TREVOR N. WEDMAN

Inverting the Norm

Rechtstheorie · Legal Theory
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Mohr Siebeck

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Law as the Form of Common Practice

Mohr Siebeck

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Preface

I am feeling the weight of the war much more since I came back here – one is made so terribly aware of the waste when one is here. And Rupert Brooke's death brought it home to me. It is deadly to be here now, with all the usual life stopped. There will be other generations – yet I keep fearing that something of civilization will be lost for good, as something was lost when Greece perished in just this way. Strange how one values civilization – more than all one's friends or anything – the slow achievement of men emerging from the brute – it seems the ultimate thing one lives for. I don't live for human happiness, but for some kind of struggling emergence of mind. And here, at most times, that is being helped on – and what has been done is given to new generations, who travel on from where we have stopped. And now it is all arrested, and no one knows if it will start again at anything like the point where it stopped.[1]

When this project began fifteen years ago, the two primary sources were John Searle's theory of institutional reality and Friedrich Hayek's analysis of the spontaneous development of order found in his monumental *Law, Legislation and Liberty*. The idea was to show how an understanding of the deontic structure of institutions, informed by Hayek's insights into the natural development of these rights and obligations within societies, could inform the contemporary debate about the nature of law. My ignorance of the historical depth of these topics made me believe that this would be a feasible project. Yet, over the course of this research, I have not only had the opportunity to explore an institutional world that is long since gone, but have also witnessed during these years the gradual, yet significant arrest of many of our own institutions. While, to my knowledge, the literati of Cambridge no longer go bathing in Grantchester as they once did, and while the educational, political and civic institutions of 2022 no longer reflect the status quo that was even two decades ago, the keynote of hope remains in the normativity that abides in each of us. These norms persist through the practice of law, in which we all engage, and through canon, to which all have access, even after each of us is gone.

Thanks to particularly persistent advisors, as well as intervening professional duties which have kept extending the project's timeline into the future, I was given occasion to wander back in time from the world of John Searle, Raimo

[1] Bertrand Russell in a letter written in Cambridge in 1915, displayed at the Orchard in Grantchester.

Tuomela and Margaret Gilbert to Weber, Durkheim, then Hegel, Hobbes, Spinoza, and Bodin. Moving from Hayek and Richard Posner, Hart, Dworkin and Raz, I had time to study enough of Hans Kelsen's work such that the Pure Theory of Law no longer seemed to be an obscure perspective of a continental jurist informed by a code law tradition, but rather the result of years of study immersed in an intellectual world which no longer exists for us today. And Kelsen was by no means the only of his generation, though the present work focuses mainly on Kelsen's contribution to the theory of law with significant assistance towards the end from the thoughts of Kelsen's early contemporary, Felix Somlo. There were dozens of jurisprudes from the turn of the 20th century up until the Great War who, though not as well received in the Anglophone world as Kelsen, were just as learned and sophisticated in their approach to the law.[2] Many of those who did not die in the first war, were either silenced in exile, such as Hermann Heller, or succumbed to either the ideology or careerist ambitions of National Socialism, such as Carl Schmitt.[3] As such, we now mostly have Kelsen in the world of law as a lucky specimen of one who escaped, just as in philosophy we came to have Kelsen's Viennese colleague, Carnap.

Kelsen's *Hauptprobleme der Staatsrechtslehre*, first published in 1911 at the age of 30, represents a standard of legal theoretical inquiry which in breadth and depth is unmatched today. As such, it is from my perspective not the result of historical inquiry that I have essentially started with Kelsen and worked backwards in time, but rather a matter of systematic and conceptual exigency:

Hans Kelsen developed a theory of the legal norm as it exists within a legal system. The legal norm which Kelsen conceives is that of a hypothetical imperative directed at officials: if citizen a does x, then official b shall respond by doing y. Through his postulate of the basic norm, Kelsen refuses to address the issue of how, why or wherein the normative force behind such norms exists. Kelsen also refuses to account for the agency of non-officials (i. e. citizens) in their interactions with the legal norm. Accordingly, the legal system for Kelsen is narrowly conceived and, within this delimitation, the legal norm enjoys a sphere of perfect ideality where it always fits perfectly within a hierarchy of norms and is always executed without fail. Kelsen refuses to inquire further into the basic norm, i. e. the issue of sovereignty, and refuses to account for legal norms being directly addressed to subjects because, in his reasoning, no norm can justify the legal system, or sovereignty, itself. For Kelsen, the existence of a legal system as well

[2] One key example is František Weyr, who developed a 'normological' theory of the law in Brno. See Kubeš and Weinberger, *Die Brünner Rechtstheoretische Schule*.

