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INTRODUCTION

Once upon a time, there was a controversy between Karl Olivecrona and Hans Kelsen about the "ought." Olivecrona offered indignant commentary on Kelsen's remark that the world of the "ought" is a "great mystery," whereto Olivecrona opined that a mystery it was and a mystery it would remain forever.[1] At the risk of tackling the day-before-yesterday's problem rather than something more decently modern, not to say later-than-modern, I want in a way to address this issue here. Our seminar of this day being, after all, about the foundations of jurisprudence, the nature and sources of law, I hope it will be relevant to address again the issue of the "ought" by reflecting a little on the character of normative order and on its specific manifestation in positive law, which is what I shall call "institutional normative order." The strategy here is to discuss first normative order, then institutional normative order, then in the light of all that, two key differentiations: that of positive law set against moral order, and that of law set against politics.

At any given time, any one of us has an idea of how the world is, but only a broad and vague idea. Television, radio, newspapers, and other media keep us broadly informed about what is going on, though we confine our attention to particular subjects that interest us. Our awareness of history and geography lets us locate ourselves somewhere terrestrially in the context of some narrative awareness of our present time in its continuity with past events, either directly recalled or spoken to in some memories or texts or reports available to us. Our own idiosyncratic understanding of the natural and social sciences gives us a broad idea of how things go along, and we have a common-sense grasp of how other people are likely to act and how our social situation is likely to change over time. We have some cosmological understanding of the earth in relation to the rest of the universe, and either

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1 KARL OLIVECRONA, LAW AS FACT 21 (1939) (quoting HANS KELSEN, HAUPTPROBLEME DER STAATSRECHTSLEHRE 441 (1911)).

do or do not have an awareness of or faith in a divine being that underpins it all and in some sense guarantees it. With or without that, we have an actual perceptual consciousness of our immediate surroundings, and can to some extent give an account of what is going on here now, though by the time any such account is given, things have already moved on into some new state of being. Even the most learned and perceptive and well-placed of us has only partial information in consciousness at any moment, always in a context of imperfect memory, possibly inaccurate scientific foundations, and conjecture concerning probabilities.

Since Hume, we have been used to contrasting the "is" and the "ought,"[2] and in this, I think we have mainly tended to contrast the straightforward factuality of the "is" with the somehow slippery character of the normative "ought." By drawing attention to the rather vague quality of our grasp of the "is," I seek to administer a modest corrective to this tendency. After all, I can usually be somewhat more certain about how things ought to be than about how they actually are. To hold or perhaps even to know that murder is wrong, or thus, that people ought not to be killed willfully and with malice aforethought, is to hold or know something that holds good everywhere and all the time (or, if I am thinking legally, everywhere within the jurisdiction by which my thought is bounded). Indeed, I can be a lot more confident that nobody ought to be murdered than I can be sure that nobody is being, has been, or is about to be murdered, even in my quite near vicinity. I can be certain that murder is wrong, but not that it won't happen. The same goes for jumping the red traffic light, or for acts of housebreaking, or for lying or breaking promises.

To think about the world, certainly to think of it beyond one's perceptual field, is to have some kind of picture or narrative account of it. This frames how I think it is, has been, has come to pass, and will probably go on. The meaning of such thoughts is clear enough, for they either match the world or they do not, and if they do, that is how it really is. (The trouble is that we can't check it all by direct immediate inspection—that is, indeed, the very trouble from which I started.) The "ought" is of course different. The picture or narrative, as I hold it ought to be, is not one that is confirmed by how events are or turn out. It is an ideal picture or narrative, one to which I envisage the world being made to conform, as it does on all the occasions when no one murders a neighbor, breaks into another person's house, jumps a traffic light, tells a lie, or breaks a promise.

If, however, I have some practical commitments concerning the way the world ought to be, or the way it ought to go on, I can be fairly

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[2] DAVID HUME, A TREATISE OF HUMAN NATURE 469-70 (L.A. Selby-Bigge & P.H. Niddtch eds., 2d ed. 1978).

certain what these commitments add up to. In this way, I can have greater certainty about the "ought" than about the "is." I can know better how the world ought to be (assuming my commitments are valid ones, and leaving entirely aside for the moment the question of what, if anything, validates such commitments) than I can know how it actually is. Personal commitment apart, the universality of legal norms entails that, assuming I have a correct grasp of valid norms of some system of positive law, I can know with considerable certainty how things ought to be according to that system of law, even when I can never be certain how they are, or how they have been, in the territory for which the law is valid. (This, I suppose, is a generalized version of Jerome Frank's "fact skepticism.")[3]

Let us therefore acknowledge that the "ought," however puzzling we may sometimes find it at the deepest ontological level, has at least the possibility of a degree of clarity and certainty that the "is" often lacks. Nevertheless, all is not entirely simple. For, in a concrete situation, I may wonder what I or someone else ought to do or to have done, and may with some confidence conclude that the case is covered by a relevant norm like "thou shalt not kill" or "promises ought to be kept, and here a promise was made." Or, I may take a single simple norm of that kind and reflect on it as in some way clearly valid for some context or jurisdiction. But it also seems that no such single normative judgment or proposition really makes sense on its own or in isolation. The judgment or proposition makes sense only when it is fitted together with whole congeries of other norms. Especially in the context of the particular judgment—"what ought to be done or to have been done?"—or deliberation—"what to do now?"—there may be many normatively salient aspects of the situation, so that one's judgment or conclusion, all things considered, has taken account of more than one norm in its bearing on the situation. In this sense, normative judgments and deliberations do not relate to, presuppose, or derive from single isolated norms, but rather some conception of normative order about the way things ought to be and ought to go on, taking the whole range of events, things, and possibilities as they appear to us at any particular time and place. This prompts an inquiry into the idea of "normative order."

