
The very idea of legal positivism

Stanley L. Paulson

Introduction

Much in recent discussions on legal positivism suggests that the controversy surrounding the notion turns on the distinction between inclusive and exclusive legal positivism.¹ As a point of departure in distinguishing them, the separation principle is helpful.² At the most general level, the separation principle – as Kenneth Einar Himma neatly puts it – denies ‘that there is necessary overlap’ between the law and morality.³ The separation principle counts, then, as the contradictory of the morality principle, according to which there *is* ‘necessary overlap’ between the law and morality, however this might be explicated.⁴ What the legal positivist’s

1 An excellent discussion, chock full of arguments, is Kenneth Einar Himma, ‘Inclusive Legal Positivism’, in *The Oxford Handbook of Jurisprudence and Legal Philosophy*, ed. Jules Coleman *et al.* (Oxford: Oxford UP, 2002), 125-65. See, too, the detailed statements in Matthew H. Kramer, *In Defense of Legal Positivism* (Oxford: Oxford UP, 1999); Kramer, *Where Law and Morality Meet* (Oxford: Oxford UP, 2004).

2 H.L.A. Hart, ‘Positivism and the Separation of Law and Morals’, *Harvard Law Review*, 71 (1957-8), 593-629, repr. in Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983), 49-87.

3 Himma, ‘Inclusive Legal Positivism’ (n. 1), 125.

4 The claimed ‘necessary overlap’ between the law and morality is under-

denial of the morality principle comes to can be refined, we are told, by appealing to the distinction between inclusive and exclusive legal positivism. Inclusive legal positivism leaves open the possibility that in a given legal system there may or may not be necessary overlap between the law and morality, while exclusive legal positivism recognizes no possibility of necessary overlap.⁵ Again – this time in Matthew H. Kramer’s words – ‘[t]he *separability* of the legal realm and the moral realm, as opposed to their ineluctable *separation*, is the condition [that the inclusive legal positivist] seeks to highlight.’⁶

One can arrive at a broader perspective by opening up the field to cover not only inclusive and exclusive legal positivism but also *non-positivism*, represented by the defence of the morality principle,⁷ according to which, again,

stood in a great variety of ways, as illustrated by prominent examples in the recent literature. See e.g. Gustav Radbruch, ‘Statutory Lawlessness and Supra-Statutory Law’ (first publ. 1946), trans. Bonnie Litschewski Paulson and Stanley L. Paulson, *Oxford Journal of Legal Studies*, 26 (2006), 1-11; John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), 2nd edn. (Oxford: Oxford UP, 2011); Finnis, *Philosophy of Law* (Collected Essays, vol. IV) (Oxford: Oxford UP, 2011); Robert Alexy, *The Argument from Injustice* (first publ. 1992), trans. Bonnie Litschewski Paulson and Stanley L. Paulson (Oxford: Clarendon Press, 2002); Lon L. Fuller, ‘The Forms and Limits of Adjudication’, *Harvard Law Review*, 92 (1978-9), 353-409, repr. (with omissions) in Fuller, *The Principles of Social Order*, ed. Kenneth Winston, 2nd edn. (Oxford: Hart Publishing, 2001), 101-39.

5 See Joseph Raz, *The Authority of Law* (Oxford: Clarendon Press, 1979); Raz, *Ethics in the Public Domain* (Oxford: Clarendon Press, 1994), at 210-27 *et passim*.

6 Kramer, *In Defense of Legal Positivism* (n. 1), 114 (emphasis added).

7 The nomenclature ‘legal non-positivism’ is congenial in suggesting a generic reading of the term, such that legal positivism and legal non-positivism together exhaust the field. That is, on the generic reading ‘legal positivism’ and ‘legal non-positivism’ are correctly read as contradictories. For an illuminating statement of various legal theories, grouped together under the ‘positivist’ and ‘non-positivist’ rubrics, see Alexander P. d’Entrèves, ‘Two Questions about Law’, in *Existenz und Ordnung. Festschrift für Erik*

there is necessary overlap between the law and morality. It is clear that any two of these three views stand in a relation of contrariety.⁸ For example, the cover statements giving expression to non-positivism and inclusive legal positivism cannot both be true, but they might well both be false, and then the cover statement giving expression to exclusive legal positivism would be true.

Say what you will about inclusive *versus* exclusive legal positivism – some defend the distinction, others dismiss inclusive legal positivism as a non-starter.⁹ I want in any case to argue that a more fundamental distinction within the positivist camp lies elsewhere. The distinction I have in mind is that between legal positivism *qua* naturalism and legal positivism without naturalism. Even though, for institutional reasons, legal positivism has largely been discussed in a vacuum, there is a standing presumption that there are ties between legal positivism and ‘positivism writ large’ in the greater philosophical tradition – or, as it would be put in present-day philosophical circles, ties between legal positivism and naturalism. What sorts of ties? In the first two parts of the paper, I offer an answer. In Part One, I draw on John Austin’s legal philosophy and argue that it reflects the greater philosophical rubric, positivism writ large or – my substitution again – naturalism. And, in Part Two of the paper, I address and defend my substitution of naturalism for positivism writ large.

Wolf zum 60. Geburtstag, ed. Thomas Würtenberger *et al.* (Frankfurt: Klostermann, 1962), 309-20, repr. in d’Entrèves, *Natural Law*, 2nd edn. (London: Hutchinson, 1970), 173-84.

8 See Robert Alexy, ‘On the Concept and the Nature of Law’, *Ratio Juris*, 21 (2008), 281-99, at 285-7.

9 For criticism, see e.g. Stefano Bertea, ‘A Critique of Inclusive-Positivism’, *Archiv für Rechts- und Sozialphilosophie*, 93 (2007), 67-81; Scott Shapiro, ‘Law, Morality, and the Guidance of Conduct’, *Legal Theory*, 6 (2000), 127-70. Kramer replies to Shapiro in *Where Law and Morality Meet* (n. 1), at 45-75.

Specifically, in Part One of the paper, two theses are of special interest, with the second thesis following from the first. My first thesis: Austin's naturalism – his reduction, at two junctures, of ostensibly juridico-normative concepts to matters of fact (namely, to habit and to fear) – is, as he contends, sufficient to make out his case on the nature of law. My second thesis, following from the first: If Austin's move is sufficient, then no thesis respecting a non-contingent link between morality and the law can be necessary to the explication of the nature of law. Taken together, these two theses make a point, I should like to think, of genuine significance. That is, if these two theses are indeed correct and if Austin's legal philosophy is representative of traditional legal positivism, then the celebrated separation principle is not doing the lion's share of the work in legal positivist circles after all. Rather, the separation principle is simply a corollary of naturalism, the overriding view.

