

Swiss Philosophical Preprint Series

29

Maksymilian Del Mar

social normativity for legal philosophers

added 12/01/2009

ISSN 1662-937X

© Maksymilian Del Mar

Social Normativity for Legal Philosophers

*Maksymilian Del Mar**

Abstract

Understanding the nature of social normativity is important for contemporary analytical legal philosophy. For one, such an account may help articulate the form of the social conventions that are said to be at the foundations of the rule of recognition. This paper argues that accounts of the nature of social normativity ought not to be based on the idea that social life is governed or regulated by norms. Rather, accounts of social normativity ought to be centred on the notion of how persons learn (and unlearn) what they come to anticipate. The first part of the paper offers some illustrations of such an account. The second part of the paper shows how social normativity so conceived can avoid some of the problems that bedevil the currently dominant view (or assumption) that social life is regulated or governed by norms. These problems include, first, difficulties associated with how much deliberative reflection and awareness to demand from participants in social life (accounts of social normativity are often said to be unrealistic or hyper-committal for demanding too much of both, which is not a criticism that can be made of the account offered here); and second, difficulties caused by assuming or positing that there can be a fact of the matter, unmediated by the evaluation or judgement of persons, as to whether or not some action is correct or incorrect on the basis that it merely conforms (or not, as the case may be) to some norm or set of norms (which is not an assumption made or a position endorsed by the account offered here). The paper does not aim to provide a comprehensive statement of the alternative view of social normativity. Rather, it seeks merely to introduce it and to suggest some of the ways in which it improves on the currently dominant view.

Introduction

There are a number of ways in which an account of the nature of social normativity is of direct importance to contemporary analytical legal philosophy. The most obvious of these is the need to provide an account of the social conventions at the foundations of the rule of recognition. Ever since H.L.A. Hart defined a legal system as the union of primary and secondary rules, supported by a certain attitude, formed within the internal point of view, of legal officials to the rule of recognition (see, Hart 1994), legal philosophers have attempted to understand just how to conceptualise that attitude. The two most common resources utilised by legal philosophers are the works of Michael Bratman¹ and David Lewis.² For example,

* School of Law, University of Edinburgh and Faculty of Social and Political Sciences, University of Lausanne.

¹ Bratman 1999 and 2007. For legal theorists relying on Bratman see, for example, Shapiro 2000 and 2002.

Gerald Postema calls on Lewis' account to argue that 'social conventions of the kind Lewis modelled are generated and maintained by a form of practical reasoning which is essentially common' (Postema 2008, 41). In his latest statement on the issue, Postema argues that 'the remarkable ability of people to identify salient options and appreciate their practical significance in contexts of social interaction is best explained in terms of their exercise of...“salience reasoning”, which is a form of common practical reasoning' (Postema 2008, 41). The exercise of that practical reason, in turn, is best explained, according to Postema, by considering the role that social rules or norms play in guiding the behaviour of agents. Postema is clearest in the following passage:

Rules are norms: they offer standards for behaviour, not just descriptions of it. They purport to guide behaviour of the rational agents they govern. To understand such norms, Lewis correctly argues, we must consider how they are meant to figure in the practical reasoning of these agents. (Postema 2008, 42)

A similar focus on practical reason has characterised those more influenced by Bratman. For Bratman, as recounted in a recent article by Mathew Smith, 'it is in virtue of agents sharing intentions that an activity in which they are engaged is a shared activity' (Smith 2006, 273). Further, 'in order that I can be responsive to your intentions, I must represent your intentions in my intentions (and so that you can be responsive to my intentions, you must represent my intentions in your intentions)' (Smith 2006, 274). Thereafter, it is 'these interlocking intentions' that 'constitute the systematic unity within which mutually responsive and supportive actions occur' (Smith 2006, 274). Following on from Bratman, Jules Coleman employs the Bratmanian framework to argue that that judges share 'an intention to apply primary rules together' (Coleman 2001, 78). For Coleman, 'judges have a certain kind of shared intention that knits together their activities into a shared action. As a result, their activities as judges have a systematic unity' (Smith 2006, 278).

² Lewis 2002. For legal theorists relying on Lewis see, for example, Postema 1982 and 2008; Coleman 1982; and Marmor 2008.

Smith himself argues that the five key features of Bratmanian shared activity – i.e., conceptual agreement, commitment to conceptual agreement, epistemic agreement, commitment to epistemic agreement, and strong practical commitment – are ‘hyper-committal’ (Smith 2006, 284). What is required by Bratman’s theory, according to Smith, is ‘not only that there is conceptual agreement with respect to concepts deployed with respect to the activity to be shared but that the agents have more or less correct beliefs about each other’s subplans and intentions’ (Smith 2006, 282). Even that, however, is not altogether satisfactory, for we would need, says Smith, not only to ‘have shared beliefs about each other’s intentions and subplans; parties must also be practically committed to the shared activity and the subplans’ (Smith 2006, 283). The demands rack up in a way that Smith finds unrealistic. ‘Our intentions’, he says, ‘can easily fail to refer to each another [sic] and continue to fail to refer to each other even once we begin to engage in our respective actions’ (Smith 2006, 281). Further, he says, ‘there is psychological evidence that people do not commit themselves to actions for reasons that prior to commitment they take themselves to have’ (Smith 2006, 291). ‘Instead,’ he continues, following the work of the moral psychologist Jonathon Haidt (see Haidt 2001), ‘they generate reasons post hoc to justify their commitment’ (Smith 2006, 291). Smith concludes that:

If shared activity is possible only in cases of explicit deliberative agency in which the agent reflects on all her reasons and then, based upon a careful consideration of all of them, identifies what it is to which the reasons recommend she ought to be committed, and she so commits herself, then shared activity will be quite a rare phenomenon. (Smith 2006, 291)

