9

Law, Normativity and the Model of Norms

George Pavlakos

1. Outline

There exists a widespread consensus amongst contemporary jurisprudents, positivists and non-positivists alike, that the meaning of 'obligation' should not radically shift from law to morality, or any of the other domains of practical reason. Yet there is limited effort in contemporary discussions of legal obligation to engage with the metaphysics of normativity with an eye to a well-founded account of those elements that deliver its non-conditional character.

On a recent occasion I discussed the shortcomings of a prominent positivist account of legal obligation, that of Jules Coleman.[1] In this chapter I turn to a prominent non-positivist account, the model of principle,[2] and argue that, even though it identifies key elements or conditions of normativity *simpliciter*, it stops short of delivering a conclusive account of unconditional legal obligation, an account that would place legal obligation in the same continuum with all other types of obligation. Taking up from where the model of principle halts, I propose a complementary—if more fundamental—account of normativity simpliciter, which I dub the

---

[1] See my 'Practice, Reasons and the Agent's Point of View' in (2009) 22 *Ratio Juris* 74-94.

[2] I take the model of principle to comprise the host of the non-positivist legal theories that is more commonly referred to as interpretivism and whose main exponent is Ronald Dworkin (for the most comprehensive statement of interpretivism's key ideas to this date, see R Dworkin *Law's Empire* (Cambridge, Mass, Harvard University Press,1986), esp chs two, seven, and nine).

model of norms. I make a case for it, by looking into universal conditions of normativity and, in conclusion, offer some more specific remarks about the advantages of the model of norms over other competing models.

Part 2 looks into the account of legal obligation tendered by the model of principle. According to it, law is an instance of action-directing action or action that purports to get other agents to comply with the ends it sets out to attain. The idea here is that the very logic of action-direction draws moral reasons—principles—into the picture of legal obligation, as the one item that can explain how and whether the facts of a social practice, which purports to direct action, come to acquire the status of reasons for action for the subjects of law. Subsequently, this model is contrasted with an alternative model of obligation that takes facts of authority to constitute reasons of action in virtue solely of their structure. In conclusion it is argued that, in contrast to the second model, the model of principle manages to capture what is distinctive about action-directing action in the domain of law—that is, the special normative significance of the possibility to coerce others under a scheme of public institutions.

Part 3 opens by pointing to a more widespread worry that needs to be addressed before the model of principle can be deemed fit for the role it is employed—the worry relates to the ability of principles to constitute genuine reasons for action. In particular, the enquiry investigates the nature of principles and their ability to avoid certain flaws that might pertain to reasons for action in general. In taking up this line of enquiry the paper looks into the more general debate on normativity with a view to specifying requirements that anything which purports to be a reason ought to meet. I employ a rationalist analysis of normativity, which brings the idea that intentional thought is normative to bear on the analysis of the meaning of normative terms, such as 'ought', 'obligation', 'duty'. In conclusion, I argue that the content of normativity consists in

normative facts—ie norms—which purport to model the content of ideal—or counterfactual—states of the will. Such norms give exhaustively the content of normativity.

In light of the above, part 4 advances a two-layered *model of norms*, with the higher level being populated by *norms simpliciter*, and the lower by *norms in a domain*. When considered jointly the two layers ground the possibility of non-conditional obligation without evoking moral realism and the concomitant suspicion of scepticism. On the face of it some key advantages of the model of norms are discussed over the two other models of legal obligation, that of principle and that of authority. On the one hand norms resist the 'talking past each other objection' which is commonly levelled against principles. On the other, norms are much better suited to account for the moral limits of action-directing action than either principles or facts of authority, for they illustrate cogently that the grounds of any reason for action already include a concern for others' autonomy.

2. The Nature of Legal Obligation

Next I turn to two central arguments, which are put forward by exponents of the model of principle. The first is metaphysical and purports to elucidate the interplay between facts and reasons as the two key determinants of legal obligation. The second is normative, aiming to illustrate that legal institutional facts are instances of action-directing action that give rise to an obligation to justification. Both arguments arrive from a different route at the conclusion that law gives rise to obligations *simpliciter*. Subsequently, the model of principle is contrasted with another influential explanation of legal obligation, the model of authority, which explains legal obligation in a contextualist or perspectival manner. Finally the conclusions drawn from the

3

comparison between the two models serve the purpose of introducing the key themes of the discussion of normativity that follows in part 3.

2.1 The Model of Principle I: Rational Determination

The point of departure of the first argument is that, when looking into the grounds of legal obligation, we ought to assert the priority of reasons over institutional facts. This thesis is recast as the rational determination condition (RDC), which Mark Greenberg has proposed in a recent paper.[3] According to RDC in order for the facts of any legal practice to determine the content of the relevant legal norms, more than a relation of supervenience is required—all that supervenience can deliver is metaphysical determination, or the condition that the facts of a particular legal practice LP determine *factually* a legal norm LN across possible worlds. However, more is required in order to establish the *normative* relevance of social facts to the content of any legal norm. Rational determination captures this requirement in pointing to normative entities—for simplicity *reasons*[4]—that make the social facts of the practice relevant to the content of legal norms. More specifically, Greenberg proposes a two-stage model for cashing out rational determination: In the first stage what determines the truth of legal propositions are models, or sets of rules, that make—rational and non-opaque—connections between the factual components of the practice and the content of legal norms. In a second step,

---

[3] M Greenberg, 'How Facts Make Law' (2004) 10 *Legal Theory* 157-98, reprinted in S Hershovitz (ed), *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin* (Oxford, Oxford University Press, 2006) pp 225-64.

[4] Since I am discussing the model of principle, it would be more appropriate to use 'principles' instead of 'reasons'. However, I prefer to stick to 'reasons' for the reason that it captures a wider range of normative items that purport to guide action. In any event, principles are but one kind of reason: they are public reasons of political morality.

models must be validated by reasons. On pain of failing to provide for rational determination, reasons must be conceived of as being external or independent of either the facts of the practice or the legal norms they purport to connect. Finally, Greenberg proposes to understand reasons not merely as rational but also as evaluative standards—value facts; value facts are, in his words, 'all-things-considered truth(s) about the applicable considerations – the Truth, for short'.[5]

The particulars of Greenberg's proposal aside, the crucial point he makes is that the connection between the factual components of legal practice and the content of legal norms must be one that is *normative*, along the lines of RDC. Thus, a great deal of the success of any account of law's normativity will turn on how we conceive of the reasons that validate our model of rational determination. Amongst the conditions reasons ought to respect, with an eye to normativity, count those requirements that contribute to a unified point of view of agency.[6] This shows precisely, that RDC is not self-standing—it can only cash out law's normativity if it stays in line with the conditions for a unified point of view of agency. For the search for such a point of view concerns as much legal reasons as does those extra-legal reasons that purport to satisfy RDC. In other words, it is more than just the content of the law that needs to be in line with whatever counts as the unified point of view of agency—also the reasons, which ground the rational determination of the law in connecting the facts of the practice with the legal norms, must agree with it. Depending on one's understanding of the point of view of agency and the

---

[5] See Greenberg 'How Facts Make Law', p 189. Interestingly, Dworkin argues that Greenberg connects values only indirectly with legal propositions for—actually—in his theory values are only standards for the evaluation of theories (models), not legal propositions themselves. See Dworkin's 'Response' in S Hershovitz, *Exploring Law's Empire* pp 291-311, at pp 310-11.

[6] I cannot deal at present with this point in more detail. For the complete argument, see my 'Practice, Reasons and the Agent's Point of View' (above n 1); and the discussion in part three of this chapter.

type of reasons this authorises, the project of rational determination will be more or less successful. To that extent, it is simply not enough to ask with Mark Greenberg 'how facts make the law?' One ought also to ask 'how reasons make the law?' The first question merely postpones the normative question to the 'meta-level' of rational determination. But it is the answer to the latter question, the one about reasons, which will determine the success of the rational determination of legal norms.

This last question addresses the problem of normativity—that is the concern that for something to be normative it should be normative for the agent themselves. Let me turn now to an additional suggestion for establishing the internal link between agency and reasons for action.

2.2 The Model of Principle II: the Morality of Action-directing Action

The rational determination condition explains why we need to structurally close the gap between the indeterminacy of the facts of the practice and some normative understanding thereof. However it still lacks a clear answer about how this gap is to be bridged. What is really that which directs us to the 'correct' principles in whose light the facts of the practice will make normative sense, giving rise to determinate legal obligations?

One way to look at this problem is to think of the facts of the legal practice as having a moral impact.[7] That is to say, that the facts of the legal practice will have a moral effect, will invoke a moral evaluation, in whose light they will acquire normative significance and the power to lay

---

[7] My reconstruction of the model of principle is heavily indebted to Nicos Stavropoulos; *see* his 'The Relevance of Coercion: Some Preliminaries' (2009) 22 *Ratio Juris* 339-58.

down obligations. In virtue of what do the institutional components of the practice invoke the moral dimension that gives shape to legal obligations?

The answer to this question involves the notion of coercion—institutional interaction has a moral impact because it always involves the *possibility* of coercion. No sooner, however, has coercion been drawn into the picture than an evaluative dimension is invoked. Here is how: coercion is not a neutral concept but, instead, can be deemed legitimate or illegitimate. Hence the determinants of legitimacy or the absence thereof can be invoked with an eye to reasons– principle—in whose light the relevant facts of the coercive institutional practice produce legal obligations. However, one should be more fine-grained with respect to coercion. It is not the case that government and its officials need to actually invoke coercion in order for it to become relevant to law. Coercion is already relevant to law in virtue of the fact that the law impacts on the network of the normative relations that obtain between those whom it addresses. How so?

Coercion is always on the cards when it comes to law, because institutional facts are action-directing in an inherent or intrinsic manner. They interfere with the reasons agents have antecedently to institutions by rearranging those reasons in one or the other way. This rearrangement however is—normatively speaking—not indifferent, at least not to the extent that we take action-direction to be action-direction of autonomous agents who already respond to reasons and who are likely to be already embedded in a network of reasons at the moment when an institutional act impacts on their lives. Hence action-direction is not morally neutral: in fact it acquires the morality of those reasons—principles—that already apply to agents who are capable of handling reasons for action. But if so, then the morality of action-directing action points the way forward in establishing the content of legal obligation—institutional facts amount to legal obligations to the extent and in the manner that they fit into the overall scheme of

reasons on which they impact.[8] You see now how coercion is always on the cards: proper action-directing action entails legitimate coercion while flawed action gives rise to illegitimate coercion and, by the same token, to an instance of injustice that ought to be blocked.[9] But, then, all institutional intervention counts as action-direction action. Hence, it can be deemed one of either only: legitimate or illegitimate; *tertium non datur*.

A few more remarks on the logic—and morality—of action-direction are due. Action-directing reasons are reasons that purport to get other agents to act in ways that converge with one's purposes, usually against the background of joint projects or activities. To that extent action-direction is a special mode of normativity that usually pertains to contexts of joint endeavours. Given that such contexts require co-ordination, action-directing reasons, if successful, can underpin the task of coordination. Thus, if A is engaged in a joint project with B and R is a valid action-directing reason, then A is entitled to appeal to it for guiding B's behaviour. More specifically, if the joint project is one that encapsulates elements that are typical of a basic structure of a political community, then action-directing reasons can be legally enforced with an eye to co-ordination.

