Validity and the Basic Norm

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As we move towards the last quarter of the 20th century, there can no longer be any doubt that the formative jurist of our time is Hans Kelsen. If the mark of the genius is that he creates a cosmos out of chaos, then Kelsen has evidently earned that title. His pure theory of law has displayed for us, with splendid accuracy and elegance, the anatomy of a legal system. He has demonstrated the essential unity of law, the distinctive marks that separate the concept of law from that of morality, and the relationship between the legal order and the concept of the state. He has corrected the monocural excesses both of Austin, who placed exaggerated emphasis on the role of a sovereign commander, and of the American realists, with their obsessive concentration on judicial activity. No general writer on the concept of law in the last half-century has been able to ignore Kelsen, and there is no important contribution to the general philosophy of law in that period that does not owe much to Kelsen's work.

The Scandinavian school of jurists, so notably represented by Karl Olivecrona and Alf Ross, has drawn heavily on Kelsen's explanation of the element of coercion as an identifying characteristic of a legal system. Professor H.L.A. Hart, in his discussion of the law's operation through "rules about rules," owes much to Kelsen's position that "the law regulates its own creation," while Hart's entire theory concerning the fundamental "rule of recognition," although significantly different from Kelsen's concept of the basic norm, is much in debt to Kelsen's writing.

Kelsen's place of honor in the development of legal philosophy is, then, secure. No challenge to any part of his theory can substantially diminish the importance of the edifice he has built. It is from the starting point of this unqualified admiration for Kelsen's great body of enduring work that this Article proceeds to take issue with, or at least pose questions to, some parts of his theory.

I

The Validity of the Basic Norm

The most recent full statement by Kelsen of his general theory of

law, articulated in 1967 in The Pure Theory of Law, reflects the same careful insistence on the special realm of discourse inhabited by the concept of law that has characterized all of Kelsen's writings:

[The question why a norm is valid, why an individual ought to behave in a certain way, cannot be answered by ascertaining a fact, that is by a statement that something is; . . . the reason for the validity of a norm cannot be a fact. From the circumstance that something is cannot follow that something ought to be; and that something ought to be, cannot be the reason that something is. The reason for the validity of a norm can only be the validity of another norm.]

The thought expressed in this quotation has become one of the most valuable and generally accepted of Kelsen's contributions to legal philosophy. By distinguishing the notions of authority and obligation from those of power and obedience, Kelsen's detailed analysis reveals the distortion of human relations contained in Austin's attempt to explain concepts of duty and obligation through reference only to the power of the commander and the subjection of the citizen.

Kelsen's lesson is that if an essential attribute of a legal system is that it consists of prescriptions about the proper use of coercion, nevertheless, the social arrangements that, taken together, make up the institutions of law are too complex to be analyzed exclusively in terms of threats of coercion. Particular rules, ordinances and adjudications within a legal system are viewed as binding because they are issued in accordance with procedures that are in turn accepted as being those that identify organs and processes of authority. The meaning of a legal norm is that it is a direction about the use of force; but the meaning, as it were, of a legal system is that it is a scheme that confers validity upon directions about the use of force.

The feature that confers unity upon the norms of a legal system, which, indeed, entitles us to speak of a system at all, is the common derivation of all inferior norms from the same basic norm. The nature of the basic norm is the proposition that we ought to comply with the directives contained in the historically first constitution, by which is meant a constitution that is the ultimate point to which we can trace

1. Max Knight’s 1967 translation of Kelsen’s Reine Rechtslehre, was carefully checked by Kelsen himself, so it may be taken to express an accurate statement of the jurist’s views in 1967. H. Kelsen, The Pure Theory of Law (1967).
2. H. Kelsen, supra note 1, at 193.
3. Essentially the same analysis of the nature of duty in a legal system has later been made by H. L. A. Hart, neatly captured by his use of the contrast between being obliged to do something and having an obligation to do it. H.L.A. Hart, The Concept of Law 80 (1961).
back the legitimacy of the present legal system; one that was not itself born legitimately of an earlier constitution.  

Now the general practitioner of law, although perhaps not accustomed to thinking very expressly about legal philosophy, would so far find himself perfectly comfortable with Kelsen’s approach to the matter. The binding quality of a statute or a judicial decision comes, he would readily acknowledge, from its constitutional lineage. If pressed, he would no doubt also quickly agree that a rigorous analysis would carry the title search back to the first, historical constitution. The point at which ordinary legal commonsense is inadequate, and where a more philosophical analysis is essential, is reached when we ask the question—but what would it mean to say that the basic norm itself is valid?

For Kelsen the answer cannot be a reference to any actual pattern of behavior, for he has chosen to characterize the basic norm as being an “ought” proposition, thereby committing himself to the Kantian epistemology that an “ought” cannot be derived from an “is.” The propounding of an “ought” proposition whose validity cannot be derived from any superior proposition poses a dilemma, since such a proposition is itself by definition ultimate, but at the same time cannot be thought of as valid simply in terms of its embodiment of an actual social practice.

