

## Understanding normativity

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DOI:

[10.2139/ssrn.3241342](https://doi.org/10.2139/ssrn.3241342)

[10.4000/revus.4773](https://doi.org/10.4000/revus.4773)

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*Document Version*

Peer reviewed version

*Citation for published version (Harvard):*

Delacroix, S 2019, 'Understanding normativity: the impact of culturally-loaded explanatory ambitions', *Revus*, vol. 35. <https://doi.org/10.2139/ssrn.3241342>, <https://doi.org/10.4000/revus.4773>

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**Publisher Rights Statement:**

Checked for eligibility 11/10/2018

Published in Revus on 03/02/2019

DOI : 10.4000/revus.4773

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# Understanding normativity: the impact of culturally-loaded explanatory ambitions

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It is an awkward word. It doesn't sound good, and nobody's too sure what it means. Yet it is there to stay. While it may be wise in principle to avoid referring to a term used in such different ways by legal theorists, expunging the word 'normativity' from our vocabulary would leave a void in our jurisprudential landscape. It is not just a matter of intellectual history. When Hart declared that he and Kelsen shared a common goal — explaining the normative dimension of law —, he is sometimes<sup>1</sup> taken to have given a solemn expression to something actually unremarkable: one of the features we need to be able to explain is law's capacity to guide our conduct. Such a minimalist interpretation however does not even start to tackle the complexity and scope of the explanatory ambitions traditionally associated with the term 'normativity' in legal theory. Beyond its capacity to being used for guidance, law also claims to oblige us, and that claim tends to be central to any account of law's normative dimension.

Things typically start getting messy, however, when it comes to explaining the way in which law's normativity is not equivalent to (or measurable by reference to) its success in imposing obligations. Much of the murkiness currently associated with the concept of normativity can be attributed to a widespread assumption that it needs to (and can) be defined in terms of either guidance — law is normative if it is capable of being used for guidance, if it provides reasons for action — or obligation. Either way is equally problematic. While defining law's normative dimension in terms of its capacity to being used for guidance would entail a constant fluctuation in its 'degree' of normative force (it would be a function of epistemological clarity and circumstances), to confuse normativity and obligation is worse. For it is often when law's claim to impose obligations is punctually defeated that one gets the best chance of grasping the way in which law's normative force is enabled on a daily basis by a fabric of socio-cultural practices.

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<sup>1</sup> (Gardner 2007)

But to talk of what ‘conditions’ or ‘enables’ law’s normative force is already to take sides: unlike Kelsen, Hart never had any ambition to explain what ‘enables’ or ‘conditions’ law’s normativity. Nor does Bix. Hart’s inscription within a philosophical context dominated by J.L. Austin’s theory of language, aimed at elucidating even the most complex concepts by reference to ‘the things people do with words’ predisposed him to developing what I have called elsewhere a ‘downstream account’ of legal normativity: its focus is to unveil how law’s normative dimension manifests itself (notably through the ‘critical reflective attitude’), rather than what enables it. That law is normative is a given, both for Hart and for Bix.<sup>2</sup> So far, so good: different accounts of legal normativity can and do proceed from different starting points, with different explanatory ambitions. The problems start when one dismisses the significance of these differences, or the possibility that fruitful insights may arise from a theory that explicitly questions one’s foundational premises. That there is an unbridgeable gap between *is* and *ought* is just one of those assumptions. It is acknowledged as such by Bix: ‘this view about not deriving “ought” conclusions from “is” statements [...] is generally accepted in modern philosophy’.<sup>3</sup>