But when is an action-directing reason a valid source of obligation? It is when it meets the negative constrain of not amounting to illegitimate coercion. Although this negative constraint does not point directly at any grounds that positively shape the content of action-directing

---

[8] See Stavropoulos, 'The Relevance of Coercion' pp 343-4, where he builds upon ideas of Thomas Scanlon on the grounding of promissory obligations; *see* T Scanlon, 'Reasons: A Puzzling Duality?' in RJ Wallace, P Pettit, S Scheffler, and M Smith (eds) *Reasons and Value: Themes from the Moral Philosophy of Joseph Raz* (Oxford, Oxford University Press, 2004) pp 231-46.

[9] AJ Julius, 'Getting People to Do Things' (MS version April 2009, in file with the author) pp 7-9.

reasons it does so indirectly. Before elaborating further on this point, let me spell out the negative constraint for action-directing action:

(1): A should not (do y, believe that her y'ing will lead B to x and that this fact is a reason to y and fail to believe with justification that A's y'ing will facilitate B's coming to x on the basis of her recognition of reasons to x that she has independently of A's y'ing.)[10]

(1) Says that leading B to x on grounds that B does not share as leading to x independently of A's action-directing action would constitute an instance of—illegitimate—coercion.[11] Clearly this stipulation does not directly spell out which among such independent grounds are involved; it does so indirectly, however. In recognising the authority of any agent as a negative constraint for coercion, it implicitly takes the same authority to be capable of specifying positively the content of such grounds that would constitute appropriate action-directing reasons. Thus (1) tells us that action-directing reasons may be only such items that can be authorised by the reason-

---

[10] I copy with minor alterations from Julius, 'Getting People to Do Things' p 1. I am aware that at the time of writing Julius was elaborating further his thoughts on the matter. To that extent I am not claiming that the quoted formulation captures exhaustively or uniquely the content that Julius confers to action-directing action. That said, it suffices for my purpose here.

[11] Further intricacies of action-direction amounting from (1) include: a) The thesis that an independent reason that applies to my doing x, should also apply to all antecedent actions that lead me to x; b) in the absence of any reason to the contrary, the same structure should be expanded to interpersonal relations—I ought not to lead you to do x without considering the reasons you have for x-ing as applying also to my own acts that purport to lead you to x; c) finally, a and b yield the thesis that coercion, when it serves to co-ordinate joint action, is justified under the condition that it is legitimate from the first-person point of view before it is addressed to others; for, if coercion facilitates someone's response to a joint requirement, then this person can rely on the fact that the threat of coercion will facilitate everyone else to pursue the same joint requirement, without wronging them in any way; *see* Julius, 'Getting People to Do Things'.

giving or deliberative capacities of agents *and* do not violate (1). But notice this: (1) is not an extra filter or sieve that comes later to contain or purify items that have been designated as reasons for action antecedently of (1). Rather, (1) is the starting point for grounding action-directing precepts in a manner that is agent-relative, if not relativistic—in fact, as I will argue later, (1) assumes something like a unified normative point of view, one that can ground reasons for action *simpliciter*.

In light of the above, it becomes easier to appreciate how the structure of action-directing action furthers the model of principle: in the model of principle action-directing reasons amount from the impact institutional arrangements have on the scheme of reasons—*qua* principles—that underpins the interaction of agents in a political community. Those principles comprise substantive principles of justice plus a procedural principle of equal treatment for all, which is addressed to everyone—and the government—and which, as it were, activates an obligation to establish coherence among the other substantive principles of justice, with an eye to identifying each time the 'moral footprint' of any novel institutional fact, and the legal obligation this may gives rise to.

2.3 The model of authority

The model of principle, as a source of action-directing reasons for action, can be readily contrasted with the model of authority. [12] The model of authority, prominently defended by

---

[12] In the presentation of the model of authority I follow Stavropoulos, 'The Relevance of Coercion' pp 346-9

Joseph Raz,[13] also purports to generate action-directing reasons with reference to a background network of reasons that apply to agents antecedently of legal institutions.

However, the main difference between the two models lies therein: while the model of principle aims to ground legal obligation on those reasons that apply anyway to agents, by including them in the determinants of legal obligation, the model of authority severs legal obligation from any background normative considerations.

The main reason for doing that is that the model of authority takes a very narrow view on what constitutes an action-directing reason, when it comes to legal obligations. It takes the view that action-directing action is exhausted by the content of the edicts which are uttered as institutional facts within a legal practice. This view stems from the claim, itself almost a stipulation, that for something to be capable of directing action it must be self-contained in its directing powers, which is to say, it must make a practical difference to the reasons of an agent directly, that is without any reference to its impact on any of the other normative circumstances of the agent.

It is not difficult, of course, to see why coercion comes too late in this picture. As we saw earlier, when discussing the structure of action-directing action, the role of coercion was to invoke, as a negative constraint, the whole palette of reasons against which agents operate in virtue of their capacity to reason. However under the stipulation of action-direction as edict—which the model of authority submits—any such reference to external or indirect determinants of action would deprive legal edicts from their action-directing force. In that case by conforming

---

[13] J Raz, *The Morality of Freedom* (Oxford, Oxford University Press, 1986); 'The Problem of Authority: Revisiting the Service Conception' (2006) 90 *Minnesota Law Review* 1003-1044, reprinted in J Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford, Oxford University Press, 2009) pp 126-65.

to coercion agents would be following a totally separate reason from the reason the edict is pressing—hence, on the authority model, coercion is at most 'a philosophical distraction'.[14]

Hence, in preventing coercion from having an impact on legal obligation the model of authority also drives out the conditions for legitimate action-direction from the determinants of legal obligation; and yet no stipulation of authority can change the fact that any action-directing action that fails on the count of legitimacy[15] becomes coercive in an illegitimate sense. However this may point to a shortcoming of the authority view, rather than the irrelevance of coercion: on the contrary, when action-direction is in play, coercion is always on the cards!

A further undesirable consequence of the authority model is that it fails to live up to the needs of co-ordination. On the edict view, the co-ordination capacity of the law is limited, for law is allowed—conceptually—to direct action only up to the point that other directing items take over. If law is in the edicts then it can only trigger off a practice of joint action, but later it is that practice itself that does the work and law drops out of the picture.[16] Conversely, co-ordination presupposes that the prospect of coercion of others gives a reason for action against the background of a scheme of reasons of which all reasonable agents can partake—in this case, joint requirements.[17]

One last remark is due: It might be far-fetched to claim that the model of authority is straightforwardly guilty of illegitimate coercion. But it is not far-fetched to say that it might be conducive to illegitimate coercion, for it circumscribes the structure of action-directing action

---

[14] Stavropoulos, 'The Relevance of Coercion' p 347.

[15] Such failure equals to a failure to satisfy formula (1).

[16] See Stavropoulos, 'The Relevance of Coercion' p 349.

[17] However, for it to work we need to take on board the action-directing structure of co-ordination: the prospect of coercion can co-ordinate only if it is deemed legitimate from a first personal point of view (*cf* above n 11).

and, hence, obliterates the normative requirements attached to it. What is more, the reduced role it assigns to coercion threatens to make the exercise of coercion rather oppressive: in the model of authority, coercion has persuasive force only on the basis of its impact as brute force, as in that case it provides a distinct—prudential—reason to subjects to conform with it, with an eye to avoiding suffering. This, however, would entail, in light of the frequency of actual government coercion, a dangerous impoverishment: by severing coercive action from its reasonable requirements, we would be rendering the state immune from the obligation to legitimise its actions in all those cases—and they are many—where coercive enforcement has taken over the task of co-ordination from the edicts of officials.

Thus on the model of authority it is a contingent fact whether legal obligation *qua* edict is actually in line with the antecednent background reasons of subjects. Of course one should hope that this is so more frequently than not. However whether it is or is not has no impact on the existence of legal obligation—or at least it becomes relevant only *ex post facto*, that is, only after the legal obligation has been identified independently of background reasons. In other words it is not the case that the existence of a legal obligation depends on the background reasons that support the edict of the authority. Such reasons may effect an *ex post* annulment of the duty to obey the relevant edict—conditions of success—but do not affect the constitution of the legal duty *qua* edict—content and grounds.[18] For in the model of authority the say-so of the authority bears by itself and without further ado the normative force of a reason that purports to make a practical difference in the overall balance of reasons. To that extent, one may say that legal obligation under the model of authority is always action-directing in a contextual or

---

[18] Thus, the model of authority needs to introduce an artificial distinction between the content and grounds of legal obligation on one side, and the conditions of success thereof on the other. For a similar distinction see Stavropoulos, 'The Relevance of Coercion' pp 341-2.

perspectival sense—from the point of view of the law—and less frequently so in an unconditional manner—as obligation *simpliciter*. Accordingly, the existence of any obligation precedes its capacity to be action-directing—or, what is perhaps a more accurate formulation, its ability to be action-directing *simpliciter* depends on its existence within a context.

3. The demands of normativity

Rounding up the conclusions of part one, the model of principle has argued that for any facts of an institutional practice to make sense to its agents as normative items, the rational determination condition should apply: that is, there should exist normative reasons—principles—in whose light those facts become relevant for the determination of the grounds of legal obligation. Such principles cannot be replaced by authoritative norms because—and this is a further contribution by the model of principle—law is an instance of action-directing action, hence answerable to any moral reasons that ensure for legitimate coercion.

    However, this line of reasoning needs refinement: it is imperative that one illustrate in virtue of what principles discharge their role of rational determination. This is a key question with far-reaching implications. It becomes urgent to know whether there is hope for a unified account of normativity or whether legal obligation must be deemed inherently distinct, an *aliud* vis-à-vis moral obligation. In the latter case we would end up with a form of strong contextualism whose disadvantages I have discussed elsewhere.[19] To steer clear of contextualism, however, we must

---

[19] Painting with a broad brush, contextualism is the semantic counterpart of a host of relativist and sceptical philosophies. Its main thesis argues that the content of a proposition varies with the context it is uttered in. The upshot of this view is that, insofar as every sentence takes its meaning from the proposition that pairs with it, it is possible to affirm and deny the same sentence without contradiction, provided it has been uttered in different

make a convincing case for a unified account of normativity, one that goes beyond the account offered currently by the model of principle. For the latter, in invoking an obligation of government to treat everyone equally, takes a quietist stance and shuns the task of a more detailed explanation of the sources and nature of normativity, or so I will argue.

In particular, we must look into conditions of normativity more generally, in a manner that would preclude a contextualist or relativist understanding of obligation. That is to say, it is not enough to merely discharge the obligation of grounding legal obligation by invoking normative principles of a more general order. One must also demonstrate, how do these principles succeed to be normative in the sense one needs them to be, if legal obligation were to be deemed one of the *simpliciter* type. In other words, one should seek to explain the nature and content of obligation *simpliciter* independently of law and other normative domains.

Such an account could take many forms. For present purposes I would like to focus on such key normative terms as 'ought' or 'obligation' and attempt through a discussion of their meaning or content to explore general conditions and insights about the nature of normativity as a whole. Let me spell out the rough steps of the argument and the main conclusions I seek to establish.

