring in' interpretation; and it is very likely that Toh has some such idea in mind. But the downside of adopting this interpretation is that the *judgment-attitude* gap is not bridged. Though this interpretation does forge a *non-contingent* connection between approval of the rule of recognition and the approval of the individual rule identified in accordance with it, it leaves the approval of the rule of recognition itself, a *contingent* matter. In other words, this interpretation has no way of ensuring that an agent would *necessarily* approve of the rule of recognition of his system. It would thus be possible for an agent to identify what the rule of recognition requires and identify an individual rule according to it, and still not have an attitude of moral approval towards either. A person who judges as a matter of fact what a rule deriving from the rule of recognition of his society requires , may be motivationally 'cold' in the face of that factual determination and may not have his attitude aligned to act in accordance with it. The *judgment- attitude* gap that we witnessed on the Razian *hybrid* also rears its head in Toh's reconstruction. There is just no way in which Toh could ensure that there exists a non-contingent connection between judging something to be required by a rule deriving from the rule of recognition and having an attitude of approval towards it. Toh's reconstruction, just like the Razian hybrid, *presupposes* this non-contingent connection without providing the means by which it could be substantiated. It will be recollected that the judgment-attitude gap was the harbinger of the collapse of the Razian hybrid into moral relativism. Facing a similar judgment-attitude gap, must Toh's hybrid also necessarily slip all the way into relativism? I argue that unfortunately for Toh, his hybrid reconstruction must also eventually suffer that fate. How that comes about will be elaborated upon in the following section. In what follows, it will be argued

that Toh's reconstruction fails for a host of reasons, each of which will be discussed in greater detail.

IV

The Shortcomings of Toh's Reconstruction

a. Fancifully Onerous Existence Conditions:

Though it is theoretically possible to imagine a person who comes to adopt an overarching attitude of acceptance to the rule of recognition—such that his attitudes are so aligned as to be motivated to follow each and every norm derived from the rule of recognition—the odds of finding this character in flesh and blood are hopelessly long. The odds of a majority of the officials in a system having such an attitude are exponentially longer. Yet, Toh rests the existence conditions of legal systems on contingencies with precisely such astronomically unlikely odds. Hart claimed that for a legal system to exist, a majority of officials must take the internal point of view. Toh's reconstruction of the Hartian internal point of view seriously jeopardizes Hart's existence conditions of a legal system by making them too onerous. If taking the internal the internal point of view requires the sort of *overarching* moral commitment that Toh insists on, it will be found that most cases which Hart would allow as instances legal systems, will turn out on Toh's test, to not be legal systems at all. On Toh's emended Hartian test, for a legal system to exist, the majority of officials would have to take an overarching moral stance towards the rule of

recognition. If one is armed with Toh's theory and is dispatched to find out, on its basis, whether there obtains a legal system in the United Kingdom, the theorist would have to say, 'let us wait till we investigate psychologically whether most officials have an attitude of overarching moral acceptance of the rule of recognition'. If the theorist doesn't find that—and it is *unlikely* that he will find such overarching moral approval—the theorist would have to conclude that United Kingdom doesn't have a legal system. Such an understanding of the internal point of view, which would disqualify most known legal systems from being counted as legal systems, will have to be viewed with a degree of scepticism. Making the internal point of view so demanding nullifies Hart's ambitions for the internal point of view as a prerequisite for existence of legal systems. Moreover, Hart insisted that the official's acceptance that constitutes the internal point of view need involve no moral commitment on their part. Toh's reconstruction doubly violates Hart's prescription: not only does it tie the internal point of view to a moral stance, but ties it to a moral stance that looks very unlikely to obtain in practice. It would be very problematic to insist that the internal point of view—when understood in Hartian terms—involves any sort of moral commitment to laws of behalf of a majority of officials. Insisting that all officials morally approve of it for one overarching reason, namely, that of accepting the rule of recognition only compounds the problem.

b. Moral Relativism Again:

Toh's Hartian reconstruction is admittedly inspired by the Razian hybrid theory. The Razian hybrid theory, it was found, collapsed into relativism. It will be argued

that Toh's reconstruction too, after all, collapses into relativism. Toh's reconstruction, by his own admission, is a hybrid account with cognitivist and non-cognitivist elements. Now, what is the cognitivist element in Toh's reconstruction? In making that determination, let us bear in mind the distinction between *making* a moral judgment and *conveying* it. On Toh's reconstructed account, as on the Razian hybrid account, *making* a moral judgment involves a factual determination. On Toh's account, that factual determination comprises in identifying what the rule deriving from the rule of recognition, requires. This is the cognitivist prong on Toh's account. The non-cognitivist prong is to be found in the speaker expressing his attitude of approval towards to the rule of recognition while *conveying* the moral judgment. [553]

On Toh's picture then, X being morally right is the equivalent of X being required by a rule deriving from the rule of recognition.[554]The factual judgment of what the law requires *is* the moral judgment; the two can never really come apart. This leads to a position more 'relativistic' than ordinary varieties of relativism. Ordinary relativism claims that 'X is morally right' is equivalent to X being the 'done thing' in society. On Toh's reconstruction, 'X is morally right' is equivalent to X being required by a rule derived from the rule of recognition. Toh's account entails that that *anything* that is legal according to the rule of recognition, is moral; and it is moral

[553] A purely non-cognitivist account of legal statements is a non-starter. A non-cognitivist state of mind such as desire or desire like attitude- of the sort 'expressed' in making a non-cognitivist statement- cannot 'identify' what the law is. Their direction of fit in such statements is world-to-mind. For making a legal statement a person first needs to 'identify' what the law is. Thus, identifying the law necessarily requires a cognitivist judgment with a mind-to-world direction of fit.