Smith’s critique is characteristic of the difficulties involved in providing an account of social normativity. The difficulties are associated with deciding how much deliberative rationality and awareness (both self- and mutual-awareness) to assign to an agent who participates in a social order regulated by norms. On some versions, human beings are – if they are human beings at all – rational. Human beings are rational insofar as they are

responsive to reasons, i.e., capable of being moved, guided by or motivated by reasons. Rational human beings acquire knowledge of these norms in the form of propositional content. This knowledge guides human beings as they deliberate, in the space of reasons, about what they ought to do. In social interaction, persons are aware of both themselves and others deliberating in the space of reasons. In certain circumstances, then, rational human beings may decide that acting in accordance with these norms will be inappropriate. Such an action, i.e., one for which reasons can be given, also has the added advantage of being capable of being evaluated, at least by other rational human beings who share knowledge of those norms. According to alternative (and largely minority) views, human beings may be rational, but only some of the time, and even then most probably minimally.³ According to these views, human beings are less rational than they like to think; their lives are influenced more by their emotions and their desires, many of which will be unresponsive to reasons, and a good deal of which may be inaccessible to the self-awareness of persons. Nevertheless, most of the time, the emotions and desires of persons will be integrated with the norms that govern social life (e.g., emotions and desires will provide the motivational base and/or function as a mode of learning and transmission of what is appropriate and what is inappropriate in social life).

However much awareness (self and/or mutual), and however much deliberative rationality, one requires in one's account of social normativity, it is the common assumption of both these views that social life is governed or regulated by norms. This assumption is tempered by the argument that many, perhaps the majority, of these norms remain implicit.⁴ Further, there is also recognition that there may be various levels of these norms, e.g., some pertaining to a society as a whole, and others regulating or governing specialised domains of

³ The term sometimes used here is that of 'bounded rationality'; see Gigerenzer 2007, especially chapter 11.

⁴ For a classic statement, within contemporary philosophy, of normativity as constituted by implicit norms, see Brandom 1994. Given his insistence on implicit norms, it is somewhat ironic that Brandom criticises Kant for having a juridical approach to normativity. Arguing for a domain of implicit norms is extending, rather than minimising, the empire of law.

various kinds of technical expertise or simply smaller communities of various kinds (e.g., families, congregations, employees, students etc).

A complex view, then, of the nature of social normativity conceived of in this vein, would argue that social life is governed or regulated by norms; that these norms may operate on different levels, i.e., some may be more general, some more particular and specialised; that most of these norms are implicit, though they are perfectly capable of being made explicit; and that all these norms guide human beings at various times, though not always in a conscious way, and not always because these norms are being considered as reasons for or against an action, but sometimes because of the push and pull of certain kinds of emotions and desires.

One possible cause for the dominance of the view that social life is governed or regulated by norms is the pleasure to be contrived, by most human minds, including the minds of scholars, in the successful anticipation, understanding and mastery of an order. If we come to believe that social life really is governed or regulated by norms (explicit or implicit), then this makes it feasible (and satisfying) for the scholar to reveal the rules of the game⁵ (much like a scientist might reveal the laws of nature).⁶ It also makes it possible for social science to believe it is making progress, i.e., it raises social science to the status of a science. But all this has its costs, as we shall see.

The pleasure involved in the anticipation, understanding and mastery of order has several stages: the first is the anticipation of order; the second is the recognition of the order that was anticipated (with some possible tweaking, given new observations, if necessary); the third is the mastery of that order (with the new information included, if necessary); and the

⁵ The reference to 'rules of the game' is not coincidental and may bring to mind, for some readers, the notions, coined by Pierre Bourdieu, of habitus being exercised in a certain field. Bourdieu is just as smitten with the idea of social life being governed or regulated by an order or orders of norms as certain analytical writers, from whom he wishes, so adamantly, to be distinguished. See, for example, Bourdieu 1990.

⁶ This is ironic, given that defenders of normativity often see it as the last defence against naturalism. More will be said about this below.

fourth is action in accordance with the guidance provided by the now mastered order. There are many domains that provide safe opportunities for this pleasure to be honed, e.g., more or less formal systems of knowledge, as well as games where luck has less a role to play than skill (such as chess). Even in the realm of aesthetics, we have many examples of the pleasure taken in recognising and reproducing orders characterised by repeated patterns – though, as E.H. Gombrich points out, for the pleasure to count as an aesthetic one, the patterns in question can neither be too easy nor too difficult to decipher (see Gombrich 1979). The scholarship of social normativity, then, is not alone in anticipating an order of norms governing or regulating social life – we all do this, all the time, both in everyday life and in more specialised domains.

As noted above, much has been written about the nature of orders constituted by norms.⁷ Much less, however, has been written about the notion of anticipation itself and its role in maintaining the fluidity and stability of social life. Moreover, if we are able to keep our eye on the issue of how to understand this sense of anticipation, then we may also be less likely to be bewitched by the ontological ambitions of the order that is anticipated. In other words, if we pay attention to the manner in which anticipation works, we may be able to see these orders of allegedly implicit norms not as real, but as projections of our imaginations, which enable the training and exercise of anticipation. Focusing on anticipation may also help us to avoid other dogmas of normativity, such as the view (or assumption) that there is a fact of the matter, unmediated by the evaluation or judgement of persons, as to whether or not a certain action conforms to a rule or norm.

The purpose of this paper, then, is two fold. The first part of the paper attempts to offer a programmatic vision of an account of social normativity centred on the notion of anticipation. It also provides some illustrations of anticipation at work in social life and

⁷ It is no coincidence, for example, that Andrei Marmor uses chess as an analogy in his latest attempt to articulate the social conventions at the foundations of legal systems: see Marmor 2008.

discusses some of the conceptual problems involved in such an account. The second part of the paper attempts to show how such an account of social normativity can avoid some of the problems that bedevil the accounts mentioned above (such as their being unrealistic or hyper-committal). It also attempts to show how such an account avoids what are here referred to as the two dogmas of normativity, namely the reification of orders of rules or norms, and the assumption or belief in there being a fact of the matter, unmediated by judgement, as to when some action conforms (or not, as the case may be) to some rule or norm.