In Part Two of the paper, I take up the substitution of naturalism for positivism writ large. In first thinking about how to sort out species of legal positivism, I assumed I would be working with positivism writ large as the greater philosophical stage on which legal positivism finds its place. A fair bit of reading disabused me of this notion. To be sure, to speak of positivism writ large might well be appropriate if I were directing my remarks to developments in philosophy in, say, the mid-nineteenth century. At that point in time, the older Hegelian consensus in Europe had been altogether displaced by scientific positivism. I am thinking, for example, of Hermann von Helmholtz, known for his pioneering work in physics and physiology, as well as for his efforts in recasting Kant's theory of knowledge in a modern, that is, positivistic idiom.¹⁰ All of this in the mid-

10 See e.g. Hermann von Helmholtz, 'Über das Sehen des Menschen' (lecture

nineteenth century.¹¹ By contrast, ‘positivism’ is a term of abuse in philosophical circles today. Jürgen Habermas writes that positivism in philosophy proceeds from ‘scientific presuppositions’,¹² and Bernard Williams writes that ‘to fall back on positivism’ with an eye to avoiding interpretation is ‘an offence against truthfulness’.¹³

In our time, the view that continues to enjoy a great reception in philosophical circles is naturalism. Willard Van Orman Quine, the ‘father of contemporary naturalism’ as one writer calls him,¹⁴ understands naturalism as the appeal to the sciences. Naturalism, Quine tells us, assimilates epistemology to ‘empirical psychology’.¹⁵ Quine’s view is not, however, the only view of naturalism. Naturalism is greater than Quine, thanks not least of all to the extraordinary role he played in begetting it in its contemporary form. Quine’s view counts today as one prominent characterization

in Königsberg 1855), in Helmholtz, *Vorträge und Reden*, 4th printing, 2 vols. (Braunschweig: Friedrich Vieweg, 1896), vol.1, 85-117.

- 11 Helmut Holzhey offers a three-fold characterization of philosophical positivism at mid-century: first, knowledge stemming from the sciences is privileged, while the philosopher’s claims respecting knowledge are disputed, second, knowledge of reality (*Wirklichkeitserkenntnis*) is restricted to what can be drawn from sense experience, and, third, thought is understood solely in terms of the ‘subjective’ function of interpretation along with the ordering of the elements of sense experience. Helmut Holzhey, ‘Der Neukantianismus’, in Helmut Holzhey and Wolfgang Rödel, *Die Philosophie des ausgehenden 19. und des 20. Jahrhunderts [Teil] 2. Neukantianismus, Idealismus, Realismus, Phänomenologie* (Munich: C. H. Beck, 2004), 30.
- 12 Jürgen Habermas, *Knowledge and Human Interests* (first publ. 1968), trans. Jeremy J. Shapiro (Boston: Beacon Press, 1971), 88.
- 13 Bernard Williams, *Truth and Truthfulness* (Princeton: Princeton UP, 2002), 12.
- 14 Penelope Maddy, *Second Philosophy. A Naturalistic Method* (Oxford: Oxford UP, 2007), 4. A single important figure in contemporary legal philosophy writes *expressis verbis* within the framework of Quinean naturalism, namely: Brian Leiter, *Naturalizing Jurisprudence* (Oxford: Oxford UP, 2007).
- 15 See n. 31 below.

of naturalism, and David Hume's view counts as another. I return to Hume in Part Two of the paper.

Finally, in Part Three of the paper, I turn to legal positivism without naturalism. Here the overriding figure is Hans Kelsen. While Kelsen is of course defending the separation principle, his position represents a wholesale rejection of naturalism, which, he insists, is wrong-headed. Thus, the idea that the separation principle is but a corollary of naturalism can scarcely be attributed to him.

My greater thesis, then, is that Austin and Kelsen represent two poles within legal positivism, namely, legal positivism *qua* naturalism and legal positivism without naturalism. The position represented by Hans Kelsen's colossus¹⁶ is, I think, peculiar to him. By contrast, any of a host of other figures in the jurisprudential tradition can be substituted for John Austin, a point to which I return.

1. John Austin

It is no accident that Austin's statement of the separation principle is found in a footnote to the text of Lecture V – a fairly lengthy footnote, to be sure, where Austin carefully sets the stage for a reply to William Blackstone:

Sir William Blackstone...says in his 'Commentaries', that the laws of God are superior in obligation to all other laws...that human laws are of no validity if contrary to them.... Now, he *may* mean that all human laws ought to conform to the Divine laws. If this be his meaning, I assent to it without hesitation.... But the meaning of this passage of Blackstone, if it has a meaning, seems rather to be this: that no human law which conflicts with the Divine law is obligatory or binding; in other words, that no human law

16 The editor of the *Hans Kelsen Werke* (Tübingen: Mohr Siebeck, 2007 ff.), Matthias Jestaedt, estimates that Kelsen's published writings run to 17,500 pages.

which conflicts with the Divine law *is a law*.... Now, to say that human laws which conflict with the Divine law are not binding, that is to say, are not laws, is to talk stark nonsense.¹⁷

Relegating to a footnote what we, influenced by H. L. A. Hart, are accustomed to calling the separation principle suggests that the real thrust of Austin's position lies elsewhere. As indeed it does. Austin, in Lecture VI, devotes a good bit of attention to the straightforward reduction of the doctrine of sovereignty to concatenations of fact. His lines on habitual obedience are familiar:

The superior which is styled sovereignty...is distinguished... by the following marks or characters: -1. The *bulk* of the given society are in a *habit* of obedience or submission to a *determinate* and *common* superior...[and] 2. That certain individual, or that certain body of individuals, is *not* in a habit of obedience to a determinate human superior.¹⁸

And, lest the significance of the appeal to habit be missed, Austin repeats the point a number of times in Lecture VI.¹⁹

With this scheme of Austin's, we have the makings of the central argument I wish to attribute to him. If his conceptual repertoire is traceable back to the doctrine of sovereignty and if sovereignty is reducible in turn to concatenations of fact, then, Austin is arguing, this is *sufficient* to explain the ostensibly normative material of the

17 John Austin, *Lectures on Jurisprudence* (first publ. 1863), 5th edn., 2 vols., ed. Robert Campbell (London: John Murray, 1885), vol. 1, Lecture V (at pp. 214-15) (emphasis in original), also in John Austin, *The Province of Jurisprudence Determined* (first publ. 1832), ed. H. L. A. Hart (London: Weidenfeld and Nicolson, 1954), Lecture V (at pp. 184-5) (emphasis in original).