I shall argue that an adequate explanation of the normativity of anything that may serve as a reason for action requires adherence to some kind of internalist account—that is, an account that is capable of connecting the reason with the agent, in a manner that would preclude that x is a

---

contexts or from different 'points of view'. Despite its noble cause—that is, to account for apparent inconsistencies in speech and preserve the diversity of ordinary discourse—contextualism threatens with semantic confusion and the loss of communication and ought to be rejected—with some notable exceptions—for most domains of discourse. For a more detailed exposition of the relevant argument and a survey of the contemporary literature, see Pavlakos, 'Practice, Reasons and the Agent's Point of View'.

reason for an agent A and yet A can still ask 'ought I to follow x?' At this juncture two options are available: first, to offer a psychological account, one that presents the will or some other mental state at the link between agents and reasons. As a synecdoche for a large host of such accounts I will use the term mentalism: mentalism reduces normativity to motivational force and also the question 'what should I do?' to 'what shall I do?'[20]

The model of authority[21], when it serves as an account of legal obligation, replicates some of the characteristics of mentalism, albeit in a somewhat covert form. Its mentalism is manifested by the claim that for any legal norm to be given any authoritative content, it must be imputed to the expression of the will—a mental state—of someone—authority—from which point onwards it is assumed to be binding for the will of every other member of the political community.[22] As I shall argue later in more detail, similar mentalist explanations of reasons are forced into a semantic picture which threatens with radical forms of relativism and scepticism.[23] In collapsing the content of any normative proposition into the mental state some agent is in, such accounts pay a high price, for they invert the standard picture of semantic content.

On the standard picture, propositions are semantic items which can be communicated between agents and serve as public standards for determining the content of the sentences we

---

[20] D Parfit, 'Normativity' in R Shaffer-Landau (ed), *Oxford Studies in Metaethics*, vol I, (Oxford, Oxford University Press, 2006) pp 325-380, at pp 332-3.

[21] See above s 2.3.

[22] The relation of imputation brings the model of authority very close to the semantic picture inherited from expressivism—which I discuss later in s 3.2 of this chapter. For the discussion in this and the next paragraph, I owe considerable debt to Ralph Wedgwood for pressing several critical objections during the conference and to Nicos Stavropoulos for valuable discussion on the semantics of reasons.

[23] See below s 3.2 of this chapter.

utter and the mental states we are in. Conversely, the mentalist model inverts that picture by suggesting that propositions—and derivatively sentences—be individuated on the grounds of speakers' mental states. Rendering mental items the grounds of semantic content, however, is bound to lead to confusion and, on occasion, even to the suspension of communication. Although more needs to be said in order to establish a clear link between the model of authority and the mentalist conception of reasons, there exists enough evidence that the two may share the same semantic premises. If so, the model of authority would have to struggle hard to avoid the sceptical conclusions that are associated with those premises, with an eye to rescuing the publicity of meaning, as a requisite for accounting for the coordinating role of authoritative directives.

Conversely —and this brings me to the second option—the account I shall advance, proposes replacing mentalism and its contextualist results with an account of normativity *simpliciter*. The main requirement for such an account is to switch from mental states to objective grounds of reasons. This shift will take us away from an explanation of normativity *qua* motivational force. What is more, it will inverse the order of explanation between normativity and motivation: on this view for something to be motivationally efficacious, it ought to be normative first.

The level of objectivity required here should be specified carefully in order to avoid other undesirable results. In working out the level of objective articulation of normative reasons I invoke the tenet of *content-* or *judgement-internalism* (JI).[24] JI is a view about intentional content that applies to a wider context than the realm of practical reason. It is the view that all

---

[24] This is inspired by Ralph Wedgwood's idea of Normative Judgment Internalism; see R Wedgwood, *The Nature of Normativity* (Oxford, Oxford University Press, 2007) ch one, pp 23-8. For present purposes I confine judgement-internalism to the normativity of the intentional. An alternative, albeit less elegant, term would be *content-normativism*.

content must be linked to thinkers in a manner that would preclude that, if p is a proposition about, say, cars then a thinker judging 'that p' could still be asking: 'is p about cars?' With this move, normative content, expressed by normative language, requires insertion into the wider picture of intentional content *tout court*: in it content ought to make sense to thinkers in a manner that is objective or invariable—as opposed to contextual—by avoiding being identified with mental states, without, at the same time, making appeal to any brute fact that escapes the possibility of articulation in propositional language.[25]

Interestingly, JI requires a deeper sense of normativity: this is the normativity of thought/content, or the idea that the components of thought are rule-like items which 'obligate' thinkers to certain—intentional—moves on pain of losing their identity as normative beings. This deep sense of normativity further comprises the idea of a fundamental practice—call it the *practice of predication*—whose key characteristic is its non-conventionality.[26]

To round up these intervening remarks, the view I propose holds that the problem of action-guidance is less a problem for motivation—or the distinction between theoretical and practical reason—and more one of normativity in a broad sense,[27] that is, the sense of linking propositional content to thinkers in an objective manner, as a matter of following a rule. This

---

[25] This requirement is formulated as the condition of reason-dependence in s 3.5 below.

[26] For a more detailed exposition of this idea *see* G Pavlakos, *Our Knowledge of the Law: Objectivity and Practice in Legal Theory* (Oxford, Hart Publishing, 2007) ch four and my 'Practice reasons and the Agent's Point of View'.

[27] In this I concur with the view that there exists something like an autonomous question of 'normativity' over and above the domains in which more specific normative questions arise. This view seems to be gaining in popularity amongst contemporary analytical philosophers. See Wedgwood, *The Nature of Normativity*; T Cuneo, *The Normative Web: An Argument for Moral Realism* (Oxford, Oxford University Press, 2007); and the most illuminating A Gibbard, 'Normative Properties' in T Horgan and M Timmons (eds), *Metaethics after Moore* (Clarendon, Oxford, 2006) pp 319-37.

general way of capturing normativity is, furthermore, most basic. It requires us to think of propositional content as normative and of thinkers/agents as normative—or reflective—beings. Falling below this threshold would obliterate not just practical normativity but also meaning and content.[28] On the other hand, once below the threshold it won't help to appeal to psychological states or—what is equivalent—to brute fact for restoring meaning and content.[29]

3.1 Setting the stage

The argument will unfold in two steps. First I shall explore a set of ideas that seem to be fundamental to normativity. In exploring those I shall try to spell out conditions of adequacy for any account of normativity. In this sense those ideas will be assumed—somewhat axiomatically—to spell out elements that are intrinsic to normativity, at least on some reflective understanding of our normative practices and the use of normative vocabulary when judging in evaluative contexts.

I shall identify three ideas that are going to function as such conditions of adequacy for any account of normativity:

(i) *Action-guidance*: for something to be a reason for action it is required that there be an internal connection between the reason and the agent. This requirement—which has been frequently

---

[28] As Ralph Wedgwood argues, the two kinds of normativity are—to avail myself of a fanciful expression—equiprimordial; *see* Wedgwood, *The Nature of Normativity*, chs one and four and especially seven.

[29] See J McDowell, 'Wittgenstein on following a rule' (1984) 58 *Synthese* 325-63, reprinted in AW Moore (ed), *Meaning and Reference* (Oxford, Oxford University Press, 1993) pp 257-93; also reprinted in A Miller and C Wright (eds), *Rule-Following and Meaning* (Acumen Publishing, 2002) pp 45-80.

labelled 'the normative question'[30]—aims to show that normativity requires that something acquires the status of a reason for action by remaining relevant to the practical problem of the agent. When taken seriously, the normative question points to some form of normative internalism. There are two ways to understand normative internalism: first as requiring that there exist a psychological connection between reasons and agents' mental states. Alternatively, as merely requiring that reasons stand in an internal relation vis-à-vis the agent, to the extent that, if x is a reason for an agent A, A may not ask 'ought I to follow x?' On the former understanding internalism amounts to a number of problems, mainly associated with one or another form of mind-dependence and concomitant ideas of mentalism.[31] These problems will pave the way to the second sense of internalism, which is compatible with mind-independence.

(ii) *Mind-independence* (*qua* independence from mental states): internalism, once purified from the shortcomings of mentalism, can supply valuable insights into normativity. For it to be purged from mentalism it needs to be linked to the objective level of thought. The latter becomes available only if—in one move—we presuppose that thinkers/agents are normative beings insofar as there are normative items that structure intentional content—that is, content that relates to what agents' mental states are about. Judgement internalism (JI) will supply the idea that drives home this intuition.

(iii) *Reason-dependence*: the third requirement can be summed up under the rubric 'semantic version of the open-question argument'. Although the starting point here is Moore's 'open-question', I am employing this idea in a much looser sense. This submits that normativity as a general property of reasons for action should not be 'fixed' in advance in any manner that would

---

[30] See especially: C Korsgaard, *The Sources of Normativity*, (Cambridge, Cambridge University Press, 1996) ch one.

[31] See s 3.2 below.

give rise to an instance of talking past each other. This, however, would be the case if normativity were to be identified with any substantive evaluative property—say, goodness as utility, or rightness as integrity or equality or distributive justice, etc. A clear instance of this problem occurs when we postulate a mind-independent reality[32] that is not merely mind-independent, but also reason-independent—that is, independent from the normativity of intentional thought. In this case what is content-giving, with respect to propositions and their components, becomes by stipulation external to the normativity of thought. Yet, if normativity *means/denotes* what lies beyond agents in a radical manner, then it invites a dualism between the method of knowing and the object of knowledge, which is likely to lead to radical scepticism and the loss of meaning.[33]

In light of the three parameters of normativity we can now turn to an account of the normativity of reasons, an account that will prove adequate for an explication of the role of principles as justificatory items of action-directing action, and will further discharge the requirement of rational determination of the facts of a legal practice. Although I shall not delve into the specifics of such principles of action-directing action, the structural account that I will tender will be rich enough to draw some substantive conclusions with regard to the content of legal obligation and the principles of action-directing action that underpin it. In conclusion, I shall argue that some conception of norms, suitably defined, is better suited than that of principles to account, also for the realm of law, for reasons of action-directing action.

3.2 Action-guidance

[32] I assume here that presupposing any such reality, not just an evaluative one, would give rise to the problems identified under this point.

[33] The point will be explored in more detail later in s 3.3 below.

Normative internalism, to put it in a nutshell, is the view that normative reasons must exercise a special pull to agents' actions, by being internally connected to them. Expressed in more precise terms it is the view that there should be no gap between someone's judging that 'x out to be done' and asking 'ought I to do x?' As it happens, however, even a quick look at the relevant meta-ethical debates would readily reveal that it is a matter of great dispute how the nature of the required internality should be understood, if it were to bridge the gap between reason and action. There are two important issues that arise in this context, each of which may lead to radically different understandings of the internal connection between reasons and agency. The first concerns the fundamental question whether reasons admit of truth-values or not. Those who say no usually identify reasons with psychological states while those who say yes hold reasons to be items capable of evaluation in terms of truth and falsity—that is, they ascribe to reasons propositional form. For brevity let me dub the first position mentalism and the second factualism. Investigating further into this distinction and the relevant consequences is the topic of this section.

There is a second issue of equal importance: irrespective of which of the two paths one chooses to walk, mentalism or factualism, there is a further question about the role of the will— is a connection with the will necessary for something to develop normative effects? If yes, does this confine our understanding of reasons within mentalism—in the sense that only mental states can be states of the will? Or is there room for conceiving the will—and the attendant question of motivation—in a manner that disengages it from the relevant mental items? The answer to this question will be postponed until section 3.3. There, I shall offer the outline of an argument for arriving at a normative conception of the will, which would account seamlessly for motivation

and normativity, as the two sides of the same coin, at the same time as it does away with motivational mental states.

