The Epistemological Turn of the Twentieth Century's Legal Positivism

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> 'Legal philosophy has, unsurprisingly, always been hostage of its own philosophical climate – jurisprudents are rarely, if ever, innovators in philosophy.'
>
> Brian Leiter, *The Demarcation Problem in Jurisprudence*, 2011, p. 665.

Arguably, Herbert Hart first asserted the continuity of current legal positivism with the legal philosophy of Bentham and Austin,[1] with other authors also pointing to Hobbes.[2] However, the relevant distance between the assumed 'classical positivism' – Hobbes included – and the legal positivism of Kelsen and Hart has often been noted. Dyzenhaus, for instance, considers that either Hobbes or Bentham connect their ideas about the legal order with a political morality while contending the importance of the legislator upon the judiciary,[3] diverging in both aspects from the legal positivism of the twentieth century. Dyzenhaus adds that Hobbes would deny one central thesis of legal positivism – the separation between law and morality, although he would subscribe that the law of a legal order is positive law.[4] Likewise, Priel thinks that Bentham embraces more utilitarianism than linguistic analysis, the opposite of Hart's positivism. Ultimately, says Priel, after *The Concept of Law*, Hart distanced himself from utilitarianism.[5] Schauer, in turn, sustains that it is a mistake to attribute to Bentham and Austin an understanding of legal positivism, which owes more to Hart and subsequent debates.[6]

In this article, I argue there is an essential epistemological break between the generations of Hobbes, Bentham and Austin and that of Kelsen and Hart, barely concealed by the label of positivists conventionally attached to all of them. So, the

1 Herbert Hart, 'Positivism and the Separation of Law and Morality' 71 *Harvard Law Review* (1957): 595-595; Gerald J. Postema, 'The Expositor, the Censor, and the Common Law', *Canadian Journal of Philosophy* IX, no. 4 (1979): 634-644.

2 See Anthony J. Sebok, 'Misunderstanding Positivism', *Michigan Law Review* 93, no. 7 (1995): 2054-2132 at 2063-2065; Gerald J. Postema, 'Legal Positivism: Early Foundations', in *The Routledge Companion to Philosophy of Law* (Routledge, 2012), 50-66.

3 David Dyzenhaus, 'The Genealogy of Legal Positivism', *Oxford Journal of Legal Studies* 24, no. 1 (2004):43.

4 David Dyzenhaus, 'Hobbes and The Legitimacy of Law,' *Law and Philosophy* 20 (2000): 461-498, 466.

5 Dan Priel, 'Toward Classical Legal Positivism', *Virginia Law Review*. 101, no. 4, (2015):987-1022, 988.

6 Frederick Schauer, 'Positivism before Hart', *Can. J. L. & Jurisprudence* 24 (2011): 455, 455-456.

doi: 10.5553/NJLP/.000114

continuity between the so-called classic positivism and current legal positivism comes into question. I think the first generation is more descriptive, perhaps more empirical, and, in this sense, more positivist. The second is less descriptive, somewhat less positivist and more rationalistic.

Before substantiating this argument, I must anticipate two preliminary objections. First, it can be contended that it is not descriptivism but the claim that law is only human-made law that makes those authors positivists. This objection is unconvincing because assuming that the classical positivist generation accepts only positive law has dissonances or complexities in Hobbes, Bentham and Austin.[7] As discussed below, they do not coincide in postulating that only positive law is the source of law, even though Austin considers that the province of jurisprudence is positive law. The exclusive existence of positive law can be sustained only on the descriptive motivations of empiricism added to the questioning of any metaphysics, which is the specific spirit of Comte's positivism. As we will see, these arguments do not concur with Hobbes', Bentham's, or Austin's philosophy.

The second objection would say that the identity of legal positivism does not reside in descriptivism but in the postulation of law as commands of the sovereign, one or many. This objection is weakened because, as is known, both Kelsen and Hart begin by questioning Austin's theory of imperatives, postulating in return the obligatory nature of law based on the supremacy of the *basic norm* or the *rule of recognition* rather than the sovereign's will. It could also be alleged that both the old and the contemporary positivists maintain the obligation to follow the positive law. Yet, in that case, the thesis becomes so extensive that all philosophies of law since ancient times could subscribe to it.

On these grounds, it can be argued that the descriptivist purpose provides a more reliable basis for comparing both generations. Indeed, Hobbes, Bentham and Austin are motivated to explain the law that 'is', which is different from saying that the law that 'is' is only positive. Likewise, Kelsen and Hart declare themselves descriptivist (see paras 4 and 5). For many authors, this is the most attractive feature of positivism, the so-called 'methodological thesis',[8] the interest in accounting for the law as it exists and not as philosophers imagine. However, the pertinent question is whether both generations are descriptivist, hence, positivist in the popularised usage of this word, and how much they achieve a convincing depiction of the existing law.

A safe start to answering these questions is remembering that 'positivism' was not frequently used in legal discussions until the twentieth century. Hobbes, Bentham and Austin speak of the mandatory character of 'positive laws', but it is hard to say they predicate positivism as an exclusive law paradigm. As Lobban explains, seventeenth- and eighteenth-century writers were more concerned with discussing

7 Mark C. Murphy and James Bernard, *The Philosophy of Positive Law: Foundations of Jurisprudence* (Yale University Press, 2005), 216.

8 See Stephen R. Perry, 'Hart's Methodological Positivism', in *Hart's Postscript: Essays on the Postscript to "The Concept of Law,"* ed. Jules Coleman (Oxford: Oxford University Press, 2001).

who had the authority to pronounce law rather than arguing that law had no foundation in morality.[9]

According to Sebok, 'positivism' appeared in legal discussions in the US in the first decades of the twentieth century. Pound (1912) used the term as a 'homonym' to characteristically explain the first stage of sociological jurisprudence[10] as a shorthand for the view associated with Auguste Comte.[11] It does not convey what legal positivism means today.[12] To be sure, Pound uses 'positivism' in the widespread sense of the moment. So, the homonym could not correspond strictly to Pound but to the most recent philosophers who speak of positivism somewhat differing from conventional uses in Pound's time. In any case, Sebok confirms that current usage differs from the past, and it is worth discussing how the change occurred.

What cannot be disputed is that the descriptivist style is the *motto* of both positivist generations, although the first is more influenced by empiricist rationalism and the second by positivism *a la* Comte since the mid-nineteenth century. Concordantly, Cohen summarised in 1927 the positivist thesis in the 'Glorification of the positive law that is',[13] just as Fuller understood it in 1940, comparing *positivism* with *realism*. Fuller says:

> "We may say of modem positivistic theories that they diverge … [One view that] may be called the ''realist'' view is represented by numerous American writers … These men represent that direction of legal positivism which seeks to anchor itself in some datum of nature, which considers that the law's quest of itself can end successfully only if it terminates in some tangible external reality."[14]

Sebok thinks that Fuller equates *positivism* and *realism* due to the conservative bias they may convey, yet it is more convincing that Fuller does so because of the interest of both strands in the law as 'it is'.[15] In Comte's positivist tone, *positivism* and *realism* assume the law as objective data – one could say by 'scientific' interest. As we will expand below, Kelsen and Hart have the same motivation, as do nearly

9 Michael Lobban, 'Theory in History: Positivism, Natural Law and Conjectural History in Seventeenth- and Eighteenth-century English Legal Thought', in Law *in Theory and History: New Essays on a Neglected Dialogue*, eds. Maksymilian Del Mar and Michael Lobban (Oxford London Portland: Hart Publishing Ltd., 2016), 206-230, 213.

10 Sebok, 'Misunderstanding Positivism', 2066.

11 Sebok, 'Misunderstanding Positivism', 2066.

12 Sebok, 'Misunderstanding Positivism', 2065.

13 Morris R. Cohen, 'Positivism and The Limits of Idealism in Law', *Columbia Law Review* 27, no. 3 (1927): 237-250, 237, https://www.jstor.org/stable/1112881.

14 Lon L. Fuller, *The Law in Quest of Itself* (Chicago: The Foundation Press, 1940), at 46-47, quoted by Anthony J. Sebok, 'Misunderstanding Positivism', 2059.

15 See Suri Ratnatapala, *Jurisprudence: An Introduction* (Cambridge: Cambridge University Press, 2009), 28.

all positivists.[16] Thus, it might be said that the descriptivist thesis defines the essential methodological approach of classics and contemporary positivists, even assuming this is not the only thesis they share. *Descriptivism* is their central paradigm.

However, Comtean positivism biased the descriptive attitude of the twentieth-century legal discussion. First, the forms and contents of the law were fragmented, and the evaluative aspects were declared non-describable. Next, positivism chose to describe only non-evaluative components. Finally, the descriptivist style was unnoticeably abandoned in favour of a philosophy of rationalistic bias. This paradoxical turn can be characteristically observed in Kelsen but also touches Hart's philosophy, with undesirable consequences for the legal concepts they postulate. In what follows, we will discuss this change, starting with a sketch of the Comtean positivism mutations and how they model the epistemological shift observed in contemporary legal positivism.

1 The positivist mutations

Positivism certainly is not a word without history.[17] In passing, it is worth specifying that although *positive law* has been mentioned since ancient times, *positivism* as a legal philosophy is a modern attitude,[18] with particularities discussed in this writing. In its origins, 'positivism' roughly alluded to the generalised interest in explaining the facts of the external world.[19] *Positivism* focused on *facts*, and 'positivist' scientists sought to discard traditional metaphysics as well as supersede religion.[20] Most scientists, rather 'naturalists' of the moment, thought of facts as 'physical' observable things. This approach also extended to the emerging social sciences modelled upon natural sciences, thus committed to the knowledge of the world as it is.[21] In the nineteenth century, Auguste Comte spoke of 'positive' as synonymous with 'scientific'.[22] A magazine summarises the popularised uses at the time:

16 See Andrei Marmor, 'Legal Positivism: Still Descriptive and Morally Neutral', *Oxford Journal of Legal Studies* 26 (2006): 683; Danny Priel, 'Evaluating Descriptive Jurisprudence', *The American Journal of Jurisprudence* 52, no. 1 (2007): 139-158.