The first section of this paper problematizes the above assumption: its hold over contemporary legal theory can indeed be said to be diminishing thanks in large part to better cross-fertilisation between legal theory and a well-established philosophical endeavour to delineate different kinds of naturalism(s). Aside from being in line with a Neo-Kantian tradition that was highly influential at the time, Kelsen’s robust methodological dualism may be said to stem in large part from the widespread belief that the only alternative to ‘Hume’s law’ is a reductive type of naturalism that leaves no room for any kind of ‘objectively true’ ethical statements. On this line of thought, any kind of naturalism entails that we only have ‘*is*’s’ all the way through, hence there is no ethical objectivity to be had: it is all a matter of personal preferences and subjective endorsements. For Kelsen, the threat inherent in such a relativist stance was ever-present, and it goes a long way towards explaining his stark rebuttal of any attempt to read his theory as ‘a doctrine of recognition’:

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<sup>2</sup> ‘[T]he approach discussed in this article does not require the full machinery of a Kantian Transcendental Deduction; it requires only belief in the basic and generally accepted Humean division of “is” and “ought,” combined with a comparably conventional idea that law is a normative system.’ (Bix 2018)

<sup>3</sup> (Bix 2018), p. 2

the doctrine of the Basic Norm is not a doctrine of recognition as is sometimes erroneously understood. According to the doctrine of recognition positive law is valid only if it is recognised by the individuals subject to it [...] The theory of recognition, consciously or unconsciously, presupposes the ideal of individual liberty as self-determination, that is, the norm that the individual ought to do only what he wants to do.<sup>4</sup>

The above quote does not sit easily with Bix's suggested reading of Kelsen, whereby the presupposed Basic Norm reflects the fact that 'legal rules and official actions [are] things that people may or may not view in a normative way'.<sup>5</sup> The second section of this paper explores the factors that contribute to the tension between the above quote and Bix's reading (via Raz's own).

## 1. The fact-value distinction

Whatever else it is, naturalism involves at least one 'lowest common denominator' commitment. Its rejection of any dualist metaphysics involves a claim that 'there is no unbridgeable space between what happens in that [natural] order and any other order in heaven or earth, including the order of our own minds' (Blackburn 2001, 157): in short, there is no unbridgeable gap between *is* and *ought*. On this basis, the challenge which any naturalist account of morality must address consists in understanding how the demands and aspirations we characteristically associate with morality may be understood as outgrowths of our animal (rather than noumenal, or god-like etc.) nature: 'there must be no unmoved mover: no intervention of the divine spark, or gifts from unexplained quarters' (Blackburn 2001).

Beyond this 'common denominator', naturalism comes in many shapes and colours. Because of some versions' scientific excesses, 'the tide of naturalism [which] has been rising since the seventeenth century' can be perceived as a threat: 'the regions under threat are some of the most central in human life.'<sup>6</sup> To protect these 'regions' – morality is one of them – an

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<sup>4</sup> (Kelsen 1967, S 34 i, p. 218 note 83)

<sup>5</sup> (Bix 2018, 4, point 17)

<sup>6</sup> (Price 1997).

increasing number of contemporary philosophers (from Price to Putnam via McDowell and Blackburn) find themselves ‘on the same [broad or liberal] side of the barricades’<sup>7</sup>, even if their respective naturalisms differ in some important ways. Elsewhere<sup>8</sup> I have distinguish between a range of naturalist positions by reference to three conceptual hurdles: defining what counts as ‘natural’, ‘science’ and defending the possibility of internalism about reasons. Because of naturalism’s supposed incompatibility with the latter position, many naturalists (including Leiter<sup>9</sup>) end up falling back upon a subjectivist position, whereby moral propositions refer to the attitudes of people, rather than objective facts independent of human opinion. This need not be so.

A non-reductive naturalism – a position defended in greater detail in (Delacroix 2017, 2019) – is wary of any account that confines ‘the natural’ to that which is the result of elementary, material forces (as opposed to human forces). In contrast to ‘bald’ versions of naturalism, the explanatory resources at the disposal of non-reductive accounts need not be confined to those inert facts as they are described by Natural Sciences. For it is indeed a challenge to explain how such facts – and the beliefs they give rise to – reliably motivate us to act in certain ways (most of our factual beliefs typically do not). In contrast, a non-reductive naturalism may rely on things like habit and habituation to explain the reliable<sup>10</sup> connection between moral judgment and motivation.

