Special Issue
The Many Fates of Legal Positivism

Comment on Kletzer—Positive Law and the "Cognitivity Thesis"

By Luís Duarte d'Almeida[*]

A.

Christoph Kletzer's paper is by and large an attempt (a failed one, I will contend) to argue for what he calls the "cognitivity thesis"[1]—the succinctly rendered claim that

(CT) The positive law is cognitive.

The idea behind this opaque (and admittedly "puzzling"[2]) proposition is traced back to the work of Fritz Sander, and ascribed to Hans Kelsen as part of his "matured" views.[3] It is also clearly endorsed by Kletzer himself. In this brief commentary, I shall concentrate directly on (CT), and leave aside, for the most part, issues of Sanderian or Kelsenian hermeneutics.[4] I will maintain that the arguments adduced by Kletzer in support of (CT) are flawed; the "cognitivity thesis" is every bit as wrong as its "highly counterintuitive"[5] make-up suggests it to be.

B.

First, however, some scene setting is in order. Let us begin by noting that (CT) is one of a group of three "new and momentous"[6] theses of Sander's which—amounting in Kletzer's judgment to nothing short of a "revolution"[7]—are said to overlie the "insight" that "legal

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[1] *See* Christoph Kletzer, *Kelsen, Sander, and the Gegenstandsproblem of Legal Science*, 12 GERMAN L. J. 794 (2011).

[2] *See id*.

[3] *See id*. at 803.

[4] The suggestion will be nevertheless be made in passing that Kletzer's case for holding Kelsen hostage to the "cognitivity thesis" is unconvincing.

[5] Kletzer, *supra* note 1, at 794.

[6] *Id*.

[7] *Id*.

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science has at all times been under the misapprehension that the positive law stands in an analogous relation to it as nature does to natural science."[8]

The proposition here rejected—that "legal science"[9] is to positive law as natural science to nature—is one which Sander is said to have endorsed in an earlier piece.[10] We should nonetheless keep in mind that both defense and dismissal of such an analogy share a philosophical background: Neo-Kantian epistemology.[11] The relevant assumptions, in Kletzer's summary, "can be expressed as a set or more or less diffuse transcendental convictions: (α) in knowing an object we in a way *construct* it; (β) the human sciences have an analogous structure to the natural sciences; (γ) legal science is a human science."[12]

We are reminded, in particular, that under this philosophical mindset "if we want to make sense of our knowledge of the world we cannot conceive of the world as itself ordered."[13] "Nature" is thus "not simply *given* to natural sciences as a unified and comprehensively determined whole."[14] Rather, "the unity of nature and thus the 'natureness' of nature has to be constructed"[15]—a "construction" "effected in the natural sciences."[16] "Cognition in the Kantian architectonic"[17] is, in the stock idiom, "constitutive."[18]

"In order to follow the debate," nevertheless, we do not need "to accept Kantian or Neo-Kantian epistemology;" "all we need to accept is that knowledge is not a purely passive phenomenon (i.e. that there is at least a minimal sense in which in knowing an object we are not only determined by the object but also determine it)."[19]

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[8] *Id.* at 793.

[9] *See* Kletzer, *supra* note 1, at 792, n. 14 (defining "legal science" as "doctrinal legal scholarship, or legal research (i.e. what we do in law schools and get money for from research bodies and the government). The Germans call it '*Rechtswissenschaft.*'".

[10] *See id.* at 792.

[11] *See id.* at 791.

[12] *Id.*

[13] *Id.* at 801.

[14] *Id*. at 791.

[15] *Id.*

[16] *Id*.

[17] *Id.* at 794.

[18] *Cf. id.* at 802.

[19] *Id.* at 791.

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These summary remarks, however generally cast, throw sufficient light on the question under scrutiny. Recall the "three levels" which "as it concerns our knowledge of nature" are to be differentiated: nature, natural science, and critical philosophy.[20] Sander's—and Kletzer's—claims do not question, but indeed assume, that a similar structure may be discerned in the legal domain. The first question, then, is "whether the law, legal science and legal philosophy stand in a similar relation"[21] to, respectively, nature, natural science, and critical philosophy.