I
NORMATIVE ORDER

Normative order is a kind of ideal order. At any given time, we may form a view of the world as we think it is, including the set of ongoing human actions and intentions for action. We may set against

[3] JEROME FRANK, LAW AND THE MODERN MIND at xi-xii (Anchor Books 1963) (1930).

that a view of the world as it could be or could become, leaving out certain actions, leaving some actual intentions abandoned or unfulfilled, while other actions take place instead of those left out, and other intentions are fostered and brought to fulfillment. A view of the world as it could be or could become is an ideal view of it. An ideal view may be constructed in terms that rule out or imperatively exclude certain ways of acting on all occasions on which such action might otherwise be contemplated, and that insist on or imperatively include certain other ways of acting as always called for, despite any contrary temptation.[4]

There is a notorious ambiguity in the term "ideal" and most of its cognates in the various European languages. Sometimes we mean by it that which exists merely in idea, that is, within ideas held by some person or persons, whether for good or ill, or in a neutral way. Sometimes, however, "ideal" conveys the notion of a favored or even highly favored idea. Normative order, of course, is ideal in the sense of the favored or preferred idea, not merely the neutral idea, yet it falls short of any "best of all possible worlds" perfectionism. Normative order is practical, both in the sense that it guides praxis, guides what we do, and therefore, is also practical in the sense of practicable. It is an order that is envisaged as a practically realizable state of the world, given things as they are and persons as they are here and now. To the extent that it is realized, the world is a better, more satisfactory, world than if no such guideline were envisaged or followed.

"Norms" are propositions that we formulate with reference to, and as singled-out elements of, normative order. In primary form, they are either exclusionary provisions (i.e., negative duties or prohibitions) that rule out certain ways of acting on all occasions on which such action might otherwise be contemplated, or provisions of the converse type (i.e., positive duties or obligations) that call for, or insist upon, certain ways of acting as required of a person despite any contrary temptation, or countervailing reason for action.

Of course, this is not an attempt to explain norms or values in terms of value-free facts. The notion of the "better" or "more satisfactory" built into the account of normative order as ideal order shows normative order to belong within, not independently of, values as fundamental elements in all human consciousness.

Also essential to making sense of these concepts is the way in which the practical concerns that which engages a person's will. Merely to envisage a possible world extrapolated from the actual one, even to think of it in some purely contemplative way, as better than

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4 *Cf.* Georg Henrik von Wright, *Is and Ought, in* MAN, LAW AND MODERN FORMS OF LIFE 263, 267-68 (Eugenio Bulygin et al. eds., 1985) (discussing the use of "ought" in "norm-formulations").

the actual, is not to cross over into the realm of the normative. A steady commitment of the will to realization of some ideal order as a coherent and realizable state of the world is what that transition requires. The will directed towards realizing a practicable, rationally coherent, and humanly satisfactory ideal order constitutes it as normative order. Only by reference to such an order is it possible to establish the difference between right and wrong actions. Those actions are right that are not excluded from the conceived order; those that it excludes as actions and to which it denies fulfillment in intention, are wrong. The dichotomy between wrong and not-wrong (or between wrong and right-in-the-sense-of-not-wrong) is the fundamental differentiation of actions or of intended or planned acts in a normative order. What a person engages upon when aiming to make normative order actual, is the task of, or commitment to, avoiding wrongdoing.

The world as already-in-part-ideal order is that upon which we base our conceptions of normative order, the ideal order that would exist if practically removable imperfections were to be purged from the way things go on now. Most promises that are made are, in due course, kept. Truthfulness and honesty are more frequent for most of us than lying and cheating. To formulate the principles that promises ought to be kept, that lies ought not to be told, nor frauds perpetrated, is to set terms for an ideal order, but not one that stands absolutely apart from actuality, neither in terms of what is commonly done, nor in terms of what others in our communities commonly assert as principles for ideal order.

Thus, normative order does not stand in absolute contrast with actuality. Quite a lot of what goes on is perfectly compatible with what is right from the point of view of any reasonable moral attitude. Moreover, this is the case, at least in part, because people share legal systems and moral attitudes or converge in the moral demands and conceptions of the moral order they endorse. The world, as it is, does not unfold independently of human wills. On the contrary, the human world-as-it-is goes on as it goes on through human choices and decisions. However imperfectly, these choices and decisions reflect and conform to the conceptions of legal and moral rectitude held by the choosing and deciding agents. So normative order as ideal order does not, by its envisaged contents or substance, stand in any absolute contrast with the world-as-it-is. Indeed, our normative commitments come out of our response to the world-as-it-is, our satisfaction or dissatisfaction with it as it is and as it goes on, and our sense of the practicable alternatives to what does or might happen.

There are, it seems to me, three ways in which human beings come to an awareness and understanding of normative order.