I. Learning and Unlearning to Anticipate

Consider, to begin with, the following scenario: I am washing up dishes after an evening meal at home. My wife is upstairs, and I suddenly believe I may be hearing her voice. Accordingly, I listen in anticipation of intelligible sentences expressed in the English language. As soon as I do so, even the water running from the tap, which I use to wash the dishes, is liable to make noises that I will attempt to interpret as messages from my wife. Indeed, I may be anticipating hearing her voice so much that I will actually hear intelligible sentences moments before I realise that my wife has in fact not said anything.

Consider, second of all, a less fanciful example: I walk off a plane in a country I am not familiar with, and make my way, after proceeding through immigration, to a place that looks like it might sell coffee. Already in anticipating such a place – an anticipation I form thanks to my familiarity with such places in my home country – I begin to look around, distinguishing between likely and unlikely candidate places.

Both of these examples show how often we anticipate. Not always do we anticipate appropriateness; in the first example, for instance, I anticipated intelligibility. Consider now two further examples.

First, consider a variation on the second example above: now I am the barman in the establishment to which someone comes in. I see that that person does not immediately come to the bar, like all persons here usually do. Rather, this person seems at first a bit confused, disoriented, and then sits down at a table. ‘What a strange thing to do!’ I think. ‘Who does that gentleman think he is?’ I ask myself. I search his face, demeanour, clothes and expressions to discern whether he is a rude local or a lost outsider.

Second, consider a perfectly familiar scenario, at least to me: I know there is currently an important chess tournament taking place in Holland. I go to the website where I know I can watch the chess games live. I open the relevant page, and see that the game I am interested in is in progress. Indeed, the game is so well advanced that I can, and do, make an immediate judgement as to who is winning. Arguably, I would not have been able to make that immediate judgement were it not for my anticipation that the game in question is being played in accordance with the rules of chess.

Third, imagine that I have come to the first social gathering of my fellow employees in a country I am not familiar with. As I walk into the room, I look as quickly as I can for clues in the behaviour of people to try to determine what I should do (e.g., how close I should stand to someone, what I should say to someone upon meeting them).

In all of these cases, what is appropriate or inappropriate is tied very intimately with what is anticipated. If we are less familiar with a particular context (as in the third example), we may loosen what we anticipate – we may, in other words, be more willing to change our anticipations, at least with respect to the new environment we may wish to participate in (e.g., we may be less quick in evaluating the appropriateness of some behaviour). If we are more familiar with a certain context (as in the first and second examples), and furthermore confident in our abilities with respect to our participation in that context, and in the absence of cues that something has gone wrong (i.e., that something unusual is happening), we will rely

on what we anticipate to make immediate judgements as to the appropriateness or inappropriateness of something. Our perception that something unusual is happening may on occasion be quick, as in the case of the barman who considers the possibility that the person who sits at the table is an outsider, or less quick (e.g., if, in the second example, we only realise later that the game is a practice session to test if the electronic boards at the venue work).

The above five examples raise several difficulties. First, is anticipation a subjective matter, dependent, say, on how and when and where each of us learns? If so, then what kind of learning is involved? Further, if anticipation is a subjective matter, then how is it that we are able to, at least in certain contexts and often very quickly, share what we anticipate, often with complete strangers? Second, are there contexts in which all of us are anticipating different things – but in which, nevertheless, we are we able to communicate, to get along, and avoid conflict – and if so, is anticipation what explains such co-operation? Third and finally, what comes first: is it the fact of anticipating something that makes a departure from that which is anticipated inappropriate? Or, is it the fact that something is either appropriate or inappropriate in a certain context that makes me anticipate it (or not, as the case may be), and if so, what are the sources of such appropriateness and inappropriateness?

These are some of the conceptual issues at stake in any account of the nature of social normativity that wishes to focus on, or at least begin by focusing on, the role of anticipation (as opposed to focusing on the nature of orders projected by anticipations). It is outside the scope of the paper to examine them all. However, the first of those mentioned above, namely how we learn what we come to anticipate, is of critical importance.

The problem of how we learn what we come to anticipate is so important because it helps bring to light the importance of considering how the normativity of some behaviour emerges (which is also part of the issue identified in the third of the above questions). The

normativity of something, i.e., the capacity for it to be done appropriately or inappropriately, depends on it being possible for that something to be done differently. When things run smoothly in a certain context, we do not even notice that some behaviour requires our attention; we have not yet picked out the behaviour as an object of judgement. However, the moment that something is done in a way that does not conform to what we expect, i.e., when there is a break in our expectations (when our predictive system malfunctions), we then realise that something can be done well or badly (at least if we want to hold on to how things have always been done). The crucial thing, then, is that thinking about learning what we come to anticipate brings to light the emergence of the normativity of something. It is not the case that our social life is rule-governed, for this assumes that all the rules are already there. The rules emerge; they are formed in response to something unusual happening, to something we are not used to.

Focusing on the role of learning also helps to bring into sharp relief the role played by hindsight. Imagine something unusual happens. You begin by trying to understand what has happened, and you do so, inevitably, from your own vantage point and on the basis of your experience. Although you may immediately think that whatever it is that has lead to what has happened is inappropriate (simply because what has happened is unusual), you may, at times, go further and evaluate the consequences of what has happened. If you think the consequences are good, you may try to understand what it was that happened that could be reproduced in the future (of course, you may identify the wrong thing to be reproduced). Similarly, if you evaluate the consequences as bad, then you may try to understand what it is that should be avoid in the future in such contexts (again, there is always the possibility that you will learn the wrong thing, i.e., that what you identified as appropriate to avoid will not help avoid the consequences you want to avoid).

