'Ought implies Can' and the Law

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ABSTRACT *In this paper we investigate the 'ought implies can' (OIC) thesis, focusing on explanations and interpretations of OIC, with a view to clarifying its uses and relevance to legal philosophy. We first review various issues concerning the semantics and pragmatics of OIC; then we consider how OIC may be incorporated in Hartian and Kelsenian theories of the law. Along the way we also propose a taxonomy of OIC-related claims.*

Keywords: ought implies can, OIC, meta-norms, iterated modalities, law, legal drafting, pragmatics, semantics, Kelsen, Hart, von Wright

1. Introduction

In this paper, we review some of the various logical and pragmatic interpretations of 'ought implies can' (OIC), and then explore the ways in which OIC might be interpreted in the context of legal philosophy, in particular the theories of Hans Kelsen and Herbert Hart. The aim is fairly modest: we do not seek to make specific proposals about how to interpret the OIC thesis in a legal context, or defend any particular perspective; rather we seek to map out some of the space of possibilities, and provide a framework to guide further investigation and exploration of this area.

The principle of OIC is intended to express the idea that if there is an obligation, then it should be possible to fulfil that obligation. Any appraisal of OIC is destined to provoke questions concerning the nature of obligations, the interpretation of 'can', and the kind of implication intended. Under what circumstances does the statement of an obligation create an obligation? Does 'can' here mean alethic possibility, physical ability, or something else? Is 'can' to be interpreted as holding in all relevant circumstances, or only some? Is the implication to be interpreted logically, or pragmatically? Related to this, what is the status of an unfulfillable obligation? Is it an attempt to assert something that is *false*, or *infelicitous*? How are we to interpret 'can' in the context of an obligation that is fulfillable in some circumstances, but not others?

Answers to these questions are not easy; not only is there a large space of potential interpretations of OIC, any rigorous analysis may involve appeal to other contentious areas—such as the interpretation of counter-factuals, or the principle of alternative possibilities (Feis 2014)—where there is, arguably, no settled analysis.

These questions about OIC do not arise out of mere sterile curiosity. When it comes to the law, the issue of 'reasonableness', both in its formulation and its application, may be a material factor. And a fundamental question that arises when considering 'reasonableness' is whether or not the law effectively imposes obligations, or creates an

expectation, that cannot be satisfied, either individually or jointly—even if OIC itself is not always directly 'determinative' (cf. Hart 1961, 175).

While there are a range of philosophical theories about the law, and descriptive and normative principles about its drafting and application, as far as we are aware, there has been little if any work that explores the space of possible interpretations of OIC in the context of these theories.

In the case of legal obligations, intuitively it would seem perverse to impose an obligation-to-do that it were not feasible to satisfy (cf. Carter 2001; Forrester 1989; Lawford-Smith 2012; Tranøy 1972, 1975). It would also appear perverse to impose an obligation that was in conflict with another legal obligation—at least not without there being some mechanism for resolving such conflicts. The standard of feasibility appears to be one that takes such conflicts into consideration (cf. Gilabert 2009; Lawford-Smith 2010). In that sense, OIC applies only to those drafting laws, or contracts, or issuing commands. OIC may be viewed as a condition relating to the rationality or reasonableness of the norm-giver. If an obligation requires the impossible, the authority issuing it can be accused of being irrational or unreasonable, but by itself that does not necessarily preclude the impossible from still being considered an obligation.[1]

As this interpretation of OIC relates to assumptions about the motives of the drafters of a legal text, it may be appropriate to consider OIC to be a pragmatic implicature. But in this context there is a difference: it would appear that the wider legal system should seek to ensure that laws are interpreted or clarified in a way that seeks to sustain this 'implicature' and avoid a cancellable, or defeasible, interpretation. That is not to say that OIC is in and off itself to be interpreted as an indefeasible implicature; rather it is that OIC seems to capture a higher-level obligation or principle that the law should be drafted, interpreted, or reformulated in a way that, as far as possible, the obligations that are deemed to be imposed, both on those subject to the law and those implementing it, are in principle achievable, thereby minimising or eliminating the occurrence of impossible obligations.

In this paper we present various strands of the OIC thesis. The remainder of the paper proceeds as follows. Section 2 gives some background, including logical and pragmatic accounts of OIC and the kind of norm that OIC might be. A taxonomy of OIC theses is also proposed. Section 3 discusses OIC and legal philosophy, with a focus on the theories of Hart and Kelsen. Section 4 concludes.

2. Background

Here we give a brief history of the OIC thesis; discuss various kinds of norms—speculating as to what kind of norm OIC might be; review some semantic and pragmatic interpretations of OIC; and propose a taxonomy of OIC theses.

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[1] On impossible obligations see Feldman (2001), Martin (2009), Jay (2013), and Kühler (2012); Feis (2015, ch. 2, especially pp. 48–50), and Tessman (2015, esp. ch. 1–3). One case where impossible obligations appear to be ruled out is Justinian *Digesta*, as it features Celsus' *impossibilium nulla obligatio*: what is impossible carries no obligation (see D.50.17.185).

2.1. A brief sketch of OIC's history

OIC is an old thesis, but it has remained live and relevant. Even when it was considered dogma, it was often invoked, although sometimes questioned—perhaps increasingly so in recent times. The principle is commonly ascribed to Kant (see Stern [2004] for the issues involved in this conception) but goes back at least to Celsus and the Justinian *Digesta* (D.50.17.185) under the formulation *inpossibilium nulla obligatio*. According to Blum (2000) the thesis can be found also in Pelagius and Augustine. (On the genesis of OIC see Baumgardt [1946].) It is appropriate to quote Howard-Snyder's (2006, 223) remarks on the status of OIC, and the attacks against it:

> Twenty years ago such an argument [against OIC] would have seemed pointless – since the principle was then regarded as more or less axiomatic – a premise rather than a conclusion. In the last few years, however, OIC has come under sustained attack from several quarters.