[3] An important step in the preservation of the legacy of Heller and the contextualization of the contributions of Schmitt was made by Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen, and Hermann Heller in Weimar*.

as the obedience of its subjects to its legal norms is not reducible to a norm, but rather is a matter of fact and thus beyond the scope of a legal theory. Thus, he develops his Pure Theory with conspicuous brackets at each end. I believe it is possible to break-open these brackets within the ambit of a theory of law. I also believe that it is imperative to do so, for, without the sovereign and the subject, there is not much left to the concept of law.

I hope to show that sovereignty, subjectivity and normativity, or the sovereign, the subject and the (legal) norm are three wholly interdependent concepts: the meaning of each of these concepts entails the other two. The five chapters of this work seek to explore this relationship. Chapter I commences with an analysis of the legal norm. It is an open question whether Kelsen subscribed to an expressivist or hyletic conception of norms, or perhaps both at different times. Only with an hyletic conception does it make sense to speak of inherent relations between norms. However, von Wright suggests that even when working with an expressivist conception of legal norms, it is possible to consider norms within a broader context that includes the issuer and the addressee. Issuers and addressees, however, are facts. Relying on the is-ought distinction, Kelsen asserted that the arbitrary nature of legal norms is fundamentally different from the causal necessity of scientific (natural) laws: legal norms express an 'ought' whereas scientific laws describe an 'is'. I propose that for legal theory the core issue of the is-ought distinction can be more clearly perceived through Anscombe's distinction of directions of fit. Scientific laws would thus have a mind-to-world direction of fit and therefore primarily require reason, legal norms a world-to-mind direction of fit and therefore primarily require the will (of a sovereign). However, both the descriptive nature of scientific laws and the prescriptive nature of legal norms begins to blur on closer inspection, just as do the respective priorities of reason and will. Kelsen subscribed to the requirement of rationality in the law at the atomic level, but denied it at the systemic level once the big issues of the nature of sovereignty and the state came into question. In order to further develop this rational element of the law, it is necessary to determine the object of our knowledge at the level of the state.

Thus, in Chapter II, I seek to understand the modern concept of state that underlies most of legal theory as it has developed in the past 250 years. The key touchstone here is the concept of the absolute state and the figure of Leviathan. I seek to avoid interpreting the rise of Leviathan as a result of a 'social contract' according to which a strong man or group of men agree to establish peace and order in a society in exchange for total subservience. In contrast, I argue that Leviathan is not a great protector, but rather an actor, a fictive person who exercises authority on behalf of the many. Accordingly, Leviathan must be conceived as being normatively (legally) constituted as a function of the desire independent

rationality that is afforded by human reason. Since Hobbes shows that desire independent rationality can only exist within a system of laws, human beings can only exist as persons, subjects, within the affordance of the state. Despite the severe limitations that Kelsen placed on his theory, this aspect of the legal order having priority to the legal subject is nonetheless a very Kelsenian point – at the heart of the Kelsenian theory is the unity of the whole of the legal order.

In Chapter II I argue, with Kelsen, that the sovereign cannot be conceived as a physical person but that it nonetheless must be conceived as a unity. However, if the sovereign is not a physical person, then it, like the law, is just a construct. Of the three necessarily interdependent concepts, sovereign, law, and subject, the first two turn out to have no existence as natural facts. The question is whether the constructed existence of the sovereign and the law is just make-believe or whether it is actual (*wirklich*). In Chapter III I explore this issue through the lens of 'political theology'. Here, I argue again with Kelsen that legal theory and theology are basically two different discourses describing one common issue: what is the relationship between the individual and the collective? Kelsen and I diverge, however, when characterizing the nature of this relationship. Kelsen maintains that while the individual used to be actually bound to the collective (or God or state) on the basis of an actual, though mistaken, belief in a supernatural entity, modern (legal) science no longer needs to resort to such superstition in accounting for the normativity of a legal order. In contrast, I argue that the relationship between the individual and the collective, whether in the religious or political realms, never actually had much to do with belief in a supernatural being. Instead, the actuality of this relationship between the individual and the collective is based on a normative stance, a categorical 'leap of faith', not unlike that which forms Leviathan, in which the individual recognizes that it is something in the collective, i. e. a rational being, which it could never be without it. As a result, sovereignty and the law are not mistaken notions that are holdovers of a bygone era, but rather essentially constituent components of individual subjectivity.