18 Austin, *Lectures* (n. 17), Lecture VI (at p. 220) (emphasis in original); Austin, *Province* (n. 17), Lecture VI (at pp. 193-4).

19 See Austin, *Lectures* (n. 17), Lecture VI (at e.g. pp. 222, 223-4, 227); Austin, *Province* (n. 17), Lecture VI (at e.g. pp. 195, 198-9, 202-3).

law. And if this reduction of sovereignty to fact is indeed sufficient, then, by hypothesis, no appeal to morality can be necessary. In other words, Austin has in effect built right into his reduction the thesis that there cannot be 'necessary overlap' between the law and morality. And there is no reason for the proponent of such a theory to pay special attention to a separation principle, which has no standing as an independent doctrine in the theory.

Before continuing with Austin, I want to underscore the general import of what I am drawing from his theory. Given the prominence of the separation principle as the underlying notion in the myriad Anglo-American defences of legal positivism over the past half century, its absence – with a single important exception – from the lively European debate over legal positivism a hundred years ago strikes one, at any rate on first glance, as puzzling.²⁰ The straightforward explanation, however, is this. A host of *fin de siècle* European legal theorists, roughly identifiable as positivists, made the very sort of move that Austin made. That is, they claimed that facts of nature are sufficient to explain ostensibly juridico-normative material, and since morality cannot, then, be necessary, they had no occasion to talk about it. In a word, their move was naturalistic.

A good illustration is found in the work of Georg Jellinek, the most influential figure in public law theory (*Staatsrechtslehre*) on the European Continent a hundred years ago, translated in his own day into major indo-European languages. In some circles, it is presumed that Jellinek is a 'normativist', a 'Neokantian'. A closer look at the texts, however, shows clearly that Jellinek's celebrated doctrine, 'the normative force of the factual', reduces without

20 The exception to the rule is Hans Kelsen, and I take up his position in Part Three.

remainder to matters physiological or psychological. And the reduction is one of Jellinek's own making. As he puts it, the 'normative import' of the factual counts simply as our physiological or psychological tendency to reproduce, in our minds, that to which we have become accustomed.²¹ This is closer to Hume than to anything in Neokantianism.

Again, my thesis is that Austinian naturalism – the move from the ostensibly normative material of the law to concatenations of fact – is standard fare for legal positivists generally. While my thesis may appear to be obvious – and I would be pleased if it did – it is hardly the received opinion. For example, in his celebrated paper 'Positivism and the Separation of Law and Morals'²² and again in *The Concept of Law*,²³ Hart sets out five different doctrines under the rubric of legal positivism – command, separation, analysis, judicial decisions as logical deductions, and non-cognitivism. He attributes the first three of these to Jeremy Bentham and Austin. The doctrine that I claim is fundamental – naturalism – does not turn up on Hart's list, and it is not implied by anything that does turn up there.

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- 21 Jellinek writes: 'To seek the basis of the normative force of the factual in its conscious or unconscious reasonableness would be utterly mistaken. The factual can be rationalized later, but its normative import lies in an underived property of our nature, on the strength of which something we are already accustomed to is physiologically and psychologically easier to reproduce than something new.' Georg Jellinek, *Allgemeine Staatslehre*, 2nd edn. (Berlin: O. Häring, 1905), 330, 3rd edn. (1914), 338. The reduction to fact, in Jellinek's work at this juncture, is captured effectively by Michael Stolleis, *Public Law in Germany 1800-1914* (first publ. 1992), trans. Pamela Biel (New York and Oxford: Berghahn, 2001), 442-3.
- 22 See Hart, 'Positivism and the Separation of Law and Morals' (n. 2), 601-2 at n. 25, repr. in Hart, *Essays in Jurisprudence and Philosophy* (n. 2), 57-8 at n. 25.
- 23 See H. L. A. Hart, *The Concept of Law*, 2nd edn. (Oxford: Clarendon Press, 1994), 302, at note pertaining to p. 185.

Back to Austin, as promised. I have spoken of tracing the whole of Austin's conceptual repertoire to the doctrine of sovereignty and of reducing sovereignty in turn to concatenations of fact. A comparable argument can be generated by looking to Austin's command doctrine, implicit in the doctrine of sovereignty.²⁴ The doctrine of command, on one reading of Austin's treatise, can be understood in terms of three components: the commander's intention that a party act (or forbear from acting) in a particular way, the commander's expression of this intention to the party, and – central to the doctrine – the commander's power to impose a sanction should the commandee fail to comply with the directive.²⁵ The power to impose a sanction is not, however, to be understood as a property of the commander, for a commander, characterized in the Austinian theory in terms of the power to impose sanctions, might not have such power over the particular party to whom he issues his directive, as in the case of a sovereign's putative command to another sovereign. The power to impose a sanction is to be understood, in other words, as a relation between commander and commandee or, more generally, between superior and inferior.²⁶ Austin gives expression to the relation – we might call it the 'power relation' – when he writes: "The term superiority signifies might: the power of affecting others with evil or pain, and of forcing them, through *fear* of that evil, to fashion their conduct to one's wishes".²⁷

24 See Austin, *Lectures* (n. 17), Lecture V (e.g. at p. 177); Austin, *Province* (n. 17), Lecture V (e.g. at p. 132).

25 Austin, *Lectures* (n. 17), Lecture I (at p. 91, and see p. 89); Austin, *Province* (n. 17), Lecture I (at p. 17 and see pp. 13-14).

26 Austin, *Lectures* (n. 17), Lecture I (at pp. 96-7); Austin, *Province* (n. 17), Lecture I (at pp. 24-5).

27 Austin, *Lectures* (n. 17), Lecture I (at p. 96) (emphasis added) (see also p. 90:

Fear, a brute fact, is the operative notion here, and the argument proceeds just as before. If Austin's 'correlative terms' of obligation and sanction are traceable back to their correlative, the command,²⁸ and if the command is reducible in turn to concatenations of fact – in particular, to the commandee's fear – then, so Austin, this move is sufficient to explain the ostensibly normative material of the law.²⁹ And if this move is sufficient, then no appeal to morality can be necessary.