Through nurture, socialization, and education, we are exposed to and socialized into some common views of the right and the wrong, and gradually led to an ability to be at least partly self-regulating against the standing norms implicit, and partly explicit, in this common view. Then, in modern conditions, we fall into a series of rather institutionalized settings in which rules are made even more explicit than in the general familial and social milieu. For everyone nowadays, this includes the experience of school, with compulsory attendance; for many, still, even in a secularizing society, participation to some extent in a church, mosque, synagogue, or other structured religious observance plays an important part. Nearly everybody participates in sports and games as player or spectator, or both; and expertise about rules of play and rules of national and international competitions organized by officials and representative bodies is at least as widespread as knowledge and understanding of state law. Thirdly, though, state agencies such as police, courts, and in a more remote way, other official organs (up to and including parliaments and international agencies) define one particularly authoritative, explicit, and highly regulated normative order for us.

At the very least, our picture of normative order emerges out of heteronomous orders, where others communicate norms to us and we learn to follow them, usually under some external incentive. The idea that any of us could invent a whole moral order for herself or himself is absurd. It is inevitable that we start from some learned or acquired framework of practical thought, gradually develop our own critical awareness of it as something for which we take responsibility, and adjust in the light of what seems to us reasonable. Our learning experience is one geared to developing an at least partial autonomy.[5] What we learn is to monitor and guide our own conduct against criteria of right and wrong that are conventional norms in some cases and formally enacted rules in others.

In a fundamental way, though, the possibility of developing fully autonomous judgment at the end of one's learning experience is that which makes intelligible the very concept of normative order. The *telos* of moral development is the fully responsible moral agent who takes responsibility for his or her judgments at all levels, and whose volitional commitment to some ideal of order is categorical, not conditional. Only a being that can act in a self-regulating way, judging between possible courses of action through voluntary commitment to some rationally willed order, and seeking to realize the willed order in action, can fully grasp the concept of "wrong" action, and therefore,

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[5] *See* Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J.L. & FEMINISM 7, 8-9, 21-22 (1989).

the concept of right-as-not-wrong action. Only such a being can make full sense of auxiliary verbs such as "ought" or "should."

This account both presupposes and points toward reasons for believing the thesis that autonomy is fundamental to morality. Conceptually, I would suggest, the idea of autonomy that was sketched above is fundamental to any idea of normative order. For in the last result, only an autonomous being can respond through acts of volition to the requirements of normative order. Normative order guides choices, but does not cause them. Choices are voluntary responses to an idea of order, not conditioned reflexes. On the other hand, the concept of a rationally coherent order in which universalizable principles find their place presupposes the agent's exposure to some conventional or institutional social ordering initially heteronomous in character from the agent's point of view. In the development of moral agency, heteronomy precedes autonomy.

II
INSTITUTIONAL NORMATIVE ORDER

Necessarily, normative order involves judgment. Being subject to a norm is being liable to judgment by oneself and by others in case one's conduct does not match up to what is required. Particular norms are to be envisaged as fragments drawn from a presupposed ideal order in the sense indicated, or as propositions formulated to capture the sense of that order in relation to a given type of situation. They are exclusionary or mandatory prescriptions that posit some course of conduct as wrong or as obligatory. To engage with a norm as an acting subject is to judge what must be done in a given context; to reflect in normative terms upon one's own or another's conduct in a given setting is to judge, against some envisaged norm, whether what was done ought to have been done or ought not to have been done. The judgment that an act ought not to have been done normally entails a consequential judgment of the measure of penitence, restitution, or censure that is apt to the case. All in all, to think normatively is to think judgmentally. This is a general and significant truth about all forms of normative order.

Judgment is sometimes purely personal and autonomous; sometimes it is conventional and heteronomous, without being institutionalized. It can also, however, be institutionalized, or, if you will, organized. The first step towards this can be seen wherever, in a question involving two parties, a third is asked to help. Such a third party can be a relatively impartial judge between two persons on whom some norm impinges differentially. Reference to such an impartial third party can become a standing practice in a variety of situations. Thus, over some range of topics, some persons may acquire a standing

role as judges, to whom reference may be made; it can come about that the judgment of such persons acquires mandatory force within some normative order, in the sense that a person who wishes action taken in virtue of some normative judgment must either handle the matter in a purely voluntary way, or resort to compulsory action only under judgment of such a judge. Then appeals may or may not be allowed; but once judgment is institutionalized, there has to be some rule about the finality of judgment; i.e., a rule that it is obligatory to accept and carry out the judgment of the ultimate court, and that it is forbidden to take any further action beyond that ultimately authorized under the final judgment.[6]

Norms involve judgment, and judgment, as I noted, is either personal and autonomous, or, in some measure, institutionalized. Institutionalization of judgment is a fundamental feature of the organization of normative orders. In one form or another, it occurs in a wide variety of settings, through churches; sporting organizations; commercial guilds and leagues; international organizations and agencies; and also, of course, paradigmatically in the state.

An inevitable effect of institutionalization of judgment, especially where there comes into being a group or a corps of judges acting in a coordinated way under a common structure of appeals, is that normative order must come to be conceived as systemic in character; and the system in question necessarily possesses, as Teubner and Luhmann point out, a self-referential quality.[7] For it has to be a question in any dispute what the governing norm is and how it is to be interpreted. Finality of judgment entails final authority on the question of what counts as a binding norm, and how it bears on the case. What makes the judgment final is a norm of the normative order that makes respect for judgments obligatory in every case; but the judgment that such a norm, or any other norm, belongs to the order, is itself one which can be pronounced with final effect only by an appropriate judge or court. And the same postulated normative order is that which makes a given judge or court appropriate, or (in the more technical term) "competent" to judge on the question.