[554]Toh insists that the 'cognitivist' prong in his account involves a 'presupposition'. The presupposition being that the rule of recognition the speaker approves of is generally approved of. The presupposition however becomes relevant, if at all, only at the stage of conveying the moral judgment. Before arriving at the stage the speaker needs to know what the law is. And 'knowing' that involves a factual determination of what is required by the rule of recognition. This is what the cognitivist prong in his account comprises in.

because it is derived from the rule of recognition. What we are then left with is not just relativism, but *ritualistic legalism*: relativism of an extreme variety.

It could be objected that Toh's isn't a straightforwardly relativistic account, as I have made out to be; he does have a non-cognitivist prong, which could serve to distance his account from relativism. To be sure, Toh's account isn't any more straightforwardly relativist than Raz's hybrid is. Toh's reconstruction purports to put a distance between itself and relativism by arguing that the non-cognitivist prong is to be *necessarily* found in all moral judgments. Toh's account presupposes a non-contingent connection that is meant to ensure that whenever a person identifies anything as being required by a rule identified according to the rule of recognition, he would necessarily express an attitude of approval/ acceptance towards it. However, as we saw earlier, Toh's account doesn't succeed in forging that *non contingent connection* because the *judgment-attitude* gap that was found in the Razian hybrid is also to be found in Toh's reconstruction. Without that, there is no mechanism to arrest the slide of Toh's reconstruction into relativism. The open question argument and the disagreement problem which so evidently disprove relativism, would disprove Toh's version of it with as much or greater force. In what follows, we will elaborate on these problems.

(i) <u>The 'Open Question' Problem:</u>

It is surely an 'open' question whether any rule deriving its validity from the rule of recognition is morally sound. Surely, we do not think that everything that is legal is, due to the very fact of its being legal, also moral. Perhaps, this is the sort of ritualistic legalism behind that infamous post war caricature of legal positivism as the position which is supposed to have claimed that 'law is law': that any law, because

of being law, is also moral and merits unquestioning obedience. To disprove this sort of ritualistic legalism one only needs recognize the intelligibility of the question: 'This is legal, alright, but is it moral?' Our moral experience tells us that knowing what the law requires does not *close* the question of whether it is morally right. Judging whether something is morally right seems to involve a judgment that is *independent* of knowing what the law requires. If that were not so, we would find ourselves unable to morally call into question the laws in currency in our legal system. All of this indicates that even after knowing that X is the 'done thing' in society, it could be an 'open question' for us whether X is morally right. The problem that the 'open question' argument presents is a serious one for Toh because it exposes the shaky metaethical foundations on which Toh rests his reconstruction.

(ii) Accounting for Disagreement

As moral relativism does not admit of a *fulcrum* of moral disagreement, which is not entirely factual, it does not admit the possibility of situations where people could have genuine moral disagreements, despite being in agreement on all factual issues, including what the 'done thing' in society is. Dworkin, it will be recollected, had charged Hart with the inability to explain moral disagreements because he probably took Hart as endorsing relativism. Toh explains why the gravamen of Dworkin's charge against the *un-emended* Hart would be well founded:

> Let us say that one group of members think that R1 is the true rule of recognition in their society, whereas another group think that R2 is. Then, in a dispute as to whether some particular norm N is legally valid, a member of the first group would be saying "N is consistent with R1,"whereas a member of the second group would be saying "N is inconsistent with R2." It is clear that such two people would not be having a genuine legal disagreement; rather, they would be talking past each other.[555]

[555] Toh, 'Hart's Expressivism' (n11)109.

Toh identifies that on this picture, there would be no *fulcrum* of disagreement, which is not entirely factual; parties could ever only 'disagree' if one of them got the 'facts' wrong. Toh's use of the expression 'genuine legal disagreement' is apt to cause some confusion. By genuine legal disagreement, Toh means 'genuine moral disagreement'.[556] Toh is led to this somewhat unhappy nomenclature because, as it was noted earlier, he equates legal statements with moral statements. With this understanding in mind, we can restate afresh Dworkin's objection against the un-emended Hart (as Toh understands it). If legal statements are moral statements that identify what is required by the rule of recognition, the moral disagreements people have, would necessarily have to be about some factual matter, namely, what is required by a rule deriving from the rule of recognition. If they have the same rule of recognition in mind, they cannot really have a moral disagreement; if they have a disagreement, it must because they have different rules of recognition in mind. Thus the un-emended Hart cannot explain how there can be genuine moral disagreements that persist despite people agreeing on all facts. Toh believes this is the charge that Dworkin makes against the un-emended Hart.

Toh believes that while the charge may have stuck against the un-emended Hart, his 'expressivist' reconstruction irons out that blemish; and that a dose of expressivism is all that is needed to set things right on this front. Toh points out—and quite rightly, I might add—that the expressivists avoid this 'disagreement' problem by arguing that in saying, 'X is right' the speaker is expressing his attitude towards X. And so when the objector, disagrees with him, they have a genuine

[556] ibid.

disagreement, not a factual one: they have a genuine *fulcrum* of disagreement.[557] When two parties morally disagree, the expressivist would argue, their disagreement is to be understood differently from how one would understand a 'factual' disagreement; rather, their disagreement takes the shape of a conflict between two persons who have different plans about a future course of action and end up disagreeing about what is to be done.[558] Disagreement in plans is also a disagreement, but it is very different from disagreement about some fact. The *fulcrum* is provided by the different attitudes they have towards the *same* thing: the thing to be done.