In attempting to resolve this dilemma, Kelsen recognizes some connection between actual behavior and the validity of the basic norm. But, although arguing that for a basic norm to be regarded as valid the legal order issuing from it must be by and large effective, he at the same time emphasizes that, while effectiveness is a condition for validity, it is not to be equated with validity—it is not the reason for validity.

The reason for validity turns out to be a presupposition—a presupposed basic norm.  

The reason for the validity—that is, the answer to the question why the norms of this legal order ought to be obeyed and applied—is the presupposed basic norm, according to which one ought to com-

4. H. Kelsen, supra note 1, at 200.

5. Several writers have professed to find difficulty with Kelsen’s explanation of the concept of the basic norm. The most thorough critique of the doctrine of the basic norm has been by Professor Julius Stone. See Stone, Mystery and Mystique in the Basic Norm, 26 MOD. L. REV. 34 (1963). See also J. Stone, Legal System and Lawyers’ Reasonings ch. 3 (1964). Kelsen has replied to Stone’s critique in Kelsen, Professor Stone and the Pure Theory of Law, 17 STAN. L. REV. 1128 (1965). Stone’s criticisms and Kelsen’s reply to them have been of the greatest value in the preparation of this Article. A brief, but important, critique of the basic norm doctrine is also to be found in H.L.A. Hart, supra note 3, at 245-47.
ply with an actually established, by and large effective, constitution, and therefore with the by and large effective norms, actually created in conformity with that constitution.⁶

Effectiveness is a condition for the validity—but it is not validity. This must be stressed because time and again the effort has been made to identify validity with effectiveness; and such identification is tempting because it seems to simplify the theoretical situation. Still, the effort is doomed to failure, not only because even a partly ineffective legal order or legal norm may be regarded as valid . . . ; but particularly for this reason: If the validity, that is, the specific existence of the law, is considered to be a part of natural reality, one is unable to grasp the specific meaning in which the law addresses itself to reality and thereby juxtaposes itself to reality, which can be in conformity or in conflict with the law only if reality is not identical with the validity of the law.⁷

Insofar as only the presupposition of the basic norm makes it possible to interpret the subjective meaning of the constitution creating act (and of the acts established according to the constitution) as their objective meaning, that is, as objectively valid legal norms, the basic norm as represented by the science of law may be characterized as the transcendental-logical condition of this interpretation, if it is permissible to use by analogy a concept of Kant's epistemology. Kant asks: "How is it possible to interpret without a metaphysical hypothesis, the facts perceived by our senses, in the laws formulated by natural science?" In the same way, the Pure Theory of Law asks: "How is it possible to interpret without recourse to meta-legal authorities, like God or nature, the subjective meaning of certain facts as a system of objectively valid legal norms describable in rules of law?" The epistemological answer of the Pure Theory of Law is: "By presupposing the basic norm that one ought to behave as the constitution prescribes, that is, one ought to behave in accordance with the subjective meaning of the constitution-creating act of will—according to the prescription of the authority creating the constitution."⁸

This formulation of the doctrine of the basic norm may not, however, be fully accepted without resolution of a basic ambiguity. The ambiguity is traceable in the crucial quotations given above, and consists of moving between two different senses of the concept of basic norm, which might be called weak and strong.⁹

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⁶ H. Kelsen, supra note 1, at 212.
⁷ Id. at 213.
⁸ Id. at 202.
⁹ Professor Julius Stone has referred to an ambiguity in the doctrine of the basic norm, "swinging between, on the one hand a norm that is at the top of the pyramid of norms of each legal order, and on the other, some other norm which remains outside the pyramid, and is thus wholly meta-legal, and amounts to a general presupposition re-
A. The Weak Sense

In the weak sense, the proposition that the validity of the basic norm is a presupposition can be taken as a shorthand statement of a fuller exposition that might run as follows. People are observed living in community under rules that, among other matters, provide penalties for certain conduct and establish adjudicative procedures for settling disputes. The rules themselves and the rulings of the adjudicators are regarded as authoritative. This is in itself a complex notion, but means at least that postures of censure and blame—which are not at all the same as the mere anticipation or forecast of coercion—are taken with respect to those in breach of the rule, and in this sense the rules are regarded as valid, or might be said to be valid. Further inquiry reveals that what all the rules and rulings have in common is common descent from the same basic set of procedures for rule making, and that this feature of legitimate descent from such procedures appears to be the reason why the rules are accepted as binding. If the external observer now wishes to give a systematic account of the order he has observed he might well characterize it as resting on the presupposition of the validity of a basic norm, by which he would mean nothing more than that certain basic procedures are actually accepted in that society as identifying authoritative rules.¹⁰

If Kelsen’s statements about the basic norm meant only this, they would be innocuous. But there are obvious difficulties about taking Kelsen’s meaning in this way. The interpretation of the “presupposition” as consisting only of the observation of the acceptance of basic procedures to identify authoritative rules appears to run up against Kelsen’s insistence that validity must be distinguished from effectiveness. Kelsen, as we have seen, repeatedly insists that effectiveness is not the reason for the validity of the norms of the system; the reason is rather the presupposition of the validity of the basic norm. On the other hand, this difficulty may be a somewhat unreal one, manufactured by Kelsen’s choice of language and overly rigid adherence to his own notions of the demands of epistemology.