In modern times (e.g., from Moore [1922] onwards) the thesis of OIC has often been considered to be 'intuitively' true. A version of it also taken to be an axiom in some forms of deontic logic (see §2.2.1). But there has been the occasional criticism of OIC (e.g. Lemmon 1965; Stocker 1971; Dahl 1974), with some further strong criticisms appearing more recently (Saka 2000; Ryan 2003; Martin 2009).[2]

2.2. Semantic and pragmatic OIC: kinds of inference

When considering possible relationships between 'Ought p' and 'Can p', there are a number of candidates in the literature, including whether 'Can p' is an entailment, a presupposition, or an implicature of 'Ought p'.

2.2.1. Entailments and axioms: OIC in von Wright's deontic logic

Formal logics by themselves cannot directly answer philosophical questions such as whether 'ought logically implies can': we can propose logics in which it does, and logics in which it does not.[3] But we can consider whether a given 'intuitive' understanding of the relationship between 'ought' and 'can' can in principle be formulated as an entailment relationship in some logic. Such a formalisation can be helpful in refining our intuitions, and in determining whether they can be given a consistent interpretation.

To exemplify this, it may be helpful to review how OIC may formulated in some versions of von Wright's deontic logic (von Wright 1963, 1968, 1983b; Feis m.s.), sometimes known as Standard Deontic Logic.[4] This provides a concrete illustration of some of the issues that arise, and need to be considered, in an account of OIC. Here we are not necessarily advocating the approach suggested by this version of deontic logic. It is just that this is one case where a rigorous interpretation of OIC has been given (even if we may dispute the details). As such, it acts as a guide as to some of the issues that arise

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[2]For a reconstruction of the criticisms and some replies, see Vranas (2007).

[3]We can also propose logical formalisations of obligations in which the status of OIC is undecided or contingent.

[4]Although OIC itself is not usually considered an essential feature of Standard Deontic Logic.

when considering how OIC might be incorporated into existing legal theory, not just an abstract, idealised logic.[5]

In deontic logic, one formulation of OIC is $Op \rightarrow \Diamond p$.[6] Here, the obligation is 'Op', where 'p' is intended to denote the propositional content of what is expected to be done, or brought about; '$\rightarrow$' is material implication, and '$\Diamond p$' is the claim that 'p' is possible. This involves mixed modalities: we have both a deontic modality (O) and an alethic one ($\Diamond$).[7]

In a possible-worlds interpretation, an obligation 'that p' indicates that it is desirable to act in a way that in some sense moves us to a world in which p holds, or to ensure we remain in a world in which p holds. And '$\Diamond p$' is the claim that there is such a world. One question might be whether the relevant notion of accessibility for $\Diamond$ is the same as that for O. If they can differ, then while p might be alethically possible, that does not mean it is actually achievable. We might also wonder whether material implication is appropriate here, or whether some kind of defeasible or pragmatic conditional would be more appropriate.

In formal logic, axioms like $Op \rightarrow \Diamond p$ are intended to be interpreted schematically. In this case, for every proposition p in the theory, the axiom effectively says we need to add the proposition $Op \rightarrow \Diamond p$. There is a sense in which such schematic axioms can be thought of as external constraints on theories expressed in a given logic; they express formal requirements with which any reasonable theory is expected to comply. Any deontic theory or system which fails to comply with this requirement will be demonstrably inconsistent when formalised in a logic that includes this axiom.[8]

Assuming that we desire to avoid inconsistency, an axiom of a logic can be thought of as imposing an obligation on any theory that is formulated in that logic—akin to 'O'($Op \rightarrow \Diamond p$), where 'O' is effectively a form of meta-level obligation (on the logician). The 'sanction' for failing to comply with this 'obligation' is that the logic will be inconsistent. But such an obligation is not an obligation *of* a theory formulated in deontic logic; rather it in effect imposes a requirement on any system of obligations formulated within the given logic. When it comes to the logician formalising a deontic theory, the existence of such an axiom can be seen as imposing a meta-level constraint or obligation *on* formal theories expressed within the logic (and as such, a constraint on the logician), rather than being a norm *of* theories formulated in the logic.

While the notation $Op \rightarrow \Diamond p$ appears to make things precise, its meaning is still contingent on the precise interpretation that we give to the constituent terms.[9] We can

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[5] This can be seen to be consistent with the advice of Żełaniec (2015) to bring deontic logic into real (legal) life. See his essay for more details on how technicalities of deontic modal logic, such as the K principle, lead the deontic logician astray.

[6] This can be added as an axiom of Standard Deontic Logic with alethic modality. In the case of the so-called Andersonian–Kangerian reduction of Standard Deontic Logic (Anderson 1959; Kanger 1971), $Op \rightarrow \Diamond p$ is a theorem.

[7] Such formulas were considered problematic in the early days of deontic logic. For example, von Wright (1951) denied that such mixed expressions were well-formed formulas of denotic logic.

[8] As with all such axioms, we can turn the schematic notion of substitution into an explicit quantification by giving a logical formalisation of the meta-theory, so we would then have $\forall p \in \mathsf{Prop} \cdot (Op \rightarrow \Diamond p)$, where Prop stands for the class of propositions of the original logic, and p is a variable that ranges over these propositions. This can be expressed in higher-order modal logic, or any logic with an appropriate system of types (e.g. see Turner 2005).

[9] One constraint that $Op \rightarrow \Diamond p$ does impose, given any standard possible-worlds interpretation of

argue about whether Standard Deontic Logic and its possible-worlds models are the most appropriate framework in which to express theories of obligations and permissions, and whether such formalisations are sympathetic to our intuitions (Fox 2012a; Żełaniec 2015). In particular, there are some potential issues in interpreting 'can' as alethic possibility $\Diamond$, given that it does not take into account questions of agency. And the existence of contrary-to-duty obligations[10] raises the question as to whether this logical formulation is sympathetic to the nuances of obligations and their fulfilment. We could also argue that the Standard Deontic Logic axiom for OIC might be too strict (cf. Fox 2012a; Martin 2009; Żełaniec 2015).