For the purpose of this paper, however, the salient question is: what factors, if any, contributed to Kelsen’s endorsing the robust methodological dualism he is famous for – this is the focus of section 2 –, and how does this compare to Hart’s own meta-ethical dilemma? I have argued elsewhere<sup>11</sup> that the latter dilemma just did not allow Hart to develop what could have been a (non-reductive) naturalist account of legal normativity, whereby there

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<sup>7</sup> (Redding 2010, 271).

<sup>8</sup> (Delacroix 2017)

<sup>9</sup> ‘Of course, the NeoHumean naturalist has not explained real normativity, as Scanlon complains, because real normativity does not exist: that is the entire upshot of the naturalist view. There are no reasons whose existence and character is independent of human attitudes; there are only human attitudes which lead us to ‘talk the talk’ of reasons. And if real normativity does not exist, if only feelings of inclination and aversion, compulsion and avoidance, actually exist, then that means that all purportedly normative disputes bottom out not in reasons but in the clash of will or affect.’ (Leiter 2015, 74).

<sup>10</sup> The term reliable indicates a ‘relaxed’ approach to drawing a connection between moral judgment and motivation that relies on the fact that ‘most of us are creatures of the right sort’. The latter expression is Railton’s, but unlike Railton I do not take the possibility of an absence of such connection in pathological cases (such as the chronically depressive person Railton refers to) to invalidate internalism about reasons.

<sup>11</sup> This meta-ethical dilemma is explored in detail in (Delacroix 2010).

would be no ‘gap’ between social facts on the one hand and social rules on the other. There are reasons to believe that Hart did have some affinities for such an account, which are in part corroborated by his reliance on both Weber’s *Economy and Society*<sup>12</sup> and Wittgenstein’s *Philosophical Investigations*. Hart could for instance have chosen to expand upon the latter’s reference to ‘custom’ as a way of explaining how the causal processes constitutive of habit get to acquire the significance they do when they evolve into rule-following practices. On this account, there is no ‘gap’ to bridge, only a narrative<sup>13</sup> that takes us from human beings with needs and desires (‘the sphere of causes’) to internalized standards of right and wrong. That Hart chose to remain agnostic instead –limiting his account to a rather thin notion of ‘acceptance’ – can be explained by various factors, including, most interestingly, his late but candid acknowledgment of a life-long dilemma between his sceptical inclinations<sup>14</sup> and a longing for some external, rational foundation for ethics. In his review of Bernard Williams’ *Ethics and the Limits of Philosophy*,<sup>15</sup> this longing is expressed negatively, as the fear that, were we to look for the ground of the moral ‘I must’ in ‘what is most deeply inside us’, this would not prove ‘enough’ to sustain a sense of moral necessity.<sup>16</sup>

Hart’s acknowledgment is particularly interesting because it echoes, in some ways, the concerns cited by Habermas to explain why he has chosen to retain the quasi-transcendentalist assumptions underlying his theory, despite his pragmatist inclinations:

I once asked Habermas in a public forum what was the most difficult aspect of his philosophy to defend. He didn’t hesitate to answer: quasi-transcendentalism. And when I asked why he thought that he had to defend it [...] his answer was straightforward: the Holocaust.<sup>17</sup>

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<sup>12</sup> In her biography of H.L.A Hart, Nicola Lacey highlights Hart’s apparent (but unacknowledged) indebtedness to Weber’s sociology. (Lacey 2004).

<sup>13</sup> As an alternative, Hart could have developed a narrative along Weberian lines. The key challenge would then consist in building upon Weber’s typology of social relationships.