The flaw in Kelsen’s presentation may be revealed by pursuing further the sense in which a presupposition can be a reason for anything. We are dealing here with the concept of a functioning legal system, not with a species of geometry, and presuppositions, if they are advanced as reasons for the viability of fundamental concepts, ought to be sus-

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¹⁰ This, of course, is the kind of account of the nature of a legal system given by Hart. H.L.A. Hart, supra note 3.
ceptible to a process of verification. The appropriate verification for the proposition that a basic norm is valid can only be its acceptance in the community. Those who operate within the system as citizens supply the verification of the presupposition by the manner in which they conduct their relations with each other in the light of rules. They reveal the authority of rules, procedures and organs by their way of talking and arguing with respect to rights, duties, penalties, and so on. Officials within a system display the same verification by acting authoritatively, which is of course, as we have seen, something a good deal more complicated than just giving orders. External observers of the system, including perhaps legal scientists, arrive at their “presupposition” about the basic norm by looking at and listening to the behavior and speechways of the community.

It may now appear that to talk of validity itself as a presupposition is dangerously misleading. In any particular legal community the particular basic procedures that people accept are, of course, not presupposed at all, but are, from the internal point of view, simply experienced and, from the external point of view, discovered by observation. It would, therefore, be correct to say that the statement that a particular norm of the system is valid presupposes that there is a valid (generally accepted) basic norm, but it would be misleading to say that the validity of the basic norm resides in a presupposition. The difference here is crucial. To say that in speaking of the validity of a particular norm of the system, the validity of the basic norm is presupposed, leaves open the possibility of an independent criterion for verifying the validity of the basic norm. But to say that the validity of the basic norm is (consists of) a presupposition, apparently excludes it from the category of propositions that may be verified. It is in failing to make this necessary distinction that Kelsen’s exposition leads to confusion.

What has been said here is not an attack on Kelsen’s separation of the concepts of validity and effectiveness. The validity of the basic norm resides in its acceptance as the reason for the authority of all the rules of the system. This is, at the least, a very special sense of the notion of effectiveness and is best not equated with it at all. But, while Kelsen’s separation of validity and effectiveness is perfectly acceptable, his reference to the basic norm as a “transcendental-logical

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11. Here Hart’s observation that in discussing validity we should keep in mind the distinction between the internal and the external points of view is helpful. Id. at 99.
12. See H. Kelsen, supra note 1, at 245.
13. Hart made this point most effectively when he explained that there is a world of difference between simple submission to coercion (which in that sense may be completely effective) and looking to rules as reasons to justify or condemn behavior, to support or reject claims, to justify the imposition of penalties, and so on. H.L.A. Hart, supra note 3, at 55.
condition” and his insistence that validity cannot be considered to be “a part of natural reality” are obscure and a source of unnecessary difficulty. This obscurity can be lifted by noting the distinction between making a presupposition that a basic norm is valid and, on the other hand, saying that its validity consists of a presupposition.14

B. The Strong Sense

The strong sense of the basic norm appears particularly in a passage in which Kelsen speaks of a general norm prescribing compliance with an effective constitution:

Nor is the effectiveness of a legal order, any more than the fact of its creation, the reason for its validity. The reason for the validity—that is, the answer to the question why the norms of this legal order ought to be obeyed and applied—is the presupposed basic norm, according to which one ought to comply with an actually established, by and large effective, constitution.15

In this passage the notion of effectiveness does not appear simply as a condition for the validity of a legal order; rather, it has become part of the prescriptive content of the basic norm that one ought to comply with an effective constitution. But this is not an easy concept to understand. We can see that when people live in a legal order, their social relations are illuminated by saying that they accept as authoritative prescriptions emanating from certain procedures. This could be put innocuously by saying that to explain their behavior we must presuppose their acceptance of these rule-fathering procedures. It is then of course their acting out of this acceptance that constitutes the effectiveness of the legal order. But if we are to say, as Kelsen does in the quoted passage, that to understand and analyze the order in which people live we must propound a basic norm that one must comply with an effective constitution, the picture clouds over. Effectiveness becomes not just a way of referring to the outward aspect of people’s acceptance of certain procedures; it appears instead as the reason that prompts the acceptance.

If this is a correct reading, then the passage could be understood as a tentative psychological or sociological analysis of the motivations underlying acceptance. People, we might say, being conditioned as children and partaking of the general receptivity and inertia of human

14. This criticism leads to the conclusion that Hart’s account of the foundations of a legal system, although owing a good deal to Kelsen’s, is ultimately to be preferred. But it is to be regretted that in his book Hart did not offer a more extended critique of Kelsen’s doctrine of the basic norm, and, in turn, that Kelsen, in revising the 1967 English version of his book [see note 1 supra], did not address himself expressly to the differences between his position and Hart’s.