On a popular view, internalism comprises two distinct theses: first, that reasons are mental states internal to the agent—call this psychologism; second that reasons are normative to the extent that they *are* motivational states.[34] Arguably one may assume that the first idea derives from the second: because motivation is taken to exhaust the meaning of normativity, mentality must be given precedence, for motivating states can only be mental items.

What does this tell us about the content of reasons for action? Basically it forces upon one a subjectivist semantics whereby the meaning of a reason for action depends on the mental state the agent is in. To understand how this works we need to look in more detail into the semantics of what is probably the dominant form of psychologism—that is expressivism—and take it to its logical conclusion.

In contrast to standard semantic explanations, expressivism identifies semantic correctness conditions not as truth-conditions but as assertability conditions. This alternative semantic model—labelled by Mark Schroeder 'assertability expressivism' for obvious reasons[35]—submits that the content of any sentence is semantically associated with the condition that the speaker is in a mental state.[36] Take the sentence S: 'pain ought to be avoided'. In a truth-conditional semantics, the meaning of this sentence would amount to the proposition *pain ought to be avoided* which subsequently would also determine the content of the mental state one is in. Not so in assertability expressivism! Here the content of S is still derived from the proposition *pain*

---

[34] For these distinctions and the discussion that follows, I have been benefited considerably by Parfit, 'Normativity'.

[35] M Schroeder, *Being For: Evaluating the Semantic Program of Expressivism* (Oxford, Oxford University Press, 2008) pp 28-35.

[36] Given a postulate of consistency what is the case for desires applies also to beliefs.

ought to be avoided and yet the latter is not the last instance for adjudicating on S's content. For *that* proposition is itself individuated according to the mental state—belief, desire or other—the speaker is in when uttering S, or quoting from Schroeder, 'As a shorthand, we can say that the sentence 'expresses' this [mental state]'.[37] Thus, on this understanding, mental states are antecedent to propositions—and, by the same token, also to sentences—with regard to settling meaning and content. What are the consequences of this?

Assertability expressivism as a semantic view leads to a radical form of contextualism[38] and eventually subjectivism. If the proposition expressed by my uttering of any sentence x depends on my having or being in a particular mental state, then the same sentence uttered by different speakers could be corresponding to different propositions. If this were the case, however, it would lead to a devastating from of context-relativity, so much so that it would endanger meaning and communication.[39] This is a devastating objection that needs to be addressed—in fact it is precisely the objection pressed by the model of principle when it tries to redeem legal obligation as obligation *simpliciter*.

The easiest way to steer clear of psychologism in the form of expressivist semantics is to turn to an understanding of normativity that does not identify it with motivational force; this is

---

[37] Schroeder, *Being For* p 31.

[38] For the main tenets of semantic contextualism, *cf* above note 19.

[39] See Pavlakos, 'Practice, Reasons and the Agent's Point of View'. There are a number of other problems connected to the semantics of psychologistic internalism. Amongst them the problem of *embeddedness*—or the objection that if normative sentences were the expressions of mental states then they would fail to embed in the various logical contexts—negation, conditionals, and so on. I shall leave those problems aside here, given that assertability semantics arguably purports to deal with them; *see* Schroeder, *Being For*, ch two.

possible if one disentangles motivating reasons from motivational states and links them to a more objective level of thought. On this view a motivating reason is not the fact that one is in the psychological state of, say, believing or desiring that x but, instead, simply, the fact 'that x'.[40] No sooner have we disentangled motivational reasons from motivational states, than we realise that the same facts that function as motivational reasons are also our normative reasons.

As it happens, moving away from psychologism requires ascending from the level of mental states to that of—propositional—thought. This move is *in tandem* with a more fundamental distinction, which we must respect when drawing the realm of normative reasons: that between mental states and thoughts—henceforth, propositions. Propositions are items that come as objective as you want, for they can be communicated between agents independently of mental states—or particular sentences of a natural language—in virtue of their being truth-evaluable. They exist, to use Frege's language, at the level of 'senses', not of 'ideas'.[41] This understanding, more or less, underpins the picture of normativity that was earlier dubbed factualism.[42]

---

[40] See Parfit, 'Normativity' pp 364-5. This corresponds, at the level of semantics, to what Mark Schroeder calls the standard semantic picture: in it propositions enjoy primacy over either mental states and sentences, in that they ensure that those ones are individuated uniformly, with an eye to sameness of content—'same content account'; *see* Schroeder, *Being For* pp 28-33.

[41] Frege's classical distinction can be found in his 'Über Sinn und Bedeutung' (1892) 100 *Zeitschrift für Philosophie und philosophische Kritik* 25-50, translated by M Black in P. Geach and M. Black (eds and trans), *Translations from the Philosophical Writings of Gottlob Frege*, 3rd edn (Oxford, Blackwell, 1980) pp 56-78 and reprinted with minor revisions as 'On Sinn and Bedeutung' in M Beaney (ed), *The Frege Reader* (Oxford, Blackwell, 1997), pp 151-171, at p 154 n D.

[42] With the passing from mentalism to factualism there is one more issue to be settled with regard to the role and importance of mental states: in mentalism desires play a prominent role for normativity, because normativity is conceived of as a non-cognitive affair and, naturally, desires are non-cognitive. Here beliefs play a secondary role,

This picture amounts to a wholesale rejection of the psychologist version of internalism. However, another version of internalism might and ought to survive; one that satisfies the requirements of the normative question, without falling into the trap of contextualism. For this view to work it must be combined with an account of normativity at the level of objective thought. This I turn to next.

3.3 Mind-independence

There is a second, healthy, form of normative internalism, one that requires that there exist an internal relationship between reasons for action and agency, without allowing normative reasons to collapse into motivational force. For this type of normative internalism to work the normative significance of reasons should be reconstructed at the—objective—level of thought, in a manner that explains why it is the case that accounting for normativity in this fashion does not leave any residual task to account for motivation separately, which of course would anew require to the

---

remaining 'the slaves of passions'. Conversely, in factualism—given the truth-evaluative nature of propositions—beliefs, when compared to other non-cognitive mental states, appear far more apposite to capture the cognitive element involved. True enough, the same proposition—and the reason embedded in it—may become the object of a number of other, non-cognitive, mental states—including desires. However, because the shift from psychologism to factualism renders desires of secondary importance as determinants of normativity, it also 'demotes' their importance at the level of mental life. An attempt to combine the cognitive element of propositions with the motivational efficacy of motivational states is factual motivationalism; *see* ME Kalderon, *Moral Fictionalism* (Oxford, Oxford University Press, 2005) as mentioned by Wedgwood, *The Nature of Normativity* p 37. Even there, however, the rejection of psychologism yields that beliefs are important only as reflecting—at the level of the mental—the cognitive status of reasons, and by no means as constitutive for reasons.

reintroduction of motivational mental states. To recall an earlier idea, the point that needs to be made is that if reasons are propositions of the form 'that x' then 'that x' is both truth-evaluable and capable of motivating an agent—although it would be better in this case to talk of a motivating reason, than a motivating—mental—state. To put it differently: once normativity has been moved to the level of propositional thought, motivation must also make sense within the same context of objective thought. And it can do so, only if motivation ceases to be a matter that is antecedent to normativity, and instead is interpreted in the light of the latter.

How to account for normativity at the—objective—level of thought? The easiest place to start from is the semantic content—or meaning—of reasons. Given that reasons are thoughts, we are looking into the semantic content of reasons *qua* thoughts—call these normative thoughts. Let me call this for short the meaning of 'being a reason' assuming that it stands for the meaning of 'ought' or 'ought'-like expressions. As we saw earlier the first condition is that any reason has as its content a proposition and not a mental state:

R: 'that x ought to be done' *as opposed to* R: <my being in 'that x ought to be done'>

Before we proceed with the semantic analysis a few remarks are due with respect to the conception of the objectivity of thought defended at present. This is a normative conception of objectivity, which I have already referred to as *judgement internalism* (JI).[43] JI comprises two components: the thesis that thought encompasses normative entities—mind-independent, if not reason-independent. Second, that agents are rule-followers who precisely respond to the normativity of thought.

---

[43] See Wedgwood, *The Nature of Normativity* pp 23-8.

The objective level of thought consists of items that reject reduction either to psychological states or to any other non-psychological brute facts of the environment, which would fail to guide thinkers conclusively.[44] Such items must remain cognitively significant[45] or accessible to thinkers—in other words be efficacious in guiding their thought—but also in a manner that does not rid them of objectivity. The best way to understand them is as rule-like entities. This has a couple of consequences: if thought contains rule-like elements, for them to be cognitively significant, we ought to postulate that agents are capable of—or disposed to—rule-following precisely in the manner that is required by those rule-like components of thought.[46] To put it figuratively, the requirement of normativity as-a guarantee of—objectivity is a basic idea that strikes one as true when one realises how little the sub-normative conceptions of the mental can deliver. Yet, no sooner has the requirement of normativity entered the stage than it becomes impossible to disentangle it from another basic idea: that of the normative disposition of thinkers/agents. It is not possible—and it doesn't make sense—to postulate normative entities without presupposing that thinkers are normative beings. And the other way round: to understand in what sense thinkers are normative beings we need to postulate an irreducible realm populated by normative entities.

The normativistic explanation of thought aptly demonstrates why mental states—and motivation—cannot be antecedent to normativity, but instead must follow suit from it. If thinkers/agents are normative beings, in the precise sense that they respond to a distinct

---

[44] This point will be developed in more detail in 3.5 below.

[45] See Wedgwood, *The Nature of Normativity*, ch 7, for the two dimensions of sense and reference and the importance he bestows on reference.

[46] There is some instance of the circularity that is typically involved in a transcendental argument here.

normative level of thought, then their mental states must also be governed by those same rules, which regulate the content of what these states are about!

These are the main parameters of judgment internalism. However, a lot of flesh needs to be added to this outline. First we need to spell out, if only briefly, the elements comprised by the normative structure of thought. As soon as this becomes transparent we can move on to explain the normativity of practical reasons.

I shall assume—alluding to Frege's context principle[47]—that the basic unit of the normativity of thought is that of the proposition. Propositions are structured entities that provide the background for interpreting concepts and other semantic items as normative items: only if those can be inserted into a proposition can they count as having discharged their normative role. Most significantly, it is the embedding within a proposition that further discharges the ontological function of such semantic items—thus, a name or a singular term would denote an object within a proposition that is deemed true—that is, depicting a fact.[48] It follows that facts are the ontological environment for objects and properties to flourish.

---

[47] This, in few words, is the idea that the content of any linguistic term can only be retrieved within the context of the sentence in which the term occurs. The *locus classicus* is to be found in G Frege, *Grundgesetze der Arithmetik*, 2 vols (Jena, Verlag Hermann Pohle, 1893 and 1903 each vol respectively), translated as *The Foundations of Arithmetic* in Beaney, *The Frege Reader*, especially paras 60-62. Also see the discussion in M Dummett, *Frege: Philosophy of Mathematics* (London, Duckworth, 1991) chs 16 and 17.