Despite its various potential shortcomings, the formalisation of OIC as $Op \rightarrow \Diamond p$ in some form of Standard Deontic Logic provides a useful example of some of the key issues to consider when it comes to normative systems: assuming we accept some version of OIC, what do we intend it to mean; how do we best capture that meaning; and who, or what, is required to ensure that OIC is fulfilled?

Before proposing a taxonomy of OIC theses (§2.4), we first review some other issues relating to the analysis of OIC, and whether it is better considered as a presupposition or as an implicature, rather than an axiomatic material implication.

2.2.2. Presuppositions

We take *presuppositions* to be those things that must be assumed to be true in order for a statement to make sense (or at least, for the statement to be considered true). We may wonder whether presuppositions are an appropriate way of characterising the relationship between 'ought p' and 'can p'. The answer to this question depends on how we characterise presuppositions and which, if any, of those characterisations may accord with our intuitions about OIC. If 'ought p' presupposes 'can p' on the Russellian analysis, then in the event that 'cannot p' holds, 'ought p' must be false. On a Strawsonian analysis of such a presupposition, if 'cannot p' holds, then 'ought p' is infelicitous.[11]

But there are confounding factors. First there is the issue of presupposition accommodation (Heim 1983; Thomason 1990). Accommodation is where, in some sense, we give the benefit of the doubt, and for the purposes of analysing meaning or engaging in coherent discourse, we treat the presupposition as if it were true (without necessarily committing ourselves to its truth). We might then accommodate 'can p' as a belief about the beliefs of the agent who states 'ought p'.

A second issue is that of ambiguity. Saying 'ought p' can impose an obligation, describe an obligation, or describe a desirable state of affairs. The last case may be characterised as 'ought to be', as opposed to 'ought to do'. One possibility is that

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deontic logic with alethic modality, is that the imposition of a *logically* impossible obligation leads to a contradiction. For example, there can be no obligation (either stated or derived) of the form $O(p \wedge \neg p)$.

[10]Contrary-to-duty obligations are those obligations that apply when some other obligation has not been fulfilled: 'you are obliged to keep your promises. If you cannot keep your promises, you are obliged to apologise.' (cf. Chisholm 1963).

[11]While not central to our concerns here, we note that it is possible to formalise a notion of 'infelicity', given an appropriate theory of propositions, where only sentences judged to be felicitous (in this case, only sentences whose presuppositions are satisfied) can play a role in truth-conditional inference (Fox 1994, 2000).

we might use presupposition failure as a diagnostic for distinguishing between 'ought to do' and 'ought to be'—or at least to motivate a charitable (re)interpretation of an impossible obligation as an optative statement: if 'ought p' is claimed, and 'can p' is false (or taken to be false), and there are no grounds for revising this view, then the charitable interpretation is that this can only be interpreted as 'ought to be p'. This perhaps ties in with the notion of an implicature.

2.2.3. Implicatures

Implicatures in the Gricean sense (Grice 1975, 1981) can be characterised as the meaning that an individual appears to convey by using a particular linguistic expression, in contrast to the overt semantic content of the expression.[12] Normative rules, or 'maxims', can be formulated that seek to characterise implicatures and the relationship between what is said and what is implicated. What is often taken to be distinctive about implicatures, in contrast to entailment and presupposition, is they are cancellable (or defeasible).[13]

In the case of 'ought p' and 'can p', Sinnott-Armstrong (1984) appears to build an argument in favour of an implicature relationship ('can p' is an implicature of 'ought p') on the basis that implicatures are cancellable. This is perhaps a different kind of implicature to that of Grice. If the argument is that the implication between 'ought p' and 'can p' should be cancellable, or defeasible, that does not necessarily mean that it is an implicature as such (at least in the Gricean sense).

If we follow Streumer (2003), we can resolve the problem that Sinnott-Armstrong identifies in his examples by distinguishing 'ought to do' from 'ought to have done' (and from 'ought to be/have been'). The maxim 'ought implies can' then becomes 'ought-to-do p implies can-do p' and 'ought-to-have-done p implies could-have-done p'.

If we take into account the notion of presupposition, accommodation, and ambiguity, this is not inconsistent with an analysis of OIC as 'ought presupposes can'. And as alluded to above (§2.2.2), a failure in the presupposition can either be attributed to a misapprehension, or indicate that 'ought' should be given an optative interpretation, 'ought to be'. For example, as a norm that governs individuals, 'we ought to put a stop to starvation in the world' is something that lies beyond any individual's financial, physical, or political abilities. Thus, assuming some form of inference to the best explanation, this might be interpreted as an optative corresponding to 'It would be desirable for there to be no starvation in the world'.[14]

There remains the question of what is actually meant by 'can'. In particular, in this context we may wonder whether 'can' in OIC is to be interpreted as taking into account what is permitted or at odds with other obligations (cf. Gilabert 2009; Lawford-Smith 2010), or indeed whether it is ambiguous. Consider the simple case of an individual

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[12] For example, the sentence 'I'm going home', when uttered in response to the question 'Are you coming for a drink?' is taken to implicate the answer 'No (I am not coming for a drink)'.

[13] By itself, the cancellability of implicatures need not be a bar to their formalisation within a logical framework. Perhaps a larger obstacle is that conversational maxims often compete with each other; for example we need to be informative, while avoiding verbosity. Arguably this may be better conceived of as an optimisation problem. Following Horn (2004) this could be viewed as a competition between 'Say as much as you can' and 'Say no more than you must'.

[14] By stating desirable goals, optative expressions may still guide individual and collective behaviour but an argument can be made that this is still different in kind to an individual obligations that must be satisfied in order to avoid some form of direct legal, contractual, or social sanction.

obligation $O(p)$. If we accept some version of the OIC principle, then this obligation appears to presume that p is possible. But if there is also an obligation $O(\neg p)$, then the question is whether that means that p should be considered to be no longer possible in the sense that might be intended by OIC. Taking this further, there may be an interpretation of OIC that gives it a key role in the analysis of conflicting obligations.