17 David Dyzenhaus, 'The Demise of Legal Positivism?', *Harvard Law Review Forum* 119 (2006): 112, 118.

18 The words *positivus* (Latin) or *possitif* (French) are older than *positivism*, which is a nineteenth-century philosophy. Nicola Abbagnano, 'Positivism', *Encyclopedia of Philosophy*, https://www.encyclopedia.com (last accessed 29 Jun 2023).

19 Herbert Feigl, 'Positivism', *Encyclopedia Britannica*, https://www.britannica.com/topic/positivism (last accessed 30 June 2023).

20 Johannes. Feichtinger, Franz L. Fillafer and Jan Surman, *The Worlds of Positivism: A Global Intellectual History, 1770-1930* (Palgrave Macmillan, 2018), 353.

21 Feichtinger, Fillafer and Surman, *The Worlds of Positivism*, 352.

22 Auguste Comte, *The Positive Philosophy*, trans., H. Martineau (Batoche Books Kitchener, 2000) Vols I-II, 27; Feichtinger, Fillafer and Surman, 349.

> "Positivism means nothing more than Science, which again, it is well to remember, is merely the Latin for knowledge, although some sort of intellectual divinity having a paramount demand on our allegiance is commonly supposed to lurk in the term."[23]

In this way, positivism increased the prestige of the word 'science', and science favoured the reputation of Comte's views, which gained widespread appeal across cultures and continents, almost a religious one.[24] *Positivism* was not a specific science but a way of promoting scientific knowledge that Comte turned into a philosophy of science: a reflection on what science should be in the context of blooming natural and social sciences.[25]

Comte considered social sciences implicated with the 'Theologico-metaphysical philosophy', affected by 'a fatal separation from all other science'. Instead, he thought of social science as 'social physics',[26] then being considered a founder of Sociology. An example of Comte's positivism in social sciences is the nineteenth-century's positivist *criminology*, aimed at detecting physical causes to explain mental illness or antisocial behaviours.[27] In all cases, positivism wanted to identify science with observable facts.

Nonetheless, critical questions arose for those attracted by the new philosophy of science: what are 'facts', what is 'observable', and what is 'experience'? The epistemological discussion started, and philosophical positivist branches began to form. Doubts about what the sciences describe were raised noticeably by Ernst Mach, who postulated a methodical 'phenomenalism'.[28] Mach thought that apart from facts of experience given through sensations, any assertion about the external world turns out to be metaphysical.[29] Thus, since there is no certainty of the world beyond the senses, the philosophy of science can only make assertions about the 'given', the 'phenomena', or the 'appearances'.[30]

23 Golden Hours, 'Recent Phases of Positivism', *A Monthly Magazine for Family and General Reading* (1884): 703-704.

24 Feichtinger, Fillafer, and Surman, The *Worlds of Positivism*, 353-354.

25 Feichtinger, Fillafer, and Surman, The *Worlds of Positivism*, 351.

26 Comte, *The Positive Philosophy*, 116.

27 Enrico Ferri, 'The Nomination of a Commission for the Positivist Reform of the Italian Penal Code', *Journal of the American Institute of Criminal Law and Criminology* 11, no. 1 (1920):67-76; John Scott, 'Criminology, positivist', in *A Dictionary of Sociology* (Oxford: Oxford University Press, 2014) https://www-oxfordreference-com.ezproxy.library.uq.edu.au/view/10.1093/acref/97801 (last accessed 16 April 2023).

28 Denis Fisette, 'Brentano's Lectures on Positivism (1893–1894) and His Relationship to Ernst Mach', in *Ernst Mach – Life, Work, Influence*, Vienna Circle (Vol. 22), ed. Friedrich Stadler (Institute Yearbook, 2019), 40.

29 Fisette, 'Brentano's Lectures on Positivism', 44; David Romand, 'Mach's "Sensation", Gomperz's "Feeling", and the Positivist Debate About the Nature of the Elementary Constituents of Experience', in , *Ernst Mach – Life, Work, Influence*, Vienna Circle (Vol. 22), ed. Friedrich Stadler (Institute Yearbook, 2019), 94.

30 Erich Becher, 'The Philosophical Views of Ernst Mach', *The Philosophical Review* 14, no. 5 (1905): 535-562, 535-536.

Thus, in positivist philosophies influenced by Mach, Comte's positivism claims to describe the physical world free from metaphysics mutated into prioritising 'elements' and 'sensations'.[31] Then, the physical world's existence became somewhat enigmatic or dubious. It rests beyond what the subject could perceive and objectively testify. Concerns about the outside world become considered metaphysical,[32] a view mostly known as *empiricism*.[33] Such a positivist debate took place mainly in the *Verein Ernst Mach* – later known as the *Vienna Circle* – where Mach's ideas merged with Bertrand Russell's logicism and Wittgenstein's philosophy of language, particularly between 1928 and 1934.[34] These philosophies influenced the denial of law as an empirical science, re-opening the path for considering law as a strictly rational 'science'.

The Vienna Circle was considered 'the most significant of serious philosophical movements', receiving the names of 'neo- empiricism', 'neo positivism', 'logical empiricism', 'and logical positivism'.[35] Often intermingled with Oxford philosophies of language, these approaches broadly were labelled *analytical*.[36] At any rate, logical positivism is possibly the denomination that best suits the distinctive thinking of the group. The Circle's hallmark is condensed in its 1929 manifesto, *The Scientific World Conception*, purportedly written by Rudolf Carnap*:*

> "The task of philosophical work lies in this clarification of problems and assertions, not in the propounding of special 'philosophical' pronouncements. The method of this clarification is that of *logical analysis;* […] It is the method of *logical analysis* that essentially distinguishes recent empiricism and positivism from the earlier version that was more biological-psychological in its orientation. If someone asserts 'there is a God', 'the primary basis of the world is the unconscious', 'there is an entelechy which is the leading principle in the living organism', we do not say to him: 'what you say is false'; but we ask him: 'what do you mean by these statements?"[37]

31 See Elske De Waal and Sjan ten Hagen, 'The Concept of Fact in German Physics around 1900: A Comparison between Mach and Einstein', *Physics in Perspective* 22, no. 2 (2020): 55-80, 61.

32 Michael Polanyi, *Personal knowledge; towards a post-critical philosophy* (London: Routledge & Kegan Paul, 1973), 9.

33 Simon Blackburn, 'Empiricism', in *A Dictionary of Philosophy*, (Oxford: Oxford University Press, 2016), https://www.oxfordreference.com/view/10.1093/acref/9780198735304.001.0001/acref-9780198735304-e-1069 (last accessed 30 June 2023).

34 Friedrich Stadler, *The Vienna Circle. Studies in the Origins, Development, and Influence of Logical Empiricism*, abridged edn. (Springer, 2015), xvi,

35 Victor Kraft, *The Vienna Circle: The Origin of Neo-Positivism* (New York: Philosophical Library, 1953).

36 Peter M.S. Hacker, 'Analytic Philosophy: What, Whence, and Whither?', in *Wittgenstein: Comparisons and Context* (2014), 221-230, https://doi.org/10.1093/acprof:oso/9780199674824.003.0010 (last accessed 29 June 2023).

37 The Vienna Circle, 'The Scientific Conception of the World', https://www.manchesterism.com/the-scientific-conception-of-the-world-the-vienna-circle/ (last accessed 2 February 2023).

On one side, like Comte, logical positivism questions metaphysics and apriorism, and declares 'philosophy ought to be scientific'.[38] On the other side, it identifies scientific knowledge with philosophical empiricism and logic:

> "The earlier claim of empiricism to derive all knowledge and science from experience as the sole ground of validity is abandoned [...] there are basically two classes of assertions, those which are necessary, valid independently of experience, and factual assertions, synthetic propositions, which are refutable and valid only on the basis of experience."[39]

This proposition is known as the 'principle of verification'. It asserts that only what can be verified is considered scientific, and the means of verification are either empirical or by logical demonstration.[40] Through these methods, only science can obtain the only possible knowledge.[41] Yet, because scientific disciplines were accumulating abundant information about the world's empirical truths, logical positivism moved to sustain that the philosophers' task was being in charge of science's linguistic and logical truths.[42] Through this passage, the Vienna Circle's empiricism mutated to be mainly logical or analytical. *Logical positivism* strictly emerged. It remained anti-metaphysical in spirit, but it was no longer concerned with physical facts but logical statements – ultimately concepts, propositions, and words.[43]

The *Vienna Circle* had mutual influences with German philosophies via neo-Kantian schools, whose abstract style is similar.[44] The *Marburg school*, for instance, criticises the scientific method of old positivism because it only suits the realities of nature. It does not apply to culture. Heinrich Rickert stated that the method of natural sciences cannot explain 'the moral imperative of justice or the meaning and value of cultural creations in art, religion, and poetry, where what counts is the individuality of creation, not the generalization of a law of nature'.[45] Accordingly, the *Marburg school* proposed a radical reduction of social science, particularly philosophy, to an abstract and *a priori* methodology. Paul Natorp styled himself a 'pan-methodist' arguing that 'it is method that determines the object of philosophy, and mathematical method, in particular, stands as the clearest symbol of scientificity as such'.[46] The closeness of Marburg's methodological formalism with the logical-positivism pattern is evident. Then, the arguments to understand the normative worlds as exclusive products of reason begin to shape.

38 Kraft, *The Vienna Circle*, 12-16.
39 Kraft, *The Vienna Circle*, 16.
40 Kraft, *The Vienna Circle*, 19.
41 Michele Marsonet, 'Philosophy and Logical Positivism', *Academicus* 19 (2019): 33.
42 Marsonet, 'Philosophy and Logical Positivism', 33.
43 Marsonet, 'Philosophy and Logical Positivism', 32.
44 Alexander Naraniecki, 'Neo-Positivist or Neo-Kantian? Karl Popper and the Vienna Circle', *Philosophy* 85, no. 4 (2010): 511-530, 517, doi:10.1017/S0031819110000458.
45 Agostino Carrino, 'The Rebirth of Legal Philosophy Within the Frame of Neo-Kantianism', in, *A Treatise of Legal Philosophy and General Jurisprudence*, ed. Corrado Roversi (Springer, 2016).
46 Carrino, 'The Rebirth of Legal Philosophy', 13.