Toh's solution involves arguing that the people who have genuine moral disagreements have different rules of recognition in mind and express approvals of different rules of recognition.[559] The 'fulcrum' for a genuine moral disagreement, he hopes, would be provided by the fact that these statements are expressivist; and as expressivists have no problems in explaining moral disagreements, he having invoked expressivism, should have none either. Toh, in fact, goes to the extent of pointing out that because his theory is 'expressivist', accounting for disagreements is one of the strongest elements going in favour of his account.

On Toh's reconstructed account—as on the Razian hybrid account—*making* a moral judgment involves a factual determination: what does the rule of recognition require? This determination is as factual as determining what the 'done thing' in

[557] Ibid. Also see Blackburn *Spreading the Word* (n 51) 168.

[558]Charles Stevenson, 'The Emotive Meaning of Ethical Terms' 46 (1937) *Mind* 14,19; Also see Alan Gibbard, *Thinking How to Live (*Cambridge, Mass., Harvard University Press, 2003) *passim*.

[559] Kevin Toh, 'Hart's Expressivism' (n11) 113.

society is. Thus, when it comes to understanding the *making* of a moral judgment, Toh's account is no different from the Razian hybrid or any typically relativistic account, for that matter. On Toh's account, those having 'disagreements', must have *different* rules of recognition in mind. If they have the same rule of recognition in mind it would not be possible for them to disagree in the first place. Let us see how the disagreement works in practice, on Toh's model. A says that rule X is the law in accordance with the rule of recognition R1. If B has to disagree with him about X, Toh says that he will have to do so thinking that R2 and not R1 is the rule of recognition. Notice the disagreement stems from a *factual* disagreement about what is the rule of recognition of the legal system. It will be argued that there is effectively no difference between what Toh complains is 'talking past each other' on Hart's un-emended model, and the solution that Toh provides us with.

If I say murder is wrong, and you say charity is good, we would not be having a genuine disagreement at all; rather, we would be talking past each other. And we would be doing so on an expressivist or a naturalistic or a non-naturalistic or for that matter any conceivable metaethical theory because we are talking about entirely different 'things'. Even an expressivist would say that in this case we are talking past each other because we are expressing our attitudes to two entirely *different things*: You say charity is to be done and I say murder is to be avoided.[560] Expressivists portray moral disagreements as disagreements about a future course of action; and that is what Toh hopes, would help him create a genuine *fulcrum* of disagreement. Now imagine A, who says to B, 'meet me at the Bank at 5 pm' intending thereby that his friend meet him at the Bank Station; and B tells A, he cannot meet him at the

[560] See Blackburn, *Spreading The Word* (n 51) 168-9.

'bank' while he has the river bank in mind. Now, *qua* a future course of action, the friends would be talking past each other because they have different 'banks' in mind: they have no genuine fulcrum of disagreement. This is precisely what happens on Toh's account. A person who is expressing his approval of R1, is actually 'talking past' someone who is expressing his approval of R2. They are talking about different *things*; and the invocation of an expressivist analysis *cannot* help him because whatever *fulcrum* of disagreement Toh tries to bring in by way of invoking expressivism comes into play only at the stage of *conveying* the moral judgment. But that move is analytically one step too late to be able to create any fulcrum of disagreement at all. According to expressivism, those *making* moral judgments express different attitudes to the same 'thing'; and that maintains the *fulcrum* of disagreement. On Toh's model, the alleged expressivist element comes in only at the stage of *conveying* the moral judgment just as we saw on the Razian hybrid. Toh's theory is relativistic in so far as the *making* of the moral judgment is concerned. This ensures that when two people are in an *apparent* disagreement, the attitudes they express would necessarily have to be towards different *things*. This is not good enough to sustain a genuine *fulcrum* of disagreement. On Toh's model, two people can only have a moral disagreement when they have different rules of recognition in mind; that it is to say when they are not agreed on all factual matters surrounding the issue. Toh burden was to show us how two people on his model could morally disagree despite being in agreement on all factual issues. He fails to show us that. Thus, all said and done, Toh's model only presents us with another way of 'talking past each other'.

(iii) <u>Inability to explain non-moral acceptance from the internal point of view</u>

Toh believes that a legal statement can be only of one of two classes: it could either be 'normative' or 'descriptive'. Furthermore, Toh believes that *only* moral statements are 'normative'. [561] According to Toh, this normative /descriptive distinction is isomorphous with the internal/ external distinction. Toh believes that if a legal statement is not moral it must therefore not be normative; and must necessarily be a 'descriptive' external statement. He also believes that Hart had just such a characterization in mind.[562]

> *Internal* legal statements are statements *of* law. They are normative statements made from the point of view of an adherent of a legal system (e.g. a judge or a lawyer). *External* legal statements, on the other hand, are statements *about* individual laws or legal systems. They are descriptive statements made from the point of view of an observer (e.g. a sociologist or an anthropologist).

Toh's interpretation of the internal /external distinction stems from a misreading of Hart. The misreading consists in taking the internal point of view as the insider's 'practical' perspective and the external point of view as the observer's 'theoretical' perspective. But Toh doesn't merely adopt that misreading; he lumps another claim on to that. He treats the 'insiders' perspective as one involving moral acceptance and the outsiders perspective as one bereft of any moral commitment (being a theoretical perspective). Thus, for Toh, the internal point of view is not only the insiders' point of view but also one involving moral commitment. This commits Toh to the picture where all insiders are thought to be morally committed to the law; and all internal legal statements are thought to be statements expressing moral acceptance/approval of the law. This forms the premise for Toh's thesis that all internal legal statements

[561] Throughout his two papers, Toh uses the terms 'moral' and 'normative' interchangeably.

[562] Toh, 'Raz on Detachment' (n11) 405 (emphasis added).

are expressivist moral statements expressing the speaker's moral approval of the rule of recognition.