[48] For a semantic explication of ontology, see the pioneering work of M Dummett and some of his most prominent students: Dummett, *Frege: Philosophy of Mathematics*; M Dummett, *Frege: Philosophy of Language*, 2nd edn (London, Duckworth, 1981); M Dummett, *Truth and Other Enigmas* (Duckworth 1978); C Wright, *Frege's Conception of Numbers as Objects* (Aberdeen, Aberdeen University Press, 1983); and to a certain extent, despite his more realist undertone, J McDowell, *Mind and World* (Cambridge, Mass, Harvard University Press, 1994).

On the face of it, the structure of the proposition delineates a grammar of thought, which allows for the normative role of the components of thought to unfold.[49] Accordingly, one must refer to the capacity of propositions to function as rules for thought and reasoning and then locate—on the grounds of the normative role propositions play in thought—the specific normative content of any practical or evaluative term. In what follows, although I am simplifying considerably, I remain reasonably confident that I am not leaving out any important details.

To make things clear, I shall say in advance that I take normative reasons for action to be normative facts—norms—which are depicted by true normative propositions.[50] Considering, however, that normative propositions constitute the environment within which normative terms discharge their normative function, we can begin by asking into the content of normative terms. In what I have elsewhere called a rationalist strategy,[51] I propose to reconstruct the normative content of normative terms through reflection on the role they play within the grammar of thought.[52] The inquiry is performed at the level of the cognitive significance of thought.

Critical of this project is Timothy Williamson, most recently in T Williamson, *The Philosophy of Philosophy* (Oxford, Blackwell 2007) pp 1-9.

[49] For extensive discussion in the context of legal theory *see* Pavlakos, *Our Knowledge of the Law*. On a cautionary note, it should be mentioned that the grammar of propositions does not exhaust the grammar of thought, even though it constitutes an important component thereof. The grammar of thought includes a wider set of normative operations which are allowed between propositions (negation, conjunction, etc).

[50] Some explanation of the advantages of this view will be added later; *see* ss 3.3 and 3.4 below.

[51] See Pavlakos, *Our Knowledge of the Law*; and 'Agency, Reasons and the Agent's point of View'.

[52] The entire enterprise resembles, methodologically speaking, a kind of conceptual analysis which is circular but informative. For a discussion of the requirements of an adequate conceptual analysis *see* Wedgwood, *The Nature of Normativity* pp 68-76.

Following Frege,[53] intentional content is assumed to be individuated on two levels: the level of sense, that is, the level at which terms have cognitive significance; and that of reference, which comprises all that is signified by true thoughts. On the face of it, the present account begins with concepts and propositions and only derivatively refers to facts and properties. Also for the sake of simplicity let me take 'ought' to stand as a synecdoche for all normative terms.

To put it in a nutshell, what is rationalist about this strategy is that, in subjecting practices to practice-immanent reflection, it arrives at rational principles that place the entire practice in a normative light. Although such principles are accessible only via some concrete practice, their scope extends beyond the particulars of any one practice—thus it is possible to use these principles with an eye to correction, modification and criticism.[54] What makes the rationalist strategy available is a particular conception of normativity, which regards human agency as fundamentally reflective. On this view, the element of reflection is pivotal in distinguishing mere reflex moves from tokens of intentional behaviour that exemplify the idea of compliance to a rule.[55] More importantly, the idea of reflective rule-following, as the key feature of agency, is

---

[53] See Frege, 'On Sinn and Bedeutung'.

[54] See T Burge, 'Frege on Sense and Linguistic Meaning' in his *Truth, Thought, Reason: Essays on Frege* (Oxford, Oxford University Press, 2005) pp 242–69; S Schiffer, *The Things We Mean* (Oxford, Oxford University Press, 2003) esp chs one and two.

[55] For the details of this view, which draws on ideas of Christine Korsgaard and other constructivist philosophers, and a thoroughgoing analysis of its implications for legal theory, see S Bertea, *The Normative Claim of Law* (Oxford, Hart Publishing, 2009).

placed at the most fundamental level of intentionality—that is, the 'activity' or 'practice' of predication.[56]

Along these lines the meaning of 'ought' in the most general sense would be given in a—normative—proposition which, if true, would depict a normative fact. How can we arrive at this most general normative proposition?

In order to retain the priority of the level of thought—over that of reference—the enquiry should avoid helping itself to items that are thought-independent in a manner that deprives them of their cognitive significance.[57] On this condition the most general normative proposition can be understood as a definite description of the meaning of 'ought', which may amount from some form of modest conceptual analysis.[58] Modest conceptual analysis of normative concepts is performed by focussing on one only out of the two dimensions of semantic content—that is, the dimension of intension. Typically the intension of a concept maps a possible world to the class

---

[56] See for a more detailed analysis, Pavlakos, *Our Knowledge of the Law* and 'Agency, Reasons, and the Agent's Point of View'.

[57] Thought-independence would lead to a dualism between conceptual scheme and conceptual content, whose detrimental effects are only well-known. Instead of others see the classic: D Davidson, 'On the Very Idea of a Conceptual Scheme' (1974) 47 *Proceedings and Addresses of the American Philosophical Association* 5–20; reprinted in D Davidson, *Inquiries into Truth and Interpretation* (Oxford, Oxford University Press, 2001) pp 183-98.

[58] For the details of modest conceptual analysis see F Jackson *From Metaphysics to Ethics: A Defence of Conceptual Analysis* (Oxford, Oxford University Press, 1998); TS Gendler and J Hawthorne (eds), *Conceivability and Possibility* (Oxford, Oxford University Press, 2002); M Garcia-Carpintero and J Macià (eds), *Two-Dimensional Semantics* (Oxford, Oxford University Press, 2006); D Chalmers, 'Two-Dimensional Semantics' E Lepore and BC Smith (eds), *The Oxford Handbook of Philosophy of Language* (Oxford, Oxford University Press, 2006) pp 574–606.

of referents that fall under the concept in that world.[59] What is most crucial with respect to the dimension of intension is that it does not fix the content of a term by pinning it down to its referent in the actual world, but allows for it to vary across possible worlds. What remains invariable, however, is the general sentence—*qua* definite description—that keeps us focussed on the same concept across possible worlds.

Postponing more detailed argument for now, let me state that the description which would give the full meaning of the practical 'ought' in it most general form, would be some variation of the Kantian Categorical Imperative:

'Act only in accordance with that maxim through which you can at the same time will that it become a universal law'.[60]

The proposition expressing the Categorical Imperative, or some variant thereof, gives the content of 'ought' in its more general form—*obligation simpliciter*. In addition, given that it is concluded from conceptual analysis, this fundamental proposition is to be *a priori* true. Thus, insofar as true propositions correspond to facts, the proposition that captures the meaning of ought can be assumed to denote a—normative—fact.[61] Cutting the long story short, the upshot

---

[59] See Chalmers, 'Two-Dimensional Semantics'.

[60] I Kant, *Groundwork of The Metaphysics of Morals* in MJ Gregor (ed and trans), *Immanuel Kant: Practical Philosophy* (Cambridge, Cambridge University Press, 1996, (1785)) AK 4:421.

[61] For an exhaustive discussion of a semantic constitution of normative facts, which also serves as a model for the present discussion, see C Heidemann, *Die Norm als Tatsache: Zur Normentheorie Hans Kelsens*, Studien zur Rechtsphilosophie und Rechtstheorie, vol 13 (Baden-Baden, Nomos, 1997).

of this line of reasoning is that *it is a priori true that there is a normative fact, a norm, which gives the role of the 'ought' in its most general form.*

At this juncture, we need to pause in order to ask in a more sustained manner about the suitability of any proposition, including the categorical imperative, to express the meaning of *normativity simpliciter*. Why, for instance, won't other forms of conceptual analysis do?

3.4 Normativity and the will

We need to take up the thread from where we left it in 3.2. There I argued that the normative question requires us to take up the issue of the relationship between practical reason and the will. The reason is that despite judgement internalism something more needs to be added in order to answer fully the normative question. Until we have clarified further this issue, it will not be possible to fully fledge the content of obligation *simpliciter*, as this is expressed from a unified point of view of agency.

True enough, if thought is normative then there exist already a proof that propositions are rules. However, while all propositions are rules with respect to intentional content, not all propositions are rules with regard to action—'what should I do?'; only normative propositions are such rules. Let me unpack this a little bit: the idea of judgement internalism is that the normativity of thought offers the platform for explaining the meaning/content of the various terms we use. Along these lines, we can say that evaluative propositions—and derivatively, owing to the context principle, evaluative terms[62] acquire their special practical meaning according to the normative use they are being put into, within the semantic structure of thought.

---

[62] See, on the context principle, above n 47.

Thus one level of normativity, that of thought, reveals another, that of practical reason. Further, to the extent that we are rational in the sense of judgement internalism—that is, we are disposed to take up thoughts and their components as rules—we are looking out for the normative impact of evaluative propositions on us. But then—and this is the rub—we discover that evaluative propositions are rules that bind thought *as they purports* to regulate action.

This further aspect of the practical 'ought' must be made explicit. Making it explicit, although presupposes judgement internalism, also requires some additional remarks. Before I attempt a demonstration of how the Categorical Imperative—or some equivalent formulation—may fulfil this task, let me briefly refer to an alternative proposal by Parfit. This exemplifies a standard move of practical realism—which incidentally yields a weaker understanding of judgment internalism[63]; realists say that it is an unanalysable property of normative reasons that they are about what one ought to do. The idea here is that there is no gap between any normative reason 'that p' and the respective motivating reason. How so? Because our motivating reason can be traced back to the same fact that is our normative reason, viz 'that p'. But this may by interpreted at least in two ways: one is to say that 'reason' refers to which action should be undertaken by the relevant agent, as in what the agent ought to be motivated to do.[64] Or it might simply report—in the form of a descriptive proposition—what the contents of some possible

---

[63] I mean that the realist move, by introducing thought-independent normative content, robs judgement-internalism of its inherent normative capacity. These problems are addressed under s 3.5 (reason independence).

[64] This could be developed further. I can only hint here at the form of an argument: an objective understanding of motivation would entail that mental states are normative states that need to be shaped according to model formulations of the will. Such model formulations of the will can take the form of norms—modal facts expressed in true modal propositions; *see also* ss 3.3 and 3.4 below.

action are without prescribing this content *qua* action. Let us assume for a moment that the latter is what Parfit suggests.[65] Would that be enough?

I think not. For the normative question—as expounded in 3.1 and 3.2—leaves a residual role for the will, which cannot be discharged by the role practical realism reserves for motivational reasons. As a result, the role of the will must be taken on board, if in a manner that is free from the predicaments of psychologism. Parfit resists this move arguing that, by letting the will re-enter the stage, we cannot help but reverting to psychologism. Parfit interprets any will-based test of normativity as requiring a test of rationality, whereupon we need to compare actual motives with those we would have after having reviewed all relevant—non-normative—facts.[66] If so, he observes, isn't it possible that we have reviewed the facts and find ourselves to be still compelled by some crazy impulse/motive? He is right, of course. But this, to be sure, is not the whole story.