There are two issues that emerge from the above. First, how is it that we are able to evaluate some set of consequences as either good or bad? What makes them good or bad for us? We may call this ability to evaluate goodness or badness of consequences as linked to values we hold dear. In other words, we learn to evaluate things as appropriate (or not) in relation to the goodness (or badness) of certain consequences that we understand as following on from that which we have identified as capable of being done appropriately (or not). However, as noted above, we may be wrong in what we identify as capable of being done appropriately (or not), and thus wrong about what it is that leads to the consequences we want to obtain (or not, as the case may be). When we are wrong in this manner, our ability to predict the consequences from something we have identified as leading to those consequences will be revealed to us as mistaken when what we anticipate will happen does not happen.

The second issue follows on neatly from the first. What is it that helps or makes us realise that we may need to revise what we had a) identified as capable of being done appropriately or not; b) understood to have been the relevant causal story; and c) evaluated as the consequences we took to have been produced by that which was either done appropriately or not? That we do revise such things is a fact – even if we do not do so often. In other words, there is another side to learning what we come to anticipate, which we may, for want of a better expression, call unlearning.

In learning, we come to acquire certain kinds of anticipations. We anticipate things will be done in this or that way. When they are not done in the way we anticipate, we are likely to evaluate that something as inappropriate. As noted above, this will often be an immediate evaluation, made on the spot and without further reflection. We have acquired that ability to come to that immediate evaluation because we are used to things occurring in a certain way or because we have previously learnt that when such and such consequences

obtain (those being consequences we want to avoid), they are linked to something having been done inappropriately.

In unlearning, on the other hand, we may realise that that which we thought was done inappropriately could not be done otherwise; we may, therefore, think that what we previously evaluated as bad consequences, are either the consequences of something else, or, precisely because we come to think they are unavoidable, are not so bad after all (for we realise we need to come to terms with them), or, yet differently, that the consequences we previously thought were bad are actually good for us. Some examples may be of assistance here.

Imagine that I am sitting at a tram stop waiting for a tram. A well-dressed man sits beside me. A bunch of children are playing around him. There is no one else in the vicinity. The children call out to him, but he ignores them. From the way the man and the children behave, I infer that the children are his, i.e., that he is either the father of the children or their caretaker (in short, that he is responsible for them). The children begin to kick around a ball. At times, the ball is kicked very hard and comes dangerously close to me. I happen to have just bought some wine glasses for a dinner my wife and I are hosting that evening. The man next to me does not seem to be paying attention to what the children are doing: he is sitting back with his eyes closed. I feel physically threatened and concerned about the wine glasses I just bought. I decide, therefore, to move away from the tram stop to what I judge to be a safe distance. As I am moving away, I form the judgement that the man is an irresponsible parent, and that the children are unruly.

Now consider an alternative version of the ending of the above. Not wishing to move away, I decide to ask the man beside me whether he could calm his children down a little. He looks at me and says: ‘Yes, I know. I am very sorry about that. We have just come back from

the hospital where their mother died. They are restless, and I do not know what to say to them. I simply cannot take it anymore.’

Now consider yet another alternative vision. I am about to ask the man to calm his children when I see a woman approaching, holding shopping bags, and yelling out to the children to calm down.

In the first scenario, I quickly and easily form judgements about what is appropriate or inappropriate. The person I take to be the father of the children is acting inappropriately because he is not keeping the children calm. It may not be unusual for children not to be calm, but it is inappropriate because what they are doing has a high probability of causing either damage to me (I value my physical safety) or my property (I value my earnings, and I wish to avoid my wife’s disappointment that, I suspect, will ensue should I not return home with the wine glasses). Nothing in this version of the example causes me to doubt my evaluations.

In both the alternative endings, however, something happens that may influence me to change my evaluations. In the first, I may come to change my evaluation of the inappropriateness of the father’s behaviour. I may then also evaluate that any danger to my physical safety or to the wine glasses is trivial compared with the pain and suffering being endured by the man and his children. I may also learn from this incident, such that I may be more careful in the future about making such evaluations about, say, the inappropriateness of supervision or of the unruliness of children. In the second alternative ending, I come to revise who is responsible for the children, so that what I am revising are certain assumptions about how I understood the situation in the first place. Of course, it may happen that I am too occupied by some other thoughts to even notice the woman approaching, or too insensitive to consider the death of the mother to warrant the behaviour of the children.

Learning and unlearning are two sides of the same coin. As I unlearn, I learn; as I learn, I also provide myself with the material that may need to be revised in certain circumstances.

One of the issues raised by the above is whether or not, and if so how, I can do anything to make myself open to unlearn. In other words, it appears as if my capacity to unlearn is dependent on me being open to revise what it is that I have previously learnt such that I had come to anticipate what I did anticipate. Sometimes, of course, the circumstances may be so unusual, i.e., they may fall so starkly and so far outside what I anticipate, that I cannot but help and reflect on the ineffectiveness of my predictive capacities. But at other times, I may need to be a lot more sensitive to the views of others, or to certain features of the environment or to the peculiarities of certain contexts or other ways of life, because it is likely that in the absence of such sensitivity, I would miss my chance to unlearn what I had learnt, and thus to learn more.

We know from both literary theory, folk psychology, the philosophy of action, and other sources, that the way we tend to understand what happens (either in hindsight or in real time) is by identifying a limited number of actors (often just one), a limited number of actions, and straightforward causal relations between the actions of those actors and some set of consequences (see Tilly 2006 and 2008). In other words, we tend to understand things by way of simple stories, and we also tend to pass on this narrative capacity, as well as the stock of stories we have accumulated (in any particular community, whether nation-wide or confined to the family), to future generations. One way, then, to get our grip on the notion of making ourselves more open to revise what we come to anticipate, is to introduce more complex ways of telling stories, e.g., to introduce more actors (or experiment with narrators and multiple voices), more actions, and more complex causation (such as feedback, simultaneous causes, and so on). Contemporary literature is, of course, notoriously

experimental in all the above ways (and in many others). Complex causation also appears in the sciences and some work in the social sciences.