15. H. KELSEN, supra note 1, at 212.
nature, tend to accept as valid whatever coercive order they find asserted around them. But Kelsen could hardly accede to such an interpretation for he certainly does not suppose himself to be offering social science stabs at the psychology of the law abiding citizen. This would be a task outside the scope and interest of the pure theory of law.

What other meaning could be given to the basic norm that might allow it to escape a sociological interpretation? Perhaps Kelsen is propounding a general moral maxim to the effect that we ought to comply with effective coercive social orders. The concept of the basic norm was advanced by Kelsen as necessary to view a coercive order as a legal order. But, to understand any particular system as a legal order, all that is necessary is to assert the existence in that society of a general acceptance of the particular procedures to which the individual rules can all be traced, for general acceptance connotes effective legal order. It is not at all necessary to assert the proposition that an effective constitution ought to be complied with; this appears analytically as a superfluous attempt to invest the notion of effectiveness with value and to anchor the concept of the validity of law in a moral proposition the foundations of which have not been revealed and that is passed off as a logical proposition.

Any effective, coercive order may have some value by providing a relative degree of stability and peace that would be put in jeopardy by attempts to overthrow the regime, however worthy the motives of the rebels. But most writers, probably not wanting to go further than to advance such a value as a prima facie reason why we ought to comply with an effective constitution, would leave open the possibility of rebuttal were the system grossly to violate the principles of justice. Kelsen would, in any event, not go along with this interpretation. His theory, a pure one in his sense of that term, is designed to exhibit the legal system as a normative ordering quite unattached to any moral anchors. But an anchor it must have, and in Kelsen’s universe this, of course, turns out to be the fundamental presupposition. Here the ambiguity in the use of the term “presupposition” appears again. To say that there is a presupposition that an effective constitution ought to be complied with, might mean, as we have seen, that statements that particular norms are valid presuppose the verifiable proposition that people actually entertain convictions about the bindingness of effective, coercive social orders and that these convictions constitute the cement of the social order. But, on the other hand, the characterization of the assertion as a “presupposition” might mean that it is in the category of unverifiable propositions and is being offered as an axiom.

16. This looks like the beginning of the kind of analysis that has been pursued further, notably by Karl Olivecrona and Alf Ross.
But a legal system is not simply a structure of reason, flowing from the assumption of a set of premises, as if it were Euclidean geometry. It is social fact in the sense that it is an actual, functioning ordering of people's lives. Legal philosophy for the same reason cannot be the same kind of discipline as the philosophy of mathematics. If it is to be of any value, legal philosophy must offer illumination and insight into the ways in which people construct social orders. Christian morals may be said to rest on the presupposition that Christ was divine; but the existence of a community of Christians rests on people holding the belief that Christ was divine. In the same way the existence of a legal community, as opposed to a model code constructed for the private edification of the draftsman, can ultimately be analyzed only in terms of the actual attitudes and dispositions towards basic procedures of the persons who make up the community.

Kelsen's presentation, then, of the basic norm is in the end either unintelligible or unacceptable. It may be unintelligible because the only meaning to which it seems susceptible is in the sense of a verifiable assumption or a moral maxim, both of which are apparently repudiated by Kelsen himself. As a moral maxim, the basic norm would be unacceptable because it would invest effective power with claims of obligation that are not justifiable in normal terms. The basic norm can, however, be sustained as a verifiable assumption. Such an approach leads into the kind of analysis offered by H.L.A. Hart, and, along a different route, into the psychological-philosophical excursions of the Scandinavian jurists.

II

Is the Basic Norm an Ought Proposition?

After what has been said, is it still proper to think of the basic norm as an ought proposition or, indeed, to speak of a basic norm at all? Would it not be more accurate and less likely to confuse if we referred rather to the simple, social fact that people accept certain procedures as being the proper ones to identify binding rules in their society? Or does the basic norm purport to serve another purpose by going beyond the fact of acceptance and supplying a reason why people should accept these procedures?

The propositions contained in the constitution, or the first historical constitution, are of course ought propositions. They designate legislatures and courts, create executive officers and organs, and perhaps even impose checks or constraints upon the laws that these institutions may create. But for Kelsen, these constitutional ought propositions are not to be thought of as constituting the basic norm in themselves.
I have always . . . clearly distinguished between the basic norm presupposed in juristic thinking as the constitution in a legal-logical sense and the constitution in a positive legal sense, and I have always insisted that the basic norm as the constitution in a legal-logical sense—not the constitution in a positive legal sense—is not a norm of the positive law, that it is not a norm "posited", i.e., created by a real act of will of a legal organ, but a norm presupposed in juristic thinking.\footnote{Kelsen, supra note 5, at 1141.}

The basic norm, then, is not the ought propositions of the constitution, but rather an ought proposition about the constitution. As such it is not a legal norm in the usual sense of being the construct of an organ of the system; rather, it is a construct of juristic thought which is necessary if we are to regard the system as giving rise to valid norms. It is legal only in the sense that it has legally relevant functions.