A variant of the same argument is rehearsed when he dismisses Korsgaard's proposal of normative necessity *qua* motivational necessity as resting on some notion of psychological necessity, which Parfit takes to be non-normative.[67] In her Tanner lectures Korsgaard asks 'what compels me to do what I am rationally required to do?' and after rejecting the most common answers—Humeanism, voluntarism and practical realism—she proposes an alternative understanding of normative reasons that would answer the normative question.[68] On this,

---

[65] This interpretation seems to be in line with the idea of practical realism that Parfit detects in Nagel's early work and endorses; there he argues that any reason-judgement 'that p' involves the belief 'that p' which, if not motivating by itself, would still be sufficient to explain our motivation; *see* Parfit, 'Normativity' pp 340ff.

[66] Parfit, ibid p 354.

[67] Ffor what follows, see Parfit, 'Normativity' pp 374-6.

[68] See Korsgaard, *The Sources of Normativity*.

normative reasons should imply some kind of necessity that passes through the will of agents. For Korsgaard this type of necessity requires that one cannot have a normative reason unless one has a compelling psychological reason—one that amounts form a test of Kantian reflective endorsement. Parfit disagrees. He argues that all psychological necessity is non-normative.[69] To buttress his argument he avails himself of an argument by Williams.[70] The latter contrasts a normative meaning of 'ought' as requirement with a non-normative meaning thereof as incapacity. Incapacity is understood as the psychological incapacity to bring oneself to perform or even to think performing some action—some kind of psychological 'I can't help it!'. On Parfit's interpretation, not only the Kantian test of reflective endorsement, but also any other attempt to involve the will in an understanding of normative reasons would amount to a reduction of normativity to psychological incapacity. He adds characteristically: 'if kleptomaniacs could not act differently, that doesn't make their stealing morally or rationally necessary'.[71]

But one ought to disagree with this understanding: as the displacement of action-guidance from motivation to normativity—effected by judgement internalism—has suggested, it should be possible to conceive of motivation—or the will—in a normative sense. In other words, when, under conditions of judgement internalism, we are 'compelled' to do x, then the meaning of 'compelled' does not any more have anything to do with some actual motive of ours but with what would be commanded by what Kant calls a good will, that is the will that is bound by a norm conceived as an objective normative fact. The content of this norm would be capable of

---

[69] Parfit formulates Korsgaard's view on reasons as follows: 'The reason why some act is *normatively necessary* is the agent's being, through an act of will, in a certain motivating state' (Parfit, 'Normativity' p 368).

[70] Parfit, ibid pp 375-6.

[71] Parfit, 'Normativity' p 376.

sharing by every other agent. Let us dub the idea of the will as being bound by such a norm 'the normative conception of the will'.[72] The norm of the good will is a fact about what we ought to will given that we are rational. In slightly bolder terms: the norm of the good will tells us that there are some motives that are objective as a matter of knowledge, not of subjective will!

But why would Parfit insist on rejecting objectified will-contents? Presumably Parfit thinks that there are two ways to capture what a reason for action is about, which are jointly exhaustive: either to say that every reason is the fact of one's being in the psychological state 'that p'; or simply to say that the reason is the fact 'that p'. In the former case we reside in the realm of mentalism, and we take reasons to be motivational states. In the latter we aspire to some form of factualism, assuming that reasons are the very propositions our mental states refer to. However, one must allow for a third possibility[73]: that there are prescriptive facts involving the will. On this view, a reason is the fact 'that I ought to will p'. Such facts can be explained as modal facts that purport to model agents' motivating sates, and admit of reconstruction as norms in a Kantian sense of the term—viz authorised by the reflective endorsement test of a Categorical Imperative.[74]

The normative conception of the will is not a curiosity of the Kantian camp. Others, even amongst those who profess realism, appear to assume some version of it in their accounts of normative reasons. To mention but two prominent examples: one version of realism takes, under conditions of rationality—or rule-responsiveness—the meaning of normativity to involve the

---

[72] I cannot say more here about this concept. However, I assume that an element of 'construction' is essential to it.

[73] Parfit alludes to other possibilities but without elaborating; *see* Parfit, 'Normativity' p 363.

[74] See Heidemann for a reconstruction of Norms as second-order modal facts, although this author offers a different grounding of normativity.

disposition of the agent to act upon it.[75] A second view takes normative facts to be counterfactual facts about motivation: here what discharges normativity is not a fact about the actual motivational state of any agent but a fact about a motivational state that is counterfactually simulated under conditions of full rationality.[76] I don't think one would be missing the mark by far if one interpreted those proposals as presupposing, in different degrees of intensity, the involvement of the will in the content of normativity.

And why should it be otherwise? Once we have ascended from the level of psychology to that of thought, it is natural to assume that the will should also respond to the normativity of content in a manner that is intrinsically action-guiding. Accordingly, the normativity of content will involve action-guiding items that have propositional structure and are intrinsically will-involving. Such items will be normative propositions which, when true will depict modal facts—norms—which will constitute practical reasons for the performance of action and its justification.

Having established the central elements of normativity *simpliciter*, one further question still remains: does the norm that grounds normativity *simpliciter* exhaust the whole range of practical normativity? The quick answer is that it, most certainly, does not. This, however, should not come as a surprise. Recall that the rationalist model of analysis puts forward a two-level understanding of normativity. While normativity *simpliciter* is given by the general norm of the

---

[75] See Wedgwood, *The Nature of Normativity*.

[76] See M Smith, 'Internal Reasons' in (1995) 55 *Philosophy and Phenomenological Research* 109-31, reprinted in M Smith, *Ethics and the A Priori: Selected Essays on Moral Psychology and Meta-Ethics* (Cambridge, Cambridge University Press, 2004) pp 17-42.

Categorical Imperative, there are other norms in the various domains of action, which actually flesh out the details of what ought to be done. I shall postpone their discussion until section 4.[77]

At present, there is a last point to be taken up before the rationalist account and its contribution to a unified normativity is rendered valid. This is the issue of reason-dependence, as it was announced in the stage-setting section, earlier on.[78] Even though the will can be conceived in normative terms there is a sense in which it cannot become independent of the conditions that enable the normative conception of the will. To that extent, norms as propositions that model ideal states of the will cannot and ought not in principle to remain inaccessible from within deliberation and reasoning.[79] This reflects the requirement that reasons for action remain tied down to the normative structure of the grammar of thought, rather than 'being given' to us in virtue of some normative environment that is populated evaluative substances.[80]

In addition the requirement of reason-dependence as a condition of normativity will shed further light on the shortcomings of practical realism: in claiming thought-independence, practical realism endangers to undermine the idea of rationality at the grass-roots level. If reasons can in principle be unfathomable, then we may loose grip of the idea that agents are normative beings in the sense of being disposed to respond to rule-like items within their intentional environment.[81] Conversely, I shall argue that reasons remain always reason- or

---

[77] See below.

[78] See above s 3.1.

[79] For similar ideas *see* Parfit, 'Normativity' pp 362-3 and 366ff; *see also* Wedgwood, *The Nature of Normativity* pp 253ff.

[80] This would, notoriously, evoke Mackie's objection from queerness; *see* JL Mackie, *Ethics: Inventing Right and Wrong* (Harmondsworth, Penguin, 1977) pp 38-42.

[81] It is crucial that the normativity of content be placed at the level of intentionality and not beyond it for the

thought-dependent, if not mind- or psychology-dependent. Such dependence is not neutral vis-à-vis the issue of the will: no sooner have we established the dependence of reasons on thought, than we are supplied with a further reason to treat the idea of the involvement of the will as plausible.

3.4 Reason dependence

The discussion of the condition of mind-independence and the proposed rationalist strategy for the (re)construction of a unified normative point of view—that is, the point of view of *obligation simpliciter*—has insisted on remaining at the level of objective thought, or the level of cognitive significance, to use the Fregean jargon. Of course this makes sense in the light of the requirement to get rid of psychologism and the contextualist semantics it fosters. However, there is at least another strategy that would be compatible with the rejection of psychologism: the one suggesting to take on board a strong externalist view which would detect the content of

following reason: if non-thought related items are taken to be rules—such as unadulterated properties, facts etc—then the question of freedom arises: on the plausible assumption that conceptual freedom is the starting point for moral freedom, only if we presuppose that there is a 'first cause' that is not causal itself it is possible to arrive to an understanding of ourselves as free/autonomous in a moral sense. This is exactly why facts/properties cannot be the rules of the practice of predication—as one that embodies conceptual freedom or spontaneity. If they were, then the normativity of thought would be imposed from the outside, giving rise to a devastating dilemma: either content would be determined externally—as is submitted by the causal theory of reference and other forms of externalism—reducing our conceptual—and hence moral—freedom to a minimum; or there would exist an unbridgeable gap between rules of thinking and their applications, leading to skepticism and the loss of meaning. Assuming freedom, however, facts are not independent in this radical sense. As I have repeated throughout, they are mind-independent, but not reason-independent.

normative propositions in the referents of normative terms in a manner that would make semantic content dependent on the dimension of the reference rather than that of the sense of normative or evaluative terms.[82] Downplaying this second option needs some justification. This I turn to next under the heading of reason-dependence.

Within the short confines of this section, I shall try to touch upon three things: first, I will address a sceptical worry that would emanate from a strong externalist—call it realist—explication of reasons. Such an explication—I will argue—evokes something like the semantic version of Moore's open question, which leaves agents talking past each other. In discussing this worry I will be shedding light, in a retrospective manner, on the two-tier model of reasons and agency of the previous section. Second, I shall briefly claim that the sceptical worry can be traced back to the more general idea of a reason-independent reality, against which our various conceptual schemes are supposed to be measured up. This damaging idea, also known as the dualism of scheme and content, would always lead to a devastating loss of meaning and content. Finally, I will briefly touch upon the issue of truth, with a view to steer clear of the tensions arising from any dualist understanding of content. The three points will be discussed in order.

3.4.1. Semantic Open-question

---

[82] This seems to be—despite some early remarks—the view that Ralph Wedgwood concludes with in his *The Nature of Normativity*, see especially chs six and seven. For the topic of normative externalism more generally, *see* the classic discussion of Bernard Williams, in 'Internal and External Reasons' in R Harrison (ed), Rational Action: Studies in Philosophy and Social Science (Cambridge, Cambridge University Press, 1979) pp17-28, reprinted in B Williams, Moral Luck: Philosophical Ppaers 1973-1980 (Cambridge, Cambridge University Press, 1981) pp 101-13; *see also* Korsgaard, *The Sources of Normativity*; and Parfit, 'Normativity'.

Succinctly put, this is the constraint that accounts of reasons ought not to lead to conceptual disagreement between the various parties of a dispute. Such disagreement occurs when an account attempts to fix essential properties of something's being a practical reason or a value.[83] This takes place when a substantive moral theory claims for itself metaphysical necessity, or the condition that normative properties remain stable across possible worlds. On a successful characterisation, this leads to something like the *semantic version of Moore's open question argument*:[84] if the properties *being right*, *wrong, just* and so on are fixed according to any of the available substantive moral theories—Utilitarianism, Deontology, divine Command Theory, Libertarianism, Interpretivism etc—then any disagreement about the meaning of the relevant normative concept will amount to conceptual disagreement whereupon parties are *talking past each other*.[85] Jules Coleman brings this point to our attention vividly when he says:

if an adequate account of law must make reference to the values…we are going to run into a number of familiar philosophical problems. For example, we will have a hell of a time explaining the possibility of meaningful disagreement using the same concept because there is some reason to think that a utilitarian and a libertarian are not using the same concept of law.[86]

---

[83] Although the relation between reasons and values is far more complex, I shall assume considerable overlap for the sake of the discussion. Given the level of abstraction at present, this should not lead to any grave misunderstandings.