2.3. Kinds of norms

In addition to the issues raised above about the most appropriate approach for analysing OIC, there remain questions about the nature of OIC, and whether it should be given the same status as other norms. As an axiom or theorem of deontic logic, its formal status will be different from that of obligations expressed within the logic. Here we explore the different kinds of status that norms, and OIC in particular, could have.[15]

2.3.1. Meta-, higher-order, primary, and secondary norms

It is appropriate to consider some of the different terminology that has been applied in various discussions of norms and their formalisation. If we consider OIC to express the expectation that it should be possible to comply with anything considered to be an obligation, then this can be taken to be a claim, or expectation, *about* all obligations. That is, we may consider it to be an expectation, or norm, that governs, or ranges over, other obligations.

There is some subtlety about the terminology here, which may also depend on precisely how a requirement such as OIC is formulated. When it comes to logical formalisations such as that given in §2.2.1, we can view the axiom schema as embodying meta-level requirements on the theory. The inclusion of OIC as an axiom is akin to giving it a meta-level requirement, with the harsh punishment of formal inconsistency in the event of a transgression.

We could also consider OIC itself to be a norm, perhaps expressed as an explicit obligation or property governing other norms, but outside the given normative framework (as already illustrated in §2.2.1). It may itself then be considered to be part of another, larger normative framework, such as one that expresses what is expected when one of the underlying norms is broken (cf. Axelrod 1986) or that guides the law-maker (von Wright 1983b).[16]

If we wished to treat OIC explicitly as an obligation itself, within the same theory as the obligations that it governs, then we could consider formulating it as an iterated obligation $O(Op \rightarrow \Diamond p)$.[17] Such cases of nested deontic operators, such as OOp, or

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[15]The notion of a 'norm' is a complex one (e.g. see Conte 2007). We do not attempt to resolve all questions about what kinds of norms are relevant to the various characterisations of OIC.

[16]von Wright's views on OIC are not straightforward; one can find three different takes on the subject in his writing (von Wright 1963, 1968, 1983b). On this, see Feis (m.s.).

[17]Which as a statement in second-order logic could be written as $O(\forall p \cdot Op \rightarrow \Diamond p)$ or $\forall p \cdot O(Op \rightarrow \Diamond p)$.

OPOp, are called 'higher-order norms'[18] by von Wright and others.[19]

It is tempting to consider simple obligations, of the form Op, as *primary norms* and obligations about obligations, perhaps including OIC, as *secondary norms*. Unfortunately these terms have already been claimed; indeed different authors already use these terms in different ways.

For Kelsen (§3.2) the primary norms are those that characterise sanctions, such as 'murderers shall be punished by life imprisonment'. And the secondary norms are those that tell us how to behave in order not to incur the sanction, in this case 'you ought not to murder'. In both cases a formal translation into the language of deontic logic would require only one deontic operator.

In contrast, Hart (§3.1) takes those norms that characterise the behaviour required to avoid sanctions to be primary norms. Hart's secondary norms are norms that perform a precise function within a given legal framework—sometimes it is said that secondary rules 'confer powers'. As with Kelsen, both of these primary and secondary norms, when translated into deontic logic, would require only a single, non-iterated, deontic operator.[20]

Regardless of difference in terminology and formulation, it seem clear that OIC is not a primary norm, given that it is a norm about norms. What is perhaps less obvious is how it might best be interpreted more formally, whether it is an iterated norm—or rule—*within* a theory, or some kind of meta-rule that is *about* a theory. And with either analysis, there are questions as to how obligations, implication, and 'can' are to be interpreted. But here we are particularly interested in how OIC itself can figure in the law. This in turn might shed light on other questions around the OIC hypothesis.[21]

Given all the various ways in which the general idea of OIC might be formulated and characterised, and the various ways in which its status as a putative constraint or expectation might be cashed out, it is difficult to come up with a neutral term that describes such a status.[22]

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[18]This use of the term is not to be confused with the now more common logical notion of 'higher order' as applied to typed logic. In general the term 'higher-order logics' refers to logics with a system of types that include propositions, individuals, and function types, and where quantification can range over expressions of a given type. There is some potential for confusion here, as we can re-express axioms for OIC as statements within higher-order logic. Specifically the axiom O$p \rightarrow \Diamond p$ can be written as something like $\forall p \cdot \text{O}p \rightarrow \Diamond p$ if we allow quantification over propositions (cf. fn. 8). And what von Wright refers to as 'higher-order norms' can themselves be expressed in higher-order logic. For example O(O$p \rightarrow \Diamond p$) could be expressed as something along the lines of O($\forall p \cdot \text{O}p \rightarrow \Diamond p$) or $\forall p \cdot \text{O}(\text{O}p \rightarrow \Diamond p)$ (cf. Fox 2012b; Żełaniec 2015).

[19]While von Wright initially rejected iterated deontic modalities (von Wright 1951), he later considered them as well formed formulae of deontic logic (e.g. in von Wright 1968, 1983a).

[20]The regulative rules and constitutive rules of Searle (1969) complicate the picture even more. The former regulate behaviour (cf. Kelsen's secondary rules and Hart's primary rules); the latter create new forms of behaviour (see Bilmes 1986). But again neither notion requires the iteration of deontic operators. In the case of constitutive rules, Grossi and others have proposed a formal analysis expressed in terms of a *Counts-As* operator (e.g. Grossi 2011), in the spirit of Searle.

[21]Looking ahead to §2.4, this distinction between iterated norms and meta-norms applies both to the *OIC-nature* family and to the *OIC-use* family. In the first case, the Foundational OIC is iterated, whereas OIC as a (Conversational) Maxim seems to constitute a meta-norm. Both OIC as a Principle of Normative Consistency and the (Meta)ethical OIC seem to be meta-norms, whereas the Legislative OIC is an iterated norm.