It is useful to dwell for just a moment on the concept of fear. Just as no one would claim that sexual desire is acquired through reasoning or is the product of experience, so likewise for fear. Notwithstanding the fact that experience may shape our responses on both fronts, the phenomena themselves have a basis independent of experience.³⁰ Hume speaks of natural instinct. This mention of Hume brings me to Part Two, the substitution of naturalism for positivism writ large.

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- 'that which is not feared is not apprehended as an evil'); Austin, *Province* (n. 19), Lecture I (at p. 24) (emphasis added) (see also p. 16).
- 28 On 'correlativity', see Austin, *Lectures* (n. 17), Lecture I (at pp. 89, 96, see also pp. 91-2); Austin, *Province* (n. 17), Lecture I (at pp. 14, 24, see also pp. 17-18).
- 29 As noted by Hart, Austin also has a second interpretation of the command. It turns on his definition of obligation 'as the "chance or likelihood" that one who has been commanded to do or abstain from doing something would suffer some evil in the event of disobedience'. See H. L. A. Hart, 'Analytical Jurisprudence in Mid-Twentieth Century: A Reply to Professor Bodenheimer', *University of Pennsylvania Law Review*, 105 (1956-7), 953-75, at 965; H. L. A. Hart, 'Legal and Moral Obligation', in *Essays in Moral Philosophy*, ed. A. I. Melden (Seattle: University of Washington Press, 1958), 82-107, at 95-9; Hart, *The Concept of Law* (n. 23), 282 note at (c), 290 note pertaining to p. 83. For Austin's own text on 'chance or likelihood', see Austin, *Lectures* (n. 17), Lecture I (at p. 90); Austin, *Province* (n. 17), Lecture I (at p. 16).
- 30 I owe the example to H. O. Mounce, *Hume's Naturalism* (London and New York: Routledge, 1999), 62.

2. The substitution of naturalism for positivism writ large

I remarked in the Introduction that Quine, in the name of naturalism, would have us appealing to the sciences. Epistemology becomes ‘empirical psychology’.³¹ Although there are great differences between Quine’s naturalistic enterprise and David Hume’s, there are similarities, too. For example, many regard Hume’s theory of human nature in Book III of *A Treatise on Human Nature* as a study in moral psychology. As one prominent interpreter of Hume puts it, ‘[t]o a large extent, Hume’s theory of human nature is not, in our terms, philosophical, but psychological’.³² Hume’s famous – some will say ‘notorious’ – dictum that ‘reason is, and ought only to be the slave of the passions’,³³ is most helpfully seen as his response to the elevated role played by reason in the rationalist philosophies of the Cartesian tradition.³⁴ Hume’s tack is diametrically opposed. He looks inward:

Take any action allow’d to be vicious: Wilful murder, for instance. Examine it in all lights, and see if you can find that matter of fact,

31 ‘[T]he epistemological question [is] a question within science: [how humans] have managed to arrive at science from such limited information. Our scientific epistemologist pursues this inquiry... Evolution and natural selection will doubtless figure in this account, and he will feel free to apply physics if he sees a way.’ W. V. O. Quine, ‘Five Milestones of Empiricism’ (lecture of 1975), in Quine, *Theories and Things* (Cambridge, Mass.: Harvard UP, 1981), 67-72, at 72.

32 Terence Penelhum, ‘Hume’s Moral Psychology’, in *Cambridge Companion to Hume*, ed. David Fate Norton (Cambridge: Cambridge UP, 1993), 117-49, at 119. Penelhum is not alone. See also Jerry A. Fodor, *Hume Variations* (Oxford: Clarendon Press, 2003), at 1-27 *et passim*, who suggests that Hume’s naturalism anticipates current work in cognitive science.

33 David Hume, *A Treatise on Human Nature* (first publ. 1739-40), 2nd edn., ed. P.H. Niddich (Oxford: Clarendon Press, 1978), II.iii.3. (at p. 415).

34 See Penelhum, ‘Hume’s Moral Psychology’ (n. 32), 119-20, on which I have drawn here.

or real existence, which you call *vice*. In which-ever way you take it, you find only certain passions, motives, volitions and thoughts. There is no other matter of fact in the case. The vice entirely escapes you, as long as you consider the object. You never can find it, till you turn your reflexion into your own breast, and find a sentiment of disapprobation, which arises in you, towards this action. Here is a matter of fact; but 'tis the object of feeling, not of reason. It lies in yourself, not in the object. So that when you pronounce any action or character to be vicious, you mean nothing, but that from the constitution of your nature you have a feeling or sentiment of blame from the contemplation of it.³⁵

These notions – feeling, sentiment, instinct, the constitution of our nature – have one looking inward. And this, Hume would have us believe, is the source of our psychological explanations.

This view of 'Hume the naturalist' comes as a surprise to those who take their cues from a textbook account of Hume, which has him following his empiricist predecessors, Locke and Berkeley, while recognizing – and making the most of – the scepticism to which their view inevitably leads. The argument on behalf of scepticism is familiar. Empiricism has its source in sense experience. Beliefs that stem from sense experience do not lend themselves to justification. A justification requires an appeal to something independent, but there is no way, so to speak, of stepping outside sense experience in order to appeal to something independent of it. The result is scepticism.

This point, in explicit criticism of Hume's scepticism, stems, *inter alia*, from the philosopher Thomas Reid. Defending his own view, Reid argues that sensory experience is not '*what we perceive*' but rather that '*whereby we perceive*'.³⁶ Norman Kemp Smith – in path-breaking papers

35 Hume, *Treatise* (n. 35), III.i.1. (at pp. 468-9) (emphasis in original).

36 See *The Works of Thomas Reid*, 8th edn., 2 vols., ed. William Hamilton (Edin-

a hundred years ago and in an extraordinary treatise on Hume some seventy years ago – stands Reid’s interpretation of Hume on its head.³⁷ In Kemp Smith’s splendid words: Hume ‘is depicted as having done no more than deliver his successors from a bondage to which he himself remained subject. A strangely paradoxical verdict!’³⁸ Hume, on Kemp Smith’s interpretation, was keenly aware of the scepticism inherent in traditional empiricism and sought to provide an alternative. The alternative, naturalism, is found in Book III of Hume’s *Treatise*. Indeed, Kemp Smith goes on, the best way to read Hume is to begin with Book III of the *Treatise* before turning to Book I, whose scepticism will then properly be seen as qualified by Hume’s naturalism.