A rational turn occurred in these philosophical debates, which paved the way for ethical doctrines doubting that moral assertions may be proved true either by empirical or logical means. Moral assertions were declared meaningless, unverifiable, or even 'irrational'.[47] Next, in the 1940s, Alfred Ayer proposed the ethical doctrine of 'emotivism', according to which moral utterances are just expressions of moral feelings.[48] They cannot be proved.[49] According to Ayer, 'if a proposition could neither be verified by science nor was valid *a priori*, then it was 'metaphysical' and thus 'neither true nor false but literally senseless'.[50] Bevir and Blakely contend that, for Ayer, 'the analytic-synthetic distinction entailed the separation of facts from values. Facts were the meaningful propositions about the world that were verified by science. Values neither had objective status nor did they hold *a priori* by tautology […]so strictly speaking they were meaningless'.[51] Ethical utterances merely convey 'the subjective emotions of the person expressing […] subjective approval or disapproval, akin to sounds such as "boo" and "hooray"'.[52]

Charles Stevenson added two distinctions to Ayer's *emotivism*. First, Stevenson argued that values are not mere 'emotions' but ethical 'symbols' for non-cognitive expressions. That is, emotions have a meaning in language, which results from conventional uses of speech, and words have history and etymology. Thereby, moral assertions are not necessarily meaningless. Second, in the context of ethical discussions, words often mix with facts, allowing moral disagreements to be settled by rational means.[53] In other words, although moral emotions are not demonstrable by cognitive methods, they make sense in language.

The standard consequence of these philosophies is that the theory displaced towards the analysis of concepts – statements, words, propositions and language –[54] a move known as the 'linguistic turn' in philosophy, roughly occurring since the publication of Wittgenstein's *Tractatus Logico-Philosophicus* in 1921. According to Richard Rorty's declaration, the turn entails that 'linguistic analysis constitutes the proper domain of the logic of science'.[55] Henceforth, the philosophers' declared mission was to clarify language according to analytical purposes and methods – the

47 Scott Soames, *The Heyday of Logical Empiricism in The Analytic Tradition in Philosophy*, Vol. 2 (Princeton University Press, 2018), 172; Arthur D. Ritchie, 'Errors of Logical Positivism', *Philosophy* 12, no. 45 (1937):47-60, 47-48.

48 Alfred Jules Ayer, *Language, Truth and Logic*, 2nd ed. (New York: Dover, 1946), 110-111.

49 Alexander Miller, 'Emotivism and the Verification Principle', *Proceedings of the Aristotelian Society*, Vol. 98, 103-124.

50 Ayer, *Language, Truth and Logic*, 251.

51 Mark Bevir and Jason Blakely, 'Analytic ethics in the central period', *History of European Ideas* 37, no. 3 (2011): 249-256, 252.

52 Bevir and Blakely, 'Analytic ethics in the central period', 252.

53 Bevir and Blakely, 'Analytic ethics in the central period', 252.

54 Andrei Marmor, 'Farewell to Conceptual Analysis', in *Philosophical Foundations of the Nature of Law*, ed. Wil Waluchow and Stefen Sciaraffa (Oxford: Oxford University Press, 2013), 213.

55 Richard Rorty, *The Linguistic Turn: Recent Essays in Philosophical Method* (Chicago: University of Chicago Press, 1967); Victor Kraft, *The Vienna Circle: The Origin of Neo-Positivism*, 17; Stadler, *The Vienna Circle. Studies in the Origins*, 8; Vittorio Hösle and Steven Rendall, A *Short History of German Philosophy* (Princeton University Press, 2012), 187.

analytical style transmitted to almost all the discussions in social disciplines, including ethics and law.

Doubtless, analysis is intrinsic to human thinking, with notable successes in natural sciences where observed objects are studied in their parts or elements. But what 'analytical' indicates in the post-Vienna philosophy is not the analysis of the world's components but the logic and linguistic analysis of disembedded words and sentences. Indeed, Carnap's analytical program was early enunciated 'to clarify meaningful concepts and propositions, to lay logical foundations for factual science and mathematics'.[56] Accordingly, Hacker notes:

> "The analytic tradition left philosophy with two general tasks [...] The first is [...] the task of resolving conceptual puzzlement and dissolving conceptual confusions, both within philosophy and in other domains of human thought and reflective experience [...] The second task [...] is, in Wittgenstein's idiom, to provide a perspicuous representation of the use of our words or of the grammar of our language... within a given domain of discourse."[57]

A primary implication from what has been said is that if positivism was a synonym of *descriptive* science in its Comtean origins, under logical positivism and connected views, positivism and the sciences distanced from each other, with the former becoming increasingly rationalistic. Logical positivism claims a scientific motivation, but in normative aspects, arguably, it induces a distancing from the observational – or naturalist – paradigm of sciences aimed at providing knowledge based on facts.[58] It remains open to the possibility of the truth of the world's *hard* components, either by empirical or logical methods. yet, it denies the existence and possibility of knowing the *soft* elements of the world – instinctive needs, feelings, emotions, social values and norms. Human subjectivity is dismissed in its peculiar existence and declared unverifiable to the extent it does not satisfy the logical positivist parameter.

In this way, under the premises of scepticism, emotivism, and linguistic analysis, logical positivism is ready to move on to explain normative facts on purely rational assumptions. It concentrates on abstract entities, concepts, logic, and linguistic standards, assuming the tasks of empirical analysis belong to specialised natural sciences.[59] As exemplified by the dominant twentieth-century currents, branches of thinking develop that cease to coincide with descriptive purposes and mutate into an analytic, purely rational activity.[60] These changes perform an anti-naturalist turn, quite the opposite of the scientific interest at the centre of the nineteenth-century's positivism. Ultimately, logical positivism derived

56 Rudolf Carnap, quoted by Hacker, 'Analytic Philosophy: What, Whence, and Whither?', 240.
57 Hacker, 'Analytic Philosophy: What, Whence, and Whither?', 240-241.
58 Alan F. Chalmers, *What is this Thing Called Science?* (University of Queensland Press, 2003), 1.
59 Kraft, *The Vienna Circle*, 17.
60 Roger W. Holmes, 'The Problem of Philosophy in the Twentieth Century', *The Antioch Review* 22, no. 3 (1962): 287-296; see also Marsonet, 'Philosophy and Logical Positivism'. 32.

paradoxically into a rational metaphysics of science, with all the dominant features of 'formalism'.[61]

For ethical and legal discussions, logical positivism induced an inevitable consequence: the denial of the possibility of speaking of moral or other normative values in scientific terms since, according to the theories of Carnap and Ayer, the objective validity of values or norms cannot be empirically verified or deduced from empirical propositions.[62] Scepticism and moral relativism became seductive among moral philosophers. In the more temperate cases, they focused on analysing the scope of moral expressions, as suggested by Stevenson. In the more radical ones, morality was expelled from the interest of the social sciences. Insofar as values and rules exist in language, they can be systematised but not justified. This turn impacted legal philosophers, emblematically in the case of Kelsen and later Hart. Kraft summarises the outcomes of the logical positivist transformations in terms that can be immediately detected either in Kelsen or Hart's legal theory:

> "Ethics can validate derivative norms in terms of fundamental norms, but it cannot *justify* the most fundamental norms, it can only describe their acceptance as a fact. There are not criteria for absolute values, all values are relative to subject."[63]

For logical positivists, emotions and feelings can be externally described, but not the values or the contents of shared subjectivity they convey. Let us see how these ideas influence the epistemology of Kelsen and Hart, making it significantly different from their predecessors' positivism.

2 The framing of legal positivism

It is generally assumed that Kelsen and Hart's legal positivism goes back to Hobbes, Bentham, and Austin's positions.[64] Indeed, proximities among these authors exist, yet they do not deny their notable, even conflicting, differences. As said before, Hobbes and Bentham speak of positive law but do not claim themselves 'positivists'. Admittedly, Hobbes and Bentham can be considered 'positivists' in the sense of naturalism, which is concerned with observing the laws of nature.[65] They were not

61 James K. Feibleman, 'The Metaphysics of Logical Positivism', *The Review of Metaphysics* 5, no. 1, (1951); Gustav Bergmann, 'Logical Positivism, Language and the Reconstruction of Metaphysics', *Rivista Critica di Storia della Filosofia* 8, no. 4 (1953), 455

62 Rudolf Carnap, 'The Rejection of Metaphysics', 1934, 10, https://www.phil.cmu.edu/projects/carnap/editorial/latex_pdf/1934-10.pdf (last accessed 2 February 2023).

63 Kraft, *The Vienna Circle*, 92.

64 Ratnapala, *Jurisprudence: An Introduction*, 27. See also Juan Moreso, and Pablo Navarro, 'The Dynamics of Legal Positivism Some Remarks on Shiner's Norm and Nature', *Ratio Juris* 10, no. 3 (1997): 288-299; Dyzenhaus,'The Genealogy of Legal Positivism', 39-67; D. Priel, 'Toward Classical Legal Positivism', 987-1022.