There are other ways we can exercise our sensitivity (or, as I shall refer to it from here, our openness) so as to maximise our capacity to unlearn that which we come to anticipate. We can, for example, be on the lookout for whatever it is that we tend to call natural, true and real. Whatever else may be the functions of such labels, one such function is that of attaching to things as parts of tendencies and strategies to simplify our understanding of the world by making certain features of our understanding impervious to doubt. For example, saying that social life is rule-governed may assist in making the rules said to govern social life impervious to doubt. Stabilising the ways in which we understand the world (and ourselves, by, for example, appealing to human nature) not only assists in making the world (especially the social world) more predictable and more manageable, but it also helps to create or maintain communities who share such ways of understanding. Unsettling that which has been stabilised by becoming dogma, and combining this with creating new causal links, new genealogies, new groupings, new classifications – all this can help relieve us from uncritical reliance on that which we have come to anticipate.

More, however, is needed for the exercise of openness. Very importantly, there must be time and space for unsettling that which is settled, for experiment and revision, for debate and disagreement, and for destruction and creation. Schools and universities are capable of being such places, but they are also places where less and less time tends to be provided for unlearning, and more and more for learning (i.e., for transmitting relatively settled ways of understanding). As university life becomes more specialised, and more bureaucratised, it becomes easier to spend one's life as a scholar burrowing oneself ever deeper into a discipline's ways of seeing and understanding. What is needed, then, are times and spaces where opportunities for disorientation and dislocation are made available and encouraged.

Theorists, and persons, are not, however, usually concerned with either providing opportunities for or exercising openness. They are more likely to be concerned about how persons considered wayward (e.g., sceptics, anarchists, offenders, etc) can be either ironed out of the practice of theory or out of social life or reformed. Both the practice of theory and everyday life tend to be oriented towards disciplining each other by criticising deviations from settled ways of understanding and ways of doing things, i.e., all those things that jeopardise what we have learnt to come to anticipate. Social emotions, such as shame and guilt, accompany the pervasiveness of mutual evaluation and discipline. Other forms of assigning credit and blame, such as prizes or punishments of various kinds, also help support this constant reinforcement of that which has become familiar and stabilised.

What happens during a moment of openness? How is openness experienced? It is difficult to say: the sense of disorientation and dislocation mentioned above is important. The sense of risk and uncertainty about the destination or outcome of one's activity is another feature. Social life does not provide too many opportunities for such experiences. If it did, most of would be concerned; too much disorientation, dislocation, risk and uncertainty tends to be unbearable for human beings. Further, when settled ways of understanding and doing are perceived to be under threat, human beings can react violently to protect that which has become stable and familiar for them. In other words, when opportunities for, and the actual exercise of, openness is thwarted or unavailable, fear of all that which lies outside one's realm of familiarity, control and mastery tends to increase, making violent conflict from perceived threats ever more likely. Of course, some threats are not only perceived, but also actual. Further, even when they are perceived, the instinct to defend what one finds familiar need not always be unjustified. But violent attempts to protect oneself against change can also be signs of an inability or unwillingness to live in an ever more intimate world of many cultures and

religions. Such an inability and such unwillingness are, needless to say, potentially disastrous for contemporary times.

II. Avoiding the Dogmas of Normativity

It is outside the scope of this paper to provide extensive textual evidence for the claim that the dominant view of the nature of social normativity is one where it is either assumed or posited that social life is governed or regulated by norms. Some indication of relevant resources should, however, be mentioned. The view can be found in any number of disciplines, including philosophy, sociology and legal theory. Within philosophy, for example, John Searle's *The Construction of Social Reality* (Searle 1995), is a classic statement of the notion that social reality is composed of constitutive rules, expressed in language, and propped up by collective intentionality.⁸ Within sociology – though the classification is not strict, and the work in question can just as well be identified as philosophical – we have Cristina Bicchieri's view that social norms are 'the grammar of society' because, 'like a collection of linguistic rules that are implicit in a language and define it, social norms are implicit in the operations of a society and make it what it is' (Bicchieri 2006, ix). As Bicchieri continues, 'like a grammar, a system of norms specifies what is acceptable and what is not in a social group', though that system of norms need not be the 'product of human design and planning' (Bicchieri 2006, ix). The notion of a system of norms or rules being conceived on the analogy of grammar has also received endorsement within legal theory, with George Pavlakos' *Our Knowledge of the Law* (Pavlakos 2007), providing a prominent recent example.

Within legal theory, however, the most ambitious statement of the nature of social normativity is due to Neil MacCormick. In his latest magnum opus, *Institutions of Law* (MacCormick 2007), MacCormick argues that whereas law is best conceived of as

⁸ More recently, Searle has extended his approach to argue that political power exists insofar as there is collective acceptance of the status functions that constitute it; see, Searle 2008.

‘institutional normative order’, not all of the normativity of social life is institutionalised. Rather, human beings are norm-users before they are norm-givers. MacCormick uses the example of forming a queue, or the practice of queuing, to extrapolate his notion of norm-users. The practice of forming a queue, he says, ‘occurs very frequently in the everyday experience of contemporary human beings’ (MacCormick 2007, 14). This common experience is orderly, at least to the extent that people ‘take their turn’ (MacCormick 2007, 14). Of course, queuing need not work perfectly: either because ‘there may always be somebody with brass neck enough to jump the queue’ or because ‘it is sometimes all right to go to the head of the line without waiting your turn’ (e.g., in cases of medical emergency) (MacCormick 2007, 14). Nevertheless, even if it may not work perfectly, ‘there is some minimum threshold of compliance below which the practice would be unsustainable’ (MacCormick 2007, 14):