The question that must ultimately be posed thus becomes that of whether it is, indeed, necessary to posit a basic norm that requires us to comply with the constitution before we can understand a coercive order as a valid one. Kelsen, of course, is committed to the position that only if we presuppose [the basic norm] can we consider a coercive order which is by and large effective as a system of objectively valid norms.\footnote{Id. at 1143.}

A Communist may, indeed, not admit that there is an essential difference between an organization of gangsters and a capitalistic legal order which he considers as the means of ruthless exploitation. For he does not presume—as do those who interpret the coercive order in question as an objectively valid normative order—the basic norm. He does not deny that the capitalistic, coercive order is the law of the State. What he denies is that this coercive order, the law of the State, is objectively valid.\footnote{Id. at 1144.}

This last quotation is, perhaps, particularly significant since it seems to suggest a contrast between a coercive order that is "the law of the State" but lacks validity, and, on the other hand, a valid legal order. Here Kelsen argues that from the external point of view of the Communist observer, a capitalist legal system, although effective, is not valid since the Communist, presumably because of his views of the general social inequities expressed through the capitalist legal system, does not believe that people ought to comply with the provisions of its constitution. He would, nevertheless, be forced to concede that the system is apparently a functioning one, explicable only on the assumption that most people in the community either believe that the constitution ought to be complied with, or at least are effectively coerced by the minority.
who so believe. “Valid” in this sense is clearly a concept of moral value, signifying a judgment that a system may make legitimate moral claims to compliance.

“Valid,” as applied to the legal system as a whole, may now be defined in several alternative ways: First, a reference by a member of the community to his own conviction that the norms of the constitution ought to be complied with; second, a reference by an external observer to his belief that the system has moral claims to compliance; third, a reference by a member of the community or an external observer that there is a widespread conviction in the community that the norms of the constitution ought to be complied with, whether or not the member or observer is in agreement with this. Any of these meanings may be useful in different contexts; but such meanings are only possible and sensible with reference to the system as a whole. If we attempt to apply any of these meanings to the concept of the basic norm itself—if we ask what it means to say that the basic norm is valid—the transference is only possible by explaining validity as agreement with the proposition contained in the basic norm. But, again, it is the validity of the whole legal system that is being explained, and to refer to the basic norm at all is only an oblique way of referring to the existence of certain beliefs and attitudes which make communal life possible.

The concept of the basic norm, therefore, seems meaningless except either as a reference to the fact that people accept the procedures laid down in the constitution, or as a moral axiom that people ought to accept these procedures. On the one hand, the former proposition would not be normative at all and the concept of validity could clearly not attach to it; on the other hand, the latter is a normative statement, but its validity could only be discussed in terms of a proffered justification for the assertion of such a duty.

Kelsen prefers not to be regarded as speaking in either of these two senses, but rather in a third, in which the basic norm is seen as an ought proposition belonging neither to the legal system itself, nor to morality. But this simply will not do. The prescriptions of the constitution are statements concerning ordered societal living. Assertions that we ought to comply with the constitution must be supported by argument drawn from social fact and moral principles. There is no other realm of meaning in which such statements can operate, and the notion of the validity of basic norms must in the end either be devoid of meaning or be a moral maxim. Kelsen comes close to admitting this:

It is as a norm presupposed in juristic thinking that the basic norm (if it is presupposed) is “at the top of the pyramid of norms of each legal order.” It is “meta-legal” if by this term is understood that the basic norm is not a norm of positive law, that is, not a norm
created by a real act of will of a legal organ. It is "legal" if by this term we understand everything which has legally relevant functions, and the basic norm presupposed in juristic thinking has the function to found the objective validity of the subjective meaning of the acts by which the constitution of a community is created. In this respect the theory of the basic norm is—to a certain extent—similar to the natural-law doctrine according to which a positive legal order is valid if it corresponds to the natural law.\textsuperscript{20}

Perhaps a last attempt to rescue the doctrine of the basic norm might be assayed by suggesting an interpretation that could purport to coexist with Kelsen's concept. When $X$, as a member of a community, speaks about duties and obligations in the context of a legal system, he assumes (presupposes) that his audience agrees with him that one ought to do as the constitution prescribes. Insofar as responsive communication proceeds between $X$ and his audience, for them there exists a shared presupposition that one ought to comply with the constitution. Reference to the validity of the legal system could properly be said to be a reference to this shared presupposition. To refer to the content of the presupposition as a basic norm—or even as a valid norm—is innocuous so long as the reference is understood to be metaphorical and to operate only as a pointer to the actual shared acceptance of the basic prescriptions of the constitution. But it is clearly very doubtful whether Kelsen would be prepared to accept this as an adequate explication of his own conception of the basic norm doctrine.