65 Priel, 'Toward Classical Legal Positivism', 998; Martin Loughling, 'The Political Jurisprudence of Thomas Hobbes', in *Hobbes and The Law*, ed. David Dyzenhaus and Thomas Poole (Cambridge: Cambridge University Press, 2012), 5.

positivists in the anti-naturalist sense popularised by the twentieth century's legal positivism. They were concerned with 'natural causes' and moral concerns, which some authors find closer to natural law.[66] Hobbes's chapter XIII of *Leviathan* speaks 'of the Natural Condition of Mankind as Concerning their Felicity and Misery', and chapter XIV says 'of the First and Second Natural Laws, and of Contracts'. Hobbes writes:

> "The right of nature, which writers commonly call *jus naturale*, is the liberty each man hath to use his own power as he will himself for the preservation of his own nature; that is to say, of his own life; and consequently, of doing anything which, in his own judgement and reason, he shall conceive to be the aptest means thereunto."[67]

Hobbes addresses 'civil law', but civil law is not merely conventional but lays upon natural circumstances. 'The law of nature, therefore, is a part of the civil law in all Commonwealths of the world. Reciprocally also, the civil law is a part of the dictates of nature.'[68] His tone is unmistakably that of the so-called natural law, which authorises Lon Fuller to suggest that Hobbes 'founded legal positivism on a natural law basis'.[69] Even justice is derived from natural law. 'For justice, that is to say, performance of covenant, and giving to every man his own, is a dictate of the law of nature.'[70]

Hobbes may be held to be a positivist because he considers law as a sovereign's command. Still, as far as he assumes civil law and justice are 'dictated' by the law of nature, he thinks of law's command as a natural law philosopher. Natural law is particularly demanding for the sovereign: 'For in this consisteth Equity; to which as being a Precept of the Law of Nature, a Soveraign (sic) is as much subject as any of the meanest of his People.'[71] Hobbes speaks of *positive divine* and *natural law*, claiming the exact obedience to them:

> "And thus I have brought to an end my discourse of civil and ecclesiastical government, occasioned by the disorders of the present time, without partiality, without application, and without other design than to set before men's eyes the mutual relation between protection and obedience; of which

66 Jeffrey A. Pojanowski, 'Redrawing the Dividing Lines Between Natural Law and Positivism(s)', *Virginia Law Review* 101, no. 4 (2015): 1023-1027. See, Brian Bix, 'On the Dividing Line Between Natural Law Theory and Legal Positivism', *Notre Dame Law Review* 75, no. 5 (2000): 1613-1624.

67 Thomas Hobbes, *Leviathan, or the Matter, Forme, & Power of a Common-wealth Ecclesiastical and Civil* (London: Andrew Crooke at the Green Dragon in St. Pauls Church-yard, 1651), 79.

68 Hobbes, *Leviathan*, 164.

69 Fuller, *The Law in Quest of Itself*, 19-20; Priel, 'Toward Classical Legal Positivism', 1000; David Dyzenhaus, 'Hobbes and the Legitimacy of Law', *Law and Philosophy* 20 (2001): 461-498.

70 Hobbes, *Leviathan*, 164; see also 'Introduction', in *Hobbes and The Law*, eds. David Dyzenhaus and Thomas Poole.

71 Hobbes, quoted by Thomas Broden, 'The Straw Man of Legal Positivism', *Notre Dame L.* 34, no. 530 (1958-1959): 536.

> the condition of human nature, and the laws divine, both natural and positive, require an inviolable observation."[72]

Broden remarks that rather than the sovereign being absolute, Hobbes clearly states that the sovereign is subject to God's law and the laws of nature.[73] Accordingly, Mark Murphy contends that 'Hobbes's theory is much more akin to earlier natural law accounts than to later positivist'.[74] Also, Coyle asserts that there are profound differences between Hobbes's treatment of law and morality and that of later positivists.[75] For Hobbes, 'the distinction between posited legal rules and moral precepts was not an analytical but a political one: positive laws do not differ in kind from substantive moral principles, but owe their considerable virtue to their ability to channel moral speculation along very specific lines.'[76]

Likewise, it is hard to expel the implicit elements of natural law from Bentham's philosophy, portraying him as interested in freeing positive law from moral law.[77] Unmistakably, Bentham's *principle of utility* is derived from natural circumstances. Bentham argues that:

> "By the natural constitution of the human frame, on most occasions of their lives men in general embrace this principle, without thinking of it: if not for the ordering of their own actions, yet for the trying of their own actions, as well as of those of other men."[78]

In this way, the *principle of utility* orders the commonwealth as well as all nations: 'a natural arrangement, governed as it is by a principle [the principle of utility] which is recognized by all men, will serve alike for the jurisprudence of all nations', and it will serve for 'all systems of positive law'.[79]

For Perreau-Saussine, the connection that Bentham establishes between *utility* and positive law resembles natural law*:* 'Just as Benthamite judges are to disregard legal requirements where the balance of utility so directs, so natural lawyers argue that an unjust law, as unjust, is not a straightforward or central case of law, not a real but only law in a secondary sense.'[80] The principle of utility seems to occupy the place of justice for natural law lawyers, and it does so in censorial and expository

72 Hobbes, *Leviathan*, 445.
73 Broden, 'The Straw Man of Legal Positivism', 536.
74 Mark C. Murphy, 'Was Hobbes a Legal Positivist?' *Ethics* 105, no. 4 (1995): 846-873, 846.
75 Sean Coyle, 'Thomas Hobbes and the Intellectual Origins of Legal Positivism', *CAN. J.L. & Jurisprudence* 16 (2003): 243.
76 Coyle, 'Thomas Hobbes and the Intellectual Origins of Legal Positivism', 268. See also Dyzenhaus, 'The Genealogy of Legal Positivism', 42.
77 Broden, 'The Straw Man of Legal Positivism', 538-539.
78 Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Oxford: Clarendon Press, 1879), 4.
79 Bentham, *An Introduction to the Principles of Morals and Legislation*, 301-302; Priel, 'Toward Classical Legal Positivism', 988.
80 Amanda Perreau-Saussine, 'Bentham and the Boot-Strappers of Jurisprudence: The Moral Commitments of a Rationalist Legal Positivist,' *The Cambridge Law Journal* 63, no. 2 (2004): 353.

contexts.[81] On this basis, Bentham justifies the legal institutions, namely the varieties of offences and punishments.[82]

Utility and *happiness* sustain Bentham's natural and legal philosophy. He says, 'The general object which all laws have, in common, is to augment the total happiness of the community …'.[83] Consequently, in Bentham – as in Hobbes – we find some substantive criteria for distinguishing right and wrong. In Hobbes, the underlying criterion is peace and natural conditions for survival. In the case of Bentham, it is happiness and utility.[84] These authors do not maintain complete relativity, neutrality, legal indifference, or the denial of values. Their ends-oriented view is a crucial difference from Kelsen's and Hart's positivism. Thus, the opinion that old positivists separate law from morality as contemporary authors do is highly contestable.[85] The denial of the relations between law and morality makes contemporary legal positivists increasingly less descriptive until the law comes to be explained upon purely rationalistic assumptions. Arguably, this detour begins with Austin.

3 John Austin: positivist but deontological

Stanley Paulson calls Austin the founder of 'classical legal positivism',[86] and his assertion seems plausible as Austin positions positive law as 'the appropriate matter of jurisprudence'.[87] Austin says positive laws are 'laws simply and strictly so called'.[88]

It is not that Austin denies other laws apart from those named 'positive'; neither does he deny a moral evaluation of the law and does not believe that governmental authority was beyond moral limitation.[89] He recognises 'divine law' and considers it as 'laws properly so called' against 'metaphorical' or 'figurative' laws such as the 'the positive moral rules'.[90] Austin sustains that 'the divine law is the measure or test of positive law and morality: or (changing the phrase) law and morality, in so

81 Perreau-Saussine, 'Bentham and the Boot-Strappers of Jurisprudence: The Moral Commitments of a Rationalist Legal Positivist': 346-383, 351, 353, 369.
82 Bentham, *An Introduction to the Principles of Morals and Legislation*, chapters XIII to XVII.
83 Bentham quoted by Broden, 'The Straw Man of Legal Positivism', 539.
84 Hobbes, *Leviathan*, 76-79; Priel, 'Toward Classical Legal Positivism', 998; Jeremy Waldron, *Law and Disagreement* (Oxford University Press, 1999), 217; Postema, 'The Expositor, the Censor, and the Common Law', 643-670.
85 See D. Dyzenhaus, 'The Genealogy of Legal Positivism', 39; Perreau-Saussine, 'Bentham and the Boot-Strappers of Jurisprudence', 354; Priel, 'Toward Classical Legal Positivism', 1013; David Dyzenhaus, 'Positivism's Stagnant Research Programme', *Oxford Journal of Legal Studies* 20, no. 4 (2000): 703-722, 708.
86 Stanley L. Paulson, 'Classical Legal Positivism at Nuremberg', *Philosophy & Public Affairs* 4, no. 2 (1975): 132-158, 134.
87 John Austin, *The Province of Jurisprudence Determined* (London: John Murray, Albemarle Street, 1832), viii.
88 Austin, *The Province of Jurisprudence Determined*, v-ix.
89 Broden, 'The Straw Man of Legal Positivism', 532.
90 Austin, *The Province of Jurisprudence Determined*, vii-viii.

far as they are what they ought to be, conform, or are not repugnant, to the law of God'.[91] On these grounds, Austin is ready to subscribe Hobbes' assertion that 'no law can be unjust' when it is measured in legal terms, but it can be 'unjust' when it is measured by the Divine Law or by positive morality.[92]

Nevertheless, the core of Austin's theory points to the epistemological demarcation of the discipline of law. He considers that, apart from positive law, neither morals nor other laws matter to the 'province of Jurisprudence'. He says:

> "By a careful analysis of leading terms, law is detached from morals, and the attention of the student of jurisprudence is confined to the distinctions and division which relate to law exclusively."[93]

Arguably, the province of jurisprudence is determined not because we live in a world where law and morals are unplugged but mainly because of the needs of the academic administration of the discipline of law. In this way, the *ontology* and *epistemology* of law can be differentiated in Austin's exposition. He then dedicates effort to clarifying the meaning of concepts such as positive law, natural law, positive morality, right, sovereign, sanction, obligation and duty.[94]

Does the analytic task imply dispensing with the substantive contents of positive law? Credibly, this does not happen in Austin. The delimitation does not exclude the substantive dimensions of law since law is not unplugged from other divine or positive moral laws.[95] Meaningfully, Austin includes law and morality within the 'science of ethics' (or 'deontology', as he says), which means 'the science of law and morality as they respectively ought to be: or (changing the phrase) the science of law and morality as they respectively must be if they conform to their measure or test'.[96]

Thus, as Hobbes and Bentham, Austin's theory does not rest on separating law and morality. For Broden, Austin's purpose is the opposite: 'Instead of ignoring or condemning the association of law and morality, Austin is vitally concerned with strengthening their relationship. No book on Jurisprudence devotes more time to the relationship of law and morality and points out more strenuously the fact that positive law should be judged by God's law and natural law.'[97]

Nevertheless, a significant change begins to take place. In Austin, the distinction between *positive* and *natural law* starts to become a distinction between *law* and *morality*, understood in the sense of rational morality, or ethics, as enlightened

91 Austin, *The Province of Jurisprudence Determined*, xiii.
92 Austin, *The Province of Jurisprudence Determined*, 276.
93 Austin, quoted by Broden, 'The Straw Man of Legal Positivism', 532.
94 Broden, 'The Straw Man of Legal Positivism', 532.
95 Austin, *The Province of Jurisprudence Determined*, xvi.
96 Austin, *The Province of Jurisprudence Determined*, xiv.
97 Broden, 'The Straw Man of Legal Positivism', 532.

philosophers proposed in the epoch.[98] The 'natural' component of Hobbes or Bentham's political morality weakens, and natural law becomes increasingly identified with morality derived from abstract reasoning, as such assumed in positive law and positive morality.[99] This rational understanding of natural law is usually called 'classical',[100] with origins remitted to Grotius and later identified with morality in the Kantian sense. Therefore, under the rationalistic bias, the distinction between positive and natural law is mostly posed as the difference between law and morality as if the terms 'positive' and 'law', 'natural' and 'morality', were respectively equivalent. Still, it is a *difference*, not a *separation*.