If the sovereign, the subject and the law are concepts that are dependent on one another, how does this relationship come to be? The scholastics might have said that God creates the order and places a sovereign in charge of the order to ensure that it functions properly. However, without a divine architect, is the relation between sovereign and subject through the law merely random? Have we established a necessary theoretical role of the collective in the subjectivity of the individual only to realize that the actual normative relations between individuals are just the result of arbitrary power relations? Chapters IV and V take account of these issues. In Chapter IV, I look to the theory of one of Kelsen's early contemporaries, Felix Somlo. One of the difficulties in accounting for the content of the law lies in explaining its hierarchical, top-down, nature. Yet, Somlo points out

that the concept of sovereignty, i. e. that which enjoys a generalized habit of obedience, in no way entails the existence of a hierarchical legal order. Instead, sovereignty only requires that there be a source which (implicitly or explicitly) issues norms covering a broad range of human conduct and that these norms are generally obeyed. Nothing in the concept of sovereignty requires that a particular government have a monopoly on legislation and, even if we would stipulate that the sovereign authorizes the government to enact laws, no sovereign can ever authorize another (secondary source) to counteract the laws of itself (the primary source). Because Somlo rejects the hierarchical model of a master imposing duties, there is no clear way for him to identify that which is the law. As a result, Somlo insists that legal norms exist only as logical sentences in context (*Satz im Zusammenhang*) and thus, since the context of each sentence depends on all other legal norms, that they can actually only exist in the form of a *plurale tantum*.

Chapter V takes its inspiration from Brian Leiter's legal naturalism, according to which facts are that which actually matters in a theory of adjudication. I agree that facts are of primary relevance for the law, but, following on the previous chapters and especially Chapter IV, the relevance of fact begins to play out very differently than how Leiter envisions. Whereas Leiter conceives of factual relevance as ultimately detracting from law's normativity, I appeal to the American Legal Realists and the idea of the generic form in order to argue that it is fact, or rather matters of fact, which are actually the source of law's normativity. This serves to indicate the proper 'logic' of norms, according to which norms arise out of general patterns of conduct among individuals as they act in groups, classes and institutions. The law, especially adjudication, plays a crucial role in reflecting upon this reality and then expressing it in the form of rules.

In the Conclusion I consider the role of this reflected normativity on the constitution of the individual and the constitution of the state. On the one hand, such normativity is essential for a common political existence even though, at the individual level, foreordained normativity can also be restrictive. On the other hand, the fact that normativity is derived from the generic forms of conduct means that there is always a critical moment that injects itself into law's normativity, thereby allowing for critical reflection.

The title, *Inverting the Norm – Law as the Form of Common Practice*, refers not only to an attempt at switching our perspective on legal normativity from top-down to bottom-up. The argument underlying such a switch reflects on an aspect of our social reality which goes beyond just legal theory: humans are not automata, but agents and agency in some way always depends on inverting the norm. This, importantly, is not the same as rejecting the norm. We are always already constituted by the law and as such cannot escape it. At the same time, the law is our reflected, and thus sovereign, form of common practice.

I am greatly thankful to the many mentors and colleagues who, over the years, have contributed their time and insights towards the realization of this project. I thank Pirmin Stekeler-Weithofer for generously agreeing to act as the advisor for the dissertation and for welcoming my project at the University of Leipzig. However, more important than the administrative affiliation was the theoretical contribution which serves, in my mind, as the chief influence in the text, even if the ideas expressed herein are all too imperfectly executed by its author. I also thank Georg Meggle, whose insights on language, meaning and social ontology have been indispensable for the work. I thank John Searle, Nikos Psarros, Christian Schmidt, Hans-Bernhard Schmid and Åsa Burman for the many valuable philosophical discussions over the years. I thank Tom Smith, Laurence Claus and Larry Alexander from the University of San Diego, who propelled me to engage in the following legal theoretical investigation. Especially the law of contract, as taught to me in San Diego, has been relentless in leading me to repeatedly consider the nature of it all. Further thanks are due to Nigel Simmonds, David Dyzenhaus, Torben Spaak, Mauro Zamboni and Benno Zabel who have provided valuable comments on passages of the text.

I dedicate the book to Beatrice … *che mi fa andare*.

Vienna, May 2022 Trevor N. Wedman

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Introduction

The following is an attempt to investigate the law on its own terms, not as a sociological, critical or meta-ethical study, but rather as a legal theoretical project in the narrowest sense. While each other approach must be recognized for its contribution to the understanding of and even shaping what the law is today, no consideration of the law from the outside can yield the perspective that can singularly be won through an examination of the law as law.[1] The task is not to deconstruct and contextualize, but to lay a foundation, ὑπόθεσις, which may prove fruitful for future endeavors.