3. Positivism without naturalism. The case of Hans Kelsen

Where legal positivism *qua* naturalism is the point of departure, Hans Kelsen is the spoiler. Other legal positivists count as naturalists, arguing that since the facts are sufficient to explain ostensibly normative material, morality cannot be necessary. Kelsen offers no such argument, for he, unlike all the others, is not arguing that ostensibly juridico-normative material is reducible to fact. Kelsen defends what he terms a normative legal philosophy.

burgh: James Thin, 1895), vol. 1, pp. 108, 112, 117, 121 *et passim*. The quotation in the text is Mounce’s tidy summary statement, in Mounce, *Hume’s Naturalism* (n. 30), 1, 54. Reid’s philosophy is presented in rich detail in Keith Lehrer, *Thomas Reid* (London and New York: Routledge, 1989).

37 See, in particular, Norman Kemp Smith, *The Philosophy of David Hume* (London: Macmillan, 1941). The early papers are ‘The Naturalism of Hume (I.)’, *Mind*, 14 (1905), 149-73, and ‘The Naturalism of Hume (II.)’, *ibid.* pp. 335-47.

38 Kemp Smith, *The Philosophy of David Hume* (n. 37), 3.

Normativity,³⁹ Kelsen tells us, is his alternative to other approaches within legal philosophy, but – the rub – there has never been any agreement on what he means here. The interpretations of Kelsen’s idea of normativity run the gamut, from a counter-factual interpretation of normativity⁴⁰ to a ‘justified normativity’ thesis. The justified normativity thesis is far and away the most ambitious reading of normativity in Kelsen’s legal philosophy. It has been attributed to Kelsen in different forms with different sorts of argument by no fewer than four leading figures – Robert Alexy, Carlos Santiago Nino, Joseph Raz, and, a bit earlier, by Alf Ross –⁴¹ with, so far as I can tell, each writer developing his own case independently of the others. I confine myself here to

39 Normativity, for many purposes a concept in its own right, has enjoyed a good bit of attention in recent philosophy. See e.g. Joseph Raz, ‘Explaining Normativity: On Rationality and the Justification of Reason’, *Ratio* 12 (N.S.) (1999), 354-379, repr. in Raz, *Engaging Reason* (Oxford: Oxford UP, 1999), 67-89. See also Alan Millar, *Understanding People. Normativity and Rationalizing Explanation* (Oxford: Clarendon Press, 2004); John Skorupski, *The Domain of Reasons* (Oxford: Oxford UP, 2010).

40 In an overview of Kelsen’s work, Robert Walter writes that coercive systems, legal systems in particular, are to be interpreted ‘as if they were normative’. Walter, ‘Der gegenwärtige Stand der Reinen Rechtslehre’, *Rechtstheorie*, 1 (1970), 69-95, at 70 (emphasis in original).

41 See Alexy, *The Argument from Injustice* (n. 4), at 95-123; Carlos Santiago Nino, ‘Some Confusions surrounding Kelsen’s Concept of Validity’, *Archiv für Rechts- und Sozialphilosophie*, 64 (1978), 357-77, at 357-65, repr. in *Normativity and Norms. Critical Perspectives on Kelsenian Themes* [hereafter: *NN*], ed. Stanley L. Paulson and Bonnie Litschewski Paulson (Oxford: Clarendon Press, 1998), 253-61; Nino, *La validez del derecho* (Buenos Aires: Editorial Astrea, 1985), at 7-40 *et passim*; Joseph Raz, ‘Kelsen’s Theory of the Basic Norm’, *American Journal of Jurisprudence*, 19 (1974), 94-111, repr. in *NN* (this note, above), 47-67, and in Raz, *The Authority of Law*, 2nd edn. (Oxford: Oxford UP, 2009) [hereafter: *AL*], 122-45; Alf Ross, ‘Validity and the Conflict between Legal Positivism and Natural Law’, *Revista Jurídica de Buenos Aires*, 4 (1961), 46-93 (bilingual printing), at 82, and see generally at 78-82, repr. in *NN* (this note, above) 147-63, at 160, and see generally at 159-61.

Raz, whose statement is in some respects the most extreme of the four. Raz begins by contrasting Hart's position with Kelsen's. H. L. A. Hart is a proponent of *social normativity*, understanding '[t]he normativity of the law and the obligation to obey it [as] distinct notions.' An altogether different understanding, Raz continues, is evident in the work of one who recognizes 'only the conception of *justified normativity*',⁴² namely, Hans Kelsen. In characterizing justified normativity, Raz writes: "[T]o judge the law as normative is to judge it to be just and to admit that it ought to be obeyed. The concepts of the normativity of the law and of the obligation to obey it are analytically tied together. Kelsen, therefore, regards the law as valid, that is, normative, only if one ought to obey it".⁴³

Of course Raz sees the paradox in attributing justified normativity to Kelsen, a thesis that places Kelsen far closer to natural law theory than to anything found in traditional or naturalistic legal positivism. Indeed, Raz invites attention to the paradox, writing that although 'Kelsen rejects natural law theories, he consistently uses the natural law concept of normativity, i.e. the concept of justified normativity.'⁴⁴

Interpreters of a philosopher will of course pursue what they deem to be the most promising reading of the philosopher's work. So far, so good, but with a caveat. Merit lies in pursuing what the philosopher actually wrote rather than in imposing on the philosopher's text an interpretation 'from without', so to speak. As Paul W. Franks puts it in his book on the post-Kantians, '[i]f we assume that historical

42 Raz, 'Kelsen's Theory of the Basic Norm' (n. 41), 105, in *NN* (n. 41), 60, in Raz, *AL* (n. 41), 137.

43 *Ibid.*

44 Raz, 'Kelsen's Theory of the Basic Norm' (n. 41), 110-11, repr. *NN* (n. 41), 67, and in Raz, *AL* (n. 41), 144.

figures are asking or answering our questions', we 'run the risk of both distorting what they say and missing an opportunity to learn from them, whether positively or negatively.'⁴⁵

Raz, like Alexy, Nino, and Ross, can reply that he is drawing an interpretation from the text, not imposing an interpretation on it. The reply is a good one as far as it goes, but it gives rise to the question of just how representative the passages selected by Raz and the others are. As I have argued at length elsewhere, the passages selected are in fact not representative of Kelsen's work. And then the point made by Franks stands: We learn best from historical figures when we address the questions they themselves were asking and answering.