Meaningfully, despite Austin's praising of utility as the basis of disinterested sympathy and benevolence inducing the 'general good',[101] utility is not as central as it is in Bentham's jurisprudence. The principle of utility is overshadowed by Austin's conspicuous emphasis on the 'sovereign's commands'[102] as proper law. Austin's legal theory is portrayed as resting on 'two fundamental doctrines, the command doctrine and the doctrine of absolute sovereignty',[103] aspects that, in any case, are present in the authors who precede him.[104]

For Austin, it is irrelevant who the sovereign is, whether a monarch or a group of persons, nor if the sovereign has legal rights to command law. What matters is that there must be 'subjection' to the law's author, somehow in a Hobbesian way, and there must be some habit of obedience from the people.[105] This definition implies that at least the relationship between the sovereign and the commanded is not explicitly subjected to morality.[106] It does not mean that Austin denies moral rights, but they exist as much as emanating from the sovereign's will.[107] Nonetheless, what attracts the most discussion in support of the separation of law and morality is Austin's famous assertion that Gerald Postema epitomises as 'Bentham's dictum':[108]

> "The existence of a law is one thing: its merits or demerits are another thing. Whether a law be, is one inquiry: whether it ought to be, or whether it agree with a given or assumed test, is another and a distinct inquiry. Although it disagrees with a given or assumed test, a law set by the state, or a law imposed

98 Austin, *The Province of Jurisprudence Determined*, xii.
99 Austin, *The Province of Jurisprudence Determined*, 135.
100 See Edgar Bodenheimer, 'Jurisprudence', *The philosophy and Method of Law* (Harvard University Press, 1974) rev. edn., 32; Alexander Passerin D'Entreves, *Natural Law, An Introduction to Legal Philosophy*, with a New Introduction by Cary J. Nederman, (Routledge, 1994) 15.
101 Austin, *The Province of Jurisprudence Determined*, 9-10.
102 Austin, *The Province of Jurisprudence Determined*, 198-199.
103 Paulson, 'Classical Legal Positivism at Nuremberg', 134; Austin, *The Province of Jurisprudence Determined*, vii.
104 Austin, *The Province of Jurisprudence Determined*, 199; Gerald J. Postema, 'Law as Command: The Model of Command in Modern Jurisprudence', 11 *Phil. Issues* (2001): 470, 471-74.
105 Austin, *The Province of Jurisprudence Determined*, 200-204; Paulson, 'Classical Legal Positivism at Nuremberg', 136.
106 Paulson, 'Classical Legal Positivism at Nuremberg', 136.
107 Paulson, 'Classical Legal Positivism at Nuremberg', 41.
108 Postema, 'The Expositor, the Censor, and the Common Law', 643.

> by opinion, is a law which the state has set, or a law which opinion has imposed: just as a yard or bushel used in a town or province, but differing from the yard or bushel prescribed by the sovereign legislature, is a yard or bushel to the inhabitants of the town or province, although it is a false measure in relation to the legal standard."[109]

Hart considered this the 'central tenet of positivism'.[110] Arguably, Hume's distinction between 'is' and 'ought to' statements can be detected in this declaration. However, it is unclear whether Austin implies a formal gap between these terms, as Hume argued.[111] Thus, moral 'merit' is only assessed in the 'ought to be' but not in the law that 'is'. Is there no merit in existence?

Broden argues that Austin's purpose in making analytic distinctions as those of positive law, natural law, positive morality and Divine law 'was to clarify the meaning of the terms, not to weaken or destroy their interrelationship'.[112] This can also be said of the distinction between *existence* and *merit*. The delimitation of the (descriptive) province of jurisprudence does not exclude moral substance in the described law. According to this interpretation, *ontology* and *epistemology* do not melt in Austin. Likewise, in Bentham, the purpose of the 'dictum' was not to preclude censorial tasks from describing law but, contrarily, to propose a compendium that 'would at once be a compendium of expository and of censorial Jurisprudence'.[113]

Be that as it may, the fact is that since then, starting with Kelsen, legal positivists have maintained the separability of law and morality, distancing themselves increasingly from the substantive philosophies of Hobbes, Bentham or even Austin, becoming more formal and less descriptive.

4 Hans Kelsen: descriptive but Kantian

Kelsen localises his *Pure Theory of Law* in the tradition of Austin's analytical jurisprudence;[114] in that sense, he sets forth a descriptive theory:

> "It is called a 'pure' theory of law, because it only describes the law and attempts to eliminate from the object of this description everything that is not strictly

109 Austin, *The Province of Jurisprudence Determined*, 278.
110 H.L.A. Hart, 'Bentham and the Demystification of the Law', *Modern Law Review* 36, no. 1 (1973): 2-17, 8.
111 D. Hume, *A Treatise of Human Nature* (Penguin Books, 1985), 521.
112 Broden, 'The Straw Man of Legal Positivism', 534.
113 Bentham quoted by Amanda Perreau-Saussine, 'An Outsider on The Inside: Hart's Limits on Jurisprudence,' 2006, 56, *University of Toronto Law Journal*, 376.
114 H. Kelsen, 'The Pure Theory of Law and Analytical Jurisprudence', *Harvard Law Review* 55, no. 1 (1941): 44-70, 54.

> law: Its aim is to free the science of law from alien elements. This is the methodological basis of the theory."[115]

The *Pure Theory*, as a general theory of law, 'answers the question of what the law *is*, not what it *ought to be*'.[116] 'What must be avoided under all circumstances is the confounding -as frequent as it is misleading- of cognition directed toward a legal 'ought,' with cognition directed toward an actual "is."'[117] Doubtless, the Humean split between 'is' and 'ought to be' lurks in Kelsen. Thus, it is essential to distinguish which sense Kelsen claims to be *descriptive*.

Kelsen's enterprise seems mainly epistemological, like Austin's. He aims to delimit the specific object of the science of law compared to other disciplines such as psychology, sociology, ethics, and politics. He seems more interested in founding the scientific discipline of law rather than describing the law as it exists, or perhaps thinks that both aspects –*epistemological* and *ontological* – are equivalent, or the former determines the latter. It is not that he denies connections, but, before all, he wants to prevent any 'uncritical mixture of methodologically different disciplines',[118] clearly following a Kantian strategy. His theory pursues to exclude 'from the cognition of positive law all elements foreign thereto'.[119] Still, he claims to be descriptive:

> "When this doctrine is called the 'pure theory of law,' it is meant that it is being kept free from all the elements foreign to the specific method of a science whose only purpose is the cognition of law not its formation."[120]

In this way, Kelsen intends to keep the law 'uncontaminated' of 'alien' matters of other disciplines.[121] Leaving aside controversial Kantian motivations, delimiting the scope of the science of law for strict cognitive purposes is Kelsen's legitimate commitment. Also, his interest in basing law on normative grounds other than force is commendable.[122] However, to conclude from the cognitive purposes that the pure theory deals with law as it 'is' without committing to the law as it 'ought to be', Kelsen needs to add other assumptions: either there is no 'ought to be' in the

115 H. Kelsen, *Pure Theory of Law* (New Jersey: The Lawbook Exchange Ltd, 2002) 1; H. Kelsen, *General Theory of Law and State* (Cambridge. Mass: Harvard University, 1949), xiv.

116 Kelsen, 'The Pure Theory of Law and Analytical Jurisprudence', 44; William Ebenstein, 'The Pure Theory of Law: Demythologizing Legal Thought', *California Law Review* 59, no. 3(1971): 617-652, 623, (italics mine).

117 Kelsen, 'The Pure Theory of Law and Analytical Jurisprudence', 52.

118 Kelsen, *Pure Theory of Law*, 1.

119 Kelsen, 'The Pure Theory of Law and Analytical Jurisprudence', 44.

120 Kelsen, *The General Theory of Law and State*, xiv; Ebenstein, 'The Pure Theory of Law: Demythologizing Legal Thought', 621; Stanley L. Paulson, 'The Neo-Kantian Dimension of Kelsen's Pure Theory of Law', *Oxford Journal of Legal Studies* 12, no. 3 (1992): 311-332.

121 Kelsen, 'The Pure Theory of Law and Analytical Jurisprudence,' 44; Paulson, 'The Neo-Kantian Dimension of Kelsen's Pure Theory of Law', 313.

122 See Lon F. Fuller, 'American Legal Philosophy at Mid-Century', *Journal of Legal Education* 6, Periodicals Archive Online (1953): 457, 463.

law that 'is', or it is irrelevant for describing the law that 'is'. Only this way, we might accept that the object of law is the norms formally considered, regardless of their evaluative content.

Kelsen does not deny the evaluative contents of positive norms. Yet, he is interested in focusing on the normative analysis of positive law, bracketing economic or psychological conditions or any political or moral end.[123] He aims at postulating a formal theory of law – a *pure theory* – for which values are irrelevant. What are the motives for such an assumption? We might point out at least four: one *apparent* reason, one *conventional-methodological* preference, and two *implicit* reasons.