However, as I have argued at some length in Chapter V, this reading is exegetically inaccurate. It was argued that Hart had two distinct versions of the 'practical' insider's internal point of view: one being norm-relative, which every insider of a legal system who is *cognizant* of the rules of his system possess; and the other being moral, which only those insiders having an *attitude* of moral approval of the law, possess.

To have the norm-relative internal point of view, all one has to do, is be a member of a social group and be *cognizant* of its rules. To have the norm-relative internal point of view, it does not matter whether the agent is morally committed to any of the rules. This norm-relative internal point of view is the one from which the law is identified and internal legal statements are made. Internal legal statements are norm-relative statements of the sort that statements of the rules of etiquette or a game are. They set out what is 'required' in the light of some socially current standards. The judgment of what is required by some socially current standard does not entail any moral commitment on the part of the agent making the judgment. It follows that, to utter norm-relative statements, the person need not be morally committed to the standard he has identified as being required by current social practices. As internal legal statements are to be understood as being norm-relative statements, they do not entail any moral commitment or endorsement on the part of the agent uttering them. Hart placed great emphasis on the fact that the identification of law—and it follows, making internal legal statements—does not

involve any sort of moral commitment. These internal legal statements, being norm-relative statements, are every bit as practical and deontic as moral statements are. They do not become 'descriptive' external statements just because they are not moral statements.

The underlying flaw which threatens to vitiate Toh's reconstruction is the failure to recognize the difference between the two rather distinct ideas that go under the generic label, 'normativity': namely, moral normativity or bindingness; and norm-relativity. Toh admits of only one form of 'normativity': moral normativity; and only one kind of 'normative' statement: moral statements. This leads him to two errors: *firstly*, he is constrained to argue that acceptance from the internal point of view is moral acceptance; and *secondly*, he treats Hart's internal legal statements (statements from the internal point of view) as moral statements rather than norm-relative statements. Toh does not seem to be aware of the presence of the norm-relative internal point of view and its centrality to Hart's account. This is to have serious consequences for his reconstruction.

Toh recognizes *only one* version of the internal point of view—the one we have identified here as the moral internal point of view—and he believes that all insiders possess it. He argues that the internal point of view involves expressivist moral acceptance; and that internal legal statements are expressivist moral statements, expressing as they do, the speaker's moral approval of the rule of recognition.[563] This causes two problems for Toh:

[563] In arguing for his expressivist reconstruction of Hart's internal statements, Toh places great reliance on Hart's early characterization of legal statements as *performative* statements in 'Ascription' (n 329); Toh, 'Hart's Expressivism' (n11) 101.

I. His argument flies in the face of Hart's repeated insistence that acceptance from the internal point of view does not entail any moral endorsement of the law. Toh's reconstruction by contrast entails that acceptance from the internal point of view is *necessarily* moral acceptance; [564]

II. He is unable to explain how it would be possible for someone like the Holmesian bad man—who does not morally approve the law—to have the internal point of view and make internal legal statements. Toh's view entails that any one making an internal legal statement *necessarily* expresses his moral approval of the law.

Toh is mindful of the problem and tries to reconcile his expressivist reconstruction with Hart's claims that acceptance from the internal point of view need not be moral acceptance. It will be argued that Toh's attempted reconciliation fails; and that in the process of attempting the reconciliation, Toh ends up retracting his expressivist account in all substantial respects.

The idea that internal legal statements are expressivist moral statements is viewed by Toh as a natural extension of Hart's early idea that legal statements were performatives; performatives and expressivist moral statements are both non-fact stating. However for reasons that I elaborate upon in Chapter IV of the thesis, there is no evidence that Hart continued to endorse the idea of performatives in *The Concept of Law*. As Stavropoulos and Baker have argued, by the time of *The Concept of Law* came to be written, Hart seems to have 'phased out' his idea of performative legal statements altogether. Furthermore, as I have argued in Chapter IV, Hart's characterization of internal legal statements was along the lines of norm-relative statements. Norm-relative statements are fact stating statements. And as such they are unlike either expressivist moral statements or performative statements. However, they are 'normative' statements in the generic sense of the term, unlike reductive statements. See, Stavropoulos (n 277) 53-61; and Gordon Baker, 'Defeasibility and Meaning' in Hacker et at (eds.), *Law, Morality and Society* (OUP 1978).

[564] Hart, *The Concept of Law* (n2) 203; Hart also specifically denies the idea that the internal point of view involves any 'feeling' of being bound: ibid 57.

On Toh's reconstruction, acceptance from the internal point of view involves expressivist acceptance of the rule of recognition. Making a moral judgment on the expressivist view involves having an attitude of approval towards the subject of the judgment. On Toh's model, then, the acceptance of the rule of recognition necessarily involves moral endorsement. Given this, is hard to see how Toh could reconcile his expressivist reconstruction with Hart's insistence that acceptance from the internal point of view, need not amount to moral acceptance. Raz had once argued that if Hart's acceptance from the internal point of view is read as moral acceptance, it would threaten his positivist ambitions. Toh in agreement with Raz, notes that if 'acceptance' involved in making internal legal statements is read as *necessarily* entailing moral acceptance, it would vitiate Hart's positivist goal. [565] However, despite recognizing what could be a potentially fatal flaw in Hart's reconstruction, Toh unwittingly ends up embracing it. Toh is certainly aware that his own reconstruction runs that risk. Toh, however, is optimistic that he has the resources to accommodate the problem that Raz identifies.