This project conceives of the law as a set of norms that places legal subjects in relation to the legal sovereign, though certainly the main task for any legal theory lies in exploring just what is meant by each of these concepts, the legal subject (or citizen), the legal sovereign (or state) and their normative relation. The upshot of focusing on the relational aspect of the law, as opposed to, for example, the aspect of commands or exclusive state power, is first and foremost to pledge allegiance to the approach of Hans Kelsen, who viewed the legal norm as connecting different points of attribution, even if in substance and outcome I will ultimately arrive at the opposite theoretical pole of Kelsen's theory, at least in its late phase. Beyond being a Kelsenian partisan though, my defining the law as a

[1] Here in common with Kelsen, who states in *Der soziologische und der juristische Staatsbegriff*, p. 93, in the context of the theory of the state: "Was bedeutet nun diese Tatsache, dass nur eine wenigstens bis zu einem gewissen Grade wirksame Staats- oder Rechtsideologie Relevanz behauptet? In welchem Verhältnis steht dieses Minimum an Wirksamkeit zu der Geltung, steht die Normativität der Staats- und Rechtsordnung, d. i. ihre spezifische Geltungsexistenz, zu ihrer Faktizität, richtiger: zur Faktizität, d. i. der Wirksamkeit des Vorstellens, Fühlens, Wollens, kurz des Erlebens dieser Ordnung? Zunächst sicherlich in keinem anderen Verhältnis als jenem, in dem sonst ein psychischer Akt zu dem ihm zugeordneten geistigen Inhalt steht! So wie wenn man, z. B. zu sagen pflegt, es könnte keinen pythagoräischen Lehrsatz geben, wenn es keine Menschen gäbe, die ihn denken, das heißt, dass der psychische Akt des Denkens zwar die conditio sine qua non, nicht aber die conditio per quam ist für den geistigen Inhalt, den man als pythagoräischen Lehrsatz bezeichnet. Dessen Geltung findet ihren spezifischen Grund nicht in der Tatsache, dass er gedacht wird, sondern in irgendwelchen letzten Axiomen. So findet auch die als 'Staat' bezeichnete Zwangsordnung den Grund ihrer Geltung durchaus nicht in der Wirklichkeit der Wollungen und Handlungen, die sie zum Inhalt haben." If law is to persist as a science unto itself, its foundation must correspondingly lie within the law, and not outside of it.

relation positions the legal norm squarely within the realm of institutional, or man-made, reality.

Importantly with the definition above, this approach is committed to considering the relations between legal sovereigns and legal subjects as normative in nature, corresponding to rights (and correlative duties) on the parts of legal subjects and legal sovereigns. Though this is clearly inherent in the concept of a *legal* subject and *legal* sovereign, it is also not trivial to note that neither the legal subject nor the legal sovereign can be similarly situated *without* the law as they are *within* it. If this is the case, then individual laws, and law in general, are not merely descriptive of a present state of affairs, but rather constitutive thereof, presuming of course that legal subjects and legal sovereigns indeed have something to do with states of affairs. Legal norms, i. e. laws, do not have a mind-to-world, but rather a world-to-mind direction of fit. Because the 'world' in this case, i. e. the addressees of the law, consists of volitional subjects who through the law are meant to conform their actions to the 'mind' of the sovereign, these individual laws must therefore be considered normative, or action-guiding.

If the law is normative, then we must be able to account for why we should follow the law. In other words, how does the law function to make the world match the mind (or many minds) of the sovereign? The following text postulates that a legal subject (or legal sovereign) cannot but follow the law. Both the legal subject and the legal sovereign are fictions (constructs) whose sole and formal function in the legal system is to follow the law and whose function in legal science is to serve as points of attribution without which the normativity of legal norms cannot be understood. A legal subject, as an abstraction, has no free will and cannot violate the law. Indeed, the legal subject is purely ideal and does not exist in space and time. As an ideal entity the legal subject can only act according to the idea which creates it and the idea which creates the legal subject is the law itself.

However, what is the relationship between legal subjects (or legal sovereigns) and subjects more generally? Subjectivity and therewith agency do not exist outside of the universe of valid statements that also, in one form or another, comprise the law. Of course, a legal system does not tie sanctions to all potential actions that a subject can undertake, just as a legal system does not contain a listing of all potential valid statements of law. However, all potential actions and all potentially valid statements that can be made are nonetheless possible only within and therefore are encompassed by the legal system, the law. Thus, in this conception, the subject (or sovereign) is identical to the legal subject (or legal sovereign) and as a result cannot but follow the law.[2]

[2] Cf. Stekeler, *Hegels Phänomenologie des Geistes*, pp. 27, 28: "Denn die eigentliche Ein-

Stating that a subject must necessarily follow the law still does not function as a satisfactory response to the traditional problem of obligation in the law. The issue of obligation on the part of an ideal subject can only be resolved once we understand the ideal subject, as well as the legal subject and the law itself as ideal entities of a generic kind, the existence of which is derived entirely from actual situations in fact brought on by the conduct of real (factual) individuals. The question, why should I, as a flesh and blood individual, follow the law, can thus be answered with the reply that I, as an individual, follow the law to the extent that I *am* actually a subject and, in a derivative sense to be explored in greater detail, a sovereign. The categorical imperative of subjectivity is that any individual can only act according to norms which should become a universal law or, in other words, which constitute the universe of valid norms comprising the law. This brings us to the fundamental issue of the relation between individuals and collectives – legal theory is not possible without political theory, and more specifically social ontology.