The answer to this question seems at first glance to be affirmative. Here, for example, is Kelsen's take on the issue:

> [A]ccording to Kant's epistemology, the science of law as cognition of law, like any cognition, has constitutive character—it "creates" its object insofar as it comprehends the object as a meaningful whole. Just as the chaos of sensual perceptions becomes a cosmos, that is, "nature" as a unified system, through the cognition of natural science, so the multitude of general and individual legal norms, created by the legal organs, becomes a unitary system, a legal "order," through the science of law. But this "creation" has a purely epistemological character.[22]

Kletzer, however, takes the contrary view. He sides with Sander in denying that natural science finds its analogue in "legal science." Let me call this their *negative* claim. It is supplemented with another, *positive* claim, pointing out what, according to Sander and Kletzer, the precise legal counterpart of natural science is. This positive claim, though, is less than accurately stated. Compare the following passages:

> Not *legal science* but the *law* corresponds to the transcendental, constitutive sphere of "cognition:" *the synthetic judgments of the law constitute the analogy to the synthetic judgments of the mathematical natural sciences*.[23]

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[20] *Id*.

[21] *Id*. at 792.

[22] HANS KELSEN, THE PURE THEORY OF LAW 72 (Max Knight trans., 2d ed.) (1970) [hereinafter KELSEN, PURE THEORY].

[23] Kletzer, *supra* note 1, at 793, quoting FRITZ SANDER, RECHTSDOGMATIK ODER THEORIE DER RECHTSERFAHRUNG? KRITISCHE STUDIE ZUR RECHTSLEHRE HANS KELSENS 93 (1921).

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> [I]t is the legal process itself, and not legal science, which is analogous to the process of cognition in the Kantian architectonic.[24]

These two excerpts (the first of which is by Sander) are clearly seen by Kletzer as different ways of rendering the very same points. The negative claim just mentioned is clearly set forth in both passages. Moreover, both purport to impart the corresponding positive claim, identifying the relevant legal correlate of "natural science." What exactly is this correlate, then? The reader is seemingly expected to take "the law" and "the legal process" as equivalent expressions in this context. In that case, what do they mean? Things are further confused by Kletzer's use of yet another phrase for the very same purpose—"the positive law," as employed in the formulation of (CT).

The surest way to dissipate these confusions may be simply to circumvent Kletzer's terminological prodigality and directly to address his argument for the "cognitivity thesis." This is an argument from the character of "legal process." What brought Sander to put forward the "radical" cognitivity thesis, Kletzer says, was "the insight that the positive law is neither a purely factual occurrence nor merely a complex of norms, but rather, that it is the *relation* of both. The *legal process*, or the legally regulated application of law, is this relation of fact and norm."[25]

Let us attempt a reconstruction of the underlying reasoning. What is the "legal process"? Kletzer speaks here of the "legally regulated application of law." By this, I gather, he means to refer not solely to judicial and administrative application of general positive law, but, more broadly, to any act of law-creation which can simultaneously be described as an act of law-application. Kletzer, then, it appears, subscribes to Kelsen's well-known dismissal of the traditional, absolute contrast between law-creation and law-application. "Borderline cases" apart,[26] says Kelsen, "it is not quite correct to distinguish between law-creating and law-applying acts," for "every legal act is at the same time the application of a higher norm and the creation of a lower norm":[27]

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[24] Kletzer, *supra* note 1, at 794.

[25] *Id*.

[26] *See* HANS KELSEN, GENERAL THEORY OF LAW AND STATE 133 (1945) [hereinafter KELSEN, GENERAL THEORY]; or KELSEN, PURE THEORY, *supra* note 22, at 234. These "borderline cases" are, on the one hand, the "acts which are only law application, not law creation," i.e. "the acts . . . by which the coercive acts, authorized by the legal norms, are executed," and, on the other hand, the "act of positive law creation, which is not the application of a positive legal norm: the enactment of the historically first constitution." *See* Kelsen, *supra* note 22, at 236.

[27] KELSEN, PURE THEORY, *supra* note 22, at 234; *see also* HANS KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY: A TRANSLATION OF THE FIRST EDITION OF THE *REINE RECHTSLEHRE* OR *PURE THEORY OF LAW* 70 (Bonnie Litschewski Paulson & Stanley L. Paulson trans., 1992) [hereinafter KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY]; KELSEN, GENERAL THEORY, *supra* note 26, at 133–4.