<sup>14</sup> These were known to be influenced by Mackie’s theory—see (Wiggins 2005)

<sup>15</sup> (Williams 1985)

<sup>16</sup> ‘Why should anyone be disturbed if Williams is right in his claim that there is no independent rational foundation for ethical thought ... In fact fears of two different kinds have been excited by such skeptical thought. The first is that if it becomes widespread we shall have nothing—or not enough—to say to the immoralist ... The second kind of fear is more realistic ... once it [a general acceptance of the view that there is no objective foundation for ethical thought] is accepted it will be no longer possible to interpret ethical experience, as many do, as a demand coming from outside. The sense of necessity (the moral “I must”) in which the recognition of moral obligation often terminates, will have to be seen as coming not from outside, but from what is most deeply inside us ... The fear is that this will not be enough ...’ (Hart 1986)

<sup>17</sup> (Aboulafia 2002, 4)

While Kelsen first developed the dualist methodology underlying his theory (under the influence of a growing Neo-Kantian school of thought) well before the Holocaust, the political reality he was confronted with is likely to have played some role in his growing mistrust of human judgment (and consequent determination to isolate the legal sphere from the messy and increasingly threatening reality of politics). This aspect of Kelsen's theory is discussed in the next section, not only because it calls into question Bix's proposed 'subjective endorsement' interpretation, but also, more importantly, because it illustrates a methodological issue which is often at the root of misunderstandings between the Continental and Anglo-American traditions (section 3).

## 2. Kelsen's ideal of methodological purity

Kelsen's project not only aims to distinguish the object of legal cognition from the objects of other sciences, such as sociology or ethics. It also requires this object to be 'autonomous', explainable by reference to normative considerations alone, without having to resort to either moral or factual considerations. As for the former, moral considerations, Kelsen's opposition to natural law theories manifests itself through his dismissing any attempt to explain law's normativity by reference to some pre-existing natural laws. Kelsen indeed rejects any attempt to locate the source of legal normativity in a concept of the good that would precede human action (be it given by God or incarnated in Nature or Reason<sup>18</sup>). This rejection proceeds from an effort to resist a growing temptation to restore social confidence<sup>19</sup> by providing a substantial justification of the legal order.

As for factual considerations, Kelsen's sharp distinction between the order of value and the order of reality, between *Sollen* and *Sein*, allows no passage from one order to the other. In this view, the worlds of facticity and normativity are not only *differentiable*: they are totally

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<sup>18</sup> 'For the norms of natural law, like those of morality, are deduced from a Basic Norm that by virtue of its content --- as emanation of divine will, of nature, or of a pure reason --- is held to be directly evident'. (Kelsen 1992, S 28, p. 56.)

<sup>19</sup> Kelsen explicitly addresses this state of social disturbance and lack of self-confidence in (Kelsen 1949a, 445)

unconnected, corresponding as they do to two different spheres of knowledge.<sup>20</sup> Any endeavour to derive legal norms from social practices misunderstands the different epistemological status characterising legal norms and social facts.

Now, the combined weight of the above methodological commitments mean that legal normativity is necessarily cut off from any extraneous explicative resource.<sup>21</sup> One of Kelsen's very early works, i.e. *Das Problem der Souveränität* – 1920 reveals a striking awareness of the difficulties inherent in this ambition to conceptualise the legal sphere in a 'closed' and self-sustaining way:

to want to determine the choice of juristic starting point juristically would be tantamount to standing on one's shoulders, [and] would be equivalent to Munchausen's attempt to pull himself out of the swamp by his own pigtail.<sup>22</sup>

So, one may ask: if he was aware of the considerable difficulties (which I document in detail elsewhere<sup>23</sup>) underlying this ambition to build a 'methodologically self-standing' account for what he calls 'the specific lawfulness of the law', why did Kelsen end up radicalising –rather than merely following- the lead of his fellow *fin de siècle* Neo-Kantians (who sought to extend Kant's transcendental inquiry to fields outside the realm of natural science)? Kelsen is indeed critical of both Laband's 'utter failure in his effort to separate the depiction of the positive law from politics'<sup>24</sup> and Jellinek's 'two-sides' theory of law (one side being