As with many theoretical debates, the discourse regarding the nature of law is fraught with many ambiguous terms. The following initial introduction to some of the concepts used in this text may serve to indicate the contours of the argument which I set forth:

'Norm' and 'value' are roughly synonymous in the present text and can be taken to mean that which is action-guiding (*handlungsleitend*). The connotation of 'value' is more abstract and general than that of 'norm'. A norm is especially an expressed or implied legal norm, although values which exist outside of the legal realm can also be expressed or implied as norms. Only a norm or value can be action-guiding, which indicates that the present text employs a Kantian understanding of action – I can only act according to a norm. Conduct that occurs on the basis of brute desires or instincts is not an action, but a re-action to stimulus.

As with 'norm' and 'value', 'normativity' is roughly synonymous with 'validity'. A legal theoretical project in a social ontological vein seeks precisely to explain the equivalence of these two terms, one being of ethical, the other of legal provenance. To say that a norm is valid is to say that it is binding, to say that a key feature of the law is its normativity is to say that legal norms at some level must guide the subjects' actions. It is clear that in using normativity and validity as synonyms, the normal boundary of a positivistic legal theory is thereby erased. As will be set forth in further detail below, the following is nonetheless an expo-

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sicht (der *Phänomenologie des Geistes*) ist die, dass wir erst vermöge der Teilnahme an einer allgemeinen Praxis zu personalen Subjekten werden, dass also das emphatische Selbstbewusstsein des Ich sich erst aus einem diffusen transzendentalen Wir oder Man entwickelt."

sition of positivistic legal theory and does not entail a natural law conception, at least not within the conventional, Aristotle's, Thomas' or Finnis', sense.

The present text seeks to avoid the terms 'moral' and 'morality'. The universe of all values or norms that exist are relevant for the legal system and, as will be argued in Chapter IV, form part of the legal order, even if the great majority of these norms and values would never be subject to sanction or codification in many if not most legal systems. I reject both (i) the notion (as supported by some natural law theorists) that there could be a set of (proper legal or even divine) norms against which individual norms within a given legal order can be judged and (ii) the notion (as supported by some legal positivists) that the value of a legal system itself can be judged by an external or my own internal moral compass.

A 'human' is an individual in its natural, brute state. A 'person' is a human in its normative relation to other humans, who are thus presumed to be capable of entering into reciprocal normative relations and are so recognized as persons themselves. A 'people' is a group of persons with a common normative background or which participate in the same society. A 'society' forms the common normative background of a people.

With Austin, 'sovereignty' or 'sovereign' relates to a highest power that enjoys a general habit of obedience on the part of a people. Rousseau's *pouvoir constitué* is synonymous with sovereignty and *pouvoir constituant* (nation) is integrally related to the concepts of highest power and generalized habit of obedience. As is familiar with the distinction between the President of the United States and the Presidency of the United States, the sovereign is never identical with a given individual, though in some legal theories and in some legal systems the sovereign may be fully embodied by a given individual, for example an absolute monarch. For the purpose of the following text, sovereignty is solely an attribute of the state, never of an individual alone, and carries with it the competency of creating and perpetuating laws. Accordingly, 'l'etat c'est moi' could never be the case, except perhaps for Robinson Crusoe before Friday.

The 'constitution' is the political form of the state (*determinans* of *status*). The state is identical to the legal order (see Kelsen).

1. A Man at Rest

Mais il suffisait que, dans mon lit même, mon sommeil fut profond et détendit entièrement mon esprit; alors celui-ci lâchait le plan du lieu où je m'étais endormi, et quand je m'éveillais au milieu de la nuit, comme j'ignorais où je me trouvais, je ne savais même pas au premier instant qui j'étais; j'avais seulement dans sa simplicité première, le sentiment de l'existence comme il peut frémir au fond d'un animal; j'étais plus dénué que l'homme des cavernes; mais alors le souvenir – non encore de lieu où j'étais, mais de quelques-uns de ceux que j'avais habités et où

j'aurais pu être – venait à moi comme un secours d'en haut pour me tirer du néant d'où je n'aurais pu sortir tout seul; je passais en une seconde par-dessus des siècles de civilisation, et l'image confusément entrevue de lampes à pétrole, puis des chemises à col rabattu, recomposaient peu à peu les traits originaux de mon moi.[3]

Donoso Cortes imagines the state as the great protector of the people, corrupted by original sin, in desperate need of guidance on its eschatological path to spiritual and political glory. Carl Schmitt views the state as the product of an existential, political struggle. For Rudolf Smend, the state best serves as an instrument for integrating a people into a unity. Hans Kelsen thinks that the state should best be conceived as nothing but the legal order, comprised of formal rules that clearly and transparently guide officials in the conduct of their public affairs. Proudhon sees the state itself as corrupt and Karl Marx sees it as an enabler of a particular class.