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> Each law-creating act must be a law-applying act—it must be the application of a legal norm that preceded the act in order to be considered as an act of the legal community. Therefore, law creation must be understood as law application, even if the higher norm determines only the personal element, the individual, who has to render the law-creating function.[28]

It is in this very same sense that Kletzer characterizes the legal process as "the relation of fact and norm." The image of the "continuous connection of the legal process" is similarly familiar: Kelsen stresses, e.g., that

> [c]ontemplated from the point of view of the dynamics of the law, the creation of individual norms by the courts represents a transitional stage of the process that begins with the establishment of the constitution, continues via legislation or custom to the judicial decision, and leads to the execution of the sanction. This process, in which the law keeps renewing itself, as it were, proceeds from the general (abstract) to the individual (concrete); it is a process of increasing individualization and concretization.[29]

The law is therefore said to "regulate its own creation."[30] The implication is that no fact counts as a fact of law-creation unless so determined by a "higher" norm:

> [A] norm whose creation is not determined by a higher norm cannot be considered as a norm created within the legal order and therefore cannot be a part of it; and an individual cannot be considered as an organ of the legal community (his function cannot be attributed to the community), unless he has been determined by a norm of the legal order, that is: unless he has been authorized by such a higher norm to perform his function.[31]

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[28] KELSEN, PURE THEORY, *supra* note 22, at 235.

[29] *Id*. at 237; *see also* KELSEN, GENERAL THEORY, *supra* note 26, at 135.

[30] KELSEN, PURE THEORY, *supra* note 22, at 71, 221; *see also* KELSEN, GENERAL THEORY, *supra* note 26, at 39, 124ff.

[31] KELSEN, PURE THEORY, *supra* note 22, at 235.

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Kletzer concurs: "by means of its legal norms," he says, the law "determines the entire realm of legally relevant facts,"[32] and thus "the legal process decides in a constitutive and not mere declaratory way on the legal quality of putatively legal entities."[33] Some of Kletzer's chosen terminology is however of quite a different stripe. Consider these extracts:

> The legal process produces *judgments* which *synthesize* given facts by employing spontaneously produced concepts into *legally relevant* facts.[34]

> In the law . . . a *synthesis* takes place . . . : by means of its legal norms, the law autonomously and spontaneously determines the entire realm of legally relevant facts.[35]

This talk of "syntheses" and "judgments," I hope you will agree, is highly conspicuous in the context of Kletzer's discussion. It is also unwarranted. There may possibly be some colloquial, non-laden sense of the word in which one might perhaps speak of a "synthesis" of norms and facts when characterizing the legal process (although to employ "judgment" for these purposes is to risk overstretching both word-meaning and the reader's indulgence). But there is certainly no room to use these terms here with the specific, "cognitive," sense which they have in the context of Kantian or Neo-Kantian epistemology, to whose terminological stockpile they notoriously belong. Yet Kletzer trades on the equivocation, and goes as far as to paraphrase Kant's famous *dictum*:

> It is only within the continuous connection of the legal process ("*Rechtsverfahrenszusammenhang*") that the extralegal fact is integrated with the legal norm to a judgment which determines both. Facts without norms are irrelevant or, as Kant would have said, "blind." And legal norms without facts to which they can be applied are ineffective or "empty." In any case, the relevant synthesis is affected in the law itself . . . since it is the law which determines which fact has which legal relevance.[36]

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[32] Kletzer, *supra* note 1, at 795.

[33] *Id*. at 796.

[34] *Id.* at 794 (emphasis added).

[35] *Id*. at 795 (emphasis added).

[36] *Id*.

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Stipulation is free, to be sure. Merely calling the product of the legal process a "judgment," however, does not make it so. Nor does it do any argumentative work for the conclusion that "the positive law is cognitive." How, then, can the abovementioned "insight" that "the legal process" is a "relation of facts and norms" be supposed to lead us toward accepting (CT)? Kletzer appears to believe that the inference is straightforward; he asserts that

> the law has to be seen to have a cognitive function because the *truth* about the law is produced in the legal process. Any pronouncement legal science or legal philosophy makes about the law can be falsified by the law itself.[37]

There are several reasons why this argument is wrong. For one, it sounds self-defeating, given that Kletzer's "legal process" in fact presupposes the possibility of "legal cognition" in the very sense which he purports to reject. Why? The point, which is in fact fairly trivial, can be expressed in Kelsenian terms. Think of Kelsen's well-known contrast between "the function of legal cognition and the entirely different function of legal authority."[38] The former's task is "to know the law—as it were from the outside—and to describe it"; the latter's, "to create the law so that afterward it may be known and described by the science of law."[39] But, of course, Kelsen adds,

> [i]t is true that the law-applying organs also have to know—as it were from the inside—the law they are applying. The legislator who applies the constitution ought to know the constitution, and the judge who applies the law ought to know the law.[40]

So if (in Klezter's phrase) "the truth about the law is produced in the legal process," then knowledge or "cognition" of the applicable law is a precondition of every step in the process, a precondition of the performance of every single norm-producing act. Does this mean that the legal process is "cognitive"? Certainly not. Not in Kletzer's sense. The legal

[37] *Id*. at 799.