It would be literally impossible to be the only person that ‘takes her turn’ because ‘turns’ require a mutually co-ordinated practice of two or more. When a substantial majority of potential competitors for a certain opportunity fails to acknowledge turn-taking, it amounts to pointless self-abnegation if one or a few act as though most others were ready to take their turn. (MacCormick 2007, 14)

From this it follows, says MacCormick, that ‘turn-taking or queuing is...normative’ (MacCormick 2007, 15):

For where there is a queue for something you want, you ought to take your turn in it, and people who do take their turn do so because in their opinion that is what one ought to do—that is, ought to do in the given context. Such action-guiding ‘ought’ alerts us to the presence of some kind of norms, and to the normative character of the opinions that people hold in such a setting. (MacCormick 2007, 15)

The practice of queuing, then, is normative, but it is also a kind of normative order. ‘People’s positioning in a queue,’ says MacCormick, ‘is ordered, not random’ (MacCormick 2007, 16). But this is not an order that can be studied “‘externally” and reported statistically”; it is a “‘normative order” because, or to the extent that, one can account for it by reference to the fact that actors are guiding what they do by reference to an opinion concerning what they

and others ought to do' (MacCormick 2007, 16). The 'result', says MacCormick, 'is a kind of common action by mutually aware participants' (MacCormick 2007, 16).

Importantly, although MacCormick acknowledges that 'there can be normative order without explicitly formulated norms' (MacCormick 2007, 18), he continues to explain normative order as the functioning of implicit norms. 'People know how to queue,' he says 'and can tell cases of queue-jumping, and protest about them, even if they have never articulated exactly what their governing norm is' (MacCormick 2007, 15). What explains this phenomenon is that 'implicit norms are in fact largely observed and respected, without any other element of supervision, direction or enforcement than that constituted by a pressure of common (not necessarily either universal or identically expressed) normative opinion among those who interact with each other' (MacCormick 2007, 18).

Even though MacCormick posits the possibility of a stratum of social behaviour that need not rely on explicit norms, he nevertheless explains the normativity of social life as an order governed by implicit norms of which persons are mutually aware. In doing so, and like other theorists in this vein, such as Bratman, Lewis, Brandom, but also Postema, Coleman, and Marmor, MacCormick faces the problem of deciding how much awareness (self and mutual) and how much deliberative rationality to assign to persons interacting socially. When the norms in question are explicit, i.e., institutionalised (as in legal settings, such as courtrooms, and thus where judges are the relevant social actors), the actions of persons can be more easily described as guided or motivated by norms.⁹ However, normative order *simpliciter* 'can exist in some cultural and social settings', and in such cases, MacCormick argues that the normativity of such orders is secured 'on the basis simply of mutual belief and inexplicit norms with overlapping mutual understanding and interpretation' (MacCormick

⁹ Of course, the fact that the behaviour of officials can be more easily described in those contexts, does not necessarily mean that such a description is accurate or even adequate. Naturally, this is precisely the battleground upon which the legal realists, critical legal thinkers and others who stress the indeterminacy of explicit (or even implicit) standards in official contexts stake their claims.

2007, 19). Exactly what that ‘mutual belief’ and ‘overlapping mutual understanding and interpretation’ amounts to is not discussed, though MacCormick has traditionally stayed on the side of those favouring a high degree of deliberative rationality and self- and mutual-awareness.¹⁰

MacCormick’s aim in presenting normative order in this manner is to prepare the ground for his definition of law as ‘institutionalised normative order.’ By recognising the existence of normative orders that are not institutionalised, MacCormick is able to bridge the gap between the articulation of norms and the normativity of social life. In other words, it is not that explicit norms (e.g., laws) exist in a vacuum; they themselves emerge from normative orders where they are already implicit. Although normative orders can often remain stable without the need for institutionalisation, the transition to an institutional normative order is sometimes necessary in order to avoid ‘problems of a kind apparently endemic in informal orders’ (MacCormick 2007, 24). Much of the remainder of *Institutions of Law* discusses the content of the tangled thicket of expressly articulated norms, i.e., laws, in contemporary Western capitalist democratic nation states. It also analyses the problems involved in relying on those explicit norms to resolve conflicts.¹¹ It will come as no surprise to legal theorists that many of these problems are associated with the difficulties of foreseeing the infinite number of possible circumstances thrown up by the imagination of life itself.

The point of this brief exegetical excursion is that in all these cases, the normativity of social life is accounted for by assuming or positing the existence of an order governed or regulated by norms. The remaining problems to be chewed over then are the familiar ones of the exact nature of the guidance and motivation by such norms, or, equally, the problems

¹⁰ Chapter four of *Institutions of Law* makes some concessions to those who think there is more to be said for the role of habits in explaining social behaviour. The forthcoming *Practical Reason in Law and Morality* (MacCormick 2009) also introduces Adam Smith’s sentimentalist account into a richer picture of practical reason. On the whole, however, as noted in the text, MacCormick tends to favour a high degree of deliberative rationality and self- and mutual-awareness.

¹¹ MacCormick has analysed these problems more extensively in other work: most famously in *Legal Reasoning and Legal Theory* (MacCormick 1978), which was completely revised in *Rhetoric and the Rule of Law* (MacCormick 2005).

associated with the alleged absence of such guidance and motivation in the perennially troubling cases of psychopaths, anarchists or sceptics.

More often than not, the more the normativity of social life is explained by reference to orders of norms, the more unrealistic are the demands placed on persons, whose successful participation in social life becomes dependent on their ability to be guided by or motivated by those norms. By contrast, and as noted above, by focusing on the notion of anticipation, we can come to see those orders of norms not as real, but as projections that enable the exercise of anticipation. As soon as these orders are not reified, but rather characterised as projections, the problem of accounting for their alleged role in rational deliberation or awareness of persons disappears, or is at least minimised. The first dogma of normativity, then, avoided by an account of social normativity centred on the notion of anticipation, is that of the explanatory reliance on, and indeed reification of (i.e., assigning ontological status to), an order of norms.