The concept of law can hardly be divorced from the concept of state. Deriving our understanding of law from an understanding of the state necessarily presupposes a consensus about the nature, purpose or scope of the state which, as evidenced by the sampling of theorists above, should not be taken for granted. As will be discussed, the state, like the legal order, is an institutional fact, a construct that is capable of taking a plethora of forms, of persistently resisting creation, doggedly persisting throughout time, or transforming quite unexpectedly. It is possible to create a legal theory on the basis of any given or conceived state, but choosing such a particular state as the legal theoretical starting point results in a concept of law that is equally particular, local in its scope. This is inherently problematic if the desire is not to create a particular, but rather a general, foundational legal theory.

Thus, instead of focusing on a necessarily local conception of the state as can be found throughout the 19th and 20th centuries in the works of their legal and political theorists, I would rather start by focusing on that other *sine qua non* of the law that is not the state, namely the social human being, the generic man. In doing so, we might take as an initial image a specimen far more *local* in nature than any of the conceptions of state listed above, i. e. a fin-de-siècle Parisian man lying in his bed, which can serve as an icon into the state of man most generally. Just like with our conception of state, our conception of man will prejudice our conception of law if we conceive of man, the legal person, too narrowly. Thus, if we take man already compromised in his legal status, like Dostoevsky's Raskolnikov, subject to law's sanction, or Mann's Thomas Buddenbrook, enjoying the privilege of property, or if we take a pre-legal man in a state of nature, whether this be Hobbes' warrior, Locke's nascent proprietor or Rousseau's noble savage,

[3] Proust, *Du cote de chez Swann*, p. 14.

then our legal theory will be equally biased toward the interests of criminal law, property law, human rights et cetera. Even if any such a man ever really existed as that abstract person imagined by Hobbes, Locke or Rousseau, such a figure, though real, is much less relevant (*wirklich*) for our present purposes than the figure of pure fiction described by Proust above that reflects itself in the ready imagination of an everyday modern man.

In his own perception, the man in question is at first in the depths of sleep, unconscious of his own identity, his place, even himself. On the verge of waking, he perceives a very basic, brute existence, perhaps equal to, but certainly weaker than that of a normal animal. A rational creature, this waking man is still more depraved of reason than a cave man. But then memories enter his mind of places where he has been or maybe imagined himself to be. These memories save, distract, him from the initial brute and carnal impressions of his waking self. The memory, or impression, of 'centuries of civilization' transform our man from a scared individual to a man with a ruffled collar, lying at rest in his bed with the full imaginary arsenal of a person of privilege in the most cultivated place in the world at the most developed time of our history. In locating the baseline for a general theory of law, we cannot look for a man in his 'natural' state because the law has precious little to do with nature. A man in action is likewise overdetermined as being necessarily either legal or illegal in his actions. A man at rest, however, at the moment of waking, stands before the entirety of the legal system as a child upon the threshold of a playground. The legal order constitutes the entirety of his potential and, as he embarks on his day, he will make thousands of decisions each of which determines his relation to the law, his legal status. Our man is not alone in this endeavor though, but rather has centuries of civilization at his disposal, guiding him on his path. He is homo oeconomicus, but he is also Moses on the mount. He is the good Samaritan, he is a Southern slave, he is a battered woman and a starving immigrant. He is Ebenezer Scrooge, he is a consummate debtor. Once he gets out of bed, our man at rest, who is none other than the ordinary reasonable prudent person, will act not on his own in the face of the law, but rather on the precedent of these and millions of other agents and figures of agency that constitute the centuries of civilization forming his horizon of action, without which our man is just an outcast, naked boy faced with an arbitrary system of coercion.