[38] KELSEN, PURE THEORY, *supra* note 22, at 72.

[39] *Id.*

[40] *Id*.

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process does not, *pace* Kletzer, produce judgments.[41] It produces norms. And "[l]egal norms are not judgments, that is, they are not statements about an object of cognition."[42]

This point is connected with a second flaw in Kletzer's argument. He says, as we saw, that "any pronouncement legal science or legal philosophy makes about the law can be falsified by the law itself."[43] Taken literally, this is plainly false—at least in what concerns "legal science."[44] Kletzer tangles here, I think, legal "dynamics" and legal "statics." An analysis of the workings of the legal process is, as he stresses elsewhere, a study in legal dynamics.[45] "Knowledge" of the law, in turn—"legal science"— is relative to the law taken (as Kelsen would put it) "as a system of valid norms."[46] More precisely, the material given to legal science is "the multitude of general and individual legal norms, created by the legal organs"—the law "in its state of rest."[47] Let me elaborate.

In the standard account, "legal science" is said to "describe" the law in truth-apt statements ("statements of law," "legal statements," "*Rechtssätze*"). A well-noted feature of such statements is particularly relevant for our discussion. This feature is often referred to as their relativity to "legal systems." None the less, as this latter term carries with it some distracting theoretical connotations, I prefer to adopt a less frequent usage and to speak instead of legal "materials" or legal "source-materials." The relativity of legal statements (of tokens, not types, of statements) to sets of legal source materials may be generally characterized, I suggest, along the following lines. First, any token statement of law can be assessed as true or false only if contrasted with a set of legal source-materials. Any token statement of law, that is, may be true when contrasted with a given set of materials, and false if contrasted with a different set. Second, the set of materials with which any token statement of law is to be contrasted is the set of materials relative to which it is put forward by a speaker (a jurist, a scholar—a "scientist"). The definition of the relevant set, which has to be made discernible to the intended hearer or audience, is entirely up to the speaker. Now, the set of source-materials to which a legal statement is relative may be defined either intentionally or extensionally. It may be extensionally

[41] *Cf.* Kletzer, *supra* note 1, at 794.

[42] KELSEN, PURE THEORY, *supra* note 22, at 71.

[43] Kletzer, *supra* note 1, at 799.

[44] "Legal science", not "legal philosophy," is the subject of the present discussion, and the claims of legal science are very different from those of legal philosophy. Not surprisingly, Kletzer's footnote to this sentence concerns only the latter; but what one needs here instead is an argument applicable to the former. (I am taking the term "legal science," of course, in Kletzer's explicitly chosen sense: *cf supra* note 9).

[45] Kletzer, *supra* note 1, at 809.

[46] KELSEN, PURE THEORY, *supra* note 22, at 70.

[47] *Id*., at 70, 72; *cf. also* KELSEN, GENERAL THEORY, *supra* note 26, at 39.

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defined, for example, as the set comprised by articles *x*, *y*, *z*. It may be intentionally defined, for example, as the set of source materials recognized as valid in society *s* at time *t*. Although the hearer needs to be capable of discerning what the relevant set in each case is, it does not have to be the case that such a set is expressly mentioned or identified in the statement itself. In fact, in what concerns what are arguably the most practically important of our statements of law—statements relative to the *whole* set of source materials which at the moment the statement is made are valid in the society to which the hearer belongs—the relevant set is contextually evident and thus seldom made explicit. The common operators (e.g. "it is the law that . . .," "according to the law . . .," "legally . . .," etc.[48]) are accordingly interpreted to yield statements of what the law is, at the time the statement is being made, in the society to which the hearer and/or the speaker belong at that same moment. The corresponding set of materials may thus be called a "static,"[49] or "momentary,"[50] set or system.