> Hart emphasized that the acceptances involved in internal legal judgments can be motivated by a variety of reasons, and not just by the perceived moral attractiveness of the relevant norms. This particular fact maybe thought to undermine my view that in *The Concept of Law*, Hart analysed internal legal statements as expressions of full acceptance…there is nothing in what Hart says to suggest that the nature or content of the psychological state of acceptance depends on the type of reasons for which people accept the relevant norms. Perhaps it is implausible to think that people may come to accept some norms in the full blown sense—i.e. to think that both they and others ought to act accordingly—when their own acceptances are motivated by reasons other than the requirements of morality. But any implausibility that may be at issue here is a psychological implausibility, and not a conceptual impossibility. [566]

Toh's purported reconciliation can be summed up as follows:

[565] Toh, 'Raz on Detachment' (n 11) 414.
[566] ibid 420-21.

I. Internal legal statements are expressivist statements expressing the speaker's full acceptance of legal norms;

II. The 'acceptance' can however be for a host reasons; and the perceived moral attractiveness of the norm is just one such consideration why people may accept legal norms;

III. Thus the expressivist acceptance need *not* necessarily be moral acceptance;

IV. He can thus reconcile his expressivist reconstruction with Hart's insistence that acceptance from the internal point of view need not necessarily be moral acceptance.

Toh thinks his expressivist reconstruction of Hart is threatened only if he is compelled to admit that his idea of expressivist acceptance is tantamount to moral acceptance. But this is not a worry, feels Toh, as nothing in his theory compels him to admit that. Toh's defence hinges crucially on the argument that 'acceptance' of legal norms in his expressivist reconstruction could be for a host of reasons and the *perceived* moral attractiveness of the norm under acceptance is just one of those considerations; thus acceptance from the internal point of view need *not* necessarily be moral acceptance. Toh acknowledges that it may be psychologically implausible that the people would accept legal norms in the expressivist sense unless they are morally committed to them. This impossibility, he feels, however, is merely psychological, not conceptual.

There is a fundamental problem with Toh's line of reasoning; and the impossibility inherent therein is—contrary to what he hopes—not just psychological, but conceptual. Before we elaborate on that, let us remind ourselves about the core

commitments of expressivism. On an expressivist analysis, making a moral judgment involves acceptance of /having an attitude of approval towards the subject of the judgment. It would be unintelligible if someone claiming to provide an expressivist theory were to argue that the agent's expressivist acceptance/approval *need* not be a moral one. According to expressivism, having the acceptance/ approval *constitutes* the moral judgment.[567] The attitude/approval and the moral judgment are thus inexorably intertwined on the expressivist model.

But Toh wants to be able hold on to the expressivist model and yet find a way of *splitting* the acceptance/approval from the moral judgment. Toh wants to argue that the expressivist acceptance/approval is one thing and that for that attitude/approval to be a moral one involves some further *unnamed* step. It is only by making some such move that he could hope to reconcile his expressivist acceptance with Hart's position that the internal point of view doesn't entail any moral commitment on the part of the agent. Toh hopes to be able to do that by arguing that an agent could express his acceptance/approval for numerous reasons and the perceived moral attractiveness of the norm in question is just one such consideration. The fact that an agent can express approval/acceptance for reasons other than the perceived moral attractiveness is, according to Toh, ample demonstration of an expressivist approval/acceptance that is *not* necessarily moral.

[567] Justin D'Arms and Daniel Jacobson, 'Sensibility Theory and Projectivism' in David Copp ed., *Oxford Handbook of Ethical Theory* (Oxford University Press, 2006) 198.

Toh does not tell us precisely how his idea of 'perceived moral attractiveness' is meant to operate, psychologically. He doesn't point to the mental states that are involved in an agent perceiving something to be morally attractive. There are two ways of understanding this idea. The perceived moral attractiveness could be understood as involving a 'cognitive' state i.e. *belief* in the moral properties of the action; or on the other hand it could be understood as involving a *conative* state such as an *attitude* towards some action.

The cognitive understanding of moral attractiveness is antithetical to the expressivist project; expressivists vehemently deny that moral judgments involve any such moral belief. The only reading of 'perceived moral attractiveness' consistent with the expressivist project, is the 'conative' one. However, on this reading, perceiving something to be morally attractive is no different from taking an attitude of acceptance/ approval towards it. And the expressivists, it will be recollected, insist that taking an attitude of acceptance/approval *constitutes* the moral judgment. The perceived moral attractiveness can thus never really be rent asunder from the attitude of approval/ acceptance. An expressivist would argue that there is no way other than the attitude of approval/acceptance to gauge whether the agent perceives something to be morally attractive. Therefore, Toh cannot really 'split' the attitude of acceptance/ approval from the moral judgment. The impossibility inherent in such a 'split' is not just a psychological one—it is, of course, *also* psychological—but a conceptual one. For an expressivist, there could be no conceptual space between having an attitude of acceptance/approval one the one hand and viewing the option as morally attractive, on the other.

Toh insists that acceptance from his reconstructed internal point of view need not necessarily be moral. But this entails the counter intuitive and paradoxical result that 'acceptance' on his reconstruction does not mean being in a state of acceptance of norms in the sense in which the expressivist understand the term. In other words, this has the implication that that acceptance in his theory is not *expressivist* acceptance at all. In what sense then is Toh's reconstruction at all expressivist? If acceptance is not 'acceptance' in the way the expressivists understand the idea then what does Toh mean by acceptance? Toh gives us no fresh answer. Whatever else acceptance may mean, it surely cannot mean acceptance in the expressivist sense. Toh's 'expressivist' reconstruction of Hart then cannot but fail.

V

In Conclusion

The problems we have identified with Toh's reconstruction could be traced back to a single wrong turn that he takes. That wrong turn comprised in thinking that the most natural way of reconstructing Hart along non-cognitivist lines would be to argue that the internal point of view involves an attitude of expressivist approval/acceptance; and that internal legal statements are expressivist moral statements. We have seen that this position, apart from being exegetically suspect, is beset with serious metaethical problems.