Whenever this is so, it follows that, relative to any institutional normative system, there is a way, conclusive within the system, to determine what counts as an authoritative norm of the system, or a definitely established right or duty of some person under the system. There is even a way to determine what counts as a person under the

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6 *Cf.* NEIL MACCORMICK, H.L.A. HART 103-20 (1981) (discussing the "secondary rules" that help build a legal system).

7 GUNTHER TEUBNER, LAW AS AN AUTOPOIETIC SYSTEM 13-24 (Zenon Bankowski ed., Anne Bankowska & Ruth Adler trans., 1993); Niklas Luhmann, *Law as a Social System*, 83 Nw. U. L. REV. 136, 141-43 (1989).

system, and what kinds of practical social and business arrangements can be set up with binding effect in the system.[8] The way is, of course, that of recourse to the judgment of those competent to judge. Otto Brusiin has remarked that, although questions about sales or marriages matter to us in quite diverse ways in the ordinary social milieu, what counts in law as a "sale" or a "marriage" is a question that the law courts necessarily have ultimate authority to determine.[9] And they have associated authority to say what ulterior legal rights, duties, powers, and the like follow consequentially upon the existence of a sale or a marriage according to law. But which law courts? Could there be merchants' tribunals deciding about sales? Or sporting tribunals deciding about the valid transfer through "sale" of a footballer's contract? Or church courts deciding about marriages?

As we know, each of these is possible. There can be tribunals of many kinds, and these can deal with similar questions affecting the same human individuals. But the characteristic of an institutional normative order is that competent judgment in it is conclusive within its own order, except to the extent that there is coordinated cross-recognition of different orders, as obtained between Pope and Emperor in the Middle Ages, or between European Communities and member-state legal orders today. Where a plurality of judgments, each conclusive within a particular order, can be passed, the question is: which ought to prevail? As a question within a self-referential system, such a question is of course self-answering, for the system's agencies can never say other than that the system's norm ought to prevail. As a question for a person confronted by competing judgments of substantially the same question in practically different senses, the issue is which to respect, on grounds external to the self-referential answer that rival normative orders provide. Shall a state court decree of divorce, or a church court prohibition or nullification of the state's decree be taken as final? Shall the judgment of the state tribunal or the trade union tribunal be observed? And so on.

The answer to the question, "Which to respect?" has both prudential and moral aspects. Which ought one to respect, all things considered? Which is least disadvantageous, all things considered, to ignore? In cases of conflict, the answer to the latter question, the prudential answer, will be considerably affected both by the weight and balance of conventional opinions and by power relations, and these will also be relevant, though with different scales of weight, to the former, the moral question. But insofar as power relations enter the question, the issue is, as I shall shortly try to show, one of politics.

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8 *See* Neil MacCormick, *Institutions, Arrangements and Practical Information*, 1 RATIO JURIS 73, 79-80 (1988).

9 *See* URPO KANGAS, OTTO BRUSIIN: DER MENSCH UND SEIN RECHT 182 (1990).

Whoever can make a judgment prevail in the last resort, in the sense of its being carried through by force if necessary, and can reliably and predictably enforce such judgments in the general run, has political power; that political power backs, and to a degree reinforces, the authority and prestige of the tribunal whose judgment is enforced, and that of the normative order to which the tribunal self-referentially belongs.

In the world as it has been, and still to a very large extent is, power of the relevant kind has been territorially concentrated, and each relevant territory has been that of a state. The coercively predominant normative orders have been those of states, though they have rarely, if ever, succeeded in absolutely eliminating rival orders of one kind or another. This is why there has been such a tendency to take for granted the equation of "law" with "state law," though this has had serious and distortive effects for legal theory.

Two obviously significant aspects of the interrelation of coercive power with normative order (thus, also the interrelation of state with law) are of course that of executive power and that of legislative power. The executive possesses the direct command of the agencies of organized physical coercion that can back up the power of judgment or, in cases of serious breakdown, disown and overthrow it. The legislature possesses, normally, the kind of democratic or quasi-democratic (or other ideological) legitimation that contributes significantly to the acceptability and durability over time of the coercive power that is organized under the executive. A delicate and shifting balance of power relations normally obtains here. But always, there is a question whether the due exercise of either legislative or executive power is a matter subjected to judicial judgment, and hence, itself incorporated into the normative order that it so crucially supports. Where it is so incorporated, the state is a *Rechtsstaat*, a state-under-law, a "law-state," as Åke Frändberg tells us to call it.[10]

In a law-state, the question of which exercises of executive power are valid is a question of law; the political power of the executive is restrained under the authority of law. Likewise, it is for the courts to say what resolutions of the legislature constitute validly enacted norms of law, and how they are to be interpreted. The authority of the legislature is not a matter of democratic or ideological or hereditary legitimacy extraneous to law, but is itself, conferred by law, or at least confirmed by it on terms that effectively limit the power of lawmaking. Self-referentiality here shades over into "autopoiesis." In such a state,

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10 Åke Frändberg, The Law State (1994) (unpublished manuscript). I am wholly indebted to my friend Professor Åke Frändberg of Uppsala for the use of the term "law-state," which he has advanced in an unpublished manuscript shown to me, and about which we have had several discussions.