What, then, takes the place of justified normativity? My answer: Kelsen's project over many decades was, above all, an ambitious and far-reaching attempt, first, to show that naturalism in *fin de siècle* legal science is mistaken, and, second, to develop the rudiments of an alternative theory that would secure the autonomy (*Eigengesetzlichkeit*) of the law and, by the same token, the purity (*Reinheit*) of legal science. And this takes us full circle back to the question of normativity. Kelsen's alternative to naturalism yields a normativity thesis, and this should come as no surprise. He has to be committed to something that is normative in character lest he have no alternative to naturalism after all. In sharp contrast to the

45 Paul W. Franks, *All or Nothing. Systematicity, Transcendental Arguments, and Skepticism in German Idealism* (Cambridge, Mass., and London: Harvard UP, 2005), 5. Of course this idea is hardly new; I quote from Franks because his statement of the matter is unusually perspicuous. To the same effect, see John Rawls, *Lectures on the History of Political Philosophy* (Cambridge, Mass.: Harvard UP, 2007), at 251: '[I]n studying the works of the leading writers in the philosophical tradition, one guiding precept is to identify correctly the problems they were facing, and to understand how they viewed them and what questions they were asking.'

thesis of justified normativity, however, Kelsen's normativity thesis is part and parcel of his greater effort to develop an alternative to naturalism and thereby to lend respectability to legal science, underscoring its nomological dimension. I call Kelsen's thesis the *nomological* normativity thesis. As Kelsen understands the thesis, its import is underscored by a 'law-like', necessary or nomological connection at the very core of his legal philosophy. In what follows, my primary concern is to invite attention to this connection.

Kelsen's alternative to naturalism is captured in my reconstruction by the concept of peripheral imputation. 'To impute' (Latin *imputare*) means to bring into reckoning, to ascribe, to attribute. Kelsen's German verb is '*zurechnen*', and 'to impute' is a reliable translation, not least of all in light of Kelsen's own occasional use of the loan-word '*imputieren*' where '*zurechnen*' might have been expected.⁴⁶

Kelsen has two doctrines of imputation. The first of these, central imputation, is by and large a reflection of the philosophical tradition, though Kelsen's use of central imputation is anything but traditional.⁴⁷ The second doctrine,

46 As Kelsen writes: 'It would be a serious misunderstanding if one wanted somehow to impute [*imputieren*] to these observations [on the legal authority of administrative agencies] the significance of a political mandate for the greatest possible restriction of the state's administrative activity.' Kelsen, *Hauptprobleme der Staatsrechtslehre* (Tübingen: J.C.B. Mohr, 1911), 503, and see at 138, 194, 209, repr. in *Hans Kelsen Werke*, ed. Matthias Jestaedt, vol. 2 (Tübingen: Mohr Siebeck, 2008), 650, and see at 244, 306, 322. See also Hans Kelsen, *Über Grenzen zwischen juristischer und soziologischer Methode* (Tübingen: J. C. B. Mohr, 1911), at 44.

47 Central imputation serves in Kelsen's very early work as an escape hatch from naturalism and psychologism. Later he turns to the basic norm, already evident in *Das Problem der Souveränität und die Theorie des Völkerrechts* (Tübingen: J.C.B. Mohr, 1920), and to a Neokantian transcendental argument, and these steps represent his effort to replace central imputation with something more satisfactory. To be sure, central imputation survives elsewhere in Kelsen's work. His most extensive discussion of both imputa-

peripheral imputation, is peculiar to Kelsen. Both doctrines purport to offer an alternative to causal explanation, and both, for this reason, are of unusual significance in Kelsen's legal philosophy – central imputation in Kelsen's very early work, and peripheral imputation thereafter. I shall confine my discussion to the latter, peripheral imputation, for this is the doctrine that underlies Kelsen's nomological normativity thesis.

Kelsen tells us that peripheral imputation links 'material facts' (*Tatbestände*). As he puts it in the *Allgemeine Staatslehre*, in what counts as an early statement of the doctrine: '[P]eripheral imputation always leads from one material fact to nothing other than another material fact.'⁴⁸ A comparable statement is found in the first edition of the *Reine Rechtslehre*. At the end of a section devoted to the doctrine of central imputation, Kelsen contrasts that doctrine with peripheral imputation. Central imputation, he writes,

is an entirely different operation from the peripheral imputation mentioned earlier, where a material fact is connected...to another material fact within the system, that is, where two material facts are linked together in the reconstructed legal norm.⁴⁹

Two questions arise. What exactly would Kelsen have us understand by material facts? And how might peripheral imputation, linking material facts, be formulated? As to the first question, Kelsen answers in terms of 'legal condition'

tion doctrines – central and peripheral – is found in a lengthy essay: Kelsen, 'Unrecht und Unrechtsfolge im Völkerrecht', *Zeitschrift für öffentliches Recht*, 12 (1932), 481-608, see at §§ 1-2 (pp. 481-504), § 5 (pp. 525-9), § 7 (pp. 537-44).

48 Hans Kelsen, *Allgemeine Staatslehre* (Berlin: Julius Springer, 1925), § 12 (d) (p. 65).

49 Hans Kelsen, *Introduction to the Problems of Legal Theory*, a translation of the first edition of Kelsen's *Reine Rechtslehre* (1934) by Bonnie Litschewski Paulson and Stanley L. Paulson (Oxford: Clarendon Press, 1992) [hereafter: *LT*], § 25 (d) (pp. 50-1).

and 'legal consequence', more precisely, in terms of the state of affairs counting as the legal condition in a particular instance and, in Hohfeldian parlance, the legal position that emerges as its legal consequence. This seems to be an odd fit, for we do not ordinarily think of a legal consequence as a material fact (*Tatbestand*). Rather, in a hypothetically formulated legal norm, a material fact falling within the scope of the antecedent clause of the norm triggers the legal consequence, establishing, in Kelsen's doctrine, the legal position of liability that counts as the legal consequence.

It is, however, material facts, thus understood, that Kelsen brings together in introducing peripheral imputation. He writes that '[i]f the mode of linking *material facts* is causality in the one case, it is imputation in the other.'⁵⁰ What is more, he uses 'legal condition' and 'legal consequence' alongside 'cause' and 'effect' as the respective *relata* of these very same ordering principles or relations, imputation and causality.⁵¹ That is, he understands their *relata* as species of the genus 'material fact'.