Perfunctory as they surely are, these remarks should more than suffice for us to see that Kletzer's Kirchmannian-flavoured protest—that "any pronouncement legal science . . . makes about the law can be falsified by the law itself"—is wide of the mark. The set of source-materials which at any given moment is valid in a society may, and typically will, vary. By the enactment and repeal of legislation, to take the simplest of examples, the set of valid legal materials is through time expanded and contracted. The diachronic subsistence of what we call a "legal order" involves the chronological succession of static sets of source-materials—each set a product of the "legal process." And, of course, the possibility that no equivalence obtains between the sets of materials valid at any two moments *t* and *t*+1 does not entail that a true token statement of law made at *t* relative to the former set becomes at *t*+1 a false statement. Rather, if true, it remains true. For whether a token of the same statement-type is true or false relative to any *other* set of materials (including the set of materials valid at *t*+1 in the same legal "order") is inconsequential for the assessment of whether a token statement relative to the former set is true.

Nor does the fact, which Kletzer also brings up, that the law "very often" "retrospectively declares inconsistencies to be consistent and vice versa" and that "faults can heal and be rendered retrospectively legal and valid pronouncements can be rescinded,"[51] lead to

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[48] *See, e.g.,* Joseph Raz, *Legal Reasons, Sources, and Gaps*, *in* THE AUTHORITY OF LAW 63 (2d ed. 2009).

[49] KELSEN, PURE THEORY, *supra* note 22, at 70, 279 (distinguishing a "static" theory from "dynamic" one: a "static" theory "attempts to comprehend the law without consideration of its creation, only as a created order"); *see also* KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY, *supra* note 27, at 91; KELSEN, GENERAL THEORY, *supra* note 26, at 39, 42, 122.

[50] JOSEPH RAZ, THE CONCEPT OF A LEGAL SYSTEM 34 (2d ed. 1980).

[51] Kletzer, *supra* note 1, at 800, note 25.

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different conclusions. The set of materials which is at any moment *t* deemed *valid at t* may differ from the set of materials which is at *t*+1 deemed *valid at t*; and, again, a statement which is true relative to the former may well be false (or true) relative to the latter, or vice versa.

Kletzer has failed to make a convincing case for the "cognitivity thesis," which was his positive claim. His contention that "[t]he law, it turned out, is 'constitutive.' Put differently: that, of which Kant claims that it happens in knowledge, actually happens in the law"[52] comes out as simply arbitrary. What about his *negative* claim, the denial that a relevant analogy does hold between "legal science" and the natural sciences? It, too, is ill-founded. Or so I will now suggest.

C.

Kletzer's reiterated argument against analogizing legal and natural sciences is made manifest in passages such as these:

> [W]hereas nature as an ordered whole is inconceivable without an experience that orders the given material, the positive law as an ordered whole is very well conceivable without the existence of legal science; whereupon again the ordered whole of legally relevant facts would be inconceivable without the positive law.[53]

> [T]he law differs in one fundamental respect from nature as an object: whereas no connection can be given in pure receptive sensation, such a connection can very well be given in the law. . . the law can very well be conceived as being *in itself ordered*.[54]

> In contrast to nature the law is *in itself* ordered, and can find its unity only in itself.[55]

Is it the case, then, that, as we read in the first of these excerpts, "the ordered whole of legally relevant facts would be inconceivable without the positive law"? There is in this

[52] *Id*. at 803.

[53] *Id*. at 795.

[54] *Id*. at 801-2.

[55] *Id*.

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sentence, on the one hand, the whiff of tautology: it is part of Kletzer's own notion of a "legally relevant fact" that no such facts are "conceivable" "without positive law." Facts are "legally relevant" only if such an interpretation is assigned to them by the law itself: "Facts by themselves are just facts. There is nothing in their quality as facts that could mark them out as *legal*. It is only the law that can mark out certain facts as legal facts."[56]

This is in essence the household doctrine that norms operate as "schemes of interpretation."[57] On the other hand, however, Kletzer errs in suggesting that the "whole" of legally relevant facts is *ipso facto*—i.e. independently of legal science—"ordered" in the suitable sense. This suggestion is clearly confounded by the possibility that any given set of legal source-materials, whilst validly produced by the adequate "legally relevant facts," contains or expresses conflicting norms. As yet again Kelsen would have it,

> it is undeniable that legal organs may create conflicting norms—that they perform acts whose subjective meaning is an "ought" and which may be in conflict with each other if their subjective meaning is interpreted as their objective meaning.[58]