It is somewhat ironic that whereas accounts of social normativity (and normativity more generally) are often designed as the last bastion of a defence against the contemporary inroads made by naturalism (see, for example, Brandom 1994), those same accounts tend to prioritise and reify orders of norms, much like those taken with naturalism will prioritise and reify orders of causal laws. Of course, proponents of normativity so conceived fight tooth and nail to avoid characterising the norms in question as causal in character. They argue that these norms are ones that can be broken (unlike causal laws), and that their account of normativity leaves room for human autonomy and thus for the making of mistakes (again, unlike naturalist accounts, which tend to be satisfied only when determinative source of human action are ‘discovered’).¹² But can normativity so conceived really work as a defence against naturalism when it adopts one of naturalism’s most dearly held strategies, i.e., assuming or

¹² Though this distinction may amount to little when both camps begin to describe the norms or causal laws of behaviour as dispositional.

positing the world (and ourselves) as capable of being described by reference to an order of norms or rules? Are not the problems associated with the difficulties faced by judges when they are confronted by the never-ending imagination of life itself not a clue that social life cannot be regulated by norms either already explicit or implicit, but that, instead, rules and norms emerge, and are always articulated by someone, somewhere, and for some purpose? Finally, are not the problems associated with how much deliberative rationality and awareness to demand from persons also a clue as to the inadequacy and inaccuracy of reliance upon orders of norms to account for the normativity of social life?

By focusing on anticipation, including the dynamics of learning and unlearning what we come to anticipate, and thereby not explaining the normativity of social life by reference to orders of norms, theorists can also avoid the second dogma, namely the notion that there is a fact of the matter, unmediated by evaluation or judgement, as to whether behaviour (or at least some behaviour) merely conforms (or not, as the case may be) to some norm. It falls outside the scope of this paper to examine this dogma in detail. Both Kelsen and Hart, as well as Hart's many followers, believe that there is, at least in certain cases, a matter of fact as to whether or not some action, e.g., the action of passing through a red light, is correct or incorrect. This is because both Kelsen and Hart believe that the correctness or incorrectness of an action can be read off a list of normative requirements, i.e., the orders of norms that are said to be regulative of the activity in question.

Hart states his case for the existence of 'mere convergence' many times in *The Concept of Law*. Indeed, Hart creates this domain of 'mere convergence' in order to articulate the conditions under which a rule exists. Famously, he argues against theorists who have characterised the difference between 'mere convergence' and the existence of rules as consisting 'in the fact that deviations from certain types of behaviour will probably meet with hostile reaction, and in the case of legal rules be punished by hostile officials' (Hart 1994,

10). Hart argues that such ‘predictability of punishment’ cannot be accepted ‘as an exhaustive account of what is meant by the statement that a social rule exists’ (Hart 1994, 10) primarily because rules do not merely or even always explain predictability, but are themselves guides – e.g., ‘in punishing’ the judge ‘takes the rule as his *guide* and the breach of the rule as his *reason* and *justification* for punishing the offender’ (Hart 1994, 11; original emphasis). ‘The predictive status of the rule...is irrelevant to’ the judge’s purposes, ‘whereas its status as a guide and justification is essential’ (Hart 1994, 11). It is this distinctive status of rules that Hart seeks to explain in *The Concept of Law*, or, to put it in his own words, it is the ‘further elucidation of the distinction between social rules and *mere convergent habits of behaviour*’ that is ‘crucial for the understanding of law’ (Hart 1994, 12; emphasis added).

The problem with this view is the obvious one of there being such a domain as ‘mere convergence’ or ‘mere habits.’ Hart has to posit such a domain because he wants to create the domain of rules, the orders of which, for him, will, when combined with a certain attitude, constitute a legal system. But is it not clear how there can be a fact of the matter, in the absence of any evaluation or judgement by a person, as to whether some behaviour is a ‘mere habit’ or ‘merely converges’ with some norm. Whether or not someone infringes the norm of crossing an intersection on a red light is never a straightforward matter. It is not the case that any one norm itself observes the behaviour of persons. Rather, it is the case that it is persons who use norms to evaluate conduct (their own or that of others). Many factors may come into play, many of them not foreseen or foreseeable, in evaluating the conduct of a person as an infringement of a norm. As many legal theorists have pointed out, the purposes of the norm have to be taken into account, though those purposes will often themselves not become relevant (or even articulated in quite the relevant manner) until the person making the evaluation accepts some account of what happened as persuasive.

We learn to anticipate certain kinds of behaviour in certain contexts. It is not the case that some action is simply correct or incorrect because it either merely conforms or does not conform to some norm (explicit or implicit). We can so easily become confused when we begin to reify norms, or rely on them too much in explanations of the normativity of social life. In social life, persons constantly make evaluations of themselves and each other. But when we reify orders of norms we can all too easily come to believe that it is norms themselves that determine whether some action is appropriate or inappropriate. A full account of this argument, however, falls outside the scope of this paper. The point in raising it here is that the notion that there is a fact of the matter, unmediated by the evaluation or judgement of persons, as to whether some action is appropriate or inappropriate because it is in accordance (or not) with some norm, results from focusing one's account of the nature of social normativity on an order of norms said to be regulative of social life.

Conclusion

One can speculate as to the causes of the dominance of the view criticised in this paper, i.e., the reliance on an order or orders of norms said to be exhaustive of social normativity. One such cause may be the boost of confidence such a view can provide to a scholar who thereby makes herself believe she can, with the help of a theoretical system, make explicit the implicit norms that are said to constitute the normativity of social life. In other words, by focusing on orders of norms, a theorist can come to believe he can understand and master the 'rules of the game.' It is an exciting prospect and a satisfying feeling, but it is also a delusion.