2. Regarding 2.061

Die Sachverhalte sind von einander nicht unabhängig, sondern *abhängig.*[4]

3. Empiricism or Positivism

Eugenio Bulygin identifies a conflict at the core of Hans Kelsen's Pure Theory of Law which comes from what Bulygin describes as fundamentally opposed philosophical traditions, i. e. Kantianism and Positivism.[5] As Kantian influences in the Pure Theory, Bulygin identifies: (i) "the characterization of legal norms as ideal entities belonging to the world of Sollen ('ought'), distinct from the world of natural reality or the world of Sein ('is')"; (ii) "the conception of validity qua binding force"; (iii) "the normativity of legal science"; and (iv) the basic norm as a transcendental category. As positivistic influences in the Pure Theory, Bulygin identifies: (a) "a sharp separation between 'is' and 'ought'"; (b) "the non-cognitivist conception of norms and value judgments as prescriptions that are neither true nor false"; (c) "the positivity of law, the thesis that all law is positive, that is to say, is created and destroyed by human acts"; and (d) "a sharp distinction between description and prescription (or evaluation), between reason and volition, between cognition of law and the creation of law, between the sciences of law and legal politics".[6]

Among these two sets, none of the Kantian influences fit very easily into the 'positivist' set while, interestingly, the only influence within the 'positivist' set that fits neatly into the Kantian set is precisely that of the positivity of the law, i. e. that law (and legal norms) are created and destroyed by human acts. As a result, there is reason for an inchoate suspicion that the tenet that is the namesake of legal positivism, i. e. the positivity of the law, is actually not adverse to Kantianism, or at least to Kant's critiques of pure and practical reason, and may well even originate in it. Meanwhile the other three 'positivist' characteristics – (a) the is-ought distinction, (b) the non-cognitivist conception, and (d) the distinction between descriptions and prescriptions – are indeed antithetical to Kantianism and must originate from a different source. I would posit that it is this dichotomy, more so than any of the ideas that are properly 'original' to the Pure Theory of Law, that makes Kelsen's work so rich. This is not, as Bulygin would imply, a conflict between metaphysical idealism on the one hand and the aspirations of

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[4] Cf. Wittgenstein, *Tractatus*, 2.061: "Die Sachverhalte sind von einander unabhängig."

[5] Bulygin (1998).

[6] Id. at pp. 299, 300.

positivism (meaning: science) on the other, but rather between dueling scientific conceptions on either side of the development of *logical empiricism* at the beginning of the 20th century. It is not so much Kantianism vs. Positivism that is the threshhold issue in Kelsen's oeuvre, but rather Positivism as the form that (Neo-) Kantianism had taken by 1911 and Empiricism as the set of background assumptions that would be adopted by the Vienna Circle within the next two decades and which would continue to accompany Kelsen throughout the remainder of his career.

The import of Kelsen's theory is thus not just emblematic of the transition undertaken by the concept of law in the 20th century, but that of philosophy and society generally from the Neo-Kantian synthesis that had obtained in Central Europe prior to World War I to the value-free logical empiricism of the Anglo-American centered, post-World War II world. The current work begins on the assumption that this rupture has occurred and that an exploration of the conceptual dimensions of this turn towards a value-free science is nowhere better placed than in an analysis of the normative science par excellence, i. e. a theory of law.

In science there are no depths, everywhere is surface[7] – this slogan of the logically empiricist Vienna Circle serves as a frame for understanding the project of legal reductivism and simultaneously indicates its limitations:

> Wenn jemand behauptet: 'es gibt keinen Gott', 'der Urgrund der Welt ist das Unbewußte', 'es gibt eine Entelechie als leitendes Prinzip im Lebewesen', so sagen wir ihm nicht: 'was du sagst, ist falsch'; sondern wir fragen ihn: 'was meinst du mit deinen Aussagen?' Und dann zeigt es sich, daß es eine scharfe Grenze gibt zwischen zwei Arten von Aussagen. Zu der einen gehören die Aussagen, wie sie in der empirischen Wissenschaft gemacht werden; ihr Sinn läßt sich feststellen durch logische Analyse, genauer: durch Rückführung auf einfachste Aussagen über empirisch Gegebenes. Die anderen Aussagen, zu denen die vorhin genannten gehören, erweisen sich als völlig bedeutungsleer, wenn man sie so nimmt, wie der Metaphysiker sie meint. Man kann sie freilich häufig in empirische Aussagen umdeuten; dann verlieren sie aber den Gefühlsgehalt, der dem Metaphysiker meist gerade wesentlich ist.[8]

It is of course possible to cull as 'meaningless statements of a metaphysician' all statements of our expression that refer to something beyond the simplest empirical facts. Indeed, precisely this approach has often succeeded as a force of disruption in the face of mistaken preconceptions, yielding tremendous results in many of the sciences. This includes the law – some of Bentham's critiques against Blackstone were indeed legitimate. The issue with the quote from the Vienna Circle above is that scientific inquiry cannot be engaged-in merely through tearing down the building of science as it has been handed down up to a

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[7] Damböck, Der Wiener Kreis. Ausgewählte Texte: "Wissenschaftliche Weltauffassung: Der Wiener Kreis": "In der Wissenschaft gibt es keine Tiefen, überall ist Oberfläche."