[84] T Scanlon, Thomas, 'Wrongness and Reasons: A Re-examination' in R Shafer-Landau (ed), *Oxford Studies in Metaethics*, vol II (Oxford, Oxford University Press, 2007) pp 5–20, at pp 12-3.

[85] Scanlon, ibid pp 12-3.

[86] J Coleman, 'Beyond the Separability Thesis: Moral Semantics and the Methodology of Jurisprudence' (2007) 27 *Oxford Journal of Legal Studies* 581–608, at p 607.

This of course is highly undesirable and would lead to a fragmentation of agency, albeit from a different route than the one suggested earlier, with respect to the semantics of contextualism. If, conversely, we wish to ensure that parties in normative disagreement are still disagreeing about the same concept of normativity, then we need to specify quasi-descriptive sentences that state the point of view of agency, without fixing the substantive properties of particular reasons/values in any manner that would disable the possibility of substantive disagreement. Scanlon proposes:

It might be that the parties to such disagreement are using the words 'morally wrong' to express different concepts. If this is so then they are simply 'talking past each other' when one says 'This action is wrong' and the other says 'No it is not.' But if they are using the words 'morally wrong' to express the same concept, such as 'must not be done' or 'violates standards we all have good reason to treat as authoritative' then there can be still disagreement between them. For one thing, they may disagree about what standards we have most reason to take as ultimate standards of action. More fundamentally, they may have conflicting views about which reasons suffice to justify ultimate standards of conduct.[87]

Such definitions allow us to accommodate the possibility of substantive disagreement about reasons without slipping into devastating conceptual disagreement. They are definite descriptions, amounting from modest conceptual analysis, and keep meaning constant across different contexts—and possible worlds; their great strength is that they leave room for picking out different substantive properties depending on the context or the practice on which we focus. This model is particularly apt for legal reasons, given the need to explain their content in line with their dependence on particular social practices.

---

[87] Scanlon, 'Wrongness and Reasons: A Re-examination' p 13.

3.4.2 The Scheme-Content Dualism and the Threat of Scepticism

The roots of the 'talking past each other' objection go deeper. Externalist explications of intentional content lead to what has been labelled the dualism of scheme and content. This is roughly the idea that there exists some uninterpreted reality, which functions as common co-ordinate system for holding together multiple points of view of cognition. Accordingly, it is submitted that the postulated uninterpreted reality functions as a single, unifying *content* to the many possible *schemes* of cognition, one that secures understanding and, at the end of the day, communication. In setting up the realm of uninterpreted reality as antecedent to thought, however, such views undermine the claim of objectivity they purport to defend. For the idea of an unadulterated reality gives rise precisely to the sort of scepticism that is connected to the existence of multiple conceptual schemes. If there is no guarantee that our thoughts converge on grounds they themselves generate, but instead is assumed that amongst their determinants count some thought-independent, uninterpreted items, then it becomes tempting to assume that there exist as many schemes of thought—that is, conceptual schemes—as exist thinkers. Yet, no sooner has the plurality of conceptual schemes been granted, than the sceptic can argue that any reason put forward to support an interpretation is merely a construct from a point of view, or *perspectival* construct. But then, if all we are left with are subjective interpretations, how can we remain confident that our reasons are genuine, let alone shared by others? Donald Davidson, in a passage that in the meantime has become one of the *loci classici* of contemporary philosophy, warns against this temptation. In its place he restores the objectivity of thought *qua* structure of grammar—which he calls 'language':

In giving up dependence on the concept of an uninterpreted reality…we do not relinquish the notion of objective truth – quite the contrary. Given the dogma of a dualism of scheme and reality, we get conceptual relativity, and truth relative to a scheme. Without the dogma, this kind of relativity goes by the board. Of course truth of sentences remains relative to language, but that is as objective as can be. In giving up the dualism of scheme and world, we do not give up the world, but re-establish unmediated touch with the familiar objects whose antics make our sentences and opinions true or false.[88]

The problems of dualism and scepticism become the more so intense when one introduces two conflicting rationales for the determination of the semantic content of normative expressions. In more jargon-related terms this is the case when the gap is let grow between, on the one hand, cognitive significance and, on the other, semantic value of sentences. This needs some explanation—for the purposes of this discussion, I shall remain within a broadly conceived Fregean framework[89]

Both aspects compete for the determination of semantic content—meaning—, a sentence, according to Frege, like any other semantic unit has two aspects: a sense and a reference. The sense of every sentence is a thought—proposition)—or an abstract object that represents reality from a point of view—however, notice that this is the unified point of view of cognition, not a mentalistic point of view. Its reference is its truth-value. Thus any sentence will derive its meaning from the combination of the thought it expresses—what is mostly a question of grammar—plus whatever makes it true. While cognitive significance already includes the various possibilities—informational states—that could make the sentence true, it cannot

---

[88] Davidson, 'On the Very Idea of a Conceptual Scheme' p 198.

[89] See above n 41.

determine its truth-value. That is a matter that escapes the capacities of cognitive significance. It must be delegated to some evaluation of the thought in light of its truth-maker.

Without breaking any new ground, truth-makers of thoughts have, throughout this chapter, been conceived as facts. Facts are those entities that are denoted by true thoughts. But here a potential conflict comes to light, depending on the way facts are understood. If facts are conceived as thought-independent items then the rationale of reference takes over from the rationale of cognitive significance with respect to the determination of content. Conversely, if cognitive significance retains its primacy, then the dimension of reference becomes dependent on the former. However, one cannot retain the primacy of both rationales, given that they both compete on the same level. We can see the reason when we ponder the effects of each strategy on the tenet of judgement internalism, which requires that content be normative for the agent.

If thoughts are normative in virtue of their reference—viz, a fact, antecedently to their cognitive significance—then what actually guides the thought is the fact. On this model of cognition facts impinge upon us in an unreflective, automatic manner: here the element of normativity is less important, for conceptual content derives from the environment, irrespective of any normative structure. This model of cognition corresponds to that with which Wittgenstein credits Augustine in the opening lines of the *Philsosophical Investigations*, with a view to taking issue with it later.[90]

Conversely, if thoughts are rules in virtue of their cognitive significance—viz, as reasons for

---

[90] L Wittgenstein, *Philosophical Investigations*, translated by GEM Anscombe, 3rd edn (Oxford, Blackwell, 2001) para one; *see also* the very illuminating discussion in D Charles, 'Wittgenstein's Builders and Aristotle's Craftsmen' in D Charles and W Child (eds), *Wittgensteinian Themes: Essays in Honour of David Pears* (Oxford, Oxford University Press, 2001) pp 49–79.

the thinker to employ them in a specific manner—then some element of normativity is rendered an antecedent condition of what counts as a property or a fact. In this, second interpretation normativity remains antecedent to factuality, as a condition of the latter.[91]

The latter model, which is the one I wish to abide by, views predication as the rule-guided activity of fact-construction. Facts are not pre-reflective ontological categories, but abstract objects which possess normative structure that is identical with the structure of a—true— proposition. This picture can still accommodate realist concerns about truth and objectivity.

If a proposition for which we claim truth is indeed true, it is so because it accurately refers to existing objects, or accurately represents actual states of affairs; albeit objects and states of affairs about which we can state facts only under descriptions that depend on our linguistic resources.[92] And on another elegant formulation, this time from John McDowell:

[T]here is no ontological gap between the sort of thing one can mean, or generally the sort of thing one can think, and the sort of thing that can be the case. When one thinks truly, what one thinks *is* what is the case. So since the world is everything that is the case…there is no gap between thought, as such, and the world. Of course thought can be distanced from the world by being false, but there is no distance from the world implicit in the very idea of thought.[93]

It is at this basic level of predication that the reflective element of agency makes its first appearance. Owing to its fundamental character for any form of intentional activity, the level of

---

[91] Interestingly John McDowell in his influential work *Mind and World* admits 'an alignment of minds with the realm of sense, not with the realm of reference…thought and reality meet in the realm of sense' (pp 179-180).

[92] See J Bohman and W Rehg, 'Jürgen Habermas' in EN Zalta (ed) *Stanford Encyclopedia of Philosophy*, (Fall 2008 Edition) available at http://plato.stanford.edu/archives/fall2008/entries/habermas/; *cf* Pavlakos, *Our Knowledge of the Law*, chs 1-4.

[93] J McDowell, *Mind and World* p 27.

predication imports reflexivity to all other instances of practice, be they of a lower or higher degree of complexity.

Any failure to appreciate the conflict between the two models, leading to placing both at the same level, would effect a breakdown of normativity by evoking something like Moore's open question with respect to the semantic content of intentional items—viz, concepts, properties, propositions and so on. If, in other words, normative propositions' content were to be individuated in a manner that is inaccessible to thought, then there would be no guarantee that thought would continue to track its determinants.

3.4.3 A Minimal Conception of Truth

One crucial constraint is not to conceive of those determinants as reason- or grammar-independent, for it would render them unintelligible or unfathomable in principle. This requirement can be met through an appropriate conception of truth. Depending on how one understands truth, one determines the constitution of facts—recall that a fact is what is lined up with a true proposition—, if truth is taken to amount to, or to be concluded from, a comparison between a thought and a thought-independent item, then, naturally, facts will remain antecedent to thoughts and the aforementioned problems will threaten to emerge. Conversely, if truth—as in *truth of a proportion*—becomes part of the *determinants* of what counts as a fact then the primacy of the level of cognitive significance is preserved and the normativity of thought stays unscathed.

Although a more detailed account of an appropriate conception of truth must be postponed for another occasion, it is safe to say now that it should be sought amongst the minimalist theories of truth that are available in the philosophical market. Such theories take care to

preserve the referential function of assertoric speech, yet without presupposing a robust notion of reference, a notion that would operate independently or antecedently to the semantic structures of thought. A minimal account of truth seeks to settle the question of reference by attending to the grammatical role played by the relevant semantic terms whose reference is at stake. Consequently, while minimalism of truth and reference leaves room for accounting for correct and mistaken uses of assertoric content, it eschews the danger of evoking a robust notion of reference, which threatens with scepticism.[94]

4. The Model of Norms: An Outline

Having put in place the main parameters of the rationalist strategy, I can now flesh out the model of norms that I propose. As a general guideline to consider, this ought to be constructed in two moves. At the top level we have a set of general norms that are *a priori* true—call them *reasons simpliciter*. Reasons *simpliciter* are definite descriptions that specify the *meaning* of normative terms—such as 'ought', 'right', 'wrong', 'obligation', 'duty' and so on. Definite descriptions of the kind suggested, are concluded via modest conceptual analysis of normative terms, when those are inserted into the normative structure of thought[95]. Admittedly, reasons *simpliciter* are meagre and can do little to guide action effectively. That said they might still function as a reliable compass to rationally determine the extension of more concrete norms by 'projecting' their evaluative point upon the context of particular social practices. This brings us to the second level of norms.

---

[94] To my knowledge, the most sophisticated instance of a minimal theory of truth (and reference) has been proposed by C Wright in his *Truth and Objectivity* (Cambridge, Mass, Harvard University Press, 1992) esp chs one and two.