there can also be an independent profession of legal science, analyzing the valid law, discussing the limits of its validity, offering interpretations that display some overall coherence and systematicity in the legal (normative) order conceived as an ideal unity. This scientific construction of order and system is itself an act of rational reconstruction extrapolating from the given material.[11] But in turn, it is a reconstruction that reinforces the conception of law as a "system," and posits the systematicity of law as a guiding ideal for judges in particular, and, to a degree, for legislators and officials of executive government.[12]

Law conceived as institutional normative order can thus come to be constitutive of a law-state. However, as Kelsen pointed out, there are two possible ways to conceive and represent the order as a working system. The first is a dynamic way.[13] Here, the process of change through time is central, including the way in which legal provisions themselves set the terms for valid change. This produces a representation of the order with a special focus on the processes of norm-creation, and on the processes of establishing institutional arrangements (contracts, trusts, and the like) within private and lower-level public law. When we represent a normative order in this dynamic way, we represent it in terms of the norms that regulate change, individuated as norms of competence, power-conferring rules, or institutive rules of legal institutions.

The second is what Kelsen called a "static" representation.[14] Here, we represent the order by individuating rules or norms prescribing duties, or conferring rights either permissive or beneficial. Sometimes, in an even more microscopic way, we simply individuate particular duties and rights, depending on the current focus of attention.[15] But this "static" conception proves to be misnamed; it concerns not stasis, but rather, momentary normative judgment, whether the judgment envisaged is that of a court seeking to determine a litigated question; or that of a citizen engaged in practical judgment over what to do or demand in a given setting; or indeed, that of a scholar trying to produce a coherent representation of some branch of the law. The recoguition of rights and duties in this practical-judgmental setting is, in any event, an intellectual procedure different from that

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11 *See* Neil MacCormick, *Four Quadrants of Jurisprudence, in* PRESCRIPTIVE FORMALITY AND NORMATIVE RATIONALITY IN MODERN LEGAL SYSTEMS 53 (Werner Krawietz et al. eds., 1994).

12 *Cf.* Joxerramon Bengoetxea, *Legal System as a Regulative Ideal*, 53 ARCHIV FÜR RECHTS-UND SOZIALPHILOSOPHIE 65, 70-78 (1994).

13 *See* HANS KELSEN, PURE THEORY OF LAW 193-278 (Max Knight trans. of 2d ed., University of California Press 1967) (1934).

14 *Id.* at 108-92.

15 *See id.* at 125-44.

of seeking guidance about the valid exercise of normative power within a normative order dynamically conceived; the two interact and overlap, but are not the same. Law as a normative order has two aspects, the dynamic and the momentary. H.L.A. Hart sought to draw these together into a single structure of "primary and secondary rules," but there is a notorious difficulty about the interconnection of his "rule of recognition" with "rules of change" and "rules of adjudication."[16] A proper representation of a legal system may reasonably take one or other of several forms, depending on one's practical concerns of the time. Material that is characterized in one way in a dynamic perspective, takes a different shape when viewed in a momentary-judgmental perspective. There is no single, uniquely correct reconstruction of the raw material of law into a single canonical form of "legal system."

III
LAW AND POLITICS, LAW AND MORALITY

The final task of the day is to sharpen our sense of the distinction between positive law and the two other realms of thought and action with which it is most intimately interrelated, and yet interrelated as something conceptually distinct, a genuine third term, not simply an amalgam of the first two. Politics is concerned with law—lawmaking and legal reform, appointments to key legal offices, maintenance of the forces of law and order, and supporting the rulings of the courts. Yet politics is not law, nor law politics, despite occasional assertions to the contrary from the ramparts of Critical Legal Studies. Morality is concerned with law, with the criticism of legal decisions and legal rules, with the issue of obligation to respect the law, and with the question of law's claim to be genuinely normative, genuinely engaged with the world of the "ought." Yet morality is not law, nor is law morality, nor a subdepartment of morality, although this has sometimes been claimed by thinkers in the tradition of "natural law." I want to reapply here ideas developed in some recent papers concerning these distinctions.[17] The key ideas are those of power, which seems to me especially focal for politics, and autonomy, which seems to me definitive for morality. Let us see how these ideas help with the distinctions sought.

Politics is a matter of power, of the actual exercise of power within human societies or communities, and of elaborating principles for the proper exercise of power. Political power is the power to di-

16 *See* MACCORMICK, *supra* note 6, at 103-20.

17 *See* Neil MacCormick, *Beyond the Sovereign State*, 56 MOD. L. REV. 1 (1993); Neil MacCormick, *The Concept of Law and "The Concept of Law"*, 14 OXFORD J. LEGAL STUD. 1 (1994); Neil MacCormick, *The Relative Heteronomy of Law*, 3 EUR. J. PHIL. 69 (1995).

rect social agencies and individuals to certain defined ends, presumptively for the common good, to dispose of available goods (economic and noneconomic) among persons and groups, and to protect the group against interference from agencies external to it. The power that we have in mind here is power-in-fact, not simply normative power; that is, power to make sure that somebody in fact acts in a certain way, rather than power to bring it about that somebody ought to act in a certain way. Political power is power-in-fact; but what is sometimes termed "legal power" is power of the other sort, normative power, power confined to the realm of the "ought."