The legal process may of course in *some* sense be said to be an "ordered" process for the creation of legal source material. The point, though, is that the legal material itself cannot plausibly be deemed "ordered" in the sense that matters here—the sense in which, in the jargon of (Neo-)Kantian epistemology, nature is indeed said to be "ordered." On the assumption, then, that "the cognition of law, like any cognition, seeks to understand its subject as a meaningful whole and to describe it in noncontradictory statements,"[59] the analogy which Kletzer strives to lay off does appear to hold quite neatly. Recall this exemplary passage of Kelsen's, which for expository convenience I now quote again:

> [A]ccording to Kant's epistemology, the science of law as cognition of law, like any cognition, has constitutive character—it "creates" its object insofar as it comprehends the object as a meaningful whole. Just as the chaos of sensual perceptions becomes a cosmos, that is, "nature" as a unified system, through the cognition of natural science, so the multitude of

[56] *Id*. at 809.

[57] *See* KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY, *supra* note 27, at 10; KELSEN, PURE THEORY, *supra* note 22, at 3ff.; and also KELSEN, GENERAL THEORY, *supra* note 26, at 41.

[58] KELSEN, PURE THEORY, *supra* note 22, at 205.

[59] *Id.* at 206.

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> general and individual legal norms, created by the legal organs, becomes a unitary system, a legal "order," through the science of law. But this "creation" has a purely epistemological character.[60]

One may therefore plausibly refer to the "judgments" of legal science, differently from those supposed "judgments" which Kletzer claims to devise in the positive law itself, in a sense which bears comparison to the "judgments" of the natural sciences. The parallel is in fact far from superficial. In Kelsen, it is famously rendered as an analogy between, on the one hand, the principle according to which the natural sciences describe their object (the "*Ordnunsprinzip*" of causality, which connects two elements as cause and effect) and, on the other hand, the principle according to which normative social sciences in general describe their object (the principle of imputation, "*Zurechnung,*" which unites two elements according to an essentially normative copula). The contrast is here between two "methodological forms":[61] the form of the scientific judgment, "if *a* is, then *b* is (or will be)," and that of the normative judgment, "If *a* is, then *b* ought to be."[62]

Somewhat surprisingly, Kletzer takes issue with Kelsen's claim that

> [t]he synthetic judgments of natural science are, even though they are "produced" by natural science, nevertheless just as determined by the "material" which is to be unified in them . . . as the synthetic judgments of legal science, the *Rechtssätze*, are. In the latter the material given to legal science (the statutes, ordinances, court judgments, administrative acts, etc.) is transformed into *Rechtssätze*, just as the material of sensation is transformed in the synthetic judgments of the natural sciences; and these synthetic judgments of legal science, the *Rechtssätze*, are just as determined

[60] *Id.* at 72.

[61] On the intellectual genealogy of this notion, relating the autonomy of "normative sciences" to the respective "methodological forms," and Windelband's and Rickert's influences on the formation of Kelsen's thought, *see* Stanley L. Paulson, *J. W. Harris's Kelsen*, *in* PROPERTIES OF LAW, esp. 14ff (2006).

[62] *See* KELSEN, PURE THEORY, *supra* note 22, at 89–90; and KELSEN, GENERAL THEORY, *supra* note 26, at 45–6, 163–4. The "form" of the legal judgment—the legal proposition, or *Rechtssazt*—is in Kelsen but a species of the general form of the normative judgment or proposition—the *Sollsatz*. It corresponds to a partial interpretation of the latter, where "*b*" is interpreted as an "act of coercion" determined by a given legal order. *See* KELSEN, PURE THEORY, *supra* note 22, e.g. at 58, 89; and HANS KELSEN, GENERAL THEORY OF NORMS 272 (first endnote) (Michael Hartney trans., 1991).

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> by the material given to them as the judgments of natural sciences are.[63]