[22]In order to provide a relatively neutral characterisation of OIC, we will suggest that it be viewed as having some 'structural' or 'architectural' role.

2.3.2. Pragmatic versus semantics norms

We have already discussed semantic and pragmatic inference in relation to OIC (§2.2). Here we consider this distinction from the perspective of legal systems.

In the case of a logical formalisation of legal systems, it would be preferable to avoid a logical collapse in the event that some obligations are individually or collectively unfulfillable (Fox 2009, 2012a; Lawford-Smith 2012). Given the fallibility of legislative drafters, this suggests that it may be preferable to give OIC some form of pragmatic interpretation. But the nature of such would need to be spelt out in any given case. The nature of any implicit notion of OIC might also change according to what is at stake: for someone drafting legislation it may act as a guide to drafting reasonable law. For someone enforcing the law, it might act as a guide for mitigation or reinterpretation.

In general, the principle of OIC may identify cases where the coherence of a given legal code may be in question (and hence whether it embodies achievable expectations). This might include the logical impossibility of satisfying conflicting obligations. In such cases there are legal questions that need to be taken into account. There may even be a body of 'compensating', or 'contrary-to-duty' obligations that prescribe how such matters are to be dealt with.[23] Given these issues, it would appear that OIC may have a pragmatic role (in some very general sense of 'pragmatic'). With various legal and, potentially, moral nuances, such a role is not easily reduced to self-contained formal notions. But a case can be made for treating OIC as an implicature of some kind, in particular an implicature that we act to maintain rather than allow to be easily overruled (cf. §1).

2.4. A taxonomy of OIC theses

The various claims about the role of OIC can be seen to fall into different categories. Some are concerned with the *nature* of OIC, and others with its *application* or *use*. Still others fall into a *methodological* category. This last category seems to be a *tertium datur* between the other two families: it tells us how to argue for a given OIC thesis (which can characterise both what OIC is and how OIC is to be applied). We might characterise this last category as being concerned with *justification*.

Here we offer a tentative classification of eight different theses into these three categories. There may be some overlap between these categories, depending on one's views of the individual theses about OIC and the distinction between nature, use, and justification. Of the following eight theses concerning OIC, some are stated explicitly in the literature on OIC itself and on the question of how to frame research on OIC; others are implicit.

As a broad approximation, theses concerned with the nature of OIC are related to issues about the general underlying semantic *vs.* pragmatic characterisation of OIC (§2.2). Those concerned with the application of OIC can be seen to relate, at a very general level, to the various proposals on OIC and the law (§3). And the methodological theses relate to those cases where we might consider OIC to be a guiding principle, as with Hart's rules of Change and Recognition (§3.1).

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[23]There is an extensive literature relating to the various issues and controversies that arise when formalising contrary-to-duty obligations (see e.g. Chisholm 1963; Castañeda 1981; Fox 2012a).

2.4.1. Theses on the nature of OIC

We can discern the following four kinds of claims that seem concerned primarily with the nature of OIC. The names are intended to be indicative of their general flavour.

1. Truth-conditional OIC: it is a truth of logic due to the semantics of deontic terms that OIC holds for norms and commands (Hare 1963; von Wright 1963).

2. Ethical OIC: OIC is an ethical truth whereby it is unfair to order what is impossible (Copp 2008, and perhaps Carter 2001).

3. Foundational OIC: OIC-related claims are different in kind to regular norms and are perhaps best conceived of as corresponding to, or a consequence of, something like a higher-order or iterated norm of the form 'it ought to be the case that OIC' (cf. Fox 2012b).

4. OIC as a (Conversational) Maxim: OIC is a Gricean maxim that we use to issue commands (§2.2). As we have seen (§2.2.3), Sinnott-Armstrong (1984) puts forward what might be described as a pragmatic version of OIC (though criticised by Streumer [2003]).[24]

2.4.2. Theses on the application of OIC

We can identify the following three general theses that can be described as related primarily to the use of OIC.

5. OIC as a Principle of Normative Consistency: OIC is needed to achieve some form of consistency in a legal system or a system of norms. Arguably this presumes a particular way of formulating norms and obligations, although this kind of thesis may be no different to some of the others in this regard. For arguments that OIC is equivalent to the principle of consistency of deontic logic, see for example Lemmon (1962, 1965); see Kading (1965) for criticisms of this view.[25]

6. (Meta) ethical OIC: OIC is needed to avoid unfair impossible requirements (Tranøy 1972, 1975; Carter 2001). Carter (2001, 92) explicitly says that OIC is a second-order ethical norm. Carter characterises OIC's second-order nature as something less than a metaethical thesis such as 'moral principles are neither truth nor false' but more than a first-order ethical claim such as 'you should not kill me'.[26]

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[24]We think the characterisation of OIC as a (Conversational) Maxim is somewhat different: it may be more appropriate to consider Sinnott-Armstrong's (1984) account as a form of 'presuppositional' OIC (although that may be included within the scope of OIC as a (Conversational) Maxim). See also Forrester (1989) for a pragmatic take on OIC.

[25]Dahl (1974) considers this view, taking into account the concept of excuses and justifications. Jacquette (1991) shows how OIC could result in a dilemma for deontic logic (see Slater [1994] for a reply).

[26]This is how Carter (2001, 81) states his OIC as an ethical norm:

> On this interpretation, we do not see [OIC] as simply holding for any prescriptive use of 'ought'. Rather, we see it as holding because we believe that its denial is wrong – because we think it ethically mistaken to prescribe impossible things.

To his ethical OIC, Carter opposes the thesis that sees OIC as a semantic norm, as advocated by Hare

7. Legislative OIC: OIC tells the norm-giver what to do if he wants to create a rational legal system (von Wright 1983b). This is perhaps related to OIC as a Principle of Normative Consistency, except that it is directed overtly at the norm-giver.