Law interacts with politics in many ways, sometimes as an object over and through which political power is exercised, and sometimes as a control upon the use and abuse of power. But law is not itself constituted by the power-in-fact to effect social change. Law is a form of normative order, setting patterns of right and wrong conduct and conferring powers that are normative rather than coercive in their intrinsic character. Nobody doubts that the United States Constitution conferred and still confers the normative power to ban the manufacture, sale, and consumption of alcohol for beverage purposes. If exercised, this entails that, according to law, alcohol ought not to be manufactured, sold, or consumed for those purposes. The experiment of the 1920s, however, proved that this legal normative power was not conjoined with sufficient power-in-fact to change the drinking practices of Americans. This sufficiently exemplifies the distinction I have here in mind—politics is about power, law is about normative order.

Certainly, one might want to add that not every exercise of brute power is itself a matter of politics. We are often inclined to contrast political with military approaches to the solution of civil conflicts (e.g., in Northern Ireland or in Chechnya). The difference is in the elements of persuasion, negotiation, and discourse. Politics concerns the exercise of power through mainly peaceful discussion, persuasion, and negotiation within forms of government which at least purport to be directed towards a pursuit of the common good in a way that could in principle win general consent among the population governed. Still, however discursive politics may be, the discourse remains one of power in the sense defined.

In its discursive aspect, politics has essential connections with morality. Morality in its most fundamental sense has to be grasped in terms akin to those of Kant's *Groundwork of the Metaphysic of Morals*,[18] and with some regard to Jürgen Habermas's ideas on a "procedural"

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18 IMMANUEL KANT, GROUNDWORK OF THE METAPHYSIC OF MORALS (H.J. Paton trans., 3d ed. 3d prtg. 1961).

account of the foundations of moral reasoning.[19] Morality concerns a normative order that is conceived to be valid independently of power and yet to be universal in scope, addressing every moral agent as such. Since it is independent of power, it is necessarily autonomous in its force—for each agent, its binding force or normative validity lies in that agent's own rational will. It is therefore discursive and controversial as well as autonomous. Moral principles are those we can argue out in conditions of free and uncoercive discourse, accepting that they must be universal in application and must take account of the interests and ideals of all persons capable of participating in the discourse or capable of being affected by its outcome. Each person is as fully entitled to enter into moral discourse as every other, and the ultimate judgment of right and wrong in moral matters is, for each agent, a matter of the conclusions one draws after engagement in actual or imagined discourse with others. The drawing of conclusions characteristic of a rational will depends upon arguments from a sense of overall coherence of the positions to which we commit ourselves in essentially discursive and uncoercive contexts.

Morality in a less fundamental sense is located in the common or conventional principles and rules held by persons in communities, often in connection with religious observances and traditions. To show why this sense is less fundamental, one need only ponder the question of why these principles and rules have authority over a moral agent. One of only two answers is possible. Either their authority derives from the agent's own willing commitment to them, or it derives from the power, however crude or subtle, of community opinion and persuasion or disapproval that keeps the individual in line. In the former case, they are incorporated in the agent's morality through autonomous choice; hence conventional morality is subordinated to individual autonomy. In the latter case, individuals are subjected to the exercise of power, however diffuse and ill-defined, and the rules of conventional morality are an element in the politics of community. If we are to understand morality as a distinct realm of thought and judgment, it can only be through giving conceptual primacy to the discursive-autonomous conception of morality.

Law has positivity. We look to law for answers to questions about what is obligatory or permissible within some sphere of decisionmaking. Inside that sphere of decisionmaking, what the law prescribes is what "ought" to be done to satisfy the institutionalized system. Relative to a presupposed system, law lays down what is obligatory or permissible, not what from some ideal point of view ought to be obligatory or permissible. A properly taken decision that a certain

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19 JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans., MIT Press 1996) (1992).

rule shall be enacted into law does confer on that rule the character of being an actual rule of law. A properly taken decision about some disputed point of right between two persons settles conclusively the legal rights of each upon that point, just as a properly taken decision upon an accusation of crime settles conclusively the legal guilt or innocence of the accused person.

Law resembles morality in that it is normative; it resembles conventional morality in being a normative order commonly observed in some community or society, and backed by both strong pressures of opinion, and the regularly confirmed belief that others apply norms that are regarded as common standards for the group in question. States being territorial political communities organized under governments capable of wielding coercive power over individuals and groups and in response to external forces, the law of states is backed not only by opinion but also by the coercive force of political power. But it is important to remember that the law of the state is not the only law that human beings have, and that the *Rechtsstaat* is, as was argued already, that particular form of state in which the law provides decisive and actually operative criteria for the rightful use of power. Such states have empirically a greater durability than police-states or party-states. In law-states, the legitimacy of the exercise of governmental power is guaranteed by law, and this is not something that simply follows from the existence of a sovereign state as such. This further indicates that the legal and the political are not to be treated as identical, however closely they interact in fortunate circumstances.

One manifestation of law's positivity lies in the way in which, on questions of law, there frequently seems to be a fact of the matter, checkable by reference to publicly accessible sources. If a person wants to find out whether there is a maximum speed limit on the roads of a country, or a maximum permitted level of blood alcohol for drivers, there are sources to which one can quite easily look for an answer. Explicit rules on such matters are to be found in pieces of legislation, frequently supplemented by pieces of subordinate legislation. Furthermore, secondary sources, such as legal textbooks or government publications about road traffic, assist in identifying them.