III

CONFLICTS BETWEEN LAW AND MORALS

Kelsen's quest for unity and symmetry in our knowledge of rule systems leads him into a position with respect to the relationship between law and morals that seems difficult to sustain. He recognizes that in this relation

conflicts are possible—for example, if a certain moral order forbids taking of human life under all circumstances, while at the same time a positive legal order prescribes the death penalty and authorizes the government to go to war under the conditions determined by international law. In this dilemma, an individual who regards the law as a system of valid norms has to disregard morals as such a system, and one who regards morals as a system of valid norms has to disregard law as such a system. This is expressed by saying: From the viewpoint of morals, the death penalty and war are forbidden, but from the viewpoint of law both are commanded or at least permitted. By this is only expressed, however, that no viewpoint exists from which

\textsuperscript{20} Id. at 1141.
both morals and law may simultaneously be regarded as valid normative orders. No one can serve two masters.\textsuperscript{21}

But this is much too stark a presentation and resolution of the dilemma. A person finding himself torn between the conflicting voices of the legal order and his conscience does not resolve the conflict in the typical case of the problem by deciding that the one does not speak for a valid order and may therefore be disregarded. The agony of the conflict arises precisely out of the circumstance that both the legal and the moral orders speak with aspects of legitimacy; he recognizes both as making weighty claims, worthy of some respect, and not lightly to be dismissed. Whichever claim wins out, there may be a sense of sacrifice of the other, for the man who follows his conscience does not have to reject the legal other as worthless, and the man who follows the law is not thereby declaring the voice of conscience to be misleading. In some situations, for example Nazi Germany, we might reject the whole legal order as being so shot through with elements destructive to our humanity that we would not recognize any claims that it made upon us as a legal order. But the more common case must be that, while by and large accepting the legal order, the usual moral duty to comply with a certain legal obligation is in that particular case overborne by more urgent moral reasons. For, if there is ever a duty to obey the law that is to mean more than a mere reference to a duty actually imposed by a functioning, coercive system, then such a duty can only exist in moral terms.

Frequently, the moral duty to obey the law is overwhelming since the content of the law in the particular context may coincide with unquestionable moral obligations, as with a good deal of the criminal law, for instance murder and rape. Where the content of the legal duty is not so obviously coterminous with a particular moral duty, then we must fall back on the general moral considerations that sustain the notion of a general duty to comply with the demands of the legal system. These are expressed in traditional notions of social contract, reciprocity, fairness, and so on. It may be better to conceive of such a general duty to obey the law as no more than a prima facie one that may be displaced by strong contrary considerations of justice.\textsuperscript{22}

Kelsen's argument is distorted by his attempt to present the individual's dilemma as a choice between two rival orders, both competing for the unique title of "valid." Moral claims cannot be monopolized in this fashion, nor is there any good reason why recognition of the claims of a legal order must be absolute in the sense that persuasive rea-

\textsuperscript{21} H. Kelsen, \textit{supra} note 1, at 329.
\textsuperscript{22} See Wasserstrom, \textit{The Obligation to Obey the Law}, 10 U.C.L.A. L. Rev. 780 (1963).
sons for disobedience are never recognized. Kelsen’s exposition has the effect of forcing the person contemplating disobedience into a total rejection of the legal order of his community before any single act of disobedience could be justified. No longer would there be a distinction between principled civil disobedience and revolution.

Kelsen’s position stems from his absolutist presentation of the concept of validity as an attribute that is either present or absent, and which, if present, precludes even the whisper of a legitimate claim from a contrary prescription. Two comments may be appropriate. First, this position seems to lend strength to the view that Kelsen’s basic norm is no more than a moral proposition commending compliance with effective, coercive order. For, if to recognize the validity of a legal system is to banish all possibility of recognizing claims to act in a manner contrary to the rules of the system, then the statement that the system is valid must be taken to embody an overwhelming moral argument. Second, this would be a curiosity even as an avowed moral position. In moral decision making we are very accustomed to valid claims being urged on both sides; the values of truth, friendship, charity and fairness sometimes pull against each other.

So it seems quite natural that in deciding whether or not to obey the law we should recognize valid competing claims of the interests of, for example, regularity, peace and stability on the one side, and, perhaps, on the other the claims of justice. If validity is taken to be a seal that extinguishes opposing considerations, it will simply falsify the reality of moral argument. When the source of this seal is apparently ultimately to be traced to the proposition that effective orders ought to be complied with, the doctrine not only is distorting but becomes fraught with danger.

IV

Basic Norm, Validity and International Law

Turning to international law, Kelsen poses the question whether international law is “law in the same sense as national law.”23 He concludes firmly that it is, but with the reservation that international law is a primitive legal system that has not progressed far towards the development of specialized organs for rule making, adjudication and enforcement of sanctions. Nonetheless, he argues that national and international law are not only of the same essential nature but must, indeed, be viewed as one, unified system, not as a collection of coexisting systems. This urge to perceive and drive to impose unity leads Kelsen

23. H. Kelsen, supra note 1, at 320.
again into complicated and difficult analyses. To maintain the essential identity of national and international law, he is compelled to depict the rules of international law as directives about the use of coercion (reprisals and war). Further, he asserts that international law obligates individuals in just the same way national law does. Questions of validity and the nature of the basic norm again present themselves in the international law context in a manner causing special difficulty.