The apparent reason is that for Kelsen, 'a science has to describe its object', not to prescribe based on some value judgment.[124] But if this is so, why not describe the values already contained in the positive law, trying, as far as possible, not to pass judgment on them? Kelsen neither asks nor answers this question, incurring an inconsistency that makes it a deceptive argument. One of the actual but implicit reasons he excludes values from the description – the first of the two above alluded to – is that he considers them indescribable. They are somewhat irrational. To be precise, this belief is not so implicit. Kelsen is plain in declaring that justice is a 'subjective value judgment', as is happiness, determined by 'emotional factors' and, therefore, 'relative'.[125] So, it is not hard to find the assumptions of emotivism in Kelsen, which declares values as simple utterances of impossible verification.

The second non-explicit reason for avoiding describing values is the influence of Hume's rule, declaring an insurmountable gap between *facts* and *norms*.[126] The law cannot be derived from facts if this gap is invincible.

The conventional methodological reason for a *pure theory* is that Kelsen pleads fidelity to the Kantian and neo-Kantian methodologies. Thus, only an *a priori* method makes the object of science possible. Accordingly, because the method of law is *normative*, the object of law must also be normative: they are the legal norms formally considered.[127] To be *pure*, the normativity of law cannot be derived from any factual existence; it needs to be presumed. In other words, the methodological requirement to describe the legal order in its own normativity can only be satisfied by assuming it originates from itself.

Thus, whether through Kantian methodology or Hume's guillotine, added to distrust in the objectivity of values, Kelsen's *Grundnorm* needs to be presupposed. The outcome is a purely *normative-formal* concept of law in which factual and substantive aspects do not count. Kelsen explicitly excludes justice from the law,

123 Kelsen, *The General Theory of Law and State*, *xiv*.
124 Kelsen, *The General Theory of Law and State*, xiv.
125 Kelsen, *The General Theory of Law and State*, 6.
126 Luis Sánchez, '¿Se Origina la Falacia en Hume?', *Doxa, Cuadernos de Filosofía del Derecho*, 30 (2007): 635-651.
127 Hans Kelsen, *Introduction to the Problems of Legal Theory*, trans. J. Mielke (Oxford University Press, 1992), 10-12; Derick Beyleveld, 'From the "Middle-Way" to Normative Irrationalism: Hans Kelsen's General Theory of Norms', *The Modern Law Review* 56, no. 1 (1993): 104-119.

and the *Pure Theory* declares itself 'incompetent' to decide whether the law is 'unjust': 'The pure theory cannot answer these questions because they cannot be scientifically answered at all.'[128] Doubtless, the 'principle of verification' of logical positivism looms behind Kelsen's reasoning, leading him to postulate that values are relative and 'Justice is an irrational ideal'.[129]

Hence, it may be concluded that Kelsen is 'descriptive' in the sense of logical positivism and 'pure' within a neo-Kantian perspective:[130] his theory does not describe facts but norms as rational or ideal entities. This detour of the *pure theory* allows Robert Alexy to sustain that Kelsen's concept of norms presupposed Frege's third world of abstract entities, an 'ideal reality' distinct from the mental or physical world.[131] Such a rationalistic escape is reiterated in Kelsen's central concepts, exemplarily in the theory of the *basic norm* and *Validity*.

At the time of the *Pure Theory*, in the 1930s, 'validity' was widely used in logic and science philosophy. It seems Kelsen's merit to have brought this concept into law, although with some logical-looking connotations.[132] In Kelsen's theory, *validity* is the form in which a norm exists within a given system of norms.[133] The validity of a legal norm derives from other norms or from how an official produces it according to what another norm prescribes.[134] The chain of validity between the system's norms ultimately relies upon the *basic norm*.[135] It means that the basic norm's validity – the normative force – needs to be logically presupposed. 'It is valid because it is presupposed to be valid; and it is presupposed to be valid, because, without this presupposition, no human act could be interpreted as a legal, especially as a norm-creating act.'[136] The reason to follow the *basic norm* is analogous to the norms of religious orders:

> "The basic norm of a religious norm system says that one ought to behave as God and the authorities instituted by Him command. Similarly, the basic norm of a legal order prescribes that one ought to behave as the 'fathers' of the

128 Kelsen, 'The Pure Theory of Law and Analytical Jurisprudence,' 45.
129 Kelsen, 'The Pure Theory of Law and Analytical Jurisprudence', 48; J. Raz, 'The Problem about the Nature of Law', *Ethics in the Public Domain* (Oxford University Press, 1994), 202.
130 Vladimir de Carvalho Luz, 'Neo-positivism and pure theory of law', *Florianópolis, Brazil* 24, no. 47 (2003): 11; Felix Kaufmann, *Theory and Method in the Social Sciences* (Springer Cham, 2014) 342; Brian Leiter, 'The Demarcation Problem in Jurisprudence: A New Case for Scepticism', *Oxford Journal of Legal Studies* 31, no. 4 (2011): 663-677, https://doi.org/10.1093/ojls/gqr020, 666 (last accessed 14 November 2022).
131 Robert Alexy, 'Hans Kelsen's Concept of the "Ought"', *Jurisprudence* 4, no. 2 (2013): 235-245, 235.
132 Kristen Rundle & ProQuest, *Forms Liberate: Reclaiming the Jurisprudence of Lon L Fuller* (Hart Publishing, 2012), 78.
133 Kelsen, 'The Pure Theory of Law and Analytical Jurisprudence', 50; Kelsen, *The General Theory of Law and State*, 111.
134 Kelsen, 'The Pure Theory of Law and Analytical Jurisprudence', 62.
135 Kelsen, *The General Theory of Law and State*, 113.
136 Kelsen, *The General Theory of Law and State*, 115-116.

> constitution and the individuals – directly or indirectly – authorized (delegated) by the constitution command."[137]

Interestingly, the ultimate source of validity seems to rely upon an assumed mandate of respecting the constitution. But then, is this not a moral reason? In that case, why not assume that validity derives from morality or social 'acceptance', as Fuller was inclined to think, instead of being just presupposed?[138] Evidently, such options do not fit Kelsen's reasoning since the *Pure Theory* navigates in the Kantian and logical-positivist atmosphere and his adhesion to Hume's argument.[139] On these grounds, he may inevitably conclude that the existing world, with all its substantive components and people's consciousness, has no meaning for the normativity of the law: the *basic norm* needs to be presupposed.

5 Herbert Hart: descriptive but analytical

Like Kelsen, Hart sets out to elaborate on a descriptive theory of law. He characterises *The Concept of Law* as an essay of 'descriptive sociology'[140] attempting to distance itself from Kelsen's conceptual analysis. In the *postscript* to *The Concept of Law*, he makes such a purpose more explicit: 'My aim in this book was to provide a theory of what law is, which is both general and descriptive.'[141] Being *descriptive* means that 'it is morally neutral and has no justificatory aims: it does not seek to justify or commend on moral or other grounds the forms and structures which appear in my general account of law'.[142]

These declarations sound like Kelsen's. However, Hart's descriptive purpose also requires some qualifications. Hart aligns with Austin's analytical jurisprudence, although he is also interested in distancing from it.[143] Likewise, he declares to follow Bentham's positivism. Nonetheless, the authors observe that there could be a contradiction between Bentham's style, which echoes the models of natural sciences, and being 'analytical' in linguistic style.[144] Utilitarianism is present in Hart's initial works, but in *The Concept of Law*, it weakens, says Priel.[145] At that stage, Hart's tone is more familiar to the analytical philosophy of language, as he

137 Kelsen, *The General Theory of Law and State*, 115-116; Grant Lamond, 'The Rule of recognition and the Foundations of a Legal System', eds. Luís Duarte d'Almeida et al., (*Reading H.L.A. Hart's 'The Concept of Law'* (Bloomsbury Publishing, 2014), 208.
138 Fuller, 'American Legal Philosophy at Mid-Century', 463.
139 Charles Pigden, 'Naturalism', in, *A Companion to Ethics*, ed. P. Singer (Blackwell, 1991), 421-431.
140 H.L.A. Hart, *The Concept of Law*, 2nd edn., (Oxford: Clarendon Press, 1994), Preface.
141 H.L.A. Hart, *The Concept of Law*, 239.
142 Hart, *The Concept of Law*, 240.
143 Edgar Bodenheimer, 'Modern Analytical Jurisprudence and the Limits of its Usefulness', *University of Pennsylvania Law Review*, 104, no. 8 (1956): 1080-1086, 1080.
144 Priel, 'Toward Classical Legal Positivism', 987; Stephen Guest, 'Two Strands in Hart's Concept of Law: A Comment on the Postscript to Hart's *The Concept of Law*', *Positivism Today* (Dartmouth: Aldershot, 1996), 29-44.
145 Priel, 'Toward Classical Legal Positivism', 988.

remarks in *Essays in Jurisprudence and Philosophy*.[146] Still, it is ambiguous in which sense he is analytical, says Perreau-Saussine, assuming linguistic analysis as it could be made free-standing. Since 'it is neither historical nor sociological nor logical nor metaphysical, what does this "purely analytical study involve?'[147] In any case, Hart tends to be a language clarifier rather than empirically descriptive.

This does not mean he shows no interest in 'the realities we use the words'.[148] On the contrary, *The Concept of Law* pursues 'to provide a definition of law [...] by reference to which the correctness of the use of the word can be tested; it is to advance legal theory by providing an improved analysis of the distinctive structure of a municipal legal system'.[149] Hart reiterates the descriptivist purpose that animates him.[150] Thus, Leslie Green can say that Hart treats 'linguistical analysis with [a] certain disdain'.[151]Nevertheless, the sociological descriptive purpose seems inconstant in Hart's exposition. Hart oscillates between describing the law as it can be observed in social facts and commitment to the methods of conceptual splitting.[152] Arguably, this tension is present in his central concepts, in the *rule of recognition*, *validity*, and *internal* and *external* points of view, elaborated with a certain degree of analytical abstraction that is not easy to match with socially identifiable facts. Such abstractness merged with a non-cognitivist view of values, makes Hart's theory challenging to follow in fully descriptive terms under concrete social situations.