Firstly, a purely *non-fact stating* semantics of legal statements (and expressivist statements are *non- fact stating*) is really a non-starter. Legal statements, whatever else they may do, must state what the law is. That presupposes identifying what the law is. Identifying the law involves a *cognitive* judgment. The direction of fit of a legal statement then has got to be *mind-to-world*. Non-fact stating statements have a *world-to-mind* direction of fit. Another consideration immediately follows from this: there has got to be something like being right or wrong about a legal judgment. Insisting otherwise would lead to the most counterintuitive result that knowing what the law is, is nothing more than having some subjective attitude.

Perhaps, owing to all these problems surrounding a purely expressivist semantic model, Kevin Toh, contrary to what he advertises—and also contrary to the very title of his paper--doesn't really give us a purely 'expressivist' semantic model for Hart's internal legal statements. The best that he can come up with is a 'hybrid' semantic model that combines cognitivist and non-cognitivist elements. The cognitivist prong here involves factually judging what is required by a rule deriving its validity from the rule of recognition. The non-cognitivist prong involves having an attitude of approval towards the rule of recognition. Such a hybrid theory needs a way to ensure that the non-cognitivist prong *necessarily* accompanies the cognitivist prong for any token moral judgment. Kevin Toh hopes to do that by arguing that there is a *non-contingent* connection between judging what the law requires and taking an attitude of approval to it. But such a hybrid theory is doomed from the get-go because the *non-contingent* connection it presupposes is psychologically implausible. The cognition of what is required by any rule cannot in itself ensure that a person will

have an attitude of approval to it. Thus, on such a model, the non-cognitivist prong cannot *necessarily* be present for all moral judgments.

In the absence of the non-cognitivist prong, on Toh's model, making a moral judgment is tantamount to judging what a rule, deriving its validity from the rule of recognition, requires. This position necessarily entails that 'judging' what the law constitutes making a moral judgment. There is no way of arguing for something along these lines without embracing moral relativism: amongst the most discredited of all metaethical positions. Moral relativism is just the position that argues that the judgment 'X is right' is equivalent to judging that something is the socially 'done thing'. The non-cognitivist prong is meant to save the day for Toh's hybrid theory and prevent it from collapsing into wholesale relativism. But as we have seen, there is really no way for Toh to ensure that the non-cognitivist prong would necessarily accompany each cognitivist act of identifying what is morally required. What we then left with is nothing more or nothing less than unalloyed moral relativism.

The only plausible way of understanding Hart's account of 'normativity of law' along non-cognitivist lines would necessarily involve taking the two steps argued for in this thesis.

EPILOGUE

I

The Motivation

The thought of exploring the themes covered in this thesis had its genesis in the puzzlement I was faced with, on reading Chapter X of *Essays on Bentham*. My initial impression was that in *Essays on Bentham*, Hart was seeking his account of 'normativity of law' to operate in just the way that Raz's account did. The presence in Hart's account of the notions of 'content independent' and 'peremptory' reasons for action—ostensibly bearing great resemblance to Razian notions—seemed to bear this out. Indeed, Hart acknowledges the affinity of these notions to Raz's works and their centrality in accounting for the 'normativity of law'. But all of this sat rather uncomfortably with Hart's vehement opposition to Raz's semantic thesis which had it that legal statements are 'normative' in the same sense that moral statements are. Hart argued that he was not persuaded by Raz's 'cognitive account' of statements of legal obligation which has it that, statements of legal obligation purport to state objective moral reasons for action. Hart also hinted that he preferred the 'non-cognitive' account of statements of legal obligation instead.

This lead me to an exploration of non-cognitivism in general and it's bearing on the debates under the rubric of the 'normativity of law' in particular. It was here that the works of the Scandinavian Realists came to assume significance. The

Scandinavian Realists were non-cognitivists and sought to explain the 'normativity of law' in terms of non-cognitive or conative stances taken by subjects towards the law. Despite Hart's protestations to the contrary, they saw a great congruence between their own project and Hart's. This prompted me to explore whether Hart's account of normativity could be understood along non-cognitivist lines. It is this central idea that guided my enquiry. I have argued that if Hart is understood along non-cognitivist lines, not only does his work yield an account of 'normativity of law' which is rival to the cognitivist models such as Raz's, but also his hitherto inexplicable paradox in *Essays on Bentham* becomes explicable.

II

The Method

The proposal to read Hart along non-cognitivist lines may, at first blush, hardly seem novel. In recent papers, Kevin Toh has proposed a reconstruction of Hart's account of normativity along non cognitivist/ expressivist lines. At the surface, Toh's project may appear to approximate mine. There are, however, significant differences between the two, both of approach and of outcome. Toh seems to have been swayed by Hart's suggestion in *Essays on Bentham* that he endorses a 'non-cognitivist' account of statements of legal obligation. Accordingly, Toh purports to introduce non-cognitivism through Hart's idea of internal legal statements; he treats them as moral statements, expressing the speaker's attitude of approval towards the law. I have argued at length why this reading would be incongruous with Hart's scheme. I

argue that an account of 'normativity of law' has *two* components: one semantic and the other metaethical. Hart's semantic model of legal statements was *not* a non-cognitivist one like Toh believes it is. When Hart argued in *Essays on Bentham*, in favour of a 'non-cognitivist' semantic model, he really meant to argue that he preferred a model that was *not* cognitivist. But that, in itself, doesn't licence us to infer that he endorsed a non-cognitivist model since there are many candidate semantic models which are opposed to the cognitivist semantic model including the much discredited reductionist model. Indeed, an exegesis of Hart's account reveals that he did not endorse the non-cognitivist semantic model. Hart's semantic model is that of norm-relativism, the thesis that statements of legal obligation state what is correct or required in relation to socially practised standards. All of this was obscured by Hart's somewhat unfortunate choice of terminology to describe his semantic model.