To shed light on Kelsen's expansion of the notion of material facts as the *relata* of peripheral imputation, it is perhaps helpful to point to his effort to provide as close a parallel as possible to the principle of causality. Since he assumes material facts to be indisputably the *relata* in the case of causality, so likewise, he is arguing, material facts serve as the *relata* in the case of peripheral imputation. Kelsen wishes to underscore a law-like, necessary or nomological relation in the law running parallel to the law-like, necessary or nomological relation manifest in causality, and his development of this parallel is a central part of his effort to reply to naturalism and, by the same token, to turn the legal

50 Kelsen, *LT* (n. 49), § 11 (b) (p. 23) (emphasis added).

51 See Kelsen, *LT* (n. 49), § 11 (b) (at pp. 23-4).

science of his day into something scientifically respectable.⁵² If it can be shown that aspects of the fundamental ordering principle of the natural sciences are reflected *per analogiam* in the fundamental ordering principle of legal science, then, so Kelsen, the parallel will indeed enhance the status of legal science qua science.⁵³

I turn now to the second question, which speaks to the formulation of peripheral imputation. One proposal for a formulation might read (with an 'and if ...' clause inserted between parentheses as a shorthand reference to the other conditions associated with a legal proceeding):

Formulation I: If an act of a certain type takes place (and if), then the actor or a surrogate⁵⁴ is liable for that act.

This formulation is ruled out, however, by Kelsen's stipulation that peripheral imputation links material facts, where the latter material fact is understood to be the liability imputed to the legal act. To adopt formulation I as a representation of peripheral imputation would be to confuse peripheral imputation with central imputation.

The alternative is a 'subjectless' counterpart to formulation I, that is to say, a formulation that does not include an ascription to a legal subject:

Formulation II. If an act of a certain type takes place (and if), then that act is treated as 'liability ascribing'.

52 See generally Kelsen, *Über Grenzen zwischen juristischer und soziologischer Methode Grenzen* (n. 46), at 1-15 *et passim*; Horst Dreier, *Rechtslehre, Staatssoziologie und Demokratietheorie bei Hans Kelsen*, 2nd printing (Baden-Baden: Nomos, 1990), at 1-15 *et passim*; Horst Dreier, 'Hans Kelsen's Wissenschaftsprogramm', *Die Verwaltung*, Beiheft 7: *Staatsrechtslehre als Wissenschaft*, ed. Helmuth Schulze-Fielitz (Berlin: Duncker & Humblot, 2007), 81-114.

53 I take up the parallel in the name of methodological forms, see the text at nn. 61-6 below.

54 Here I am using 'surrogate' to cover all the variations on the theme of vicarious and collective liability, see the text at nn. 58-9 below.

Its counterintuitive character aside, a point to which I return below, formulation II captures the import of peripheral imputation. A defensible formulation must reflect a necessary connection between the two material facts. And if the formulation is confined, as here, to the act and to liability – the liability imputed to the act – then the link is indeed necessary. As Kelsen writes:

If there is the necessity of an absolute ‘must’ when the law of nature links cause and effect, so there is the equally rigorous ‘ought’ when the law of normativity (*Rechtsgesetz*) sets out the synthesis of conditioning and conditioned material facts. In the sphere of the law or in ‘legal reality’,...delict is linked to punishment with the same necessity as, in the sphere of nature or in ‘natural reality’, cause is linked to effect.⁵⁵

This is close to being right as a statement of Kelsen’s position, though one wrinkle has to be ironed out. Kelsen cannot be claiming a necessary link between the delict and the actual imposition of punishment. That would not make good sense, for, as we know and as Kelsen makes perfectly clear elsewhere, ‘in the system of nature, punishment may fail to materialize for one reason or another’.⁵⁶ It is not punishment but criminal liability – and by the same token civil liability – that figures in the law-like, necessary or nomological link. In the most general terms, liability serves in this formulation as the second *relatum*, the second ‘material fact’. The relation of liability to the act to which it is imputed is a necessary relation. By contrast, the actual imposition of punishment in the criminal law and the actual execution of judgment in the civil law is a contingent matter.⁵⁷

55 Hans Kelsen, “Foreword” to the Second Printing of *Main Problems in the Theory of Public Law*, trans. in *NN* (n. 41), 3-22, at 5 (in the last latter sentence, the quotation marks are in the original text).

56 Kelsen, *LT* (n. 49), § 11 (b) (pp. 25).

57 The point made here can be compared with Hart’s argument directed

Still, formulation II seems counterintuitive in imputing liability to the act, not to the actor. We are accustomed to distinguishing between the imputation of liability individually on the one hand and collectively on the other.⁵⁸ In the first case, the imputation of liability is either to the actor or, under the rubric of vicarious liability, to a surrogate. In the second case, liability is imputed, say, to the insurance company.

Why does Kelsen restrict himself to the imputation of liability to the act rather than to the actor? Kelsen's restriction can be explained, I think, by the contingent element presupposed in identifying the liable party. As understood in this or that jurisdiction, the character of the liable party – actor, surrogate, or collective body – is a contingent factor, a question of legal policy, not legal science. This point strengthens Kelsen's hand in insisting that the necessary link be limited to the imputation of liability to the act.

In any case, it is precisely this necessary relation between act and liability that represents the core of what I am calling Kelsen's nomological normativity thesis. The relation is nomological in being necessary or law-like, and it is normative in being non-causal. Further permutations stemming from imputation, thus understood, will then be forthcoming where liability is ascribed to a person, triggering

to Austin's claim that nullity is a sanction. Hart replies that nullity and sanction are conceptually distinct. Specifically, he points out that a nullity follows necessarily from the failure to satisfy the conditions of the legal arrangement (Jones purports to marry Sally, but the 'marriage' is null and void, for he is already married), whereas the actual imposition of a sanction is a contingent matter. See Hart, *CL* (n. 23), at 33-5, and Austin, *Lectures on Jurisprudence* (n. 17) Lecture XXIII (at p. 457), Lecture XXVII, (at pp. 505 f.).

58 See Kelsen, *LT* (n. 49), § 13 (at p. 27); Hans Kelsen, *General Theory of Law and State*, trans. Anders Wedberg (Cambridge, Mass.: Harvard UP, 1945), at 59, 69-71; Hans Kelsen, *Reine Rechtslehre*, 2nd edn. (Vienna: Franz Deuticke, 1960) at § 28 (c) (pp. 125-6).

the empowerment of a legal organ to follow through with whatever sanction is called for.

What remains now is to cast imputation in terms that invite attention to the underpinnings of the nomological normativity thesis. At some points in his work, Kelsen treats imputation as a Kantian or Neokantian category by analogy to the category of causation.⁵⁹ The transcendental argument that Kelsen adduces in the name of imputation *qua* category, however, is not sound. If Kelsen nevertheless utilizes imputation in his philosophy as in my sketch above, then its foundation requires a closer look. My suggestion is that Kelsen's concept of peripheral imputation be conceptualized as a *methodological form*, specifically, the methodological form peculiar to legal science. The notion is drawn from the work of the Baden Neokantian Heinrich Rickert.