2.4.3. Justification and OIC

We can identify the following thesis that is related to the justification of OIC and, in general, the resolution of the different issues pertaining to OIC.

8. Methodological OIC: OIC is a thesis to be justified on methodological grounds but is not a conceptual or logical truth. There are reasons to include it in a normative system, but a system lacking OIC would not necessarily be contradictory. This view can be identified in von Wright (1968).[27] Also Forrester (1989) emphasises the methodological question, and considers OIC to be more a *desideratum*.

3. OIC and Legal Philosophy

Having considered some general questions concerning how OIC may be analysed and formalised, we now consider whether, and how, OIC may feature in the legal theories of Hart and Kelsen. To this end, we consider each of these frameworks in turn, giving a brief overview of them, and then reflect on where and how the OIC thesis might apply, or at least be considered, within these two influential theories.[28]

For us, it seems that OIC plays what can be thought of as a 'structural' or 'architectural' role,[29] by which we mean that OIC is placed in some 'meta-' position when compared to the simplest example of norms that tell us what to do or what is permitted—such as 'do not steal' or 'you are allowed to turn left'. In contrast to simple norms and obligations, OIC reflects something about other norms, or those issuing them, regardless of precisely how such a 'second-order' status might be formulated (§2.3.1). We can view OIC as a notion that can be used to shape, manage, or characterise a system of norms. OIC need not be regarded as an explicit precondition for obligations but can

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(1963, 59):

> The impossibility, or the inevitability, of doing something stops the question of whether to do it arising.

According to Carter (2001) the function of this latter OIC is 'to describe one of the semantic properties of prescriptive ethical norms, thus filtering out some of the norms which cannot fall into this category' (p. 80). Thus the semantic OIC can be used 'to circumscribe our ethical prescriptions' (p. 81).

[27] 'A decision to accept the idea that 'ought' implies 'can' must be motivated, it seems to me, from consideration of an *axiological* order.' (von Wright 1968, 68).

[28] For a broader picture of Kelsen's Pure Theory, see Kelsen (1934, 1945, 1960). The first two chapters of Marmor (2010) offer a presentation of the Kelsenian and Hartian frameworks, as do essays 3, 5, 7, and 8 of Raz (1979).

[29] The terms 'structural' and 'architectural' are intended to be suggestive of the various different ways in which OIC may play a role in a system of norms. Other terms that may also seem appropriate—such as 'secondary', 'meta-' or 'higher-order'—run the risk of being conflated with related topics in the philosophy of law. As an example, it is tempting to call OIC a 'secondary' norm, but as we shall see, this term has already been co-opted. Given that in the context of legal norms, the word 'secondary' already has two existing, incompatible senses—as adopted by Kelsen and Hart, respectively—it would be unhelpful to add a third.

instead be viewed as having a role in evaluating the coherence of a system of rules, and perhaps the rationality of the norm-giver.

First we consider the nature of OIC in relation to Hart's conception of a secondary norm (§3.1); then we consider OIC in relation to Kelsen's distinction between primary and secondary norms and his idea of a *Basic Norm* (§3.2). It is hoped that these considerations will help provide a better understanding of the potential applications of OIC and the ways it may feature in legal philosophy. In addition, legal philosophy may help us to determine if OIC might be used in some (pragmatic) legal way—whether during legal drafting or legal interpretation—that is distinct from its interpretation or relevance in the context of everyday statements about obligations.

3.1. OIC and the Hartian framework

Hart (1961) adopts what might now be considered the traditional view of the primary–secondary norms distinction: that law consists of duty-imposing *primary norms*, while *secondary norms* confer power and add structure to the legal system, and —according to Hart's thought experiment—distinguish a working legal system from a primitive legal system consisting only of primary norms. He argues that the distinction resides in secondary norms that govern the recognition of the relevant laws, and procedures for changing and for applying those laws. These are Hart's rules of *Recognition*, *Change* and *Adjudication*. We sketch these rules in turn—and then discuss how they may relate to the interpretation of OIC.

1. Recognition: Hart's *Rules of Recognition* determine which norms belong to a certain legal system and which do not. They are Hart's solution to the problem of the unity of a legal system and the validity of its norms. In some key respects they play roles similar to Kelsen's Basic Norm (§3.2). Nonetheless, according to Hart, a rule of recognition is something we can find in the world and recognise. We accept some form of rule of recognition and persevere with it.[30]

2. Change: Hart's *Rules of Change* prescribe how we can change a given legal system. The rules for changing a legal code will differ depending on the legal system in question.[31]

3. Adjudication: Finally, Hart's *Rules of Adjudication* are concerned with the application of a legal system and how to deal with controversies. They are the rules (or identify those rules) governing the organisation of tribunals, judges, and trials.

For each of Hart's secondary rules we can ask how they relate to OIC. There is a *caveat* for the rest of our analysis of OIC when interpreted along the lines of Hart's theory of secondary rules: all of Hart's secondary rules of recognition, change, and adjudication are empirical in nature (i.e. they are not presuppositional in nature, unlike Kelsen's Basic Norm). Our inquiry into OIC's possible roles takes into account only the

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[30]This idea of a *Rule of Recognition* is not without problems or controversy, but as before our main objective here is not to provide a critical commentary on these accounts, but merely to identify in what ways OIC might play a role in a given theory.

[31]As with the *rule of recognition*, the *rules of change* are concerned with the validity of a legal system.

function Hart is using rather than the empirical characterisation. The claim that some form of OIC thesis could itself be empirical is not something we seek to defend here.[32]

3.1.1. OIC and the rules of recognition

Hart's *Rules of Recognition* are the means by which those rules that belong to the legal system are distinguished from those that do not. In our view, OIC could play a role in recognition: if it were claimed that only norms that can be fulfilled may be part of the legal system, then that would in effect be using OIC as one of the criteria that need to be satisfied for a rule to be recognised as part of the legal system.