[95] See above s 3.2.

The second level of our account of normativity consists in a 'buck-passing account'[96] (Scanlon 2007) of substantive reasons, one that defers the content of reasons to the specifics of some relevant (social) practice. The buck-passing account of reasons is rooted in the view that all value needs, at some level, to be anchored, ontologically speaking, to some practice (Raz 2003, lecture 1). Here, in specifying reasons' content, we focus on the second dimension of semantic content, i.e. their extension. Reasons are given, in this context, by the normative facts that correspond to true normative propositions (call these, *reasons in a domain*). Reasons in a domain are *a posteriori* norms and amount from the projection of reasons simpliciter onto the particular facts of a practice. Reasons in a domain behave like propositions that contain proper names: they retain the same reference (for a particular configuration of practice) across possible worlds without, however, blocking the possibility of genuine substantive disagreement, as is the case with other practice-independent conceptions of value. Reasons in a domain are worked out against the various particular social, moral and legal, practices which, nevertheless, are constituted in light of the agent's point of view as representing intentional normative activity. Here it is possible to have intelligible disagreements with other participants within the same practice in the light of the abstract formulations of reasons simpliciter: consequentialists, libertarians or virtue-ethicists may still engage in meaningful disagreement, provided they remain on the side of the agent's point of view. This comes very close to Jules Coleman's suggestion that it is possible to retain substantive disagreement over the content of the rules of a practice.[97] To the extent that we retain two levels of normativity, it is possible to keep meaning invariable without fully determining content, thus allowing disagreement about the correct

---

[96] Scanlon, 'Wrongness and Reasons: A Re-examination' pp 6-10.
[97] J Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (Oxford, Oxford University Press, 2001) ch seven.

configuration of—even—conventional rules. All this would work, of course, only on the caveat that all reasons have a practice-dependent component, for otherwise, if we assume that there existed fully fledged, practice independent *moral* reasons, then disagreement would fall prey to the 'talking past each other' objection.[98]

A related consequence of the two-layered model of norms is that no strict separation can be postulated between norms from different domains. For instance, legal reasons may be related to a particular 'legal' value, such as the value of *Rechtssicherheit*. And yet, to the extent that reasons become relevant from the agent's point of view, no strict separation between 'legal' and other values may be postulated: legal value will make sense only as justified value, and for justification to work, the involvement of reasons from other domains will be required. This means that there is no direct route leading from legal values to the agent's point of view. This route must be demonstrated in a manner that requires backing from all relevant reasons, those that originate in any other relevant domain—morality, ethics ad so on. This, however, should not obliterate the fact that legal reasons may occasionally be assigned equal or even higher weight than other—eg moral—norms. In this sense there is no fixed priority between legal and other reasons in a domain—as, perhaps, the vocabulary of natural lawyers and, occasionally, interpretivists might suggest. What bestows on a reason in a domain its particular weight is its interaction with the level of normativity *simpliciter* plus reasons from other domains and should be determined *ad hoc*.[99]

So far the account may evoke the impression that reasons *simpliciter* are weak in their regulatory capacity and that, in order for them to guide action, they ought to be combined with

---

[98] For the content of this objection see above s 3.5.

[99] Yet, such ad hoc-ness is not devastating as it is already aligned with the content of the relevant reasons simpliciter.

reasons in a domain. Notwithstanding their thin status reasons *simpliciter* retain a direct regulatory impact when it comes to constituting certain kinds of reasons in a domain. This is particularly the case for reasons *simpliciter* that give expression to core ideas of agency, such as *reflection* and *justification*. An example of such a reason simpliciter is: 'there is a general obligation to justify actions'. This proposition, although falling short of fleshing out a full reason for action, would still be capable of preventing certain categories of normative propositions from acquiring the status of genuine reasons in a domain—eg any sentence imposing an obligation on the grounds that morality leads to the perpetuation of the human species. To that extent reasons simpliciter and reasons in a domain stand in a relation of synergy and mutual contribution to the agent's point of view.

4.1 Some advantages of the model of norms

I would like to conclude by pointing out some of the advantages of the model of norms over the two other models of legal obligation that were discussed earlier—that is, the model of principle and the model of authority.

I begin with the model of principle. The concept of the norm employed by the model of norms is normatively richer or conceptually antecedent to the concept of principle as employed in the model of principle. Norms in the sense of the model of norms are invoked to answer the normative question, which goes far deeper than the concerns addressed by the model of principle. They so do, not only with respect to the issue of the objectivity of the will, but also with regard to what was earlier referred to as the 'talking past each other' objection. I shall briefly recall both themes in what follows.

Main exponents of the model of principle seem to reject the idea that reasons for action are norms, insofar as norms are linked to the *conventional expression of a psychological state*. However conventionality in this sense is not a necessary condition for being a norm, as the discussion in part 3 has shown. Let me address this point in more detail.

It has been submitted that norms cannot, strictly speaking, be reasons for action, for only facts can credibly perform this function.[100] In this case, the remedy for understanding norms as reasons would be to focus in each case on the relevant—institutional—fact of norm creation. Focussing on such facts of creation, however, would give a head start to the model of authority in the explanation of legal obligation, given that the vehicle of normativity—viz, norms—would always presuppose some moment of institutional expression of the content of someone's will. So, the implied conclusion goes, better do away with norms.[101] This is slightly misleading. As the discussion in 3.4 has illustrated there is a normative explication of the will which allows us to conceive of norms as modal facts that 'correspond' to true normative propositions, which involve the will in a manner that is non-psychological, hence, objective. Such propositions spell out standards for action which are binding not because they are expressions of the content of some actual state of the will, but because they model the content of an ideal—or counterfactual—state of the will.[102] Such counterfactual 'simulation' of a fully rational will, ceases to be an institutional or psychological fact and is rendered normative in an absolute manner—propositions, we should not forget, are as absolute as we want. In the model of norms

---

[100] See J Broome, 'Reasons', in *Reason and Value: Themes from the Moral Philosophy of Joseph Raz* pp 28–55; *see also* D Parfit, *On What Matters*, MS (draft January 2009) available at http://users.ox.ac.uk/~ball2568/parfit/bibliography.htm, chs 1-4.

[101] Stavropoulos in 'The Relevance of Coercion' strikes me as reasoning along these lines.

[102] For a similar construction see M 'Internal Reasons'.

the objective dimension of the will comes into expression by the level of normativity *simpliciter*, while the norms of the various domains of action are left with the more modest task of generating more particular reasons in the light of norms simpliciter.

Finally, a few words on the 'talking past each other objection'. In contrast to principles, norms—conceived of as response to the normative question—can explain away the sceptical gap arising from assuming robust normative facts that are enshrined into the fabric of an un-interpreted reality. Given that facts of that sort are doomed to evoke some variant of the scheme-content dualism, with all the devastating consequences that follow for content and meaning, they ought to be expelled appropriately. While the model of principle remains silent on this topic, the model of norms employs the idea of judgement internalism and a minimalist conception of truth to prevent the dualist menace from taking off the ground.[103]

4.2 Norms and the Justification of Action-Directing Action

The advantages of the model of norms are not limited to the model of principle, but extend to include the model of authority. As it was argued in part 2, the model of authority ignores the normative consequences of action-directing action, as a result of which it fails to give a plausible account of legal obligation as obligation *simpliciter*. The model of norms replaces authority by tackling the concerns raised by the model of principle, while improving on the latter's intuitions.

---

[103] See below s 3.5.

The model of norms brings to expression the internal link between action-directing action and institutional impact in the manner suggested by the model of principle, while doing away with some ambiguities pertaining to the latter. Despite having brought to light the importance of coercion, as an intrinsic constraint of action-directing action, the model of principle faces a further difficulty: it remains open-ended as to the possibility of locating moral principles *inside* the process of action-directing action. Given the residual question 'what guides the will?' it always seems—as the model of authority assumes—that some institutionalised instance of the will—an authoritative will—ought to be imported to discharge the task of action-direction.

This ambiguity disappears in the model of norms: in taking on board normativity *simpliciter* as consisting in a Kantian Categorical Imperative, the model of norms buys into the familiar idea that the way we direct ourselves and, derivatively, others entails that action-direction is subject to a constraint: that of not subjecting anyone who is capable of reason-giving to coercive interaction. This constraint to action-direction is intrinsic to how we conceive of reasons, in a manner that introduces a substantive justificatory constraint to all action-guiding items. The pairing of the activity of action-direction with constraints imposed by practical reason—once in the model of norms—is enabled through the conceptual relation between two of the formulations of the Categorical Imperative in Kant: that of the *humanity formula* and that of the *means-ends formula*. Because—Kant tells us—the process of giving reasons to ourselves acquires the rational structure he describes, this is why action-directing actions are necessarily subjected to a constraint from coercion: a coercer is legitimate in directing the action of a coercee only if the latter has a reason to perform the action, a reason that he would anyway have independently of the coercer's ends, which are served by the action directed at the coercee.

This relation can be best brought into expression through the hierarchical relationship between the two-tier structure of normativity, envisaged by the model of norms. On the one

56

hand normativity *simpliciter* demarcates the nature and function of normativity and introduces an obligation to justify action-direction that is intrinsic to the nature of action-guidance. On the other, normativity in a domain provides for the terrain where substantive justificatory reasons are fully articulated, be it through institutionalised legal processes or other less formalised practices of practical reasoning.

In slightly different terms, the model of norms combines the two aspects of norm-based normativity: the fact that norms are directed at the will—cancelling the gap between knowing a norm, and being required to act according to it—with the idea that norms, in their basic mode of existence as action-directing reasons for one's own will, already contain the ideal aspect of obligation *simpliciter*, as one requiring that one should not get others to do things in an illegitimately coercive manner.[104]

Thus, it is an essential requirement of the model of norms that there exist a hierarchical relation between the various levels of normativity. This is not an unfamiliar idea in legal theory. Norms stand in inferential relationship, as Kelsen has demonstrated and as the model of authority most likely assumes.[105] What the model of norms adds to this picture is a postulate to expand the hierarchical chain of norms beyond law, in a manner that satisfies the normative link between the two levels of normativity it introduces—normativity *simpliciter* and normativity in a domain. The outcome of this expansion is that for a legal norm to give rise to an obligation, it becomes a requirement that it be linked to a 'higher' justification of action-direction. Or, in

---

[104] *Cf* Julius, 'Getting People to do Things'; for the transition from the personal to the interpersonal level *cf* above n 11.

[105] This hierarchical relationship between norms has recently been introduced with great force in the model of authority through the idea of the deep convention; see A Marmor, *Social Conventions: From Language to Law* (Princeton, Princeton University Press, 2009) ch three.

related terms, that amongst the determinants of the grounds of validity of any legal norm there exist an inferential link with some norm *simpliciter*.

This would also steer clear of the danger of a regress of norms to which Kelsen's edifice remains vulnerable. In the model of norms there can be no regress because there are, necessarily, two and only two levels of normative inquiry: the level of the Categorical Imperative—or reasons *simpliciter* where the notion of normativity is first articulated—and the level of domain normativity—where reasons are ingrained in the various practices. No higher level would make sense, for the level of obligation *simpliciter* exhausts the meaning of normativity. Further, domain reasons are not insular between domains but instead are made to communicate via the level of reasons simpliciter, while remaining bound to the perspective of normativity.