If international law and national law are to be viewed as one unitary system, then, for Kelsen at any rate, conflict between the norms at national and international levels is inconceivable. It is one of Kelsen's frequently repeated doctrines that conflict of norms, in the absence of a normative procedure for resolving the conflict, shatters the concept of a unified system. He is, therefore, at pains to present apparent cases of conflict between national and international law as not, on further analysis, amounting to genuine conflicts in the unity shattering sense.

The explanation is presented by way of an analogy between a national law that contravenes norms of international law and a statute that is unconstitutional in national terms. An unconstitutional statute, Kelsen argues, is "valid" until the normative mechanism that may declare it unconstitutional is both invoked and authoritatively applied. Indeed, it is possible in municipal systems to have a meaningful concept of the unconstitutionality of a statute, even though no mechanism exists for voiding the statute; it may continue to be recognized as "valid" in spite of its "unconstitutionality." This might occur, for example, when sanctions were provided to be imposed on legislators having a hand in passing the unconstitutional statute, even though the statute itself could not be annulled except by another, repealing statute. In such a situation the statute would be at the same time both valid and the occasion for a punishable delict.

The same analysis, Kelsen argues, applies to the national statute that is apparently in breach of a norm of international law. Such a statute is perfectly valid in terms of the unified national-international law system. But the passage of the statute is itself a delict in terms of the unitary system and, therefore, is the occasion for the invocation of rules of international law prescribing the appropriate sanctions (reprisals and war) for the breach.24

This presentation borrows a good deal from Kelsen's general thesis that the primary sense of any rule of law should be understood as a stipulation of circumstances constituting a delict and giving rise to the

24. Id. at 330-31.
imposition of a sanction.\textsuperscript{25} The law prohibiting murder, in its primary sense, states: "If $X$ should kill $Y$ under certain circumstances, then certain procedures should follow." The directly prohibitive aspect of this law ("don't kill") has for Kelsen a secondary, derivative meaning. Similarly, he invites us to see the norms of international law as primarily a stipulation of certain circumstances, constituting delicts, that will be the occasion for the authorized imposition of sanctions.

But this analogy breaks down, for the act of murder (the delict that occasions the sanction) is not in any sense valid, although it is certainly legally significant. In the international law example, however, Kelsen regards the offending statute as valid, even in the eyes of international law. Moreover, any national law analogies in which the offending statute might be regarded as valid would be weak, and, indeed, ultimately unconvincing. One might point to the instance, which obtains in some systems, of a thief's passing good title in stolen goods to a third party in certain restricted circumstances; here the act of the thief is itself a fresh delict, yet the act transmits important, legally protected interests. But there is not even the appearance of any conflict within the system here. A decision has been expressed in the norms of the system that for some purposes an otherwise criminal act may serve to transfer effective title. Delicts always change the pattern of legal rights and duties; the stolen goods example is only exceptional in that it includes a valid transfer of title. We do not think of a conflict within a system until one rule of the system has the appearance of contradicting another, and the above example is not of this kind. One can make a logical presentation of the unconstitutional statute situation or the national-international law conflict situation in the same terms. In the former, the norm of the system is that to pass an unconstitutional statute constitutes a delict but as a collateral consequence the statute is valid, just as for the thief to sell stolen goods is a delict but may have the collateral consequence of passing good title. Similarly, the enactment of a municipal statute that apparently clashes with a norm of international law is a delict but as a collateral consequence the statute is valid. But such a presentation, while compatible with the demands of logic, does considerable violence to important aspects of reality.

The notion of the validity of an unconstitutional statute is a somewhat peculiar one, implying an extraordinary state of affairs in which legislators may enforce some of their legislative judgments, but only at the price of suffering a penalty for committing a delict. Although logically feasible, such a situation would provide an empty analytical portrait of unity, while at the same time concealing conflicts of such

\textsuperscript{25} Id. at 108.
magnitude in vital organs of lawmaking that the system could only survive if such instances were extremely rare and aberrational. A legal system in which most of the legislators spent most of their time in jail for creating valid law in an unconstitutional manner is a curious model indeed.

When we think of the usual example of a "conflict" between national law and international law, the attempt to expel the element of conflict from the situation seems even less convincing. Suppose a state passes a statute denying privileges to a certain minority group within the state, in contravention of an international agreement guaranteeing certain rights and privileges to such minorities. The condemnation of the state in the international community for this action will probably elicit one of two major responses. Either the state will recognize the existence of the international law on the point, in which case it will argue that its statute is not in breach of that law, or it will declare itself not to be bound by the international law on this point. In neither case will the international community, subscribing to international law, regard the state statute as valid.