On the moral question of how fast it is right to drive, or how much, if any, alcohol it is morally acceptable to drink before driving, there is no interpersonally checkable source establishing a quantitative limit; such questions can only be settled through moral discourse, weighing relevant arguments, and establishing considerations relevant to the issue at hand. Their settlement from time to time depends on the conscientious judgment of a moral agent, whether or not in conformity with the conscientious judgment of other agents actually or potentially participating in the relevant discourse. Of course, it would

be difficult to comprehend a claim that the norms of positive law in the state regulating alcohol consumption by drivers are irrelevant or weightless in a moral deliberation on the topic in question. But it would be even harder to comprehend, far less accept, a claim that morally, the enacted rules could have the conclusive character they have within legal deliberation.

The settled, positive character of law is jurisdiction-relative.[20] How fast one may drive is a question differently answered in different places governed by different legal systems under the jurisdiction of different organs or agencies. The fact of the legal matter is a fact about some discrete legal system, and where the law in question is state law, the answer normally holds good only in respect of the territory of the given state. Sixty miles per hour is the maximum permitted speed on roads in the United Kingdom, other than designated "Motorways," on which the maximum is seventy miles per hour. That holds good, of course, only for roads in the United Kingdom regulated by the Road Traffic Acts. If I visit another country, such as Canada, I expect the rules to be different, and even expressed in different units of measurement. There, I have to check on maxima in terms of kilometers per hour; and so on. In each jurisdiction, I look for some distinct piece of legislation (or other authoritative law text) that settles the matter within that jurisdiction.

Moral judgments, however personal and controversial, are not in this way relativistic. If I hold that driving above a certain speed is inherently dangerous to life and limb, or wasteful of natural resources, and if I hold that humans ought not to endanger each others' bodily safety, or make excessive demands on nonrenewable resources, then I must hold that speeding is wrong wherever it may cause danger or use too much fuel. These judgments apply universally. No doubt they are susceptible only to being supported with arguments in a moral discourse, without any interpersonally authoritative source to check against; but in their own character they are universalizable claims, not restricted by jurisdiction or territoriality. Certainly, circumstances alter cases morally; but they do so in a universalizable way. The truth of moral matters is not checkable by reference to established, public, and institutional sources. But their truth is an unrestricted and universal truth to the extent we can establish it at all.

Here may rest the argument on the dual contrast of law with politics and with morality. Law is both a normative and an institutional order, and this connects it with the two poles of the contrast. As a normative order, it replicates certain features of morality, and con-

20 *Cf.* Neil MacCormick, *Comment*, *in* ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY: THE INFLUENCE OF H.L.A. HART 105 (Ruth Gavison ed., 1987) (discussing the jurisdictional relativity of the validity of positive law).

nects necessarily to morality in certain ways. As an institutional order, it connects necessarily to politics and is in part constitutive of the political, while well-conducted politics is necessary to the maintenance of systems of positive law, and especially state law.

CONCLUSION

I have tried to outline how to approach an understanding of law as institutional normative order conceptually distinct from morality and from politics. By focusing on an idea of institutional normative order, one negates the existence of any analytically necessary nexus between law and state. Law is institutional normative order, and state law is simply one form of law. Conversely, the state is a form of territorial political order with some internal power structure and power relations, and the law-state is simply one form of state. This entails a firm denial of Kelsen's assertion that every state is a *Rechtsstaat*, a law-state,[21] at any rate in a minimalist, nonideological sense, on the ground that law and state are in effect the same object viewed in different terms. This is not to be accepted. They are not the same object at all. The law-state is, in fact, the only morally acceptable form of state, and the mere existence of some institutional normative order within a state does not guarantee that the state's power is effectively limited and regulated by law. That limitation is a difficult, but vitally important, achievement of statecraft, as is all the more important the achievement of the quality of a *Rechtsstaat* in a more substantial sense.[22]

All this helps in building an understanding of the coming world order beyond the sovereign state. That order will enhance the moral significance of the law-state by enlarging and internationalizing the legal orders to which the state comes to be subjected. The development of a legal order under the European Human Rights Convention as well as the development of the legal order of the European Communities, and the subjection of European States ever more firmly to one, and in some cases to both, show the way forward here.

It always remains, in the end, a question of whether the law constituted by some institutional normative order really has validity, really is binding. This can be handled in two ways. As a question of law, it receives a clear, but clearly self-referential answer. Any purported legal provision is either a valid member of a given system or not, either binding according to that system or not. But the law itself, through those it determines to be competent judges, regulates the an-

21 KELSEN, *supra* note 13, at 312-13.

22 *See infra* CODA.

swer to the question posed. Such answers have the merit of being objective, often clear, and authoritative.

The interpersonal objectivity of such judgments is a great merit in them, both from a prudential and from a moral point of view. But from the standpoint of the autonomous judgment, the price of interpersonal objectivity is, as always, heteronomy. If it is right to insist on the judgment of the autonomous moral agent as the final touchstone of morality, two things follow. First, even the most morally acceptable form of law remains crucially distinct from morality itself. Second, the ultimate basis of normative practical judgment ought to be morality, not law. The binding force of law is either a simple matter of intrasystemic, self-referential, and self-authenticating judgment, or it is for some moral agent autonomously endorsed. Only in the latter case is it fully normative. Only then does it, or should it, guide conduct categorically.