If all that Hart told us about 'normativity of law' was that legal statements are norm-relativist statements we would have been constrained to admit that Hart's work does not have the resources to yield an intelligible account of 'normativity of law' since we would have been left with nothing to bring to fruition, the metaethical prong of the project of accounting for the 'normativity of law'. But Hart didn't stop there. He also argued that the 'normativity of law' was to be explained by the stance subjects take towards the law. Given his metaethical ambivalence, Hart refused to acknowledge that this stance is a moral one; let alone acknowledging it as a non-cognitivist one. It was at this juncture that I proposed a two-fold emendation of Hart, with a view to bringing the metaethical prong of his project to fruition. Firstly, I argued that notwithstanding Hart's ostensible protestations to the contrary, the

internal point of view has got to be understood as a moral stance since Hart expected the internal point of view to operate in ways only a moral stance could. Then, I argued that the moral stance involved in the internal point of view has got to be understood as non-cognitive attitude of approval of law since what Hart seeks to achieve with the internal point of view is only consistent with understanding it along projectivist lines. In short, I argue that is only by attributing projectivism to Hart, that his idea of the internal point of view can be made to yield an *intelligible* account of 'normativity of law' *qua* moral bindingness. Thus, I argue that Hart's semantic model when combined with the non cognitivists' projectivist model of moral bindingness yields a complete account of 'normativity of law'.

III

The Limitations

This thesis focuses on the limited project of understanding Hart's account of normativity along projectivist lines. I have not been able to undertake an exhaustive survey of the thoughts of all influential philosophers on the issue of 'normativity of law'. I have also not had the occasion to examine the many shapes the impinging model could take, let along comment on their shortcomings. I have discussed a few central themes from Raz, insofar as they bear on the subject of the projectivist account of 'normativity of law' and its contrast with the impinging model; but I have been able to devote far less attention than I initially hoped, to the works of leading legal philosophers such as John Finnis and Ronald Dworkin (and many others) who

also engaged with Hart's works and no doubt have many illuminating things to say about his account of normativity. The reasons for this restricted scope of discussions in this thesis are two-fold.

Firstly, as I embarked on this project, I realized that I had to undertake a great deal of foundational work on metaethics and place the projectivist account of 'normativity of law' in the history of jurisprudential thought. I got the sense that this was indispensable to establish the very plausibility of the projectivist model since this alternative has been sparsely articulated in the literature and tends to ring all sorts of alarm bells for many philosophers, however open-minded. A good deal of foundational work in history of jurisprudential thought was also necessary to recalibrate to a metaethically aseptic viewpoint, the problematic of 'normativity of law', which I found was skewed heavily in favour of the impinging model to the point of *in limine* ruling out a projectivist model. *Secondly*, I found that focusing on Joseph Raz, helped bring out most effectively, the contrast in the methodologies of the impinging and projectivist models of 'normativity of law' with the greatest possible clarity; much more than discussing Finnis or Dworkin would have enabled me to. Since I couldn't have possibly discussed them all—Finnis, Raz and Dworkin—satisfactorily, I made the conscious choice of focusing on Raz. Raz and Hart disagreed on many issues (some of which are discussed in this work) but their disagreements were always set against the backdrop of a solid core of shared commitment on many foundational questions allowing me to isolate issues in the debate with greater clarity. Now, this is to a certain extent true of Finnis' engagement with Hart as well. However, I found that engaging with Finnis would have entailed a deeper engagement with the methodological issues in jurisprudence, which though enormously fascinating and potentially rewarding, would have meant digressing

from the core of this thesis. After considerable effort, I found that placing Dworkin in the scheme of this thesis was a challenge. Often, Dworkin doesn't seem to be responding by the same set of concerns that Raz and Hart were. For instance, I do not think I can say with any confidence where Dworkin stands on the semantic model of statements of legal obligation or on legal validity or on the models of 'normativity of law'. All of these are issues Raz takes an express stance on and also distinguishes his own view from Hart on all these counts. There was another added advantage of restricting my focus to Raz. Raz has discussed Kelsen's account of normativity in great detail. As we have seen, Kelsen's thoughts on normativity have had a considerable impact on Hart's account. All of this made Raz as the natural choice of interlocutor with Hart for the themes discussed in this thesis.

IV

The Potentiality

The lines I have sketched in my thesis could potentially be extended and deepened in several directions. I can merely hint at a few of them here, since a deeper engagement with these issues comprehensively outstrips my present capacities.

a. Taxonomy: The classical taxonomy which classifies jurisprudential theories into the legal positivist and natural law camps is increasingly coming to be thought of as unhelpful. The traditional litmus test of legal positivism is a combination of: (1) the sources thesis: the identity and content of law can be determined by social facts alone, without resort to moral argument; and (2) the separability thesis: there is no