Under the first possibility the disagreement will concern only the interpretation of the international law, which would quite probably not be a situation of conflict in any important sense of that term. But under the second possibility, in which the state expressly repudiates international law on a particular point, realistically there would appear to be open conflict. For, from the internal viewpoint of the state, the statute is valid, but from the external viewpoint of the international community, the statute is invalid. It is not as if a murder had been committed and, the deed being done, there was now nothing left to do but pursue and prosecute the criminal. Although the concern of the international community might indeed encompass the possibility of sanctions, it would be much more centrally directed to persuading the errant state to acknowledge its breach and to recognize the validity of international law and in the future to conform its municipal laws to international principles. The essence of the situation would be one of conflict and its resolution, not, as Kelsen argues, simply one of invocation of authoritative mechanisms against a delict. The entire dispute would be in terms of a disagreement about the validity of international law and the validity of the state statute. To present the situation as if there were no disagreement at all about validity, but only a mechanical triggering of sanction procedures by a routine delict, it to blur an important distinction between the criminal law of municipalities and the operation of international law in the world.

Kelsen's attempt to present national and international law as one, unitary system inevitably leads him to reappraise the doctrine of the
basic norm. Kelsen views the unity of national law and international law as stemming from the primacy of national law or, alternatively, from the primacy of international law. The logic of systems does not prescribe a choice between these alternatives, but rather finds either equally acceptable; the choice, if it is to be made, is one of ideology. True to the purity of his theory, Kelsen does not himself make any final choice between these possibilities (although one has the impression that he favors the theory resting on the primacy of international law) but is content to draw out the possibilities of both.28

If we accept the primacy of international law then two fresh questions must be settled. First, the basic norm of the supra-national system must be identified; second, the basic norm of national law must be replaced with some suitable intermediate norm of international law that will account for the subordinate character of state systems. Kelsen's statement of the basic norm of international law is roughly to the effect that states ought to behave with respect to each other as they have customarily behaved.27 Hart has pointed out the difficulties in accepting this proposition as a meaningful basic norm and there is no need to pursue that point further here.28 But also of some considerable interest is the replacement of the basic norm of national systems with a general intermediate norm of international law, which legitimizes and regularizes the position of states in the system of international order.

The reason for the validity of the individual national legal order can be found in positive international law. In that case, a positive norm is the reason for the validity of this legal order, not a merely presupposed norm. The norm of international law that represents this reason for the validity usually is described by the statement that, according to general international law, a government which, independent of other governments, exerts effective control over the population of a certain territory, is the legitimate government; and that the population that lives under such a government in this territory constitutes a “state” in the meaning of international law, regardless of whether this government exerts this effective control on the basis of a previously existing constitution or of one established by revolution. Translated into legal language: A norm of general international law authorizes an individual or a group of individuals, on the basis of an effective constitution, to create and apply as a legitimate government a normative coercive order. That norm, thus, legitimizes this coercive order for the territory of its actual effectiveness as a valid legal order . . . .29

26. Id. at 333-47.
27. Id. at 216.
International law must have some criterion for the recognition of states, for international law operates through and on states and a state does not identify itself as naturally as a human being does with respect to national law. Kelsen’s statement of a norm of international law is thus quite acceptable as a statement of the criterion used by international law to identify the carriers of rights and duties in the international system of order. But, as we have seen, Kelsen puts forward the statement for much more extensive purposes—as a reason for the validity of national law systems, and this is a much more difficult proposition to accept.

It is one thing to say that there is a system of international order which recognizes for certain basic purposes any effective government as a participant in the system. Such a statement speaks only to the organs of international order. But it is a different matter to say that the reason for the validity of a national system is a norm of international law which somehow legitimizes any effective, coercive order. Such a statement seems rather to speak to the citizens of each state, telling them that because of a superior, supra-national norm, the system under which they live properly commands their respect so long as it can apply coercion effectively. Under Kelsen’s position, if a citizen asks why a rule of the system under which he lives is to be regarded as valid, the ultimate answer would be that a norm of international law so provides because the system under which he lives is able to organize coercion effectively. Such an answer manages at once to be both dangerous and silly. It is dangerous because it appears to invest effective coercion with disproportionate value; it is silly because no one has ever been persuaded that the mere presence of effective coercion is sufficient to answer all inquiries about the validity of an order. South Africa is a good example, for it is for some purposes recognized as a participant in the international system of order simply because it is an effective coercive government in a certain piece of territory. But a South African black would certainly not agree that the system under which he lives is valid because it monopolizes effective coercion. Kelsen’s presentation fails to distinguish between these quite different questions.

CONCLUSION

Kelsen’s doctrine of the validity of the basic norm, perched on the pinnacle of his system, has occasioned more doubt than any other part of the pure theory. The discussion in this Article may have buttressed those doubts. But this should not be thought of as vitiating the main body of Kelsen’s work. For, although Kelsen himself has always written of the basic norm as if it were a necessary keystone of his whole philosophy of law, it does not in fact appear to be so.
The necessary dilution of Kelsen's doctrine of the basic norm will still leave intact virtually everything in his pure theory. A reinterpretation of the concept of validity, purging it of its absolutist, moral overtones will accomplish the conversion of the basic norm into a simple presupposition of common subscription to certain procedures. The fine, intricate and illuminating study of law that Kelsen has given us in the body of his work would thus be purged of its one obscure and unrewarding concept.