CODA

The text as presented above is almost identical with that presented to the *Cornell Law Review* Symposium on March 1, 1997. But I wish to acknowledge my very great indebtedness to Professor William Ewald, from the University of Pennsylvania Law School, for pulling out some of the implications of my position as stated, and for adding historical context to some of my themes, in a way infinitely better than I could have done, and in a way that I recognize as fully compatible with the position I have tried to state.[23] In particular, I agree that the possibility of a legal pluralism implicit in my position, and hence the possibility of an individual's legal position being a matter of inquiry into more than one normative order, has something in common with premodern ideas of law. Professor Ewald explains in a masterly way the extent to which von Gierke drew on these models in his critique of the overweening pretensions of the nineteenth-century state.[24] One might add that similar inspiration perhaps underlies some of the work of French institutionalists of the same period, and later.[25] So it may be that contemporary institutionalism such as that represented in my present Article has a greater continuity in thought than is sometimes supposed with earlier "institutionalisms." Anyway, it does not seem to me to be merely antiquarian to advocate a revived awareness of the possibilities of, and opportunities for, a form of normative pluralism in the contemporary world. In Europe particularly, there are now "new legal orders" beyond the law of the state, and state

23 William Ewald, *Comment on MacCormick*, 82 CORNELL L. REV. 1071 (1997).

24 *Id.* at 1074-76.

25 *See* JULIUS STONE, SOCIAL DIMENSIONS OF LAW AND JUSTICE 516-45 (1966) (discussing the work of Maurice Hauriou, Georges Renard, and associated thinkers).

sovereignty is at least problematized in the context of the European Union. Whether there will or can be long-run stability beyond the confines of sovereignty as it was classically conceived is still an open question, and keeping the question open is a valid task for an open-minded philosophy of law at this time.

Professor Ewald also gives valuable historical context for an appreciation of the way in which Kelsen came at the problem of the "dualism" of law and state.[26] Kelsen sees the law and the state as the same thing viewed differently—the state is simply the legal order personified. Hence, in a weak or minimalist sense every state has to be a "law-state" since it simply is the legal system conceptualized as an acting subject. It does not, however, follow that it is a *Rechtsstaat* in the stronger ideological sense of having a legal system with separation of powers and recognition and protection for fundamental human rights. Where I differ with Kelsen, and perhaps also with Ewald, is in doubting the tenability even of the weak or minimalist claim about the state as law-state. If the legal order is a normative order, and if the state is an order of political power relations, it is an open question how far and how effectively the power relations are mediated through law, even rather skeletal law. To bring power even under not-very-enlightened law is still something of an achievement in my view, and Kelsen seems to me to err in treating as an analytical truth what is in fact an achievement of statecraft, and quite a significant achievement at that. (All the greater, of course, when the subjection to law is subjection to a law that enshrines respect for human rights and the like.)

Finally, I must say how greatly I benefited from attending the discussion of all the articles presented in the present volume. They suggest to me three things. First, we do have to wrestle with the dichotomy of obligation versus inclination introduced by Professor Cooter.[27] My present discussion of normative order is an attempt to come to terms with that. Second, context is all-important in coming to any understanding of the normative. We frequently, and perhaps necessarily, single out particular norms to talk about, whether instructions about soupmeat or norms about trust between principal and agent. But no single norm ever "exists" in isolation. What makes a particular norm conceivable is the way it takes place in a larger ordering, *viz*, a normative order. This is strongly implicit in both Professor Greenawalt's discussion of interpretation,[28] and Professor Cooter's use of the bargaining game as a test-bed for his account of normativ-

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26 Ewald, *supra* note 23, at 1072-74.

27 Robert Cooter, *Normative Failure Theory of Law*, 82 CORNELL L. REV. 947, 953-68 (1997).

28 Kent Greenawalt, *From the Bottom Up*, 82 CORNELL L. REV. 994 (1997).

ity.[29] We cannot understand any "ought" in isolation from some overall schema of judgment, that is some normative order out of which one individuates a norm for some purpose.

And third, we must consider the extent to which issues of formality and formal validity (the source-based theory of law) concern us in law, whether as depicted by Professor Summers[30] or as doubted somewhat by Professors Schauer and Wise.[31] We should recognize this as being quite largely dependent on how we choose to construe or construct or even reconstruct the legal material for the particular practical or theoretical purposes we have in mind at a certain time. I am pleased to have in other contexts pursued the issue of legal doctrine as "rational reconstruction" with Professor Summers.[32] I should say that if we do not construct or reconstruct law as exhibiting a high degree of formality, we deprive it of the very properties that make institutional normative order useful or even essential to beings like ourselves, despite our morally fundamental character as autonomous agents who are called upon to pass judgment on the value as well as the validity of the order that emanates from institutions.

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29 Cooter, *supra* note 27, at 953-68.

30 Robert S. Summers, *How Law Is Formal and Why It Matters*, 82 CORNELL L. REV. 1165 (1997).

31 Frederick Schauer & Virginia J. Wise, *Legal Positivism as Legal Information*, 82 CORNELL L. REV. 1080 (1997).

32 For a discussion of "rational reconstruction," see Zenon Bankowski et al., *On Method and Methodology*, *in* D. NEIL MACCORMICK & ROBERT S. SUMMERS, INTERPRETING STATUTES: A COMPARATIVE STUDY 9, 18-24 (1991). A commitment to this methodological stance is continued in D. NEIL MACCORMICK & ROBERT S. SUMMERS, INTERPRETING PRECEDENTS: A COMPARATIVE STUDY (1997), though in this work the relevant conception of "rational reconstruction" is largely carried forward from its predecessor.