Kletzer offers this as proof that Kelsen simply does not "comprehend" "the point of Kantian philosophy."[64] For Kelsen, he says, "seems to be reading Kant in the following way: science has to 'produce' judgments which correspond to the 'true relations' present in the world, or to the objective order of the world."[65] There is nothing in the quoted Kelsenian passage, however, that even remotely mandates such a charge. The problem, apparently, lies in Kelsen's reference to the judgments of natural science being "determined" by the "material given to them," when "after all," says Kletzer, it is "the point of Kantian philosophy . . . that the judgments of natural sciences are not determined by the given material but that, conversely, the capacity of judgment determines the material to nature."[66] But this is uncharitable and slightly offhand. Surely Kletzer does not mean to intimate that the judgments of natural sciences do not at all depend on *what*, content-wise, the given material of sensations is? Any given legal-science judgment will similarly depend on the contents of the legal material to which it is relative. To different sets of legal material there correspond different sets of true statements of law. No sort of commitment to "Humean sense-data" or "picture-theories" of cognition is evinced by the notion that the "judgment" is in this sense "determined" by the material; nor is this notion inconsistent with the acknowledgment that legal science is, to put it in Kletzer's words, "constitutive of the order of the law."[67] I am doing no more than stressing the obvious. But should further evidence be required for the unreasonableness of this objection of Kletzer's, we need only note how elsewhere in the paper he himself finds it perfectly fitting to assert that "knowledge is not a purely passive phenomenon (i.e. there is a minimal sense in which in knowing an object we are *not only determined by the object* but *also* determine it)."[68]

Kletzer's reading of the doctrine that norms operate as "schemes of interpretation," incidentally, is questionable in yet another respect. In his hands, this doctrine is taken to

[63] Kletzer, *supra* note 1, at 800.

[64] *Id*. at 801.

[65] *Id*.

[66] *Id*.

[67] *Id*. at 802.

[68] *Id.* at 791 (emphasis added).

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imply that law "has a morality,"[69] or that law is "fundamentally moral in nature,"[70] and so that morality "cannot by itself contradict the law:"[71]

> [Law and morality] are related in a way which reveals the strict impossibility of a moral treatment of "the law." As "the law" itself is not a thing, but a relation of norms and facts, since it itself is an "assessment" of facts, it is no suitable object of moral assessment.[72]

Kletzer's point is that any supposed moral evaluation of the law is in fact an evaluation, not, strictly speaking, of "the law," but of "a specific act of creation of law:"[73] "When we say, 'This statute is morally reprehensible', what we are primarily saying is something like 'Parliament should not have enacted it.'"[74] And "the problem with this," he says, "is that the act in question can only be law if another law evaluates it as being lawful."[75] Morality and law, in other words, "both want to do the same thing."[76] Both want normatively to *assess* facts. Accordingly, Kletzer subscribes to Kelsen's claim that "from the point of view of positive law as a system of valid norms, morality does not exist as such,"[77] which he goes on to elaborate by presenting morality as "incomplete law":

> [M]orality is "incomplete law." The positive law has to react to expressions of moral opinion with "infinite indifference" and it has to do so not because the positive law was somewhat amoral, or in a wrong sense "pure", or because it was not interested in morality, but because the positive law is already the *actual elaboration* of what is only subjectively claimed in private moral utterances. Morality may be the trigger,

[69] *Id.* at 805.

[70] *Id.* at 811.

[71] *Id.* at 813.

[72] *Id.* at 811.

[73] *Id*.

[74] *Id*.

[75] *Id*.

[76] *Id.* at 810.

[77] *Id*. at 811-812.

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> the occasion of a legal process, but it cannot by itself contradict the law.[78]

But this claim, I submit, is wrong. It cannot account, e.g., for moral assessments of the legal organs' negative acts (such as legislative omissions); for the distinction between *prima facie* and all-things-considered moral assessments of how legal organs have acted or ought to have acted or to act; or for the difference between evaluative and prescriptive moral assessments of the law. But, more generally and more importantly, Kletzer seems here to make the mistake of supposing that "moral" and "legal" assessments of any given fact must be similar in content or type simply because in both cases "norms" can be said to be at play. Yet legal authorization, although it involves a "norm"-dependent assessment, does not convey or entail any sort of "moral" assessment of the authorized acts.

Kletzer's seeming belief to the contrary is perhaps a reflection of Kelsen's own error—an oft-diagnosed one[79]—of muddling up under a single umbrella-notion several dimensions of legal validity. This hypothesis is supported by Kletzer's characterization of Kelsen's doctrine of the basic norm. Kletzer draws no distinction at all between the presuppositions involved in "legal cognition" and the presuppositions involved in judgments of legal validity. This is indeed faithful to Kelsen. But it may easily be shown to be wrong. No aspect of a description of the law turns on whether the relevant set of materials is in fact the product of legally authorized acts of law-creation (let alone of morally justified ones). Something along the lines of Kelsen's *Grundnorm* might arguably be needed in order for us to represent a given set of materials as expressing a set of valid norms. But we can very well do without the *Grundnorm* when determining *what* norms a given set of materials expresses *if it expresses a set of valid norms*.