[8] Ibid.

certain point. It is clear that all of our impressions can be reduced to the elemental phenomena of the empirical world. However, this alone does not characterize the human experience. In addition to *Gefühlsgehalt*, also knowledge, thought, community and meaning, all core aspects of the human existence, may be lost when transitioning from the given statement to its empirical equivalent. None of these are directly *given to*, but rather *constituted by*, us as a function of our rational, logical apparatus.[9]

It may be necessary to return to the 'surface' of empirical reality every now and again in order to critically examine the conceptions which pre-determine our knowledge. However, this knowledge itself does not exist at the surface, but rather in the depths. Social reality, including all of the sciences, is deep, with iterations upon iterations of institutional construction, designed with the blueprint of normativity. Some of this is superfluous, and if we assign the moniker of 'metaphysics' to that which is superfluous, then we should all be able to agree to the banishment of metaphysics from our sciences. However, not everything that constitutes our society, or that is not directly perceptible as a matter of empirical fact, is metaphysics in this derogative sense. Thus, a further differentiation is needed between the depths of human knowledge made by and for ourselves and the surface of empirical phenomena: between positivism and empiricism.

A similar sentiment to that of the Vienna Circle above can be found already with Bentham:

> Common law,…, that fictitious composition which has no known person for its author, no known assemblage of words for its substance, forms every where the main body of the legal fabric: like that fancied ether, which, in default of sensible matter, fills up the measure of the universe. Shreds and scraps of real law, stuck upon that imaginary ground, compose the furniture of every national code. What follows? – that he who, for the purpose just mentioned or for any other, wants an example of a complete body of law to refer to, must begin with making one.[10]

Bentham says that if there is to be a legal system built on a solid basis then, one (i. e. Bentham) must make one himself. In doing so, Bentham operates on the basis of a logic of the will according to a principle of utility – meaning, basically, that which makes sense.[11] As Montague suggests in the footnote below, the prin-

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[9] Probably the most eloquent formulation is John Searle's: x counts as y in c. Cf. Carnap's *Der logische Aufbau der Welt*.

[10] Bentham, *An Introduction to the Principles of Morals and Legislation*, Preface.

[11] See id. at Ch. I, Sec. 2.: "By the principle of utility is meant that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question: or, what is the same thing in other words, to promote or to oppose that happiness." See also Montague's introduction to *The Fragment on Government* (Clarendon Press 1891), p. 43: "The truth is that such a principle as the principle of utility is valuable not as a creative, but as a critical principle. It is valuable as a test, not as a germ. Its true potency is negative, a potency to lay bare injustice, to

ciple of utility, like the Vienna Circle's reduction of statements to the empirically given, works first and foremost as a critical principle. However, Bentham, and then his pupil Austin, moved beyond the reductive aspect to focus on the positive, thereby attempting to develop, in some ways from scratch, a system of law. This is also a form of positivism, but not the kind to be expounded here.

Justice Holmes cautions us that the life of the law is not logic, but experience. A perusal of his opinions suggests that this experience is not that of the cold facts of life or a cynical understanding of how judges decide cases based on party affiliation or ideology, but rather it is an experience of the law as it is lived in practice, both in harmony and discord. This understanding of the law in practice suggests that there are practice 'forms' underlying our social endeavors and that the science of law consists in the understanding and determination of these forms, i. e. norms. As such, the life of the law must be both experience and logic – this, so the assumption of this work, must be the basis for any legal positivism.

4. Radical Legal Positivism

The following presents a defense of a radical version of legal positivism. As a radical version, it will affirm many of the core tenets of the doctrine while arguing that it has sometimes gone astray by focusing too much on certain peripheral aspects. The touchstone on which this analysis is based is the core attribute of legal positivism – the separability thesis. It is this touchstone which has succeeded in both guiding and misguiding the debate within the Oxonian vein. The separability thesis has afforded great progress in the field of analytical jurisprudence insofar as it correctly suggests that the law, as an objective, jurisprudentially verifiable social fact, is logically distinct and independent from morality. Understood as a separate normative system, any such 'moral' system, being separate from the law, is necessarily subjective and unverifiable from the jurisprudential perspective. However, the separability thesis has hindered progress in the field insofar as, along with morality, it has eschewed value altogether, for, as will be

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unravel sophistry, to cancel verbiage. For such purposes it is most efficacious. Is a law really and not merely apparently partial? Is it an instrument for aggrandizing a class of citizens without any reference to the common weal? If so, it will not bear to be tried by a standard which requires the legislator to seek the happiness of the greatest number and of each individual equally with every other individual. Is a law incapable of being explained or justified except by merely technical arguments, by professional petitio principii or professional pedantry? If so, it will not bear to be tried by a standard which makes happiness the object of all legislation."

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