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<sup>20</sup> 'on one reading [...], Sein and Sollen mark two points of view, the explicative and the normative; they are modalities de re, addressing what can be said about the thing (which is, then, either natural or normative in character). On another reading, Sein and Sollen are modes of thought -- modalities de dicto, which, like grammatical modes, address what can be said not about the thing itself but about propositions of judgements (that are in turn addressed to things)' (Paulson 1998, 157)

<sup>21</sup> Kervégan describes Kelsen as 'a characteristic representative of normativism given his concern to consider law as an order closed on itself' (Kervégan 1995, 238)

<sup>22</sup> (Kelsen 1960, 96). In his subsequent writings, Kelsen's way of coming to terms with this enigmatic sentence amounts to insisting on the extra-systemic character of the Basic Norm, as a way of insuring that, indeed, the Basic norm as a juristic starting point is not 'juristically determined'. In *Das Problem der Souveränität*, Kelsen above all underlines the 'borderline status' of the 'Origin-Norm' (*Ursprungsnorm* Kelsen does not yet use the term 'Basic Norm'. See (Kelsen 1960, 97) as the fundamental presupposition that the legal system as a whole is valid, which cannot itself derive from that system. Later, in *Allgemeine Staatslehre* (1925) Kelsen takes pains to emphasise that the 'hypothetical Norm' 'actually does *not stand inside the system* of positive legal propositions but first of all finds these systems' (Kelsen 1925, 104), (emphasis mine). He reiterates this view in the second edition of the *Pure theory of Law*, where he explicitly rejects interpretations according to which the Basic Norm is inside the legal order, declaring that the Basic Norm is 'actually "outside the constitution"'.<sup>23</sup>

<sup>23</sup> (Delacroix 2006)

<sup>24</sup> (Kelsen 1998, 170)

examined from a legal point of view while the other is apprehended sociologically). Kelsen actually goes as far as claiming that Kant's rejecting the application of the transcendental method to the fields of law and ethics is a sign of weakness:

A complete emancipation from metaphysics was probably impossible for a personality still as deeply rooted in Christianity as Kant's. This is most evident in his practical philosophy [...] At this point, Kant abandoned his method of transcendental logic [...] So it happens that Kant, whose philosophy of transcendental logic was pre-eminently destined to provide the groundwork for a positivistic legal and political doctrine, stayed, as a legal philosopher, in the rut of the natural-law doctrine.<sup>25</sup>

Kelsen thus leverages the transcendental method to build a theory according to which the category of imputation conditions our knowledge of legal propositions, just as the category of causation conditions our knowledge of the natural phenomenon.<sup>26</sup> Where Kelsen departs from Kant, however, is in relying exclusively on the *regressive* version of Kant's transcendental argument: Kelsen indeed has to start from the fact that one has cognition of legal norms, to then assert that this cognition is possible only if the category of normative imputation is presupposed. He then concludes that cognition of legal norms necessarily presupposes the category of imputation. Kelsen does acknowledge the fact that the sceptic is unlikely to assent to the first premise<sup>27</sup> – the fact of normative cognition (given that these knowledge claims are precisely the target of the sceptic) – but his theory was never meant as an answer to such sceptical positions, including theoretical anarchism.<sup>28</sup>

This leads us to a central point: Bix builds upon Kelsen's acknowledgment that an anarchist need not presuppose the Basic Norm to develop a 'subjective endorsement' interpretation of Kelsen's understanding of legal normativity. There are many ways in which such an

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<sup>25</sup> (Kelsen 1949b, 444-445)

<sup>26</sup> 'Just as laws of nature link a certain material fact as cause with another as effect, so positive laws [in their basic form] link legal condition with legal consequence (the consequence of a so-called unlawful act). If the mode of linking material facts is causality in the one case, it is imputation in the other, and imputation is recognised in the Pure Theory of Law as the particular lawfulness, the autonomy of the law'. (Kelsen 1992, S 11 (b), p. 23.)