When Hart speaks of a 'morally neutral' theory, he does not exclude describing the values – inevitably a social fact attached to the rules of positive law. Instead, he suggests not to judge them personally when they are described: 'Description may still be description, even when what is described is an evaluation.'[153] So, 'morally neutral' alludes to the viewpoint of an external observer of law in contrast to an internal one. Yet, his solution is questioned. Apart from Dworkin, authors observe the difficulty of describing without simultaneously assuming an evaluative stance – not necessarily individual.[154] Separating the internal and external viewpoints seems to be an unlikely achievement.

Confidently, this is why Joseph Raz proposed to avoid 'Hart's dichotomy', distinguishing a 'third category of statements' that he calls 'detached legal

146 Herbert L.A. Hart, *Essays in Jurisprudence and Philosophy*. (Oxford University Press, 1983), 3; A. Marmor, 'Farewell to Conceptual Analysis', 213; Leiter, 'The Demarcation Problem in Jurisprudence: A New Case for Scepticism', 666.

147 Perreau-Saussine, 'An Outsider on The Inside: Hart's Limits on Jurisprudence', 379.

148 Hart, *The Concept of Law*, 14.

149 Hart, *The Concept of Law*, 17.

150 See Perreau-Saussine, 'An Outsider on The Inside: Hart's Limits on Jurisprudence', 382.

151 Leslie Green, 'The morality in Law', in *Reading HLA Hart's 'The concept of law'*, ed. Duarte d'Almeida et al., (Oxford: Hart Publishing, 2013), 360; Marmor, 'Farewell to Conceptual Analysis', 209-217.

152 Michael D. Bayles, *Hart's Legal Philosophy* (London: Kluwer Academic Publishers, 1992), 15.

153 Hart, *The Concept of law*, p. 244

154 John Finnis, *Natural Law and Natural Rights*, (Oxford University Press, 2011), 3; Jeremy Waldron, 'Law', in The *Oxford Handbook of Contemporary Philos*ophy, eds. F. Jackson and M. Smith (Oxford: Oxford University Press, 2007), 182.

statement'.[155] These statements could be distinguished from the internal-external viewpoints because they would correspond to an external observer, who, for heuristic reasons, assumes the internal point of view without a genuine commitment to it. That is, 'detached normative statements' incorporate moral aspects, with which Raz thinks the natural law's objections could be saved. The 'morally neutral' description of law would be achieved, and an eventual bridge between positivism and natural law may be reached.[156]

Hart seems to accept Raz's proposal and thinks it sheds light on Kelsen's *normative* characterisation of law propositions.[157] However, he observes Kelsen's reluctance 'to identify his representation of the law with mere statements about the meanings of laws or paraphrases in which rules and "oughts" are mentioned but not used'.[158] Kelsen would doubt that an outsider may describe a normative proposition's 'internal sense' without assuming a genuine commitment. In Robert Mullins' opinion, a 'puzzle' is implicated in the relationship between the thesis social and the 'deontic detachment'. Unfortunately, he says, 'it is not possible to accept both theses as they are stated without contradiction', among other things, because the conclusions of deontic detachment may not 'itself validated by any practice or attitude of legal officials', they are not itself a matter of social fact'.[159] Thus, Hart's dilemma remains, and Raz's solution is unconvincing.

The analytical abstractness of Hart's theory increases with Hart's well-known moral non-cognitive affiliation.[160] Brian Leiter says that, unlike Kelsen, Hart's:

> "[W]as an 'impure' theory of law in which anti-realism about norms was conjoined with non-cognitivism about the semantics of normative judgment: 'to judge that doing X is morally (or legally) wrong is just to express a certain kind of attitude or feeling, presumably one tied – psychologically – to motivation and action.'"[161]

Still, the proximity to Kelsen cannot be denied. Like Kelsen, Hart is unsatisfied with Austin's theory of law as 'sovereign command'. Otherwise, there would not be a difference between law and a gunman order.[162] The condition of law is not achieved by a sovereign who commands *de facto* rules to which people develop a habit of obedience. Instead, we need an instance allowing us to pass from the plain mandate

155 Joseph Raz, 'Legal Validity', in Joseph Raz, *The Authority of Law: Essays On Law and Morality* (Oxford: Oxford University Press, 1979), 153-155.
156 Raz, 'Legal Validity', 157-159.
157 Hart, *Essays in Jurisprudence and Philosophy*, 15; Jeffrey D. Goldsworthy, 'The Self-Destruction of Legal Positivism', *Oxford Journal of Legal Studies* 10, no. 4 (1990): 449-486.
158 Hart, *Essays in Jurisprudence and Philosophy*, 295.
159 Robert Mullins, 'Legal Positivism and Deontic Detachment', *Ratio Juris*31, no. 1 (2018): 7.
160 Hart, *Essays in Jurisprudence and Philosophy*, 11; Hart, *The Concept of Law*, 254.
161 Leiter, 'The Demarcation Problem in Jurisprudence: A New Case for Scepticism,' 671; Bayles, *Hart's Legal Philosophy*, 123; Priel, 'Toward Classical Legal Positivism', 989; Goldsworthy, 'The Self-Destruction of Legal Positivism,' 450.
162 Hart, *The Concept of Law*, 19-23; Kelsen, *General Theory of Law and State*, 31.

to the *law* in its normative sense. This instance is the *rule of recognition*. The passage to law occurs when, in addition to social rules, there is a rule that allows recognising standards of conduct in the words that a person pronounces or writes. Then, this rule transforms sovereignty and command into the ruler's 'right' and the people's 'acceptance'.[163]

Such a rule is the *rule of recognition*, which, like in Kelsen, validates the rules: 'In a system with a basic *rule of recognition* we can say before a rule is actually made, that it *will* be valid *if* it conforms to the requirements of the *rule of recognition*'.[164] The *rule of recognition* is 'the last link in the chain – the point where the chain of rules comes to an end'.[165] Lamond compares this *rule* with Austin's concept of the sovereign.[166] Yet, while Austin's sovereign may be easily recognised in the real world, the *rule of recognition* is not so simply identified. Besides, it is not permissible to ask for the validity of the *rule of recognition*. As Jeremy Waldron asserts:

> "We do not know [...] what gives the *rule of recognition its* legal force [...] what makes it the authoritative way of determining what the law is [...] the *rule of recognition* is just there."[167]

The validity criterion does not apply to this rule, whereby Hart's *rule of recognition* ends being confessedly Kelsenian:

> "One of the central theses of this book is that the foundations of a legal system consist not in a general habit of obedience to a legally unlimited sovereign, but in an ultimate *rule of recognition* providing authoritative criteria for the identification of valid rules of the system. This thesis resembles in some ways Kelsen's conception of a basic norm, and, more closely, Salmond's insufficiently elaborated conception of 'ultimate legal principles.'"[168]

Nonetheless, a difference with Kelsen is that Hart does not assume a hypothetical condition of the *rule of recognition* but purports this a social fact. Hart says the validity criteria 'is regarded throughout this book as an empirical, though complex, question of fact'.[169] The *rule of recognition* 'exists only as complex, but normally concordant, practice of the courts, officials, and private persons in identifying the

163 Hart, *The Concept of Law*, 57-58.
164 Hart, *The Concept of Law*, 105, 235; Lamond, 'The Rule of recognition and the Foundations of a Legal System',188.
165 Lamond, 'The Rule of recognition and the Foundations of a Legal System', 188.
166 Lamond, 'The Rule of recognition and the Foundations of a Legal System', 179.
167 Jeremy Waldron, *The Law* (London, New York: Routledge, 1990), 66.
168 Hart, *The Concept of Law*, 292; Lamond, 'The Rule of recognition and the Foundations of a Legal System', 207-208.
169 Hart, *The Concept of Law*, 292.

law by reference to certain criteria'[170] or as a 'conventional form of judicial consensus'.[171]

There appears to be a certain circularity in Hart's explanations. The *rule of recognition* presupposes the practices of officials, and the practices of officials presuppose the *rule*.[172] It might be thought that they constitute each other simultaneously. Nevertheless, a significant difficulty is that within legal orders with various sources of law, thus with multiple classes of legal officers – judges, administrators, legislators – it is not easy to identify from which criteria the *rule of recognition* comes out.

Hart says that the *rule of recognition* is 'seldom expressly formulated'.[173] Moreover, it is characteristically used by courts and other officers from the internal point of view but could also be 'external'.[174] Hart's interpreters, in turn, defend that the rule of recognition would be a social fact and a secondary identification criterion.[175] In any case, through its various attributes, the *rule of recognition* remains elusive. We do not know which rule or rules the *rule of recognition* precisely incorporates.[176] In Britain, Waldron says, the *rule of recognition* has its own institutional pedigree that is not the same as that of the US. In other countries, it may refer to very uneven rules. Besides, as Lamond notes, it is unclear if the *rule of recognition* considers the binding statutes if this includes or not the views of non-officials, and it does not indicate what makes someone an 'official'.[177]

In the end, it is not arbitrary to think of Hart's *rule of recognition* as a self-referenced rule. In legal theory, we can only presuppose that it exists, but if we do so, the difference with Kelsen's *basic norm* becomes inexistent. Instead of presupposing the basic standard as a logical condition, Hart presupposes that it exists as a social fact and is accepted.[178]

Nonetheless, in some respects, Hart's rule contrasts with Kelsen's. First, Hart's rule intends to be just of 'recognition'. It is not properly *normative*.[179] *Recognition* and *validity* only allude to the rules' social existence, perhaps to the duty of imposing law directed at officials, but it says nothing of the normative implications for all the participants. Recognition and validity pretend to be merely descriptive.