Another possible cause for the dominance of this view is the manner in which such a view can help support, and perhaps sustain, the objectivity and legitimacy of the practice of evaluating conduct by reference to certain norms posited or already recognised by the person evaluating. That theorists tend to be concerned about the objectivity and legitimacy of norms,

particularly norms which are thought to be necessary for the existence and maintenance of social (as well as moral and legal) order, is visible from the many works that continue to be published on the topic of moral, political and legal obligation. Whether theorists should be so concerned about these problems is a topic for another paper, but let it be said here that it is not obvious why objectivity and legitimacy should be concerns. In other words, the suggestion made here is that objectivity and legitimacy become concerns only when theorists assume or come to think that normativity (social, moral, legal, or political) is dependent upon the status of the relevant norm or set of norms. This problem disappears the moment one realises that normativity is not dependent on some order of norms, but rather on the dynamics of anticipation.

Finally, the dominance of the view in question, and thus also the raising of the orders of norms to the status of reality, may be of importance in the maintenance of certain established authorities, which may in turn help us to resolve conflicts and reach agreement in certain circumstances. For example, some might argue that if we do not believe in the reality of norms (as well as any standards, rules or reasons), we may make it harder for ourselves to accept any one resolution or to reach (at least some defeasible) consensus on controversial issues. Placing in jeopardy the acceptance of conflict resolution mechanisms and of reaching defeasible consensus would most certainly be problematic. However, is it really the case that we would not accept the resolution of conflicts or reach consensus unless we believed in the reality (or, for that matter, the objectivity and legitimacy) of norms? Does not this assumption require some proof, or at least some analysis? Again, that is a question for another paper.

This paper has sought to argue that social normativity, or, in other words, the fluidity and stability of social life, is not dependent on, or even best explained by, the orders of norms alleged to be either explicitly or implicitly governing social life. Rather, accounts of the nature of social normativity would do better to focus on the dynamics of anticipation,

including the processes of learning and unlearning what we come to anticipate, which are intimately linked to what participants in social life regard as appropriate or inappropriate. Social life is not a game any of us can come to control or master. Rather, the best we can hope for is that, for all our ambitions to participate successfully in social life, we will remain open enough, both as individuals and as communities, to revise the tendencies and strategies that we depend on to make sense of what happens to us. The first part of this paper presented those tendencies and strategies of making sense of what happens to us as largely reliant on narrative structures, i.e., on identifying a limited number of actors, actions and simple causal links, though that is not a necessary element of any account of social normativity centred on anticipation. The point is that focusing on the dynamics of anticipation allows us to make room for learning and unlearning; and we will do better, as individuals and communities, to make sure we can and do exercise those capacities, rather than ceaselessly expressing concern over the status of orders of norms that are said to determine the wrongness or rightness of actions.

References

- Bicchieri, C. (2006), *The Grammar of Society: The Nature and Dynamics of Social Norms* (Cambridge: Cambridge University Press).
- Bourdieu, P. (1990), *The Logic of Practice*, translated by R. Nice (Cambridge: Polity Press).
- Brandom, R. (1994), *Making it Explicit: Reasoning, Representing and Discursive Commitment* (Mass.: Harvard University Press).
- Bratman, M. (1999), *Faces of Intention: Selected Essays on Intention and Agency* (Cambridge: Cambridge University Press).
- Bratman, M. (2007), *Structures of Agency* (Oxford: Oxford University Press).
- Coleman, J. (1982), 'Negative and Positive Positivism', 11 *Journal of Legal Studies* 139.
- Coleman, J. (2001), *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (Oxford: Clarendon Press).
- Gigerenzer, G. (2007), *Gut Feelings: Short Cuts to Better Decision Making* (London: Penguin Books).
- Gombrich, E.H. (1979), *The Sense of Order: A Study in the Psychology of Decorative Art* (New York: Cornell University Press).
- Haidt, Jonathon (2001), 'The Emotional Dog and its Rational Tail', 108(4) *Psychological Review* 814-834.

- Hart, H.L.A. (1994), *The Concept of Law*, 2nd edition (Oxford: Clarendon Press).
- Lewis, David (2002), *Convention: A Philosophical Study* (Oxford: Blackwell).
- MacCormick, N. (1978), *Legal Reasoning and Legal Theory* (Oxford: Clarendon Press).
- MacCormick, N. (2005), *Rhetoric and the Rule of Law* (Oxford: Oxford University Press).
- MacCormick, N. (2007), *Institutions of Law: An Essay in Legal Theory* (Oxford: Oxford University Press).
- MacCormick, N. (2007), *Practical Reason in Law and Morality* (Oxford: Oxford University Press).
- Marmor, A. (2008), 'How Law is Like Chess', 12 *Legal Theory* 347-371.
- Pavlakos, G. (2007), *Our Knowledge of the Law: Objectivity and Practice in Legal Theory* (Oxford: Hart Publishing).
- Postema, G. (1982), 'Coordination and Convention at the Foundations of Law', 11 *Journal of Legal Studies* 185.
- Postema, G. (2008), 'Salience Reason', 27(1-2) *Topoi* 41-55.
- Searle, J. (1995), *The Construction of Social Reality* (London: Penguin).
- Searle, J. (2008), 'Social Ontology: Some Basic Principles' in Searle, J. *Philosophy in a New Century*, 26-52 (Cambridge: Cambridge University Press).
- Shapiro, S. (2000), 'Law, Morality and the Guidance of Conduct', 6 *Legal Theory* 127-17.
- Shapiro, S. (2002), 'Laws, Plans and Practical Reason', 8 *Legal Theory* 387.
- Smith, M. (2006), 'The Law as a Social Practice: Are Shared Activities at the Foundations of Law?', 12 *Legal Theory* 265–292
- Tilly, C. (2006), *Why?* (Princeton: Princeton University Press).
- Tilly, C. (2008), *Credit and Blame* (Princeton: Princeton University Press).