In the last chapter of his treatise, *The Object of Knowledge*,⁶⁰ Rickert distinguishes the constitutive categories of objective reality – for example, the category of permanence – from the methodological forms of the various standing disciplines. Rickert's basic idea is that objective reality, constituted transcendently, must be sharply distinguished from the processing (*Bearbeitung*) of the material given in objective reality. Objective reality, Kant's phenomenal world, is constituted by means of the categories of reality, while the processing of the material of objective reality is the work of the standing disciplines, which are grounded in their respective methodological forms. Rickert offers lawfulness

59 See Kelsen, *LT* (n. 49), § 11 (b) (at p. 23).

60 See Heinrich Rickert, *Der Gegenstand der Erkenntnis*, 2nd edn. (Tübingen and Leipzig: J.C.B. Mohr, 1904), at 205-28, Rickert, *Der Gegenstand der Erkenntnis*, 6th edn. (Tübingen: J.C.B. Mohr, 1928), at 401-32. See also Heinrich Rickert, *Die Grenzen der naturwissenschaftlichen Begriffsbildung* (first publ. 1902), 5th edn. (Tübingen: J.C.B. Mohr, 1929), at 283-4, 373-7, *et passim*.

(*Gesetzlichkeit*) as an example of a methodological form in the natural sciences.⁶¹ In fact, the example has to be taken as the *genus* of methodological forms in the natural sciences generally, for it has application to all of them.

In *The Object of Knowledge*, Rickert begins with the constitutive categories of reality:

The unique significance of...the forms that have been discussed in terms of the examples of causality and permanence requires that they be given a special name, one that distinguishes them as original forms in contrast to methodological forms. Building on the expression 'objective reality', we could speak...of 'objective forms of reality'. But we prefer...the term 'constitutive'. In that these particular forms constitute what is presupposed as finished product or as real material of cognition, 'constitutive' designates exactly what we mean. Thus, the categories that shape the objective, real world from what is in fact given should be called the *constitutive categories of reality*.⁶²

The methodological forms to which Rickert alludes are peculiar, respectively, to the various standing disciplines. Referring in his treatise to Cartesian dualism, Rickert writes:

This *other* species of dualism, according to which the world is supposed to consist of two types of reality, each excluding the other – the world of *extensio* and the world of *cogitatio* – is created by physics and by psychology, each with its respective methodological form.⁶³

Physics has its own methodological form, and so does psychology. Legal science, too, has its own methodological form, namely, imputation or, as Kelsen sometimes puts it,

61 See Rickert, *Der Gegenstand der Erkenntnis*, 6th edn. (n. 60), at 409-10.

62 Ibid. at 406-7 (quotation marks and emphasis in original), compare Rickert, *Der Gegenstand der Erkenntnis*, 2nd edn. (n. 60), at 211.

63 Rickert, *Der Gegenstand der Erkenntnis*, 6th edn. (n. 60), 424 (emphasis in original), see also at 404, 410, 411, 424, 426, *et passim*, and compare Rickert, *Der Gegenstand der Erkenntnis*, 2nd edn. (n. 60), at 208, 210, 217, 221, *et passim*.

the 'law of normativity'.⁶⁴ As he explains, looking back on the theses he defended in *Hauptprobleme*:

[T]he core problem becomes the *reconstructed legal norm*, understood as the expression of the specific lawfulness, the autonomy, of the law, as the legal counterpart to the law of nature (*Naturgesetz*) – the 'law of the law', so to speak, the *law of normativity* (*Rechtsgesetz*) What is obviously of importance in *Main Problems* is securing the *objectivity of validity*, without which there can be no lawfulness whatever, let alone the specific lawfulness, the autonomy, of the law. But without the expression of that autonomy, without the law of normativity, there can be no legal knowledge, no legal science. Therefore: objective judgment, not subjective imperative. 'The law of normativity is – outwardly – like the law of nature, in that it is directed to no one and valid without regard to whether it is known or recognized.' If the analogy between the law of normativity and the law of nature is still fairly limited here, this is in order to prevent the confusion of the two, indeed not to lose sight – because of the analogy – of the specific lawfulness, the autonomy, of the law as against the causal lawfulness of nature.⁶⁵

The normative or non-naturalistic import of Kelsen's enterprise, the force of his law of normativity, plays itself out in the context of nomological legal science, understood as Kelsen's alternative to psychologism and naturalism in legal science. Specifically, the focus is on the methodological form of legal science – the relation of peripheral imputation. Where the antecedent condition obtains, this marks the imputation of liability to the act, a necessary relation. Where the ascription of liability to a person is made, this marks a

64 See the quotation immediately below.

65 Kelsen, "Foreword" to the Second Printing of *Main Problems in the Theory of Public Law*' (n. 55), 5-6 (emphasis in original). Kelsen's quotation within the quotation is from the *Hauptprobleme* (n. 46), at 395, repr. in *Hans Kelsen Werke*, vol. 2 (n. 46), at 529 ('outwardly' appears in italics in the *Hauptprobleme* but not in the 'Foreword' quoted here). See also Kelsen, *LT* (n. 49), § 11 (b) (at p. 23-5).

change in that person's legal position. The change, Kelsen insists, is a normative change, not a causal change.

4. Concluding remark

Coming full circle, back to the Introduction, I should like once again to allude to the distinction between inclusive and exclusive legal positivism, comparing it with the distinction between legal positivism *qua* naturalism and legal positivism without naturalism. The first distinction has inclusive legal positivism riding piggyback on exclusive legal positivism. That is, in all those legal systems correctly characterized by means of the 'exclusive' variant, no distinction whatever is marked by inclusive legal positivism; the two views come to the same thing. The second distinction, however, that between legal positivism *qua* naturalism and legal positivism without naturalism, marks a difference that is constant. That is, a characterization of a given legal system by appeal to legal positivism *qua* naturalism is always different from a characterization of the same system by appeal to legal positivism without naturalism.

Kelsen, our proponent of legal positivism without naturalism, wages battle on two fronts, against natural law theory and against naturalism. And he responds on both fronts with doctrines that count as independent doctrines in his legal philosophy - 'independent' in that neither doctrine is derived from the other. He responds to natural law theory with the separation principle and to naturalism with the nomological normativity thesis. The import of these two doctrines is to be sharply distinguished from legal positivism *qua* naturalism, where the separation principle is simply a corollary of naturalism and where there is of course no nomological normativity thesis.