There are a number of ways in which such a result could be obtained: (1) We could claim that OIC is an essential requirement that holds for all the norms, and use it as a rule of recognition. (2) Another option is to say OIC is a pragmatic Gricean maxim included in every act of norm issuing; this would be another way in which OIC could have a role in recognising salient norms. (3) A third option to give OIC a role in recognition would be to load it with some ethical import: either (a) consider OIC as a truth of ethics that claims it is unfair and unjust to order the impossible, or (b) claim OIC is ethically required to avoid impossible requirements. These two ethically loaded options may also play a role in recognition: while they may allow an impossible command to still be considered a command—unlike option (1)—they may suggest that, ethically at least, such a command need not be followed, because of its 'unfairness'. (4) A final option is to say that OIC is a norm of rational law-making. In that way it is addressed to law officials or the law-givers and when they follow a rule of recognition, it allows them to determine which norms are part of the legal system.[33]

3.1.2. OIC and the rules of change

Concerning OIC and the *Rules of Change* — the rules that allow and govern the modification of the legal system—it can be argued that the OIC thesis cannot play a direct role when it comes to modifying a legal system, as it does not say *how* a modification should be made. *Prima facie* it seems that the notion of 'changing a rule' as such is not able to interact with the OIC thesis, unless we say that OIC has a role in recognising legitimate rules (as in §3.1.1 above).

Given the 'recognition' role that may be played by OIC, one may say that as a guiding principle OIC can help prevent legal systems from issuing impossible norms.[34] Even if OIC has this role of helping to specify what may count as a norm, the various interpretations of OIC do not state how to change the law; they may instead play a role in excluding, or at least identifying, certain problematic outcomes, or even recognising cases where a change may be appropriate.

Saying that certain outcomes are to be avoided, or that certain systems of rules are problematic and need to be changed, can both be construed as being related to the

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[32] For an empirical study on OIC see Mizrahi (2015).

[33] These different options correspond to the earlier classifications of OIC (§2.4) as follows: OIC can be considered (1) a form of Truth-conditional OIC; (2) a (conversational) maxim; (3a) Ethical OIC; (3b) a principle of normative consistency; or (4) Legislative OIC.

[34] *Truth-conditional OIC*—§2.4.1 and option (1) of §3.1.1 (OIC and the Rule of Recognition)—will prevent them from being included in legal codes, and *Ethical OIC*—§2.4.1 and option (3a) of §3.1.1— could be used to say they are not obligatory norms in the event they were issued.

rule of change. In this regard, the status of OIC in the context of the rule of change is somewhat nuanced: it may depend on how we see the rules of recognition and rules of change interacting.

3.1.3. OIC and the rules of adjudication

In the case of OIC and the *Rules of Adjudication* — the rules according to which legal controversies can be solved—the situation is, perhaps, similar to that of the *Rules of Change* (above, §3.1.2): the principle of OIC does not tell us how to adjudicate over conflicting rules, but it may help identify the contributing sources of conflicts, either between rules themselves or between the rules and external realities, perhaps as a result of contingencies that were not contemplated when the law was drafted.

  We might hope that OIC could identify which rules should be excluded when resolving a dispute. But this requires some way of determining which rules should remain and which should be excluded or moderated. By itself, OIC may not help resolve such conflicts or provide any specific 'OIC adjudication procedures'; it does not specify what counts as an admissible proof, which legal institution has competence over a case, whether testimonial proofs are admitted or not, and so on. It may instead merely help to localise some of the issues that give rise to the conflict.

3.2. OIC and the Kelsenian framework

Kelsen (1934, 1945, 1960) was predominately interested in what he described as a 'Pure Theory' of the law that avoided a reduction of the law to other, non-legal, notions (such as justice or morality). Rather than evaluate the motivations and merits of this account, here we have a specific interest in how the OIC thesis might be accommodated by some of the technical aspects of his account, in particular his distinction between *primary* and *secondary norms* and his notion of the *Basic Norm* of a legal system.

  According to Kelsen, a legal system is composed of an hierarchical structure of norms, and the leading characteristic of legal norms is that of being valid. He also thought that a 'lower level' norm is valid because there is a norm above it that confers validity on it. The problem is easily seen: how do we avoid an infinite regress? How can we establish a source of validity?

  Kelsen's answer was that we have to *presuppose* a source that confers validity on the whole system of norms. Kelsen called this norm the Basic Norm (*Grundnorm* in German). He further characterised it as a set of characteristics and procedures that enabled a norm to be valid in a given legal system. Thus we can regard the Basic Norm as a constitution or as the procedure we use to make a valid law.

3.2.1. Kelsen's primary and secondary norms

As in any other field, different views on the nature of the law can result in the adoption of different terminology, or different uses for the same terminology. This applies to the question of what counts as a primary obligation, rule, or norm: what counts as secondary; and from whose perspective. For Kelsen, a *primary norm* is a the rule that determines the sanction for some behaviour according to a certain legal system—for example, 'pay €50 if you smoke inside the university'. And a *secondary norm* is one

that specifies what you have to avoid a sanction—in this case, 'do not smoke inside the university'.

This might now be considered non-standard terminology, or a non-standard perspective, when compared with the usual contemporary conventions whereby—in a legal context at least—the desired behaviour is considered a primary norm, and secondary norms are concerned with the application of the law (§2.3.1, Hart 1961). Some of the difference in terminology may be attributed to there being a different perspective on who is considered to be the target of the obligation.[35]

3.2.2. Basic norm

For Kelsen, the 'Basic Norm' (*Grundnorm*) is the norm that founds and give authority to a given system of positive law. The Basic Norm of a legal system lays down the conditions that the norms of a system must satisfy to be valid. By doing so, it grants the system 'unity': only the norms that follow or comply with the basic norm (*Grundnorm*) are valid in that legal system.