<sup>27</sup> '[T]he Pure Theory is well aware that one cannot prove the existence of the law as one proves the existence of natural material facts and the natural laws governing them, that one cannot adduce compelling arguments to refute a posture like theoretical anarchism, which refuses to see anything but naked power where jurists speak of the law'. (Kelsen 1992, S 16, p. 34.)

<sup>28</sup> Indeed, to provide an answer to the sceptic, Kelsen would have had to resort to the *progressive* version of Kant's transcendental argument, starting from a weak premise – the 'uninterpreted' data of consciousness – to then conclude about the possibility of legal cognition. Yet such a progressive version is incompatible with Kelsen's endeavour to defend a specifically *normative interpretation* of the raw material that presents itself as law, as the latter endeavour entails that he cannot start his demonstration with raw or 'uninterpreted' data.

interpretation makes sense: not only does it tie in nicely with Raz's infamous concept of 'detached point of view'; it may also be the only interpretation that 'works' if one is *not* prepared to question the 'view [according to which] not deriving "ought" conclusions from "is" statements [...] is generally accepted in modern philosophy.'<sup>29</sup> A view which Kelsen would certainly endorse. Yet there's a catch.

Kelsen's stance as to whether or not the anarchist can be seen as presupposing the Basic Norm changes drastically over the years: in 'Value Judgments in the Science of Law' (1971c), Kelsen states that the anarchist 'will decline to speak of "lawful" and "unlawful" behaviour, of "legal duties," or "delicts." He will understand social behaviour merely as a process whereby one forces the other to behave in conformity with his wishes or interests [ . . . ] He will, in short, refuse to presuppose the Basic Norm'.<sup>30</sup> Yet in the second edition of *The Pure Theory of Law*, Kelsen withdraws his previous statement that the anarchist 'refuses to presuppose the Basic Norm,' to argue that actually an anarchist can object to the law and yet 'describe positive law as a system of valid norms, without having to approve of this law'.<sup>31</sup> This reversal may have been due to Kelsen realising that 'disapproval of law in general, in virtue of a moral attitude (anarchism), or of a certain type of legal system, in view of a political attitude (communism), constituted, for this theory, a practical stance such as could co-exist with the juristic view, without affecting it or being affected by it'.<sup>32</sup> Surprisingly, although he is aware of Kelsen's explicit change of mind on the question, Raz refers to Kelsen's early statement—maintaining that the anarchist will 'refuse to presuppose the Basic Norm' — in order to support his claim according to which 'for an individual to presuppose the basic norm is to interpret the legal system as normative, i.e., as just'.<sup>33</sup>

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<sup>29</sup> (Bix 2018), p.2

<sup>30</sup> (Kelsen 1971b, 226–7)

<sup>31</sup> (Kelsen 1967, 218, note 82)

<sup>32</sup> (Wilson 1982, 53)

<sup>33</sup> (Raz 1979, 138)

### 3. The roots of a misunderstanding: contrasting explanatory ambitions

For our purposes, what matters is not so much the flaws in Raz's interpretation of Kelsen – detailed in (Delacroix 2004), but rather the factors that lead both Bix and Raz to defend this 'subjective endorsement' account, given that the latter is at odds with Kelsen's explicit rejection of what he called a 'doctrine of recognition'.<sup>34</sup> At the heart of these factors is a culturally-loaded misunderstanding of the very different explanatory goals that can be associated with an endeavour to account for law's normativity.

One may, on one hand, seek to explain how law's normativity manifests itself through our linguistic and social practices. One of the challenges, from that perspective, is to account for the fact that, in theory at least<sup>35</sup>, some of us may never consider law to be a source of reasons for action (while nevertheless referring to law as a normative system 'from a detached perspective'), while others may regularly have (moral or prudential) reasons to defeat law's prima-facie reasons. One may then analyse the contrast between the normativity of law and that of morality by pointing out, as Gardner does<sup>36</sup>, that morality's hold over us – 'inescapable' as it is – is rather different from law's. A large proportion of the Anglo-American literature on legal normativity proceeds within this explanatory framework, under Hart's decisive influence.