D.

I am bound to conclude that Kletzer offers in his paper no satisfactory arguments either for the "cognitivity thesis," or against its rival view. Moreover, the foregoing discussion has also hinted that, *contra* Kletzer, (CT) forms no part of Kelsen's views.

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[78] *Id*. at 813.

[79] *See* Alf Ross, *Validity and the Conflict between Legal Positivism and Natural Law*, 4 REVISTA JURÍDICA DE BUENOS AIRES 46ff (1961), *reprinted in* NORMATIVITY AND NORMS. CRITICAL PERSPECTIVES ON KELSENIAN THEMES 147ff (S.L. Paulson, B.L. Paulson eds., 1998); Carlos Santiago Nino, *Some Confusions around Kelsen's Concept of Validity*, 64 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 357ff (1978), *reprinted* (with minor changes, and under the title *El Concepto de Validez Jurídica en la Teoría de Kelsen*) *in* LA VALIDEZ DEL DERECHO 7ff (1985), and partially *reprinted in* NORMATIVITY AND NORMS. CRITICAL PERSPECTIVES ON KELSENIAN THEMES 253ff (S.L. Paulson, B.L. Paulson eds., 1998); Eugenio Bulygin, *An Antinomy in Kelsen's Pure Theory of Law*, 3 RATIO JURIS 29ff (1990), *reprinted* (under the title *Validez y Positivismo*) *in* ANÁLISIS LÓGICO Y DERECHO 499ff (1991), and *reprinted in* NORMATIVITY AND NORMS. CRITICAL PERSPECTIVES ON KELSENIAN THEMES 297ff (S.L. Paulson & B.L. Paulson, eds., 1998).

As tall tales go, however, CT is not without company. Consider some of the claims made by Kletzer regarding what is supposedly his main subject—the "*Gegenstandsproblem*," the "problem of being an object of cognition in general."[80] While nowhere given a precise formulation of this "problem" in connection with the legal domain, we are vaguely told that "the *Gegenstandsproblem* deserves a technical term, because the better part of contemporary jurisprudence takes, as its object, the positive law *san phrase*."[81] At first sight this suggests that the "problem" concerns the "object" of jurisprudence. But this is not what Kletzer means. "Object," in this excerpt, refers instead to jurisprudence's subject of inquiry as a discipline. In a different passage, Kletzer appears to characterize the "problem" as concerning "the possibility of rationally relating to the positive law."[82] This suggestion, though, must also be ruled away. For, as we have seen, Kletzer's overall endeavor is aimed at denying that the "positive law" is in fact an "object" of cognition. At any rate, and despite such imprecision, the "*Gegenstandsproblem*" is the subject of many a bold assertion. The "philosophical shallowness" of the "Anglo-American strand of legal positivism"—and particularly of the "tradition of Hartian positivism," derided by Kletzer as "a mixture of quasi-philosophy and quasi-sociology"—is due, he informs us, to its "lack of a proper engagement with the 'problem of being an object of cognition in general.'"[83] How so? Unfortunately, we are never told. Thus these diagnoses and accusations—which very often sound wrong-headed[84]—are baldly delivered in a matter-of-fact manner that nonchalantly dispenses with the support of argument.

[80] Kletzer, *supra* note 1, at 785.

[81] *Id.* at 786.

[82] *Id*. at 790.

[83] *Id*. at 785-786. The problem is in turn suggested to be well-known to Continental theorists; and the Pure Theory of Law is said to owe its "philosophic sophistication" *precisely* to its "early engagement" with the *Gegenstandsproblem*: *see id.* at 786, note 1.

[84] Take, for instance, Kletzer's assertion (as well as the ensuing discussing in terms of divided "competences"), at 786, that "Hartian positivism," "apart from being a theory of the positive law, is so obviously also a theory of the division of labour between itself and the positive law." This oddly depicts "Hartian positivism" as if it were essentially, if only in part, a meta-theoretical stance. Or take, for another example, Kletzer's unqualified endorsement of Cotterell's account of Hart's "linguistic empiricism" at 788. In his discussion of ordinary-language philosophy, however, Cotterell confuses methods and subject-matter, saying, e.g., that according to Hart "legal statements" "*represent*" (!) the ("observable") "reality of linguistic practices of people living within a legal system." Kletzer, *supra* note 1, at 789 (emphasis added).