170 Hart, *The Concept of L*aw, 110.
171 Hart, *The Concept of Law*, 266-267; Lamond, 'The Rule of recognition and the Foundations of a Legal System', 182.
172 Hart, *The Concept of Law*, 292-293; Manuel Atienza, Juan Ruiz, *Theory of Legal Sentences* (Netherlands: Kluwer Academic Publishers, 1998), 81.
173 Hart, *The Concept of Law*, 101.
174 Hart, *The Concept of Law*, 102, 112.
175 Lamond, 'The Rule of recognition and the Foundations of a Legal System',186.
176 Lamond, 'The Rule of recognition and the Foundations of a Legal System'; Reidar Edvinsson, *The Quest for the Description of the Law*, (Springer, 2009), 15.
177 Lamond, 'The Rule of recognition and the Foundations of a Legal System', 197-210.
178 Lamond, 'The Rule of recognition and the Foundations of a Legal System', 208-209.
179 Lamond, 'The Rule of recognition and the Foundations of a Legal System', 203; Stephen R. Perry, 'Hart's Methodological Positivism', *Legal Theory* 4 (1998): 427-467, 466.

doi: 10.5553/NJLP/.000114

Under these conditions, deprived of normative intentions, validity becomes an abstract concept that is hard to grasp in operational terms unless we assume it is equivalent to the mere existence of legal texts. However, it is implausible to imagine a legal operator, whoever it may be, that can provide a validity judgment in a coldly descriptive way without looking at the rule's content and without implying an evaluative-normative dimension in the interpretative tasks. Under purely descriptive conditions, it is also challenging to decide where the *normative* force of the rules comes from unless we assume that it comes from the mere fact of being written or commanded.

Hart's morally neutral viewpoint is also not attuned to its distinction between *internal* and *external* points of view.[180] We might ask why Hart needs to appeal to such internal/external dimensions. Why not just plainly define law from a 'neutral' or 'external' point of view consistent with the descriptive positivist assumptions? The obvious answer comes from the difficulty of ignoring the values indeed present in positive laws. Thus, a theoretical mechanism is required to account for the inevitable presence of substantive contents and explain the normative character of law. Such a mechanism is the concept of an *internal point of view* in which facts and values intend, to some extent, to be reconciled.

However, the internal viewpoint seems insufficient as it is not a fully descriptive concept. It may describe that legal operators appeal to values but say nothing about the values indeed incorporated in the law. This gap may explain why Raz thinks introducing the 'detached normative statements' is necessary, as previously commented on.

As may it be, the positivist view's 'internal' and 'external' splitting raises more doubts than certainties about a 'morally neutral' description of law. It is unclear which of Hart's branches achieves the positivist purpose. Thus, the many discussions and disagreements among positivist authors around the internal and external distinction and the problems of morality in law are unsurprising.[181] Hart's analytic view remains abstract, ultimately rational rather than positivist in explaining the law as it 'is'. The contrast with classical authors becomes evident.

6 The point of contemporary legal positivism

As it has been rehearsed, the strict continuity between the classical generation of positivist authors and contemporary legal positivism is dubious. In the end, none of the three usually assumed theses to be definitional for positivism: the law as commands, the source thesis, or the separability of law and morals, are fully shared by both generations.

180 Hart, *The Concept of Law*, 89.

181 Priel, 'Toward Classical Legal Positivism', 995; Wil J. Waluchow, 'The Many Faces of Legal Positivism', *The University of Toronto Law Journal* 48, no. 3 (1998): 387-449.

Regarding the first thesis, the difference is marked by contemporary legal positivists who would not ascribe law to a *sovereign's command*. To be sure, Kelsen's and Hart's theories begin criticising Austin's theory of commands, resulting in the sovereign's replacement by a supreme norm. The law is not derived from commands but from a rational assumption that legitimises it.

On the other hand, the *source thesis*, in the sense of contemporary legal positivism, would not be subscribed to in all its extremes by Hobbes, Bentham or Austin, to the extent they accept at least *natural law*, or in some cases *divine law*, also as a source of law. In this authors, natural law differs from positive law but is not denied by it, without saying that they would lean more toward the law of the parliament or the sovereign as the primary – even exclusive – source of positive law against the assumed discordant meanings ensuing from common law.[182] In contrast, contemporary legal positivism relies more on the judiciary, as observed noticeably by Waldron.[183]

Once the confusion between the *ontological* view – about what law is – and the *epistemological* view – what the object of the science of law is – is saved, the last one, the *separability thesis*, becomes strange for the philosophies of Hobbes, Bentham and Austin. Epistemologically, the science of law must describe the law as it 'is', which does not mean that the law that 'is' does not carry values nor should not be described – quite the opposite. A descriptive theory of law should be able – as Hart aspired at some point – to describe the formal and substantive elements of law both in the dimension of the law that 'is' as well as in the dimension of the law that 'ought to be' – if such a separation is possible in practice.

Persuasively, Hobbes, Bentham or Austin would not accept that law can be thought of without reference to the substantive content it incorporates, even if they are established exclusively by the sovereign's command. The ontological separability of law and morality found in Kelsen, Hart and followers[184] is not a feature of the old positivists. They describe law with all its formal or substantive components based on the political philosophy that they assume. Thus, the coincidence of both generations around this thesis is unconvincing.

Accordingly, we may conclude that the differences between the generations around the three theses pondered as defining contemporary legal positivism are nearly unbridgeable. It has also been argued that continuity cannot be served by the thesis of the *identity* of law and positive law because, as implied in *the source thesis*, for the old generation, positive law effectively orders the contractual state but does

182 Coyle, 'Thomas Hobbes and the Intellectual Origins of Legal Positivism', 260.

183 Jeremy Waldron, *The Dignity of Legislation* (Cambridge University Press, 1999).

184 Hart, 'Positivism and The Separation of Law and Morals', 601-602; Brian Leiter, 'Legal Realism, Hard Positivism, and the Limits of Conceptual Analysis', in Brian Leiter, *Naturalizing Jurisprudence* (Oxford University Press, 2007), 122; Robert Alexy, The *Argument from Injustice. A Reply to Legal Positivism* (Oxford University Press, 2002), 3; Pino Giorgio, 'Positivism, Legal Validity, and the Separation of Law and Morals', *Ratio Juris* 27, no. 2 (2014): 190; Leiter, 'The Demarcation Problem in Jurisprudence: A New Case for Scepticism', 670-664; Waldron, *Law and Disagreement*, 36.

not levitate on itself. To some measure, positive law rests on natural law, deontology and even divine law. As Dyzenhaus maintains, we cannot call Hobbes and Bentham natural law theorists, but they do not seem to be positivists in the sense of modern legal positivists. They do not absolutise positive law, distrust its evaluative aspects, or detach it from social purposes. The classic views of law are not deprived of ends.[185]

It has been argued that the distinctiveness of positivism, if we want to compare the first and second generation, is best supported by the *descriptive thesis* since both are interested in offering a realistic description of the existing law. At least, this is true of their primary motivation. Yet, contemporary legal positivism partially abandons the descriptivist orientation when it refuses to account for the values informing the idea of law or considers them indescribable. This drives legal positivists to lean toward a rationalist methodology that essentially does not describe but establishes the formal categories of law from merely rational assumptions. It might be said that they postulate a *restricted descriptive thesis*, a *descriptive thesis of non-values*.

Yet, as Hart suggests, even if we do not share the values of a specific legal order, legal science should pursue to describe them. Hart thinks this can be done 'neutrally', yet whether neutrality can or cannot be achieved, the substantive aspects of law cannot be ignored. The question is that under the *separability thesis* and *cognitive scepticism*, legal positivism cannot describe the law's evaluative dimensions, and this is the point of contemporary legal positivism: it cannot describe the law in all its observable complexities. Insightfully, this conclusion was advanced by Fuller when he says:

> "The purely formal and verbal nature of the conclusions of legal positivism is revealed in the inability of positivism, in all its forms to deal with the content of the law. Not only has positivism failed in its quest for some definite criterion of the law that is, but it has failed to say anything significant concerning the law which it assumes to 'be.'"[186]

Legal positivism claims a descriptive attitude not consistently preserved across contemporary legal positivism. Instead, its concepts are set mostly by rational inspection. This constitutes the methodological – rather an epistemological – turn conducted by contemporary legal positivism, highly influenced by the logical positivist and rationalistic philosophies of the twentieth century. In Kelsen's *Pure Theory*, law transmutes into a quasi-logical rational order. In Hart, the legal order abstracts into analytical concepts that fail to prove their empirical correlation with social facts.

185 Dyzenhaus, 'The genealogy of Legal Positivism', 51.

186 Lon Fuller, *The Law in Quest of Itself* (The Foundation Press, Inc., 1940), 88-89, quoted by William H. Rose, 'Book Review', *Law Journal* (1941) June: 479.

The rationalist bias is detected in the primary concepts they offer. The *basic norm* and the *rule of recognition* are formal and stripped of any political, ethical or natural content. Likewise, validity is assumed in formalistic terms, only referring to the mere existence of the norms. This way, the idea of law in Kelsen and Hart turns out to be almost a rational metaphor in which important descriptive properties of existing law get lost, among them, the values objectively existing in the language of positive law and the link of law with people's substantive expectations, particularly with the idea of justice. Values are inevitably present in legal texts, social practices and people's expectations, even though they all need to be interpreted. Yet, legal positivism does not describe them or declare values non-describable.

Thus, Kelsen and Hart's descriptive purpose reveals inconsistency. The continuity between both generations, on these grounds, is not strict. Indeed, we are faced with two essentially different varieties of positivism. Hobbes, Bentham, and Austin's theories could be called *naturalist positivism*. In contrast, current legal positivism is more *rationalistic* and *formalist*, a bias accused at the time by influential critics like Pound,[187] Heller,[188] Bodenheimer,[189] and Fuller.[190] Thus, straightforwardly associating both generations hides their fundamental discrepancies.[191] It is worth asking if this is not a magnified mistake of our retrospective classificatory conventions.

187 Roscoe Pound, 'Mechanical Jurisprudence', *Columbia Law Review*8, no. 8 (1908): 605-623.

188 Hermann Heller, *Teoría del Estado*, , trans. Luis Tosio, Fondo de Cultura Económica, 1942, 202-203; David Dyzenhaus, 'Legal Theory in the collapse of Weimar: Contemporary Lessons?', *American Political Science Review* 91, no. 1 (1997): 128-129.

189 Edgar Bodenheimer, 'The Natural-Law Doctrine Before the Tribunal of Science: A Reply to Hans Kelsen', *Political Research Quarterly* 3 (1950): 335, 344-345.

190 Lon L. Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart', *Harvard Law Review* 71, no. 4 (1958): 630-672, 637-638, 641.

191 See Brian Bix, 'On the Dividing Line Between Natural Law Theory and Legal Positivism', *Notre Dame Law Review* 75, no. 5 (2000): 1613-1624,1614.