Alternatively, one may seek to understand what makes law's normative status possible in the first place. How can contingent, fallible and 'man-made' laws have such a hold over us? This line of questioning is ancient. Ever since the progressive discredit of the meta-referents (whether they be God or Nature) that are central to classical natural law models, this question has become 'live' again. One may adopt a multitude of strategies to answer it – or indeed circumvent it, a trend that was inaugurated by Montaigne<sup>37</sup>: to 'save' law from the peril inherent in the discovery of its precarious origins, Montaigne posits a 'law of pure obedience', enjoining us to obey the law 'because it is the law', without asking any further

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<sup>34</sup> (Kelsen 1967, S 34 i, p. 218 note 83)

<sup>35</sup> It is doubtful whether this is more than a counterfactual stance, as law tends to provide reasons for action (even if they may be negative) even to those most opposed to it on ideological grounds.

<sup>36</sup> (Gardner 2007)

<sup>37</sup> (de Montaigne 1991)

question. For to inquire further into the sources of this law of pure obedience is to expose oneself to the risk of ‘disgust’ for the law and its authoritative force. Montaigne thus goes as far as using the term ‘mystical’<sup>38</sup> to refer to the need to shroud the origins of law’s normative force in ‘mysteries’ available only to the ‘wise’, who are less likely to let the discovery of the contingent ‘tiny spring’ at the origins of law affect their respect for law’s authority. In many ways, I think there is a strong parallel between Montaigne’s circumvention strategy and Kelsen’s.<sup>39</sup>

Kelsen is a lot less candid about it than Montaigne, but Kelsen’s theory, through all its twists and turns, is attempting to answer the age-old ‘sources’ question – ‘what are the sources of legal normativity?’ (in the same way as Korsgaard asks ‘what are the sources of [moral] normativity?’) – while at the same time ruling out any reference to social facts or moral norms. In other words, the source of legal normativity has to be found within legal normativity itself, a task that may well be akin to ‘Munchausen's attempt to pull himself out of the swamp by his own pigtail’.<sup>40</sup> The solipsism inherent in such a normativist ambition was rightly emphasised by Schmitt, who criticises the trend to proceed as if legal normativity can be understood without any reference to its conditions of effectuation.<sup>41</sup> The many twists and turns within Kelsen’s theory – including, most interestingly, the disappearance of the notion of ‘content’ of the Basic Norm in the second edition of the *Pure*

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<sup>38</sup> The use of this term is noteworthy....

<sup>39</sup> For a detailed argument to this effect, see (Delacroix 2006)

<sup>40</sup> (Kelsen 1960, 96) p. 96. In his subsequent writings, Kelsen's way of coming to terms with this enigmatic sentence amounts to insisting on the extra-systemic character of the Basic Norm, as a way of insuring that, indeed, the Basic norm as a juristic starting point is not ‘juristically determined’. In *Das Problem der Souveränität*, Kelsen above all underlines the ‘borderline status’ of the ‘Origin-Norm’ *Ursprungsnorm* Kelsen does not yet use the term ‘Basic Norm’. See (Kelsen 1960, 97) as the fundamental presupposition that the legal system as a whole is valid, which cannot itself derive from that system. Later, in (Kelsen) (1925) Kelsen takes pains to emphasise that the ‘hypothetical norm’ ‘actually *does not stand inside the system* of positive legal propositions but first of all founds these systems’. (Kelsen 1925) p. 104 (emphasis mine).} He reiterates this view in the second edition of the *Pure theory of Law*, where he explicitly rejects interpretations according to which the Basic Norm is inside the legal order, declaring that the Basic Norm is ‘actually “outside the constitution”.’