Different systems will have a different Basic Norm (for example, compare a positive law system based on common law *vs.* a positive law system based on continental constitutional law). Nonetheless, given one system of positive law there is only one Basic Norm.

Kelsen's adoption of the notion of a Basic Norm can be seen to follow from his belief in the *Is–Ought* gap—that obligations cannot be derived from simple facts—meaning that a system of law (or morals) cannot have a factual, empirical source of validity.[36] In effect, the Basic Norm can be seen as a hypothesis that Kelsen adopted to block the *regressus ad infinitum* when attempting to trace back the source of validity or legitimacy of a legal system that can have no empirical foundation. Clearly many arguments can be made about the advantages and disadvantages of assuming a Basic Norm, and the role and nature of any such norms and claims about them. But our primary concern here is the question of whether, and how, consideration of OIC may feature in such an account.

We now consider the relationship between OIC and Kelsen's *primary–secondary* distinction and his *Basic Norm*.

3.2.3. OIC and the Kelsenian primary/secondary distinction

We need to consider the question of how OIC and its role might be interpreted in the context of Kelsen's distinction between primary and secondary norms. To address this, we need to reflect on whether the Kelsenian distinction between primary and secondary norms (§3.2.1)—that is, between the imputation of a sanction and stating the rule that tells you what to do to avoid that sanction—is relevant for OIC.

We find it a little awkward to characterise OIC in these Kelsenian terms, but we tentatively offer the following:

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[35]Kelsen distinguished different kinds of normative system: (i) dynamic systems (e.g. positive law); and (ii) static systems (e.g. systems of morals). In the latter, validity follows 'analytically' from the Basic Norm. We 'read in the content' of 'love thy neighbour' that 'do not steal' may be deduced. Kelsen is aware that real legal systems are somehow mixed between (i) and (ii), e.g. that morality affects the positive law.

[36]'... the distinction of vice and virtue is not founded merely on the relations of objects, nor is perceived by reason' (Hume 1739, 335).

1. OIC as a Kelsenian primary norm: *A norm that requires something impossible is not valid.*

2. OIC as a Kelsenian secondary norm: *The legislator should not issue norms that demand the impossible.*

This merits some discussion. The idea of taking OIC to be a Kelsenian primary norm seems a little strange. It would appear to treat 'not being valid' as akin to some form of sanction (a controversial thesis, see Mullock 1974 and Bulygin 1992); thus we would then be using OIC to ascribe sanctions. Still, these sanctions are quite peculiar as they primarily sanction norms rather than agents: compare 'do not smoke (or you'll be fined)' and 'do not pass impossible norms (or they will be invalid and you will be sanctioned as a bad legislator)'. In effect, the target of this latter primary OIC is not behaviour as such but the norms themselves. Thus, when considering the Kelsenian primary aspects of this OIC, we are in secondary territory from Hart's perspective, that is, that of 'norms for norms', or meta-norms.

As a secondary Kelsenian norm, OIC here is interpreted as something that applies to the law-givers. The case can be made that it is only the law-giver (and those issuing commands) whose behaviour we might expect to be governed by a requirement to consider OIC. In order to do their job of being rational law-givers and avoid sanction for producing a null and void norm (because of the sanction carried by OIC as a primary norm), they have to issue norms that 'pass the OIC test'.

3.2.4. OIC and Kelsen's Basic Norm

We now compare OIC, and its potential role, with the function of the Basic Norm in Kelsen's theory. Kelsen's Basic Norm (§3.2.2) appears to play a 'structural' or 'architectural' role. And we have already seen that there might be room for a similar foundational role for OIC, especially if we considered it a rule addressed to law-givers. So should OIC be taken to constitute part of such a foundational norm from the Kelsenian perspective?

While it can be argued that OIC is a prerequisite or a presupposition of a (fair) legal system—a feature that OIC shares with the Basic Norm—it is also the case that it is rare to find a legal system that positively and explicitly lays down OIC as an article of a civil or penal code (one of the possible exceptions being the Justinian *Digesta*, which features *impossibilium nulla obligatio*). But analogies are not enough; even though the use of OIC as a presupposition of legislation shares some features of the Basic Norm, OIC cannot really be considered to form part of the Basic Norm, at least not in the sense that Kelsen intends. To see why, remember that Kelsen's theory was a Pure Theory. He wanted to avoid talking about justice or moral practices in giving the formal structure of a legal system (Kelsen 1957); using OIC with reference to fairness and justice as a Basic Norm would seem to violate the Kelsenian positivistic stance.

There is an option to frame OIC as a rational principle rather than a moral one, which might make it easier to accept within the Kelsenian theory. Still, one would need to see the details of this and ensure that it does not aim directly at optimising good, welfare, justice or other elements that Kelsen wanted to exclude.

4. Conclusions

A key objective of this paper has been to review the 'ought implies can' (OIC) hypothesis, and the various ways in which the hypothesis might apply in theories of the law.

We outlined different ways of relating 'ought' to 'can' (§2.2), distinguishing implicature, presupposition, and entailment. This provides some perspective on how we might interpret OIC, in particular by finding an appropriate characterisation of what 'imply' means. This also has the potential to provide insight into the relevant applications of OIC. But the mere use of logic or related formal methods does not by itself answer any questions about what OIC means or when it should be applied. Rather, it provides tools that may help us to characterise and refine our intuitions about what it means—intuitions that include our understanding of how OIC may serve as a norm in some contexts, such as in the domain of legal reasoning.

There is a question about the status of OIC, and what kind of norm it could be (§2.3), such as a meta-norm or some form of iterated modality. We take it that, at the least, OIC has what can be described as a 'structural' or 'architectural' nature. We have proposed a taxonomy for the OIC thesis that reflects the various roles OIC may be taken to play (§2.4). We suggest that this provides a framework in which to describe and compare different approaches to the question of what OIC is, how it can be applied, and how it can be analysed. Finally, we considered the potential status of OIC in the context of Hartian theory and Kelsen's Pure Theory of Law (§3).

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