necessary connection between law and morality.[568] The first thesis states criteria easily met not just by legal positivists but also by self-confessed natural lawyers like Finnis. The second thesis also is too broad and vague to serve any useful taxonomical purpose. Thomian natural lawyers like Finnis and Orrego have argued that they could very well endorse this broad separability thesis, as nothing in their theories precludes the possibility of existence of the most immoral laws. The tools we have gathered from this thesis could be employed to identify an important differentia which remains obscured on the traditional litmus test. The differentia I suggest could be calibrated in the following terms—whether there is a conceptual connection between legal statements and objective moral properties? Or, in other words, do legal statements purport to describe objective moral facts and properties? The moral descriptivists would answer in the affirmative and non-descriptivists would answer in the negative. On the basis of this differentia, the so-called natural lawyers and Raz and Finnis would belong to the descriptivist camp; and Bentham, Austin, Scandinavian Realists, Hart and Von Wright would fall in the non-descriptivist camp. In fact, all the self-professed legal positivists before Raz would fall in the non-descriptivist camp. If my initial intuitions about this are correct, this would hardly be a novel differentia but the reorientation (even demystification) of the old one, namely the 'separability thesis'. It could be argued that Bentham's reductionist semantic model of legal statements was influenced by an opposition to moral descriptivism; and the separability thesis is something that is intrinsically tied to his semantic model. Though Hart criticized Bentham's model, as discussed in Chapter IV, his semantic model was also non-descriptivist. Now, whether or not to appropriate the label 'positivist' for the non descriptivist camp is a moot point that I think legal philosophy could well do without.

[568] Raz, 'Purity of the Pure theory' (n 180) 239.

b. Critiquing Raz: Some of the central arguments I have advanced in my account could form the material for a systematic and novel critique of Raz's account of 'normativity of law'. Raz is aware that any plausible theory about legal statements must explain how it is possible to make legal statements (which according to him are equivalent to moral statements) without moral commitment to its justification on behalf of the speaker. As we discussed in Chapters II and IV, the phenomenology of moral statements seems to overwhelmingly rule out such a possibility. The moral descriptivist's dilemma is to explain how legal statements, despite being equivalent to moral statements, need not necessarily entail moral endorsement and commitment of the sort that moral statements necessarily do. Raz endorses moral descriptivism about legal statements with a vivid awareness of this dilemma. The way out of the dilemma, Raz thinks, lies in the idea of detached legal statements. What Raz gives us in the form of a detached normative statement is a linguistic device whereby the speaker can tell the hearer what moral reasons he has for action, while still being uncommitted to the moral judgment himself. Raz's idea of detached statements is meant to enable the speaker make moral judgments without any of the moral commitment or endorsement associated with moral judgments. In my opinion, it could be argued that Raz's move fails because the resultant detached statements are not practical or deontic statements but hypothetical or conditional ones. Raz has reiterated that a semantic model of legal statements which shows legal statements as hypothetical or conditional statements is flawed.[569] It could be argued that this is precisely the problem that Raz's idea of detached legal statements leaves him with.

[569] Raz, *Practical Reason and Norms* (n 288) 173.

c. Political Philosophy: One of the main points of difference between the cognitivists and non-cognitivists is to be found in their contrasting conceptualization of moral disagreements. How to deal with deep rooted moral disagreements in the public sphere is one of the most urgent questions of political philosophy. Rawls proposed the idea of public reason to address this very problem.[570] Public reason, Rawls argued, is the set of reasons – principles and ideals – that all citizens '*may reasonably be expected* to endorse' from within their normative standpoints. Comprehensive doctrines, making and testing truth claims, Rawls argued, were to be excluded from public reason. Finnis and other natural lawyers criticize this idea on two grounds: that it spirits out normativity altogether (by truncating the resources of reason); and that it makes reason in the public sphere hostage to the subjective whims and fancies of an indeterminate mass. It is my initial view that the non-cognitivist model of explaining disagreements and the projectivist model of moral bindingness has a natural affinity with liberal political theory in general and John Rawls' idea of public reason in particular; and could be used to defend the idea from the natural lawyers' criticisms. The charge of spiriting away normativity that Finnis makes is premised on the impinging model of normativity; but if we assumed the projectivist's motivational model of normativity instead, this charge would automatically dissipate. Finnis' fear of the debilitation of public discourse is also largely exaggerated. As argued in Chapter I, no objective reason can, in and of itself, motivate an agent. If a person cannot be moved by arguments which are likely to motivationally resonate with him—which is what Rawls' proposal is calculated to leverage—it would not be very sanguine to hope that an objective moral justification,

[570] John Rawls, *Political Liberalism* (Columbia University Press 1993).

from a comprehensive doctrine could have any impact on the person's motivational set. If moral disagreement is a disagreement over plans as the non-cognitivists claim it is; their ultimate resolution is to be found in the alignment of plans, whatever be the grounds for persons arriving at the alignment. Rawls' idea then seems especially well-suited to address the problem of moral disagreements (where disagreements are understood in the non-cognitivist sense).

d. Responsibility- I think that some of the themes I have explored in this thesis could have a bearing on the question of responsibility: an area which has for long been the source of puzzlement for legal and moral philosophers. Alf Ross had extended his non cognitivism to an account of responsibility and guilt.[571] P.F. Strawson argued that the notions of responsibility, guilt, condemnation and justice could be understood in terms of 'participant reactive attitudes'.[572] My initial sense is that Strawson's project too could lend itself to be understood along the lines of a projectivist model. Strawson was extremely critical of the project of 'justifying' responsibility with a set of objective requirements on the fulfilment of which a person can be theoretically judged to be responsible. Accordingly, Strawson maintained that the practice of holding people responsible neither calls for nor permits, an external 'rational' or 'objective' justification.

Strawson's account is severely criticized because it can at best 'explain' responsibility but not 'justify' it. What Strawson's critics find problematic in his

[571] A. Ross, *On Guilt, Responsibility and Punishment* (London: Stevens & Sons 1975).

[572] P.F. Strawson, 'Freedom and Resentment', *Proceedings of the British Academy* 48 (1962)1–25.

account seems to me to be not all that different from what Hart's critics find problematic with his account of 'normativity of law'. The critics, it seems to me will not rest content until they find an account which provides an objective set of conditions for the attribution of responsibility. But a projectivist in this area of thought could contend, as she does in metaethics, that such a project is redundant.

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