<sup>41</sup> According to Schmitt, the systematic ‘disregard of the independent problem of the realisation of law’ allows these normativist doctrines to present the legal order as ‘a system of ascriptions to a last point of ascription and to a last Basic Norm [...] The state is the terminal point of ascription, the point at which the ascriptions, which constitute the essence of juristic consideration, ‘can stop’ (Schmitt 1985)...And must stop, if ‘all sociological elements [ are to be ] left out of the juristic concept’. (Schmitt 1985) In contrast, Schmitt denounces the elision of the gesture that institutes normativity, even if Schmitt’s own conceptualisation of those conditions of effectuation – a decision ‘emerging from normative nothingness’ – is akin to a dangerous political fable, based as it is on the idea of a sovereign people with quasi-divine powers. This argument is detailed in (Delacroix 2005).

*theory of law*<sup>42</sup> – do betray considerable tensions, which culminate in Kelsen's turn to a characterisation of the Basic Norm as a *fiction*. The latter testifies, somewhat dramatically, to Kelsen's awareness of the impossibility for the Basic Norm to be at the same time this transcendental presupposition free of any ideological or factual consideration and the element that, via its content, intrinsically refers to the factual sphere.<sup>43</sup>

In the light of these difficulties, Bix's 'subjective endorsement' interpretation may be deemed a neat and elegant way of rescuing Kelsen's account of normativity. The problem is that it underestimates the significance of the contrast between Hart's and Kelsen's respective explanatory ambitions. To state that law is a system that one may (or may not) choose to view in a normative way is tantamount, from Kelsen's perspective, to a form of subjective voluntarism, as it effectively traces the source of legal normativity to the individual's subjective endorsement of it. Clearly, the latter, voluntarist interpretation is not what Bix has in mind, but if, like Kelsen, your explanatory ambition is not limited to accounting for the way law's normativity manifests itself within our socio-linguistic practices, but instead aims to explain what makes it possible, then this voluntarist interpretation (with its aporetic implications) imposes itself, as exemplified in the passage quoted earlier:

The theory of recognition, consciously or unconsciously, presupposes the ideal of individual liberty as self-determination, that is, the norm that the individual ought to do only what he wants to do.<sup>44</sup>

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<sup>42</sup> See for instance (Kelsen 1967, 219), which has an equivalent in (Kelsen 1949b, 401), except that any reference to the *content* of the Basic Norm has disappeared. It is as if Kelsen had realised that ultimately this notion of 'content' would necessarily lead him either to provide a satisfactory conceptualisation of these 'social practices' which he had left to the province of legal sociology (and thus force him to renounce to – or at least temper – his methodological dualism), or would introduce an internal point of contradiction threatening the coherence of his whole system.

<sup>43</sup> In *General theory of law and state*, Kelsen characterises the content of the Basic Norm as 'determined by the facts through which an order is created and applied, to which the behaviour of the individual regulated by this order, by and large, conforms'. (Kelsen 1949a, X Cg, p. 120)

<sup>44</sup> (Kelsen 1967, S 34 i, p. 218 note 83)

## Conclusion

The point of this paper is not to argue about the merits of this or that interpretation of Kelsen's account of legal normativity, but rather to emphasise the fact that one may associate one's account of legal normativity with very different explanatory ambitions. An endeavour to trace the *sources* of legal normativity need not be doomed (or 'shrouded in mysteries' a la Montaigne). Granted, such an endeavour is unlikely to succeed if one rigorously upholds what some people refer to as 'Hume's Law' – the idea that one may not derive an *ought* from an *is*. In some ways Kelsen's theory is a formidable demonstration of the unavoidable circularity that is concomitant with a strict dualist methodology.

Yet this need not mean that a Hartian, downstream account that takes legal normativity as a given (and proceeds from there) is the only way to go. On the upstream side, legal theory has a lot to learn from various forms of non-reductive naturalism. The latter may, among other things, help dislodge the idea that any account of the social practices that give rise to legal norms must presuppose intentional agency all the way through (as per conventionalist accounts).

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